

IN THE COURT OF APPEALS OF IOWA

No. 1-290 / 11-0396
Filed May 11, 2011

**IN THE INTEREST OF T.D.L.-H.,
Minor Child,**

**C.D.L.-H., Father,
Appellant.**

Appeal from the Iowa District Court for Jackson County, Phillip J. Tabor,
District Associate Judge.

A father appeals from a juvenile court order terminating his parental rights
to a child. **AFFIRMED.**

Stuart G. Hoover of Blair & Fitzsimmons, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, Chris Raker, County Attorney, and Sara Davenport, Assistant
County Attorney, for appellee.

John Kies, Bellevue, for mother.

Mark R. Lawson of Mark Lawson, P.C., Maquoketa, attorney and guardian
ad litem for minor child.

Considered by Doyle, P.J., Danilson, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

Corey is the father, and Joyce the mother, of T.D.L.-H. who was two years of age at the time of a March 2011 termination of parental rights hearing. Following that hearing the juvenile court terminated Corey's parental rights pursuant to Iowa Code sections 232.116(1)(d) (2011) (court has previously adjudicated another child of the same family to be a child in need of assistance (CINA) for physical abuse by act or omission of a parent, circumstance continues to exist despite offer or receipt of services), (h) (child three or younger; adjudicated CINA; removed from physical custody of parents at least last twelve months, or for last six months with any trial period at home less than thirty days; cannot be returned at present time), and (i) (child a CINA based on physical abuse by a parent, the abuse posed significant risk to life of the child or constituted imminent danger to the child, offer or receipt of services would not correct conditions within reasonable period of time). (The order also terminated Joyce's parental rights to T.D.L.-H., and she has not appealed.) Corey appeals. We affirm.

We review termination proceedings de novo. Although we are not bound by them, we give weight to the trial court's findings of fact, especially when considering credibility of witnesses. The primary interest in termination proceedings is the best interests of the child. To support the termination of parental rights, the State must establish the grounds for termination under Iowa Code section 232.116 by clear and convincing evidence.

In re C.B., 611 N.W.2d 489, 492 (Iowa 2000) (citations omitted).

Corey initially asserts the State did not prove that T.D.L.-H. could not be returned to his custody, citing "Iowa Code section 232.116(1)(f) [sic]." This

assignment of error and argument implicates only the fourth element of section 232.116(1)(h). Corey presents no issue, assignment of error, or argument challenging the grounds for termination pursuant to sections 232.116(1)(d) or (i), and we could therefore affirm termination pursuant to those provisions, if otherwise appropriate. See Iowa Rs. App. P. 6.903(2)(c) (requiring an appellant's brief to state the issues presented for review), and 6.903(2)(g)(3) (requiring an appellant's brief to include an argument containing contentions and reasons for the contentions). We nevertheless choose, as a matter of grace, to address briefly the grounds for termination pursuant to section 232.116(1)(h). If the State proved the grounds for termination pursuant to that provision, we may affirm if otherwise appropriate. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999).

Joyce has another son who lived with Joyce, Corey, and T.D.L.-H. Three months before T.D.L.-H.'s birth, Corey whipped that son, then six and one-half years old, with a belt. The beating resulted in injuries to his buttocks and lower back so severe as to leave marks that were still visible several days later. Corey would also at times discipline or punish Joyce's son by forcing him to stay in a "push-up" position so long that the child screamed from pain. The son was removed from Joyce, who was unable or unwilling to protect him from Corey, and was placed in foster care. Corey refused to participate in parenting instruction, believing his discipline of the child to be necessary and appropriate.

T.D.L.-H. was born in November 2008. He was removed from his parents the day after his birth, and placed in the legal custody of the Iowa Department of

Human Services (DHS) for placement in foster care. Concerns included Corey's abuse of Joyce's other son, Joyce's failure to protect that son from Corey, Corey's abusive behavior toward Joyce, Corey's refusal to accept parenting skills instruction, and Corey's refusal to consider non-physical means of discipline. Corey moved from Jackson County, where Joyce remained and her sons were in foster care, to a brother's home in the Iowa City-Coralville area.

T.D.L.-H. was adjudicated a CINA in January 2009, pursuant to Iowa Code sections 232.2(6)(b) and (c)(2). He remained in DHS custody and foster care through ensuing dispositional, review, and permanency hearings. In mid-November 2009 T.D.L.-H. was placed in Joyce's home for a trial home visit. In mid-December 2009 the juvenile court ordered legal custody of T.D.L.-H. placed with Joyce subject to DHS supervision, and that Corey have supervised visitation with him. Up until then, that is for the first year of T.D.L.-H.'s life, Corey had had very little contact with him.

