IN THE COURT OF APPEALS OF IOWA

No. 0-858 / 10-1627
Filed April 13, 2011

IN THE INTEREST OF C.M.,
Minor Child,

C.J.B., Mother,
Appellant,

C.M.M., Father,
Appellant.

Appeal from the Iowa District Court for Polk County, Louise Jacobs, District Associate Judge.

A mother and father each appeal from the order terminating their parental rights. **AFFIRMED ON BOTH APPEALS.**

Christopher A. Kragnes of Kragnes & Associates, P.C., Des Moines, for appellant mother.

Amanda Demichelis of Demichelis Law Firm, P.C., Chariton, for appellant father.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Annette Taylor, Assistant County Attorney, for appellee.

Paul White, Des Moines, attorney and guardian ad litem for minor child.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

PER CURIAM.

A mother and father each appeal from the order terminating their parental rights. The mother challenges the evidence supporting the statutory grounds for termination cited by the court and also contends termination in not in the child's best interest. The father challenges the evidence supporting the statutory grounds for termination cited by the court. He also contends the Iowa Indian Child Welfare Act applies in this case, termination is not in the child's best interest, and the State failed to prove adjudicatory harm. We affirm on both appeals.

Background. The child, born in December of 2009, was removed from the parents' custody just days after birth and placed with the maternal grandmother. At the time of the child's birth, the child's three siblings had already been found to be in need of assistance in August of 2009, and the father was in prison. The mother had a lengthy history of exposing her children to unsafe people, resulting in prior child-in-need-of-assistance proceedings in 1994, 2000, and 2005. The child was found to be in need of assistance in February of 2010. The parents did not contest this finding. In March, the State petitioned to terminate the parental rights of both parents. Following an amended-and-substituted petition to terminate in June, and two hearing days in August, the court filed an order in September that terminated the parental rights of the mother under Iowa Code section 232.116(1)(d), (e), (h), and (i) (2009) and the parental rights of the father under section 232.116(1)(b), (d), (e), (h), and (i). Both parents appeal.

Scope and Standards of Review. We review orders terminating parental rights de novo. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). We review the facts and the law and adjudicate rights anew. *In re H.G.*, 601 N.W.2d 84, 85 (Iowa 1999). We give weight to the juvenile court's factual findings but are not bound by them. *In re E.H., III*, 578 N.W.2d 243, 248 (Iowa 1998). In cases where the district court terminated a parent's rights on more than one statutory ground, we will affirm if at least one ground has been proved by clear and convincing evidence. *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995).

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). The State has the right to terminate the legal relationship between a parent and a child, but the Constitution limits its power to do so. *Quilloin*, 434 U.S. at 255, 98 S. Ct. at 554, 54 L. Ed. 2d at 519; *see Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045 (1923); *In re T.R.*, 460 N.W.2d 873, 875 (Iowa Ct. App. 1990). The State has the burden of proving the grounds for termination by clear and convincing evidence. Iowa Code § 232.96(2); *In re H.L.B.R.*, 567 N.W.2d 675, 677 (Iowa Ct. App. 1997). The issue whether to sever the biological ties between parent and child legally is an issue of grave importance with serious repercussions to the child as well as the biological parents. *H.L.B.R.*, 567 N.W.2d at 677. The goals of child-in-need-of-assistance proceedings are to improve parenting skills and to maintain the parent-child relationship. *Id.* An underlying issue in a termination action is

whether the parent is beyond help, but a parent does not have an unlimited amount of time in which to correct his or her deficiencies. *Id*.; *see In re D.J.R.*, 454 N.W.2d 838, 845 (Iowa 1990).

