IN THE COURT OF APPEALS OF IOWA

No. 0-445 / 00-0573

FILED
AUG 16 2000
CLERK SUPREME COURT

IN THE INTEREST OF M.R., L.A., and E.A., Minor Children,

X.A., Mother,
Appellant.

Appeal from the Iowa District Court for Scott County, John G. Mullen, District Associate Judge.

Mother appeals from the juvenile court order terminating her parental rights to three of her children. She contends (1) the State failed to use reasonable efforts to preserve the family, (2) termination was not in the children's best interests, and (3) the court erred in finding clear and convincing evidence supporting the grounds for termination under Iowa Code sections 232.116(1)(d), (e), and 232.102 (1999). **AFFIRMED.**

Marsha J. Arnold, Davenport, for appellant.

Thomas J. Miller, Attorney General, and Kathrine S. Miller-Todd, Assistant Attorney General, for appellee-State.

Norma Nunez, Rock Island, Illinois, guardian ad litem for minor children.

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

SACKETT, C.J.

Xochitl appeals a March 9, 2000 juvenile court order terminating her parental rights to her children, Marco, born March 2, 1988; Editt, born February 6, 1990; and Leticia, born May 4, 1991. Xochitl contends (1) the State failed to use reasonable efforts to preserve the family; (2) termination was not in the best interests of the children; and (3) there was not clear and convincing evidence supporting the termination pursuant to Iowa Code section 232.116(d), 232.116(e) or 232.102. We affirm.

On November 24, 1997 a petition was filed seeking to have Marco, Editt, Leticia and their two half-siblings[1] found to be children in need of assistance based on a failure of their maternal grandparents, who were caring for the children, to provide appropriate care. At the time the grandparents, who had raised the children, were not aware how to contact either Xochitl or the children's three fathers. In January of 1998 Xochitl returned to Iowa and became involved in the children's lives. A hearing was held in March of 1998 and an order was entered placing custody of Rosa and Anibal with their mother and the remaining children with their grandparents. At the time all the parties and the children lived in the same home. Things went well until May of 1998. Xochitl had problems with her parents and the State filed an application for temporary removal contending the children's parent or guardian or legal custodian was absent and there was a belief that the children needed to be removed immediately to avoid imminent danger. The petition was supported by further allegations that Xochitl had a substance abuse problem and the grandmother had poor health. The

[1] These children were placed with the birth father in October of 1999 and are not a part of these proceedings.

court entered an order and the children were placed in the custody of the department of human services. A hearing was held on July 20, 1998 and an order was entered finding transfer of the children was necessary. The children were left in the custody of the department of human services and in the foster homes where they then lived. There was evidence that the home where the children lived prior to their removal was in poor repair, they did not get adequate food, they were bathed infrequently, and a number of people on the premises used drugs. The children also were disciplined by their grandfather spanking them with a belt.

In January of 1999 a review hearing was held. The three children a part of these proceedings were to remain in foster care pending further review by the court. The juvenile court found that Xochitl had made remarkable progress with the case permanency plan, had fully cooperated with the department of human services and the service providers and that the goal remained reunification with the mother. A February 1999 report indicated the children had regular visits with their mother. However, Xochitl, who was living in the Souourner House, moved into the Sister of Humility Transitional Housing Program. She started working on a GED at Scott Community College and was working on parenting skills. She worked at several hotels. She quickly became overwhelmed with the needs of five children during visits.

In November of 1999 the department recommended the termination of parental rights of these children and their two half siblings. It was alleged that Xochitl had not made any efforts to address issues necessary to regain custody and her relationship with her mother had deteriorated. The department

contended it had offered services including parenting skills development, therapy, housing at Sojourner house and Humility of Mary housing, foster care services and visits with the children. It was contended Xochitl was given overnight visits but was not able to handle the children, and foster parents and service providers intervened. The petition to terminate was filed.

Xochitl was born in Mexico and lived there until she was ten years old. She has worked as a janitor and a farm laborer. Personality testing suggested she was a mildly nonconforming and rebellious individual with fairly strong vulnerability for substance abuse. She did not appear at the termination hearing. The juvenile court took evidence from the State as to the problems it had with Xochitl, the services it offered, and Xochitl's responses. There was testimony that Xochitl had made progress until about May of 1999. At that time relations with her parents broke down.

Xochitl did not comply with all the provisions put on her by the department. She took the children to their grandparents and included them in activities with her boyfriends though instructed not to do so. Xochitl was evicted from Humility of Mary Transitional Housing Program for failing to pay rent. Xochitl did not attend the termination hearing. She has used cocaine.

