

IN THE COURT OF APPEALS OF IOWA

No. 9-131 / 08-1967
Filed April 8, 2009

**IN THE INTEREST OF D.B., J.H., J.H., JR.,
and A.H., Minor Child,**

**A.M.C., Mother,
Appellant.**

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

A mother appeals from the juvenile court order terminating her parental
rights to four of her five children. **REVERSED AND REMANDED.**

John J. Bishop, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, Harold Denton, County Attorney, and Rebecca Ann Belcher,
Assistant County Attorney, for appellee.

Henry Keyes of Keyes Law Offices, Cedar Rapids, for father.

Robert Davison, Cedar Rapids, attorney and guardian ad litem for minor
children.

Considered by Sackett, C.J., and Miller and Mansfield, JJ.

SACKETT, C.J.

This is an appeal by a mother from a juvenile court order terminating her parental rights to four of her five children. The children at issue were born in January of 1999, March of 2004, January of 2006, and April of 2007.¹ The oldest child's father's parental rights were terminated as were the parental rights of the younger three children's father. Neither father has appealed. The mother contends that the State failed to make reasonable efforts towards family reunification and failed to prove the children could not be returned home. We reverse and remand.

SCOPE OF REVIEW. We review termination proceedings de novo. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000).

BACKGROUND. The family had three children living in their home when they came to the attention of the Iowa Department of Human Services following a report on July 18, 2006, that the child born in March of 2004 was walking unattended near the street. An investigation revealed that the child had opened the door to the family apartment and walked outside. Police had been called and when an officer located the child's father he was out looking for the child. The father said he had gone to the bathroom and when he came out the child was gone. The mother was working outside the home at the time of the child's escape. A worker visiting the parents' home at that time reported that there was nothing noteworthy concerning the children's behaviors. It appeared the children got along with each other and no negative interactions between them were

¹ A fifth child, born in April of 2008, and voluntarily placed in foster family care following her birth, is not a subject of these proceedings.

observed; rather, they were seen as being pleasant and cooperative with each other and wishing to reside with their parents with whom they appeared to be bonded. No developmental or social delays in the children were observed nor was there any report that the children had health problems. It was recommended that the family utilize services under juvenile court supervision, that the parents have mental health evaluations, and that they receive services to enhance their parenting skills.

On July 27, 2006, the same child was once again found walking outside.² The children were being cared for by an uncle because the mother had left home and was on her way to work and the father of the three younger children was in jail. The children were removed from their home and placed with the Department of Human Services who put the children in the home of their maternal great-grandmother.

On August 9, 2006, a review hearing was held and it was agreed that the children remain temporarily in the relative placement but be returned to their mother by August 21, 2006. The mother was to use protective daycare, and any caretaker for the children had to be preapproved by the Department of Human Services. It was verified that the family had installed a chain lock on their door. The children were returned to their mother on August 21, 2006.

On September 9, 2006, the Department learned the older child was not in school and the provider was not able to contact the family. The court was notified the family's whereabouts was not known and it was believed they had left

² The lock on the apartment door was inadequate and there was some question whether or when the parents had asked the landlord to have it repaired.

the state. A protective service alert was issued and on October 24, 2006, Iowa was notified the family had attempted to obtain food stamps in Mississippi. The children were returned to Iowa in early November. There was no evidence the children had suffered any harm between the time they were returned to their mother on August 21, 2006, and their return to Iowa in early November of that year. Once again the children were placed with their great-grandmother. At a review hearing on November 3, 2006, there was evidence the father of the younger children was not in contact with them because there was a warrant for his arrest. The mother had visited the children, but she was staying with friends and family and did not have a home for them.³ Neither parent was employed. It was determined to place the children in foster care and it was so ordered. On December 21, 2006, the court found the children to be in need of assistance.

On March 1, 2007, upon the mother's request the court ordered that the Department have discretion to allow semi-supervised visits between the mother and children. Apparently prior to this time the visits were totally supervised.

