IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 6-045 / 95-340

IN THE INTEREST OF M.H., Minor Child,

M.A., Mother.

Appellant,

M.H., Minor Child.

Appellant.

Appeal from the Iowa District Court for Polk County, Constance C. Welu, Juvenile Court Judge.

Mother and child appeal the termination of mother's parental rights. **AFFIRMED.**

Robert A. Wright, Jr., Des Moines, for appellant mother.

M. Kathryn Miller of Youth Law Center, Des Moines, for appellant child.

Thomas J. Miller, Attorney General, and Charles K. Phillips, Assistant Attorney General, for appellee State.

Considered by Sackett, P.J., and Cady and Huitink, JJ. Streit, J., takes no part.

HUITINK, J.

Mary A. and Michael H. appeal the termination of Mary's parental rights to Michael. We affirm.

Mary A. is the mother of Michael H., born November 10, 1982. Michael's father is not a party to these proceedings. In 1989 Michael began displaying severe behavioral problems at school, leading to a conflict between Mary and the school district regarding proper educational placement for Michael. Although the school district concluded Michael was a behaviorally disturbed child and needed to be in a special education classroom, Mary strongly disagreed and refused to cooperate with the school district's decision.

After several administrative and federal district court proceedings, the department of education issued a ruling allowing the school district to obtain an in-patient clinical evaluation of Michael and implement the evaluator's recommendations through appropriate educational placement and services. Mary refused to adhere to the terms of this ruling. In March of 1993 the State initiated CINA proceedings alleging Michael had failed to attend school for the last year and Mary had refused to cooperate in assisting Michael with his education and with his behavioral disorder. Michael was adjudicated CINA on April 8, 1993. This adjudication was affirmed on appeal. *See In re M.H.*, No. 94-76 (Iowa August 8, 1994).

In May 1993 the juvenile court ordered Michael placed in the custody of the Iowa Department of Human Services and that he undergo in-patient clinical evaluation at Orchard Place. Although Mary was ordered to cooperate with services and to obtain a parenting evaluation, she refused to comply. She was found in contempt on two separate occasions for her willful failure to follow the juvenile court's orders. These contempt citations were affirmed on appeal, and as a result Mary served a thirty-day jail sentence. The juvenile court then informed Mary that it would no longer punish contempt with a jail sentence and warned her that continued failure to cooperate would likely result in termination proceedings.

Throughout 1993 and 1994, Michael resided at the Polk County Youth Shelter and at Orchard Place. He ran away from these group homes on four occasions. During this time, he also committed several delinquent acts and attempted suicide. In November 1994 the State filed a termination petition pursuant to Iowa Code section 232.116(1)(e) (1993).[1] Following a termination hearing, the juvenile court terminated

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[1]Iowa Code section 232.116(1)(e) allows termination of parental rights if the court finds all of the following:

> (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 child has been removed from the physical custody of the child's parents 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 232.202.

Mary's parental rights, noting the reunification efforts made by the State and "Mary's eleventh-hour promises to cooperate with evaluations and services." The court concluded termination would afford Michael "the opportunity to develop into a young man with a positive future, unfettered by his mother's use of him to attack the system." Mary and Michael appeal.

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 court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by those determinations. *Id.* at 491-92.

Our primary concern in termination proceedings is the best interest of the child. Iowa R. App. P. 14(f)(15); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). In deciding what is best for the child we look to the child's long-range as well as immediate interests. We also look to the past performance of the parents because it is an indication of the quality of care the parent is capable of providing in the future. *In re A.M.S.*, 419 N.W.2d 723, 726 (Iowa 1988). We will not terminate parental rights pursuant to Iowa Code section 232.116(1) absent clear and convincing evidence the requirements of each provision have been met. *In re Chad*, 318 N.W.2d 213, 219 (Iowa 1982). The objection of a child over the age of ten may allow the trial court to refuse termination despite the satisfaction of other statutory requirements. Iowa Code § 232.116(3)(b). The court may, however, disregard the presence of this and other

mitigating factors in favor of ordering termination. *In re L.P.*, 379 N.W.2d 839, 843 (Iowa App. 1985).

