IN THE COURT OF APPEALS OF IOWA

No. 2-648 / 92-1372

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CLERK SUPREME COURT

IN THE INTEREST OF E.B.L. and H.B.L., Minor Children,

M.L., Mother,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Brian L. Michaelson, Associate Juvenile Judge.

The mother appeals from the juvenile court order which terminated her parental rights as to E.L. and H.L. **REVERSED AND REMANDED.**

Kay E. Dull, Sioux City, for appellant.

Bonnie J. Campbell, Attorney General; John M. Parmeter, Special Assistant Attorney General; Kathrine S. Miller-Todd, Assistant Attorney General, for appellee State.

Debra Y. Lulf, Sioux City, for minor children.

Heard by Donielson, P.J., and Hayden, J., and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

DONIELSON, P.J.

This appeal involves the termination of two children, E.L. and H.L. M.L. is the natural mother of seven children: M.L., born in 1980; T.L., born in 1982; E.L., born in 1983; H.L., born in 1984; P.L., born in 1986; A.L., born in 1987; and Z.L., born in 1989. O.L. is the natural father of the oldest six children. D.S. is the natural father of Z.L., the youngest child.

The mother was thirty-one at the time of termination. Her I.Q. is between 68 and 70, which places her in the range of mild mental retardation. As a child, she was a victim of mental, physical, and sexual abuse. The mother is not gainfully employed, and her source of income has been limited to governmental benefits.

M.L.'s family first came into contact with the Department of Human Services (DHS) in February 1988, when the oldest daughter, M.L., reported that O.L. had sexually abused her. In March 1988, the juvenile court found the six oldest children to be children in need of assistance. The court ordered the father to have no contact with the children and ordered the mother to have no telephone communications with the father.

In April 1988, DHS learned the family had left the jurisdiction of Woodbury County. Less than two weeks later, New York reported the mother had sought shelter services in New York City and the father (O.L.) was arrested in Chicago. The authorities extradited the

parents to Woodbury County and the court placed the children in foster care. In February 1989, O.L. pleaded guilty to two counts of indecent exposure and the court sentenced him to two consecutive two-year terms of imprisonment.

On March 15, 1989, the mother gave birth to Z.L. D.S. was the father of Z.L. Two days later, Z.L. was removed from the mother's custody. The child was adjudicated to be a child in need of assistance, and temporary custody of Z.L. was returned to the mother on April 12, 1989.

In June 1989, the juvenile court reviewed the status of the other six children. Although the court noted the mother had been cooperating with supervised visits, parenting classes and therapy sessions, the court found the children could not be returned to their mother.

In May 1990, the State filed petitions for the termination of parental rights as to all children. O.L. voluntarily terminated his parental rights. Pursuant to a stipulation, the mother voluntarily terminated her parental rights with respect to P.L. and A.L. In July 1990, the court approved the stipulation and ordered M.L. and T.L. to be returned to the custody of their mother in August 1990. Z.L. remained with the mother subject to DHS's supervision. The court ordered H.L. and E.L. to remain in foster care with services for the mother continued. The court terminated the parental rights of D.S. as to Z.L.

Also in July 1990, a child abuse referral was received on E.L. and H.L. E.L. alleged O.L. had sexually and physically abused him. DHS founded the report and indicated the abuse had occurred prior to O.L.'s incarceration. H.L. also alleged O.L. had sexually abused her. However, that report was unfounded. In November 1990, E.L. and H.L. moved to the foster home of T.P. and M.P. They had previously lived in two other foster homes since being placed in foster care in 1988.

In February 1991, the mother began unsupervised visits with E.L. and H.L. The visits were for four hours every other week. In the March 1991 review hearing, the court continued the placement of all the children. The court suggested H.L., M.L., and T.L. all could benefit from additional therapy. However, the court found no other additional services other than those contemplated in the case plan were necessary to effectuate the goal of reunifying E.L. and H.L. with their mother.

In April 1991, the mother moved into a four-bedroom home and began the process of divorcing O.L. In August 1991, O.L. was released from prison. By that time, the mother had developed a plan of action if O.L. were ever to come to her home.

