

IN THE COURT OF APPEALS OF IOWA

No. 1-560 / 11-0704
Filed August 10, 2011

**IN THE INTEREST OF A.Y.,
Minor Child,**

**Z.D.Y., Father,
Appellant.**

Appeal from the Iowa District Court for Shelby County, Susan Larson Christensen, District Associate Judge.

A father appeals from the order terminating his parental rights.

AFFIRMED.

William T. Early, Harlan, for appellant father.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, Marcus Gross Jr., County Attorney, and Todd Argotsinger, Assistant County Attorney, for appellee State.

Karen Mailander, Anita, for minor child.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

DOYLE, J.

A father appeals from the order terminating his parental rights. He contends the juvenile court erred in failing to disqualify itself. Additionally, he argues the State failed to prove the grounds for termination by clear and convincing evidence. Upon our de novo review, we affirm.

I. Background Facts and Proceedings.

Z.Y. is the father of A.Y., born in October 2004. At the time of A.Y.'s birth, the father lived with his mother (the child's paternal grandmother) in Omaha, Nebraska. A.Y.'s mother, J.I., suffered from Crohn's Disease and requested the father care for the child. The child began living with the father and the grandmother a week after her birth, though the child regularly visited her mother. The grandmother was generally the child's primary caregiver.

In November 2005, the father was sentenced to prison for possession of methamphetamine and theft. The grandmother continued to care for the child while the father was incarcerated, and two or three times a month she would take the child to visit the father in prison. The father was released in June or July 2006, and he returned to live at the grandmother's home with the grandmother and child.

In January 2007, the father was incarcerated in the Pottawattamie County Jail after being convicted of theft in the second degree and felony eluding. The child continued in her mother's and her grandmother's care. The father did not have visitation with the child during his incarceration at the county jail, but he did have phone contact with the child. He was released from jail in April 2007, but was thereafter immediately incarcerated in the Omaha Correctional Facility in

Lincoln, Nebraska, for a parole violation. He was released from that facility in October 2007. During that time, he saw the child twice.

After his release, the father returned to living at the grandmother's home. He obtained employment and helped support the child. He began dating J.H. in 2008, who had a one-year-old son, A.W. A.Y.'s mother passed away in April 2008.

In December 2008, the father was charged with third-degree burglary. From December 15, 2008, to January 23, 2009, the father was again incarcerated. After his release, he and A.Y. moved into J.H.'s parents' home in Harlan, Iowa, with J.H.'s parents, J.H., and J.H.'s son. The father asked J.H. to care for A.Y. if he were to be imprisoned on the burglary charge, and he printed some guardianship forms from the Internet and signed the forms before a notary. The forms were never filed in the district court. The father and J.H. later had a child together, B.Y., born in 2009.¹

The father was ultimately sentenced to prison in April 2009 for third-degree burglary, and A.Y. remained in J.H.'s care. Shortly thereafter, A.Y. began to exhibit difficult behaviors. J.H. testified:

It was fine at first. And then like just after a while [A.Y.] just like started having really bad tantrums. And [A.Y.] and my son wasn't getting along. And I caught [A.Y.] with a blanket over my daughter's face because she was crying and she wouldn't stop and it was bothering [A.Y.]. And [A.Y.] had bit my son's leg to where it was almost bleeding I caught [A.Y.] with knives next to the bed because she said she would stab somebody. From there it just got worse.

¹ A.W. and B.Y. are not at issue in this appeal.

J.H. contacted a social worker, and she received services to help deal with A.Y.'s behaviors and disciplining the child. A.Y. also saw a therapist. However, A.Y.'s behaviors did not improve. The social worker advised J.H. to contact the Iowa Department of Human Services (Department).

On August 28, 2009, the Department reported J.H. had contacted it "stating that she could no longer care for [A.Y.] due to her difficult behaviors and needed her removed from the home." A.Y. was then voluntarily placed in family foster care. J.H. advised the court that the father did not want A.Y. placed with the paternal grandmother because she "was on drugs." J.H. stated that the grandmother's paramour also used drugs and A.Y. had told J.H. the paramour had touched her private parts. On October 2, 2009, A.Y. was adjudicated a child in need of assistance (CINA).

