

IN THE COURT OF APPEALS OF IOWA

No. 1-070 / 10-1942
Filed February 23, 2011

**IN THE INTEREST OF E.J.,
Minor Child,**

C.F., Father,
Appellant,

M.J., Mother,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Mark J. Eveloff, Judge.

A mother and father appeal separately from the order terminating their parental rights. **AFFIRMED.**

John P. Heithoff, Council Bluffs, for appellant father.

Mandy L. Whiddon, Council Bluffs, for appellant mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Matthew Wilber, County Attorney, and Dawn Landon, Assistant County Attorney, for appellee State.

Tricia McSorley and Sara Thalman, Council Bluffs, for minor child.

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

MANSFIELD, J.

Mandy and Chad separately appeal from a district court order terminating their parental rights to their son, E.J. (born November 2009). Mandy contends the State did not make reasonable reunification efforts. Both parents also challenge whether the State proved the statutory grounds for termination by clear and convincing evidence and whether termination was in the best interests of the child. For the reasons set forth herein, we affirm.

I. Background Facts and Proceedings

On February 6, 2010, the Council Bluffs Police Department received a call “for a reported disturbance with a child involved.” The call came from Mandy’s parents’ home where Mandy was living with her infant son, E.J. When the officers arrived, Mandy’s father reported that Mandy had made comments about wanting to place E.J. (then three months old) outside to freeze. Mandy’s parents also reported that Mandy had made several statements about giving E.J. away or putting him up for adoption. E.J. was observed to be wearing a sling. Mandy said E.J. had broken his collar bone two and a half weeks before when he rolled from the twin bed in which he was sleeping and fell to the floor.

The officers decided to take E.J. into protective custody. Two days later, E.J. was placed into family foster care, where he has remained since. A child protective assessment was completed by the Iowa Department of Human Services (DHS) and determined to be founded for denial of critical care.

Following E.J.'s removal, Mandy was initially uncertain whether she wanted to work towards reunification or have E.J. adopted.¹ Mandy eventually decided to participate in services and work towards reunification.

Mandy has an IQ of 66 and received special education services when she was in school. Accordingly, instead of group parenting classes, DHS provided Mandy with one-on-one parenting skill sessions and individualized child development sessions. DHS also made available several assistance programs to help with food, transportation, budgeting, and employment. However, Mandy showed little interest and generally declined to avail herself of these programs.

Mandy was also offered supervised visitation with E.J. four days a week, but was inconsistent in her attendance and often arrived late or asked to end the visits early. The foster mother provided Mandy with "open" visitation whereby Mandy could arrange additional visits at any time, but Mandy never used this opportunity.

When this case was initiated, Chad was identified as a possible father for E.J. But when DHS made contact with Chad, he refused to participate in visitation or any services until paternity was established.

On March 31, 2010, E.J. was adjudicated a child in need of assistance under Iowa Code sections 232.2(6)(b) and (c)(2) (2009). The court ordered Mandy to continue to participate in parenting services and visitation at DHS's discretion.

¹ According to the foster mother, after Mandy's second visit with E.J., she asked, "Would you adopt my baby?"

On May 26, 2010, a family safety plan was approved allowing Mandy's parents to supervise visits.² DHS then authorized Mandy to have visitation at any time as long as the foster mother or her parents could supervise. Despite having essentially unlimited supervised visitation opportunities, Mandy did not take advantage of the situation. Mandy never arranged for weekend visits, remained inconsistent in her attendance at scheduled visits, and continued to arrive late or end visits early. In addition, during visits, Mandy often required prompting to ensure E.J.'s needs were met, such as cleaning his mouth after feedings and using wipes when changing his diaper. Mandy also struggled to follow a regular nap schedule for E.J. Mandy was shown various exercises for E.J. to promote his learning how to crawl and walk; however, Mandy often refused to follow direction and generally just held E.J.

On June 21, 2010, paternity testing confirmed Chad was E.J.'s father. The following day, DHS wrote Chad a letter offering to establish services. Chad did not respond to this letter. Chad never participated in any services or visits with E.J. On August 21, 2010, Chad was arrested and charged with first-degree murder. At the time of the termination hearing, Chad was still incarcerated awaiting trial.

On September 3, 2010, the State filed a petition to terminate parental rights. Thereafter, Mandy increased the number and duration of her visits with E.J., but her visitation schedule continued to lack consistency.

The termination petition came to a hearing on October 12, 2010. By then, Mandy had only attended 84 of the 159 scheduled visits, and had arrived late or

² Mandy continues to live with her parents.

ended visits early 19 times. The DHS caseworker and the family consultant both testified that when Mandy was approached about the importance of visits, she became upset and stated that she “had a life too.” The DHS caseworker testified, “My recommendation of termination of parental rights is not due to Mandy’s IQ. It’s definitely due to her lack of interest and initiative and lack of follow through with the visitation and things we’ve offered.”

Mandy also testified at the hearing. She stated that she had resisted some services because she wanted to teach her son skills herself. She also said that she took E.J. back early from visits “[b]ecause I wasn’t really thinking of him fully. I was worried about hanging out with friends and stuff, and—or sometimes looking for a job.” Mandy also admitted that as recently as July 18, she had told the foster mother she did not want to be E.J.’s mother.

