IN THE COURT OF APPEALS OF IOWA

No. 7-418 / 07-0485
Filed July 25, 2007

IN THE INTEREST OF T.D.,
Minor Child,

W.L.C., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Karla J. Fultz, Associate Juvenile Judge.

A mother appeals the termination of her parental rights to her daughter. **AFFIRMED.**

Patricia K. Wengert, Des Moines, for appellant mother.

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

Judd Kruse of Kruse & Dakin, L.L.P., Boone, for appellee father.

Kathryn Miller, Juvenile Public Defender, Des Moines, for the minor child.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

W.L.C. is the mother of T.D., born in 2001. In 2004, the State initiated child-in-need-of-assistance proceedings against W.L.C., based on her repeated efforts to document sexual abuse of the child by the child's father. The proceedings culminated in a petition to terminate W.L.C.'s parental rights to T.D. That petition was granted and this appeal followed.

A detailed summary of the facts precipitating the underlying child-in-need-of-assistance proceedings is included in the first of two unpublished opinions filed by our court. *In re T.D.,* No. 06-1758 (Iowa Ct. App. Dec. 28, 2006); *In re T.D.*, No. 06-0765 (Iowa Ct. App. Oct. 25, 2006). We will not repeat those facts except as necessary to illuminate the issues facing us in this appeal. Those issues are numerous, but fall under one of the following broad categories: (1) challenges to evidentiary rulings, (2) constitutional challenges, (3) challenges to the reunification efforts of the Department of Human Services, (4) challenges to the adequacy of the evidence supporting the court's decision, and (5) challenges based on the best interests of the child.[1]

I. Challenges to Evidentiary Rulings

W.L.C. raises several evidentiary issues, which we will address before proceeding to the merits of the court's ruling.

A. Res Judicata. The court held a hearing on the termination petition in February and March 2007. Shortly before the beginning of the hearing, the juvenile court ruled that the testimony would be limited to evidence adduced after

[1] W.L.C. filed a pro se reply brief. A reply brief is not allowed under the expedited appeal procedures. Therefore, we will not consider it.

a review hearing in October 2006. W.L.C. takes issue with this ruling, contending the court improperly applied res judicata principles.

Our court has stated that principles of res judicata bar re-litigation of previously decided issues. *In re D.S.*, 563 N.W.2d 12, 15 (Iowa Ct. App. 1997). The proceedings on or before the October 2006 review hearing were the subject of two appeals and the two appellate opinions cited above. Therefore, W.L.C. was not deprived of a "'full and fair opportunity' for a trial" by virtue of the juvenile court's decision to limit the evidence adduced at the termination hearing.

Having said that, we emphasize that the entire juvenile court record is before us on our review of a termination ruling. *In re C.M.*, 652 N.W.2d 204, 211 (Iowa 2002). That record is afforded de novo review. Iowa R. App. P. 6.4.

B. Exclusion of Exhibit. W.L.C. also challenges the juvenile court's decision to reject a filing captioned "Objections and Corrections of State's Petition for termination of parental rights and Submission of Exculpatory Evidences withheld from the Court and Request for Constitutional Review of Evidences." This document was offered at the beginning of the final day of the termination hearing. The State's attorney objected on the ground that the proffer violated court-prescribed filing deadlines announced two months earlier. The juvenile court agreed, stating "[i]t's untimely and the Court will not accept it." We discern no ground for reversal, given the belated date on which the document was offered.

C. Completeness of Exhibit. W.L.C. finally contends that the State withheld two pages of a service provider's master treatment plan that would have shown an improvement in W.L.C.'s behavior. As the record contains a seemingly

complete master treatment plan dated February 14, 2007, we reject this contention.

II. Constitutional Challenges

W.L.C. raises what she characterizes as constitutional challenges to the juvenile court's ruling. In our view, none of the challenges implicate the United States or Iowa Constitutions.

