IN THE COURT OF APPEALS OF IOWA

No. 2-882 / 12-1476
Filed October 31, 2012

IN THE INTEREST OF R.N.,
Minor Child,

STATE OF IOWA,
Appellant.

Appeal from the Iowa District Court for Story County, Steven P. Van Marel, Judge.

The State appeals the denial of its petition to terminate the rights of both parents. **AFFIRMED.**

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Stephen Holmes, County Attorney, and Tiffany Meredith, Assistant County attorney, for appellant.

Duane M. Huffer of Huffer Law, P.L.C., Story City, for appellee-father.

Robyn C. Huss of Thornton, Coy & Huss, P.L.L.C., Ames, for appellee-mother.

Matthew Mauk, Ames, attorney and guardian ad litem for minor child.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

The State appeals a juvenile court order denying its petition to terminate the rights of R.N.'s parents. The State argues the court prematurely concluded the termination hearing without allowing the guardian ad litem (GAL) to present evidence. In addition, the State challenges the court's conclusion that factors in Iowa Code section 232.116(3) (2011) weigh against terminating the rights of the mother. The State also contests the court's determination the record lacked clear and convincing evidence of the father's abandonment of R.N.

We decline the State's invitation to remand the case for the taking of additional evidence. Moreover, we find no error in the juvenile court's reliance on section 232.116(3)(a) and (c) in declining to terminate the mother's rights. The record reflects a strong bond between the mother and daughter, and R.N. remains in the custody of her maternal grandparents. Finally, while it is a closer call, we agree with the juvenile court's conclusion that the State did not prove the grounds for terminating the father's rights by clear and convincing evidence.

I. Background Facts and Proceedings

R.N. is the four-year-old daughter of Priscilla and Wesley. The family came to the attention of the Iowa Department of Human Services (DHS) because both Wesley and another paramour, LaDon, assaulted Priscilla. The DHS was concerned about R.N.'s exposure to the domestic violence. Wesley was subject to a no-contact order protecting both Pricilla and R.N., originally issued on November 3, 2009. On February 18, 2010, the no-contact order was extended

until February 17, 2015. Wesley relocated to Indiana and has complied with the no-contact order while continuing to pay child support.

In January 2011, Priscilla admitted to regularly using marijuana in her home in the evenings after R.N. went to bed. A drug screen confirmed her admission. That same month, LaDon assaulted Priscilla in the presence of R.N. DHS also received a report that Priscilla attempted to smother R.N.[1] Based on R.N.'s repeated exposure to violence and her mother's continued use of marijuana, on April 24, 2011, the juvenile court adjudicated R.N. as a child in need of assistance (CINA). R.N. remained in her mother's custody.

In its May 23, 2011 dispositional order, the juvenile court ordered Priscilla to participate in family safety, risk, and permanency (FSRP) services; engage in domestic violence education through ACCESS (Assault Care Center Extending Shelter and Support); undergo a substance abuse evaluation; and continue to provide random drug screens as requested by DHS. She did not comply with the court's orders.

In July 2011, Priscilla was arrested for public intoxication, disorderly conduct, and interference with official acts. R.N. was present during her mother's arrest. Later that month, Priscilla was arrested for operating a vehicle while intoxicated, but R.N. was not in the vehicle with her at the time. Stemming from her July charges, in October 2011, the juvenile court ordered Priscilla undergo a

[1] A subsequent medical evaluation of R.N. could not confirm the allegations. Priscilla later asked her father to take her to a local hospital for mental health treatment because she tried to smother R.N. on two separate occasions.

substance abuse evaluation, place R.N. in protective daycare as directed by DHS, and complete a mental health evaluation.

On November 17, 2011, DHS removed R.N. from Priscilla's care and placed her with maternal grandparents. Priscilla visited her daughter twice-weekly under DHS supervision. R.N. began going to weekly play therapy in December 2011 and has continued her sessions as of the termination hearing date. The therapist reported R.N. was having difficulty adjusting to the separation from Priscilla. The therapist noted, "It is apparent that [R.N.] has a bond with her mom."

Priscilla's noncompliance with the court orders and DHS services continued. She withheld information from DHS, refusing to disclose her living arrangements. In March she completed her mental health evaluation, though she refused to attend individual therapy sessions. She also refused to provide drug screens. But she did complete a substance abuse evaluation, the results of which did not recommend treatment. After Priscilla abruptly left a May 23, 2012 hearing reviewing R.N.'s status as a CINA, the court filed an order directing the State to seek termination of parental rights.

