

IN THE COURT OF APPEALS OF IOWA

No. 0-863 / 10-1632
Filed December 8, 2010

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

**D.Q.W., Father,
Appellant.**

Appeal from the Iowa District Court for Polk County, Colin Witt, District Associate Judge.

A father appeals from the order terminating his parental rights.

AFFIRMED.

Alexandra Nelissen of Nelissen & Juckette, P.C., for appellant father.

Thomas J. Miller, Attorney General, Janet Hoffman, Assistant Attorney General, John P. Sarcone, County Attorney, and Faye Jenkins, Assistant County Attorney, for appellee State.

Barbara Davis, West Des Moines, for Intervenor.

Nicole Garbis Nolan of the Youth Law Center, Des Moines, for minor children.

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

DANILSON, J.

A father appeals the termination of his parental rights to his six-year-old daughter. He contends the State failed to prove the grounds for termination by clear and convincing evidence and that termination is not in the child's best interests. He further contends his parental rights should not be terminated because the child is in the custody of relative, and due to the closeness of the parent-child relationship. Considering the father's incarceration during the first nine months of these proceedings, his criminal history, and his failure to complete case plan requirements upon his release from prison, we conclude there is clear and convincing evidence the child cannot be returned to his care at this time. We further agree that termination is in the child's best interests, despite the child's placement with her maternal grandmother and any presence of a parent-child bond. We affirm termination of the father's parental rights.

I. Background Facts and Proceedings.

The child was born in October 2004. The parents were not involved in a committed relationship, and in fact, their relationship "appears to have been steeped in conflict." The mother and the child lived in Des Moines. The father lived in Kansas City and made frequent trips to Des Moines to visit the child during her first year of life. The child first came to the attention of the Iowa Department of Human Services in August 2005, when she was ten months old, as a result of the mother's active use of methamphetamine. She was adjudicated in need of assistance (CINA) and placed with the maternal grandmother. The father and the paternal grandmother appeared in court and were involved with the CINA proceedings. The court ordered an Interstate

Compact for the Placement of Children (ICPC) review of both the father and the paternal grandmother's homes in the Kansas City area, but neither home was approved for the child's placement.¹ The court also ordered the father to complete a drug test, which was negative, and he was allowed visitation with the child. However, during the CINA proceedings, very little focus was on the father as a noncustodial, out-of-state parent. In August 2006, after the mother had successfully completed substance abuse treatment and "appeared to be in solid recovery," the child was returned to the mother's care, and the case was closed.

A formal visitation, custody, or child support order was not sought by either parent. The father had informal visitation with the child in 2006 and 2007, but conflict persisted between the father and mother. As a result of the inability of the parents to get along, the father stopped trying to have contact with the child for a short time in early 2007.

In August 2007, the father was charged with having committed a criminal threat and an aggravated battery as a part of a domestic incident in Kansas City. The alleged victim was the father's long-time girlfriend. The girlfriend complained of substantial violence committed upon her by the father. Physical evidence at the scene and from the victim generally corroborated the violence and injuries.

¹ The ICPC reviews were completed in early 2006. The father's home was not approved because he had no experience being a primary caretaker for the child; he had a history of domestic abuse; and because he was on probation. The report also noted that the father had two older sons by two different mothers who had never been in his custody, although he did spend time with them and provided child support when he was able. The paternal grandmother's home was not approved primarily because of the grandmother's physical health and inability to care for the child who was then an active toddler.

Subsequently, the father pled guilty to aggravated battery and went to prison in August 2007.²

While the father was in prison in Kansas, another CINA case involving the child was initiated in Iowa. In March 2008, the child was removed from the mother's care because the mother was again actively using methamphetamine and was selling methamphetamine from their home. The child was again placed with the maternal grandmother, where she has remained since that time. The mother's parental rights were later terminated, and this court affirmed the termination decision in *In re D.W.*, No. 09-0941 (Aug. 19, 2009).

The father was appointed counsel in April 2008. The paternal grandmother was active in the CINA proceedings and engaged in visitation with the child. The father was released from prison in December 2008 and sought to engage in services. The court entered an order in January 2009 stating that the father was granted visitation with the child as professionally supervised by the child's therapist and DHS caseworker. The father was ordered to attend parenting classes and individual therapy, and to comply with DHS recommendations. The court also ordered an ICPC review of the paternal grandmother's home where the father was staying after his release from prison the month prior. The home was not approved for placement of the child. The paternal grandmother completed the necessary forms and there was a home

² Prior to these proceedings, the father was charged with disorderly conduct for a domestic incident that occurred with the mother of one of his sons, and he spent two days in jail. He was later charged with domestic violence assault for a domestic dispute involving a different woman he was living with at the time. The father also testified that he previously sold cocaine and received eighteen months probation after he pled guilty to cocaine paraphernalia charges.

visit. However, the father was not at the home at the time of the visit, and although he was given the opportunity, he failed to provide the appropriate paperwork to complete the report.

