

IN THE COURT OF APPEALS OF IOWA

No. 7-811 / 07-1612
Filed November 29, 2007

IN THE INTEREST OF E.S., Minor Child,

L.A.B., Mother,
Appellant.

Appeal from the Iowa District Court for Dubuque County, Thomas J. Straka, Associate Juvenile Judge.

A mother appeals from the order terminating her parental rights to her daughter. **AFFIRMED.**

Patricia M. Reisen-Ottavi of Kintzinger Law Firm, P.L.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Ralph Potter, County Attorney, and Jean Becker, Assistant County Attorney, for appellee.

Dan McClean, Dyersville, for father.

Kim Roddick of Reynolds & Kenline, L.L.P., Dubuque, guardian ad litem for minor child.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

PER CURIAM

Lori, the mother of Emily and Zachary¹, appeals from the order terminating her parental rights to Emily. She contends the court erred (1) in terminating her parental rights, but not Patrick's, Emily's father, (2) in failing to order reasonable services for her, (3) in finding she was a risk of harm to Emily and a cause of Emily's psychological disorder, and (4) in failing to hold review hearings and allowing suspension of her visitation without a hearing. We affirm.

I. Background

Zachary, born in 1992 and Emily, born in 1997, were removed from their mother's care in May of 2005 because of safety issues for the children. Both were returned to Lori's care a few days later with a safety plan and services to be provided. Formal adjudication was suspended and services continued pending sufficient progress by Lori that the case could be closed. Emily was removed again one day after her return because Lori was conducting inappropriate examinations of Emily's genitalia, based on a belief Emily had been sexually abused.

Following a hearing in July of 2005, Emily was found to be in need of assistance. The court continued her foster care placement, ordered Lori and Patrick to undergo a psychosocial evaluation and a mental health evaluation. The court ordered family-centered services, counseling and play therapy for Emily, random drug tests for Patrick, and a domestic violence program for Lori.

Lori was diagnosed with depressive disorder and paranoid personality disorder with dependent, borderline, and obsessive compulsive features. She

¹ The appeal from the permanency order concerning Zachary, No. 07-1544, is addressed in a separate decision, *In re Z.S.*, filed on _____.

tested positive for cocaine and refused to submit to follow-up drug testing. Emily was diagnosed with reactive attachment disorder. During the pendency of the case, Emily made progress in therapy and in foster care.

Following a disposition review hearing in October of 2005, the court continued Emily's foster care placement and services for Emily and the parents.

In May of 2006 Lori filed a request for a different therapist, which the court granted. Hearings set for June and July case were continued to October. In October, Lori's attorney moved to withdraw and to continue the hearing. The court granted the withdrawal, appointed new counsel for Lori, and scheduled a permanency hearing in April of 2007. It also discontinued reunification services for Lori "due to mother's lack of progress and not being considered a placement option for Emily." Reunification services continued to be provided to Lori in Zachary's case, however.

In March of 2007 Lori was admitted to the Family Empowerment Program, but was discharged in May without completing the program. Also in March Lori made an ex parte request for additional services, substitution of counsel, and a continuance. The court denied Lori's requests following a hearing in early April. It also denied Lori's counsel's motion to withdraw. The court noted the children's cases had been pending for two years, they had been removed from Lori's care for more than a year, and "the time for permanency [was] long overdue." It also noted services had not been successful and Lori had "not made any progress on her mental health issues despite two years' worth of efforts." The scheduled permanency hearing was continued to May.

In May the State petitioned to terminate Lori's and Patrick's parental rights to Emily. Evidence was received on May 23, June 6, June 15, and August 21 in combined permanency-termination proceedings in both cases. Lori failed to return for the afternoon session on June 6. On June 9 she was injured in a fight with her current boyfriend despite a domestic abuse no-contact order in effect. At the August 21 hearing, Lori testified she had a pending OWI charge.

The court found clear and convincing evidence to terminate Lori's parental rights under Iowa Code section 232.116(1)(f) (2007) and that termination of Lori's parental rights was in Emily's best interest. It concluded termination of Patrick's parental rights was not in Emily's best interest. Instead, it ordered another permanent planned living arrangement with continued placement in foster care. It provided for visitation for Patrick and his parents at the discretion of the Department of Human Services. Lori appeals.

II. Scope of Review

Our review is de novo. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001); Iowa R. App. P. 6.4. The statutory grounds for termination must be supported by clear and convincing evidence. *In re T.B.*, 604 N.W.2d 660, 661 (Iowa 2000). We give weight to the findings of the juvenile court, especially concerning the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

III. Analysis

We first note that Lori has not directly challenged the statutory ground for termination cited by the court. Consequently, any such challenge is waived. See Iowa R. App. P. 6.14(1)(c).

A. Terminating Only One Parent's Rights. Lori contends the court erred in terminating her parental rights but not Patrick's. The juvenile court found clear and convincing evidence supported termination of both parents' rights under section 232.116(1)(f) in that Emily was ten years old, was a child in need of assistance, had been removed from the physical custody of her parents for the requisite period, and could not be returned to her parents at that time. It found termination of Lori's parental rights was in Emily's best interest, but termination of Patrick's parental rights was not.