Father. The father contends Iowa's Indian Child Welfare Act, Iowa Code chapter 232B, applies in this case.[1] Two tribes identified by the father were contacted. The Omaha Tribe of Nebraska responded that the child was not eligible for enrollment. The Rosebud Sioux Tribe was notified but had not responded by the time of the termination hearing. However, the tribe had determined that another child of this father did not meet the definition of "Indian child." Even though the tribe had not yet responded to the inquiry concerning C.M., the court could determine it was "likely that a similar response will be received" concerning C.M. *See* Iowa Code § 232B.4(3) ("If an Indian tribe does not provide evidence of the child's status as an Indian child, the court shall determine the child's status."). The father notes that his mother had applied for enrollment in the tribe, but had not yet been accepted. He argues "the only reason [his] prior child was denied from the Rosebud Tribe was because [his mother] had not yet been accepted as a member." It is not enough that the child may have some Native American heritage; the child must be a member of an

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[1] On January 5, 2011, an anonymous "Notice of Information" was filed with the Supreme Court Clerk's office. It is not a part of the record considered by the juvenile court and is not properly before us on appeal. *See* Iowa R. App. P. 6.801 (noting the record on appeal comprises the "papers and exhibits filed in the district court," any transcript of the district court proceedings, and the certified district court docket). "[A]ppellate courts cannot consider materials that were not before the district court when that court entered its judgment." *Alvarez v. I.B.P.*, 696 N.W.2d 1, 3 (Iowa 2005). We do not consider the Notice of Information.

Indian tribe or eligible for membership therein and must also be the biological child of a Native American. *See id.* We affirm on this issue.

The father also challenges all the statutory grounds cited by the court. We focus on section 232.116(1)(e). The father admits the first two elements have been satisfied, but denies there is clear and convincing evidence he had not maintained significant and meaningful contact with the child. He argues the court did not give adequate weight to his visitation with the child and his participation in services after his release from prison in June of 2010.

The third element of section 232.116(1)(e) provides:

> There is clear and convincing evidence that the parents have not maintained significant and meaningful contact with the child during the previous six consecutive months and have made no reasonable efforts to resume care of the child despite being given the opportunity to do so. For the purposes of this subparagraph, "significant and meaningful contact" includes but is not limited to the affirmative assumption by the parents of the duties encompassed by the role of being a parent. This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parents establish and maintain a place of importance in the child's life.

By the time of the termination hearing on August 24, the father had visited the child only four times. He was involved in therapy and participating in services through the department. He was not providing any significant financial support for the child. During the first seven months of the child's life, he had no contact because he was incarcerated. He did not participate in services while incarcerated. He cannot use his incarceration as an excuse for failing in his "affirmative duty" as set forth in the statute. *See In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993). His testimony concerning his changed attitudes and approach to

caring for his children is not credible. Considering his lack of any significant and meaningful relationship with this child, as well as his past and continuing indifference to establishing and maintaining a place of importance in the lives of his other children, we find clear and convincing evidence supports termination on this statutory ground.

We also consider the termination of his parental rights under section 232.116(1)(h). There is no dispute the first three elements are satisfied. The fourth element requires proof "the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time." Iowa Code § 232.116(1)(h)(4). A child cannot be returned to the custody of a parent as provided in section 232.102 if doing so would put the child at risk of "some harm" that "would justify the adjudication of the child as a child in need of assistance." *See id.* § 232.102(5)(a)(2). Iowa's termination statutes are preventative as well as remedial and are designed to prevent probable harm to a child. *In re E.B.L.*, 501 N.W.2d 547, 549 (Iowa 1993). They do not require delay until after harm has occurred. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1983).

The father testified he had a part-time job. He was living with his mother in a two-bedroom residence along with three other people. He is the father of at least six other children and has not provided for them. In the previous ten years he has spent more time incarcerated or under supervision of the department of corrections than as a man free to fulfill the duties of a custodial parent. The juvenile court considered the father's past actions and choices along with his testimony concerning the new changes in his life, but found the child could not be

returned to his care at the time of the termination hearing. From our review of the record, we agree with the juvenile court and affirm the termination on this statutory ground.