Meanwhile the mother, on April 13, 2007, gave birth to her fourth child and it appears that the visits were again supervised. On April 26, 2007, at a mandatory review hearing, the juvenile court found the Department had made reasonable efforts to reunify the family and no party had requested additional services or assistance. The Department was to provide in home supervision and parenting services to the mother, who was encouraged to find housing and employment so that she could move to expand her visits and demonstrate the

³ It does not appear any efforts were made to assist the mother in finding a home.

ability to supervise the children. Visits with the children were to be as previously ordered.

On May 3, 2007, a petition was filed to have the fourth child found to be a child in need of assistance under Iowa Code section 232.2(6)(c)(2) (2007). An affidavit from the worker who was assigned to the family was submitted with the petition and related that (1) the mother and child were living with the mother's maternal grandparents, (2) the worker had no address for the father who had a pending warrant for his arrest on a driving while barred charge, (3) the mother did not have a safe and stable home and resided with relatives,⁴ (4) the older children were found to be in need of assistance because a child left the parents apartment twice as explained above,⁵ (4) the other children had been removed from the grandparents' home because they did not use a car seat for one child and were "not providing proper nutrition to the children," (5) there were concerns the grandparents had allowed the mother to have unapproved contact with the children, (6) the mother did not have a job but relied on government assistance, the child's father, and her grandparents to provide food and clothing for herself and the child, and (7) the mother did not have reliable transportation and relied on the children's father or her grandfather for rides, which was determined to be problematic when she needed to attend parenting classes and doctors' appointments for this child and her other children.

⁴ The home where the mother resided with the children is where the Department placed the children when they were first removed.

⁵ The mother was not present at the time and the children were being cared for by their father in one instance and an uncle in another.

On July 19, 2007 the father of the younger children was arrested for assaulting a woman in a car where the woman's infant child⁶ was present. He was arrested and incarcerated on several charges. On this date a temporary removal order issued for the fourth child on a finding there was reasonable cause to believe a request for consent would cause the parents to take flight with the child. The child was placed in foster care.

On December 26, 2007, at a mandatory review and permanency hearing, the juvenile court again found the Department had made reasonable efforts to reunify the family and that no party had requested additional services.

On December 27, 2007, the fourth child was found to be a child in need of assistance pursuant to section 232.2(6)(c)(2). The court in its order noted Sonia Goings of the Young Parents Network testified she had no problems with the mother's parenting. The court noted Goings had less contact with the mother than did Rosemary Sanford, who reported specific concerns regarding the mother's supervision of the children. The court further found that the mother did not have a valid driver's license and that since the child's birth the mother has lived with relatives, the mother has not maintained consistent employment, has been charged with driving while barred, and has a fifteen-day jail sentence to serve. The child's custody was placed with the Department for purposes of family foster care.

On December 28, 2007, the petition for termination of the parental rights that led to this appeal was filed. The State contended all parents' parental rights

⁶ It is suggested this was the father's child.

to the four children should be terminated under sections 232.116(1)(a), (b), (e), (f), (h), and (l).

In a permanency review order on March 19, 2008, the juvenile court ordered custody of the children to remain with the Department for purposes of family foster care. The parents were ordered to submit to random urinalysis,⁷ and visits between the children and their parents were to remain as previously ordered. The court found the Department had made reasonable efforts to reunify the family.

The fifth child was born in April 2008. The mother consented to the child going from the hospital following her birth to a foster care home. The mother was to testify she agreed to the placement because she did not believe she had a choice.

The petition for termination of parental rights of the four children came on for hearing on June 3, 2008. The court heard the evidence. The court entered an order terminating parental rights on November 25, 2008. The court found that the mother's parental rights should be terminated under section 232.116(1)(f) as to the two older children, and section 232.116(1)(h) as to the two younger children. The court found that the parental rights of the father of the oldest child should be terminated pursuant to sections 232.116(1)(b) and (e). The court found the parental rights of the father of the younger three children should be terminated. The court terminated this father's rights to his older child pursuant to sections 232.116(1)(b), (e), and (f), and to his two younger children pursuant to

⁷ This did not happen and there was surprise by one of the workers that the tests were ordered because there was no concern that the parents were abusing drugs.

section 232.116(1)(h). The mother's appeal from this order was filed on December 9, 2008.

