

IN THE COURT OF APPEALS OF IOWA

No. 0-103 / 10-0063
Filed March 10, 2010

**IN THE INTEREST OF M.M., M.G., and M.M.,
Minor Children,**

T.D.G., Father of M.G.,
Appellant.

Appeal from the Iowa District Court for Polk County, Joe E. Smith, District Associate Judge.

A father appeals from the order terminating his parental rights.

AFFIRMED.

Jon Garner, Des Moines, for appellant father of M.G.

Marc Elcock, Des Moines, for mother.

Andrea Flanagan of Sporer & Ilic, P.C., Des Moines, for father of M.M.

Diana Rolands, Osceola, for father of M.M.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appellee State.

Michelle Saveraid, Des Moines, for minor children.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

A father appeals the termination of his parental rights to his nine-year-old daughter, M.G. We affirm.

I. Background Facts and Proceedings.

M.G., the oldest of her mother's five children,¹ was adjudicated a child in need of assistance (CINA) on September 24, 2008, due to not receiving adequate care. M.G. has allegedly been sexually abused by a male the mother had allowed to live in the home, and the mother's current boyfriend had a founded child protection assessment for sexual abuse of a fourteen-year-old girl. M.G. was removed from her mother's care on January 21, 2009, and placed in the care of a longtime, close family friend that M.G. calls "grandma" where she has remained since that time.

The father was incarcerated at Anamosa State Prison on December 7, 2007, for his failure to register as a sex offender.² He has remained incarcerated throughout the pendency of these court proceedings. The father has an extensive criminal history, which includes convictions for assault causing bodily injury, failure to register as a sex offender, assault on a police officer, attempted burglary in the third degree, theft in the fifth degree, and harassment of a public officer. M.G. has never been in her father's custody. She is nine years old, yet

¹ The children have different fathers. The parental rights to the all the children have been terminated. The mother consented to termination of her parental rights. The parental rights of M.G.'s father are the only parental rights at issue in this appeal.

² In 2001 the father was convicted of assault to commit sexual abuse of a male victim between the ages of fourteen and seventeen, for an act that occurred when the father was fifteen-years-old.

the father has had little meaningful contact with her throughout her life, and has provided little financial support for her.

The father has been incarcerated for approximately forty to forty-five months of M.G.'s life. The father will be released from his current incarceration on August 11, 2010, but he could be released earlier if he completes victim impact treatment. At the time of the termination hearing, the father had not completed treatment of any kind and had not yet started the victim impact treatment. The father's attorney was present at review hearings in January, February, April, and June 2009.

On September 30, 2009, the State filed a termination petition. A contested hearing took place on November 12, 2009. At the hearing, the father alleged that reasonable efforts were not made, as a result of DHS's failure to contact or work with him throughout the proceedings. On December 23, 2009, after the contested hearing, the court terminated the father's parental rights to the child pursuant to Iowa Code section 232.116(1)(b) (2009). The father now appeals.

II. Scope and Standard of Review.

We review termination of parental rights de novo. *In re Z.H.*, 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). Grounds for termination under section 232.116(1) must be proved by clear and convincing evidence. *In re P.L.*, ___ N.W.2d ___, ___ (Iowa 2010); *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). If a ground exists, the court may terminate a parent's parental rights. *P.L.*, ___ N.W.2d at ___. In determining whether to terminate, our primary considerations

are the child's safety, the best placement for furthering the long-term nurturing and growth of the child, and the physical, mental, and emotional condition and needs of the child. *Id.*, ___ N.W.2d at ___; Iowa Code § 232.116(2). We also consider whether any of the exceptions contained in section 232.116(3) allow the court not to terminate. *P.L.*, ___ N.W.2d at ___; Iowa Code § 232.116(3).

III. Merits.

A. Clear and Convincing Evidence under Section 232.116(1).

The father argues the State failed to prove the grounds for termination by clear and convincing evidence. Under section 232.116(1)(b), parental rights may be terminated if the court finds "there is clear and convincing evidence the child has been abandoned or deserted." Abandonment is characterized as the giving up of parental rights and responsibilities along with the intent to forego them. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa Ct. App. 1996). The father contends the State failed to prove (1) that he gave up his parental rights and responsibilities as demonstrated by his conduct and (2) an accompanying state of mind showing his intent to forego these rights and responsibilities.

The father has not had contact with the child since sometime in April 2008.³ He has been incarcerated three separate times during the child's life, for a period totaling more than three years. The child has never been in his custody. The father is twenty-four years old. He has been convicted of assault causing bodily injury, failure to register as a sex offender, assault on a police officer, attempted burglary in the third degree, theft in the fifth degree, and harassment

³ The father bonded out of his incarceration on March 11, 2008, and went back on April 30, 2008.

of a public officer. Most recently, he was convicted of failure to register as a sex offender, and began his current incarceration for that offense on December 7, 2007. He remained incarcerated throughout the pendency of these proceedings. Following his August 2010 release, he will remain registered on the Iowa Sex Offender Registry and live with residency and work restrictions.