Mary and Michael both contend the State has failed to prove Michael cannot be returned to Mary and that termination is in Michael's best interest. We disagree. The juvenile court wisely noted "that while there is clearly a bond between the mother and the child, it is not a healthy one. The mother's focus is on the 'battle' not the child." The record contains abundant evidence supporting this conclusion. For example, Mary has foregone visitation opportunities simply because she disagreed with the conditions imposed by the court or the department of human services. She has also ignored the advice of mental health professionals, and as a result, most of Michael's underlying psychological and emotional problems initially identified in these proceedings have not been addressed.

Like his mother, Michael displays significant difficulty in adhering to authority. He has committed several delinquent acts, exhibited severely deviant behavior at school, and run away from juvenile institutions on many occasions. While we can only speculate as to the underlying cause of Michael's defiant behavior, it is clear that Mary has, at the very least, set a poor example with regard to respect for authority figures. Moreover, Mary's refusal to cooperate with services and the school system has hindered Michael's ability to receive an education and treatment for his psychological problems.

Based on these considerations, we find that it is in Michael's best interest to terminate his mother's parental rights. Although we recognize the attachment shared by Michael and Mary, we believe Michael's relationship with Mary is one that will ultimately work to his disadvantage rather than his benefit. The juvenile court correctly concluded Michael could not be returned to his mother's custody.

We further reject Mary and Michael's contention the State's reunification efforts were inadequate. The record reflects Mary's refusal to cooperate with court orders to participate in a parenting evaluation and parenting skills training. Although the State provided Mary with a case plan, she refused to comply and would not discuss the plan with social workers offering assistance in fulfilling plan requirements. Mary has also defied court orders to provide Michael with counseling and placement at juvenile homes. Moreover, Mary's ongoing battle with the Des Moines public school system further reflects her inability to cooperate with State-offered assistance. The record thus reveals the failure to accomplish reunification is not for lack of effort on the part of the State, but is instead based on Mary's failure to take advantage of services offered by the State. The State has clearly provided Mary with sufficient opportunity to be reunited with Michael.

We have considered all of the appellants' arguments and find them to be covered by this opinion or without merit. Our de novo review of the record reveals clear and convincing evidence showing Mary cannot adequately care for Michael. The statutory

grounds for termination under section 232.116(1) have been met. We conclude it is in Michael's best interest to terminate Mary's parental rights. We affirm.

AFFIRMED.

Cady, J., concurs specially; Sackett, P.J., dissents.

CADY, J. (specially concurring)

I write specially to acknowledge the unusual facts responsible for the termination of the parental rights between a mother and her teenage son. In the early stages, these facts seem far removed from a termination proceeding. In some ways, they portray a mother's ardent fight against a school to keep her son in mainstream classes. The facts, however, tragically evolved. This evolution has provided damaging consequences for the child, which the mother has all but disregarded. These consequences, and the mother's response, now make the case indistinguishable from other termination proceedings.

The key inquiry, I believe, is whether the child will suffer harm as set forth in Iowa Code section 232.6 (1993) if returned home. The child was adjudicated a child in need of assistance on April 8, 1993, due to the mother's failure to exercise a reasonable degree of care in supervising the child. The problem was so serious the child was removed from the home. He has not returned and, tragically, nothing has changed to permit him to return to the care of his mother. The child would suffer the same harm which led to his removal if returned home. These facts support termination. As with other termination cases, the child should not be forced to wait indefinitely for a parent to change. *See Long v. Long*, 255 N.W.2d 140, 146 (Iowa 1977).

SACKETT, P.J. (dissenting)

I dissent. I would reverse and remand with instructions.

A mother and child challenge a juvenile court order severing their legal ties. The focal question is whether the juvenile court should have terminated parental rights because a mother challenged educational decisions about her child made by the Des Moines Public School System.

The mother, Mary, challenges the order terminating her parental rights to her son, Michael, born November 10, 1982. Mary contends (1) her resistance to the school's decisions were lawful; (2) there is not clear and convincing evidence Michael cannot be returned to her custody; (3) reasonable efforts were not made to keep the family together; and (4) termination is not in Michael's interest.

