IN THE COURT OF APPEALS OF IOWA

No. 2-112 / 11-2037
Filed February 15, 2012

IN THE INTEREST OF M.D.,
Minor Child,

L.D., Mother,
Appellant,

A.B., Father,
Appellant.

Appeal from the Iowa District Court for Mahaska County, Randy S. DeGeest, District Associate Judge.

A mother and a father separately appeal from a juvenile court order terminating their parental rights to a child. **AFFIRMED ON BOTH APPEALS.**

Michael S. Fisher of Fisher Law Office, Oskaloosa, for appellant-father.

Amber L. Thompson of Stravers Law Firm, Oskaloosa, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Rose Ann Mefford, County Attorney, and Tyler Lee Eason, Assistant County Attorney, for appellee.

Charles Stream, Oskaloosa, attorney and guardian ad litem for minor child.

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

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2012).

MILLER, S.J.

Armando is the father, and Laura the mother, of M.D. who was born in July 2009. M.D. was just over twenty-eight months of age at the time of a December 5, 2011 termination of parental rights hearing. Armando and Laura separately appeal from a December 8, 2011 juvenile court order terminating their parental rights to M.D. We affirm on both appeals.

M.D. came to the attention of the Iowa Department of Human Services (DHS) in August 2010 because of concerns he had been physically abused. Laura, who had earlier lived in Florida with M.D., had left M.D. in the care of a paramour, who was intoxicated. M.D. suffered physical injuries to his scalp and mid-face. Testing revealed that M.D. had been exposed to methamphetamine.[1] M.D. remained in Laura's custody, and services were initiated.

Criminal charges were pending against Laura in Florida. She was required to return to Florida on September 21, 2010. Armando was imprisoned in Florida at that time. Laura voluntarily placed M.D. in family foster care. In October 2010 M.D. was adjudicated a child in need of assistance (CINA) pursuant to Iowa Code section 232.2(6)(c)(2) (2009) (child who has suffered or is imminently likely to suffer harmful effects as result of failure of parents to exercise reasonable degree of care in supervising child). Legal custody of M.D. was transferred to the DHS for purposes of placement in foster care.

Pursuant to a November 2010 dispositional order, and April 2011, July 2011, and August 2011 dispositional review orders, M.D. was continued in DHS

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[1] Laura tested negative for illegal substances.

custody for continued placement in family foster care. On August 30, 2011 the State filed a petition for termination of parental rights. The juvenile court held a combined CINA dispositional review and permanency hearing, and termination of parental rights hearing. Following hearing the court terminated Armando's parental rights pursuant to Iowa Code section 232.116(1)(b) (2011) (desertion), and terminated each parent's parental rights pursuant to sections 232.116(1)(e) (child adjudicated CINA, removed from parents at least six consecutive months, parents have not maintained significant and meaningful contact with child during previous six consecutive months and have made no reasonable efforts to resume care of child despite being given opportunity to do so) and 232.116(1)(h) (child three or younger, adjudicated CINA, removed from parents at least six of last twelve months, and cannot be returned to parents at present time). Armando and Laura separately appeal.

> 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).

Armando and Laura each assert that the State did not prove any of the statutory grounds upon which the juvenile court terminated parental rights. Although the court relied on three separate statutory provisions to terminate Armando's rights, and two separate statutory provisions to terminate Laura's, we need find grounds under only one of those provision as to each parent in order to

affirm the juvenile court if termination is otherwise appropriate. *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995). We choose to focus on section 232.116(1)(h).[2]

Armando and Laura each assert the juvenile court erred in determining M.D. could not be returned to parental custody. This implicates the fourth element of section 232.116(1)(h).[3] That element is proved when the evidence shows the child cannot at the time of the termination hearing be returned to the parent without remaining a CINA. Iowa Code § 232.116(1)(h)(4); *R.R.K.*, 544 N.W.2d at 277. 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.*, 482 N.W.2d 812, 814 (Iowa 1992).

