IN THE COURT OF APPEALS OF IOWA

No. 3-1031 / 13-1336
Filed December 5, 2013

IN THE INTEREST OF A.M.,
Minor Child,

A.M., Father,
Appellant,

J.O., Mother,
Appellant.

Appeal from the Iowa District Court for Linn County, Susan Flaherty, Associate Juvenile Judge.

A father and mother appeal separately from the order terminating their parental rights. **REVERSED AND REMANDED.**

Mark D. Fisher of Nidey, Erdahl, Tindal & Fisher, P.L.C., Cedar Rapids, for appellant father.

W. Eric Nelson of Public Defender's Office, Cedar Rapids, for appellant mother.

Thomas J. Miller, Attorney General, Janet Hoffman, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Lance Heeren, Assistant County Attorney, for appellee State.

Jessica Weibrand, Cedar Rapids, for intervenors.

Cory Goldensoph, Cedar Rapids, for minor child.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

McDONALD, J.

Jessica and Allen appeal a juvenile court order terminating their parental rights with A.M. They contend that the State failed to establish by clear and convincing evidence grounds for termination of their parental rights. Even if the State proved such grounds, they argue, it is not in the best interest of the child to terminate the rights between A.M. and Jessica and Allen. We conclude the State failed to establish by clear and convincing evidence grounds for termination of the parents' rights.

I.

A.M. was born on February 22, 2012, to Jessica and Allen. The hospital staff was concerned about Jessica's ability to feed A.M. consistently. The hospital staff was also concerned about Jessica's mental health because they found Jessica crying in her hospital room. The staff also had concerns regarding Allen's ability to care for an infant because of Allen's medical condition—Tourette's syndrome. The Iowa Department of Human Services (DHS) was made aware of these concerns, and A.M. was removed from Jessica and Allen's custody on February 24, 2012. At a subsequent hearing to review the order of temporary removal, Jessica and Allen stipulated that A.M. remain in the custody of DHS with the parents to have visitation and receive services.

This is not the first instance that Jessica came to the attention of DHS. Jessica has two other children, S.O., and A.L., from prior relationships, both of whom were adjudicated in need of assistance. Ultimately, A.L. was placed in the custody of his father, and S.O. was placed into foster care with Jessica's mother, Sandy.

On April 4, 2012, Jessica stipulated that A.M. be adjudicated a child in need of assistance. Allen did not stipulate to the same. Following an evidentiary hearing, on April 26, 2012, the court adjudicated A.M. a child in need of assistance with respect to Allen. A.M. was placed in the custody of Sandy, the maternal grandmother. The court held regular review hearings following the adjudication.

On December 28, 2012, the State filed petitions to terminate Jessica's and Allen's parental rights. The State also sought the termination of Jessica's parental rights with respect to S.O. The court held a termination hearing on March 6, 2013. At the time of the termination hearing, Jessica consented to the termination of her rights to S.O. so that she could focus her efforts on parenting A.M. jointly with Allen. At the hearing, the court heard testimony from the family's service providers and from Jessica, Allen, and Sandy.

On August 13, 2013, the court entered its order terminating the rights between Jessica and Allen and A.M. The court found that parental rights should be terminated pursuant to Iowa Code section 232.116(1)(h) (2011).

II.

We review de novo proceedings terminating parental rights. *See In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011). We examine both the facts and law, and we adjudicate anew those issues properly preserved and presented. *See In re L.G.*, 532 N.W.2d 478, 480-81 (Iowa Ct. App. 1995). We give weight to the findings of the juvenile court, especially concerning the credibility of witnesses, but we are not bound by them. *See id.* at 481. While giving weight to the findings of the juvenile court, our statutory obligation to review termination

proceedings de novo means our review is not a rubber stamp of what has come before. We will thus uphold an order terminating parental rights only if there is clear and convincing evidence of grounds for termination. *See In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). Evidence is "clear and convincing" when there are no "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *Id.*

III.

