IN THE COURT OF APPEALS OF IOWA

No. 1-540 / 11-0710
Filed July 27, 2011

IN THE INTEREST OF S.W.,
Minor Child,

S.Y.H., Mother,
Appellant,

B.L.W., Father,
Appellant.

Appeal from the Iowa District Court for Scott County, John G. Mullen, District Associate Judge.

A mother and father appeal the termination of their parental rights to their child. **AFFIRMED.**

Cheryl Fullenkamp, Davenport, for appellant-mother.

Angela Fritz Reyes, Davenport, for appellant-father.

Patricia Zamora, Davenport, attorney and guardian ad litem for minor child.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Michael Walton, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

Their history of substance abuse, the exposure to sexual abuse, and their overall poor decision-making led the juvenile court to terminate the parental rights of a mother and a biological father[1] to their five-year-old daughter, S.W. The father and mother—who absconded to Wisconsin for nearly two years rather than have S.W. removed from their custody—now challenge the Iowa court's jurisdiction to terminate their rights. They also challenge the statutory grounds for termination.

Because Iowa was S.W.'s home state when the State filed its petition to terminate parental rights, the juvenile court properly assumed jurisdiction under Iowa Code chapter 598B (2009). Further, we find ample evidence supporting termination in our de novo review of the record.

I. Background Facts and Proceedings.

In September 2005, S.W. was born with cocaine in her system.[2] In November 2005, the Iowa Department of Human Services (DHS) had trouble locating the family to check on the welfare of the children. The father later acknowledged that they were in their home hiding from the DHS. The DHS placed S.W. and her four half-siblings[3] in foster care by ex-parte order on November 15, 2005. The juvenile court adjudicated S.W. as a child in need of

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[1] The court also terminated the parental rights of another man who was the girl's legal father by virtue of his marriage to her mother at the time of the girl's birth. He did not contest the termination and does not appeal.

[2] This was not the first time that this mother gave birth to a drug-exposed baby. She previously received services in Illinois after one of her older children tested positive for controlled substances at birth.

[3] These half-siblings were the biological children of S.W.'s mother, but had different fathers.

assistance (CINA) on February 10, 2006, as a result of the parents' substance abuse issues and their failure to protect her from an uncle who is a registered sex offender.[4]

The children remained in foster care from November 2005 until April 2007. The DHS returned the children to the parents on April 6, 2007, for a trial home visit. The DHS discovered in July 2007 that both parents tested positive for crack cocaine and refused treatment. Anticipating the DHS would again petition for removal, the parents left the state with the five children in August 2007. Authorities found the four older siblings within three months,[5] but S.W.'s whereabouts remained unknown until September 2009.

On December 3, 2008, the court dismissed the original petition adjudicating S.W. as a CINA, based on the inability of the DHS to regain custody of the child. The Scott County Attorney's Office charged the parents with felony violation of a custody order and the court issued warrants for their arrest. In the spring of 2009, the parents were arrested and bonded out of jail. After a few months of discussion with the DHS, on September 16, 2009, the father brought S.W. to the Davenport office to show the DHS workers that she was in good health. The child did appear to be well cared for. But the DHS learned from the mother's seventeen-year-old daughter, P.I., that S.W.'s father had sexually

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[4] The DHS had information in 2005 that the mother's brother had sexually abused the mother's oldest daughter, who was by then an adult. In March 2006, the DHS learned that "Uncle Shawn" also molested another daughter and son while they were living at home.

[5] The DHS placed the older daughter in a long-term foster family placement and the older brother in the custody of his father. The mother's parental rights were terminated with respect to the other two children and they were adopted.

abused P.I. during the time of the trial home visit in 2007 and while the family was "on the run."

The DHS obtained an ex parte removal order for S.W. on October 14, 2009. The father attended the hearing and testified that he did not know the location of the mother and S.W. He also denied sexually abusing P.I. On February 15, 2010, the parents turned S.W. over to the adoptive mother of her two other children. On April 14, 2010, the juvenile court again adjudicated S.W. as a CINA, citing concerns about the parents' inability to protect her from sexual abuse. At a dispositional hearing in May 2010, the father said he was willing to participate in sex offender treatment, but declined to admit that he sexually abused P.I. for fear of prosecution.

The mother attended regular visitation with S.W. from February 2010 until June 2010. But in June the mother disappeared. When asked at the termination hearing why she left, the mother explained: "I had a lot of things going on with myself and I felt I couldn't do no good for my daughter if I was going through a lot in myself." The mother returned on November 10, 2010.