REASONABLE EFFORTS. The mother contends the State did not make reasonable efforts to reunite her with her family. She argues that because the Department is typically given discretion by the juvenile court to decide when and how to increase the number of visits and to decrease the level of supervision, the Department effectively gets to decide whether parents are allowed to move forward to reunification with their children or are forced into a holding pattern that will inexorably result in the children being dispossessed of their parents in termination proceedings. She argues, and we agree, that the court ultimately must decide whether the Department, in affording visits, is making reasonable efforts.

Reasonable efforts to reunite parent and child are required prior to the termination of parental rights. *In re M.B.*, 553 N.W.2d 343, 345 (Iowa Ct. App. 1996). The core of the reasonable efforts mandate is that the child welfare agency must make reasonable efforts to prevent out-of-home placement or to reunify families in each case. *In re H.L.B.R.*, 567 N.W.2d 675, 679 (Iowa Ct. App. 1997). While efforts made by the State to reunify a family may not be successful, this does not mean the efforts were unreasonable. *Id.* Visitation between a parent and child is an important ingredient to the goal of reunification. *M.B.*, 553 N.W.2d at 345; *see also In re S.W.*, 469 N.W.2d 278, 280-81 (Iowa Ct. App. 1991).

The issue the mother raises was not preserved for appellate review.⁸ A challenge to the sufficiency of services should be raised at the removal or review hearing or when the services are offered. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa Ct. App. 1994). While the mother contends she made requests to expand visitation and to reduce the level of supervision, she has failed to point out in the record where these requests were made. We recognize that the mother made a request for semi-supervised visits that was granted and utilized, though ultimately withdrawn. Our review of the record as set forth above indicates that the issue of reasonable efforts was reviewed at a number of hearings where the juvenile court found both that reasonable efforts were being made and that no further services were requested.

The mother, to her credit, made a real effort to exercise the visitation she was allowed. This was not always easy for her as her financial resources are limited. She works at an hourly wage of \$7.25. Visitation, however, is only one facet of reasonable efforts to reunify families. *M.B.*, 553 N.W.2d at 345; see Iowa Code § 232.102(10)(a) (listing examples of reasonable efforts). The absence of an adequate lock on a rented apartment door initially brought this family into a child in need of assistance proceeding. While other efforts including assistance in finding housing might have been made the mother did not request other services to help reunify the family. We affirm on this issue.

⁸ Because it is required that reasonable efforts issue be raised in the juvenile court it is important that the parent have a strong advocate there to assure that they receive the necessary services.

THE STATE FAILED TO MEET ITS BURDEN TO PROVE TERMINATION. The mother contends that the State failed to show by a preponderance of the evidence that the children will suffer harm in the manner specified in section 232.2(6). Her challenge is that sections 232.116(1)(f)(4)⁹ and 232.116(1)(h)(4)¹⁰ have not been proved.

The parent-child relationship is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511, 519 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15, 35 (1972). The State has the right to terminate the legal relationship between a parent and a child, but the Constitution limits its power to do so. *Quilloin*, 434 U.S. at 255, 98 S. Ct. at 554, 54 L. Ed. 2d at 519; see *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045 (1923); *In re T.R.*, 460 N.W.2d 873, 875 (Iowa Ct. App. 1990). The State has the burden of proving the grounds for termination by clear and convincing evidence. Iowa Code § 232.96(2); *H.L.B.R.*, 567 N.W.2d at 677. “The issue of whether or not to legally sever the biological ties between parent and child is an issue of grave importance with serious repercussions to the child as well as the biological parents.” *H.L.B.R.*, 567 N.W.2d at 677. The goals of child-in-need-of-assistance proceedings are to improve parenting skills and to maintain the parent-child relationship. *Id.* An underlying issue in a termination action is whether the

⁹ Iowa Code section 232.116(1)(f)(4) provides: “There is clear and convincing evidence at the present time the child cannot be returned to the custody of the child’s parents as provided in section 232.102.”

