

IN THE COURT OF APPEALS OF IOWA

No. 1-344 / 11-0228
Filed May 25, 2011

**IN THE INTEREST OF R.C. and D.R.,
Minor Children,**

**K.M.C., Mother,
Appellant,**

**D.L.R. Jr., Father of D.R.,
Appellant.**

Appeal from the Iowa District Court for Polk County, Carol Egly, District Associate Judge.

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

Joey Hoover of Kragnes & Associates, Des Moines, for appellant mother.

Nathaniel Tagtow, Des Moines, for appellant father of D.R.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Jon Anderson, Assistant County Attorney, for appellee State.

Kimberly Ayotte of the Youth Law Center, Des Moines, for minor children.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

The father of D.R. appeals the termination of his parental rights. 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. Considering the father's current incarceration, his incarceration during the majority of these proceedings, and his failure to complete case plan requirements, 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 any presence of a parent-child bond. We affirm termination of the father's parental rights.

The mother of R.C. and D.R. appealed the termination of her parental rights to her children, but her appeal was not timely filed and was dismissed by our supreme court. The parental rights of any putative father of R.C. were also terminated, and that decision is not being appealed.

I. Background Facts and Proceedings.

D.R. was born in April 2008 in Des Moines, when the mother was seventeen years old and the father was twenty-two years old. In June 2008, the family came to the attention of the Iowa Department of Human Services (DHS) when D.R.'s maternal great-grandmother threw a cup of coffee at the father while he was holding D.R. and the child suffered a first degree burn from the coffee spilled on her back. The mother had a history of violence involving the child's maternal great-grandmother. The incident resulted in a confirmed denial of critical care, failure to provide proper supervision assessment, but the child remained in the parents' care.

When D.R. was four months old, the mother and father separated, and the father moved to Grimes with D.R. Thereafter, the mother had no contact with the child, but made threatening phone calls to the father. The mother also showed up at the father's apartment, despite a no-trespassing notice against her by the apartment complex. DHS established the father's paternity to D.R., and the father continued to access DHS services to gain custody of D.R. DHS closed its case in February 2009, upon determining the father had been able to demonstrate his ability to safely parent the child.

On October 8, 2009, the father was arrested for assaulting his paramour. This was his second arrest for domestic assault; the first was against the mother. He was jailed in the Polk County jail. His mother (D.R.'s paternal grandmother) picked up the child from his apartment and took over the child's care.

On January 14, 2010, the family came to the attention in DHS again when the mother gave birth to R.C. at Broadlawns Medical Center.¹ Immediately prior to the child's birth, the mother was incarcerated in the Polk County jail on drug possession charges. She was released to Broadlawns to deliver R.C., but was soon sent back to the Polk County jail after she assaulted staff at Broadlawns. The court entered a removal order for R.C. when the child was one day old and still in the hospital, as well as D.R. (who was still living with the paternal grandmother due to the father's incarceration). The children were placed in foster care with the same family, where they have remained since.

¹ The paternity to R.C. has not been established, but tests ruled out the father. Parental rights as to any putative father of R.C. were terminated.

On February 22, 2010, the father was transferred from jail to Fort Des Moines, a residential correctional facility. He began to have supervised visitation with D.R. On May 3, 2010, the father was placed back in jail as a result of probation violations. On July 5, 2010, the father was again transferred to Fort Des Moines. However, by that time, the child was thriving in her placement, bonding with her sister and the foster family, and was disappointed and angered by the instability of the father. Understandably, the child reacted negatively when visits resumed with the father. On August 27, 2010, the father escaped from custody and absconded from Fort Des Moines. The father was captured on September 21, 2010, and is now serving the original sentence imposed for the domestic assault charge.

Meanwhile, the mother was released from jail on April 28, 2010, but was arrested again on May 10, 2010, on domestic charges. She remains in jail. She has no relationship with D.R. and has not seen D.R. for over two years since the child was four months old. She has not seen R.C. since the child's birth.

Following a hearing in October 2010, the court entered its order terminating the mother and father's parental rights pursuant to Iowa Code sections 232.116(1)(b), (d), (e), and (h) (2009). The parents now appeal.

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). If a statutory ground for termination exists, termination is in the child's best interests, and no factor weighing against termination exists, we will affirm. *P.L.*, 778 N.W.2d at 39.

III. Parental Rights of the Mother.

The mother's appeal was not timely filed. On April 29, 2011, our supreme court issued an order dismissing the mother's appeal. See Iowa R. App. P. 6.201(1)(b) (2009).