"[T]he relationship between parent and child is constitutionally protected." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). "[T]he custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Due process would be violated if the State "attempt[ed] to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Id.*

Termination of parental rights under chapter 232 follows a three-step analysis. *See In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010). First, the court must determine if a ground for termination under section 232.116(1) has been established. *See id*. Second, if a ground for termination is established, the court must apply the framework set out in section 232.116(2) to decide if the proceeding with termination is in the best interest of the child. *See id.* Third, if the statutory best-interest framework supports termination of parental rights, the

court must consider if any statutory exceptions set forth in section 232.116(3) should serve to preclude termination of parental rights. *See id.*

The court terminated Jessica's and Allen's parental rights pursuant to Iowa Code section 232.116(1)(h). As relevant here, to establish a ground for termination, the State must prove by clear and convincing evidence that the child "cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time." Iowa Code § 232.116(1)(h)(4); *In re Chad*, 318 N.W.2d 213, 218 (Iowa 1982). A child cannot be returned to the custody of the child's parents under section 232.102 if by doing so the child would be exposed to any harm amounting to a new child in need of assistance adjudication or without remaining a child in need of assistance. *See In re R.R.K.*, 544 N.W.2d 274, 277 (Iowa Ct. App. 1995); *see also In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992). "The threat of probable harm will justify termination, and the perceived harm need not be the one that supported the child's initial removal from the home." *M.M.*, 483 N.W.2d at 814; *see In re C.M.T.*, 433 N.W.2d 55, 56 (Iowa Ct. App. 1988). After reviewing the record, we conclude that there is not clear and convincing evidence that returning A.M. to Jessica and Allen exposes A.M. to statutorily proscribed harm.

We begin with what is not at issue. There is no concern here regarding physical or emotional abuse of the child. There is no concern here regarding parental substance use or abuse. There is no concern here regarding domestic violence or domestic abuse. There is no concern here regarding parental criminal behavior. There is no concern here regarding neglect. Indeed, there

does not even appear to be any particular concern regarding any probable or non-speculative harm to A.M.

What is at issue is the State's concern that Jessica and Allen's mental health history and low mental functioning will preclude them from providing proper care and supervision to A.M. "[L]ower mental functioning alone is not sufficient grounds for termination." *In re D.W.*, 791 N.W.2d 703, 708 (Iowa 2010). It can be a contributing factor in a person's inability to perform the duties of parenthood, however. While we do not doubt the sincerity of the family's service providers' concern for A.M., the record reflects that the termination recommendation here is evidenced by generalized conclusions resting only on several trivial incidents not constituting statutory grounds for termination.

There is no evidence Jessica or Allen's mental health conditions or intellectual limitations create the type of statutory harm that would justify termination of parental rights. Jessica is twenty-five, and Allen is twenty-two. Jessica has been diagnosed with depression. She has medication prescribed for the condition. Allen has Tourette's syndrome. Allen's condition causes some hand shaking, leg kicking, and stuttering. Allen testified that the symptoms do not interfere with his ability to work or to care for A.M. There was no evidence to the contrary. Testing performed during the course of these proceedings established that Jessica has borderline adult intellectual functioning. While the State refers to Allen as low functioning, the evidence showed that Allen tested in the lower range of average functioning. He is a high school graduate, and he has maintained employment.

The evidence also showed that Jessica and Allen have created stability for A.M. At the time of removal Jessica and Allen—Jessica in particular—lacked stability in their lives. At that time, Jessica and Allen were unmarried, without gainful employment, and lacking a permanent residence to provide shelter for themselves and A.M. Since that time, Jessica and Allen have actively and consistently participated in services. They participated in family team meetings, Partnership for Safe Families, and the Young Parents Network. They also worked to obtain training in the areas of financial management. Caseworker Lora Meyer testified the parents grasped parenting concepts over time and they improved their abilities. By the time of the termination hearing, Jessica and Allen were engaged with plans to wed in the near future. Jessica had obtained part-time employment at a fast-food restaurant. She also began to attend vocational rehabilitation classes. Allen had obtained and had maintained full-time employment at Target. Jessica and Allen had obtained a permanent residence—leasing an apartment since May 2012. The State's witnesses testified that the apartment is clean and appropriate for A.M.