¹⁰ Iowa Code section 232.116(1)(h)(4) provides: “There is 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.”

parent is beyond help, but a parent does not have an unlimited amount of time in which to correct deficiencies. *Id.*; see *In re D.J.R.*, 454 N.W.2d 838, 845 (Iowa 1990).

The mother contends that the State has failed to meet its burden to prove that the her¹¹ parental rights should be terminated pursuant to 232.116(1)(f) and (h). She states that the children were specifically found to be in need of assistance pursuant to section 232.2(6)(c)(2), which involves the failure to exercise a reasonable degree of care in supervising the children. She then argues that the Department's choice to allow only fully-supervised visits made it difficult to make a case either way as to whether the mother would fail to exercise a reasonable degree of care in supervising her children. She further argues that in the limited circumstances she did a good job supervising the children and providing activities that allowed her to interact with the children. Her position is that the State failed to prove by clear and convincing evidence the children could not be returned home, and juvenile court erred in terminating her parental rights.

The State's brief provides minimal assistance to help us extract from the record that evidence it claims supports its position there is clear and convincing evidence to terminate the mother's parental rights. The brief relates (1) that all five of the mother's children have been found to be in need of assistance, (2) that the children are imminently likely to suffer harm as a result of the failure of the mother to exercise reasonable supervision, (3) that the mother demonstrated

¹¹ Her issue is stated as: "Whether the State has met its burden to prove that the father's rights should be terminated pursuant of Iowa Code 232.116(1)(f)." Her argument, however, addresses termination of her rights and we consider it.

difficulty supervising all of her children at one time and having them respond to her,¹² (4) the fourth child, then an infant, was left alone in a bed while the mother went outside to help the other children out of the car, (5) the same child wandered alone out of the visitation room, (6) one provider, Thomas Bose, testified he did not believe it would be safe to leave the children alone with the mother for more than half an hour, (7) the mother drives without a license, (8) the mother has a fifteen-day sentence to serve for driving without a license, (9) at the time of the termination hearing the mother had an apartment but only had had it for one month and, given her history of homelessness, there was no indication she would maintain stable housing for her children, and (10) the juvenile court found she was unable to provide for the children's basic needs on an ongoing basis and the situation was unlikely to change in the reasonable future.

The incident that brought this case to the attention of the Department of Human Services was a lack of supervision by the father and the uncle. The mother was at work or going to work when the incidents happened. The mother and the father took the children to Mississippi when the children had been found to be in need of assistance. They should not have left the state of Iowa with their children. This was not a responsible move on the parents' part and because they

¹² The State cites twenty-five pages of the testimony of Susan Smith, a registered nurse working for Young Parents Network, in partial support for this argument. The mother voluntarily sought them out. The mother did not attend all scheduled sessions and this was the major problem Smith had with her. The mother also responded and was open to the assistance being provided. Smith instructed the mother when giving the children instructions to say it once, not repeat and not raise her voice, and the mother tried to follow the instructions and she also listened to strategies for dealing with multiple children. When asked about the mother's relationship with the children and the ability to supervise all the children, the witness testified she was not qualified to make that judgment call.

did so, the Department understandably lost trust in the family. However, there is no evidence that the children suffered any harm while traveling with their parents.

The mother made a substantial effort to attend scheduled visits, bring lunches for the children, and plan activities for them. The strongest evidence supporting the State's position that the mother cannot adequately supervise the children came from Thomas Bose. Bose testified he holds a Bachelor's Degree in criminal justice with a minor in sociology from Northern Arizona University and worked as a juvenile probation officer for five years in Apache County, Arizona. His interaction with the family came through his work with the Young Parents Network at Four Oaks through its Safety and Permanency Program. Bose had been working for the agency since September of 2007. He appears to have gotten this case shortly after beginning his employment. His main responsibility was visitation supervision as well as transporting the children from their foster homes to the visitation place. The mother had two-hour visits on Mondays and Thursdays. Bose testified she was consistent with the visits and sometimes she would interact with the children and other times she would just watch them play. The State specifically pointed to this part of Bose's testimony in support of its case:

Q. Could you recommend at this time that the visits go to semi-supervised since she [the mother] now has her own apartment? A. I wouldn't feel comfortable.

