

IN THE COURT OF APPEALS OF IOWA

No. 1-722 / 01-0579
Filed November 28, 2001

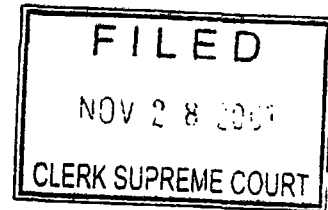
IN THE INTEREST OF S.R.R., Minor Child,

STATE OF IOWA,
Appellant,

CATHERINE A. PUGH, Guardian ad Litem,
Appellant,

D.C., Mother,
Appellee,

G.R., Father,
Appellee.



Appeal from the Iowa District Court for Johnson County, Stephen C.
Gerard II, District Associate Judge.

Both the State and the guardian ad litem appeal the juvenile court's
refusal to terminate the parents' rights. **AFFIRMED.**

Thomas J. Miller, Attorney General, and M. Elise Pippin, Assistant
Attorney General, for appellant State of Iowa.

Catherine A. Pugh, guardian ad litem and attorney for S.R.R.

Amy L. Evenson, Iowa City, for appellee mother.

Bruce D. Nestor, Iowa City, for appellee father.

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

VAITHESWARAN, J.

A juvenile court denied the State's petition to terminate the parental rights of two alcoholic parents. The State and guardian ad litem appealed. After considering factors implicating the best interests of the child, we agree with and accordingly affirm the juvenile court's ruling.

I. Background Facts and Proceedings

Deb and Tom are the parents of Sarah, born in December 1996. Both have a history of alcohol abuse that led to other problems, including domestic violence, child endangerment, and founded reports of denial of critical care. When Sarah was five and a half months old, Deb reported to the police that Tom physically abused her. A no-contact order was issued but eventually violated by both parents while they were intoxicated. Sarah was placed with a family friend. Deb sought counseling from the Department of Human Services. The department initiated services focused on relationship counseling, parental skills education, substance abuse treatment and relapse prevention.

Deb's therapist found Deb was determined to overcome her problems and was committed to becoming a better mother to Sarah. These observations were prominent in the therapist's parenting reports compiled over the course of treatment. The reports noted a strong mother-child bond and Deb's gentle, affectionate, and patient approach to parenting Sarah. During therapy, Deb finished school, was obtaining subsidized housing, and was addressing her relationship with Tom.

Both Deb and Tom continued to battle alcoholism. When Sarah was fifteen months old, they were charged with child endangerment after authorities

discovered Tom passed out in a smoke-filled apartment, while Sarah lay in her crib. Sarah was placed in foster care and her parents began inpatient substance abuse treatment. Deb continued to visit Sarah and she and Tom again pursued relationship counseling for approximately a year.

The department, the foster family and the parents all continued to pursue the goal of family reunification. Although both parents experienced relapses, they maintained visitation with Sarah and she was ultimately returned to their care.

Five months after Sarah was returned to Deb and Tom, the parents again encountered difficulties managing their alcoholism. Sarah was returned to her foster home on two separate occasions in 1999, the last following a Thanksgiving weekend relapse. The department determined that a permanent home would have to be found for her by June 2000.

Pursuant to the department's recommendation, the State petitioned to terminate Tom and Deb's parental relationship with Sarah. The juvenile court held a hearing in June 2000, approximately six and a half months after the Thanksgiving relapse. Both parents maintained they had remained sober since that date.

Following the hearing, the parents moved to supplement the record with evidence of their continued sobriety. The State's response questioned the need for an additional hearing and suggested "the Court allow the parties to supplement the record in writing within seven days." The court considered evidence from both sides.

Ten months after the termination hearing, the juvenile court denied the State's termination petition and ordered the department to develop a plan for the "orderly transition of Sarah's placement from foster family care to her parents."

The State and Sarah's guardian ad litem appeal. Our review of a termination proceeding is de novo. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999).

II. Motion to Supplement the Record

The State and guardian ad litem initially contend the juvenile court inappropriately considered evidence outside the record. Their charge stems from the following language in the court's final order:

Subsequent to the Trial, both parents and the State have filed documents and reports concerning the ongoing status of the case. The parents have asked that the Court re-open the record to admit these documents. While the State has resisted the parents' requests, the State has offered responses and reports from the Department.

The court went on to summarize the proffered posttrial evidence and found on the basis of this evidence that the parents had been sober for "well over a year."

The State first argues, "[t]he information provided to the Court subsequent to the termination trial [was] not part of the record and should not have been considered by the Juvenile Court." We disagree with this assertion. Although the court did not explicitly grant the parents' motion to supplement the record, the court effectively did so. *See State v. Wilson*, 573 N.W.2d 248, 251 (Iowa Ct. App. 1998) (court's consideration of issue raised in motion to amend sufficed to preserve error notwithstanding absence of express ruling on motion). As the posttrial evidence was properly before the court for consideration, the only question before us is whether the court abused its discretion in supplementing

the trial record. See *In re J.R.H.*, 358 N.W.2d 311, 318 (Iowa 1984) (in a bench trial, court has broad discretion to reopen the evidence). We conclude it did not.