The father attended several parenting classes in the spring of 2009. He attended therapy six times in the summer of 2009. The father engaged in significant visitation with the child. It appears the father and the paternal grandmother visited with the child two weekends per month, and that the father drove the child to and from Kansas City for these visits. Caseworkers described these visits as positive for the child, but explained that the child faced insecurity, confusion, and anxiety issues, and had trouble leaving the maternal grandmother to go on visits. The child had been in the uninterrupted custody of the maternal grandmother since March 2008. Prior to that time, the child had lived either with the maternal grandmother or with the mother and the maternal grandmother, for the majority of her life. It was clear to caseworkers and the child's therapist that the maternal grandmother was the one person the child felt secure with after a lengthy history of disruption and loss, and it was likely that the child would have an "extreme grief reaction" if she were taken away from the maternal grandmother.

DHS advised the father that he needed to address attachment and anxiety issues in child trauma cases to prepare himself to be able to care for the child's needs. The record does not show that the father engaged in therapy to address those issues. In fact, the father did not attend any therapy or parenting classes after the summer of 2009. In September 2009, a mediation agreement was

established between the father and maternal grandmother. The agreement fixed a visitation schedule and addressed other co-parenting type issues.

The child appeared to be doing very well with the arrangement. She was thriving in the maternal grandmother's care, and enjoyed visitation with the father and paternal grandmother. Caseworkers attempted to reach an agreement with the father that the child would be placed in a guardianship with the maternal grandmother with visitation rights to the father. In February 2010, the court granted a continuance, as the parties were trying to reach a resolution.

By April 2010, it became clear the father would not agree to a guardianship with visitation rights, and the State filed its petition to terminate the father's parental rights. Caseworkers, including the child's therapist, and the guardian ad litem recommended termination of the father's parental rights if a guardianship/visitation agreement could be not established. Following a hearing over two days in June and July 2010, the juvenile court entered its order terminating the father's parental rights pursuant to Iowa Code sections 232.116(1)(e) and (f) (2009). The father appeals.

II. Standard of Review.

We review termination proceedings de novo. *In re Z.H.*, 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). Although we are not bound by them, we give weight to the district court's findings of fact, especially when considering the credibility of witnesses. Iowa R. App. P. 6.904(3)(g); *In re M.M.S.*, 502 N.W.2d 4, 5 (Iowa 1993). 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). The State has the burden of proving the grounds for termination by clear

and convincing evidence. *In re P.L.*, 778 N.W.2d 33, 34, 39 (Iowa 2010); *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006).

III. Clear and Convincing Evidence.

The father contends clear and convincing evidence does not support termination under Iowa Code sections 232.116(1)(e) or (f) (2009). We may affirm the termination if facts support the termination of the father's parental rights under any of the sections cited by the juvenile court. See *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). We focus our analysis on appeal on section 232.116(1)(e). Termination is appropriate under that section where the State has proved the following:

- (1) The child has been adjudicated CINA.
- (2) The child has been removed from the physical custody of the parent for a period of at least six consecutive months.
- (3) There is clear and convincing evidence that the parent has not maintained significant and meaningful contact with the child during the previous six consecutive months and has made no reasonable effort to resume care of the child despite being given the opportunity to do so.

Iowa Code § 232.116(1)(e). There is no dispute the first two elements have been proved. Our inquiry therefore focuses on whether there is clear and convincing evidence father has not maintained significant and meaningful contact with the child during the previous six consecutive months and has made no reasonable effort to resume care of the child despite being given the opportunity to do so. See *id.*

We acknowledge the father's efforts since his release from prison to maintain visitation with the child and participate in these proceedings. He also testified at trial that he has made efforts to stop having violent relationships with

women. However, upon our de novo review of the record, we conclude the statutory grounds under section 232.116(1)(e) have been met.

We share some of the same concern noted by the district court in its assessment that it was “convinced that the father has not taken the necessary preparatory steps to ready himself to address the grave attachment and anxiety mental health concerns that would be present upon the reality of one more massive disruption in the child’s life.” As the court stated:

The father has undoubtedly shown an interest in the child. He has continued with consistent visitation with the child, and he has tried to maintain a place of importance in the child’s life since he was released from prison in late December 2008. But the Court notes that the term “significant and meaningful contact” as defined in this statutory subsection includes a requirement that a parent put forth “a genuine effort to complete the responsibilities prescribed in the case permanency plan.” This is not one factor as a part of a balancing test, but it appears to be one of several required parts that must be met in order to meet the overall “significant and meaningful contact” standard. The State has proven by clear and convincing evidence that the father did not put forth a genuine effort to complete case plan requirements.