During the summer of 1991, the family's case was reassigned to a Virginia Fraser and then to a Nancy Freeman (both from DHS). The Lutheran Social Services (LSS) contact was also reassigned to a new person. In August

1991, Freeman continued the permanency/review hearing from September to October. That same month, following an overnight visit, DHS suspended all visitation between the mother and E.L. and H.L. Visitation had been suspended because E.L. reported M.L., his oldest sister, had come into the bathroom while he was bathing. The LSS caseworker believed, due to the past history of sexual abuse, the children should not have seen each other naked. During this time, the social workers first approached T.P. and M.P. about the possibility of adopting E.L. and H.L.

At the October 1991 permanency/review hearing, the court ordered visitation between H.L. and E.L. and their mother be within the "discretion" of DHS in conjunction with the children's therapist (a psychiatric social worker). The court also ordered a conference between the children's therapist, the guardian ad litem, the mother, the mother's attorney and the DHS caseworker be arranged to discuss visitation. The court ordered the next review hearing be held in February 1992.

During November and December 1991, Freeman was on medical leave for six weeks, and the case was reassigned to another DHS caseworker. During that time, the DHS caseworker had no contact with the family. After several contacts by the mother's attorney to Freeman and the children's therapist, the court-ordered conference took place some four and a half months later in February 1992.

With another new LSS caseworker, supervised visits were reinstated for three hours every other week.

In the January 1992 case plan, Freeman requested E.L. be able to decide for himself whether to go on visits and that visitation be reduced to two hours every other week. Freeman also expressed her intent to file for termination. By March 1992, Freeman observed H.L. had gone to every visit and E.L. had gone only once. The court entered an order following the March 1992 review hearing which continued this limited visitation.

In April 1992, the State filed a petition for termination of parental rights as to E.L. and M.L. In August 1992, following a three-day hearing, the juvenile court terminated the mother's rights as to E.L. and H.L. pursuant to Iowa Code sections 232.116(1)(e) and (f) (1991).

At the time of the termination, E.L. was nine years old and H.L. was seven years old. E.L. was about six to twelve inches shorter than average, and he had been diagnosed with a growth hormone deficiency. When he was eight years old, he told T.P. he wanted to be six years old because people had told him he looked six. He was being treated by growth hormone shots.

There is much evidence in the record of the many emotional and psychological troubles these two children have experienced. They have been in therapy for the past three years. At the time of the termination, they were

seeing a psychiatric social worker. When the children first became involved in therapy, they told the therapist they did not want to return to their mother. Eventually, some progress was made. However, in the months preceding the termination, the children consistently expressed their desire to remain with their foster parents.

E.L. has especially expressed the desire to neither visit nor be reunited with his mother. In therapy, E.L. expressed anger towards his father for abusing him and towards his mother for allowing the abuse to occur. During the last few visits in which E.L. participated, he intentionally acted out with the hope that he would not be forced to visit his mother again or be returned to her custody.

E.L. and H.L. are unusually close siblings. They often play together and are very affectionate towards each other. While the visits were occurring on a more regular basis, H.L. wanted to visit and enjoyed the time with her sisters and mother. However, after the visitation was suspended, E.L. encouraged H.L. not to go on visits. In the months preceding the termination, the tension greatly increased between these children, their mother and their sisters, M.L. and T.L. (who live with the mother).

The mother appeals from the juvenile court order which terminated her parental rights. She contends the juvenile court: (1) erred in determining there was clear and convincing evidence to warrant termination of her parental

rights; (2) violated her due process rights by failing to order reunification of the children, terminating visits with the children, and comparing the foster family with her; (3) failed to properly balance the best interests of the child with the rights of the natural parent; (4) erred in not separately considering the termination of her parental rights as to each child; and (5) erred in considering the testimony of the foster parents.

Appellate review of termination proceedings is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984) cert. denied sub nom. J.G. v. Tauke, 469 U.S. 1222 (1985). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those determinations. Id. at 491-92.

I. **Whether There was Clear and Convincing Evidence to Warrant Termination of Parental Rights.** The mother first contends the juvenile court erred in concluding there was clear and convincing evidence so as to warrant termination of her parental rights as to E.L. and H.L. Specifically, she argues the State has not proven, by clear and convincing evidence, the elements of Iowa Code sections 232.116(1)(e) and (f) (1991).

