IN THE COURT OF APPEALS OF IOWA

No. 3-817 / 13-0971
Filed October 23, 2013

IN THE INTEREST OF F.C. and G.P.,
Minor Children,

S.C., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Louise Jacobs, District Associate Judge.

A mother appeals the juvenile court's termination of her parental rights. **REVERSED AND REMANDED.**

Nathaniel A. Tagtow of Tagtow & Lockwood, P.L.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, John Sarcone, County Attorney, and Annette Taylor, Assistant County Attorney, for appellee.

Kimberly Ayotte of Youth Law Center, Des Moines, attorney and guardian ad litem for minor children.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

A mother appeals the juvenile court's order terminating her parental rights to her now four-year-old son and three-year-old daughter. She argues the State did not meet its burden to prove grounds for termination under Iowa Code section 232.116(1) and the best-interest considerations in section 232.116(2) (2011) weigh against termination. After reviewing the record de novo, we agree the State did not present clear and convincing evidence to support the statutory bases for termination. We also find termination is not in the children's best interests, as those are defined in section 232.116(2). Accordingly, we reverse and remand.

I. Background Facts and Proceedings

The mother is twenty-six years old and emigrated from Burma to the United States in 2010. She speaks primarily Hakha Chin, but has taken English language classes since arriving in Des Moines. She and her husband have two children, F.C., born in December 2008, and G.P., born in July 2010.

It was the father's domestic abuse that brought this family to the attention of the Department of Human Services (DHS). In December 2010 the police responded to an assault by the father against the mother while she was holding their child. The mother reported several other incidents of violence perpetrated by her husband.[1]

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[1] The father was convicted of domestic abuse assault in 2011 and sentenced to four years in prison. He received parole in May 2012. The juvenile court terminated his parental rights in September 2012.

The DHS also reported two founded incidents of child abuse in the spring of 2011—one involved the mother driving the car recklessly with the children unrestrained[2] and one involved the father operating while intoxicated with the children in the car. After these incidents the DHS recommended F.C. and G.P. be removed from their parents' custody; removal occurred on June 3, 2011. On July 19, 2011, the juvenile court adjudicated them as children in need of assistance (CINA). The children have been in foster care since that time.

The mother's justified fear of the father has been a constant in this case. Early on, the mother stayed at a domestic violence shelter. The DHS workers noted the father's family had strong ties among the Burmese refuges in Iowa and the father was "very intimidating to other members of the community." This intimidation even impacted the availability of interpreters during the case, with some Chin speakers declining to interpret for the mother due to their fear of the father. Even when the father was incarcerated, the mother reported his family continued to harass her. The mother told the case worker the family was posting her photograph accompanied by negative information on an email discussion group used by Chin speakers. The DHS worker was critical of the mother for not reporting the harassment to the police, "despite this worker suggesting [she] should do so." The mother explained she felt uncomfortable calling the police because of her limited English skills and asked the worker to do so, but apparently the worker declined.

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[2] The DHS reported that the father, who was intoxicated, was also in the car at the time.

In early 2012, the mother explored plans to move to Pennsylvania where she has family. But those plans fell through when the relatives declined to be a long-term option for the children if the mother's parental rights were terminated. At various times during the case, the mother's sister and brother traveled to Iowa to support her efforts to reunite with the children.

The mother was able to stabilize her situation by the spring of 2012. According to DHS reports, the children were "always happy to see her" during visits. The mother progressed from supervised to semi-supervised to unsupervised visits, enjoying three overnights per week with the children by June 2012. DHS reports filed in July and August of 2012 described the mother as providing "proper supervision" for her young children with only "minimal concerns" about the accessibility of hazardous items in the home. The reports also recognized the mother's "very strong bond with the children" and concluded: "it is clear that they all love each other very much."

After the court terminated the father's rights in September 2012, the DHS workers believed the mother would become a more effective parent and achieve reunification with her children. At that time the case worker reported the mother was providing proper supervision of the children and the worker observed "no safety concerns" in the mother's apartment.

The situation changed in late September 2012, when G.P. returned with an unexplained burn or scrape on her shin after an unsupervised visit with her mother. The mother pointed the injury out to case worker Lindsey Vietz, but was "unable to tell workers how the burn happened or when it happened." The DHS

also emphasized the mother did not seek medical attention for the injury. But at the termination hearing, Vietz acknowledged she was not sure whether G.P. was with her mother, her foster parents, or at daycare when the injury occurred. Vietz also conceded neither she nor the foster parents took G.P. to the doctor for treatment.