IV. Parental Rights of the Father.

The father contends clear and convincing evidence does not support termination under Iowa Code sections 232.116(1)(b), (d), (e), or (h), alleging he "is scheduled to be discharged from Newton Correctional Facility on March 22, 2011" and "upon his release from prison he would reengage in DHS services and continue to remain actively involved in D.R.'s life." Therefore, the father contends "there is not clear and convincing evidence that D.R. cannot be returned to [his custody] after March 22, 2011."

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) ("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."). We choose to focus our analysis to the merits of challenged ground

section 232.116(1)(h). Termination is appropriate under that section where there is clear and convincing evidence of the following:

- (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.

Iowa Code § 232.116(1)(h). There is no dispute the first three elements have been proved. Our inquiry focuses on whether there is clear and convincing evidence the child cannot be safely returned to the father's custody. *Id.*

We conclude the State proved the child could not be returned to the father's care at the time of termination, or anytime in the reasonably near future. The father has a history of domestic assaults that have not been adequately addressed. He has not successfully completed a batterer's education program per case plan requirements. Nor has he completed attachment assessments per case plan requirements. An attachment assessment was scheduled for August 30, 2010, but the father failed to appear because he was on the run from Fort Des Moines.

The father has been incarcerated throughout most of these proceedings. On February 22, 2010, he was moved to Fort Des Moines and was able to have visitation with D.R. However, on May 3, 2010, the father violated the conditions of his probation and was placed back in the Polk County jail. As the court observed, "Though the father had positively engaged in services, a huge step

backwards occurred when he was jailed again in May.” See *In re M.M.S.*, 502 N.W.2d 4, 7 (Iowa 1993) (“When opportunities for association with a child are few, they become more precious, and the spurning of them more egregious.”).

The father is clearly not available to parent the child at the present time. Although he might be eligible for release in the near future, he provides little confidence that he would be able to parent the child given his history of domestic violence, instability, and denial of critical care. We further note that the father’s incarceration resulted from a lifestyle chosen in preference to, and at the expense of, a relationship with the child. *M.M.S.*, 502 N.W.2d at 8. Even more unfortunate is the fact that the father was a few months from completing his sentence when he absconded from Fort Des Moines in August 2010, over two months prior to the termination hearing.

The father has not put himself in a position to safely and effectively care for the child. Evidence of the parent’s past performance may be indicative of the quality of the future care that parent is capable of providing. See *In re C.B.*, 611 N.W.2d 489, 495 (Iowa 2000). The State has presented clear and convincing evidence to support termination of the father’s parental rights pursuant to section 232.116(1)(h).

The father also argues termination is not in the child’s best interests. Even if a statutory ground for termination is met, a decision to terminate must still be in the best interests of a child after consideration of the factors set forth in Iowa Code section 232.116(2). *P.L.*, 778 N.W.2d at 37. In determining best interests, this court’s 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.” *Id.* Taking these factors into account, we conclude the child’s best interests require termination of the father’s parental rights. The child is an adoptable age and in need of permanency and security. The father is not able to provide for the child’s long-term nurturing and growth. It would be a detriment to the child’s physical, mental, and emotional condition to maintain this parent-child relationship.

Lastly, the father contends his parental rights should not be terminated due to the closeness of the parent-child relationship. Iowa Code section 232.116(3) lists factors weighing against termination, including the 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)(c). The factors weighing against termination in section 232.116(3) are permissive, not mandatory. See *P.L.*, 778 N.W.2d at 38; *J.L.W.*, 570 N.W.2d at 781. 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).

Although we recognize that a bond exists between the father and D.R., that bond has been disrupted, and undoubtedly lessened, by the father’s incarceration and absence in the midst of these proceedings, and the abrupt discontinuation of visitation. As the court observed:

D.R. did have a bond with her father when the Court became involved in 2010 even though she had been left in the care of others and he was in jail. That bond survived until he was released from jail. He immediately began to have supervised contact and it appeared that D.R. would be reunited with the father. However, he

made decisions that resulted in his re-arrest and D.R. was directly hurt. On his second release from custody he worked to reintroduce himself into D.R.'s life. D.R. reacted, most likely in disappointment and anger. By this time she had lived for seven months with her sister and foster parents and to her they had become her family. The foster parents had provided for her daily needs and she had formed a bond with them. It had been almost a year since the father had been the parent meeting her daily needs.

We cannot maintain a relationship where there exists only a possibility that the father will become a responsible parent sometime in the unknown future. Termination of parental rights is in the child's best interests, see Iowa Code § 232.116(2), and no consequential factor weighing against termination in section 232.116(3) requires a different conclusion. We therefore affirm.

AFFIRMED.