

IN THE COURT OF APPEALS OF IOWA

No. 6-390 / 06-0459
Filed September 7, 2006

**IN THE INTEREST OF J.E.,
Minor Child,**

**R.E., Mother,
Appellant.**

Appeal from the Iowa District Court for Wapello County, William S. Owens,
Associate Juvenile Judge.

A mother appeals a juvenile court order terminating her parental rights.

REVERSED AND REMANDED.

Michael O. Carpenter of Webber, Gaumer & Emanuel, P.C., Ottumwa, for
appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, Mark Tremmel, County Attorney, and Jason Helm, Assistant
County Attorney, for appellee State.

Kenneth A. Duker of Breckenridge & Duker, P.C., Ottumwa, guardian ad
litem for minor child.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

PER CURIAM***I. Background Facts & Proceedings***

Robyn is the mother of Cody, born in 1989, Cory, born in 1990, Elyjah, born in 1992, and Jerimiah, who was born in April 1996.¹ In March of 2006 the juvenile court terminated Robyn's parental rights to Jerimiah. Her other three sons remain in her care. Robyn has filed a petition on appeal contending (1) the State failed to show that Jerimiah could not be returned to her care, (2) she should have been given additional time to reunite with Jerimiah, and (3) termination is not in Jerimiah's best interest. We reverse and remand.

I. STANDARD OF REVIEW

The scope of review in termination cases is de novo. *In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005). The grounds for termination must be proven by clear and convincing evidence. *In re T.B.*, 604 N.W.2d 660, 661 (Iowa 2000). Our primary concern is the best interests of the child. *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa Ct. App. 1997).

II. BACKGROUND

Jerimiah was removed from Robyn's care in July 2004. The facts that led to Jerimiah's removal are somewhat sketchy. Jerimiah went to a neighbor and said his brother had left and he did not know how to contact his mother. Social workers and a police officer went to the home and interviewed neighbors who reported that Jerimiah spent long periods of time at their homes, was always hungry, and frequently there was no one at his home. While the officer and social worker were there Robyn returned home. She had not paid her electric bill

¹ Paternity for Jerimiah has not been established.

and she had no electricity. She reported she was absent from the home because she worked and had to do community service hours. She agreed to a voluntary placement for Jerimiah. She supplied samples of her hair and urine for purposes of testing. A urine test was positive for opiates and she said a friend had given her a pain pill after she suffered a fall. Her hair tested negative for all substances. Subsequent tests showed her urine positive for codeine and morphine.

At the time of Jerimiah's removal he had a laceration on his neck, which he told an examining physician had happened when he ran into a rope he strung up. Jerimiah also had an old injury which he said was a dog bite, but the examining physician found it to be more consistent with a human bite. Jerimiah is intellectually challenged and performs below grade level. He is a trusting and loving child.

Jerimiah was subsequently found to be a child in need of assistance (CINA) under Iowa Code section 232.2(6)(c)(2) (2003).²

There have been three other findings that Robyn denied critical care to a child. The first two reports were the result of the same incident. Robyn had burned trash and left one of her sons, who then would have been about thirteen or fourteen, outside with Jerimiah and a neighbor child. Jerimiah played in the

² Iowa Code section 232.2(6)(c)(2) states:

6. "Child in need of assistance" means an unmarried child:

...
 c. Who has suffered or is imminently likely to suffer harmful effects as a result of either of the following:

...
 (2) The failure of the child's parent, guardian, custodian, or other member of the household in which the child resides to exercise a reasonable degree of care in supervising the child.

fire with a stick and the neighbor child was burned. There is no evidence of the extent and/or seriousness of the burn. In addition, Robyn left three children in a car, but there was no evidence how long the children were in the car, nor how old two of the children were. The third child was Jerimiah, who was about seven at the time. In addition Robyn was charged with violating the compulsory attendance law after Cory missed an excessive number of days of school.

After Jerimiah's removal Robyn participated in services, but did not attend all scheduled sessions. Reports indicated unhappiness with Robyn and Jerimiah's visits because she allowed him to play video games and did not interact with him. Robyn had a psychological evaluation, and was diagnosed with ADHD, depression, and post-traumatic stress disorder. She had therapy and was subsequently given unsupervised visits.

