

IN THE COURT OF APPEALS OF IOWA

No. 8-637 / 08-1066
Filed October 1, 2008

IN THE INTEREST OF S.D.G., J.D.H., and K.E.G.,
Minor Children

W.B., Father of K.E.G.,
Appellant,

L.G., Mother,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Kathleen A. Kilnoski, District Associate Judge.

A mother and father each appeal from a juvenile court order terminating their parental rights. **AFFIRMED IN PART AND REVERSED IN PART ON MOTHER'S APPEAL; REVERSED ON FATHER'S APPEAL AND REMANDED.**

Maura C. Goaley, Council Bluffs, for appellant father.

Phil R. Caniglia, Council Bluffs, for appellant mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Matthew Wilber, County Attorney, and Dawn Landon, Assistant County Attorney, for appellee.

Helen Savage of Roger Sawatzke Law Firm, Council Bluffs, guardian ad litem for minor child.

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

SACKETT, C.J.

The mother of sons born in August of 2000 and November of 2003, and a daughter born in 2006, filed a petition on appeal seeking reversal of a juvenile court order terminating her parental rights to the three children. The juvenile court terminated her rights under Iowa Code sections 232.116(1)(d), (f), and (h) (2007). She contends there is not clear and convincing evidence to support termination under any of these grounds. The father of the two younger children has not appealed. The father of the child born in August of 2000, also filed a petition on appeal seeking reversal of a juvenile court order terminating his parental rights to the child under Iowa Code sections 232.116(1)(d), (f), and (i). The father contends there is not clear and convincing evidence to support termination under any of these grounds. We affirm in part and reverse in part on the mother's appeal, reverse on the father's appeal, and remand.

SCOPE OF REVIEW AND AUTHORITIES

Our review is de novo. Iowa R. App. P. 6.4. We give weight to the district court's findings, especially concerning credibility, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

The parent-child relationship is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511, 519 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15, 35 (1972). The State has the right to terminate the legal relationship between a parent and a child, but the Constitution limits its power to do so. *Quilloin*, 434 U.S. at 255, 98 S. Ct. at 554, 54 L. Ed. 2d at 519; see *Meyer v. Nebraska*, 262

U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045 (1923); *In re T.R.*, 460 N.W.2d 873, 875 (Iowa Ct. App. 1990). The State has the burden of proving the grounds for termination by clear and convincing evidence. Iowa Code § 232.96(2) (2007); *In re H.L.B.R.*, 567 N.W.2d 675, 677 (Iowa Ct. App. 1997). “The issue of whether or not to legally sever the biological ties between parent and child is an issue of grave importance with serious repercussions to the child as well as the biological parents.” *Id.* The goals of child-in-need-of-assistance proceedings are to improve parenting skills and to maintain the parent-child relationship. *Id.* An underlying issue in a termination action is whether the parent is beyond help, but a parent does not have an unlimited amount of time in which to correct his or her deficiencies. *Id.*; see *In re D.J.R.*, 454 N.W.2d 838, 845 (Iowa 1990).

MOTHER’S BACKGROUND

The three children were removed from the home where the mother lived with the father¹ of the two younger children and placed in foster care in August of 2006. In late September of that year the children were found by the juvenile court to be children in need of assistance under Iowa Code sections 232.2(6)(c)(2) and (n), primarily because of the mother’s use of illegal drugs. The children were removed from the mother’s care and placed in foster care on August 1, 2006. The mother admitted to cocaine use in the prior month. She tested positive for the substance. Services were offered her.

¹ His name did not appear on the birth certificates. The juvenile court also terminated the parental rights of unknown fathers of the two younger children.

By the time of a dispositional hearing at the end of October of that year the mother had completed a substance abuse evaluation and was diagnosed with cocaine dependence and cannabis abuse. It was recommended, among other things, that she have outpatient treatment and she be evaluated to determine if she were bi-polar. She was visiting with the children at all scheduled times, and while there was testimony she was overwhelmed with the three at times, the record clearly shows that she was receptive to suggestions and was working on her parenting techniques.

In March of 2007 the mother entered a residential treatment program, and by July of 2007 had progressed with treatment and was ready to move into a residential component of the program. A permanency plan provided for continued efforts to reunify her and the children in the ensuing months, noting her sustained commitment to sobriety, her successful completion of treatment and aftercare, and the fact she had adequate housing. However there was concern about the younger children's father and her relationship with him.

In October of 2007 there were concerns she was again using illegal drugs. She admitted she had a relapse and had been discharged from a residential program in August. However, before an October permanency hearing she was accepted into another program. The juvenile court found she continued to participate in outpatient treatment, was living in a sober community at Oxford House in Council Bluffs, regularly attended AA or NA meetings, and her drug screens had been negative since her admitted cocaine use in August of 2007.