The father contends termination of his parental rights is not in the child's best interests, considering the relationship he shares with the child's mother, the changes he is making in his life, and the efforts he is making toward reunification. "In considering whether to terminate the rights of a parent under this section, the court shall 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." Iowa Code § 232.116(2); *see In re P.L.*, 778 N.W.2d 33, 37 (Iowa 2010) ("[T]he 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.").

Although the father is married to the mother, by his own testimony he continues to have relationships with other women and may be the father of another child by another woman since the time of C.M.'s conception. Until the last two months before the termination hearing, the father was not involved in C.M.'s life. He has repeatedly demonstrated is irresponsibility toward his several children. He has been unable to obey the law for any period of time while free, resulting in repeated periods of incarceration and probationary supervision. He admits lying freely to family and friends. In contrast, the child is placed with the maternal grandparents who are committed to the long-term nurturing and growth of the child. We agree with the juvenile court on this issue.

The father also argues the court need not terminate his parental rights because a relative has legal custody of the child. *See* Iowa Code § 232.116(3)(a). The exceptions to termination in section 232.116(3) are permissive, not mandatory. *See P.L.*, 778 N.W.2d at 38; *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). The court has discretion, based on the unique circumstances of each case and the best interests of the child, whether to apply the factors in this section to save the parent-child relationship. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). Under the facts and circumstances before us in this case, we conclude the exception in section 232.116(3)(a) is not sufficient to save this parent-child relationship.

Having considered all of the father's claims, we affirm the termination of his parental rights.

Mother. The mother challenges all the statutory grounds for termination cited by the court. She argues she successfully participated in services and the court placed too much emphasis on actions and events that occurred prior to the child's birth, as shown in prior child-in-need-of-assistance proceedings in 1994, 2000, and 2005 involving the mother's other children.

The juvenile court terminated the mother's parental rights under section 232.116(1)(d), (e), (h), and (i). We vacate that portion of the order providing for termination under section 232.116(1)(e) because that section was not pled as to the mother.

Termination under section 232.116(1)(d) requires proof, among other things, that "[s]ubsequent to the child in need of assistance adjudication, the

parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services." Iowa Code § 232.116(1)(d)(2).

Concerning the mother, the court found:

> [The mother] also has a history of not being reliable in her reporting. While the initial CPA report and the Termination of Parent/Child Relationship report set out examples of [the mother] not being forthright, perhaps the most pertinent is her denial for months that she was in a relationship with [the father]. The court is familiar with how often parents disclaim "relationships" by just defining the word in a distorted manner and [the mother] participated in some of such word games. [She] was often told of the concerns of others about an ongoing relationship with [the father]; she had the opportunity to clearly understand the concerns. Yet, she made sure she was able to pick [him] up at prison when he was released. She testified that she would not remain in a relationship with him if he engaged in criminal activity again. She discounts his most recent charge to which he pled guilty to trespass. She spends all her time with him with few exceptions.
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> Many services have been offered to this family. [The mother] did well in participating in services. She has also done so with the services offered in previous cases. If a decision just rested on participation in services, the child would likely be returned. But the safety of the child does not rest simply on participation in services. It rests on a change in thought, priorities, and decision making, which are all areas in which there is a lack of a history of sustained change. The evidence indicates that no significant change has taken place, but some changes have. A lengthy period of time would be required to determine whether [the mother] could sustain changes after such a lifetime of bad choices.

The court concluded:

> [The mother] has made some changes but still is unable to put her child's needs first; her decision making, particularly as it relates to priorities, criminal activity, and stability and safety for children in her home, remains a significant concern. To be clear, [the mother] can demonstrate parenting skills while participating in services. She fails to show good decision making on the issues of lifestyle choices.
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> . . . .
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> Despite the offer or receipt of services, the underlying, long term concerns which led to the adjudication continue to exist . . . .

From our review of the record, the evidence supports the findings and conclusions of the court cited above. We affirm the termination of the mother's parental rights under section 232.116(1)(d).

