

IN THE COURT OF APPEALS OF IOWA

No. 9-824 / 09-1169
Filed November 12, 2009

**IN THE INTEREST OF T.C.,
Minor Child,**

J.D., Mother,
Appellant.

Appeal from the Iowa District Court for Wayne County, Sherman Phipps,
Judge.

A mother appeals the termination of her parental rights. **REVERSED.**

Amanda M. Demichelis of Demichelis Law Firm, P.C., Chariton, for
appellant mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, and Alan M. Wilson, County Attorney, for appellee State.

Patrick Greenwood, Lamoni, for minor child.

Considered by Vaitheswaran, P.J., Eisenhauer and Potterfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Judy is the biological mother of Timothy, who was eleven years old at the time of trial. Timothy came to the attention of the Iowa Department of Human Services (DHS) in June of 2007 when Judy asked for help controlling Timothy's aggression. Timothy was diagnosed with attention deficit disorder, oppositional defiant disorder, and mild mental retardation. On June 12, 2007, all parties stipulated to adjudication of Timothy as a child in need of assistance, noting he was at risk of physical injury at home because of his out-of-control behaviors. On June 13, 2007, DHS founded a report of child abuse against Timothy's maternal grandmother, Kathy. However, Timothy's adjudication as a child in need of assistance was not related to the report against his grandmother. DHS advised Judy that Kathy was not to be around Timothy without supervision.

Following the June 12 adjudication, Timothy was placed at Youth Emergency Services and Shelter until he was discharged on September 10, 2007. He was allowed a brief visit home and was then placed at Four Oaks Treatment Center on September 12, 2007. Timothy excelled during his placement at Four Oaks, and he experienced no major problems. Timothy was discharged from Four Oaks on February 13, 2008, and was placed in foster care, pending completion of a home study to determine suitability of placement in Judy's home.

Judy had struggled to find stable housing for herself. In April of 2008, Judy began counseling, which she attended regularly. Judy also found a home,

where she was allowed unsupervised visits with Timothy. Timothy spent every other weekend with Judy, unsupervised, until September of 2008.

Timothy's foster family, who provided Timothy with a stable home, moved approximately three hours from Judy's home in June of 2008. In October of 2008, Timothy began to see a counselor. Judy reluctantly agreed to allow Timothy to take medication to help him stay on task.¹ Timothy showed improvement as a result of these measures. Timothy became involved in extracurricular activities and showed considerable academic progress. He was better able to concentrate at school and to decrease his need for a one-on-one aide during the school day from full time to only three hours per day.

In September of 2008, Chuck Allen, an in-home counselor with Children and Families of Iowa, stopped by Judy's home during an unsupervised visit with Timothy. When Allen arrived, Kathy was in the home, and Judy asked Allen not to report this fact to anyone. DHS had been willing to reunify Judy and Timothy in September of 2008 until these concerns about Judy's contact with her mother arose. DHS workers suspected Kathy was living with Judy. Judy and Kathy denied living together for a time, but eventually admitted Kathy was living in Judy's home. Judy testified that she subsequently asked Kathy to move out, which Kathy did.

In the beginning of 2009, Judy showed improvement. Allen noted that Judy was implementing properly the parenting skills he had taught her, but was concerned she did not completely follow through in every situation. Allen

¹ The record shows Judy was concerned the medicine would worsen an underlying heart problem Timothy had. After being assured Timothy could safely take the medicine, Judy agreed to allow Timothy to take the medicine.

reported that Judy's home was adequate and had improved greatly since he first became involved in the case. Allen also reported improvement after Kathy moved out of Judy's home, as this allowed Judy to parent Timothy on her own.

In May of 2009, DHS was considering allowing Timothy to have extended visits through the summer to determine whether Judy could successfully parent Timothy. Before these plans could be finalized, Timothy's foster family told DHS they were planning to move to Colorado in June of 2009. After receiving this information, the DHS worker assigned to this case, Krista Hickie, reported that this case should not be prolonged any further and recommended the termination of Judy's parental rights. Hickie noted that Timothy had been out of Judy's home since June 12, 2007, and that Judy had not had unsupervised visitation since September of 2008.

Following a two-day trial, on August 4, 2009, the juvenile court terminated Judy's parental rights to Timothy pursuant to Iowa Code section 232.116(1)(f) (2009). Judy appeals, arguing the juvenile court erred in: (1) finding the State established by clear and convincing evidence that Timothy could not be returned to Judy's care; and (2) finding a termination of Judy's rights was in Timothy's best interests.

II. Standard of Review

We review proceedings to terminate parental rights *de novo*. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). We review the facts as well as the law and adjudicate parents' rights anew. *Id.* We give weight to the findings of the juvenile court, particularly with respect to the credibility of witnesses, but are not bound by them. *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990). Grounds for

termination must be proved by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006).

III. Statutory Requirements

Section 232.116(1)(f) provides that termination is appropriate when: (1) the child is four years of age or older; (2) the child has been adjudicated a child in need of assistance; (3) the child has been removed from the physical custody of the child's parents for at least twelve of the last eighteen months; and (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. Iowa Code § 232.116(1)(f). The first three elements are not disputed.

Further, the court need not terminate the parent-child relationship if the "child is over ten years of age and objects to the termination." Iowa Code § 232.116(3)(b). Hickie noted that Timothy's answers were inconsistent when he was asked with whom he wanted to live. Understandably, the child talked about wanting to go home to his mother, but sometimes stated that he wanted to stay with his foster parents. The record shows that Timothy had a strong bond with both Judy and his foster parents.

However, after a review of the record, we agree with Judy that the State failed to establish by clear and convincing evidence that Timothy could not be returned to her. The guardian ad litem report to the court filed on May 12, 2008, stated Timothy should stay in foster care placement until Judy was able to: (1) provide a safe, clean, and stable home for Timothy; (2) properly parent and discipline Timothy; and (3) keep Timothy safe from all forms of abuse. The record indicates Judy has met all of these goals. Judy maintained safe, clean,

and stable housing for an extended length of time. While Judy's home was initially full of debris, she greatly improved the condition and cleanliness of the home. Allen's reports show that Judy was making progress in learning how to better parent Timothy and was implementing the skills she had been taught. The juvenile court order acknowledges that the bond between Judy and Timothy was "good" and acknowledges that Judy "attempted to comply with services directed by the case plan." Although Judy was dishonest about her mother's presence in 2008, she eventually asked her mother to leave and testified that she has not since allowed her mother around Timothy.

Further, DHS reports indicate that in May of 2009, DHS was considering allowing Timothy extended visits with Judy. In its May 5, 2009 report, the Foster Care Review Board recommended a continuance of the termination so that Timothy could have a trial home visit with Judy. No one disputes the quality of care provided by Timothy's foster family, however "[c]ourts are not free to take children from parents simply by deciding another home offers more advantages." *In re C. and K.*, 322 N.W.2d 76, 81 (Iowa 1982) (internal quotations omitted). The State has not met its burden of proving by clear and convincing evidence that Timothy cannot be returned to Judy at this time. Because we find the State has not proved the statutory grounds for termination, we need not address Judy's argument that termination is not in Timothy's best interests.²

REVERSED.

² The mother's brief provided the court with information outside of the record. In reaching our conclusion, we did not consider facts that were not a part of the record. See *Rasumssen v. Yentes*, 522 N.W.2d 844, 846 (Iowa Ct. App. 1994) ("We do not address issues . . . based on information not contained in the record.").