

IN THE COURT OF APPEALS OF IOWA

No. 3-594 / 13-0557

Filed June 26, 2013

**IN THE INTEREST OF K.R., T.R., S.R., AND M.R.,
Minor Children,**

**STATE OF IOWA,
Appellant.**

Appeal from the Iowa District Court for Sac County, James A. McGlynn,
Judge.

The State appeals the district court order dismissing a petition to terminate parental rights and in entering a permanency order. **AFFIRMED AS MODIFIED.**

Thomas J. Miller, Attorney General, Katherine S. Miller-Todd, Assistant Attorney General, and Benjamin J. Smith, County Attorney, for appellant State.

Charles A. Schulte of Schulte & Gravel Law Firm, P.C., Sac City, for appellee mother.

Peter A. Goldsmith of Boerner & Goldsmith Law Firm, P.C., Ida Grove, for appellee father.

Marcy Lundberg, Fort Dodge, attorney and guardian ad litem for minor children.

Martha A. Sibbel of Law Office of Martha Sibbel, P.L.C., Carroll, for minor child, B.R.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VOGEL, P.J.

The State appeals the district court order dismissing the termination of parental rights petition filed as to Carmin and James regarding four of their children: daughters K.R. (born 1998), T.R. (born 2000), S.R. (born 2002), and M.R. (born 2005).¹ The State argues it proved by clear and convincing evidence the statutory elements of Iowa Code section 232.116(1)(e) (2011) (child adjudicated in need of assistance (CINA), child removed for six months, parent has not maintained significant and meaningful contact with the child); (f) (child four or older, adjudicated CINA, removed from home for twelve of last eighteen months, and child cannot be returned home); and (i) (child adjudicated CINA, child was in imminent danger, services would not correct conditions). The State also argues termination was in the children's best interests.

We agree with the State the elements of section 232.116(1)(f) and (i) have been proved as to both parents, but in light of the pending criminal charges against the father, we disagree that termination—at this point in time—was shown to be in the children's best interests. In that same regard, we modify the implementation of expanded visitation until the resolution of the criminal charges.

This family first became involved with the Iowa Department of Human Services (DHS) in December 2009 because of deplorable housing conditions, the worst the testifying DHS case manager had witnessed in her twenty-six years of service. There were up to thirty animals living in the small home, which was overwhelmed with filth and odor, and so much clutter that there was barely a path

¹ The proceedings originally included the oldest daughter, B.R. (born 1996). The parents consented to the termination of their parental rights as to B.R. and that termination is not part of this appeal.

to walk from room to room. Another major concern was that James was sending pornographic text messages and photos to both B.R. and K.R. In addition, B.R. reported James showed her pornographic pictures and videos on the computer depicting various sex acts. James also had a severe alcohol problem, and Carmin's mental health was so unstable that she failed to provide for the girls' basic necessities and did not protect the girls from James's inappropriate actions. A child protective assessment was completed on January 20, 2010, with multiple findings as to both James and Carmin including: (1) denial of critical care, failure to provide adequate shelter; (2) gross failure to meet the children's emotional needs; and (3) assault with intent to commit sexual abuse as to James. These findings were not appealed by either parent.

In February 2010, James and Carmin stipulated to the adjudication of the children as CINA, as defined in Iowa Code section 232.2(6)(g) (parents fail to exercise a minimal degree of care in supplying the child with adequate food, clothing, or shelter and refuses other means made available to provide such essentials). The family was provided with Family Safety, Risk, and Permanency Services (FSRP), therapy for all members, couples counseling, and psychological and psychosexual evaluations and therapy for James. Initially the children were allowed overnight visitation with James and Carmin; however, based on interviews with the children at the Child Advocacy Center, additional and graphic information surfaced resulting in an October 14, 2010 founded report with James as the perpetrator of (1) assault with intent to commit sexual abuse and (2) indecent exposure. No appeal was taken of these findings. The report summary included the comment that "[n]either [James nor Carmin] can

acknowledge that James has sexually deviant behaviors and has abused his children by exposing them to these behaviors. Carmin and James tend to minimize how they have been neglectful of or abusive to their children.” Visitation was changed to supervised and has remained so through the termination hearing.

A petition to terminate James’s and Carmin’s parental rights was filed on January 5, 2011, and amended on March 5, 2012. The termination hearing was stretched out for over one year with testimony heard and other evidence received on March 21, July 18, July 27, and October 17, 2012, and on February 18-19, 2013.

During the pendency of this matter, child pornography was found on a computer in the family’s house. On December 14, 2012, James was charged with three counts of purchasing/possessing a medium depicting the exploitation of a minor and one count of lascivious acts with a child inflicting pain or discomfort. This criminal action was pending at the time of the completion of the termination hearing.²

The juvenile court determined James and Carmin had substantially complied with services offered, but found:

the one issue which has prevented reunification is the State’s concern that the father is a risk to sexually abuse his daughters. The gist of the State’s case is that even though the parents have made substantial progress on all of the objective goals, it is not safe to return the children to the parents because of the father’s propensities.

² Although the juvenile court took judicial notice of the pending criminal charges against James, the criminal file was not transmitted to this court on appeal.

