IN THE COURT OF APPEALS OF IOWA

No. 6-1042 / 06-1768
Filed January 31, 2007

**IN THE INTEREST OF M.M.M., S.E.M,
AND R.O.M.,
Minor children,**

S.M., Father,
Appellant.

Appeal from the Iowa District Court for Benton County, Susan Flaherty, Associate Juvenile Judge.

A father appeals the termination of his parental rights to his three children.

REVERSED AND REMANDED.

John Mossman of Mossman & Mossman, L.L.P., Vinton, for appellant.

Patricia Lough, Vinton, for appellee mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, David C. Thompson, County Attorney, and Anthony H. Janney, Assistant County Attorney, for appellee State.

Craig Elliott, Anamosa, for minor child.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

Scott appeals the termination of his parental rights to his three children, M.M., born in 1992, S.M., born in 1994, and R.M., born in 1995. We reverse and remand.

I. Background Facts and Proceedings

Scott and his wife divorced in 2000. Pursuant to the divorce decree, Scott was afforded unsupervised visitation with his children every other weekend.

In September 2003, the State sought to have the children adjudicated in need of assistance based on several confirmed reports of neglect. Only one of the reports listed Scott as a perpetrator. That report, dated December 1998, found that Scott and his wife (1) failed to prevent R.M. from running into the street and (2) did not maintain a clean and healthy home. The parents eventually stipulated to the adjudication.

The three children were placed with maternal relatives in Vinton. Scott continued to exercise unsupervised overnight visitation with them. The visits took place at Scott's home in Maxwell, which was about a two-hour drive away from Vinton.

In mid-2004, M.M. exhibited violent behaviors that led to his hospitalization and eventual placement at a residential treatment facility in Cedar Rapids. Scott visited M.M. at the facility. He also maintained unsupervised visitation with his two younger children, as before.

In February 2005, the State petitioned to terminate the parental rights of Scott, the children's mother, and the father of a fourth child. The petition cited the child abuse reports, including the 1998 report involving Scott, but alleged no

additional factual basis for termination of Scott's parental rights. In fact, the petition, stated: "Scott and his spouse have maintained regular care with [R.M.] and [S.M.]." The petition also stated that "[a]ll parents wish to maintain contact with their children."

Approximately one month after the petition was filed, the Department of Human Services unilaterally curtailed Scott's unsupervised visits. The Department made this decision after learning that Scott talked to the children about the State's efforts to terminate his parental rights. From that point forward, Scott was only allowed to exercise supervised visitation.

A termination hearing was held in September 2005. Scott contested the termination petition. The children's mother and the father of a fourth child consented to the termination of their parental rights.

Approximately eleven months after this hearing, the State applied to reopen the record. The State noted that a termination ruling had not been issued and, in the interim, the Department had accumulated a "back log" of updates and reports that were relevant to the termination decision. The juvenile court granted the application, the record on the termination petition was reopened, and a second hearing was convened. Following this second hearing, the juvenile court issued a ruling terminating Scott's parental rights to his three children. Scott appealed.

Scott contends: (A) the juvenile court "abused its discretion by failing to make and file written findings after the termination hearing was concluded on September 1, 2005, and reopening the case thirteen and one-half months after the initial termination trial without allowing any review hearings during that period

of time," (B) "the juvenile court failed to terminate the parental rights of the father under an applicable code section or under the code section listed in the Petition to Terminate Parental Rights as requested by the State," (C) the State failed to make reasonable efforts toward reunification, and (D) termination was not in the children's best interests. Our review of termination proceedings is de novo. Iowa R. App. P. 6.4.

II. Analysis

A. Reopening/Absence of Review Hearings

The first question before us is whether the juvenile court acted appropriately in reopening the record. Our highest court was faced with the same issue in *In re J.R.H.*, 358 N.W.2d 311, 318 (Iowa 1984), an appeal from a dispositional order in a child-in-need-of-assistance proceeding. The court affirmed the reopening of the record, stating, "this is a juvenile case in which the best interests of the children dictate that the rules of procedure be liberally applied in order that all probative evidence might be admitted." *Id;* c*f. In re J.J.S.*, 628 N.W.2d 25, 30-31 (Iowa Ct. App. 2001) (holding juvenile court could not reopen record to receive additional evidence following final adjudication on merits of termination petition).

In re J.R.H. is controlling. Although it involved a dispositional hearing rather than a termination hearing, the court's focus on the child's best interests applies equally to both proceedings. *See In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). Those best interests support the juvenile court's decision to reopen the record. We also note that Scott was allowed to present evidence to rebut the State's new evidence. We conclude reopening was appropriate.