Michael, through his attorney and guardian ad litem, challenges the termination order advancing he is bonded to his mother, he is not adoptable, and if the order terminating is affirmed, he will live parentless in residential care until he reaches his majority. I cannot find termination to be in Michael's best interest.

This case is a saga of good intentions gone astray. It is an almost unbelievable acceleration of a conflict between Mary and the Des Moines Public School System that has found no winner, but has failed to work in Michael's interest.

Michael was born in California. His father is not a party to these proceedings and did not know he was born. Michael has African-American heritage.

Mary has done some college work. She was a federal employee in the Department of Housing and Urban Development. She no longer is employed there and claims to have lost her job because of the problems concerned with these proceedings. Mary has a firm desire for family privacy and has refused to provide much information about the family. She also feels strongly about her right to personally direct Michael's education.

Mary lived with Michael and her mother and several of Michael's cousins. Michael attended kindergarten at Hillis Elementary in Des Moines. He was originally cooperative, but by the end of the term, he was refusing to be a part of classroom activities. The next fall, in first grade at Hillis Elementary, the problems continued. The Des Moines Public School System, in April 1990, had Michael evaluated at the Des Moines Child & Adolescence Guidance Center and then by the school system on further follow-up. Mary was not consulted prior to the second evaluation and did not consent to it being done.

The April 1990 psychological evaluation was done by Keri Kinnaird, Ph.D., with the Des Moines Child & Adolescence Guidance Center, Inc. Kinnaird found Michael to have reading, mathematics, and written language skills of a child midway through first grade. At the time, Michael was eight years and five months old. Kinnaird further wrote about Michael:

> Michael is not a seriously emotionally disturbed child . . . . Rather, he is a youngster who is missing out on some critical opportunities to develop social skills that are necessary for success in the world outside

> of the home. Specifically, Michael needs to develop trust in authority figures and the ability to follow their direction. Michael also needs to have structured opportunities to practice the social skills necessary to make friends and to resolve conflicts without fighting or fleeing from the situation. Apparently, a regular education program has not been sufficient to meet Michael's needs in these areas. Michael's scores on the achievement tests indicate that he does have some academic deficits. However, there was no evidence that he lacks the capacity or the potential to do first grade work. It is more likely that he lacks the confidence that he can function away from his mother and his immediate family and keep up with the other children without individual attention from adults.

Kinnaird went on to recommend Michael be considered for a "Behavior Disorder Classroom."

In May 1991, the school district concluded Michael was a behaviorally disturbed child and needed to be in a special education classroom. Mary strongly disagreed and refused to agree to the placement. A special education due process hearing was held and the administrative law judge ordered Michael be evaluated at a place the school district chose. The school district chose Orchard Place. Mary resisted and attempted to enroll Michael in a local school rather than have him evaluated at Orchard Place. This led to a confrontation between Mary and the school principal. The principal threatened to call the police if Mary and Michael did not leave the school. They left and Michael did not return to the Des Moines Public School System.

On March 2, 1993, a petition to have Michael found to be a child in need of assistance was filed alleging Mary abused and neglected Michael, Mary failed to

exercise a reasonable degree of care in supervising Michael's schooling, and Michael was mentally ill. The juvenile court found Mary had not abused Michael but he was in need of court intervention because she did not cooperate in his special education and Michael needed a clinical evaluation at Orchard Place and needed to be at Cowles Elementary School. The issue of whether Michael was mentally ill was to wait further evaluation.

In May 1993, the court found Mary had not seen that Michael was evaluated at Orchard Place and she had not cooperated. Michael's care was then put with the Iowa Department of Human Services and it was ordered Michael's psychological evaluation be conducted at Orchard Place and Michael continue his education at the Focus program at Cowles Elementary School. Mary appealed and the juvenile court was affirmed. *In re M.H.*, 517 N.W.2d 217 (Iowa 1994) (unpublished).