Iowa Code section 232.116(1)(e) (1991) permits the juvenile court to terminate the parent-child relationship if the court finds 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 custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 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.

Iowa Code section 232.116(1)(f) (1991) permits the juvenile court to terminate the parent-child relationship if the court finds all of the following have occurred:

> (1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
> (2) The court has terminated parental rights pursuant to section 232.117 with respect to another child who is a member of the same family.
> (3) There is clear and convincing evidence that the parent continues to lack the ability of willingness to respond to services which would correct the situation.
> (4) There is clear and convincing evidence that an additional period of rehabilitation would not correct the situation.

The mother has stipulated to paragraphs (1), (2), and (3) of section 232.116(1)(e). She has stipulated to subparagraphs (1) and (2) of section 232.116(1)(f). Therefore, the issues on appeal relate only to section 232.116(1)(e)(4) and section 232.116(1)(f)(3) and (4).

A. Section 232.116(1)(e)(4). The mother first argues the juvenile court erred in finding there was clear and convincing evidence the children could not be returned to the custody of their mother as provided in section 232.102 (as required by section 232.116(1)(e)(4)).

The criteria for determining whether a child may be returned to the home is similar to the statutory criteria for determining whether a child should be removed from the home. In re M.W., 458 N.W.2d 847, 850 (Iowa 1990). Statutory criteria for determining whether a child shall be removed from the home include whether "the child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance and an adequate placement is available." Id. (quoting Iowa Code § 232.102(4)(b)).

Since 1988, E.L. and H.L. have never been returned to the custody of their mother. Visitation was limited and ultimately suspended when E.L. began acting out and expressing fears about visiting his mother. However, at the same time, the mother continued to work towards achieving the goals set by her caseworkers and the juvenile court. The mother obtained a low income, four-bedroom home. She divorced O.L. and developed a plan for his return. The mother also independently sought the therapy of Dr. Satterfield, a licensed psychologist, and has been seeing her for the past several years.

The decision that the children could not be returned to the mother's custody was primarily based upon the behavior and intentions expressed by the two children, especially E.L. E.L. has been adamant that he does not wish to return to his mother. However, E.L. is a nine-year-old boy with serious psychological problems. The fact that E.L. has

decided he does not want to return to his mother cannot not be the decisive factor in determining whether the children can safely be returned home. Iowa Code section 232.116(2)(b)(2) (1991) states, in determining whether termination is in the best interest's of the child and in considering the child's integration into a foster family, the court shall review: "the reasonable preference of the child, if the court determines that the child has sufficient capacity to express a reasonable preference." However, here, we cannot reach this section until we independently determine the grounds of section 232.116(1)(e) have been met. See In re T.R., 483 N.W.2d 334, 337 (Iowa App. 1992).

This court has found clear and convincing evidence that the children could not be returned to their parents where the father was incarcerated and the circumstances which led to the prior physical abuse and neglect were not corrected despite DHS assistance. In re J.S., 470 N.W.2d 48, 50-51 (Iowa App. 1991). This court also found clear and convincing evidence of harm where, following the CINA adjudication, the mother had been arrested and incarcerated for prostitution, and had missed visitation. In re D.P., 465 N.W.2d 313, 315 (Iowa App. 1990). Finally, this court terminated parental rights under section 232.116(1)(e) where, following a CINA adjudication, the child had been whipped about the back and face, and thrown against a wall. In re M.L.W., 461 N.W.2d 609, 612 (Iowa App. 1990).

The facts here are clearly distinguishable from the above cases. The mother in this case has turned her life around. She has complied with the services provided to her by DHS and LSS, and three children have already been returned to her custody. We recognize continued therapy is necessary for both E.L. and H.L. However, noting the mother's progress and her willingness to cooperate with the services provided by DHS, we do not find E.L. and H.L. would continue to meet the definitional criteria for children in need of assistance under Iowa Code section 232.2(6) (1991). We find the State has not established by clear and convincing evidence that the children cannot be returned to the custody of their mother.

B. Section 232.116(1)(f)(3). The mother next contends the State failed to prove by clear and convincing evidence the mother lacks the ability or willingness to respond to services which would correct the situation (as required by section 232.116(1)(f)(3)).

