IN THE COURT OF APPEALS OF IOWA

No. 1-399 / 00-1179
Filed October 24, 2001

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CLERK SUPREME COURT

**IN THE INTEREST OF H.T., and C.C., Minor Children,**

**L.T., Mother,**
**Appellant.**

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Appeal from the Iowa District Court for Polk County, Karla J. Fultz, Associate Juvenile Judge.

The Mother appeals from the termination of her parental rights. **AFFIRMED.**

Christopher Kragnes, Sr., and Tiffany Koenig, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Jennifer Navis, Assistant County Attorney for appellee.

Todd Babich, Des Moines, for minor children.

Heard by Huitink, P.J., and Hecht and Vaitheswaran, JJ.

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**VAITHESWARAN, J.**

Lisa appeals the termination of her rights to parent Connie and Harry. She maintains the juvenile court: (1) did not consider her bond with the children; and (2) did not demonstrate a substantial change in circumstances to support termination of her parental rights following the entry of a permanency order. We affirm.

***I. Background Facts and Proceedings***

Lisa gave birth to two children: Connie, born in 1989, and Harry, born in 1998. Each had a different father, neither of which is the subject of this appeal.[1]

Lisa has a long history of abusing alcohol and illegal drugs. In 1992, her drug of choice became methamphetamine. Harry was born with methamphetamine in his system. As a result, the Department of Human Services sought and obtained temporary legal custody of the children. Connie, who had been living with Lisa's mother Dorothy for several months, remained in her grandmother's care. Harry also was placed with Dorothy. Later, the juvenile court gave Dorothy temporary legal custody of the children, subject to supervision by the Department.

Dorothy took care of the children for approximately a year. However, the arrangement caused her financial strain and took its toll on her emotionally, as she was forced to serve as mediator between the children and their parents. The juvenile court ordered the children placed in foster care.

With the children out of the parents' care for more than a year, the court was soon faced with entering a permanency order. The key issue was whether

[1] Although the juvenile court terminated their parental rights, neither has appealed.

to move toward termination of parental rights or instead order placement of the children in long-term foster care. The court concluded termination would not serve the children's best interests, given the age of one of the children and the bond between Connie and Lisa. The court further noted the circumstances leading to the children's removal would not exist in six months, as the parents were working "to be clean and sober" and Harry's father had funds for a permanent home. The court ordered the children placed in long-term foster care and scheduled the matter for a review hearing in three months.

Three months later, the State filed a petition to terminate the parental rights of Lisa and the children's fathers. The juvenile court granted the petition. Lisa's appeal followed. We review her case de novo. *In re S.J.*, 620 N.W.2d 522, 524 (Iowa Ct. App. 2000).

***II. Bond with Children***

Relying on Iowa Code section 232.116(3)(c), Lisa argues the juvenile court should not have terminated her parental rights in light of the close bond she had with the children.[2] Section 232.116(3) is permissive, not mandatory. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). A juvenile court has discretion to apply the provision based upon the unique circumstances before it and the best interests of the child. *Id.*

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[2] That section provides in pertinent part:

> 3. The court need not terminate the relationship between the parent and child if the court finds any of the following:
>
> c. There is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.

Although Connie maintained a close bond with her mother as reflected in pictures and letters she prepared for her, we have stated this bond is only one of many factors we consider in deciding what is in the best interests of the child. *In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998). Countervailing factors exist here.

By the time of the termination hearing, Connie had been formally out of Lisa's care for almost eighteen months and informally out of her care for about two years. A few months after Connie's formal removal, the juvenile court curtailed all unsupervised visitation between Connie and her mother and, for a period of time, the two did not have any visitation.

In addition to the absence of significant contact between the two, Connie appeared deeply troubled by her mother's past and possible future role in her life. She expressed concern that her mother would relapse and die, leaving Connie and her young brother to fend for themselves. Connie thought about suicide and was twice hospitalized for psychiatric care. She acted out at school and in foster care. In light of these behaviors, we agree with the juvenile court's assessment that "placement of the child with her mother today, assuming there was a room available, would not be in her best interest."

As for Harry, there is no evidence that he had an opportunity to develop a close relationship with his mother. *See In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). He was taken from Lisa immediately after his birth and spent the remainder of his young life in the care of his grandmother or foster parents. We find no basis for reversing the termination ruling as to him under the "close relationship" standard.