Meanwhile, on August 13, 1993, the State filed an affidavit requesting Michael be removed from Mary's custody. Michael was removed and placed in the legal custody of the Department of Human Services on August 15, 1993. On the same day, the Department of Human Services put Michael in the Polk County Youth Shelter. The removal was because Mary did not follow court orders to complete an evaluation on Michael and did not sign Michael in and participate in the admission process for him to be placed at Orchard Place. Mary was also found to have failed to cooperate with the Department of Human Services and the juvenile court.

Michael was then placed in Orchard Place. He was there for one month before he ran away. When Michael went to Orchard Place, Bill Dickey, a Social Worker II with the Iowa Department of Human Services, observed Michael to be a very nice and cooperative boy. Dickey reported Michael was open with him and behaved well at the shelter in the month before he ran away. Dickey attributed adverse behavior to Mary's visits.

Additionally, at the time of Michael's admission to Orchard Place, Dr. Kunze and Dr. Reed found no psychiatric problems with Michael, but found a need to establish a common ground between Michael and the school.

The file goes on. A hearing was continued for additional evaluations; a contempt action was filed against Mary; a warrant issued because Michael ran away from the Youth Shelter; there were further orders continuing placement; an order was entered directing Mary to go to Broadlawns for a parenting psychological and psychiatric evaluation. Then Mary was sentenced to jail for thirty days and an appeal was taken from this order and it was affirmed. *M.A. v. Iowa Dist. Court*, 517 N.W.2d 205 (Iowa 1994).

A second application for a warrant was requested because Michael had run away from the Youth Shelter. Mary was then charged with criminally violating a custodial order. Mary was arrested and incarcerated from November 12, 1993 to February 24, 1994. The charges were dismissed without prosecution. A second request Mary be held in contempt was filed and she was given another thirty-day

sentence. The order was appealed. *M.A. v. Iowa Dist. Court*, 523 N.W.2d 443 (Iowa 1994) (unpublished).

By now, Michael had committed a delinquent act and the State asked he be detained at Meyer Hall. Michael was charged with four delinquent acts; then he attempted suicide while detained at the Youth Shelter and he was ordered hospitalized at Broadlawns. At this time, Michael was found to be seriously mentally impaired. Additional orders were filed for detention, finding Michael committed delinquent acts. Michael was placed in the Youth Shelter and then Youth Homes of Mid-America. A no-contact order issued forbidding Mary from being on the premises at Youth Homes of Mid-America or from calling staff members or board members on the phone and allowed off-campus visitation.

There were plans to put Mary and Michael together but, because Mary did not complete the ordered parenting evaluations, that did not happen. Michael ran away twice.

There is no evidence Michael ever suffered physical or sexual abuse or he has not had sufficient food, clothing, shelter, and love while living in his mother's care. Michael was originally removed from Mary's custody because she did not complete psychological evaluations ordered by the court at the dispositional hearing.

On November 30, 1994, the State filed a petition to terminate Mary's parental rights pursuant to Iowa Code section 232.116(1)(3) (1993) (child over four years of age, adjudicated in need of assistance, removed from parent's physical custody for

twelve months and cannot presently be returned). The juvenile court granted the State a partial summary judgment leaving two issues for trial: could Michael presently be returned to Mary's custody, and was termination in Michael's best interest. The juvenile court terminated Mary's parental rights. The juvenile court made the following factual findings:

> 1. The mother has never been evaluated to determine her psychological or parenting status or needs due to her refusal to participate in court-ordered evaluations.
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> 2. The mother has repeatedly sabotaged placements for Michael.
>
> 3. The mother has hidden the child from authorities when the child was on the run and lied to authorities as to his whereabouts.
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> 4. The mother verbalizes that she will provide an appropriate education for Michael, but her history belies these representations. She has consistently refused to work in concert with educators. She kept the child out of school for a period of fourteen months without authority.
>
> 5. While there is clearly a bond between the mother and the child, it is not a healthy one. The mother's focus is on the "battle," not the child. She can recall the dates of every court hearing over a period of years, but she does not know her son, his likes, dislikes, etc. She aborted visits in order to make a point which was irrelevant to the needs of the child, thereby compromising their relationship.
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> 6. The mother has a history of hostile, threatening and profane treatment of service providers, often in the presence of Michael and/or other children. Appropriate agencies have declined to work with Michael due solely to the mother's conduct. The mother has consistently refused services.
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> 7. Michael is a special needs child. He is in need of special education, having been classified as 3.6 Behavior Disordered. He is asthmatic and requires medication. He has had suicidal ideation and gestures in the recent past. He is a bedwetter; he is a thumbsucker. He has difficulty controlling his temper and can become violent. He has evidenced delinquent behavior. He requires more structure than the mother can provide.