On June 15, 2012, the State filed its petition to terminate both parents' rights to R.N. The court held a hearing in connection to the State's petition on July 30 and 31. The State, R.N.'s GAL, Priscilla, and Wesley attended the hearing on July 30, but Wesley's work schedule did not allow him to attend the following day. In its August 2, 2012 ruling, the court refused to terminate either parent's rights.

II. Standard of Review

We review proceedings involving the termination of parental rights de novo. *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011). We give weight to the juvenile court's fact-findings, especially when they involve witness credibility, but are not bound by them. *Id.*

III. Analysis

The State sought to terminate the parents' rights under section 232.116(1)(h), which requires clear and convincing evidence of the following:

> (1) The child is three years of age or younger.
> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
> (3) The child has been removed from the physical custody of the child's parents for at least six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.

The State also alleged abandonment as a basis for terminating Wesley's rights. *See* Iowa Code § 232.116(1)(b).

The juvenile court found the State met its burden of proving the grounds contained in section 232.116(1)(h) relating to Priscilla, but elected not to terminate her parental rights based on the factors in section 232.116(3). It noted R.N. has remained with her maternal grandparents since December 21, 2011, and additionally found clear and convincing evidence that termination would be detrimental to R.N. because of her close relationship with her mother. *See* Iowa Code § 232.116(3)(a), (c). The court also found the State produced insufficient evidence to show R.N. could not be returned to Wesley's home at this time, or that he abandoned her. *See* Iowa Code § 232.116(1)(b), (h). It accordingly

denied the State's petition to terminate and ordered R.N. remain in the custody of her maternal grandparents.

A. Did the Juvenile Court Improperly Restrict Evidence by Ruling after the State Rested?

At the conclusion of the State's evidence, but before the GAL produced its report or either parent presented their case, the juvenile court found insufficient evidence existed to terminate Priscilla's and Wesley's parental rights: "Now, the State's presented their evidence so it's not going to get any better for the State from this point forward. Their evidence will not get any stronger or better." The court reopened the record for the GAL to submit an oral report. The GAL shared his experience with the case, his communications with R.N.'s therapist, and his ultimate conclusion that it would be in R.N.'s best interest to terminate both parents' rights.

The State argues the juvenile court "short-circuited" the evidence and the GAL had a right to be heard. It contends by closing the record after the State rested, the court denied the GAL the opportunity to call witnesses and denied the State the opportunity to cross-examine them.

Both parents challenge the State's standing to bring this issue on appeal. They argue it is the GAL—who did not appeal the decision—who is the aggrieved party and not the State. Even if the State had standing to raise the issue, the parents assert the State had the opportunity to call the GAL and R.N.'s therapist as witnesses, but chose not to do so.

A GAL has authority to file a petition to terminate parental rights, and likewise has the right to appeal. *In re A.L.*, 492 N.W.2d 198, 200–01 (Iowa Ct. App. 1992) (recognizing right set out in section 232.111(1)). The GAL in this case chose not to do so. To the extent that the State is challenging the juvenile court's decision to rule after the State rested its case, we find the argument unpersuasive. The burden rests on the State to prove grounds for termination by clear and convincing evidence. Iowa Code § 232.116; *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). Because the State could have called both the GAL and R.N.'s therapist to further supplement the record, but chose not to, it is bound by the evidence it presented before resting its case.

B. Did the Juvenile Court Improperly Rely on Section 232.116(3) in Refusing to Terminate Priscilla's Parental Rights?

The State contends the juvenile court improperly considered the closeness of R.N.'s relationship to her mother, and her placement with a family member to refuse terminating Priscilla's parental rights. It argues no clear and convincing evidence shows severing R.N.'s bond with her mother would be detrimental to her, and because R.N.'s grandparents will not be able to care for her long-term because of their age, the family-member exception to termination is inappropriate as well.

Priscilla advocates for affirming the juvenile court. She contends she has made significant life improvements over the past months and should have the opportunity to continue to make improvements while R.N. is well cared for by

family members. She notes the State may file for termination again in a few months if circumstances do not improve.

Even if a juvenile court finds grounds exist to terminate and the statutory best-interest framework supports termination, it may elect not to terminate if any of the factors in section 232.116(3) apply to the case. *D.W.*, 791 N.W.2d at 707. The section reads, in relevant part:

> The court need not terminate the relationship between the parent and child if the court finds any of the following:
>
> (a) A relative has legal custody of the child.
>
> . . . .
>
> (c) There is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.