We find the mother has been more than willing and able to work with DHS and its services. The mother worked with her social worker to obtain housing, and to improve her health and physical appearance. She has obtained a phone, and plans to learn to drive and secure her driver's license. In addition to divorcing O.L., she independently sought therapy with a licensed psychologist. The mother testified she had met the goals set out in her case plan. In its findings, the juvenile court noted the mother's

progress in therapy, and her ability to protect herself from O.L.

We note the mother has a low I.Q. which places her in the range of mild mental retardation. However, mental disability is not a sufficient reason standing alone for the termination of the parent-child relationship. In re Wardle, 207 N.W.2d 554, 563 (Iowa 1973).

We find the State has not established by clear and convincing evidence that the mother lacks the ability or willingness to respond to services which would correct the situation.

C. Section 232.116(1)(f)(4). The mother next contends the State failed to prove by clear and convincing evidence that an additional period of rehabilitation would not correct the situation (as required by section 232.116(1)(f)(4)).

From our review of the record and of the juvenile court's decision, it appears the basis for the decision to terminate the mother's parental rights was the emotional and psychological problems experienced by E.L. and H.L. The months which immediately followed the August 1991 incident were crucial in working towards reunification. Yet, the evidence suggests DHS did little to encourage visitation or reunification during this period. Four and one-half months passed between the court's order mandating a conference regarding visitation and the conference itself. Visitation was not resumed until February, and the

petition to terminate the mother's parental rights was filed just two months later. At the same time, the mother continued to receive therapy, to be cooperative with DHS and to be receptive to its services.

The delays, the lack of communication and the suspended visitation all increased the distance between the children and their mother. We especially note the testimony of T.P. regarding his and his wife's position on encouraging the children to visit the mother:

> Q: (Guardian ad litem) Could you describe any differences in the children's behaviors on or around the court hearing that they know is coming up or of the meetings of the professionals that they are aware of or a visit? A: [T.P.] Their behaviors really go downhill. . . . We were to encourage the kids to keep the visits going, and we did that and boy, I got the riot act from that. Basically, I was -- You know, we just said, okay, [the mother] would like to have you guys come back home and live with her. And right away [E.L.] says, This is not -- You are not my friend. I don't want to talk to you anymore. And I said, well, no. Just -- [the mother] loves you. She just wants to have -- just to have you go for a visit. Don't worry about it. If it doesn't work out, don't worry. You can come -- you can always come back to our house. Our house is always open for you no matter what happens, but go and give it a shot. See what works out. And basically go, have fun and go enjoy your family. But it didn't work out that time.
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> Q: How did that affect your relationship with [E.L.]? A: . . . They were upset. . . . [E.L.] especially was just darn right mad with me. I think he thought -- he felt betrayed because, you know, before we were always, you know saying oh, it's time for a visit. Let's get ready to go and stuff, but we didn't push as hard. We gave it that extra little push at that time, is what I understood we were supposed to do; and he didn't appreciate that.
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> Q: After a couple of incidents like this, have you been advised to take a different tactic as far as visits? A: Yeah. Yeah. We were told -- okay. Let's not -- Let's not ruin the trust we

> have with the kids. Let's cut the strings. Let's just back off for us. We were given the okay to back off basically, and as far as that -- that's made a tremendous difference with us and the kids. . . . It's not that we discourage in any way, you know. We don't bring it up. If they wanted to talk would be fine. We just don't bring it up, and there was no mention of anything until Kim comes. Would you like to go to a visit? No. I don't think so. Okay. Well, basically it's to that effect. You come talk to Kim. They know what she is going to ask. They know the routine basically. And they know there is 10 minutes there where they have to talk about the situation or so, but after that it's okay. We can go play again or something.

(Emphasis added.) T.P.'s testimony, while well-intended, demonstrates how both DHS and the foster family essentially gave up on encouraging visitation and reunification.

The State, as parens patriae, has the duty to assure that every child within its borders receives proper care and treatment. In re Dameron, 306 N.W.2d 643, 745 (Iowa 1981) (citations omitted). However, reasonable efforts to reunite the parent and child are also required prior to termination. See In re M.Z., 481 N.W.2d 532 (Iowa App. 1991).