When presented with the parents' motion to supplement the record, the State resisted only that portion of the motion requesting a hearing, and the guardian ad litem filed no resistance to the motion. The State's response in fact contained its own request to supplement the record. The court considered the State's written filing and attachments together with the parents' attestations of sobriety. Under these circumstances, we are not convinced the court's decision to reopen the record amounted to an abuse of discretion. *Id.* (stating "the best interests of the children dictate that the rules of procedure be liberally applied in order that all probative evidence might be admitted.")¹ Accordingly, we will consider the materials introduced by the parents and the State following trial but before the decision was rendered.²

III. Factors Implicating Child's Best Interests

Iowa law affords a juvenile court discretion to deny termination when the safety, condition, and needs of the child would be served, or if there is a close parent-child relationship. See Iowa Code § 232.116(2), (3)(c). A court may deny termination on these grounds even if the statutory grounds for termination are satisfied. *In re L.H.*, 480 N.W.2d 43, 47 (Iowa 1992) (stating Iowa Code section 232.116(2) "serves as a basis for refusing to terminate parental rights when the

¹ Even if we were to consider only the evidence presented at trial, our decision on the merits would be the same. See *In re M.M.*, 483 N.W.2d 812, 818 (Iowa 1992).

² In support of its application for stay filed with our highest court, the State attached materials prepared by its expert witness after the juvenile court ruled on the termination petition. We do not consider these materials part of our record for review. See *In re M.M.*, 483 N.W.2d 812, 815 (Iowa 1992).

statutory grounds appear to be present."); *In re A.L.*, 492 N.W.2d 198, 202 (Iowa Ct. App. 1992) (stating Iowa Code section 232.116(3) authorized juvenile court to deny termination petition even if all statutory grounds for termination satisfied). These criteria essentially implicate the best interests of the child. *In re L.H.*, 480 N.W.2d at 47; *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993); *In re D.P.*, 465 N.W.2d 313, 315 (Iowa Ct. App. 1990).

The juvenile court did not base its decision on the best interest criteria set forth in Iowa Code section 232.116(2) and (3), concluding instead that the State failed to establish a statutory ground for termination.³ The State and guardian ad litem take issue with this conclusion, pointing to numerous statutory grounds for termination they claim were satisfied. We find it unnecessary to analyze each of these grounds, as we find the best interest factors cited above justify denial of the termination petition. See *In re E.H.*, 578 N.W.2d 243, 247 (Iowa 1998) (we may affirm on any basis appearing in the record). In particular, we focus on: (1) the parents' alcoholism as it bears on Sarah's safety; (2) the ability of the parents to attend to Sarah's needs; and (3) the close relationship between Sarah and her parents.

A. Alcohol Abuse as Bearing on Child's Safety. All parties agree that this case turns on the effect of the parents' chronic alcoholism. The State and guardian ad litem contend the parties' history of alcohol abuse coupled with false representations of sobriety have jeopardized Sarah's safety. See Iowa Code § 232.116(2). In support of this contention, they point to the opinion of their expert,

³ Iowa Code section 232.116(1)(k) requires the State to establish a child cannot safely be returned to the custody of the parent. The court concluded Sarah could safely be returned to her parents' custody.

pediatric psychologist Anne Jensen, who opined that Sarah suffers from adjustment disorder with anxiety and is at risk of developing attachment disorder if returned to her parents.

Deb and Tom point out, however, that Dr. Jensen saw Sarah interact with them on only one occasion for approximately an hour and a half. Although they do not specifically address the statutory best interest criteria we have identified, the parents suggest Deb's therapist, who had the benefit of working with them for over two and a half years,⁴ is a more reliable source of information concerning Sarah's future welfare than Dr. Jensen. After carefully reviewing the testimony of both these witnesses, we must agree with the parents.

While Dr. Jensen observed and interacted with Sarah at the parents' home, the foster parents' home, Sarah's daycare center, and in an office, her unequivocal statement that there were no circumstances under which she would recommend Sarah be returned to Deb and Tom, including circumstances of continued sobriety, is contrary to the department's own position throughout this case. The department consistently maintained that reunification would be possible if the parties maintained their sobriety. The department's own evidence suggests that the parents obtained sobriety in the late fall of 1999 and maintained this sobriety through the time of the termination hearing.

Although Deb's therapist recommended the parents' rights be terminated based on their dishonesty about their alcohol consumption, her assessment of the parties' post-1999 conduct was positive. She stated:

Well, they state that they're maintaining sobriety. They have greatly increased their AA attendance, based on attendance sheets

⁴ The therapist stated she met with one or more members of the family 188 times.

that they fill out and send to [the Department supervisor]. Tom's sister, Lorrie, reported to me that she feels like her brother has made great changes for the better. She sees him looking much better than he used to. And I see Deb accepting a greater level of responsibility for this situation. I think she is really coming around and starting to understand that everything that's occurred up to this point has been as a result of choices that they made.

