

**IN THE COURT OF APPEALS OF IOWA**

No. 0-610 / 10-1181  
Filed September 9, 2010

**IN THE INTEREST OF W.D.,  
Minor Child,**

**D.D., Father,**  
Appellant.

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Appeal from the Iowa District Court for Scott County, Mary Howes, Judge.

A father appeals the termination of his parental rights. **REVERSED.**

Brenda Drew-Peebles, Davenport, for appellant.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, Michael Walton, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Joel Walker, Davenport, for mother.

Marsha Arnold, Davenport, guardian ad litem for minor child.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

**POTTERFIELD, J.****I. Background Facts and Proceedings**

In early September 2008, when he was less than one year old, William came to the attention of the Iowa Department of Human Services (DHS) because of allegations that his mother was not providing him adequate food or cleanliness. William had lived with his mother since his birth in January 2008. William's father, Dustin, was not married to his mother but had participated in William's care from William's birth until Dustin was incarcerated in July 2008 on federal charges of possession of stolen guns.

On September 19, 2008, William's mother entered into a safety plan and placed William into the care of her father.<sup>1</sup> William has not returned to the care of either parent since this removal. On April 2, 2009, William was moved to the home of his maternal great-aunt, where he has remained since that time.

Dustin was released from federal prison on September 1, 2009, after William had been in the care of maternal relatives for a year and was about twenty months old. On September 2, 2009, Dustin's father contacted DHS and advised that Dustin wanted to participate in services and to see his son. On September 8, 2009, Dustin and his parents participated in a family team meeting. As a result of this meeting, the case plan was updated with steps Dustin would need to complete to work toward having the child placed in his care. The case plan required that Dustin complete parenting classes weekly, attend a two-hour supervised visit with William twice per week, complete a batterer's education

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<sup>1</sup> Only Dustin's parental rights are at issue on appeal.

program (BEP),<sup>2</sup> attend therapy and manage medication to address his mental health needs, follow through with his parole requirements, secure housing, complete a substance abuse evaluation, and complete a psychological evaluation.

Dustin immediately began to comply with all the requirements of the case plan, and, for the ensuing seven months, Dustin participated in services and accomplished each goal in the case plan. Dustin has a learning disability, is illiterate, and receives social security disability benefits. The providers with whom he interacted acknowledged that his inability to read limited his progress since much of the instruction was in the form of written material. However, everyone involved in Dustin's efforts to gain custody of his son agreed that he had worked toward accomplishing the goals in the case plan.

Dustin exhibited some anger and frustration toward the providers when confronted with the challenges they posed although he was able to moderate his tone fairly soon in the process. Dustin's anger seemed to be the result of his feeling that DHS would never allow him to care for his son and that the deck was stacked against him from the beginning. The witnesses involved with Dustin stated that his anger never was directed at his son, William.

Rachel Zawatzki, the DHS caseworker assigned to William's family recommended termination of Dustin's parental rights, testifying:

This is a tough case regarding Dustin, because I do feel he has tried, and unfortunately I feel that he has some mental capabilities

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<sup>2</sup> DHS recommended a batterer's education program because of concerns regarding domestic violence between William's mother and Dustin. Dustin testified that William's mother made a complaint against him, but that it was not true, and no charges were filed against him.

that could get in the way to safely parent his child, as well as some anger issues.

She went on to say that Dustin

does have a learning disability, and he is illiterate. That in and of itself, I wouldn't normally say would be close enough to recommend that somebody's parental rights be terminated, but coupled with the other issues, I do believe it plays a factor.

When asked what "other issues" she had in mind, Zawatzki responded, "The anger issue--the best way to sum it up is immaturity."

The permanency goal for William was changed from reunification to adoption in early December 2009, just three months after Dustin was included in the case plan.<sup>3</sup> Nevertheless, Dustin followed through with all of the requirements of the case plan. He consistently attended weekly parenting classes with Shelly Hansen, a family consultant with Mid-Iowa Family Therapy Clinics. She testified that she gave Dustin information in written form, which he took home to review with the help of his mother. When he returned the following week, Dustin "generally" did not seem to understand the information provided in the written material, and told her he had not re-reviewed it since the previous week. Dustin testified that when he received paperwork in parenting class, he would take it to his mother's house and spend two or three hours with her going over the information. Dustin acknowledged that parenting classes helped him, but testified that he felt he could benefit by more in-depth discussions about areas that need improvement.

