

IN THE COURT OF APPEALS OF IOWA

No. 9-995 / 09-1619
Filed January 22, 2010

**IN THE INTEREST OF E.N.S. and R.L.J.,
Minor Children,**

**M.R.S., Mother,
Appellant.**

Appeal from the Iowa District Court for Adams County, Monty W. Franklin,
District Associate Judge.

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

Elizabeth M. Biver of Richard L. Wilson, P.C., Lenox, for appellant
mother.

Charles E. Richards, Red Oak, for appellee father of R.L.J.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, and Jeffrey Millhollin, County Attorney, for appellee State.

Karen Emerson-Peters, Atlantic, for minor children.

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

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

Misty is the mother of two children, Eric and Randall, whose ages at the time of trial were three years and eight months respectively. This family came to the attention of the Iowa Department of Human Services (DHS) after a founded child abuse assessment was completed on March 29, 2008. Misty's boyfriend and Randall's father Steven admitted to biting Eric and grabbing him in a manner that caused bruises.¹ Following the incident, DHS placed safety services in the home, which allowed Misty to care for Eric at home with daily unannounced visits from DHS workers to ensure his safety. Misty was not to allow Steven to be alone with Eric; the record reflects that Misty followed that requirement.

Misty allowed her sister and her sister's boyfriend to live with her, Steven, and Eric. On May 11, 2008, the police were called to the home regarding a verbal dispute involving the sister, the boyfriend, and Misty while Eric was home. During this incident, Misty contacted one of Steven's relatives and asked if she could place Eric with her temporarily until the conflict was resolved. On May 19, 2008, Misty informed DHS that she was not happy with Eric's placement with Steven's relative. Accordingly, on May 20, 2008, Misty consented to voluntary foster care placement for Eric, where he has remained for the entirety of the case. On May 29, 2008, Misty contacted DHS and said she wanted Eric to be returned to her. DHS then requested an ex parte removal order, and Eric was adjudicated a child in need of assistance (CINA) on July 16, 2008.

¹ Eric's father has not been part of Eric's life and did not participate in the juvenile court proceedings.

Following Eric's removal, Misty participated in regular supervised visits with Eric. She never missed a scheduled visit. Notes from the in-home care provider, Amber Abraham, establish that Misty began to make progress in her parenting skills. Misty was able to interact appropriately with Eric and needed little, if any, redirection. Eric appeared to enjoy activities Misty planned, including fishing and swimming.

In January of 2009, Misty gave birth to Randall. After a family team meeting in December 2008, Misty and Steven consented to Randall's removal and, following his birth, he was immediately placed in voluntary family foster care with Eric. Randall has remained in family foster care and has never been in Misty's custody.

Throughout the life of this case DHS provided Misty with a wide array of services. Misty cooperated with all the services provided and reportedly learned a great deal. Misty acknowledged the seriousness of the abuse that led to DHS's involvement in this case although she continued her relationship with Steven for many months. She attended mental health therapy and her therapist reported that Misty is "doing okay, she's maintaining her mental health" apart from being sad about the children. Misty participated in parenting classes. Misty maintained her employment with the same company, and for much of the case, she and Steven lived in a home owned by Steven's parents. Misty did not always grasp the providers' opinions regarding age appropriate activities for the two children, and she struggled with multitasking—when she was working on improving one skill, other areas tended to suffer. However, Misty was extremely reliable in attending appointments and scheduled visits with the children. There is no

question that Misty loves her children and wants very much to have them returned to her.

Sadie Hockett, the DHS caseworker assigned to this case, testified that Misty made a lot of progress, and went on to say “The kids enjoy time with Misty, but Misty has not consistently demonstrated that she’s able to keep the children safe on her own with no supervision for a long period of time.” Misty had semi-supervised visits of six hours each twice during the week and a six to eight-hour visit on the weekend at her grandparents’ home. Hockett recommended terminating Misty’s parental rights, conceding there was no one flagrant issue with Misty’s parenting, but many small issues that were concerning.

