IN THE COURT OF APPEALS OF IOWA

No. 7-734 / 07-1388
Filed December 28, 2007

IN THE INTEREST OF S.P. and J.P.,
Minor Children,

H.L.P., Mother,
Appellant,

M.J.P., Father,
Appellant.

Appeal from the Iowa District Court for Johnson County, Marsha M. Beckelman, Judge.

A mother and father appeal from the order terminating their parental rights to two children. **REVERSED AND REMANDED ON BOTH APPEALS.**

Natalie H. Cronk of Law Office of Natalie H. Cronk, Iowa City, for appellant-mother.

Jacob R. Koller of Simmons Perrine, P.L.C., Cedar Rapids, for appellant-father.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Janet Lyness, County Attorney, and Kristin Parks, Assistant County Attorney, for appellee.

Maurine Braddock of Honohan, Epley, Braddock & Brenneman, Iowa City, for intervenor.

Shannon Walsh of Walsh Law Firm, Iowa City, guardian ad litem for minor children.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

SACKETT, C.J.

A mother and father appeal from the order terminating their parental rights to two children. They both contend the court erred (1) in finding clear and convincing evidence supports the statutory grounds for termination, (2) in determining the State made reasonable efforts toward reunification, and (3) in determining that termination is in the children's best interest. We reverse and remand on both appeals.

I. Background.

The children, Skylar, born in May of 1999, and Jade, born in October of 2002, were removed from their parents' care in July of 2005. During their time in the home, the children were exposed to drug use, domestic violence, pornography, and adult sexual activity. The older child, Skylar, was abused sexually. By the time of the termination hearing in October of 2006, she had made progress in therapy, but there was testimony she needed placement in a therapeutic foster home.

The juvenile court, in an order dated May 15, 2007,[1] terminated both parents' parental rights under Iowa Code sections 232.116(1)(i) (2007), 232.116(1)(f) (Skylar), and 232.116(1)(h) (Jade). It found the parents "have been largely compliant and cooperative with services provided." But, it concluded it was "not clear from the evidence that [the parents] will be able to provide a suitable family environment for their daughters in the future on an ongoing basis." The court further concluded:

[1] Post trial motions were overruled in an order filed August 16, 2007. The case came to us on October 10, over a year after the matter was tried.

> Without assurance that the parents will adequately protect their children from further abuse, the court concludes that S.P. cannot be returned to the custody of either parent at this time without being a child in need of assistance and without being in danger of neglect. As with S.P., there is clear and convincing evidence that J.P. cannot be returned to the custody of her parents for the same reasons.

The court concluded the children's grandmother was not an appropriate placement for the children and that it was in the children's best interest not to be returned to either parent but "to be placed in foster care with the possibility of adoption."

II. Analysis.

Both parents contend on appeal that the State did not prove the statutory grounds for termination by clear and convincing evidence, it did not make reasonable efforts toward reunification, and termination is not in the children's best interest. The attorney for the father admits this case has significant bad facts that paint an ugly picture, including substance abuse, domestic conflict, criminal conduct, and as a byproduct of those facts, trauma to a child. He contends the bad facts occurred prior to removal of the children from their parents on July 18, 2005. He argues that unlike many termination cases this case also has good facts, including rehabilitation, acceptance of responsibility, and full compliance with the case permanency plan. He contends the good facts occurred after removal and symbolize the essential goal of the juvenile court system, which is to maintain families.

He further argues that the pre-removal mistakes of these parents have determined the outcome at every step in the child in need of assistance and termination proceedings, while their post-removal efforts have been

marginalized, ignored, or otherwise disregarded. He contends the key question on appeal is whether the pre-removal bad facts justify termination of parental rights notwithstanding the parents' full compliance with the case plan. He suggests if the answer is in the affirmative, then the fate of these parents was sealed at the removal and Iowa law requiring reasonable efforts to reunify families is without teeth. He argues if the answer is in the negative, then these parents should retain their parental rights and their family should be reunified.

The State argues there was clear and convincing evidence to support the termination, the issue of reasonable efforts was addressed by this court in a May 12, 2006 decision and termination is in the children's best interest.

When the court terminates parental rights on more than one statutory ground, we may affirm if any of the grounds cited are supported by clear and convincing evidence. *See In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995). Sections 232.116(1)(f)(4) and 232.116(1)(h)(4) both require a finding the child cannot be returned to the parents' custody "at the present time." Both parents challenge the court's determination the children could not be returned to their custody at the time of the termination. They also challenge the application of these sections to the circumstances of this case, arguing they have complied in all essential respects with the requirements of the case permanency plans, yet the court determined the children could not be returned home because the older child needed more therapy and the younger child would be harmed by separation from her sibling.