Some of the claimed constitutional issues are in fact challenges to the evidence supporting the termination ruling. Those issues will be addressed below.

Other issues are challenges to the court's procedural rulings, such as the court's decision to (1) quash subpoenas, (2) allow commencement of termination proceedings before the statutory removal period expired, and (3) proceed with the termination hearing after W.L.C. and her attorney elected to leave the proceedings. Those procedural rulings did not implicate the procedural due process requirements of notice and an opportunity for a hearing. *In re J.S.,* 470 N.W.2d 48, 52 (Iowa Ct. App. 1991). First, the court quashed the subpoenas issued by W.L.C. because the information to be gleaned from the subpoenaed witnesses arose before the October 2006 review hearing. Second, although the State initiated the termination action before the statutory removal period expired, the juvenile court did not terminate W.L.C.'s parental rights until after the period expired. *See In re J.L.H.,* 326 N.W.2d 284, 285-86 (Iowa 1982). Finally, the juvenile court admonished W.L.C. and her attorney that, if they chose to leave based on the perceived unfairness of the hearing, the court would "continue this

matter in [their] absence." As W.L.C. was forewarned of the consequences of leaving, we conclude she was not deprived of procedural due process.

W.L.C. raised other constitutional challenges such as (1) "[m]other would have to waive [her] constitutional privilege against self-incrimination in order to have any contact with her daughter" and (2) the hearing was substantively unfair. Similar challenges have been rejected by our highest court. *In re C.H.*, 652 N.W.2d 144, 148-50 (Iowa 2002); *In re D.J.R.*, 454 N.W.2d 838, 845 (Iowa 1990).

III. Reunification Efforts

The Department is obligated to make reasonable efforts to reunify parent with child. *In re C.B.*, 611 N.W.2d 489, 493 (Iowa 2000). W.L.C. acknowledges the Department offered her reunification services. She further acknowledges that the juvenile court granted her request for additional therapy. She maintains, however, that the additional therapy was not adequate. She also challenges supervised visitation services.

A. Additional Therapy. W.L.C. requested additional services following an October 2006 juvenile court review order continuing placement of her daughter with the child's father. The matter was scheduled for a contested hearing. Following the hearing, the juvenile court granted W.L.C.'s request for additional individual therapy and, over the Department's objection that it lacked funds to pay for therapy, ordered the Department to "make such funding available to" W.L.C. so that she could see the therapist of her choice. That therapist advised the Department that he held six psychotherapy sessions within the month following the court's order. The sessions were scheduled "to process and work

on DHS directives for therapy." We conclude the Department satisfied its court-ordered mandate to provide W.L.C. with additional individual therapy sessions.

B. Supervised Visitation. W.L.C. also takes issue with the services of LifeWorks, Inc., a provider retained by the Department to supervise visits. She contends "[t]here was a total absence of honesty and integrity in LifeWorks social workers' written reports and testimony in court." She specifically challenges the provider's comments on her belief about whether the child was sexually abused, contending the provider had no authority to address this issue.

We agree that LifeWorks was not charged with assessing W.L.C.'s belief about whether sexual abuse of T.D. occurred. However, LifeWorks was asked to supervise visits and "to work with the family on how to provide and establish safe boundaries with the child." LifeWorks's employees stated that, while supervised visits went well, "[s]essions (outside of visits) have been difficult, as [W.L.C.] becomes angry and defensive, and it is difficult to address how her actions could be damaging her daughter." We conclude this comment and others relating to W.L.C.'s behaviors fell within LifeWorks's charge.

IV. Adequacy of Evidence Supporting Termination Ruling

The juvenile court terminated W.L.C.'s parental rights on two grounds, Iowa Code sections 232.116(1)(d) (requiring proof of several elements including proof that circumstances continue to exist despite offer or receipt of services) (2005) and (f) (requiring proof of several elements including proof that child cannot be returned to parent's custody). W.L.C. directly challenges the second ground and indirectly challenges the first ground. We may affirm if we find clear and convincing evidence to support either one of the grounds. *In re A.J.*, 553

N.W.2d 909, 911 (Iowa Ct. App. 1996). On our de novo review, we conclude the record contains clear and convincing evidence to support termination under Iowa Code section 232.116(1)(f).