Q. Why is that? A. The fact that if we're having a visitation in a visitation room and a child can get out of that without the parents seeing it every time¹³ and not interacting every time with

¹³ Apparently there was an instance where the youngest of the four children started out of the visitation room and the mother did not react for thirty seconds.

your children, I just don't see it being a safe alternative for the children.

Q. You don't think it would be safe for them to have periods alone with their mother? A. I think periods maybe, but an extended period of time, no.

Q. Well, how long of a period of time do you think would be a safe period of time? A. I'd say something—I wouldn't say more than like a half hour.

Q. During your observations of [the mother's] visits, does she have any difficulty in keeping track of all four children and giving her attention to all four children during the visits? A. Yes. Normally she can focus on one child. She focuses pretty well on that one child at times. And then there's times when she can do very well and sit down, have two of the kids doing an activity while interacting with the two other ones, but a lot of times she focuses on one child in the visit while the other ones are doing their thing and then she'll attempt to move to the next one.

Q. Do the children initiate much interaction with their mother? A. The oldest will initiate interaction with mom.

Bose also testified the food the mother initially brought was fast-food that is not healthy for the children. He said the mother met with a Hy-Vee food dietician and paid attention and he said the meals proceeded to be better and healthier alternatives for the children.

He was asked if he had an opinion or recommendation with regard to the State's petition to terminate parental rights to the four children and stated his recommendation would be for termination. When asked to state his reason he said:

Based on lack of parenting that we've had, the fact that the mother continues to drive though her license is revoked or suspended. She is still interacting¹⁴ with the father of the three younger children,

¹⁴ The witness, when cross-examined about visitation, acknowledged among a number of other things that at times the mother brought dinner for the children, helped the older one complete homework, worked on the child's spelling words with him, and got down on the floor to play with them, and a number of times she brought books, helped a child with speech therapy, and played games with the children.

she really hasn't completed many of the objectives we set out at the family team meeting.

In reviewing a termination case we recognize we only have the written record and must rely heavily on the testimony of those who work with and observe the family and as a result give their opinions a certain deference. However, the legislature's decision to charge us with review of termination cases means our deference is not to be an automatic approval of what has come before. We must not only review the evidence de novo, we must also determine, when assessing opinions of proffered alleged experts such as Bose, whether they actually qualify as experts and what weight should be given their opinions.

Iowa Rule of Evidence 5.702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Generally we look at the witness's education, training, and experience to determine if the witness is qualified as an expert. There was no objection made to the admissibility of Bose's opinion testimony, so the admission of the same is not an issue. We still must look at the weight to give it, and in doing so do consider his education and experience. See *State v. Newell*, 710 N.W.2d 6, 28 (Iowa 2006). The reliability of an expert's opinion is for the fact finder. See *State v. Kolbet*, 638 N.W.2d 653, 660 (Iowa 2001). We recognize that Bose worked as a juvenile probation officer and minored in sociology and in the nine months prior to his giving testimony had worked with the Department to set goals to help families be reunited and safe in their current environment. There is no evidence,

however, that he has worked with young children or that he has had education or experience in early childhood development or in parenting. We note, too, that his observations were made in a controlled environment and involved the mother's interaction with her children over a very limited time. We give them limited weight.

We just do not find there to be clear and convincing evidence in this record that the mother does not have the ability to supervise her children. There is no evidence that any of the children suffered physical harm while they were in her care. There were no concerns about the children remaining in the home when the Department first became involved with this family. The children were taken away after the second incident and the children were quickly returned to her. We recognize that her ability to provide for her children is limited by her financial resources. Her wages are inadequate to allow her to house, feed, and clothe five children. The State does not specifically claim that not having ample resources to care for your children is clear and convincing evidence you cannot be a parent. Yet the fact the mother has not had resources for adequate housing for her children has been a factor in not allowing her to take them home, and is a factor that was considered in terminating her parental rights.

REVERSED AND REMANDED.