Since the time of removal, Jessica and Allen have consistently participated in visitation with S.O., A.L., and A.M. Those visits progressed to semi-supervised visits. The service providers had some concerns about Jessica and Allen's ability to supervise all three children at the same time during the visits. For the most part, however, the visits went well. Jessica and Allen exercised appropriate physical care of A.M. during these visits. Each of the State's witnesses conceded that Jessica and Allen are trying hard to be good parents, that Jessica and Allen love A.M., and that Jessica and Allen and A.M.

share a close bond. As recently as February 2013, DHS determined there was "a good prognosis for rehabilitation of the . . . parental condition that would enable the child to safely return home."

Despite Jessica and Allen's efforts and DHS's conclusion that A.M. could safely return home, each of the parents' service providers testified and recommended the termination of parental rights. Notably lacking in the testimony is any specifically identifiable harm likely to befall A.M. should she be returned to her parents' care. *See In re H.H.*, 528 N.W.2d 675, 677 (Iowa Ct. App. 1995) ("Termination is a drastic, final step, which improvidently employed can be fraught with danger. Termination must only occur where more harm is likely to befall the child by staying with his or her parents than by being permanently separated from them."). Instead, the State's witnesses offered conclusory opinions supported, if at all, by harms insufficient to justify the termination of these parents' rights.

For example, during the entirety of the time that A.M. was removed from the parents, the service providers expressed concerns regarding the feeding of A.M. On closer inspection, however, the testimony showed that the concern was not that the parents would not feed A.M., would not feed her enough, or would not feed her the appropriate food. The providers' concerns were that A.M. should have a balanced nutrition plan that was coordinated with the foster parents. It also appears that one of the service providers was frustrated because Jessica would not feed A.M. exactly the way the provider wanted—not mixing the fruit with the cereal at feeding. The parents alleged failure to coordinate a balanced nutrition plan with Sandy and the service provider's disagreement with

the parents about whether fruit should be mixed with cereal or served separately do not evidence any future risk to A.M.

Likewise, during these proceedings, the service providers also raised concern about A.M.'s sleep habits while in Jessica and Allen's care. Specifically, Allen held A.M. until she fell asleep and then placed A.M. in the Pack 'n Play. The service providers thought this was inappropriate, in part, because the foster parents did not have "time to hold the baby for a couple of hours at a time." In other words, the State is taking the position that one of the reasons Allen's parental rights should be terminated is because he holds his child until she falls asleep, which is unfair to the foster parents who may not have the time to do the same.

The State's witnesses expressed concerns about Jessica and Allen's finances. As an example of their alleged financial irresponsibility, Lora Meyer testified that it was inappropriate for the parents to drive to Oelwein to see Allen's family because they should not "be driving somewhere where you have to pay for gas." Likewise, she testified that it was irresponsible of Allen to buy video games. On cross examination, she conceded that she did not know if Allen actually bought the games or rented them, how many games he bought or rented, and what the total cost of the purchase or rental was. The evidence showed that Jessica and Allen both work, they obtained and have maintained an apartment for a significant period of time, they have a vehicle, and they have insurance for the vehicle. They are able to feed themselves and A.M. There is no doubt that Jessica and Allen are not financially sophisticated. And, while it is true that Jessica and Allen have a "meager" existence, being without means, in

and of itself, is not grounds for termination of parental rights. *See In re Z.T.D.*, 478 N.W.2d 426, 428 (Iowa Ct. App. 1991).

The State contends, very vaguely, that Jessica and Allen cannot provide adequate supervision to A.M. The State cites several examples from the approximately seventy-five visitations. On one occasion, A.M. crawled on the floor, picked up a piece of plastic, and put it in her mouth. As another example, one witness testified that Jessica and Allen have not taped their electrical cords to the wall to secure them from A.M.'s grasp. On another occasion, Allen put a floor fan on the floor, which provider Meyer thought posed a great risk to A.M. We conclude these incidents and any others not specifically discussed herein, individually and collectively, do not provide clear and convincing proof that A.M. cannot be returned to the parents because of a risk of harm. *Cf. In re L.E.H.*, 696 N.W.2d 617, 619 (Iowa Ct. App. 2005) (holding State did not meet burden of proof under same provision where evidence showed only several incidents of small safety risk).