While acknowledging “the father’s behaviors were inappropriate,” and “the Department’s concern that the father was grooming his daughters for a sexual relationship,” the juvenile court faulted the State for not offering “any expert testimony to prove that this father has a propensity to sexually abuse his daughters.” It then found Iowa Code chapter 229A to be “relevant to the decision in this case,” and concluded:

[T]he State has not established a factual basis for treating James . . . as though he was a sexually violent predator with a propensity to re-offend, the Department should have made reasonable efforts to truly test these parents in their ability to parent their children, such as a trial home placement or weekend overnight visitation. The Court finds that the Department’s resolute refusal to expand visitation was not justified. It follows that the Department failed to make reasonable efforts toward reunification and the termination petitions must be dismissed. By separate Court Order in the underlying CINA cases, the Court is issuing a permanency order granting the parents an additional six months to work toward reunification and directing DHS to promptly develop a plan of increasing visitation to work toward reunification.

A separate permanency order was entered the same day, continuing the placement of the children in foster care,

for an additional period of up to six months with a goal of reunification within that period of time. A contract of expectations shall be developed and implemented, appropriate counseling, treatment and services shall be provided, expanding visitation shall be provided and substance abuse and mental health issues shall be addressed by the parents

The State appeals, asserting the district court should have terminated James’s and Carmin’s parental rights.

Termination of parental cases are reviewed de novo. *In re A.B.*, 815 N.W.2d 764, 773 (Iowa 2012). We conclude the State has proved by clear and convincing evidence the children were in imminent danger and services would

not correct conditions and that the children cannot be returned home. See Iowa Code § 232.116(1)(f) and (i). However, we affirm the dismissal as we find terminating the parental rights is premature given the pending criminal proceedings, and therefore, it is not proven to be currently in the best interests of the children. See *id.* § 232.116(2).

Chapter 232 exists in part to protect the children from those who have allegedly abused them. While our paramount concern is always the children's best interests and these interests are generally served by keeping "children from languishing in foster care," the best resolution in this case is to continue the out-of-home placement for the safety and protection of the children until the resolution of James's criminal charges. See *In re J.E.*, 723 N.W.2d 793, 802 (Iowa 2006) (Cady, J., concurring specially) (stating a child's safety and his need for a permanent home are the defining elements in a child's best interest).

As the district court found in the most recent permanency order, "[T]he father is facing serious criminal charges. A conviction may result in his incarceration. [K.R.] and [B.R.] are making further and more detailed statements which might bolster the State's case against the father." The State has proved the children would be in danger if they were returned to a home with such serious unresolved criminal issues, particularly in light of the fact two of the girls were the alleged victims as "founded" by the two child protective assessments. While the presumption of innocence is fundamental to defendants in our criminal justice system, given the serious nature of the accusations against James, establishing a plan to return the children to his and Carmin's care at this time is contrary to the purpose of our juvenile justice system: serving the children's best interests.

See Iowa Code § 232.1 (“This chapter shall be liberally construed to the end . . . that will best serve the child’s welfare and the best interest of the state.”). Their best interests would be served by protecting them until the criminal court determines whether James is guilty of the serious crimes he allegedly committed against his children.³

Should he be found not guilty, the reunification goals can be implemented. If he is convicted and incarcerated, it remains to be seen whether the best interests of the children would dictate the termination of Carmin’s parental rights. The testimony shows Carmin was aware of the allegations of inappropriate sexual conduct between James and the two oldest daughters, and yet she did not step into the mothering role and advocate to protect her children. These are issues that must be examined after the resolution of the criminal charges before parental rights are severed. The tragedy is that these children have waited far too long for the charges to be resolved. They have moved forward in stable and safe placements but have expressed lingering doubts and fears as to their future placement. Their best interests continue to suffer because of the delays.

Because termination is not in the children’s best interest at this time, we affirm the juvenile court’s dismissal of the petitions. However, we depart from its finding that the DHS had not offered the parents reasonable services in the form of meaningful visitation to “test” their parenting ability. The district court faulted DHS for its unjustified “resolute refusal to expand visitation” and ordered in the underlying CINA case that DHS “be required to develop a plan of expanding

³ There is no indication of a no-contact order in this record. Should a no-contact order be in place between the children and the alleged perpetrator James, DHS could reconsider increasing visitation with Carmin.

visitation with the children to work toward a trial home visit.” What constitutes reasonable services, including visitation, is based on the requirements of each individual case. *In re C.H.*, 652 N.W.2d 144, 147 (Iowa 2002). The concept of reasonable efforts broadly includes “a visitation agreement designed to facilitate reunification while protecting the child from the harm responsible for the removal.” *Id.*

Because of the pending criminal charges against James, the district court should not have ordered DHS to develop a plan to increase visitation, working toward reunification within the next six months (from March 28 to September 28, 2013). Such would be a dereliction of DHS’s duties under the code to protect the children. James is facing serious criminal charges, and we find DHS acted properly by limiting and supervising the visitation between the parents and their children until the pending criminal charges are resolved.

We therefore affirm the dismissal of the termination petition but modify as to the implementation of expanded visitation.

AFFIRMED AS MODIFIED.