In a November 29, 2010, review order the juvenile court concluded that the mother "abandoned the child." Also in the November 29 order, the court noted that the father had maintained consistent visitation with S.W. But the father had "refused or failed" to engage in sex offender treatment, declaring "he has no intention of participating." The court concluded that "[n]either parent is making significant effort to address the adjudicatory harm to reunify with the child."

On January 26, 2011, the State filed a petition to terminate parental rights; a jurisdictional affidavit was attached to the State's petition. The juvenile court held a hearing on April 21, 2011, and issued its order terminating parental rights on May 2, 2011. The mother and biological father separately appeal the termination order.

II. Standard of Review.

We give de novo review to questions of subject matter jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), enacted as Iowa Code chapter 598B. *See In re Guardianship of Deal-Burch*, 759 N.W.2d 341, 343 (Iowa Ct. App. 2008).

We also review orders terminating parental rights orders de novo. *In re P.L.,* 778 N.W.2d 33, 40 (Iowa 2010). The juvenile court's findings of fact do not bind our decision, but should be accorded weight, especially in assessing the credibility of witnesses. *In re D.W*., 791 N.W.2d 703, 706 (Iowa 2010). Our court will uphold an order terminating parental rights if there is clear and convincing evidence of grounds for termination under Iowa Code section 232.116. *Id.* Evidence is "clear and convincing" when there are no "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *Id.*

III. Discussion.

A. Subject matter and personal jurisdiction

We begin with the issue of the juvenile court's subject matter jurisdiction under the UCCJEA. Both parents argue on appeal that the juvenile court erred in finding it had subject matter jurisdiction over the CINA and termination of parental

rights proceedings because "Iowa was not the children's home state at the time of the initial custody determination and removal in February 2010." The parents claim that S.W. lived in Wisconsin with her father from August 2007 until February 2010, so Iowa was not her "home state" for jurisdictional purposes under Iowa Code chapter 598B.[6] The parents did not ask the juvenile court to rule on these issues. But we recognize that subject matter jurisdiction may be raised at any time. *In re Jorgensen*, 627 N.W.2d 550, 554 (Iowa 2001).

The State rebuffs the parents' argument, asserting that the family was under the jurisdiction of the juvenile court when the parents took the children out of Iowa to avoid having them removed by the DHS. The State points out that the December 2008 CINA petition was dismissed only because the DHS could not find S.W. and her parents. The State argues: "For the parents now to argue that their illegal action in absconding to Wisconsin with [S.W.] should now prevent the Iowa courts from having jurisdiction would result in their benefitting from their own wrongdoing."

The State further contends that even if Iowa was not S.W.'s home state, section 598B.201(1)(b) gives jurisdiction to Iowa because Wisconsin courts did not take jurisdiction, the child and parents have significant connections to Iowa, and substantial evidence is available here regarding the child's care and protection. In support of this contention, the State cites *In re E.A.*, 552 N.W.2d 135 (Iowa 1996).

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[6] "Home state" means a state in which a child lived with a parent or a person acting as a parent for "at least six consecutive months immediately before the commencement of a child-custody proceeding." Iowa Code § 598B.102(7).

E.A. interpreted a provision of the predecessor to the UCCJEA. *E.A.*, 552 N.W.2d at 138-39. Applying Iowa Code section 598A.3(1)(b) (1995) (a provision of the Uniform Child Custody Jurisdiction Act, which was repealed in 1999 and replaced by chapter 598B), the supreme court decided that the Iowa juvenile court had jurisdiction over a child in need of assistance adjudication despite the fact that Ohio was the home state of the children. *Id*. Section 598A.3(1)(b) allowed a state to assume jurisdiction, notwithstanding its lack of home state status if

> it is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents or the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships.

The language of section 598B.201(1) (2009) is similar, but not identical, to its forerunner. Significantly, the "best interest" reference does not appear in the UCCJEA.[7] The new section provides that an Iowa court has jurisdiction to make a child custody determination if

> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
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> (b) A court of another state does not have jurisdiction under paragraph "a", or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum . . . and both of the following apply:

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[7] The comments to the UCCJEA explain that the "best interest" language was eliminated because it created confusion between the jurisdictional issue and the substantive custody determination. Unif. Child Custody Jurisdiction & Enforcement Act § 201 comments, 9 ULA 251 (1997).

> (1) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
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> (2) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

Iowa Code § 598B.201(1).

We agree with the State that the juvenile court had subject matter jurisdiction under section 598B.201(1), but we take a different route to our conclusion. The first step in our analysis is to pinpoint "the date of the commencement of the proceeding" as that phrase is used in section 598B.201(1). Commencement is defined in the UCCJEA as "the filing of the first pleading in a proceeding." Iowa Code § 598B.102(5). The definition of a child custody proceeding includes proceedings for the termination of parental rights. Iowa Code § 598B.102(4).