8. The mother is in the process of refurbishing a home, but presently resides with her mother and several of Michael's cousins. She is currently unemployed and has no source of income.

On appeal, Mary contends her parental rights should not be terminated. She contends, in part, her resistance to the school district's plan for Michael was lawful under federal legislation.

Mary also argues Michael's close relationship to her, his objection to termination, and his current need for institutional care precludes adoption.

I. Mary contends her parental rights should not be terminated because she did no more than attempt to exercise her lawful rights in challenging the decisions of the Des Moines Public School System. She advances she was only exercising her right to challenge the State's diagnosis and contends the issue has already been resolved by the federal court proceeding.

The Education For All Handicapped Children Act (hereafter EAHCA) became law in 1975. *See* 20 U.S.C.A. §§ 1400-1461 (West 1990). The EAHCA is a funding institution that provides additional financial resources to states for providing education to handicapped children on an equal basis and with appropriate due process protection. In *Smith v. Robinson*, 468 U.S. 992, 1009, 104 S. Ct. 3457, ____, 72 L. Ed. 2d 746, 763 (1984), the court held, where the EAHCA provides redress for the special education matter at issue, the EAHCA is the exclusive avenue for the redressing of the claim. Mary contends, because the EAHCA provides for due process

hearings, administrative appeals, and court appeals, it has exclusive jurisdiction to address her concerns regarding Michael's special education needs.

In 1990, Congress amended the EAHCA and renamed it the Individuals With Disabilities Education Act (hereafter IDEA), placing emphasis on using the term "disability" rather than "handicapped." The major substantive, procedural, and remedial aspects of the IDEA are:

> 1. Education is to be provided to *all* age eligible children with disabilities (sometimes known as the zero reject philosophy).
> 2. Education is to be provided in the *least restrictive appropriate* placement.
> 3. Education is to be provided at no cost.
> 4. Substantive requirements are ensured by means of detailed *procedural safeguards*.
> 5. Education is to be *individualized* for each student.

See 20 U.S.C.A. §§ 1400-1461 (West 1990) (emphasis supplied). A fundamental principal of the IDEA is children with disabilities are to be educated with non-disabled children to the maximum extent appropriate. 20 U.S.C.A. § 1412(5)(B) (West 1990). This concept is commonly known as the "mainstreaming mandate." The basis for the mainstreaming mandate is the recognition of the stigmatizing effect of being placed in an educational setting other than the regular classroom, as well as the educational benefits to be gained by children with disabilities in receiving education in the regular classroom. *Thornock v. Boise Indep. School Dist.*, 767 P.2d 1241 (Idaho 1988). Mary has this concern because Michael is of African-American descent. Although the placement of all disabled children in the regular classroom is

the desired goal, Congress recognized this placement would be inappropriate in all circumstances. 20 U.S.C.A. § 1412(5)(B)(West 1990). Recognition of this is reflected in 34 C.F.R. section 300.551, which requires educational agencies to develop a "continuum of alternative placements." In response to this regulation, Iowa's Administrative Code adopts a placement alternative system basically starting with the regular education classroom as the ultimate goal and listing a number of increasingly more restrictive placements with the policy the student should be moved into the more restrictive placement only as necessary and should be returned to the less restrictive placement as soon as possible. *See* Iowa Admin. Code r. 281-31.38 and 281-41.82-.85 (19__).

States seeking federal funds under the IDEA are required to establish and implement procedures for the evaluation and placement of children with disabilities and to establish and implement a program of due process procedures that will protect children and obtain a free, appropriate public education as defined in the IDEA. 20 U.S.C.A. § 1412(5)(C) (West 1990). These procedural safeguards apply whenever an identification, evaluation, or placement is proposed initially; or where there is a refusal to identify, evaluate, or place a child protected under the IDEA. 20 U.S.C.A. § 1415(b)(1)(C) (West 1990).