Armando began serving a prison term when Laura was six months pregnant with M.D., about April 2009. His imprisonment was for the manufacture, sale, and delivery of cocaine; fleeing a law enforcement officer; and resisting an officer with violence. Laura had been the victim of domestic abuse by Armando. Armando has a history of unstable relationships, having fathered four other children by three other women, none of whom he has been married to. All of those children are in the custody of their mothers.

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[2] In doing so we pass the question of whether Laura has waived any claim of error with respect to section 232.116(1)(h) by arguing only that M.D. could be placed with Armando. We also note, but need not address whether Armando, by arguing the evidence does not support a finding of *abandonment*, has waived any claim of error concerning the juvenile court's reliance in part on a finding of *desertion*.

[3] Neither parent challenges one or more of the first three elements of section 232.116(1)(h), which were clearly proved and are not subject to reasonable dispute.

In October 2010 Armando became aware of the court proceeding involving M.D. He was released from prison in March 2011. Armando asserts that he had requested contact or communication with M.D., but was frustrated by the DHS's lack of cooperation. As previously noted, he had a history of criminal activity, violence, and unstable relationships. The DHS had recommended he undergo a mental health evaluation, and informed Armando it would seek an InterState Compact home study if and when he established a residence in Florida. At the termination hearing Armando testified he had voluntarily undergone a mental health evaluation in Florida. He had not, however, provided a copy of the results and did not have a copy to provide. Armando acknowledged that until shortly before the termination hearing he had not established an appropriate residence. He had been "living on a couch here and there" among three Florida cities. Armando testified he had established what he believed was an appropriate residence about two weeks before the hearing. According to his testimony he had for that time been living with a male roommate, the male roommate's girlfriend, and the male roommate's two-year-old daughter in a three-bedroom apartment. Armando opined that adding M.D. to this arrangement would be appropriate.

Armando has never had contact with M.D. He has never seen him. Armando did not, however, attend any of the April, July, and August dispositional review hearings, asserting he was financially unable to do so. The evidence shows that he is responsible for paying $1086 per month child support for his

other four children, is in arrears on his support obligation, and finds it necessary to use food stamps to secure food.

Based on the foregoing facts we conclude that at the time of the termination hearing placing M.D. in Armando's custody would subject M.D. to such threat of abuse or neglect as would cause him to remain a CINA. We thus conclude that the State proved by clear and convincing evidence the section 232.116(1)(h) grounds for termination of Armando's parental rights, and affirm on this issue.

In about November 2010 Laura was sentenced to three years imprisonment in Florida. At the termination hearing she testified she had filed a petition for writ of habeas corpus, seeking immediate release, and had a court date later in the month. She frankly acknowledged, however, that at the present time she was unable to have M.D. returned to her custody. Laura testified at the termination hearing that with good behavior her sentence could be reduced to two and one-half years. Somewhat differently, she also testified that every month she could earn, and had been earning, ten days reduction in sentence for good behavior. Her tentative discharge date is April 25, 2013.

We agree with the juvenile court that at the time of the termination hearing M.D. could not be returned to Laura's custody within the meaning of section 232.116(1)(h)(4). We thus conclude the State proved by clear and convincing evidence the section 232.116(1)(h) grounds for termination of her parental rights, and affirm on this issue.

Armando asserts that reasonable efforts were not afforded to allow him to be reunited with M.D. The State asserts error was not preserved on this issue. For two reasons, we agree with the State. First, a parent must inform the juvenile court, not others, of any challenge to the adequacy of services, *In re C.H.*, 652 N.W.2d 144, 148 (Iowa 2002), and any demand for other, different, or additional services must be made before the termination hearing, *In re A.A.G.*, 708 N.W.2d 85, 91 (Iowa Ct. App. 2005). As noted by the State, the record contains no indication that Armando raised the issue of adequacy of visitation or other services with the juvenile court before the termination hearing. Second, "[i]ssue 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, 256 (Iowa 1995), and "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). The juvenile court's termination ruling does not address an issue of reasonable efforts or services, and the record contains no indication that Armando filed a post-ruling motion asking the court to address such an issue.