The foster family initially reported that A.Y. demonstrated negative behaviors in the foster home. A.Y. did not follow directions, saying "no" when told to do something and having temper tantrums when she did not get her way. A.Y. would growl and hit herself. She could not be taken out in public the first few weeks she was with the foster parents because "her behavior was atrocious." The foster parents stated that when a person would make a reference towards them, A.Y. would "defiantly remind [the person] that we were not her parents—'mommy's in heaven and my daddy's in prison.' This had become her mantra, as she had not been in the same household for . . . any length of time."

The child initially had weekly visitation with J.H. and J.H.'s children. However, J.H. advised she wished to dissolve the "guardianship." J.H. then stopped participating in visitation, her last visit taking place in December 2009.

The child had weekly visitation with the grandmother, and the grandmother's home was considered for the child's placement. However, the grandmother's paramour tested positive for methamphetamine twice. The Department also reported that both the grandmother and her paramour lacked consistency with the drug screens it requested. The grandmother stated that the father was due to be released in 2013, although the father believed he would be released earlier.

The child began seeing a play therapist in January 2010. The foster mother reported to the therapist that A.Y. "tells lies, often argues with adults, often loses her temper, often defies adults' requests and blames others for her misbehavior." The therapist diagnosed A.Y. with reactive attachment disorder, a condition in which young children do not establish healthy bonds with caregivers. A.Y. was also diagnosed with oppositional defiant disorder, along with ruling out posttraumatic stress disorder. The therapist opined that A.Y. "tends to defy adult authority figures as she has not only . . . had numerous caregivers but also has [had] all of her caregivers . . . abandon her by dying or placing her outside of their home." She noted the child "does act out in play therapy her father stealing and going to jail. . . . She also acts out her chaotic life in her home with her father and [J.H.]" A.Y.'s play acting included "[J.H.] smacking and hitting [A.Y.], having [A.Y.'s] nose bleed due to [J.H.] hitting her, being given corporal punishment, impatient and yelling adults, and going to jail for stealing."

By June 2010, the foster parents reported the child had made progress and her negative behaviors were less frequent than when she was first placed, stating their routine and structure "led to [A.Y.] trusting and understanding that

she could be a kid.” A.Y. continued participating in therapy, and she began participating in dance classes and swimming lessons. The child and father exchanged letters while the father was incarcerated.

A permanency hearing was held on June 23, 2010. At that time, the father was still incarcerated with no obvious date in the near future that he might be released. Although the father’s sister (the child’s paternal aunt) was being considered for the child’s placement, the child’s guardian ad litem (GAL) recommended the permanency goal in the case be changed from reunification with the family to adoption by the foster family. The GAL explained:

I find this case to be really quite difficult. . . . We have a five-year-old girl who has some fairly serious mental health diagnoses. She’s been moved six or seven times in her five years of life. . . . [T]he first preferred option for permanency is reunification with the biological parents. That’s not possible in this case. . . . I think that given that [A.Y.’s a reactive attachment disorder] child already, another disruption is only going to make things worse as far as her treatment. [A.Y.’s play therapist’s] report indicates that [A.Y.’s] had loss upon loss upon loss of caretakers. And this would be another one.

The juvenile court agreed with the GAL and changed the permanency goal from reunification with the family to adoption. The court directed the State to file a petition for termination of the father’s parental rights in September 2010, a year after A.Y.’s removal.

In July 2010, the father was released from prison to a residential correctional facility in Council Bluffs, Iowa. While at the facility, the father had weekly contact with A.Y. He attended A.Y.’s play therapy session every other week and had regular supervised visitation on the off weeks. During the play therapy, the family addressed some of the concerns that A.Y. has had in the past

such as the discipline given to her by the father or being left behind. While in the facility, the father missed one play therapy session because he did not have the correct time for the appointment and arrived at the appointment's end. He also did not show up for one visit. He and J.H. resumed their relationship.