At any stage of the placement process -- identification, evaluation, individualized educational program development, or implementation -- if the parent(s) or the educational agency disagree with the results or decision, a due process hearing

may be requested. 20 U.S.C.A. §§ 1400-1461 (West 1990); *see* Iowa Admin. Code r. 281-41.107 and 281-41.113(1) (19__). Under the IDEA, the party aggrieved by the results of a local due process hearing has the right to appeal to the state educational agency. 20 U.S.C.A. § 1415(c) (West 1990). The review at the state level is to be based on the entire hearing record and any additional evidence which may be necessary. *See* Iowa Admin. Code r. 281-41.113(2)-.123 (19__). Any party dissatisfied with the decision of the reviewing state official or the hearing decision, if it is made initially at the state level, may bring a civil action in a state court of competent jurisdiction or in a federal district court. 20 U.S.C.A. § 1416(e)(2) (West 1990); *see* Iowa Admin. Code r. 281-41.124(2) (19__).

At all stages of the process, unless all parties agree otherwise, the IDEA requires the child whose placement is involved to remain in the present educational setting pending a final resolution of the controversy. 20 U.S.C.A. § 1415(e)(3) (West 1990). When an initial placement is involved, the child must be placed in a regular public program until final resolution, unless the parent(s) does not consent. 20 U.S.C.A. § 1415(e)(3) (West 1990); *see* Iowa Admin. Code r. 281-41.106(3) and .125 (19__). This is known as the "stay-put" provision of the IDEA. The stay-put provision only prohibits a change in placement, not the re-evaluation of the child. While the various Department of Human Services people did not appear to know this, the Johnston Middle School did, as did the Iowa Department of Education. *See Delaware County Intermediate Unit No. 25 v. Martin K.*, 831 F. Supp. 1206, 1216

(E D. Pa. 1993). Also, it can be overridden with a court injunction as was the case here

When there is a danger to self or others, removal of the child from the classroom is permitted without requiring due process procedures.

The State contends Mary's battles are so consistent it is not possible to find a rationale basis between Michael's interests and her behavior. Mary correctly argues she has the right to enforce the safeguards of the IDEA and Michael has certain rights under this federal law. Because of the IDEA's supremacy, a parent's insistence on the lawful implementation of the IDEA cannot be used as a basis for terminating his or her parental rights. However, there must be a reasonable basis for the parent's challenge.

The question of which of Mary's actions were reasonable is the difficult issue. From the start, her anger and frustrations, and at times her stubbornness, precluded rationale challenges.

There is a basis in Michael's history for problems identified by the Des Moines Public School System. The solutions proposed were the result of decisions of persons employed by the school. There also are bases in Michael's history for some of the arguments Mary raises.

Mary was at most times unreasonable in exercising her rights as a parent. The fact she was unable to advance her challenges in a reasonable manner does not mean her challenges were not reasonable. The Des Moines Public School System was not

able to communicate with Mary in a constructive manner. Yet, a review of this record makes it clear working with Mary is extremely difficult.

Because I would decide this case on another issue, I find it unnecessary to determine which of Mary's actions were protected actions under the IDEA and I do not do so.

II. Mary next contends reasonable efforts were not made to reunite Mary and Michael.

The legislative basis for termination of the parent-child relationship between Mary and Michael is Iowa Code section 232.116(1)(e). The fourth requirement of this section required the State to prove by clear and convincing evidence that at the present time Michael cannot be returned to the custody of Mary. *See* Iowa Code § 232.116(1)(e)(4) (1993). This means reasonable efforts to reunite Mary and Michael are required before termination of the parent-child relationship. *In re T.C.*, 522 N.W.2d 106, 108 (Iowa App. 1994) (Sackett, J., dissents on another issue); *In re C.L.H.*, 500 N.W.2d 449, 453 (Iowa App. 1993) (Sackett, J., dissents on another issue); *In re A.L.*, 492 N.W.2d 198, 201-02 (Iowa App. 1992). Mary claims no attempts were made to reunite her and Michael. Even though the Department of Human Services' goal was reunification as late as December 1994, the reunification was conditioned upon a case plan not approved by the court. The case requires submission of a plan to the court. Iowa Code § 232.102(7); *see In re V.B.*, 491

N.W.2d 168, 170 (Iowa App. 1992). Mary contends, even if the case plan had been submitted to and approved by the court, its requirements were not reasonable.