The parents appear to argue that the date of the commencement of the proceeding would be February 15, 2010, when the mother returned S.W. to Iowa, or April 14, 2010, when the juvenile court adjudicated her as a CINA for the second time. We disagree that these are the key dates.

A proceeding for termination of the parent-child relationship is commenced by the filing of petition by the county attorney or other authorized party. *See* Iowa Code § 232.111. The termination proceeding is related to the CINA adjudication, but commences with a separate pleading. *See* Iowa Code § 598B.102(5); *see also In re J.D.B.*, 584 N.W.2d 577, 581 (Iowa Ct. App. 1998) (holding that parent cannot challenge deficiencies in the CINA proceedings in the termination

appeal). The termination proceedings being challenged in this appeal commenced with the filing of the State's petition on January 26, 2011. S.W. lived in Iowa for more than six consecutive months before that filing date. Accordingly, her home state was Iowa on the date of the commencement of the termination proceedings. *See* Iowa Code § 598B.102(7). The juvenile court had jurisdiction under section 598B.201(1)(a).

To the extent that the parents are contesting personal jurisdiction, we find that issue waived. The parents received notice of the termination proceedings and participated in them. Their actions were sufficient to confer personal jurisdiction. *See In re Guardianship of Cerven*, 334 N.W.2d 337, 339 (Iowa Ct. App. 1983) (holding personal jurisdiction may be conferred upon the court by consent of the parties and consent "may take the form of a general appearance and participation in the proceedings").

B. Statutory grounds for termination

The mother and father both contest the juvenile court's conclusion that the State established grounds for termination by clear and convincing evidence. The juvenile court terminated parental rights pursuant to six subsections: 232.116(b), (d), (e), (f), (g) and (i). To affirm, we need only find termination appropriate on one of those grounds. *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.").

In the mother's case, we find clear and convincing evidence that she abandoned S.W. within the meaning of section 232.116(1)(b). Abandonment does not require the parent to be absent from the child's life for any specific length of time, but the evidence must show both an intent to relinquish the rights and privileges of parenthood and acts that reveal that intent. Iowa Code § 232.2(1).

On June 4, 2010, while S.W. was in foster care, the mother left the Davenport area and had no contact with her daughter until mid-November 2010. The mother also did not notify the DHS workers of her whereabouts. The mother testified that she was working on her own issues during those five months. She acknowledged in her testimony that it is not acceptable for parents to limit their care-giving to times when it is convenient for them. We agree with the juvenile court's conclusion that the mother abandoned her daughter by disappearing for more than five months. *See In re D.M.*, 516 N.W.2d 888, 892 (Iowa 1994) (finding mother abandoned children when she was out of contact for nearly a year despite her insistence she had no intent to do so).

In the case of both parents, we find termination was proper under section 232.116(1)(d). That provision authorizes termination where the State proves by clear and convincing evidence the following:

> (1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.
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> (2) Subsequent 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.

Despite the parents' protestations, the circumstances that led to the CINA adjudication continue to exist. The mother claims to have maintained sobriety for the past two years. The juvenile court was skeptical, noting that it had only the mother's word to substantiate that claim. The juvenile court was certain that S.W. would be "subject to a high risk of harm in the nature of physical abuse, sexual abuse, neglect, and failure of supervision." We agree.

Like the juvenile court, we are most troubled by the mother's failure to understand the danger that she creates for S.W. by exposing her to sex offenders. The mother testified that she has accepted that the father molested her older daughter P.I., but that he would still be a proper caretaker for S.W. The mother did not believe that the father would molest S.W. "because that is his daughter and [P.I.] is not his daughter." Whether the mother is naive or chooses to turn a blind eye, in either case, she does not show the potential for protecting S.W. from predators. Her older children fell victim to both her husband and her brother. The juvenile court was reasonable in believing that S.W. would face the same fate if she were returned to her mother's care.

As for the father, he registered no progress in addressing his substance abuse or sexual offending. He admitted he was not receiving substance abuse treatment, despite a recommendation from the DHS that he do so. He testified he did not need treatment: "Am I high? My UA's ain't dirty." He also did not follow up on a DHS directive to receive a sex offender evaluation. He expressed

that he "shouldn't have to do an evaluation" because he "ain't never been charged with anything." When asked at the termination hearing if he wanted S.W. to be reunified with him, he said "no" that he "just don't want her out of the system." He clarified that by "system," he meant out of the family.

Neither parent has been able to correct the deficiencies that led to S.W.'s adjudication as a CINA. The evidence satisfied section 232.116(1)(d). Because neither parent raises a claim under sections 232.116(2) or (3), we will not analyze those issues here. Termination was the proper course.

AFFIRMED.