In September 2010, a CINA review hearing was held. The Department recommended the State file a petition for termination of the father's parental rights, reporting that "[d]espite [the father's] current involvement in services, he is not in a situation where he could resume care of [A.Y.] at this time, or in the very near future." The Department further noted that "[d]espite her family's involvement, [A.Y.] has made significant bonds with her foster home, where she has been for one year." It was reported that A.Y. continued to thrive in the foster home. A.Y.'s behaviors continued to improve, and A.Y. was doing well in kindergarten. The father requested that he be reunited with A.Y. He stated he planned to move in with J.H. after he was released from the facility and that he wanted to change his life. The court continued the permanency goal of adoption.

In October 2010, the father filed a motion for recusal. The father asserted that because the juvenile court judge assigned to the case had lived next door to the foster parents in the past, for approximately seven years, the judge should recuse herself and allow another judge to proceed in the case. The father stated "I just don't feel I have a fair—it's not a fair advantage to me. I don't know if there's a relationship between the two of them. They lived next door for around seven years." The court denied the father's motion. Although the judge admitted she had lived next to the foster parents a number of years ago, she stated there was absolutely no relationship between her and the foster family. In fact, the

judge stated she had removed the foster father's son from his care because at that time the child needed a lot of therapy and help, a position that would be considered contrary to most people. The judge stated: "I was never invited to [the foster family's] home for a meal nor were they to mine. We were neighbors and purely neighbors. . . . I do not have any concern whatsoever about my ability to be unbiased."

In November 2010, the father was released from the residential correctional facility and moved in with J.H. and her children in Harlan, Iowa. He continued to have visitation with A.Y. However, he missed several play therapy sessions after he was released due to transportation issues. His visitation with A.Y. when it occurred was appropriate, though the child's therapist believed A.Y. saw the father as more of a playmate than an authority figure.

In December 2010, the State filed its petition for termination of the father's parental rights. Hearing on the petition was held in February 2011. The father renewed his motion for recusal, and the court again denied the motion based upon its previous ruling.

At the time of the hearing on the termination petition, the father had been attending NA meetings since the end of January 2011. The father and J.H. had also started attending parenting classes. J.H. had scheduled a psychological evaluation. Other than missing several therapy appointments, the father was generally consistent with his visits with the child.

Nevertheless, the Department recommended the father's parental rights be terminated, stating:

[The father] very clearly loves and care[s] for his daughter and very much would like for her to be reunified with [him]. . . . This is now after [A.Y.] has been in foster care for almost [eighteen] months. Due to the serious concerns with stability in adults as well as [A.Y.'s] mental health and behavioral issues, it would take several months of additional services and [the father] being able to fully understand how his past and current choices have had a serious impact on [A.Y.] for reunification to only possibly occur. Currently, it is not clear as to whether [A.Y.] even could successfully be returned to her father with additional services due to not only her father's history of instability, criminal activities, and drug use, but also [A.Y.'s] own mental health, attachment, bonding, and trust issues. The Department believes that it would be detrimental to [A.Y.'s] overall well-being to disrupt her current placement in attempts to 'see' if reunification could work.

The child's play therapist's summary of A.Y.'s progress was admitted at the hearing. The summary stated:

[A.Y.'s] lies have significantly decreased as she has felt more secure in her foster home. As [A.Y.'s] verbal vocabulary increases and she learns more social skills from school she is able to decrease her blaming others for her behaviors. . . .

[A.Y.] is able to tell me and show me how [J.H.] abused her. [A.Y.] will show me how [J.H.] made her squat in time out with her hands in the air and her knees bent, leaning forward. It resembles something from boot camp. [A.Y.] has been consistent in showing me and now telling me about how [J.H.] would yell at her, slap her across the face, lock her in her room, tell her that her dad told her to "whack me across the head." No child let alone an adult can be this consistent in telling a lie for over a year and a half. . . .

[The therapist] has tried to assist [A.Y.] in telling her father about the abuse by [J.H.] but she freezes up. [The father] told [A.Y.] he would believe her and would not stop loving her or having visits with her if she told him. [A.Y.] refused to tell him anything. . . .