The State points to Mary's lack of cooperation in Michael's special education and Mary's refusal to receive the parent evaluation as the basis of the recommendation for termination.

The State also advances reunification of the family is not the primary goal of a child in need of assistance proceeding. With this, I disagree.

Iowa Code section 232.1 states:

> *This chapter shall be liberally construed to the end that each child* under the jurisdiction of the court *shall receive, preferably in the child's own home, the care, guidance and control that will best serve the child's welfare* and the best interests of the state. When a child is removed from the control of the child's parents, the court shall secure for the child care as nearly as possible equivalent to that which should have been given by the parents.

Iowa Code § 232.1 (1993) (emphasis supplied).

Parents have a responsibility to challenge the failure to offer reasonable efforts at the time they are needed. Mary obviously challenged the State's removal and did advance other avenues to pursue. However, for reasonable efforts to be successful, cooperation is required by both State and parent. Because I would decide this case on other grounds, I need not address this matter further.

III. Is termination in Michael's interest? The court must consider what might happen if termination of a parent-child relationship is granted. *In re S.O.*, 483

N.W.2d 602, 604 (Iowa 1992). Michael is nearly thirteen years of age, is of African-American descent, and has exhibited behavior problems.

M. Kathryn Miller was appointed to and has been Michael's guardian ad litem since the initiation of the child in need of assistance proceedings. *See* Iowa Code § 232.2(22). At the termination hearing, she reviewed the past problems and her predictions for Michael's future and argued against termination. She gave the following reasons:

> [B]ased upon Iowa Code 232.116(3) where the Code says that the child -- that the court need not terminate parental rights, and sub (b) of that section if the child is over the age of ten and objects.
>
> Michael is twelve and does object. And sub (3) says if there is clear and convincing evidence that termination would be detrimental to the child due to the closeness of the relationship with his mother or parent.
>
> I believe it is also clear that termination of that relationship would be detrimental to Michael. There is certainly a bond that exists between Michael and Mary. I think that has been apparent not only from the testimony, I think that's apparent from the observations that the court has been able to make during the five days of the proceedings that have taken place in this courtroom.
>
> . . . .
>
> And as Michael's attorney, I would ask the court to allow him the opportunity to try to go home and attend school and receive an appropriate education.
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> [Michael's] placement was also pursuant to his adjudication as a delinquent as well as his CINA adjudication. Testimony was clear, Michael worked very hard during the course of his placement for the opportunity to return home. He did whatever he could do to earn that right, and I think that Michael does need an opportunity to go home and demonstrate he can go to school, that his behavior will be improved, and Mary can have an opportunity to demonstrate now that she will support a school placement.
>
> . . . .

> And I think, finally, as Michael's attorney and guardian ad litem, I have concerns about Michael's future in the event of a termination of parental rights. I think the Department of Human Services testified they have concerns about Michael's future. Even [Heyer] testified that she had concerns about his adjustment to that. It was [Heyer's] opinion that he could successfully make that transition. I don't think that the Department is -- it's clear the people from the Department of Human Services that he can successfully make that transition, and as guardian ad litem I don't believe it's clear that he can make that transition.
>
> The bottom line is unfortunately the state does not make a very good parent. The testimony is clear that adoption is unlikely in the event of termination of parental rights. I think the Department of Human Services testified to that. I think the reality is that Michael will be raised in long-term foster care if his parental rights are terminated. He will lose his right to the support and whatever benefits there would be in that relationship, but more importantly, Your Honor, he will lose the opportunity for that emotional bond, that emotional contact that a child needs with a parent. The state cannot replace that bond.
>
> Making a determination as to what to do in this case was a very difficult process for me as Michael's guardian ad litem. Ultimately the conclusion, the reality is that the child Michael can always receive an education. He can always enhance his education. Michael will have only one childhood. Looking at the future, I cannot in good conscience delegate Michael to a life within the system without a parent.

