IN THE COURT OF APPEALS OF IOWA

No. 1999-175 (9-392) / 99-0176
Filed July 23, 1999

IN THE INTEREST OF T.B. and T.B., Minor Children,

K.S., Father,
Appellant,

J.B., Mother,
Appellant.

FILED
CLERK SUPREME COURT

Appeal from the Iowa District Court for Clinton County, Nancy S. Tabor, Associate Juvenile Court Judge.

The father and mother of two minor children appeal a district court order terminating their parental rights. **REVERSED AND REMANDED.**

J. David Zimmerman of Pillers, Pillers & Zimmerman, P.C., Clinton, for appellant father.

Mary Lynn Wolfe of Wolfe Law Office, Clinton, for appellant mother.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, and Ross J. Barlow, Assistant County Attorney, for appellee State.

Thomas D. Lonergan of Mayer, Mayer, Lonergan & Rolfes, Clinton, guardian ad litem for minor children.

Considered by Sackett, C.J., and Mahan and Zimmer, JJ.

MAHAN, J.

The mother and father appeal the juvenile court's order terminating their parental rights to their two youngest children. Both parents claim the court erred in finding the children could not safely be returned to their care and that termination was in the children's best interest. We reverse the juvenile court.

Kevin and Jean have five children: twins Maya and Mica, born in August 1993, Matthew, born in August 1995, and twins Tarlesha and Tarnisha, born in September 1996. Tarlesha and Tarnisha were born prematurely at thirty weeks gestation and tested positive for cocaine at birth. Family preservation services began in early October 1996. In late October, Maya, Mica, and Matthew were removed from their parents' care by ex parte order based on a case worker's allegations of lack of supervision and possible continued drug use by Jean. The Department of Human Services (DHS) placed them in foster care. Tarlesha and Tarnisha were placed in foster care upon their discharge from the hospital in early November. The three older children were in one foster home; the younger two were in another. From November 1996 until June 1997, visitation with all five children was supervised at Lutheran Social Services (LSS) for two hours once a week.

The court adjudicated all five children in need of assistance in February 1997. After a dispositional hearing in April and May 1997, the court entered a stipulated order that Kevin would move out of the home and have no contact with Jean or the children except for supervised visitation and counseling. A review order in June 1997

directed DHS to increase visitation with the three older children. In July 1997, the court ordered the three older children returned to Jean's care. Visitation in Jean's home with Tarlesha and Tarnisha was increased to twice weekly -- one two-hour supervised visit and one five-hour partially supervised visit.

In September 1997, visitation was moved to LSS because of concern Tarlesha and Tarnisha were being exposed to smoke. Jean cleaned her carpets and visitation was returned to her home in November 1997. In late November, the court rescinded the no-contact order between Kevin and the family. After that time, Kevin was in the home about 85 percent of the time when case workers observed visitation or during unannounced visits. He was actively involved with the children, assisting with child care, transportation, meals, and playing with them.

In September 1998, the State filed a petition to terminate Jean's and Kevin's parental rights to Tarlesha and Tarnisha, alleging both voluntary termination under section 232.116(1)(a) and that the children could not be returned to their parents' care under section 232.116(1)(g). The court held termination hearings in November. The court expressed a number of concerns about the case in its findings of fact and conclusions of law, yet terminated Jean's and Kevin's parental rights on January 8, 1999, only under section 232.116(1)(g). Among the concerns expressed by the court were the following: (1) from November 1996 until July 1997, visitation with Tarlesha and Tarnisha was only once a week for two hours; (2) from October 1996 until July 1997, the reunification efforts were directed only at the three older children, not the

infant twins; (3) the three older children were returned to their parents in July 1997 without continuing services; (4) Tarlesha and Tarnisha did not appear to be bonded with Jean and Kevin; and (5) although Kevin had not complied with the case plan as written (but had received substance abuse counseling as requested and was on medication), services to the older three children ceased after their return home.

On appeal, both Jean and Kevin claim the court erred in finding clear and convincing evidence the girls could not be returned to their care and that termination was in their best interest. Iowa Code section 232.116(1)(g)(4) requires the court to find clear and convincing evidence "the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time." *Id.* Section 232.102 provides, in pertinent part:

> 5. Whenever possible the court should permit the child to remain at home with the child's parent, guardian, or custodian. Custody of the child should not be transferred unless the court finds there is clear and convincing evidence that:
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> a. The child cannot be protected from physical abuse without transfer of custody; or
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> b. 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.
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> The order shall, in addition, contain a statement that removal from the home is the result of a determination that continuation therein would be contrary to the welfare of the child, and that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home.