[A.Y.] states she does not want to live with her [aunt] or her [grandmother] or her dad and [J.H.]. [A.Y.] is now able to tell me that she wants to live with her foster parents whom she now calls mom and dad because they take good care of her and she has a real home.

On April 21, 2011, 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 court also again denied the father's motion for recusal. The father now appeals.

II. Discussion.

On appeal, the father contends the juvenile court erred in failing to disqualify itself. Additionally, he argues the State failed to prove the grounds for termination by clear and convincing evidence. We address his arguments in turn.

A. Recusal.

We review the denial of the father's motion to recuse for an abuse of discretion. *State v. Fami*, 325 N.W.2d 107, 110 (Iowa 1982). The father must do more than raise the possibility of judicial bias. See *In re A.B.*, 445 N.W.2d 783, 784 (Iowa 1989) (“[T]o change judicial officers whenever a party claimed there was an appearance of impropriety would cause an unmanageable disruption in the functioning of our judicial system.”). Actual prejudice must be shown before recusal is required. *In re C.W.*, 522 N.W.2d 113, 117 (Iowa Ct. App. 1994).

Here, the judge stated she had no bias against the father and had in fact removed a child from the foster father's care in the past. We conclude the father has not shown actual prejudice and find no abuse of discretion.

B. Grounds for Termination.

We review termination orders de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). We are not bound by the juvenile court's factual findings, but we give weight to them, especially those that involve witness credibility. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006).

“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). Termination is appropriate under section 232.116(1)(f) where:

- (1) The child is four years of age or older.
- (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 twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.
- (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child’s parents as provided in section 232.102.

The father does not dispute the first three elements of this section have been proved. He instead argues there was not clear and convincing evidence A.Y. could not be returned to his care at the time of the termination hearing.

While the law requires a “full measure of patience with troubled parents who attempt to remedy a lack of parenting skills,” this patience has been built into the statutory scheme of chapter 232. *In re C.B.*, 611 N.W.2d 489, 494 (Iowa 2000). The legislature incorporated a twelve-month limitation for children adjudicated CINA aged four and older. Iowa Code § 232.116(1)(f)(2), (3). Our supreme court has stated that “the legislature, in cases meeting the conditions of [the Iowa Code], has made a categorical determination that the needs of a child are promoted by termination of parental rights.” *In re M.W.*, 458 N.W.2d 847, 850 (Iowa 1990) (discussing section 232.116(1)(e)). The public policy of the

state having been legislatively set, we are obligated to heed the statutory time periods for reunification.

Although a close call, we believe the State carried its burden in this case. At the time of the termination hearing, A.Y. had been out of the father's custody for over a year. What's more, the child had developed severe mental health issues associated with her father's and other caregivers' abandonment of her over the years. The child had also described abuse by J.H. that would require additional time for reunification given that the father had renewed his relationship with J.H. and now lives with J.H.

Finally, A.Y.'s needs for stability and permanency should not go unheeded. While we do not doubt the father's love for A.Y. and the child's for him,

[i]t is well-settled law that we cannot deprive a child of permanency after the State has proved a ground for termination under section 232.116(1) by hoping someday a parent will learn to be a parent and be able to provide a stable home for the child.

P.L., 778 N.W.2d at 41. Children are not equipped with pause buttons. "The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987). "At some point, the rights and needs of the child rise above the rights and needs of the parents." *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997), *overruled on other grounds by P.L.*, 778 N.W.2d at 39-40.

We recognize and commend the progress the father has made in attempting to address his long-standing issues with substance abuse. However, the child has been placed with the same foster family for over a year because the

father was incarcerated and his chosen caregiver, J.H., could not care for the child. By all accounts, the child is now bonded with her foster parents. She is finally doing very well, and the foster parents have expressed interest in adopting her. Termination will provide the child with the safety, security, and permanency she deserves. See *P.L.*, 778 N.W.2d at 41.

Upon our de novo review, we conclude there was clear and convincing evidence A.Y. could not be safely returned to the father's care at the time of the termination hearing. We accordingly affirm the juvenile court order terminating the parental rights of the father.

AFFIRMED.