The guardian ad litem points out at the time of termination Michael had been discharged from one facility and waited for placement in another. I give considerable weight to the opinions of the guardian ad litem.

On appeal, Michael advances in testimony from Department of Human Services workers they recognized termination of his parental rights might not be in his best interest because of the bond Michael has with his mother and because issues involve Michael's behavior and education.

Michael's attorney and guardian ad litem does not suggest Mary cooperated with efforts to help Michael or that what she has done is in Michael's best interest. She recognizes, if we were to affirm, the school system no longer will need to deal with Mary. Mary's challenges have been costly to the Des Moines Public School System and the school system will have free reign to choose the path of education for Michael if he is in the foster care system with no parent.

There need not be a finding of adoptability to terminate, but it is a consideration in looking at the child's best interest. *See In re T.C.*, 522 N.W.2d 106, 109 (Iowa App. 1994) (Sackett, J., dissents on another issue; Huitink, J., concurs).

Furthermore, Michael is twelve and objects to the termination. *See* Iowa Code § 232.116(3)(b).

The State says this case is not about freeing Michael for adoption, but it is about finding him permanency by freeing him from Mary's influence so he can be taught to socialize and deal with authority.

The State recognized the Department of Human Services worker assigned to the case was reluctant to recommend termination because Michael and Mary are so close. The State argues this is not controlling because Michael cannot go home.

The State, while recognizing Michael's wishes should be given consideration, argues as long as he is under the influence of Mary his wishes and his interest will not coincide.

Richard Nightingale, M.D., a board certified child and adolescent psychiatrist, wrote of Michael's case on February 15, 1994:

> I do not see any simple solution to his case. One can make the argument that unless his mother gives him permission to be in treatment, he is untreatable at this time. I think this situation would apply even if Michael were in placement and his mother was completely removed from the picture. Thus, I don't really see this is a solution. I anticipate that as long as Michael is away from his mother he will continue to act out.
>
> Given some of the recent developments, such as Michael assaulting staff at Focus, I would offer the following suggestions: first, Michael needs to have charges pressed against him, and he needs to be adjudicated a delinquent. He needs to learn that he will be held accountable for his behaviors, that certain actions are not acceptable behavior, and that society does extend consequences to those who violate the rights of others. Secondly, I would send Michael home to his mother and place him on an extremely tight probation. Specifically, if he violates the laws of society he is in violation of his probation. If he does not attend school, he is in violation of his probation. If he violates his probation, he then should be placed outside of the home. For the time being I would suggest that he continue school at Focus and continue with the therapy component of the program. This, of course, needs to be re-evaluated by Focus. The approach of home, school and counselling, and a tight probation is consistent with other recommendations we have made in regards to conduct disordered children and adolescents who have been adjudicated delinquent. I would suggest that he be placed on probation for a one year period of time. If he is going to violate his probation he will certainly do so within that time frame, most likely even within six months. If he satisfies the terms of his probation for one year, then he may earn his way off probation and as such essentially be off the hook with juvenile court. Of course, after this time he still would be expected to abide by the rules of society and attend school.
>
> Given the complexities of this case, I think the above solution should be satisfactory to all parties concerned. This puts the onus of responsibility on Michael. If Michael and his mother want everyone to leave them alone, this can be accomplished with Michael simply behaving as any child his age should.

There are merits in Dr. Nightingale's opinions.

I do not know what would have happened to Michael had he remained in his mother's care. Unfortunately, he has not fared well in state care. When Michael entered the first of the four institutions he was to live in from the time of removal to now, doctors examining him found no psychiatric problems. At the time of the termination hearing, he had attempted suicide, had committed delinquent acts, and had psychiatric problems. State care has not enhanced Michael's life.

Michael does not want his parental rights terminated. I cannot find making him an orphan to be in his best interest.

I would reverse the termination and remand to the juvenile court for the guardian ad litem to present the court with a plan for Michael's future. I would find Michael should remain a child in need of assistance.