After an unsupervised visit in May 2005, Robyn returned Jerimiah early to the foster parents' home. Although the foster parents were not home, she left him in the care of a teenage foster child, who apparently also lived in the home. Jerimiah later told Robyn he had been sexually abused by this child. Jerimiah was moved to a different foster home.

In August 2005, while Jerimiah was with her, Robyn was arrested for shoplifting and taken to the police station. Jerimiah told a social worker that it was okay for his mother to steal food. Robyn's visits were again supervised.

In October 2005, the State filed a petition seeking termination of Robyn's parental rights to Jerimiah. The juvenile court terminated Robyn's parental rights pursuant to section 232.116(1)(f) (2005).³ The court noted:

Robyn has participated in services, and visits with Jerimiah; however, her in-home provider testified that Robyn has not been consistent with services, has a history of being unprepared for parent skill sessions, and does not have a strong bond with the child.

The court concluded Jerimiah needed permanency, and it was in his best interests to terminate Robyn's parental rights.

III. SUFFICIENCY OF THE EVIDENCE

Robyn contends the State failed to show by clear and convincing evidence that Jerimiah could not be returned to her care. She points out that she has maintained the care of Jerimiah's older brothers. She believes that because she can care for these children, she can also care for Jerimiah.

Robyn has deficiencies as a parent. She also lives at or below the poverty line. The family has insufficient money for food and basic services. She has

³ Iowa Code section 232.116 states as follows:

1. Except as provided in subsection 3, the court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds:

- . . .
- f. The court finds that all of the following have occurred:
- (1) The child is four years of age or older.
 - (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 twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.
 - (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

attempted to work at a minimum wage job and apparently has to perform community service which takes her away from her family.

She suffers from depression. We do not seek to minimize her adverse behaviors which are basically acts of omission. In considering her actions we recognize that at all times Robyn and her children were living at or below the poverty level.

Clearly Jerimiah deserves more careful care when she is away from the home. Yet we recognize her problem in affording child care when her sole employment is a minimum wage job, and in addition she has been ordered to do community service hours which take her away from her children. We find it hard to believe that Jerimiah's interests are better served in removing him from his three older brothers, who have a substantial bond with him, and he with them.

Robyn has participated in services. She has missed some sessions but has difficulty with transportation. Ideally she would have engaged in more intellectually stimulating exercises with Jerimiah during visits than allowing him to play video games for which she is being chided. The State's entry through child in need of assistance programs is not to create the perfect parent but to assure adequate care for its children. Jerimiah was found to be a child in need of assistance because he did not have reasonable supervision, yet no efforts were expended to that deficiency.

If reasonable efforts were made to provide Robyn child care for Jerimiah while she works, modifying her community service requirement to allow her to provide service that would not take her away from her children, giving her

budgeting help, assistance in finding adequate housing and legal assistance to help her resolve her delinquent bills, there is little evidence Jerimiah would not be safe in her care if she had assistance with child care at times she was required to be absent from the home. We therefore question whether the State has proved the grounds for termination by clear and convincing evidence.

IV. BEST INTERESTS

Robyn also asserts termination of her parental rights is not in Jerimiah's best interests. She states he has a close bond with her and his brothers. Robyn points out that Jerimiah revealed the sexual abuse to her, and states this shows he feels he can trust her.

Jerimiah has a strong bond with his older brothers. Cody testified he loves Jerimiah a lot and the older brothers miss him a lot. It is not in Jerimiah's best interests to sever these bonds.

We are not willing to find that Jerimiah's best interests will be served by termination.⁴ Despite the State's argument that termination is necessary so he can get on with his life, he will get on with his life in whatever situation he finds himself.

IV. ADDITIONAL TIME

Robyn claims she should have been given more time to reunite with Jerimiah. She points out that she had progressed to unsupervised overnight visitation in July and August 2005. She asserts that this shows she is able to make progress, and can resume care of Jerimiah. Robyn needs assistance with

⁴ If we were only guided by best interest only the most worthy would parent. It is more honest to recognize that the most a court can do is determine the best or better of available alternatives.

child care. The older children are of an age to care for him but they need education on their responsibilities. She also needs assistance on money management. Services focused on these needs will lead to early reunification.