B. Citation to Improper Code Section

Scott next contends the juvenile court cited to a ground for termination not pled by the State. The juvenile court addressed this issue, noting that the State "erroneously cited" Iowa Code section 232.116(2)(e) (2005) rather than section 232.116(2)(f). Because the petition recites the elements for termination under Iowa Code section 232.116(2)(f) (authorizing termination upon proof of several elements including proof that child cannot be returned to parent's custody), we conclude the juvenile court relied on an appropriate code provision.

C. Reasonable Efforts

The Department is obligated to make reasonable efforts to reunify parents with their children following an out-of-home placement. *In re C.B.*, 611 N.W.2d at 493. This obligation is "a part of its ultimate proof the child cannot be safely returned to the care of a parent." *Id.*; s*ee* Iowa Code § 232.116(1)(f).

Scott contends the Department "did not provide services nor take the necessary steps to consider [him] as a placement option prior to filing for termination of his parental rights." We agree. Services should facilitate reunification. *In re C.B.*, 611 N.W.2d at 493. The minimal services that the Department offered Scott either did not serve this goal or were successfully completed by Scott.

When the child-in-need-of-assistance proceedings were initiated, the Department referred Scott for a psychological evaluation and recommended that he take an anger management class. Scott completed the psychological evaluation and made efforts to begin an anger management course. When he approached the service provider recommended by the Department, he was told

there was no class, but only individual sessions costing $25 per session. Scott advised the Department that he could not afford this fee. The Department asked the district court for financial assistance. The court ordered that these costs be paid through court service funding, if no other funding source was available. Instead of pursuing this option, the Department referred Scott to the Department of Corrections. This agency informed Scott it could not furnish treatment because he was not the subject of criminal charges. At this point, Scott returned to the service provider to whom he had initially been referred and paid the $25 session fees himself. He completed several sessions. Following these sessions, the provider reported that Scott's level of functioning was "normal and adequate" and there was no indication he could not provide a home to his children. The Department provided no explanation as to why court service funding was not utilized.

Prior to the first termination hearing, the Department did not recommend additional anger management sessions or parent skill training. Indeed, several months after the child-in-need-of-assistance proceedings were initiated, the Department's caseworker reported to the court that,

> Scott [] continues to maintain his housing, and employment. Scott and [his wife] Billie Joe participate with services offered to them through the Department. Scott and Billie have sought out additional assistance through community supports. Scott and Billie Joe have maintained regular and consistent contact with the three minor children. Scott has requested additional visitations with his children. Scott has contacted a BEP program in the Ames area, but has not started due to funding issues.

A provider of in-home services also noted no concerns with visitation and recommended that these visits continue. The provider also recommended that

Scott continue to work on his parenting skills and develop a support structure, in order to facilitate reunification. The Department did not follow up on this recommendation.

At the first termination hearing, the caseworker acknowledged that Scott maintained "regular and consistent" contact with the children until the month the termination petition was filed. She also acknowledged that Scott had been meeting her expectations until that point. And, she conceded that Scott's parenting of the younger two children was fine.

We turn to the Department's decision to curtail unsupervised visitation after the termination petition was filed. This decision was made without a court order and without a service provider in place to supervise visits. More than one month elapsed before the Department found a volunteer court-appointed special advocate to conduct the supervision. That advocate met with Scott and his two younger children approximately every other week. The visits were held in Vinton rather than in Maxwell. The Department caseworker conceded she made no effort to contact a provider who had previously furnished in-home services in Maxwell to see whether he could supervise the visits there. The Department also did not furnish financial assistance or make alternate arrangements to facilitate this long-distance visitation, even though the caseworker was informed that Scott occasionally had to miss a visit due to lack of adequate transportation or gasoline money.

The Department additionally made no effort to determine whether Scott was a suitable placement option, despite the caseworker's concession that Scott asked the Department to consider this option well before the termination petition

was filed. At the first termination hearing, the caseworker was specifically asked why she had not pursued a trial home placement with Scott. She admitted Scott's home was "fine" but stated she "was concerned more about the stability for financial reasons, things of that sort." When the juvenile court asked her whether she furnished additional visits after Scott asked to be considered as a placement option, she responded "no. We didn't do – and that's something I should have done and we didn't do that." The caseworker also stated she assessed "the services that he's been getting, which obviously were not enough." She continued, "I mean, that's an error on my part that I'll take responsibility for." The following dialogue is equally telling on the issue of whether the Department made reasonable efforts toward reunification:

> The Court: You saw no reason to provide parenting skill or anything else after [M.M.] was removed?
>
> The Witness: No, because there was no behavioral issues for [S.M.] or for [R.M.] . . . .
>
> The Court: And you want [Scott's] parental rights terminated when, up until March, he was having unsupervised every other weekend visits and you saw no problem with that?
>
> The Witness: Correct.
>
> The Court: And you haven't offered him any services or assistance since you decided that the visitation had to be moved to fully supervised?
>
> The Witness: No. I've given – he has what has been offered through [the residential treatment facility]. I've not given him anything extra that's in Maxwell.
>
> The Court: And the [residential treatment facility] services are for [M.M.]?
>
> The Witness: Correct.