Also in October 2012, the DHS expressed concerned about an incident where the children got into fingernail polish, spilling it on themselves and the mother's couch and walls. Vietz testified she explained to the mother that fingernail polish can be toxic if swallowed, but the mother "laughed and didn't seem to really care."

Lata D'Mello, an advocate from Monsoon United Asian Women of Iowa, testified the case worker may have misread the mother's reactions based on language and cultural barriers. D'Mello explained in the Burmese refugee community "if you don't speak the language, it is more polite to smile instead of looking like you don't understand anything, because it is more respectful." Vietz admitted she has struggled to get a Chin interpreter for visits, and estimated that since September 2012, an interpreter has been present only two or three times a month. D'Mello also testified that it was her impression Vietz was watching [the mother] to see her fail rather than being there to teach her how to improve her parenting skills." The mother was more charitable toward Vietz: "I believe she tried to work with me, but many times I had a hard time understanding her, but I try to improve as to the best of my ability."

The DHS reinstated fully supervised visitations in October 2012 "due to [G.P.] having a large burn on her leg where no one can identify the cause." The DHS worker noted the mother, who was working the night shift, was "tired all the time" and "claimed she was not getting enough sleep." The worker also noted the mother did not "have a lot of support from her community." In a subsequent report, the DHS worker criticized the mother for "relying on her sister for help with the children since [the sister] arrived" in Iowa.

On November 28, 2012, the State filed petitions to terminate the mother's parental rights, citing Iowa Code sections 232.116(1)(d), (f), (h) and (i) (2011). The court held two hearings on the petition. During the first hearing on January 15, 2013, an advocate for the mother who was present in the courtroom noticed mistakes by the interpreter because the interpreter spoke a different dialect of Chin than the mother. The hearing was continued until March 29, 2013, when a new interpreter could be scheduled.

Between the two hearings, the mother continued to have supervised visitations with her children. The case worker reported the mother was "improving immensely" when it came to providing nutritious meals for the children, though the worker noted the mother still gave them soda and candy. The mother also continued to work full time and send clothing to the foster home for the children. The worker noted the mother was "clearly able to provide for herself and her children." The mother also asked the worker what she could do "to improve upon herself." In addition, the worker observed the mother remained "terrified of her husband's family."

On June 3, 2013, the juvenile court issued its order terminating the mother's parental rights, finding "ongoing concerns about the safety of the children if returned to the care and custody of their mother." The mother appeals.

II. Standard of Review

We review termination proceedings de novo; we give weight to the juvenile court's fact findings, but are not bound by them. *In re A.B.*, 815 N.W.2d 764, 773 (Iowa 2011). Under Iowa Code section 232.116(1), the State must prove the allegations by clear and convincing evidence. *See In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). "Clear and convincing" means we have no serious or substantial doubts about the correctness or the conclusions drawn from the evidence. *Id.* It is a less burdensome standard than proof beyond a reasonable doubt, but more burdensome than a preponderance of the evidence. *Cf. In re B.B.*, 826 N.W.2d 425 (Iowa 2013) (involuntary mental commitments).

The de novo standard of review also applies to the determination of best interests under section 232.116(2). *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010) (rejecting prior cases suggesting an abuse-of-discretion standard).

III. Analysis

The mother advances two arguments for reversal. First, she claims the State did not offer clear and convincing evidence to prove the circumstances that led to the CINA adjudication continue to exist or to prove the children could not be presently returned to her care. Second, she argues termination was not in the children's best interest. We find merit in both arguments.

A. The State Did Not Prove the Statutory Grounds for Termination.

The juvenile court granted the petition to terminate the mother's parental rights based on four statutory bases: Iowa Code sections 232.116(1) (d), (f), (h), and (i). Subsections (d) and (i) applied to both children. Subsection (f) applied only to F.C., who was four years old. Subsection (h) applied only to G.P., who was less than four years of age. We do not find clear and convincing evidence to support the juvenile court's decision to terminate under any of the statutory provisions.

Under section 232.116(1)(d), the court may terminate parental rights if it finds that both of the following have occurred:

> (1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.
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> (2) Subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

The mother contends the State "presented no evidence to show the circumstances which led to the adjudication continue to exist." In this case, the juvenile court adjudicated the children as CINA based on section 232.2(6)(c)(2)—finding the children suffered or were imminently likely to suffer harmful effects as a result of the parents failing to exercise a reasonable degree of care in supervision of the children. The particular circumstances that led to the CINA

adjudication were acts of domestic violence committed by the father against the mother in the presence of the children. The mother cut ties with the father and the father was incarcerated.