REVERSED AND REMANDED.

Miller, J., dissents.

MILLER, J. (dissents)

I respectfully dissent.

Jerimiah is a special needs child. He is mildly mentally retarded and suffers from attention deficit/hyperactivity disorder (AD/HD). He operates on a much younger level than his age, and is unable to make good or safe decisions. Jerimiah has physical problems, including heart arrhythmia for which he takes medication, and is on a low-sugar, no-caffeine diet.

Robyn has several psychiatric problems. Despite services she has continued her pattern of providing inadequate supervision of Jerimiah, which on one occasion appears to have resulted in his sexual abuse. The record indicates she even shoplifted while Jerimiah was with her, and he is apparently convinced that shoplifting for food is acceptable behavior.

In the earlier parts of the juvenile court proceedings Robyn was inconsistent in her attendance at and participation in services. She did not interact with Jerimiah during visitations. Nevertheless, she made some progress and her visitation with Jerimiah progressed from supervised to unsupervised. However, the visitations regressed to supervised visitations following the shoplifting incident. Robyn again became inconsistent in her participation in services. The in-home service provider testified at the termination hearing that Robyn has been inconsistent in attending Jerimiah's medical and psychiatric appointments and that there is an absence of bonding between them.

Sufficiency of the Evidence. Robyn contends the State did not sufficiently show that Jerimiah could not be returned to her care. She points out that she

has maintained the care of Jerimiah's older brothers. She believes that because she can care for these children, she can also care for Jerimiah.

I note that although Robyn may be able to parent some of her children, this does not necessarily mean she is capable of providing appropriate care for all of her children. *In re T.J.O.*, 527 N.W.2d 417, 421 (Iowa Ct. App. 1994). Elyjah lived with his father for a substantial period of time during the juvenile court proceedings, leaving Robyn with the care of only two older children. Her ability to care for these children, seventeen and fifteen years of age and perhaps fully capable of caring for themselves, does not equate to an ability to care for nine-year-old Jerimiah who has special needs that his brothers do not. Because he is intellectually challenged and has AD/HD, Jerimiah needs structure and stability, which Robyn is unable to provide. Robyn's history shows she would be likely to neglect Jerimiah if he were returned to her care. I agree with the juvenile court that the State proved by clear and convincing evidence the statutory grounds for termination under section 232.116(1)(f).

Best Interests. Robyn asserts termination of her parental rights is not in Jerimiah's best interests. She states he has a close bond with her and his brothers. Robyn points out that Jerimiah revealed the sexual abuse to her, and states this shows he feels he can trust her.

The stronger evidence supports the juvenile court's finding that Robyn does not have a strong bond with Jerimiah. The paramount consideration in a termination of parental rights proceeding is the best interests of the child. *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997). In seeking out those best interests, we

look to the child's long-range, as well as immediate, interests. *Id.* Robyn has not provided for Jerimiah's best interests in the past. She has left him unsupervised, in a home without electricity and with very little food. Despite receiving extensive and lengthy services, Robyn subsequently provided Jerimiah with a very poor role model by shoplifting in front of him, which led Jerimiah to form the conclusion that stealing was "okay." Robyn has also demonstrated that she is unable to provide the stability that Jerimiah needs. I would conclude, as the juvenile court did, that termination of Robyn's parental rights is in Jerimiah's best interests.

Additional Time. Robyn claims she should have been given more time to reunite with Jerimiah. She points out that she had progressed to unsupervised overnight visitation in July and August 2005. She asserts that this shows she is able to make progress, and could eventually resume care of Jerimiah. While Robyn did have unsupervised overnight visitation with Jerimiah, visitation became supervised again after she shoplifted while she had Jerimiah with her, and he saw her being arrested and taken to jail. Robyn subsequently again became inconsistent in her participation in services. I would conclude Robyn had adequate time to comply with services, and it would not be in Jerimiah's best interests to give her additional time for reunification.

Conclusion. I would affirm the detailed and well-reasoned decision of the juvenile court.