Following the first termination hearing, the Department made a limited effort to rectify the deficiencies in its provision of services to Scott. The Department's caseworker sent Scott a "packet[] off the Internet" with information on service providers. She contacted two of the providers and recommended one

to Scott for parenting skills training. This provider charged $32 per session. Scott attended several sessions but stopped going a few months before the second termination hearing. When asked why, he testified that, on the days of the sessions, he missed eight hours of work at $10 an hour and had to pay $32 for a session that had nothing to do with parent skills training. In our view, Scott's action in curtailing this "service" does not amount to non-compliance with services.

Following the first termination hearing, the Department also continued to provide visitation services but did not expand visitation or allow unsupervised contact. The Department's caseworker admitted that there was no reason to deny Scott visitation. While she pointed to missed visits, Scott explained that, on one occasion, he injured his back and was prescribed a narcotic drug that prevented him from driving and, on another occasion, he was asked to transport family members to a funeral in Minnesota. We are not persuaded that these missed visits amount to non-compliance with services, as the State suggests.

We conclude Scott was not afforded services that would have truly tested his ability to parent, such as a trial home placement or weekend overnight visitation. Given the paucity of evidence that Scott was an inadequate parent, we believe these additional services were essential.

We further are convinced that Scott made the Department aware of his desire for these services in a timely fashion.[1] We conclude the Department did

[1] Scott could not have challenged the Department's decision to curtail unsupervised visitation prior to the termination hearing, as this decision was made only after the termination petition was filed. There is no question that he asked for additional visits and

not satisfy the reasonable efforts requirement. Because this requirement is part of the State's "ultimate proof" under Iowa Code section 232.116(1)(f), we are compelled to reverse the termination of Scott's parental rights.

D. Best Interests

Scott finally contends that termination was not in the children's best interests. We will address this issue, even though we have concluded the absence of reasonable efforts mandates reversal.

All three children were over ten years old at the time of the second termination hearing. By all accounts, the children shared a bond with their father. A therapist who worked with the oldest child testified that "he wanted to live with his dad." While she acknowledged that his opinion on this topic went "back and forth," she told the court that she did not believe termination of Scott's parental rights was in the child's best interests. She stated she saw a benefit to maintenance of a parental relationship with his father and no detriment.

Another service provider who worked with the oldest child and met with Scott for family therapy testified that Scott had no trouble establishing a routine with M.M. She said Scott was "[v]ery cooperative" during counseling sessions.

Finally, the Department's caseworker acknowledged that the children had a good relationship with Scott. The Department employee conceded that,

> [p]art of me says, yes, they should probably have some kind of ability to have some relationship with their dad; but yet I also see it that, you know, they have been consistent, they have – they have structure and it is – and in their mind, it is permanent.

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talked to the caseworker about being considered for placement. The caseworker denied both requests.

We believe these competing concerns can be accommodated without termination. Scott acknowledged that, given the lapse of time, it was best if the children stayed in their current placement. However, he asked that, at a minimum, visitation continue. The Department conceded that the maternal relatives had no obligation to voluntarily afford visitation if Scott's parental rights were terminated. Additionally, Scott suggested that these relatives harbored ill feelings toward him, given his estrangement from his former wife. Under these circumstances, we believe a court-ordered visitation schedule would serve the children's best interests. *See* Iowa Code § 232.117(5) (authorizing court to enter orders consistent with provisions pertaining to children in need of assistance, including orders under Iowa Code section 232.104(2) relating to permanency orders).

III. Disposition

We reverse that portion of the termination ruling terminating Scott's parental rights to M.M., S.M., and R.M. We remand for entry of a permanency order that includes liberal visitation between Scott and his children, subject to the terms and oversight of the juvenile court. *See In re B.M.*, 532 N.W.2d 504, 507 (Iowa Ct. App. 1995).[2]

REVERSED AND REMANDED.

[2] Scott's attorney filed a reply brief. Iowa Rules of Appellate Procedure 6.151 and 6.152 provide for the filing of a Petition and a Response in an appeal of a termination of parental rights action. The reply brief is stricken as there is no provision for the filing of such a brief.