In its own January 2, 2013 report to the court, the DHS acknowledges the mother has maintained "appropriate boundaries" with the children's father and has established "a safe home for her and her children." But the report also stated the mother has "not demonstrated the ability to place the needs of her children first and is still receiving supervised contact with their [sic] children at this time."

After reviewing the entire record, we are not sure what actions by the mother prompted the DHS worker to assume the mother was not placing the needs of her children first. The mother does not abuse substances. The mother does not have unresolved mental health issues. The mother does not engage in criminal activity. The mother does not expose her children to dangerous people, including their father. The mother has been employed throughout the case and even switched her work schedule to be more available for her children. The mother prepares meals for her children and maintains a clean, safe apartment. The mother has worked with the Monsoon advocacy agency to find a daycare center for the children. She has been taking classes and steadily improving in her English language skills.

The DHS report identifies the "primary concern through the duration of the case has been [the mother's] lack of insight to how her decisions impact her children." Our reading of the record does not reveal a lack of insight so much as

language barriers and cultural differences, which resulted in the mother not always understanding what the case worker expected. The mother offered sincere testimony showing her commitment to the safety and careful supervision of her children. The State did not offer clear and convincing evidence the circumstances that led to the CINA adjudication continue to exist despite the offer and receipt of services.

Under section 232.116(1)(f), the court may terminate parental rights if all of the following have occurred:

> (1) The child is four years of age or older.
> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
> (3) The child has been removed from the physical custody of the child's parents for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.
> (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 as provided in section 232.102 at the present time.

Similarly, under section 232.116(1)(h), the court may terminate parental rights if all of the following have occurred:

> (1) The child is three years of age or younger.
> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
> (3) The child has been removed from the physical custody of the child's parents for at least six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.
> (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 as provided in section 232.102 at the present time.

The mother does not contest the first three elements of sections (f) and (h). She does dispute that the children cannot be returned to her care at this time. The mother asserts on appeal "[t]he DHS and FSRP workers never provided an adequate or reasonable explanation as to why the overnight visitation was stopped or why visits were tapered back to fully supervised."

The record indicates the DHS scaled back to supervised visitation after discovering G.P. suffered an unexplained burn or scrape on her shin. The DHS reports imply the child incurred the injury while in her mother's care and fault the mother for not taking the child to the doctor. But the case worker's testimony reveals a less clear picture of when and where the injury occurred. Vietz did not know who was caring for the child when she received the injury. "[The mother] pointed it out to me, so I believe she should have sought medical attention that day." But the worker acknowledged neither she nor the foster parents took the child to the doctor either. The worker said she tried "to schedule an interpreter to see if there was a communication barrier between [the mother] and I that was leading me to understand where this burn had come from," but apparently the worker did not find anyone to interpret.

While an unexplained injury to a child is obviously concerning, the State did not establish by clear and convincing evidence the child was even in the mother's care when G.P. suffered the burn. In addition, while the mother should have taken the initiative to contact a doctor to check the injury, the DHS cannot credibly maintain it was neglectful for the mother to refrain from doing so when

neither the worker nor the foster family perceived immediate medical treatment was necessary.

The record does not show why the DHS insisted the visits remain fully supervised through the fall of 2012. The only troubling incident documented in the worker's reports is the children spilling a bottle of fingernail polish. It is not uncommon for toddlers to find their way into messes. We appreciate the worker's concern that the substance could be toxic and the need to advise the mother to be more vigilant in supervising the children. But we do not find this letdown in supervision to be significant enough to serve as the last straw before termination. *See In re L.E.H.*, 696 N.W.2d 617, 619 (Iowa Ct. App. 2005) (finding State did not meet burden of proof under section 232.116(1)(h) by offering DHS "safety concerns"—such as hot bath water, careless use of a knife, and cooking with child on the hip—that did not pose such a risk to the child as to preclude placement with the parent). The State did not present clear and convincing evidence G.P. and F.C. could not be safely returned to their mother's care.