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<sup>3</sup> William's mother, who had been the primary focus of reunification efforts, had stopped visiting at this point.

Hansen further testified that at first Dustin was belligerent when he disagreed with what she taught and would threaten to go to the papers or the news media with information about what he considered to be the injustice of his situation. However, she testified that after she discussed her concerns with Dustin's attitude at a family team meeting, Dustin stopped arguing with her and complied with her directions more often.

Dustin consistently attended his visits with William, which were supervised by Hansen, Zawatzki, family members, and others. The visits took place first at Mid-Iowa Family Therapy and then, later, at Dustin's apartment. Hansen testified that she had to prompt Dustin "during each visit on different things" that involved safety concerns and gave the example of suggesting that Dustin cut grapes in two before giving them to William.<sup>4</sup> She also testified that Dustin fell asleep "off and on" during two separate visits, an allegation that Dustin denies. She further testified that at times during visits, Dustin walked away from William and left him unsupervised (except for the supervisor). She acknowledged that there was affection between Dustin and William, that their relationship had developed, and that both father and son had become more comfortable with each other.

Zawatzki also supervised Dustin's visits with William. She testified that Dustin was consistent in attendance and brought appropriate meals and supplies. She further testified that Dustin played with William, did "appropriate things with him," and had a desire to get to know him. Zawatzki testified that

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<sup>4</sup> This example apparently was the "safety concern" on which the juvenile court based its findings, along with "domestic violence issues not addressed" (despite his participation in BEP) and "unstable" living arrangements (despite Dustin's apartment and stable income).

Dustin's bond with William had improved, but that it was not a strong bond. Zawatzki expressed concern that at some visits Dustin expressed more interest in speaking with care providers than in playing with William.

Dustin's mother attended a few of Dustin's visits with his child and testified that she did not observe anything inappropriate. She testified that Dustin is bonded with his child. Dustin's father also testified that Dustin is bonded with his child. Dustin testified that he felt bonded with his child and that his child was "somewhat" bonded with him. Dustin's parents both testified that they would be available for Dustin and the child as a support network.

Zawatzki testified that Dustin had taken the necessary steps to address his mental health needs. Dustin is bipolar, but the record establishes that he regularly took the necessary medication. On September 23, 2009, Dustin attended a therapy intake session. Dustin told caseworkers that he was told no follow-up was needed; however, the therapist told caseworkers that he believed Dustin would benefit greatly from individual therapy but Dustin was not interested. Soon after, Dustin attended a second therapy intake session with a different therapist. Dustin suggested to this therapist that he did not need therapy. Caseworkers concluded that Dustin was in denial of his mental health issues that affected his ability to parent his child and that he would quit attending therapy once DHS was no longer involved in the case. Dustin continued to attend therapy on a regular basis throughout the pendency of this case. While Dustin admitted that at first he did not feel therapy was necessary, he acknowledged to case workers and at the termination hearing that it was good for

him. He testified therapy made a difference in his behavior and the way he felt physically and psychologically. He described his attitude toward therapy, saying, "I feel there's a big weight taken off of me. I feel more relaxed now since I've been going." Dustin further testified that he intended to continue attending therapy.

Dustin began attending batterer's education classes on September 24, 2009, almost immediately after the case plan had been modified to include him in the family reunification efforts. At first, his BEP counselor noted that although Dustin participated, he minimized the degree of his abuse and failed to see the seriousness of his behavior. However, four months later, his counselor noted that Dustin was slow at comprehending the information from the classes, but he was "getting something out of it." Dustin testified that these classes helped with his anger issues and his self-control.

No one disputes that Dustin followed through with his parole requirements and secured appropriate housing. On September 8, 2009, DHS recommended Dustin complete a substance abuse evaluation. Dustin completed the evaluation on September 9, 2009, and no substance abuse services were recommended. Thus, Dustin complied with these requirements of the case plan.

