

IN THE COURT OF APPEALS OF IOWA

No. 0-1000 / 10-1927
Filed January 20, 2011

**IN THE INTEREST OF T.M. AND D.J.M.,
Minor Children,**

T.M., Father,
Appellant,

M.M., Mother,
Appellant.

Appeal from the Iowa District Court for Dubuque County, Thomas J. Straka, District Associate Judge.

A mother and a father appeal the termination of their parental rights to their children. **AFFIRMED.**

Stuart G. Hoover of Blair & Fitzsimmons, P.C., Dubuque, for father.

Patricia Reisen-Ottavi, Dubuque, for mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Ralph Potter, County Attorney, and Jean A. Becker, Assistant County Attorney, for appellee.

Steven Drahozal, Dubuque, attorney and guardian ad litem for minor child.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

A mother and father separately appeal the termination of parental rights to their two children; both children were under two years of age at the time of the hearing. The father, who has moved to Chicago, argues that the termination of his parental rights violates the equal protection clause because the children are placed with their maternal grandparents, affording the mother greater access to the children in the future. The mother, who is incarcerated, argues that the placement of the children with her parents is cause for postponement of the termination of her parental rights until she is paroled from prison. Unconvinced by either argument, we affirm the juvenile court order terminating the parental rights of both the mother and father.

I. Background Facts and Proceedings

Melissa and Terrell lived together in Dubuque from May 2008 until December 2008 when Melissa was arrested for a probation violation. Their first child, T.M., was born in February 2009 while Melissa was in a residential facility.

Both parents have a history of substance abuse. The Department of Human Services (DHS) removed T.M. from the parents' custody on November 23, 2009, based on their use of controlled substances. A "hair stat" test on the baby was positive for the ingestion of cocaine and alcohol. The mother also tested positive for cocaine and its metabolites. T.M. was adjudicated a child in need of assistance (CINA) in January 2010. The DHS placed the child in the care of her maternal grandparents, where she has remained during the pendency of this case. The juvenile court ordered Family Safety, Risk, and Permanency

(FSRP) services for the parents, as well as substance abuse and mental health treatment.

The couple's second child, D.M., was born in February 2010. The DHS removed that child soon after birth due to his older sister's exposure to drugs and the parents' history of substance abuse. The DHS also placed D.M. with his maternal grandparents.

The DHS provided FSRP services to the family with the intent to reunify the children with their parents. Initially, the mother was cooperative and performed admirably during supervised visitations. She participated in substance abuse treatment. But before she could be successfully discharged from treatment, she violated her probation and was sentenced to an indeterminate ten-year prison term for forgery and delivery of a controlled substance. The mother, who was twenty-one years old at the time of the termination hearing, revealed in counseling that Terrell, who was thirty-five years old, was verbally and physically abusive toward her during her pregnancies. Although she contacted police to report assaults, she recanted the allegations when they arrived because she was afraid of Terrell. The DHS workers were concerned that Melissa maintained contact with Terrell during her incarceration.

Terrell was less cooperative with the DHS services than Melissa was. For about one month in the winter of 2010 he refused to attend meetings with the DHS workers. He tested positive for drugs in November 2009, January 2010, and February 2010. From November 2009 to the spring of 2010, he participated in about seventeen supervised visits. In March 2010, Terrell moved back to

Chicago where he had more family support. Because of the distance to travel, Terrell reduced the frequency of his interactions with T.M. and D.M. The social worker testified that the children had a hard time recognizing him and took time to warm up to him during the supervised visits. In Chicago, Terrell lived with his grandmother, had no job, no driver's license, and no plans as to how he would accommodate the children's needs should he assume their care. Terrell testified that he had a total of ten children with seven different mothers. By his own account, he provided financial support for only one of his offspring. Terrell admitted to having physical fights with Melissa during their relationship, but denied being physically or sexually abusive toward her.

On September 2, 2010, the State filed a petition seeking to terminate the parental rights of Terrell and Melissa. The petition alleged that termination was proper for both parents under Iowa Code section 232.116(1)(h) (2009). The juvenile court heard evidence on November 4, 2010. On November 17, 2010, the court entered an order terminating the rights of both parents, finding clear and convincing evidence that the children, both under two years of age, cannot be returned to the care of their mother or their father at this time. The parents have filed separate appeals from the termination order.