Armando next asserts: "The Court misinterprets the firm deadline requirements and should have allowed the father additional time to prove his parenting abilities and show that he possessed adequate parenting skills to care for his child." He cites section 232.116(1)(h) but does not, however, in any manner explain how he believes the juvenile court "misinterpret[ed]" the time

frames set forth in that provision. "A parent does not have an unlimited amount of time in which to correct his or her deficiencies." *In re H.L.B.R.*, 567 N.W.2d 675, 677 (Iowa Ct. App. 1997). Our appellate courts have repeatedly followed the principle that statutory time limits should be followed and children not forced to wait for a parent to be able to provide for their care. *In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998). Section 232.116(1)(h) provides a six-month framework within which termination, if otherwise appropriate, should ordinarily be ordered in the case of a child of M.D.'s age. At the time of the termination hearing M.D. had been removed from parental custody for fourteen and one-half months. We find no merit to this claim of juvenile court error.

Armando and Laura each assert that the juvenile court erred in finding termination of parental rights to be in M.D.'s best interest. We disagree.

Because of Armando's history of criminal activity, domestic violence, and serial, unstable relationships, the DHS reasonably wanted the result of a mental health evaluation and a home study before considering whether M.D. could be placed with Armando. Armando first claimed at the termination hearing that he had undergone a mental health evaluation. However, even at that late date he did not provide a copy of the results. At the termination hearing Armando for the first time suggested he had a suitable residence on which a home study might be conducted, but acknowledged he had maintained that residence, shared with three others, for only about two weeks.

Armando has never met, seen, talked to, or written to M.D. There is no evidence that Armando has ever provided any financial, material, or emotional

support for him. Armando obviously lacks any bond with M.D. His lack of any relationship is the product of his own choices, acts, and inactions.

It appears that up to late September 2010, when M.D. was about fourteen months of age, Laura was a reasonably nurturing parent for him and had a healthy bond with him. She has not, however, had any contact with him, other than telephone calls, since mid-October 2010. Those calls have at times been sporadic, and for about two months before the termination hearing there were no such calls. As found by the juvenile court, the bond between mother and child has obviously been diluted by the passage of the fourteen months, the most recent one-half of M.D.'s young life, since their last face-to-face contact. M.D.'s foster mother testified that she is not certain that M.D. is even aware he is talking to his mother during the telephone calls that had occurred.

As noted above, Laura is imprisoned, with a tentative discharge date of April 23, 2013, but may be released somewhat earlier by earning good conduct credits. Further, she hoped to be released by way of a pending habeas corpus proceeding, but at the time of the termination hearing no habeas corpus hearing had yet been held.

M.D. has been in the home and care of his foster parents for fourteen and one-half months. He is closely bonded to his foster parents, is thriving in their care, and is an adoptable child. M.D.'s foster family is committed to providing for his long-term care, but acknowledges that others will decide whether they will be allowed to adopt him.

In determining whether termination of parental rights is in a child's best interest, we apply the statutory factors found in Iowa Code section 232.116(2). *In re P.L.*, 778 N.W.2d 33, 37 (Iowa 2010). We consider the child's safety, long-term nurturing and growth of the child, and the physical, mental, and emotional condition and needs of the child. Iowa Code § 232.116(2); *P.L.*, 778 N.W.2d at 37. M.D. needs security, stability, and a permanent home. At the time of the termination hearing neither parent could presently or within the reasonably foreseeable future provide them. M.D.'s long-term foster family, into which he has become fully integrated, is committed to providing for all of his needs. After considering the statutory factors, we agree with the juvenile court that termination of M.D.'s parents' parental rights is in his best interest.

Laura cites Iowa Code section 232.116(3), and appears to assert that whatever relationship continues to exist between her and M.D. should preclude termination of her parental rights. Based upon the passage of fourteen months since M.D. last saw Laura, which occurred when he was only fourteen and one-half months of age, and as shown by the foster mother's testimony, it appears highly unlikely that any substantial bond continues to exist between them. M.D. is closely bonded to his foster family.

We have carefully reviewed the five statutory exceptions set out in section 232.116(3), and find that none of them should serve to preclude the otherwise appropriate termination of each parent's parental rights in this case.

AFFIRMED ON BOTH APPEALS.