In April 2009, DHS was prepared to allow Misty to have unsupervised visits with her children. At that time, however, Misty decided to include Steven in her visits. Because DHS had more concerns with Steven, they declined to allow unsupervised visits once Steven was involved. Amber Abraham reported that Misty’s interactions with the children were appropriate, except for a few incidents that she described as minor. Misty provided meals, snacks, and activities for the children. Amber’s notes from visits show that Misty was working to implement providers’ suggestions into her parenting behavior. Misty’s grandmother testified that she had not seen any problems and that Misty was a good mother.

On July 6, 2009, Misty and Steven decided to end their relationship. Misty moved out of Steven’s house and in with her mother. She then lived with her grandparents briefly before moving back in with her mother. Misty has struggled to find stable housing since she separated from Steven although she was looking for independent housing at the time of the termination trial. However, she

testified that if her children were returned to her, there would be room for them at her mother's house in the front porch, which is finished and heated.

On August 6, 2009, the State filed a petition to terminate Misty's parental rights.² After trial on September 23, 2009, the juvenile court terminated Misty's parental rights to Eric pursuant to Iowa Code section 232.116(1)(h) (2009) (child is three years or younger, has been adjudicated CINA, has been removed from parent's custody for at least six of twelve months, and cannot be returned to custody of parent). The juvenile court also terminated Misty's parental rights to Randall pursuant to Iowa Code section 232.116(h) and also pursuant to 232.116(d) (prior CINA adjudication, subsequent offer or receipt of services to correct situation, and proof that circumstances leading to adjudication continue to exist). Misty appeals, arguing: (1) the State failed to prove statutory requirements to support termination; and (2) termination of her parental rights is not in the children's best interests, particularly because of their close bond with Misty.

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).

² Misty's parental rights to Eric and Randall are the only rights at issue on appeal.

III. Statutory Requirements

The State has not established by clear and convincing evidence that the children cannot be returned to their mother's custody, as required by Iowa Code section 232.116(1)(h). Misty had semi-supervised visits with her children for several months with nothing more than a few minor incidents. In March of 2009, Amber Abraham noted, "Misty appears to be listening to things that this worker has talked with her about in the past." Amber frequently reported that Misty's interactions with the children were appropriate. A review of her records shows that Misty consistently provided her children with proper meals, activities, and support. Though Misty initially struggled to use age appropriate activities with Randall, over time Amber's notes reveal that Misty's interactions with Randall improved. Misty's grandmother testified that Misty is calmer when the in-home provider is not at the home. She testified that Misty is afraid of doing something wrong when a provider is watching her, but, "When she relaxes with the kids, it is Misty with the kids." We believe it is likely that some of Misty's parenting actions of which DHS disapproved were a result of Misty's discomfort with having a care provider present.

A former court appointed special advocate (CASA) volunteer that worked with Misty recommended against termination. She testified that she spent several hours with Misty each week for about a year and that, though Misty could benefit from further education and training, she believed Misty was capable of being a great mother. This CASA volunteer quit working with Misty roughly five months before trial, and the record establishes that Misty continued to progress during these five months.

During the pendency of this case, Misty fully cooperated with DHS, and as a result her parenting skills improved. Sadie Hockett reported in April 2009 that Misty had shown improvements in her ability to make positive decisions for herself and her family. Misty's therapist reported that her biggest concern was Misty's commitment to Steven, who "brings very little to the table in terms of stability and support." Misty testified that her relationship with Steven ended in early July. Because Misty and Steven maintained an on-again-off-again relationship for an extended period of time, we recognize the possibility that Misty and Steven's relationship may not have ended permanently. However, this possibility does not justify terminating Misty's parental rights.

There is conflicting testimony about the adequacy of Misty's present residence at her mother's home, in terms of space for the children. The State presents this potential logistical difficulty as a substantial reason for termination. We disagree. We find that Misty is capable of providing the children with adequate shelter.

Eric and Randall are both flourishing in foster care. No one disputes the quality of care provided by the boys' 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 providing clear and convincing evidence that Eric and Randall cannot be returned to Misty's custody.

Further, the State has not proved that termination is appropriate under Iowa Code section 232.116(1)(d). There is no evidence in the record that the circumstances that led to Eric's CINA adjudication continued to exist. Eric was

adjudicated a CINA because of physical abuse on the part of Steven. The record shows no further signs of abuse after DHS got involved in the case. There is nothing to suggest termination would be appropriate on this ground.

REVERSED.