The mother also contends termination of her parental rights is not in the child's best interests. 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." *P.L.*, 778 N.W.2d at 27 (quoting Iowa Code § 232.116(2)). The mother argues there is no evidence she cannot provide for the long-term nurturing and growth of the child. She further argues the evidence in record suggests she can provide for the child's long-term stability. She asserts she has refrained from criminal activity (since before the child's birth), she has a suitable home for the child, she is attending school to learn a trade that will allow her to earn more money to support the child, and she has been attending therapy. She also argues she and the child share a bond and she has been a significant part of the child's short life.

Although the record shows the mother has participated in services and can care for the child, we question her ability to provide for the child's safety and the physical, mental, and emotional condition and needs of the child on any consistent, long-term basis. Once the father was released from prison, the mother's participation in visitation decreased. She testified at the termination hearing that she spends most of every day with the father. They may not actually be living together, but the evidence shows he is at her residence even when she is not. She has continued in that relationship even after the father's continued

troubles with the law. While her commitment to her relationship with her husband is commendable, it comes at the expense of her relationship with her child. After considering the factors in section 232.116(2), we conclude termination of the mother's parental rights is appropriate.

We next consider the exceptions to termination in section 232.116(3) because the mother claims the parent-child bond should prevent termination. While there is evidence of a parent-child bond, there is no evidence that severing that bond would be detrimental to the child due to the closeness of the bond. *See* Iowa Code § 232.116(3)(c). We also do not find the fact the child is in the custody of the maternal grandmother, *see* section 232.116(3)(a), is sufficient to preserve the prevent termination under the record before us. We affirm the termination of the mother's parental rights.

AFFIRMED ON BOTH APPEALS.

Sackett, C.J., dissents.

SACKETT, C.J., (dissenting)

I dissent.

There is not clear and convincing evidence supporting termination. The case worker here failed to identify any problem with the mother except her relationship with the father and lying about the relationship. The case worker testified concerning the mother:

> Q. What have you asked her to do that she hasn't done? A. My belief is that she has not made insight or progress as to how she makes her decisions, and that's evidenced by her untruthfulness with me almost throughout this case.

Follow up questions led to the caseworker's agreement that

> the real decision that you think [the mother] has done wrong or has lacked insight is to her decisions with [the father]?

Continued probing led the caseworker to admit the mother had complied with case plan requirements, had safe suitable housing, knows how to and is able to care for the child, and was in school to improve her job prospects.

> Q. So, bottom line, this case is about the mother lying to you about her relationship with the father? A. That, and her prior history.

The caseworker asserted this CINA proceeding is no different than all the prior ones that were closed only to be followed by a new CINA. Follow-up questions revealed that prior CINA cases involved an abusive relationship with other men. Those facts are not present here. Nor in the prior cases had the mother taken the positive steps she did here such as her schooling.

> Q. I want to get back to the discussion of why you're recommending termination. . . .[I]t deals with apparently [the mother's] lack of insight on decision making and her boundaries with [the father], correct? A. Yes.
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> Q. And her past history, correct? A. Yes.

> Q. And what else? A. That would be the important component.
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> Q. The important component. And we've already established . . . that while she has had contact with [the father], she has been able to maintain all of her service requirements on this case? A. Yes.
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> Q. [W]e've already established that the only criminal history that [the father] has had since his release in April of 2006 is a driving while suspended and a criminal trespass? A. Yes.
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> Q. We've already established that the mother has positive gains in this case that she didn't have in her other prior CINA cases? A. Yes.

Admittedly, the father does not have a good track record and is not particularly responsible. Yet there is no evidence he has ever been abusive to a child nor that he has been abusive to this child. Therefore, I do not believe that the mother's contact with him is sufficient to show on the record here there is clear and convincing evidence to support termination of her parental rights and I would reverse the termination of her parental rights.

I would also reverse the termination of the father's parental rights as it terminates his responsibility to support the child, leaving the support to the mother and, most probably, the State.