It should also be noted the fact that Jessica and Allen have received services almost since the date of A.M.'s birth has little probative value under the facts and circumstances of this case. One of the primary reasons that services have continued since A.M.'s birth is because of the State's disagreements with these parents about the above-discussed items. An additional reason there was a perceived need for continued services is that these parents—as demonstrated by disagreements over feeding and sleeping—were having trouble complying with their service providers' request to do things a certain way for the benefit of A.M.'s foster parent's schedule, a need that would have disappeared had care of

A.M. been returned to these parents. In short, the State should not now be allowed to bootstrap these disagreements into evidence that these parents pose a risk of statutorily-proscribed harm to A.M.

The goal of assistance proceedings is to improve parenting skills and maintain the parent-child relationship. *In re H.L.B.R.*, 567 N.W.2d 675, 677 (Iowa Ct. App. 1997). That being said, as a general rule, courts "do not gamble" with a child's future by asking the child to wait indefinitely for stable biological parenting. *See D.W.*, 791 N.W.2d at 707. We do not believe that this is a case, however, where A.M. is waiting unnecessarily for stable parenting. Jessica and Allen have availed themselves of the services required and offered and worked to reunite with A.M. *Cf. In re T.O.*, 470 N.W.2d 8, 12 (Iowa 1991) (holding termination not warranted where mentally disabled parent availed herself of services to provide safe environment for children). While we recognize and commend Sandy's care for this child and acknowledge her home offers some advantages over the parents' home, "these advantages, regardless of how desirable, cannot serve as a basis for terminating a parent-child relationship." *In re Wardle*, 207 N.W.2d 554, 564 (Iowa 1973). "The parent's right to have a child returned, . . . is not measured by comparing the parent's home to the foster home or an ideal home." *In re Blackledge*, 304 N.W.2d 209, 214-15 (Iowa 1981). "Rather the parent's right is established by negating the risk of reoccurrence of harm." *Id.* at 215. The unspecific, nebulous concerns voiced by the service providers do not rise to the level of clear and convincing evidence the child would be subject to adjudicatory harm if returned to her parents. The few, specific examples raised by the State, individually and collectively, do not constitute clear and convincing

evidence that the child would be subject to adjudicatory harm if returned to her parents.

Because we conclude the State has not established grounds for termination by clear and convincing evidence, we need not address the remaining considerations under Iowa Code section 232.116(2) and (3).

REVERSED AND REMANDED.

Mullins, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully disagree with the majority and would affirm the juvenile court's termination of the mother's and father's parental rights. I believe the State proved by clear and convincing evidence grounds to terminate both parents' rights under Iowa Code section 232.116(1)(h), given A.M. cannot be returned to her parents' care at the present time.

The mother has been receiving extensive services since she and her children came to the attention of DHS in 2009.[1] As the second DHS worker to be involved in the case testified, the parents "weren't just getting the typical two visits a week that most parents get. They were getting additional services based on their cognitive abilities to give them the opportunity to pick up on the skills that they need in order to be able to parent the kids." However, once providers began with parenting services, the parents were not able to comprehend simple measures to assure the safety of their children. The first worker to be engaged in A.M.'s case observed that, over the course of her involvement from March 2012 until January 2013, she saw no improvement in either of the parents' overall ability to parent A.M. Specifically, she stated:

> Because for the last year, working with them they don't retain what you are saying or they don't understand what you are saying. They are not necessarily seeking out the help, you have to prompt them and then they are not really happy about it. So within the last year that has not changed.

[1] The termination order states: "Jessica has received parenting services for over seven years. She has not been able to effectively parent [S.O] or [A.L]." S.O was born November 2005, and A.L. was born April 2009. The mother consented to the termination of her parental rights to S.O. in the same proceeding and does not appeal. A.L. is residing with his biological father and S.O. is residing with his grandparents, in the same placement as A.M.