The juvenile court terminated Xochitl's parental rights in regards to Marco, Editt and Leticia pursuant to Iowa Code sections 232.116(1)(d), 232.116(1)(e) and 232.117.

We review termination proceedings de novo. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993). The grounds for termination must be proven by clear and convincing evidence. *In re E.K.*, 568 N.W.2d 829, 830 (Iowa App. 1997). The

State has the burden of proving the grounds for termination by clear and convincing evidence. *In re T.A.L.*, 505 N.W.2d 480, 483 (Iowa 1993). We may review the facts as well as the law and adjudicate a parent's rights anew. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

Xochitl first contends the State failed to use reasonable efforts to preserve the family. She argues the children were not provided therapy until August and October of 1999, after the decision to recommend termination. She also advances that if the department believed she had a substance abuse problem, she should have been provided services to address the problem. She was not provided any such services but also did not request any.

The State contends that Xochitl failed to preserve error regarding the issue of whether the State used reasonable efforts to preserve the family. There is a requirement that reasonable services be offered to preserve the family unit. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994) (citations omitted). While the State bears the obligation to offer reasonable services, Xochitl has the responsibility to challenge or object to the services provided at the removal or review hearing. *Id.* The March 9, 2000 termination order found reasonable and appropriate services had been offered to help Xochitl stabilize her own living situation and to help her make better decisions regarding her own life. The order further found reasonable and appropriate services had been provided to help improve Xochitl's relationship with her children and to improve her parenting skills. There is no evidence Xochitl before or at the March 2, 2000 termination hearing challenged the fact that reasonable efforts had not been utilized. She did not make any request for specific services to allow the family to continue towards

reunification with Xochitl. Parents have a responsibility to demand services prior to the termination hearing. *Id.*; *In re C.D.*, 508 N.W.2d 97, 101 (Iowa App. 1993). Challenges to the plan for reunification should come when the plan is entered. *In re L.M.W.*, 518 N.W.2d at 807. It is too late to challenge the adequacy of services at the termination hearing. *See id.* The issue of adequate services, therefore, had not been preserved for appellate review. *See In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa App. 1994). We affirm on this issue.

Xochitl next claims termination was not in her children's best interests. Even if the statutory requirements for termination are met, the decision to terminate must still be in the best interests of the child. *In re N.H.*, 383 N.W.2d 570, 574 (Iowa 1986); *In re D.W.K.*, 365 N.W.2d 32, 34-35 (Iowa 1985).

These children would be best served if we could assist their parents in assuming their care and providing them a structured safe environment. Unfortunately we do not have the ability to accomplish this goal. These children have strong bonds with their biological family, which will not be severed by termination. We know little of the future the children will have in State care and labor under no assumptions that termination of parental rights guarantees these children a successful adoptive placement. Xochitl does love her children. She is limited in her ability to care for them by problems in her youth, her limited education, and problems with substance abuse. She has nearly abandoned her children since their births, and while she should be commended for coming to Iowa and working with the children and the department to improve her skills as a parent, it was too little to late. By the time she returned she had five children with whom she had limited experiences. The children suffered from lack of attention

and the problems they experienced living in their grandparents home. Unfortunately the programs offered the mother did not correct her problems. Whether different services would have provided better results has now become a moot issue. The children appear to have more structure in their current foster homes. Xochitl's life has been and continues to be unstable and unpredictable. There is no evidence the children interests will be better served by not terminating their parental rights. We affirm on this issue.

Xochitl also claims the State failed to show the statutory elements for termination under Iowa Code sections 232.116(1)(d) and 232.116(1)(e) were met by clear and convincing evidence. We need only find grounds to terminate under one of the sections cited by the juvenile court to affirm. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa App. 1999).

Iowa Code section 232.116(1)(e) (1999) permits the juvenile court to terminate the parent-child relationship if the court finds all the of the following have occurred:

> (1) The child is three ears 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 twelve of the last eighteen month, 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.

The State has the duty to see that every child within its borders receives proper care and treatment and must intercede when parents abdicate that responsibility. *In re I.L.G.R.*, 433 N.W.2d 681, 689 (Iowa 1988). The State must

act to prevent probable harm to children and need not delay until actual harm has occurred. *Id.*

Xochitl is not able to provide a safe environment for her children. She has been an absent parent most of their lives. She is not equipped to assume their care. There is clear and convincing evidence to terminate Xochitl's parental rights under Iowa Code section 232.116(1)(e). The juvenile court termination is affirmed.

AFFIRMED.