Iowa Code § 232.116(3). We construe these provisions to be permissive and not mandatory. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993), *overruled on other grounds by P.L.*, 778 N.W.2d at 39.

The record shows a compelling parent-child bond. Since being separated from her daughter, Priscilla has visited R.N. twice per week. The social worker testified to a strong bond between the two, that visits were very optimistic, and that Priscilla has commendable parenting skills. In her report, R.N.'s therapist summarized the strong connection R.N. retains with her mother and concluded: "[R.N.] clearly has a positive relationship and bond with her mom. If visits were to stop abruptly this could be emotionally damaging for [R.N.]."

We believe this constitutes clear and convincing evidence that at this time, given the closeness of the mother-daughter bond, termination would be detrimental to R.N., given the recent strides the mother has taken to create an

environment to which R.N. can return. Priscilla shows promise for being able to care for her daughter, is now going to counseling and taking medication regarding her mental health diagnosis, and also found a stable living arrangement.

Moreover, R.N. remains in the custody of her grandparents. Although they admit their age may preclude them from caring for her long-term, they express willingness to continue providing a safe and secure atmosphere for R.N. We agree with the juvenile court's decision not to terminate Priscilla's parental rights.

C. Did the Juvenile Court Improperly Deny Termination of Wesley's Parental Rights?

The State argues Wesley's lack of interaction with his daughter met the statutory definition of abandonment and desertion, and the juvenile court erred in not terminating his parental rights.

Wesley contends the State failed to preserve error as to desertion. He argues the State did not prove abandonment by clear and convincing evidence because the no-contact order prohibited him from interacting with his daughter, but that his parents remained in communication with the family, and he continued to pay child support. He challenges the State's assertion that he was obligated to attempt to modify the no-contact order.

After the State rested its case, the juvenile court inquired "concerning terminating the father's parental rights, the State's ground is abandonment, is that right?" The State answered in the affirmative. The juvenile court went on to

find the State failed to meet its burden in proving abandonment, and at no point considered the ground of desertion at hearing or in its subsequent order denying termination.[2] Because the court did not address the issue of desertion, the State failed to preserve it as a ground for termination on appeal. *See In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994) (holding "an issue not presented in the juvenile court may not be raised for the first time on appeal").

Abandonment is "the relinquishment or surrender . . . of the parental rights, duties, or privileges inherent n the parent-child relationship." Iowa Code § 232.2(1). It involves giving up one's parental rights and responsibilities along with an intent to forego them. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa Ct. App. 1996). The State must prove by clear and convincing evidence both the intention to abandon and the acts evincing the intention. *Id.* A parent must execute one's responsibilities to the extent practicable and feasible considering the circumstances. *Id.*

The State argues Wesley had an affirmative obligation to modify the no-contact order, citing *In re D.J.R.*, 454 N.W.2d 838 (Iowa 1990) to support its point. In that case, the no-contact order allowed the father limited visitation with his child. *See D.J.R.*, 454 N.W.2d at 842. The father chose not to visit his daughter, participate in the services provided by DHS, pay expenses, or attend the relevant hearings. *See id.* The court found the father abandoned his daughter, not because he complied with the no-contact order, but because of his

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[2] In its order, the court also found the State failed to prove Wesley's rights should be terminated under section 232.116(1)(h). Because the State makes no argument regarding this ground for termination, we narrow our analysis to the question of abandonment.

failure to exercise his rights to visit, or show interest in any judicial or other proceedings concerning his child. *See id.*

We believe Wesley's circumstances are distinguishable. The 2010 no-contact order prohibited any form of contact with his daughter. Wesley's compliance with the no-contact order does not show a clear intent to abandon R.N.[3] He remains up to date on his child support payments, demonstrating conduct specific to parental obligations, and the intent to carry on the same. *Cf. In re S.K.C.*, 435 N.W.2d 403, 404 (Iowa Ct. App. 1988) (considering father's failure to provide monetary support, inter alia, in finding abandonment).

Wesley resides in Indiana and was informed of the termination proceedings only shortly before they were underway. To maintain his parental rights, Wesley traveled back to Iowa to attend the hearing. Because of those circumstances, combined with his continued payment of child support, we conclude Wesley has not shown the intent to abandon R.N. required as grounds for termination. *See A.B.*, 554 N.W.2d at 293.

AFFIRMED.

[3] We do not suggest that a parent subject to a no-contact order would never have an affirmative duty to seek modification to facilitate contact with a child.