In July 2010 Joyce's older son was returned to her custody. Three days later that eight-and-one-half-year-old son reported to the police that Joyce's most recent boyfriend was smoking marijuana in the presence of himself and T.D.L.-H. T.D.L.-H. and the other son were moved from Joyce and placed in DHS custody and foster care. In late July the juvenile court confirmed T.D.L.-H.'s removal and scheduled a review hearing for late October 2010.

Until July-August 2010 the case plan had been to reunify T.D.L.-H. with Joyce. By then, however, Joyce's continuing associations and relationship with males who used drugs and others with significant criminal histories suggested

such reunification would probably not be possible. By then Corey had been exercising appropriate visitations with T.D.L.-H. on about one-half of the occasions scheduled for such visitations and had been receiving some informal parenting instruction. It appeared that it might eventually be possible to place T.D.L.-H. in Corey's custody. On August 19, 2010, T.D.L.-H. began a trial home visit with Corey.

By this time Corey had developed a relationship with a girlfriend. Just over two weeks after T.D.L.-H. began the trial home visit with Corey, Corey was a front seat passenger in a vehicle driven by his girlfriend. T.D.L.-H. and Corey's brother were back-seat passengers. An argument developed between Corey and his girlfriend. Corey punched or slapped her. When she attempted to use her cell phone, Corey broke it. Corey was arrested and charged with domestic abuse assault. T.D.L.-H.'s trial home visit with Corey was ended and he was returned to foster care where he remained at the time of the early March 2011 termination hearing. The charges against Corey were later "dropped."

In October 2010 the permanency goal for T.D.L.-H. was changed from reunification with a parent to termination of Joyce's and Corey's parental rights and adoption. In October 2010 Corey, who had until then declined suggestions that he participate in anger management and batterer's education programs, sought a court order that he attend an anger management program. In December 2010 the State filed a petition seeking termination of parental rights. Following an early March 2011 hearing the juvenile court terminated the parental rights of both parents.

The fourth element of section 232.116(1)(h), that “the child cannot be returned to the custody of [a parent] as provided in section 232.102 at the present time,” is proved when the evidence shows the child cannot be returned to a parent without remaining a CINA. *In re R.R.K.*, 544 N.W.2d 274, 277 (Iowa Ct. App. 1995). The threat of probable harm will justify termination of parental rights, and the perceived harm need not be the one that supported the child’s removal from the home. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992).

From the August 2008 beginning of the case involving Joyce’s older child, concerns regarding Corey’s ability to parent a child properly and appropriately have included his belief in and use of harsh, inappropriate, and harmful discipline or punishment; his inability to control his anger; and his engaging in domestic violence. To his credit, by the time of the termination hearing Corey had engaged in anger management counseling and a batterer’s education program. He stated that he no longer believed in the harsh physical punishment that he had previously engaged in. However, in September 2010, more than two years after his beating of Joyce’s older child, he was still unable to control his anger and engaged in domestic violence as a result of a mere argument with a girlfriend. Further, Corey was unwilling to participate in anger management or the batterer’s education programs until it became clear that T.D.L.-H. could probably not be returned to Joyce and that the case plan would be changed from reunification with a parent to termination of both parents’ parental rights. In the opinion of the DHS case worker, Corey still did not believe he had a problem with domestic violence, and his participation in anger management and batterer’s

education programs was solely to comply with the case plan and appease workers and to avoid termination of his parental rights.

The juvenile court found, in part, that Corey's recent efforts

have been for his benefit, which certainly will eventually benefit any children he has, [but they have] been for his benefit, and he has not internalized those for the benefit of his son, and the child cannot be returned to his care safely at this time.

This finding by the juvenile court is fully supported by the record and we agree with it. We conclude, as the juvenile court did, that at the time of the termination hearing T.D.L.-H. could not be placed with Corey without remaining a CINA by reason of the threat of physical abuse. We conclude the State proved the grounds for termination of Corey's parental rights pursuant to section 232.116(1)(h).

Corey also asserts that the juvenile court erred in finding that a six-month extension of time pursuant to sections 232.117(5) and 232.104(2)(b) would be detrimental to T.D.L.-H. The State asserts that error was not preserved on this issue.

"Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal." *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). "Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal." *In re K.C.*, 660 N.W.2d 29, 39 (Iowa 2003).

It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal. . . . It is not a sensible

exercise of appellate review to analyze facts of an issue without the benefit of a full record or lower court determination[].

Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002) (citations and quotation omitted).

Assuming, without so deciding, that Corey presented the issue of a six-month extension to the juvenile court, it is clear that the juvenile court did not address or rule upon such an issue. “It is well settled that a [rule 1.904(2)] motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication.” *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984). Corey did not file such a motion. We conclude error was not preserved on the issue of a six-month extension, and do not further address it.

AFFIRMED.