

IN THE COURT OF APPEALS OF IOWA

No. 9-075 / 08-1597
Filed March 11, 2009

**IN THE INTEREST OF A.L.M. Jr. and A.M.,
Minor Children,**

**D.M.Y., Mother,
Appellant.**

Appeal from the Iowa District Court for Linn County, Barbara H. Liesveld,
District Associate Judge.

A mother appeals from the order terminating her parental rights.

AFFIRMED.

Lorraine Machacek, Cedar Rapids, for appellant mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, Harold L. Denton, County Attorney, and Kelly J. Kaufman,
Assistant County Attorney, for appellee State.

Dawn Wilson, Cedar Rapids, for minor children.

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

DOYLE, J.

A mother appeals from the juvenile court order terminating her parental rights to her child. Upon our de novo review, we affirm.

I. Background Facts and Proceedings.

D.Y. is the mother and A.L.M. Sr. is the father of A.L.M. Jr., born in June 2003, and A.M., born in January 2005.¹ The record reveals D.Y. has a long history of substance abuse and involvement with the Iowa Department of Human Services (Department).

A.L.M. Jr. tested positive for THC (tetrahydrocannabinol) at birth, resulting in a founded child abuse report against D.Y. It was believed at that time that D.Y. would be cooperative with substance abuse treatment, and a case was not formally opened by the Department. However, the Department received a report in September 2003 that D.Y.'s children had been exposed to illegal substances. Following hair stat tests, A.L.M. Jr. and D.Y.'s two older children, not at issue here, tested positive for cocaine, resulting in a second founded child abuse report against D.Y.² Thereafter, D.Y. was offered services designed to reunite her with her children. D.Y. entered and successfully completed the Heart of Iowa treatment program. The Department's case was closed in 2005, with D.Y. and the children being reunited.

In October 2006 D.Y. tested positive for marijuana and cocaine.³ Hair stat tests performed on A.L.M. Jr. and A.M. (hereinafter "the children") tested positive

¹ A.L.M. Sr. has not appealed from the termination of his parental rights.

² A.M. was not yet born.

³ D.Y. was required to provide samples for urinalysis as a condition of her probation stemming from an earlier criminal offense.

for cocaine and its metabolite. The children were removed from D.Y.'s care and placed with their maternal grandparents under the protective supervision of the Department.

On January 24, 2007, following a stipulation by the parties, the juvenile court adjudicated the children as children in need of assistance (CINA) and continued their placement with their grandparents. Following a dispositional hearing, the court on March 7, 2007, entered its order finding the children continued to be CINA and continuing the children's placement with their grandparents. Additionally, the court adopted the Department's case permanency plan developed to reunite D.Y. and the children. To that end, multiple services were offered to D.Y., including parenting instruction, supervised visitation and services, individual counseling for the children, family counseling, couples counseling, substance abuse treatment, and mental health evaluations.

D.Y. again entered and completed the Heart of Iowa treatment program. However, she did not follow up with aftercare treatment. Although her visitation with the children was progressing, she relapsed and tested positive for cocaine in December 2008. As a result, her probation was revoked, and she was placed in jail. There, D.Y. entered the Violator's Program.

On December 20, 2008, the State filed a petition to terminate D.Y.'s parental rights. A contested termination hearing was held on February 15, 2008, and April 18, 2008. Because D.Y. was incarcerated, she was not present at the hearings. She testified at the April 18, 2008 hearing via telephone.

In June 2008 extensive flooding in Cedar Rapids, Iowa, resulted in the loss of records at the Linn County Courthouse. Among the lost records were the

entire court file and court reporter's notes relating to the April 18, 2008 hearing, as well as the original exhibits admitted at the hearing. The court reporter's notes from the February 15, 2008 hearing were not lost.

On September 16, 2008, the juvenile court entered an order terminating D.Y.'s parental rights to A.L.M. Jr. pursuant to Iowa Code section 232.116(1)(f) (child four or older, child CINA, removed from home for twelve of last eighteen months, and child cannot be returned home) (2007) and to A.M pursuant to section 232.116(1)(h) (child is three or younger, child CINA, removed from home for six of last twelve months, and child cannot be returned home). D.Y. appeals.

Following the filing of D.Y.'s appeal, the Iowa Supreme Court ordered the parties to provide a statement of the evidence pursuant to Iowa Rule of Appellate Procedure 6.10(3) and to have the record settled or approved by the district court. The juvenile court then received into the record D.Y.'s statement of evidence and objection to summary procedure, and without objection the Mother's Exhibit 1, the State's Exhibit list, the State's response to D.Y.'s statement of evidence and objection to summary procedure, and various State's exhibits, containing copies of documents from the CINA file. The parties stipulated that the summaries of evidence were accurate summaries of the evidence presented at the time of trial and that no factual disputes remained for the court to resolve. The juvenile court approved the statements and exhibit to be included in the record on appeal.

II. Scope and Standards of Review.

We review termination proceedings de novo. *In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005). The grounds for termination must be supported by clear

and convincing evidence. *In re T.B.*, 604 N.W.2d 660, 661 (Iowa 2000). We are primarily concerned with the children's best interests in termination proceedings. *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa Ct. App. 1997). Even when the statutory grounds for termination are met, the decision to terminate parental rights must reflect the children's best interests. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). When we consider the children's best interests, we look to their long-range as well as immediate best interests. *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997).