While we recognize both parents have problems that prevent Emily from being placed in their custody, there are differences in Emily's relationship with each parent. In assessing best interests of a child, we evaluate the child's long-range as well as immediate interests. *In re K.F.*, 437 N.W.2d 559, 560 (Iowa 1989). We consider what the future likely holds for a child if returned to a parent. *See id.* We gain insight into the child's prospects by reviewing a parent's past performance—for it may indicate a parent's future capabilities. *Id.* We give primary consideration to the physical, mental and emotional condition and needs of the children. Iowa Code § 232.116(2); *In re J.W.D.*, 456 N.W.2d 214, 217 (Iowa 1990). A parent's mental disability, standing alone, is not a sufficient reason to terminate parental rights. *J.W.D.*, 456 N.W.2d at 218. We may properly consider it, however, in determining whether a parent is able to function as a parent effectively. *In re T.T.*, 541 N.W.2d 552, 556 (Iowa Ct. App. 1995). Iowa Code section 232.116 has been interpreted to allow the termination of one parent's rights. *In re N.M.*, 491 N.W.2d 153, 155 (Iowa 1992). Consequently, the rights of one noncustodial parent may be terminated without terminating the other

parent's rights. See *id.* We, like the juvenile court find termination of Lori's parental rights to Emily appropriate under the circumstances before us. We agree with the juvenile court that termination of Patrick's parental rights is not in Emily's best interest.

B. Reasonable Efforts. Lori contends the court erred "in failing to appropriately order additional reasonable effort services" for her. She argues her serious mental health diagnosis was not dealt with adequately because of disjointed mental health treatment, a lack of opportunity for hands-on ongoing therapy between Lori and Emily, a lack of review hearings, and conflicts between Lori and Tammy Welbes, the case worker from the State.

We find the State made reasonable efforts to reunify Lori with Emily. Lori did not take advantage of services and either was unable or unwilling to benefit from them. When she asked for a different therapist, the court granted her request. She exercised visitation with Emily until her best interest required suspension of visitation. See *In re M.B.*, 553 N.W.2d 343, 345 (Iowa Ct. App. 1996). Lori did not comply with requests for drug testing after testing positive for cocaine in January of 2006. She did not take medication as ordered to help with her mental health problems. When offered residential treatment, Lori rejected it. When she entered the Empowerment Program, she failed to complete the program successfully. Even though services for Lori eventually were suspended in this case, they were continued in Zachary's case. We find no merit in this claim.

C. Risk of Emotional Harm. Lori contends the court erred in finding Lori was a risk of emotional harm to Emily and that contact with Lori was the cause of

Emily's reactive attachment disorder. Neither finding is essential either to support the statutory ground for termination or to the finding Emily could not be returned to Lori's care at the time of the termination hearings. It is abundantly clear both Lori and Emily have significant psychological problems. We need not consider whether Lori caused Emily's problems. When determining whether Emily could be returned to Lori's care, we need not limit our consideration of possible harm only to emotional harm. The risk of any adjudicatory harm as set forth in Iowa Code section 232.2(6) is sufficient to prevent returning a child to a parent's care. See Iowa Code § 232.102(9). We find Emily cannot be returned to Lori's care.

D. Hearings and Visitation. Lori contends the court erred in failing to hold review hearings and in suspending visitation without a hearing. Iowa Code section 232.102(9) provides for a dispositional review hearing within six months of the original dispositional hearing and subsequent review hearings within a year of the first review hearing. This provision is directory, not mandatory. *In re A.E.O., III*, 437 N.W.2d 238, 239-40 (Iowa 1989). Its aim is "to provide order and promptness in the monitoring of dispositional orders." *Id.* at 240. Lori argues holding review hearings would have allowed the court to address the adequacy of services and other concerns she raised in motions. The original disposition occurred on July 13, 2005. A review hearing was held in October of 2005. Lori's request for a different therapist was met in May of 2006. A permanency hearing in June of 2006 was continued to July. At Lori's request it was continued again to October. In October the hearing addressed reunification services and granted Lori's counsel's motion to withdraw. Appointment of new counsel required

continuing proceedings to give new counsel time to become familiar with the case. We conclude the court adequately addressed issues and concerns as this case progressed even though it held a specific “dispositional review” hearing only in October of 2005. We also question whether this issue is properly before us because it does not appear to have been presented to and ruled on by the district court. See *In re N.W.E.*, 564 N.W.2d 451, 455 (Iowa Ct. App. 1997).

Although visitation between a parent and child is an important ingredient to the goal of reunification, *In re S.W.*, 469 N.W.2d 278, 280-81 (Iowa Ct. App. 1991), the nature and extent of visitation is always controlled by the best interests of the child and may warrant limiting parental visitation. See *In re C.G.*, 444 N.W.2d 518, 520 (Iowa Ct. App. 1989). A change in visitation could be made by the State without a hearing because the court gave the State discretion in allowing visitation with either parent.

We affirm the termination of Lori’s parental rights to Emily.

AFFIRMED.