When explaining the attempts she made to teach them the necessary skills, she noted:

> No matter which approach I used, we would do the same thing over and over. It's not that they didn't try. Quite honestly, it just appeared they didn't get what I was saying. If I stood there and helped them, they would do what I told them to do, but when I walked away or when I came back, it was something completely different.

This characterization of the parents' lack of abilities is reinforced in the DHS report submitted to the court on February 25, 2013, which noted the parents:

> [S]eem to have hit a plateau where their capabilities as parents may not allow them to make further progress. The children have been out of the home for a significant period of time and are in need of permanency. It is obvious that Jessica and Allen love and care for the children but it is also becoming very clear that it is not in the long-term best interest of [A.M.] to be returned to their care. Allen and Jessica do not appear to have the functional skills at this time to take on the full time care of two or even just one child.

For example, there have been numerous occasions when A.M. was scheduled to visit, but the parents did not have the proper food or clothes for her, and had to rely on the grandparents to give them the necessary items so A.M. could be properly fed and changed.

This demonstrated lack of ability to learn how to effectively and safely parent A.M. shows A.M. cannot presently be returned to the parents' care. As the second DHS worker to be involved in the case responded when asked if she believed A.M. could be returned:

> I believe that Jessica and Allen care deeply for the kids and really would love to be able to parent them full-time, however, they are both fairly low functioning. They seem to have a very difficult time grasping even some of just the basic aspects of parenting.
>
> . . . .

> I don't believe [A.M. can be returned to their care]. At this time the ability for the parents to provide for the kids, financially they struggle to make ends meet just on their own without any children in their home. And I continue to have concerns about their supervision of the children and the safety concerns that go along with that and the risks involved with not providing proper supervision for the kids.

While the majority points to specific instances that, by themselves, do not pose a great danger to A.M., I believe this is a minimization of the big picture—one that has in particular plagued the mother since 2009. It is the totality of the parents' circumstances and overall lack of abilities that prevent them from safely and adequately parenting A.M. There is a great deal of testimony, which is also reflected in the DHS reports, that, despite the extensive services offered to the parents, their parenting skills are not retained for any length of time. For instance, each provider has

> noted times where we have told Jessica and Allen something and then asked them to repeat it and then they were unable to do so, even after they said that they understood what had been said . . . . [T]here is a lot more to parenting the kids than just being able to supervise and make sure they don't choke on something . . . .

Even the parents admitted they need services to continue in order to effectively parent A.M. When questioned as to what the mother felt she would need to have A.M. returned to her care, she stated:

> A: I know I have talked with the worker about—named Wanda, we talked about she feels that we could take care of her, as long as we have like a worker there to guide us, help us a little bit, being supportive about what we are doing and go on from there.
>
> Q: So you think you would still need some drop-ins?
>
> A: Yes.
>
> Q: And what do you think the drop-ins would do for you?
>
> A: A little bit for parenting, like if we need—like anything that we need from them, we can always ask them. If we need any other services that they want us to have.

When asked if the father felt A.M. could be returned to his care, the following exchange occurred:

> Q: So in your opinion you feel [A.M.] could be returned to you and Jessica's care today as long as you had someone still coming to the home to help you out?
> A: Yes.
> Q: And how frequently would this person have to come to your house?
> A: It depends. I don't know exactly how well we will do. I know we are good parents, we do take care of her and her needs are met, but I do need a crib and I need baby gates, but we do keep an eye on her. But it depends on how they come out, we will have to schedule, I guess.
> Q: Would you want this person to come at least once a day?
> A: Once a day, probably twice. Once every other day or—
> . . . .
> Q: You mentioned that you want to have someone come once a day or once every other day. Do you think that would be necessary for the return of the child, or just something you'd want?
> A: It's not necessary, but just to be on the safe side, you know, to help things out a little bit.

Given this admission by both parents that they still would rely fairly heavily on supervision services if they were to begin caring for A.M., it is evident A.M. cannot presently be returned to their care. *See In re J.E.*, 723 N.W.2d 793, 802 (Iowa 2006) (Cady, J., concurring specially) (stating a child's *safety* and need for a permanent home are the defining elements in a child's best interests).