II. Standard of Review

We review decisions to termination parental rights *de novo*. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). While we give weight to the factual determinations of the juvenile court, we are not bound by them. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). In any decision whether to terminate parental

rights, our primary concern is the best interests of the children. *Id.* The State must prove grounds for termination under section 232.116(1) by clear and convincing evidence. *Id.*

III. Analysis

A. The father failed to secure a ruling on his equal protection claim and failed to show that it has merit.

On appeal, the father contends the parental rights of the mother will essentially be “reinstated through the permission of her parents” who have custody of the children, “discriminating against the constitutionality of the father’s protection for equal treatment.” The father did not properly preserve this claim for appellate review. Even issues of constitutional dimension must be presented to and ruled upon by the juvenile court to preserve error for appeal. *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003). While the father’s attorney alleged an equal protection violation during the termination hearing, the juvenile court did not rule on his constitutional claim. He did not seek to enlarge or amend the termination ruling pursuant to Iowa Rule of Civil Procedure 1.904(2). Accordingly, his equal protection claim is waived. See *Benevides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) (“Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal.”).

Even if the father had preserved error, his equal protection claim does not withstand close scrutiny. Equal protection of the laws, guaranteed by the Fourteenth Amendment of the United States Constitution and article one, section

six of the Iowa Constitution, mandates that those similarly situated are treated alike by the government. *Kuta v. Newberg*, 600 N.W.2d 280, 288 (Iowa 1999). Terrell alleges that the termination impacts him differently than it does Melissa because the children are placed with her parents, who have indicated a willingness to adopt them. The father's allegation of potential disparate impact does not qualify as an equal protection violation.

The record does not reveal that Terrell has objected to the placement of T.M. and D.M. with Melissa's parents. As the DHS social worker testified, if the children are adopted by their maternal grandparents, it will be "up to the adopted family what kind of contact they're going to give" to either biological parent. Terrell has not shown sufficient state action to sustain his equal protection claim. See *Midwest Check Cashing, Inc., v. Richey*, 728 N.W.2d 396, 404 n.6 (Iowa 2007). The father has provided no viable basis to reverse the juvenile court's termination of his parental rights.

B. An extension of the time for termination of the mother's rights is not in the best interest of these young children.

The mother contends she should be allowed more time to prove she can parent the children. The mother is serving an indeterminate ten-year prison term for forgery and delivery of a controlled substance. She is first eligible for parole in March 2011, but does not expect to be paroled until she completes a substance abuse treatment program. A more likely parole date would be July 2011. By that time, her daughter will have been out of her care for more than nineteen months and her son for his whole life.

The children have found a stable and secure environment in the home of their maternal grandparents. The DHS social worker testified that the children have developed an attachment with both grandparents and T.M. has “a special spot for Grandpa and is always on his lap.” The grandparents have expressed an interest in adopting the children.

The mother has not been available to care for the needs of her children since November 2009 because of her poor choices. She acknowledged in her testimony that it was not “fair to punish” her children for her actions by making them wait for permanency. We conclude that it is not in the children’s best interests to delay termination. Their safety, long-term nurturing and growth, and physical, mental and emotion condition would be best served by severing the parental rights of their mother and allowing plans for permanency with their grandparents to move forward. See Iowa Code § 232.116(2).

It is well-settled law that we cannot deprive a child of permanency after the State has proved a ground for termination under 232.116(1) by hoping someday a parent will learn to be a parent and be able to provide a stable home for the child.

P.L., 778 N.W.2d at 41.

Finally, contrary to the contentions of the mother, the relative placement in this case does not provide a sufficient counterbalance against the ground for termination. See Iowa Code § 232.116(3)(a). The DHS worker addressed the uncertainty that would haunt these young children if the mother is granted until July 2011 and beyond to assume the role of a reliable parent: T.M. “needs permanency and she needs to understand that this is going to be her forever

home. Grandma and Grandpa are going to raise her and not have that in the background what could be.” We agree and affirm the termination.

AFFIRMED.