First, from this record, the father appears not to have cooperated with the ICPC review in 2009 in the Kansas City area. He didn’t complete his portion of the paperwork, and it appears that a report as to him as possible placement was never completed. Second, he appears to have engaged in very limited therapy or rehabilitative activity. There is no record that he has addressed issues of attachment and anxiety in children like D.W., or how he would address that with D.W. . . . He did not complete parenting classes. For these reasons, the Court concludes that the statutory ground has been met by the State by clear and convincing evidence.

We agree. Section 232.116(1)(e) includes but is not limited to the affirmative assumption by the parents of the duties encompassed by the role of being a parent. See Iowa Code § 232.116(1)(e)(3); *In re A.J.*, 553 N.W.2d 909, 911-12 (Iowa Ct. App. 1996), *overruled on other grounds by In re P.L.*, 778

N.W.2d at 39. Where the father failed to put forth a genuine effort to complete the responsibilities prescribed in the case permanency plan, it follows that the father has not put himself in a position to safely and effectively care for the child. See Iowa Code § 232.116(1)(e)(3). Clear and convincing evidence supports termination of the father's parental rights.

IV. Best Interests.

The father contends termination is not in the best interests of the child. This claim implicates our analysis under section 232.116(2). Even if a statutory ground for termination is met, a decision to terminate must still be in the best interests of a child after a review of Iowa Code section 232.116(2). *P.L.*, 778 N.W.2d at 37. In considering a child's interests, "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).

In seeking out those best interests, we look to the child's long-range as well as immediate interests. This requires considering what the future holds for the child if returned to the parents. When making this decision, we look to the parents' past performance because it may indicate the quality of care the parent is capable of providing in the future.

J.E., 723 N.W.2d at 798 (quoting *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997)).

The father has been involved with DHS on and off since 2005. The father has a criminal history, including convictions for violent crimes. He was in prison for the first nine months of these CINA proceedings. The father's incarceration resulted from a lifestyle chosen in preference to, and at the expense of, a relationship with the child. *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993). Upon his

release, extensive services were offered to him, and the case plan requirements were clear.

Unfortunately, the father failed to take full advantage of these services and complete the case plan requirements. He has not attended therapy or parenting classes in more than a year. The father claims he is able to parent the child and that she could be returned to his care immediately; however, the record indicates that the father has two other older children that have never been in his custody and he has no experience being the primary caregiver for this child. As the court stated:

The emotional needs of the child are best met by the maternal grandmother. She was there for D.W. during the first CINA case when D.W. was an infant. She was there for D.W. in March 2008 when D.W. was removed from her mother's custody, and the father was incarcerated and unavailable for the vital first nine months of this CINA case. It appears that even when D.W. was in her mother's custody, the maternal grandmother was serving as a primary parental figure.

Additionally, the Court has concern regarding safety of the child if she were permanently placed in the care of her father given the violent conviction from August 2007 and all circumstances surrounding it. Ultimately the Court concludes that the long-term nurturing and growth of this little girl—who is about ready to turn six years old—those interests are best met by the only consistent and stable parent figure that has always been there for her.

We find it is unlikely the father will be able to safely and effectively parent the child now or in the near future. Placement of the child with the father would be contrary to the child's welfare. Applying the factors in section 232.116(2), we conclude termination of the father's parental rights is in the child's best interests. See *P.L.*, 778 N.W.2d at 37 (outlining a best-interests analysis).

V. Factors Weighing Against Termination.

Lastly, the father contends his parental rights should not be terminated because the child is in the custody of relatives and due to the closeness of the parent-child relationship. Iowa Code section 232.116(3) lists factors weighing against termination including where “[a] relative has legal custody of the child” and presence of evidence “that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.” Iowa Code § 232.116(3)(a), (c). The factors weighing against 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).

In this case, we find that the father’s testimony and past behavior indicates that he remains resistant to a guardianship of the child with the maternal grandmother. Without some level of cooperation or approval of a guardianship arrangement by the father, it is unlikely that such an arrangement would be successful. Further, any bond the father has with the child cannot come before “the appropriate sense of safety and finality and permanency” the child needs. We therefore conclude that any applicable factors listed in section 232.116(3) are not sufficient to save this parent-child relationship.

Having considered all issues raised on appeal, we affirm termination of the father’s parental rights.

AFFIRMED.