Reports from Family Systems of Iowa City include references that the parents "have been very cooperative to date," "maintained regular contact with

family services," "incorporated Family Services suggestions into behavior management during their visits," "had their home clean and organized," "stopped smoking cigarettes in the family home," "stated they made terrible mistakes," "continue to be on time, prepared, and appropriate at every visit," "have made good to excellent progress on reunification plan goals," and "have cooperated with virtually every task and expectation assigned to them by FS and DHS."

The record is clear that the parents have done what they have been asked to do. Theresa Dunnengton with Family Services, who had been more involved with the family more than any one person, characterized their progress as excellent. She saw no reason why the parents could not parent. Jill Foens with DHS for eighteen and one-half years and the ongoing case worker for this family from twenty days after the inception of the case testified the parents have done what they were asked to do. When repeatedly asked what needs to be done she indicated that Skylar needs to be ready, yet she was unable to articulate specifically how this was to happen or what, if anything, the parents needed to do. Foens testified that the determination Skylar is ready requires the compliance or approval of Elizabeth Dook, a clinical psychologist in private practice. Foens requested that Dook, who holds a Ph.D. in clinical psychology, meet with Skylar to determine the appropriate placement for her and to determine if she had current mental health problems. Dook saw Skylar in November of 2005 and January of 2006. Dook spent five hours with Skylar for the requested evaluation and an additional three hours to conduct an evaluation of her attention deficit hyperactivity disorder. Dook testified as a result she determined Skylar needed to be in treatment-level foster care, and she needed

weekly play therapy and family therapy at some point because she had a moderate to severe adjustment disorder. Dook used tests in addition to the interviews to arrive at these conclusions. At the time of the October 2006 hearing Dook had had no participation in the case since April of that year.

The record supports the argument that Skylar has issues. The record also supports a finding Skylar's problems, at least in part, are the result of her parents' fighting and drug use prior to her removal. What is not as clear is both the cause and nature of Skylar's sexual acting out, which was reported by the first of Skylar's three sets of foster parents. Dook appears to be of the opinion that this behavior was the result of sexual abuse. She bases her conclusion on the tests of and interviews with Skylar. The validity of Dook's assessment was challenged in part by Luis Rosell, who has a Ph.D. in psychology and, like Dook, is licensed as a psychologist to practice in Iowa.

While the alleged sexual abuse appears to be the underlying factor in the State's reluctance to return the children home, in assessing this position we must recognize that sexual abuse was not a ground for finding the children in need of assistance, there has been no finding of sexual abuse, and the parents deny there was sexual abuse and contend the sexual acting out did not occur while the children were in their care. There was no evidence Skylar had acted out in school prior to removal, and there was a question raised about sexual abuse by a foster family with whom Skylar resided. Skylar had a physical examination at the time of removal and no physical evidence of sexual abuse was noted.[2]

[2] The parents were not made aware of the fact the examination had occurred until the termination hearing.

The State has failed to show by clear and convincing evidence that the children cannot be returned home or that the problems that led to their removal have not been corrected. Obviously Skylar has some problems and it is in her best interest that she have therapy, something her parents recognize is largely because of their earlier actions.

There is no evidence that Skylar cannot or will not receive such help in her parents' care. While there is a reference to the fact she is in a therapeutic foster home, there is no evidence of what Skylar's future holds. It is unclear what skills the foster parents have that render them more able to provide for Skylar than her biological parents, with whom the evidence shows her to be bonded. *See In re S.J.*, 451 N.W.2d 827, 830 (Iowa 1990) (holding that a professional opinion or evaluation is needed to show child will continue to need specialized care).

The parents' substance abuse was serious and led to the removal of their children. In addition to their cooperation with services, the parents have shown they are recovering substance abusers. The father's probation officer testified to the father's attendance at Narcotics Anonymous meetings as well as his monitoring of the father's random drug tests. The evidence is the mother has tested negative for drug use since the children were removed.

The mother has maintained constant employment with the University of Iowa and the father has gone from part-time to full-time employment.

We reverse the terminations and remand to the juvenile court.

REVERSED AND REMANDED ON BOTH APPEALS.

Vaitheswaran, J. dissents.

VAITHESWARAN, J. (dissenting)

I respectfully dissent. In a prior appeal from the denial of an application to modify a dispositional order, our court affirmed the juvenile court's refusal to return the children to the home of their parents. *In re S.P. and J.P.*, No. 06-0904, *3 (Iowa Ct. App. Aug. 9, 2006). While acknowledging that the parents "made considerable progress in addressing the concerns of substance abuse and domestic violence," we stated "this case involves much more than issues relating to parental problems and marital discord." *Id.* at *2. We summarized the additional issue, specifically affirming the juvenile court's finding that the sexual abuse of Skylar "occurred in her parents' home." *Id.* We also agreed with the juvenile court that the Department made reasonable efforts towards reunification and the juvenile court was correct in refusing to increase visitation. While this is a different appeal from a different ruling, it is based on the same record and much of the same key evidence. I would affirm.