### *III. Effect of Permanency Order*

Iowa Code section 232.104(2)(b), relating to permanency hearings, provides in pertinent part that a court shall enter an order "to continue placement of the child for an additional six months at which time the court shall hold a hearing to consider modification of its permanency order." Iowa Code § 232.104(2)(b). The provision further states:

> [a]n order entered under this paragraph shall enumerate the specific factors, conditions, or expected behavioral changes which comprise the basis for the determination that the need for removal of the child from the child's home will no longer exist at the end of the additional six month period.

*Id.* The juvenile court invoked this provision in ordering placement of the children in long-term foster care and in requiring the parents to become clean and sober within six months.

Before the six-month period had expired, however, the State petitioned to terminate Lisa's parental rights. Lisa maintains that, to prevail on its petition, the State was required to establish that there was a deterioration in her behavior after the permanency order was entered, a showing she contends was not made here. The State responds that, notwithstanding the juvenile court's citation to Iowa Code section 232.104(2)(b), that provision does not apply because the court's order was not in fact a permanency order. The State further maintains it did indeed prove that Lisa's circumstances changed after entry of the order, warranting early termination of her parental rights.

We reject the State's argument that Iowa Code section 232.104(2)(b) is inapplicable. The court's order, by its terms, was a permanency order entered

pursuant to that provision. We reach this conclusion notwithstanding our holding to the contrary in *In re R.C.*, 523 N.W.2d 757, 760 (Iowa Ct. App. 1994) (finding order placing children under permanent custody and guardianship of DHS was not a continuation of prior temporary placement as contemplated by Iowa Code § 232.104(2)(6)). That holding turned on the fact that the permanency plan adopted by the court in conjunction with its order clearly listed termination of parental rights as a goal. *Id.* Here, in contrast, the permanency plan adopted at the time of the permanency order states only that the children should "remain in the custody of DHS for placement in foster care." The Department here recommended and the court found that termination was not a viable option at the time and the children should continue in foster care. Therefore, this was a permanency order under Iowa Code section 232.104(2)(b).

Although we disagree with the State's contention that section 232.104(2)(b) is inapplicable, we agree that the State could seek to terminate parental rights before expiration of the six month window set forth in that provision. As our court stated in *In re R.C.*, to hold otherwise "would lead to absurd results," as our primary obligation is to act in a child's best interests. *R.C.*, 523 N.W.2d at 760.

Having concluded that section 232.104(2)(b) applies but does not preclude consideration of an early termination petition, we must next determine what showing the State must make to obtain termination. The State agrees with Lisa that it was required to show a material and substantial change in circumstances following the entry of the permanency order.

We conclude the State made this showing. Although Lisa participated in drug rehabilitation programs, her progress was rocky. She graduated from an outpatient treatment program and attended an aftercare program but relapsed into drug use less than three months after her children were removed. She began an inpatient program, but violated a rule prohibiting contact with Harry's father, also a drug user. She displayed manipulative and defiant behavior while participating in another drug treatment program. She did not begin to cooperate with treatment for more than fifteen months after the children were removed.

Lisa relapsed again after entry of the permanency order and just two weeks before the termination hearing. A counselor testified that the amount of drugs detected in her system was "significant." Even before this incident, Lisa was demoted from a "middle recovery" phase to an "early recovery" phase after missing required sessions with her counselor. The counselor stated Lisa's prognosis for successfully completing her most recent inpatient treatment program was poor, given her history of noncompliance. Additionally, Lisa continued to maintain contact with Harry's father, and had not addressed issues of codependency, physical abuse, and the father's facilitation of her drug use.

At the same time Lisa was experiencing difficulty remaining sober, her daughter Connie's difficulties were also escalating. When the permanency order was entered, Connie was in a psychiatric treatment facility. She was again placed in the facility a week before the termination hearing after having thoughts of suicide and expressing concerns about her mother, visitation, and the custody arrangement. A counselor stated, "[t]he current destabilization is attributed to her concern about what's happening with Mom."

Long-term foster care is not preferred to termination of parental rights. *In re R.L.*, 541 N.W.2d 900, 903 (Iowa Ct. App. 1995). As noted, the children had been out of Lisa's home for at least eighteen months by the time of the termination hearing. On our de novo review, we agree with the juvenile court's decision to terminate Lisa's parental rights to Connie and Harry.

**AFFIRMED.**