Beyond the fact everyone involved in the case has stated the mother and father cannot parent A.M. without the State's continued oversight, there is also concern regarding the mother's inability to tend to her own needs by taking her medication. As one DHS worker testified:

> Jessica was put on an antidepressant, and at one point just decided to stop. And the only reason it was brought to anyone's attention is at that time, the specific visit I was at, she really seemed to have an attitude where she was mad about something, and I was like, are you taking your medication, and she said no.

> And that is the only reason I found out about it. And I asked her why she was not taking it, and she said she didn't think she needed it anymore.

A second DHS worker also voiced concerns about the mother's medication, stating:

> I know that she recently went off of her medication. She did say that she was approved by her doctor to go off of the medication, but my concern with it is how honest she is being with her doctor about some of the things that are going on in her life right now, including the upcoming termination hearing.

This is a significant issue as well, considering if the mother cannot take care of herself and properly use her medications, she is increasingly likely to fail to meet the needs of A.M.

The mother's previous parenting of S.O. and A.L.—A.M.'s older brothers—is further cause for concern. In the hearing and in DHS reports, the DHS worker noted S.O.'s speech and cognitive functioning were well below children his own age, which was likely a result of the mother's early parenting of S.O. Specifically, the DHS worker stated:

> I have a lot of concerns about even just returning [A.M.] because of the delays that we see in [S.O.] and the fact that Jessica had the opportunity to parent [S.O.] by himself for the first four years of his life with no other children, yet he is still significantly behind other children his age.

In determining the future actions of the parent, her past conduct is instructive. *In re J.E.*, 723 N.W.2d at 798 (Cady, J., concurring specially); *see also* Iowa Code § 232.116(2) ("[T]he court shall give primary consideration to the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional condition and needs of the child."). I believe in this case the mother's past demonstrated inabilities does not bode well

for A.M.'s future growth and development, particularly given neither the mother nor father has made any progress beyond semi-supervised visits in the past year, despite the extensive services received.

Though it is true the juvenile court stated "it is tempting to consider allowing the parents to continue to work on a plan of reunification," given the factors listed above, more time would not cure the parents' sheer lack of parenting abilities. It is clear neither the mother nor father can internalize the necessary skills to keep A.M. safe and developing properly without the hovering supervision of DHS workers. *See In re D.A.*, 506 N.W.2d 478, 479 (Iowa 1993) ("Some progress is not enough. A parent must show an adequate overall ability to care in all custodial areas."). Considering the totality of the circumstances present in this case, I would conclude the State proved by clear and convincing evidence A.M. cannot presently be returned to her parents' care.

Furthermore, termination is in A.M.'s best interest. There is no dispute that she is bonded to her brother S.O., who is in the care of the maternal grandparents. There was also testimony A.M. identifies her grandparents as her primary caretakers. Because she is also bonded to her mother and father, the grandmother testified that the parents would continue to be a part of A.M.'s life. However, neither parent would be responsible for her everyday care, which is clearly in her best interest given all of the safety and developmental concerns expressed by the supervising workers.

It is also within A.M.'s best interest to have stability and permanency in her life. She has been out of her parents' care since just after her birth in February 2012, and the parents have not progressed beyond semi-supervised visits. Even

the parents admit they still need the supervision and direction of DHS workers to care for A.M. As the juvenile court noted, if the parents were granted any additional time, it would come "at the expense of [A.M.'s] need for permanency and without a reasonable likelihood of success." Our court has long held that:

> When the statutory time standards . . . are approaching and a parent has made only minimal progress, the child deserves to have the time standards followed by having termination of parental rights promptly pursued. At some point, the rights and needs of the child rise above the rights and needs of the parents.

In re J.L.W., 570 N.W.2d 778, 781 (Iowa Ct. App. 1997); *see also* Iowa Code § 232.116(2). I believe A.M.'s need for permanency and safety is paramount. The mother's and father's limited parenting abilities are well documented and this young child should not be placed at risk with so little progress having been made by the parents. Therefore, I would affirm the juvenile court's termination of the parental rights of both the mother and father.