Although termination is not a necessary result of conviction of a crime and resulting imprisonment, the father cannot use his incarceration as a justification for his lack of relationship with the child. *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993). This is especially true when the incarceration results from a lifestyle that is chosen in preference to, and at the expense of, a relationship with a child. *Id.* The father's own actions produced this situation. See *In re J.S.*, 470 N.W.2d 48, 51 (Iowa Ct. App. 1991).

The father further contends the State failed to make reasonable efforts to reunify the family or eliminate the need for removal. He points to DHS's lack of contact with him and failure to offer services. The father was incarcerated throughout the pendency of these court proceedings. As the juvenile court stated, "[The father] is incarcerated because of his own choices and actions. He was unable to avail himself of services."

The father was timely served with both the CINA petition in September 2008, and the termination of parental rights petition in September 2009. Although his attorney attended the review hearings, no mention was ever made in regard to the sufficiency of the services. A parent's challenge to services by the state should be made when they are offered, not when termination of

parental rights is sought after services have failed to remedy a parent's deficiencies. *In re A.A.G.*, 708 N.W.2d 85, 91 (Iowa Ct. App. 2005). The father fails to indicate that he requested or otherwise challenged the adequacy of services prior to the termination hearing. We conclude this issue has been waived.

The father further alleges the juvenile court failed by not granting him additional time for reunification with the child. As the juvenile court stated:

If [the father] were to be released from prison tomorrow I would not be able to place [the child] in his custody. It would take months if not years of cooperation with services to establish that he could be a safe custodian for his daughter.

We agree. The father does not have an unlimited amount of time to correct his deficiencies. *See In re H.L.B.R.*, 567 N.W.2d 675, 677 (Iowa Ct. App. 1997). Past performance of a parent may be indicative of the quality of future care the parent is capable of providing. *In re C.W.*, 554 N.W.2d 279, 283 (Iowa Ct. App. 1996). There is no reason to further delay M.G. the permanency she needs and deserves. We find clear and convincing evidence supports termination of the father's parental rights.

B. Child's Interests under Section 232.116(2).

The father also argues termination of his parental rights is not in the best interests of the child. In addition to meeting the section 232.116(1) grounds for termination, section 232.116(2) requires us to give primary consideration to the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional condition and needs of the child. *P.L.*, ___ N.W.2d at ___; Iowa Code § 232.116(2).

Therefore, termination is not mandatory upon finding the requisite statutory elements under section 232.116(1). *P.L.*, ___ N.W.2d at ___; *In re C.W.*, 554 N.W.2d 279, 282 (Iowa Ct. App. 1996).

As our supreme court recently stated:

Rather than a court using its own unstructured best-interest test, the court is required to use the best-interest framework established in section 232.116(2) when it decides what is in the best interest of the child. . . . Accordingly, a court should base its best-interest determination on the legislative requirements contained in section 232.116(2), rather than upon the court's own value system. Additionally, in making this determination the court's decision should contain specific reasons as to why the court made its determination under section 232.116(2). By doing so, we will assure parents that our courts are applying the legislative intent of the statute in termination actions decided under chapter 232.

P.L., ___ N.W.2d at ___. In determining the best placement for the child, the court is to look at the child's long range as well as immediate interests:

The court is to consider what the future likely holds for the child if the child is returned to the parent Insight for that determination is to be gained from evidence of the parent[s] past performance, for that performance may be indicative of the quality of future care the parent [is] capable of providing. Case history records are entitled to much probative force when a parent's record is being examined.

In re S.N., 500 N.W.2d 32, 34 (Iowa 1993).

In this case, it is clear the father is unable to provide the child with a safe home. Prior to his incarceration, the father provided little financial support for the child. The child has not had contact with the father for the majority of her life. The father has his own sexual abuse issues and an extensive criminal record. Even when he has not been incarcerated, the father blames the mother's relationships with other men as the reason he did not exercise

visitation with the child. While he attempts to shift the responsibility for his lack of relationship onto others, the fact remains that he has no significant bond with the child.

The child is now nine years old. She has been sexually abused and has serious mental health concerns. She needs a home she can trust that offers permanency and stability. The child has found that home with a longtime family friend that she calls “grandma” and has expressed her desire to live with “grandma.” This home provides the best placement for the child’s long term growth and nurturing. Additionally, the child has not mentioned her father during her counseling sessions.

The child is unable to be returned to the father’s care, and will be unable to be returned to his care in the foreseeable future. Children should not be forced to endlessly await the maturity of a natural parent. *In re C.B.*, 611 N.W.2d 489, 494 (Iowa 2000). At some point, the rights and needs of the child rise above the rights and needs of the parent. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). We also find that none of the exceptions to termination listed under section 232.116(3) apply. We agree with the juvenile court that termination of the father’s parental rights is in M.G.’s best interests.

We affirm the termination of the father’s parental rights.

AFFIRMED.