On January 19, 2010, the State filed a petition to terminate Dustin's parental rights. After a hearing on March 25, 2010, the juvenile court terminated Dustin's parental rights pursuant to Iowa Code section 232.116(1)(e) and (h)

(2009).<sup>5</sup> Dustin appeals, arguing the State failed to prove the statutory grounds for termination by clear and convincing evidence.

## **II. Standard of Review**

We review a termination of parental rights de novo. *In re Z.H.*, 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). The parent-child relationship is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511, 519 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15, 35 (1972). Grounds for termination must be proved by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). Evidence is clear and convincing when it leaves no serious or substantial doubt about the correctness of the conclusion drawn from it. *In re D.D.*, 653 N.W.2d 359, 361 (Iowa 2002). Our primary concern is the best interests of the children. *Id.*

## **III. Statutory Requirements**

First, Dustin contends the State did not present clear and convincing evidence that his parental rights should be terminated under Iowa Code section 232.116(1)(e). We agree. This section requires the State to present clear and convincing evidence that Dustin has not “maintained significant and meaningful contact with the child during the previous six months” and “made no reasonable efforts to resume care of the child despite being given the opportunity to do so.”

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<sup>5</sup> The State did not base its petition on Iowa Code section 232.116(1)(k), alleging a parent’s chronic mental illness and, indeed, could not have proved on this record that Dustin presented “a danger to self or others as evidenced by prior acts.”



See Iowa Code § 232.116(1)(e). The record does not support such a finding.<sup>6</sup> Beginning September 2, 2009, Dustin has been actively involved with DHS, and caseworkers and the guardian ad litem reported that Dustin tried very hard to resume the care of his child.

Next, Dustin contends the State did not present clear and convincing evidence that his child could not be returned to his custody at the present time, as required under Iowa Code section 232.116(1)(h). There is no dispute under subsection (h) that William was under the age of three, had been adjudicated a child in need of assistance, and had been removed from his parents' custody during the preceding six months. The juvenile court determined William could not be returned to Dustin's custody, finding:

[Dustin] has domestic violence issues not addressed and his living arrangements are unstable. He is on SSI due to disabilities. He has a bi polar disorder. Shelley [sic] Hansen, a social worker with Mid-Iowa Therapy testified she does not think William would be safe in Dustin's care. Dustin had to be prompted on simple issues like appropriate food. Based on Dustin's [sic] young age, this is a safety concern.

On our de novo review, we conclude that the juvenile court's findings are not supported by the record.

Dustin complied with every requirement in the case plan, including attending BEP to address his alleged domestic violence issues and managing his mental health issues. He told case workers and also testified that he believed he benefitted from his classes and from his mental health therapy. Most importantly, Dustin regularly attended visits with his child and demonstrated that he is able to

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<sup>6</sup> The juvenile court may have mistakenly included Dustin in this finding, which primarily involved the mother's lack of contact with William.

safely care for him. Notes from Dustin's visits reveal that Dustin interacted and played with his child in a manner that required little, if any, direction from care providers. Dustin consistently provided proper meals, activities, and support during visits with his child. Though at first Dustin was reluctant to impose discipline on William, the record shows that this improved after direction from a care provider. Dustin has adequate housing where William has visited with him, and his financial situation is stable. We find nothing in the notes describing Dustin's visits that suggests William could not be returned to his care.

The State points out that Dustin seemed unwilling to accept that William had developed a close bond with his foster parents. Assuming this to be true, we do not believe this is a factor that would prevent William from being returned to Dustin. Though we are concerned by the fact that Dustin fell asleep during two visits, this appears to have been an isolated problem. The record shows that at nearly all visits, Dustin was attentive to William and interacted properly with him.

Further, Dustin's parents have testified that they will be available to assist Dustin and William. They have provided Dustin with a great deal of support throughout this case and would continue to provide a strong support network for Dustin and William.

Because Dustin consistently visited the child without incident and with only minor redirection, we cannot conclude the evidence "leaves no serious or substantial doubt about the correctness of the conclusion drawn from it." We thus reverse the order terminating Dustin's parental rights.

**REVERSED.**