Id. Under the circumstances before us, there is no claim of physical abuse as set forth in the language of section 232.102(5)(a). The juvenile court must have relied on the language in section 232.102(5)(b). The primary emphasis of the State's witnesses

were the lack of bonding or attachment and the potential emotional and mental harm Tarlesha and Tamisha could suffer if returned to their parents. Section 232.2(6)(c)(1) provides "mental injury" as a harm which would justify adjudicating a child to be in need of assistance. Section 232.2(35) (1999) defines "mental injury" as:

> [A] nonorganic injury to a child's intellectual or psychological capacity as evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, considering the child's cultural origin.

Id. The legislature has carefully crafted a framework for State intervention into the parent-child relationship while protecting wherever possible the integrity of the family unit. *In re I.L.G.R.*, 433 N.W.2d 681, 689 (Iowa 1988). Under chapter 232, the State must act to prevent probable harm to a child and need not delay until harm has actually occurred. The termination statutes are preventative as well as remedial. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). However, a clear-and-convincing burden of proof requires there be more than vague speculation of some possible harm.

The testimony before the juvenile court concerning the potential emotional or mental harm to Tarlesha and Tamisha if returned to their parents is vague. Kathy Rockwell spoke of emotional harm based on a lack of attachment. She explained, "[I]t's not just the nurturing but it's the whole focus of where these children see themselves being with family. It's more than just receiving nurturing. It's recognizing where the children are at this point in their own development and going from there." She acknowledged the lack of bonding likely is "due to the length of time that they have lived away from [their parents] and also the short amounts of times that they

have spent visiting their parents." When questioned about a time frame for progressively increasing contacts to return the girls to their parents, she opined they could move home in "probably two to three months."

Pam Norton testified she did not believe the girls could be returned home at the time of the hearing because, "I believe there's a risk of harm due to the lack of commitment, which has created, in my opinion, the lack of attachment." We do not find the lack of attachment sufficient to support a finding by clear and convincing evidence Tarlesha and Tamisha would probably suffer from any mental injury as defined in the statute or case law. We find the evidence does not support termination on these grounds.

Both Ms. Norton and Ms. Rockwell also pointed to a potential lack of supervision if the family had all five children instead of just three. Supervision of each individual child in a family will naturally decrease as the number of children increases. We are not prepared to hold, however, that the decrease in individual supervision resulting from having more children in a family is a sufficient basis for terminating a parent's rights. Jean's commitment to obtaining and maintaining employment also was raised as a negative factor. We find her efforts commendable and not a basis for terminating her parental rights.

From our de novo review of the record, we agree with the assessment of the juvenile court that Kevin has not complied completely with the case permanency plan. That plan set forth thirteen requirements for Kevin, including signing releases,

supplying information to DHS, and maintaining contact with DHS and LSS workers. We are unable to say Kevin has completely fulfilled such requirements. More importantly, the plan also required Kevin to participate in a substance abuse program, to maintain a safe and stable home for the children, and to provide for their emotional, physical, and educational needs during visits. We find clear and convincing evidence Kevin has complied with these requirements, even if his relationship with service providers is poor.

In reviewing the year after the older children returned to the home, we find clear and convincing evidence Jean and Kevin have adequately provided for and cared for them. The substance abuse and mental health issues of the parents no longer appear to be a concern. Tarlesha and Tarnisha, although classed until age five as "high risk" children because of their prematurity and cocaine exposure, reveal no physical or mental problems. They are developing normal, but simply are monitored more frequently because of their classification. They do not appear to require any specialized parenting skills which Jean and Kevin do not possess. We do not find clear and convincing evidence the girls would suffer some adjudicatory harm if returned to their parents. We also do not find termination to be in their best interest. We therefore reverse the termination of Jean's and Kevin's parental rights to Tarlesha and Tarnisha and remand this matter to the juvenile court for reunification efforts with the goal of quickly reunifying the family.

REVERSED AND REMANDED.