Mandy’s mother testified at the hearing that Mandy has made progress in parenting, and added that she would be willing to serve as E.J.’s guardian but not to adopt E.J.

On November 17, 2010, the district court filed an order terminating Mandy’s parental rights under Iowa Code sections 232.116(1)(d), (h), and (i), and Chad’s parental rights under sections 232.116(1)(b), (d), (e), (h), and (i). Mandy and Chad separately appeal.³

II. Standard of Review

We review the termination of parental rights *de novo*. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). Although we give weight to the district court’s

³ The State’s original brief addressed only Chad’s appeal. We grant the State’s motion to file an amended brief.

factual findings, we are not bound by them. *Id.* Our primary concern is the best interests of the child. *Id.*

III. Analysis

A. Reasonable Efforts at Reunification

Mandy initially argues the State did not make reasonable efforts to reunify her with E.J. The State has an obligation to make reasonable efforts towards reunification. Iowa Code §§ 232.102(7), 232.102(10)(a) (setting forth reasonable efforts). However, “a parent has an equal obligation to demand other, different, or additional services prior to a permanency or termination hearing.” *In re A.A.G.*, 708 N.W.2d 85, 91 (Iowa Ct. App. 2005). If a parent fails to object to the services provided, then the issue is not preserved for appellate review. *Id.*

Mandy never requested additional services and has not stated what additional services she should have received. Rather, her own testimony at the termination hearing reveals that she was satisfied with the services being provided:

Q. Do you feel like you’ve been offered enough services to become a better parent from DHS? A. Yes, I would have to say.

Q. Pardon? A. I would have to say yes.

Q. Do you feel like the services offered have been helpful to you? A. Yes.

....

Q. [Y]ou’ve testified that you were happy with the services that were offered to you? A. Yeah.

Accordingly, we find Mandy has not preserved this claim for our review.

Even if we assume error was preserved, “the reasonable efforts requirement is not viewed as a strict substantive requirement of termination.” *In re C.B.*, 611 N.W.2d 489, 493 (Iowa 2000). Rather, “[t]he State must show

reasonable efforts as a part of its ultimate proof the child cannot be safely returned to the care of the parent.” *Id.* For the reasons addressed in the next section, we find the State met its burden showing E.J. cannot be returned to Mandy’s care.

Also, even if we construe Mandy’s argument on appeal as one that she should have been given more time to work toward reunification, see Iowa Code §§ 232.104(2)(b), 232.117(5) (providing for a six month permanency extension), she raised no such argument below, and therefore waived it. *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003); see also *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994) (“There is no indication in the record this issue was raised in the juvenile court. As a general rule, an issue not presented in the juvenile court may not be raised for the first time on appeal.”).

B. Statutory Grounds for Termination

Mandy’s parental rights were terminated under Iowa Code sections 232.116(1)(d), (h), and (i), while Chad’s parental rights were terminated under sections 232.116(1)(b), (d), (e), (h), and (i). “When the juvenile court terminates parental rights on more than one statutory ground, we need only find grounds to terminate under one of the sections cited by the juvenile court to affirm.” *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). In this case, we find termination of both Mandy and Chad’s parental rights was proper under section 232.116(1)(h), which requires the following to have occurred:

- (1) The child is three years of age or younger.
- (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
- (3) The child has been removed from the physical custody of the child’s parents for at least six months of the last twelve months,

or for the last six consecutive months and any trial period at home has been less than thirty days.

- (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

Mandy and Chad only dispute whether there is clear and convincing evidence showing E.J. cannot be returned to either of their custody.

Mandy has been offered significant one-on-one parenting services, but she has made little progress towards meeting E.J.'s daily needs. She has only attended approximately half of her scheduled visits, and often arrives late or ends visits early. Further, when she does have a visit, she continues to need constant prompting and supervision while caring for E.J. In addition, Mandy has shown little interest in other services that were offered, and is currently unemployed. Although Mandy made some improvements following the filing of the termination petition, and no one disputes her affection for E.J., she is still not in a position to have E.J. placed in her care. *C.B.*, 611 N.W.2d at 495 (holding time is a critical element and a parent cannot wait until the eve of termination to express an interest in parenting).

Chad is also not in a position to have E.J. placed into his care. Chad is incarcerated and awaiting trial for a first-degree murder charge. Chad has never participated in services or visitation, and has shown no ability or interest in providing care or support for his son.

Accordingly, we find clear and convincing evidence that termination is appropriate under section 232.116(1)(h).

C. Best Interests of the Child

Mandy and Chad also argue that termination is not in E.J.'s best interests. See Iowa Code § 232.116(2); *In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010). In evaluating this issue, the court gives "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.*, 778 N.W.2d at 39.

At the time of the termination hearing, E.J. was less than a year old and had been removed from his parents' care for the majority of his life. E.J. is healthy, adoptable, and in need of permanency. Neither parent has shown the ability to provide for E.J.'s needs or safety. "Children simply cannot wait for responsible parenting. Parenting cannot be turned off and on like a spigot. It must be constant, responsible, and reliable." *In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990). Upon considering the statutory factors, we find termination of Mandy's and Chad's parental rights to be in E.J.'s best interests.

IV. Conclusion

For the foregoing reasons, we affirm the order of the district court terminating the parental rights of Mandy and Chad to E.J.

AFFIRMED.