Finally, under section 232.116(1)(i), the court may terminate parental rights if all of the following have occurred:

> (1) The child meets the definition of child in need of assistance based on a finding of physical or sexual abuse or neglect as a result of the acts or omissions of one or both parents.
> (2) There is clear and convincing evidence that the abuse or neglect posed a significant risk to the life of the child or constituted imminent danger to the child.
> (3) There is clear and convincing evidence that the offer or receipt of services would not correct the conditions which led to the abuse or neglect of the child within a reasonable period of time.

The record does not show the offer or receipt of services by the mother would not correct the conditions which existed when the children were removed. The DHS concerns about supervision were not backed by clear and convincing evidence. The mother testified to steps she has taken to make her apartment safer for the children and the progress she has made in her parenting style to be more attentive to risks in the children's environment. In our de novo review, we find the evidence fell below the quantum required to terminate the mother's parental rights.

B. Termination of the Mother's Parental Rights Was Not In The Best Interest Of The Children.

Our supreme court clarified the best-interests test in *P.L.*

> In considering whether to terminate, "the 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." [Iowa Code] § 232.116(2). Any findings in this regard should be contained in the judge's decision.

P.L., 778 N.W.2d at 39.

The juvenile court found it was in the best interests of G.P. and F.C. for their mother's rights to be terminated so they could live in "a safe environment with appropriately protective supervision." We disagree with the juvenile court's assessment of the best-interest criteria. While safety is the key consideration, we do not find clear and convincing evidence the mother could not offer a safe environment for her children. Moreover, we believe the children's long-term nurturing and growth would be best fostered by maintaining the legal bond with their mother.

The DHS final report to the court extolled the mother's positive interactions with the children: "[The mother] is always very caring and loving with her children. She is often encouraging and smiling when she is spending time with her children. She often gives them hugs and kisses." The report did express concern the mother did not believe the children needed rules or chores "when it was suggested that she ask [F.C.] and [G.P] to help her pick up after a visit." The DHS reports also criticized the mother for giving the children candy and not enforcing their nap times. But the mother's reluctance to impose chores on her three- and four-year-old children does not overcome the close emotional bond they share. And we find it hard to believe that a mother overindulging her children with candy and not consistently requiring them to take naps qualify as grounds for continued removal.

In addition, the supreme court has recognized a child's loss of cultural identity is a viable factor to consider when deciding whether to terminate parental rights. *In re L.L.*, 459 N.W.2d 489, 496–97 (Iowa 1990) (agreeing child should retain racial identity to the extent she can, but finding other factors weighed more heavily in L.L.'s case). Here, the case worker agreed "culturally they do need to see their mother." We find the importance of maintaining the children's tie to their Burmese heritage is a valid factor in the best-interest determination.

Given our findings above, we conclude the State did not meet its burden to prove the grounds for termination by clear and convincing evidence. We also find it was not in the best interests of the children to sever the legal tie to their mother. Accordingly, we reverse the order terminating the mother's parental

rights and remand the case for further proceedings with the permanency goal of reuniting the children with their mother.

REVERSED AND REMANDED.

Danilson, J., concurs; Vogel, P.J., concurs specially.

VOGEL, P.J. (concurring specially)

I concur with the majority's opinion, but do so with some reservations as to the mother's ability to maintain a safe environment for the children. *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.). The DHS reports detail several incidents regarding the mother's lack of supervision of the children during supervised visits. Those concerns include allowing the children to wander outside in very cold weather without warm clothing, having knives and scissors either on the floor or within reach of the children, falling asleep during visits, and leaving the supervision of the children to the attending workers. Furthermore, the mother has no familial or communal support, and continues to be harassed by various members of her community, which negatively impacts her stress level. However, the mother has demonstrated great strides in adapting to her new culture, while understandably still reverting to standards of behavior perhaps more acceptable in her native country. The mother must continue to make progress in providing a safe home for her children so as to not subject the children to adjudicatory harm. The juvenile court was not optimistic this would be the case, finding:

> [The mother] has been provided lots of "hands on" advice about appropriate parenting techniques. Yet issues of appropriate supervision of children still exist. It is unlikely that any additional time would result in improvement in [the mother's] supervision skills. She lacks the insight to see the importance of making changes to be more aware of the children's actions. Her motivation is waning rather than intensifying.

Despite these concerns, I agree with the majority there is a lack of evidence in this record that would rise to the level of clear and convincing evidence to support termination of parental rights. Moreover, while the children have been admirably cared for in their foster home since June 2011, they still have a strong bond with their mother, which militates against termination. *See* Iowa Code § 232.116(3)(c). For these reasons, I specially concur.