Additional rehabilitation is indeed necessary for this family. We note that, despite the extensive history of emotional and psychological problems, E.L. and H.L. have never been treated by a psychologist or psychiatrist. While we commend the progress to date, the only therapy the children have received has been with a licensed psychiatric social worker. It was not until the petition for termination was filed that E.L. was evaluated by Dr.

Kenneth Schmitz, a licensed psychologist. In his findings, Dr. Schmitz recognized the need for E.L. to continue counseling and recommended E.L. be evaluated for hyperactivity.

It appears not enough effort has been made to actually change E.L.'s attitude towards reunification with his mother. We find the State has not proven by clear and convincing evidence an additional period of rehabilitation would not correct the situation.

For the reasons stated above, we find the State has not proven the elements of either section 232.116(1)(e) or (f). We reverse the order of the juvenile court terminating the parental rights of the mother as to E.L. and H.L., and remand to the juvenile court to resume services in order to facilitate the mother reunification with E.L. and H.L.

II. **Best Interests of the Children.** The mother also contends the juvenile court erred in not properly balancing the best interests of the children with the interest of the natural parent.

The parent whose parental rights are subject to termination has an interest in parenting his or her child. See In re K.L.C., 372 N.W.2d 223, 226 (Iowa 1985). This interest involves a basic civil right "far more precious than property rights." In re M.H., 367 N.W.2d 275, 278 (Iowa App. 1985). Indeed the parent's fundamental liberty interest in the care, custody and management of the child

is constitutionally protected. In re T.R., 483 N.W.2d 334, 337 (Iowa App. 1992) (citations omitted).

Under the Iowa termination of parental rights statute, the court first must determine whether the parent has forfeited his or her protected interest. T.R., 483 N.W.2d at 337. "Only after making an affirmative finding on the first inquiry, does the court made subsequent decisions based solely upon its determination of the child's best interest." Id. "[T]ermination of parental rights may not occur except on a showing of one or more of the statutory grounds that the legislature has established." In re L.H., 480 N.W.2d 43, 47 (Iowa 1992) (citing In re R.M., 431 N.W.2d 196, 199 (Iowa App. 1988)). The "physical, mental, and emotional condition and needs of the child" do not provide an independent basis for granting a termination petition. Id. See also Iowa Code § 232,116(2) (1991).

In the juvenile court's decision, considerable weight was given to the best interests of the child. The court noted how the children had become well-integrated into their current foster family and that the children were adamant about remaining with the family. Here, because we have found the State has not proven the elements of sections 232.116(1)(e) and (f), we need not consider the best interests of the child.

However, we are troubled by the attention given by the juvenile court to the foster family. Iowa Code section 232.116(2)(b) (1991) allows the court, in assessing the

best interests of the child, to consider the child's relationship with the foster family. However,

> [t]emporary foster relationships must be designed with the knowledge they will almost certainly end in separation. In the Interest of A.C., 415 N.W.2d 609, 614 (Iowa 1987). When adults can show they will be good parents to their children the State has a compelling interest in reuniting the children with those parents, even when the children have become attached to foster parents. Id. at 616 (emphasis added).
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> . . . We find that although the legislature provided for consideration of the bonding of a child to its foster parent in the termination process, the provisions in Iowa Code section 232.116(2)(b) were not intended to be elevated to the sole determinative factor.

In re J.R., 478 N.W. 2d 409, 414 (Iowa App. 1991).

The mother has demonstrated her interest and ability to be a good parent to these children. While the mother fully cooperated with services and prepared for the return of her children, the State made little attempt at reunification. With less and less visitation, and decreased effort on the part of DHS and the foster family to encourage visitation, the bonding between the mother and the children gravely suffered.

Furthermore, we will not terminate the mother's parental rights simply because the home of T.P. and M.P. offers economic and cultural advantages. In re Burney, 259 N.W.2d 322, 324 (Iowa 1977). The State's interest in protecting children is not absolute. Alsager v. District Court, 406 F. Supp. 10, 22, (S.D. Iowa 1975). The State's interest "must be balanced against the parents' countervailing interest in being able to raise their

children in an environment free from governmental interference." Id.

Because of our result, we will not address the other issues presented by the mother. We reverse the decision of the district court, and remand with directions to continue services and work towards reunification with the mother.

The costs of this appeal are taxed to the State.

REVERSED AND REMANDED.