After T.D. was adjudicated a child in need of assistance, she remained in her mother's care for more than a year.[2] The child was removed when W.L.C. disclosed that she videotaped T.D.'s genitalia in an effort to document physical signs of sexual abuse. Following this action, the juvenile court placed T.D. with her father. In a split opinion, our court affirmed this ruling. *In re T.D.*, No. 06-0765 (Iowa Ct. App. Oct. 25, 2006).

The majority and dissent cited the testimony of a physician who specialized in examining children for signs of sexual abuse. This physician testified that, when she examined T.D. in 2003, she found no physical indications of sexual abuse. Despite this finding, the physician recommended that T.D. undergo another independent examination. The juvenile court adopted this recommendation and referred T.D. to another physician. That physician performed a second examination in 2006. She also noted no physical signs of sexual abuse on the date of the examination.

In the ensuing months, W.L.C. subpoenaed color photographs of T.D.'s genitalia from the physician who performed the second examination. W.L.C. took this action in violation of a juvenile court order. In addition, W.L.C. took T.D. to the bathroom during a supervised visit, pulled down her pant leg, and spread her

[2] In 2004, it was stipulated that T.D. was a child in need of assistance.

legs.[3] Based on these actions, the juvenile court ruled that T.D. would remain with her father. Our court affirmed this ruling. *In re T.D.,* No. 06-1758 (Iowa Ct. App. Dec. 28, 2006).

While the second appeal was pending, W.L.C. posted remarks on the internet seeking assistance in rescuing her daughter from "pervasive sexual abuse by her own father." She characterized the abuse as "[v]aginal rape and anal penetration."

We conclude these actions continued to place T.D. at risk of harm. *See* Iowa Code § 232.116(1)(f)(4) (requiring proof that child cannot be returned to parent's custody "as provided in section 232.102"); 232.102(9) (requiring finding of harm to child pursuant to Iowa Code section 232.2(6) for continued out-of-home placement); 232.2(6)(c)(1) (defining child in need of assistance as child "[w]ho has suffered or is imminently likely to suffer harmful effects as a result of . . . [m]ental injury caused by the acts of the child's parent, guardian, or custodian."); *In re B.B*., 500 N.W.2d 9, 12 (Iowa 1993) (affirming child in need of assistance adjudication based on mother's insistence that child was ill despite medical evidence to contrary). We emphasize that our conclusion is not based on W.L.C.'s belief about whether or not sexual abuse occurred but on whether that belief affected her behaviors toward the child. In the past, the belief led W.L.C. to take invasive actions. We have often stated that past behavior is a good predictor of future actions. *In re T.B.*, 604 N.W.2d 660, 662 (Iowa 2000).

[3] At the termination hearing, W.L.C. testified that she did so simply to assist T.D. in situating herself on an adult-size toilet bowl and to prevent her pants from getting soiled on a dirty area in front of the toilet bowl. In our last opinion we noted the similarity between this act and actions that triggered the child-in-need-of-assistance proceedings. *See In re T.D.*, No. 06-1758 (Iowa Ct. App. Dec. 28, 2006).

We cannot discount that past behavior. We also cannot discount one of the physician's testimony that the videotaping incident could have caused the child to lose perspective about appropriate boundaries. We have additionally considered recent testimony from T.D.'s therapist, who stated, "[i]t is, at a minimum, very confusing for [T.D.] to have a parent continuously suspicious that she is being abused."