At the time of the termination of parental rights hearing in April and May of 2008 the juvenile court found there was no indication the mother would resume a relationship with the younger children's father, she had kept her job, was committed to maintaining sobriety, had been sober for nine months, and there was no evidence she would relapse. She had surrounded herself with a sober support group and had regained a positive relationship with her parents and her sister who had helped her with the children.

The court then found that the mother was overwhelmed by the care of the three children and failed to intervene during a supervised outing when the older boy threw rocks at and hit his younger brother. The court also noted that her housemates heard her screaming at the children for two hours during unsupervised overnight visitation in May of 2008.

The court found:

[The mother] cannot safely and consistently care for her children. They continued to be at risk of physical and emotional abuse and neglect while they were supervised and unsupervised in her care, despite the offering of parenting services for nearly two years.

The court also found termination was in the best interest of these children and the mother could not meet the high-needs of the children.

FATHER'S BACKGROUND

The father of the male child born in August of 2000 had his parental rights terminated under Iowa Code sections 232.116(1)(d), (f), and (i).

At the time of the removal of his son from the mother's care, the father was living in rented space in the home of family friends in Omaha. He was exercising visitation with his child and paying \$200 a month for his support.

Earlier he had reason to believe there were problems in the mother's home and with her boyfriend and he testified he asked the police to investigate. Evidence at trial revealed that the boyfriend had been abusing the child. The father took his son but after a period returned him, apparently because of a threat by the mother.

The father agreed to the proceedings, indicating he wished to have more time with his son and hoped to move to Council Bluffs so he could care for him. He apparently was incorrectly advised that he had to live in Iowa to obtain his son's custody. He was given supervised visits of two hours a week but through the course of these proceedings he sought additional visitation and asked that it be unsupervised. He was true to his visitations, appearing when they were scheduled. He attended parenting sessions. A man of few words, he does not use drugs or alcohol, and there is no evidence he has been abusive. His son has a series of problems. The child has an attention deficit disorder and a temper. He flies off and is belligerent with his parents, child care providers, and social workers. He has mental health issues, is receiving counseling, and takes prescribed medications.

By October of 2007 the father had secured a large, clean apartment in an acceptable Council Bluffs neighborhood within walking distance of a school. It was sparsely furnished but the bedroom had ample room for two beds and two dressers. He wanted his son to move in with him. It did not happen. He did ultimately get overnight visits and there were no discernable problems.

The juvenile court in its termination order found many positives for the father with which we on our de novo review agree. He found a different job and a new home in Council Bluffs so he could have the child there. The juvenile court noted as do we that it was not the father's parental behavior that led to the child being found in need of assistance. The court found the father had participated in nearly every scheduled visit and parenting session, made efforts to incorporate the parenting techniques, and that he was close to friends recommended by several providers. The court found, and we agree, that the father maintained significant, meaningful contact with his son and made efforts to comply with the case plan and resume his son's care. The court further recognized that the father had friends who were close to his son in the past. The court found, however, the father cannot offer his son the emotional security and safety his son with high needs requires, the father does not grasp the severity of his son's behavior, and he does not comprehend the child's need for a parent who can lead and discipline appropriately. The court recognized the professionals observing the father with his son do not believe he would actively hurt or abuse him but found, "[The father] has not demonstrated the initiative to be the proactive parent that [his son] needs."

The father at the time of the hearing was forty-one years old. He was in the reserves for ten years until 1993. He attended Vatterott College in Omaha and has been paying off student loans. An observer at parenting sessions testified his voice is a monotone and she would like for him to be more assertive and authoritative. A couple who have served as foster parents and with whom

the father resided during a number of visits with the child were complimentary of his relationship with the child.

THE CHILDREN

The juvenile court found the children have a connection with their mother and the oldest child is developing a bond with his father. The court found that the children had flourished in their foster parents' home, they are bonded with each other, and that the youngest child is bonded with her foster mother but not her biological mother. The court found all the children should be placed together. Apparently the foster parents are willing to adopt the children.

ANALYSIS

The children were removed primarily because the mother was using cocaine and living with a man who also was. There is no finding that the father's conduct led to the child's removal. The mother had been sober for nine months at the time of the termination hearing and she was active in support groups that provided aftercare. The children could live with her where she was then staying. The father had an apartment where his child could live and he testified he was ready to take the child, although he supported the child going with the mother and his having visitations.