III. Discussion.

D.Y. appeals from the juvenile court order terminating her parental rights to the children. She contends the juvenile court erred in determining clear and convincing evidence established the children could not be returned to her custody and the court erred in determining clear and convincing evidence established termination was in the best interests of the children. Additionally, D.Y. contends the use of the procedure contained in Iowa Rule of Appellate Procedure 6.10(3) in this case is inconsistent with the applicable standards of appellate review and violates the D.Y.'s right to due process of the law under the Fourteenth Amendment to the Constitution. Upon our de novo review, we affirm the judgment of the juvenile court.

A. Use of Iowa Rule of Appellate Procedure 6.10(3).

We preliminarily address D.Y.'s argument concerning the use of Iowa Rule of Appellate Procedure 6.10(3). The rule on summaries of evidence states:

If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, appellant may prepare a statement of the evidence or proceedings from the best available

means, including the appellant's recollection. The statement shall be filed with the clerk of the district court and served on appellee within 20 days after the filing of the notice of appeal. Appellee may file with the clerk of the district court and serve on appellant objections or proposed amendments to the statement within 10 days after service of appellant's statement. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included in the record on appeal.

Iowa R. App. P. 6.10(3). Compliance with this rule is not mandatory but "an appellant will not be entitled to a new trial or any other relief on appeal unless the appellant attempts to comply with the rule." *In re T.V.*, 563 N.W.2d 612, 614 (Iowa 1997).

In *T.V.*, a delinquent child's appellate attorney discovered that a tape recording of the delinquency adjudication hearing was inaudible in places and did not include a significant part of the child's testimony. *Id.* The attorney informed the court he was unable to summarize the missing record because he did not represent the child at the hearing and "had no independent knowledge of the proceedings." *Id.* Additionally, *T.V.*'s trial attorney attested he did not have sufficient independent recollection of the proceedings to prepare a summary. *Id.* This left only the juvenile court's trial notes to fill in the gaps. *Id.* at 613. Under these circumstances, the Iowa Supreme Court declined to penalize the appellate attorney for not preparing a summary of the evidence. *Id.* The court further concluded reversal was necessary because *T.V.*'s appellate attorney could not determine whether the State presented sufficient evidence of guilt at the adjudicatory hearing. *Id.* at 615.

This case is unlike *T.V.* Here, *D.Y.* filed a summary of the evidence. In addition, the State agreed with *D.Y.*'s summary and provided the court with

copies of the lost original exhibits. The summary, exhibits, and the transcribed portion of the termination hearing create a sufficient record to permit a de novo review of the issues raised by D.Y. We proceed to an analysis of that record.⁴

B. Statutory Grounds for Termination.

D.Y. does not dispute the first three elements of Iowa Code sections 232.116(1)(f) and (h) have been established. Instead, she contends the fourth element of sections 232.116(1)(f) and (h), that there is clear and convincing evidence the children cannot be returned to D.Y.'s custody as provided in section 232.102, has not been proved by the State. We disagree.

A.L.M. Jr. has tested positive for illegal substances three times, A.M. once, and D.Y. numerous times. D.Y. has twice completed the Heart of Iowa treatment program, and relapsed thereafter. D.Y.'s admitted past substantial substance abuse puts the children at risk of harm if she should relapse. Her recent participation in treatment through the Violator's Program is to be commended, but the juvenile court and this court are not convinced she can continue to avoid drug use and provide a safe home for her children. Insight for the future can only be gained from D.Y.'s past actions. See *In re R.L.F.*, 437 N.W.2d 599, 601 (Iowa Ct. App. 1989).

Although the children could be returned to D.Y.'s care at some point in the future if she maintained sobriety, additional time is needed, especially given her incarceration. Considering D.Y.'s history, this is unlikely to occur soon or ever. While the law requires a "full measure of patience with troubled parents who attempt to remedy a lack of parenting skills," this patience has been built into the

⁴ We find it unnecessary to reach the due process issue raised by D.Y.

statutory scheme of chapter 232. *In re C.B.*, 611 N.W.2d 489, 494 (Iowa 2000). Children should not be forced to endlessly suffer in parentless limbo. See *In re E.K.*, 568 N.W.2d 829, 831 (Iowa Ct. App. 1997). At some point, the rights and needs of the children rise above the rights and needs of the parent. *J.L.W.*, 570 N.W.2d at 781. We therefore find clear and convincing evidence established that the children could not be returned to her custody.

C. Best Interests.

Even when the statutory grounds for termination are met, the decision to terminate parental rights must reflect the children's best interests. *M.S.*, 519 N.W.2d at 400. The children have been living and thriving in the home of their grandparents. The children are adoptable, and the grandparents have stated they would like to adopt the children.

When a parent is incapable of changing to allow the child to return home, termination is necessary. *In re T.T.*, 541 N.W.2d 552, 557 (Iowa Ct. App. 1995). The children deserve stability and permanency, which D.Y. cannot provide. *In re C.D.*, 509 N.W.2d 509, 513 (Iowa Ct. App. 1993). We agree with the juvenile court that termination of D.Y.'s parental rights is in the children's best interests.

IV. Conclusion.

Because we conclude there was a sufficient record to permit a de novo review of the issues raised by D.Y., and we find clear and convincing evidence established that the children could not be returned to her custody and that termination was in the best interests of the children, we affirm the judgment of the juvenile court.

AFFIRMED.