The therapist noted that, a month before the termination hearing, Deb acknowledged she was responsible for the current state of affairs, an admission that the therapist characterized as a "huge step" in the alcoholism treatment process. The therapist also stated that, while Tom had made less progress in owning up to the past, he seemed to be "doing a good job of attending AA."

It is true the State introduced posttrial reports prepared by the department that raised a suspicion Deb may have relapsed on two occasions. However, on the first occasion, Deb willingly submitted to a preliminary breath test which revealed no alcohol in her system. The second allegation was unverified. Four unannounced in-home visits turned up no signs of alcohol consumption by either Deb or Tom. Under these circumstances, we agree with the juvenile court's decision to discount the State's posttrial evidence of relapse.

Deb's therapist stated that if the parents could remain sober for a year or a year and a half, she would feel comfortable returning Sarah to them. By virtually all accounts, they came close to this benchmark. Therefore, we conclude the parties' history of alcohol abuse does not warrant termination of Deb and Tom's parental rights. *See In re T.O.*, 470 N.W.2d 8, 12 (Iowa 1991) (affirming denial of termination petition despite mother's history of exposing children to severe harm, where mother made steady progress at improving parenting skills); *Cf. In re D.M.*, 516 N.W.2d 888, 892 (Iowa 1994) (terminating parental rights where mother

checked herself out of substance abuse treatment and left the state); *In re R.J.*, 436 N.W.2d 630, 637 (Iowa 1989) (affirming termination of alcoholic mother's parental rights where she was discovered drinking the weekend before the termination hearing).

B. Parents' Ability to Meet Needs of Child. There is no question the parents are capable of meeting Sarah's physical, mental, and emotional needs as set forth in Iowa Code section 232.116(2). Deb in fact did so whenever presented with the opportunity. The therapist acknowledged Deb was an excellent parent when sober. She further conceded Deb had actively participated in services, missing only one appointment in the two and a half years she worked with her. Finally, the therapist acknowledged she had seen no signs of developmental or social problems in Sarah, and, indeed, had contemplated ending services for the couple at the time of the Thanksgiving relapse.

Although the evidence regarding Tom's commitment to parenting is less complete, the therapist's testimony at least establishes that, after the Thanksgiving 1999 relapse, he did nothing to jeopardize Sarah's welfare and made efforts to bond with her more closely. Additionally, the record reflects a commitment by Tom to a family unit comprised of himself, Deb and Sarah. Accordingly, we agree with the juvenile court that his rights also should not be terminated.

C. Close Relationship Between Parents and Child. We are also persuaded that termination is not warranted in light of the close relationship Sarah maintained with her parents throughout these proceedings. See Iowa Code § 232.116(3). Both parents nurtured the relationship, with the

encouragement and active assistance of the foster parents. Deb's therapist stated Sarah was bonded to both parents, with a particularly strong bond to Deb, her primary caretaker. When Sarah was just two years old, the therapist noted Sarah was anxious at the end of visits with her mother. The therapist expressed concern that Sarah might begin to experience attachment disorder if she remained in foster care for an extended period of time. At the termination hearing, however, the therapist admitted she saw no signs of adjustment disorder when she picked up and dropped off Sarah for visitation with her parents.

The department's records indicate visitation continued to go well after the Thanksgiving 1999 relapse. In particular, the therapist noted Sarah appeared to "transition well" into her visits and expressed sadness at leaving. While the therapist's posttrial report noted that the lack of permanency was affecting Sarah's ability to feel secure and was taking its toll on her emotional health and well-being, it is clear the parents had nothing to do with the posttrial delay in establishing permanency. Under these circumstances we conclude termination would prove detrimental to Sarah given the established bond she has with her parents.

In reaching this conclusion, we recognize, as the therapist and Dr. Jensen did, that Sarah also shares a close bond with her foster parents. However, we are not convinced that her "familial identity" is solely with the foster family. See Iowa Code section 232.116(2)(b). Instead, Sarah appears to view both units as her families. In the absence of evidence that her parents jeopardized Sarah's welfare after the Thanksgiving relapse, we believe the balance tips in favor of the natural parents. See *In re S.J.*, 451 N.W.2d 827, 831 (Iowa 1990) (noting foster

parent's exceptional abilities did not constitute legally sufficient reason to terminate the relationship of the natural parent with her child).

IV. Summary

We conclude Deb and Tom's parental relationship with Sarah should not be terminated. However, our conclusion that termination is not warranted based on the record before us does not leave the State without recourse should the parents revert to their past lifestyle. See *In re S.J.*, 451 N.W.2d at 833 (noting State is not foreclosed from initiating a new termination petition under appropriate circumstances). We affirm the juvenile court's decision.

AFFIRMED.