The CASA on this case, who had been a CASA for some eight years and was relieved of her assignment not by her choice but by the director and the court for reasons we are unable to discern from the record, kept requesting more visits for each parent and testified she would be willing to work with the family if reappointed to represent the children. She testified she believed the parents

should have been given more visits and a greater opportunity to demonstrate their parenting ability and to follow through with services. She further testified both parents had made progress to the point she had seen the father deal with his son and believed that he was capable of disciplining and/or controlling the child. She thought there should be unsupervised overnight visits. She said she generally was told to help work towards reunification but that reunification did not seem to be the focus of the case here. She testified she had been against termination but was in favor of it now because the children had been in foster care for so long.

The juvenile court's decision to terminate both parents' rights to the older boy appears to rest primarily on concerns of DHS workers and the guardian ad litem about the parents' ability to care for the child's emotional needs on a long-term basis, noting both parents are passive and the child requires parents who can advocate for him at school, with therapists, and in the community. There is evidence that supports this conclusion but there also is evidence that refutes it from friends of the parents.

The children obviously are difficult to parent in part because of the disruption in their lives caused by their mother's drug use and by the two younger children's alleged father.

This case is extremely difficult, for the appealing parents have made substantial efforts to regain their child or children, there is evidence that would support a finding they are able to parent their child or children, and the CASA testified that in her opinion the case was not focused on reunification. Yet

according to some of the evidence their parenting skills, while improving, are so deficient as to provide clear and convincing evidence the children cannot be returned to their care.

The fundamental liberty interests of biological parents in the care, custody, and management of their children do not evaporate simply because they have not been model parents or have lost temporary custody of their children to the State. See *In re S.J.*, 451 N.W.2d 827, 830 (Iowa 1990); *In re Chad*, 318 N.W.2d 213, 218 (Iowa 1982) (citing *Santosky v. Kramer*, 445 U.S. 745, 753, 102 S. Ct. 1388, 1394-96, 71 L. Ed. 2d 588, 606 (1982)). The evidence criticizing their parenting skills comes primarily from the State's witnesses and is in the nature of general rather than specific complaints about the manner certain situations with the children have been handled. In *S.J.*, 451 N.W.2d at 830, the court in a termination appeal addressed a record where it found, "The State's evidence consists solely of testimony by social workers and visiting nurses describing a mother who cannot control her troubled child." The court noted there were no professional opinions or evaluations probative of the child's prognosis and suggested it is preferable in cases involving children with special and difficult mental problems to have probative professional opinions to address the child's behavior problems, whether they will continue, the parents ability to develop parenting skills, and the long term prognosis of the child.

The State's evidence the father has parenting problems does not give us this guidance. Furthermore, the State's evidence is contradicted by friends of the father with whom he lived earlier while he was exercising visitation with his son.

Additionally the CASA does not appear to agree with the assessments of the State workers. She has been frustrated by the refusal to increase the father's visits and her general concern that the State was not working toward reunification. She made her recommendation for termination based solely on the fact that the children had been in the foster home for some time. It is difficult in termination cases not to compare the foster home with the parents' home and be influenced by a comparison of the homes. "The parent's right to have a child returned, however, is not measured by comparing the parent's home to the foster home or an ideal home. Rather the parent's right is established by negating the risk of reoccurrence of harm." *S.J.*, 451 N.W.2d at 831 (citing *In re Blackledge*, 304 N.W.2d 209, 214-15 (Iowa 1981)). The oldest child was not found to be a child in need of assistance based on the father's actions and there is not clear and convincing evidence that this child cannot be returned to his father's care. We reverse the termination of his parental rights.

We also reverse the termination of the parental rights of the mother to the oldest child. We recognize her problems, primarily with the use of illegal substances, led to the removal of the child from her home and his entry into the juvenile court system. At the time of trial she was no longer using drugs and was in an aftercare type of program, lessening the chance that she will relapse. We consider also in our decision that she has a good relationship with the child's father and he testified he wants her, if his parental rights are retained, to be a part with him in the child's life.

We affirm, however, the termination of the mother's parental rights to the two younger children. We do this relying primarily on the factual findings of the juvenile court that there is clear and convincing evidence that the mother is not able to parent these children. In doing so we note there is testimony, though contradicted, that she could care for the children. Her parenting problems are more clearly defined than those of the father and obviously are more serious when viewed in the context of caring for three children, two of whom require more attention to their safety than the oldest child, who at eight years of age is more able to communicate his needs. We recognize this decision separates half-siblings. Yet this factor should not override a parent's constitutional right to parent his or her child.

We remand to the juvenile court to make such orders as are necessary to assure the prompt reunification of the parents with the oldest child. The child will need, among other things, continuance of the help he was receiving from professionals while in foster care.

We affirm the termination of the mother's parental rights to the two younger children.

AFFIRMED IN PART AND REVERSED IN PART ON MOTHER'S APPEAL; REVERSED ON FATHER'S APPEAL; AND REMANDED.