In reaching this conclusion we recognize that W.L.C.'s actions between October 2006 and the termination hearing did not result in actual harm to T.D. However, actual harm is not a predicate to termination. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998) (recognizing termination provisions are designed to prevent probable harm to child); *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992) (stating the threat of probable harm will justify termination of parental rights). As the Department's caseworker clarified, "I'm saying that [T.D.]'s not exhibited any behaviors at this point in time but that those may manifest in the future if she is continually exposed to a mother that believes that she's sexually abused."

We are also keenly mindful that T.D. risked harm at the hands of her father if W.L.C's belief concerning sexual abuse proved true. However, the record before us reveals that, beginning in 2003 and culminating with the independent examination in 2006, health care professionals found no physical signs of sexual abuse.

Additionally, T.D.'s therapist stated the child's interactions "are normal" and she would not be recommending therapy for the child "if it were not for the Court involvement." She wrote that T.D. had a "stable" mood and "bright" affect and was "well adjusted and happy." On questioning by the child's attorney, she

stated that she saw none of the indicators of sexual abuse that she had seen in her work with other children, such as memory lapses, low self-esteem, fear, withdrawal, or hyper-vigilance. Based on T.D's behaviors in therapy, the therapist expressed no concerns with her placement at her father's home.

Finally, we note that the juvenile court did not discontinue supervision of T.D. when W.L.C.'s parental rights were terminated. Instead, the court confirmed that T.D. remained a child in need of assistance, left T.D. under the supervision of the Department, with custody and guardianship placed with her father, and retained jurisdiction and review authority over her case.

Based on the risk of harm posed by W.L.C.'s past behaviors, we agree that T.D. could not be returned to W.L.C.'s custody. Iowa Code § 231.116(1)(f)(d).

V. Best Interests

The overriding factor in termination of parental rights cases is whether termination will serve the child's best interests. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). W.L.C. raises several arguments implicating this factor. First, W.L.C. points to the acknowledged bond between mother and child. Second, W.L.C. states termination violated "the doctrine of least restrictive means of protection." Finally, W.L.C. argues permanency would not "be impaired if mother's parental rights were not terminated." We will address these issues together.

All concerned agreed supervised visits after October 2006 went well. W.L.C. and her daughter shared a close bond and interacted appropriately and lovingly during the twice-weekly supervised visitation sessions. The

Department's caseworker testified: "I think that [W.L.C.] was very nurturing with [T.D.]. I think that [T.D.] enjoyed her interactions with her brothers and her mother." Similarly, the visitation supervisors reported that W.L.C. was "very nurturing with [T.D.] throughout the visit" and it appeared T.D. enjoyed "spending time with her mother and brothers." It is this evident bond that raises legitimate concerns about whether termination was in the child's best interests.

On this question, T.D.'s therapist opined that it was important for T.D. to maintain some contact with her mother, irrespective of termination. One of the visitation supervisors echoed this sentiment, stating it would be a positive development if the father and mother agreed on structured supervised visits. Even T.D.'s father agreed termination would have a negative effect on T.D., and he expressed a willingness to facilitate supervised visitation with W.L.C. regardless of the court's disposition.

Countervailing statements were also in the record. The Department's caseworker testified that W.L.C. was unlikely to move closer to reunification in six months, a condition the juvenile court stated it had to find to defer termination and enter a permanency plan under Iowa Code section 232.104(2)(b) (requiring court to "enumerate the specific factors, conditions, or expected behavioral changes which comprise the basis for the determination that the need for removal of the child from the child's home will no longer exist at the end of the additional six-month period"). Additionally, the guardian ad litem "reluctantly" recommended termination over other legal options, given the "upheaval" the child experienced over the previous three years. *See* Iowa Code §§ 232.104(2)(d) and 232.117(5). Given this testimony and the mandate that we must view

statutory time frames "with a sense of urgency," *In re C.B.*, 611 N.W.2d at 495, we conclude deferral of termination was not warranted.

We find it unnecessary to decide any remaining issues raised by the parties.

We affirm the termination of W.L.C.'s parental rights to T.D.

AFFIRMED.