

IN THE COURT OF APPEALS OF IOWA

No. 2-151 / 12-0004
Filed February 29, 2012

**IN THE INTEREST OF C.S., A.S.,
B.S., E.S., and D.S.,
Minor Children,**

R.S., Father,
Appellant.

Appeal from the Iowa District Court for Floyd County, Gregg Rosenblatt,
District Associate Judge.

A father appeals from the order terminating his parental rights to five
children. **AFFIRMED.**

Dylan J. Thomas, Mason City, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, and Normand Klemesrud, County Attorney, for appellee State.

Nicholas Larson of Schroeder & Larson Law Office, Osage, for mother.

Cynthia Schuknecht of Noah, Smith & Schuknecht, P.L.C., Charles City,
attorney and guardian ad litem for minor children.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Randy, the father of C.S., A.S., B.S., E.S., and D.S., appeals from the order terminating his parental rights to the children.¹ He contends the evidence does not support any of the statutory grounds, termination is not in the children's best interest, and the court erred in denying his motion for new trial. We affirm.

I. Background Facts and Proceedings.

Following founded child protective assessments in September 2009, voluntary services were provided to the family by the Department of Human Services and safety plans were put in place. Tara, the mother, voluntarily placed the children with a relative and later in foster care in February 2010 after she became homeless. On the State's application, the court ordered temporary removal of the children to shelter care after Randy did not follow the safety plans, stated he would not cooperate with the department, and had criminal charges pending in Iowa and Minnesota for drug-related matters, assault, and burglary.

The State petitioned to have the children found in need of assistance based on the mother's lack of housing and the father's pending criminal charges and refusal to cooperate with the department. At the hearing in late March 2010, Randy and the guardian ad litem consented to the children's adjudication. The record was kept open for a further hearing on Tara's response. Following a hearing in May 2010, the court adjudicated the children in need of assistance and continued their placement out of the home.

In its dispositional order in July, the court noted,

¹ The mother's parental rights also were terminated, but she did not appeal.

Randy has not participated in services with the Department, except for two visits with his children. He has been belligerent and disrespectful to the Department and the court. There have been concerns regarding physical abuse with Randy and his children, which have been unable to be resolved due to his lack of cooperation. He is currently incarcerated.

The court continued the children's placement out of the home and ordered Randy to contact the department to arrange visitation when he was released from jail in Minnesota.

By the time of the October 2010 review hearing, Randy had been released. He contacted the department after being released on a Friday and asked to visit the children on Monday. That was not enough time to arrange for a visit, and Randy did not provide any contact information. He did not contact the department again until mid-January 2011. At that time Randy was living with his girlfriend and working in a restaurant. He asked for a visit in mid-February 2011, but later called to cancel this visit due to weather. Randy was informed it had been a long time since he had seen his children (his last visit occurred on June 8, 2010) and the children would need permanency very soon. Randy stated he was ready to cooperate with the department so he could have his children placed in his care. The February 2011 review and permanency order noted Randy had started new medication and was seeking care from a psychiatrist. It also noted Randy's limited contact with the children and that a recent phone contact had upset them.

The State petitioned to terminate only Randy's parental rights in early April, alleging termination was proper under Iowa Code section 232.116(1)(b), (d), (e), and (f) (2011).

Randy appeared for the June 22, 2011 review and permanency hearing. He had not had contact with the department since the February 2011 hearing. After reviewing Randy's lack of involvement with the children or the department, the court concluded "the children will likely suffer some emotional impacts if visitations are suddenly started with their father." The State then filed an amended petition to terminate parental rights in late June 2011, adding the mother to the petition.

Randy began visitation in June, having had no visits with his children since his release from incarceration some eight months prior. He had supervised visitation of two to three hours every other week. Because he was on probation in Minnesota, which made frequent travel to Iowa for visitation difficult, he filed a motion for a review hearing, which was held in early September 2011, seeking increased visitation and requesting that his girlfriend, with whom he lives, be approved to supervise the visits. The motion noted the State had denied any increase in visitation because termination was pending. Following a hearing on the requested visitation, the court concluded,

it is not appropriate to radically alter the visitation schedule at this time, and [the court] is concerned that the children being allowed to travel to Minnesota and have an extended day visit with their father may well send "mixed messages" to the children about their potential placement, which may be detrimental to the children. The court also puts emphasis on the recommendation of the children's attorney [and GAL] against altering the present plan of visitation.

The court denied Randy's motion and continued visitation at the discretion of the department.

In mid-October 2011, the petition to terminate both parents parental rights came on for hearing. Prior to the hearing, the Floyd County Sheriff arrested Randy on an outstanding probation revocation warrant.

At the hearing, workers who had supervised Randy's visitation testified his interaction with the children was appropriate and there were no supervision concerns. One noted the children had just begun calling Randy "Dad." Randy testified the time he spent in jail and on probation was "rebuilding" his life. He opined his use of prescribed medication for depression and bipolar disorder and his improved mental health now make it possible for the children to be placed in his care. He contended the lack of contact with his children until June 2011, was because he had his "own battles and demons" to fight. The children's attorney and guardian ad litem recommended termination.

The court concluded, in relevant part:

Randy [] has made some progress in the areas of mental health and re-establishing contact with his children at the eleventh hour. When the petition for termination of his parental rights was filed in April of 2011, Randy, at that time, had essentially abandoned the children. His contact with the children and the department was almost non-existent for many months. Randy had been in jail in Minnesota, and after his release in October 2010, he made little to no effort to resume care of the children.

None of the children could be returned to Randy's care at the time of the termination hearing. Randy had reinitiated visitation with the children only after the second permanency hearing in June of 2011. Randy had had several supervised visits with the four younger children and a visit with [C.S.] about the time of the termination hearing. However, the children were only just re-establishing a relationship with their father. Additionally, Randy's mental health has only recently stabilized, and by his own admission, for many months he was not in a condition to have the children or even be around them. Randy remains on probation in Minnesota, and was facing a revocation hearing in Floyd County. Randy's brief period of progress on the eve of the termination trial

gives insufficient basis to believe that he could sustain this progress in the long term or achieve reunification with the children anytime in the near future.

The court terminated the parental rights of both parents under section 232.116(1)(d), (e), and (f) in its order filed in early December 2011.

In mid-December 2011 Randy filed a motion for new trial, for a stay of proceedings, and for visitation. The court issued its ruling the next day, finding it made no “substantial or material mistakes in fact or errors of law.” It further found and concluded that allowing visitation by Randy pending the outcome of an appeal “would not be appropriate or in the best interests of the children.” The court denied Randy’s motions. Randy appealed.

II. Scope and Standards of Review.

We review termination of parental rights cases de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). Although we are not bound by the juvenile court’s findings of fact, we do give them weight, especially in assessing the credibility of witnesses. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). An order terminating parental rights will be upheld if there is clear and convincing evidence of grounds for termination under section 232.116. *Id.* Evidence is considered “clear and convincing” when there are no “serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence.” *Id.* The juvenile court cited three independent grounds for termination under Iowa Code section 232.116(1). On appeal, we may affirm the juvenile court’s termination order on any ground we find supported by clear and convincing evidence. *Id.* Our primary concern in termination of parental rights cases is the best interests of the child. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001).

III. Analysis.

Randy first contends no statutory ground for termination is supported by clear and convincing evidence. We choose to focus on section 232.116(1)(f). There is no dispute the children are all age four or older, they have been adjudicated children in need of assistance, and they have been removed from their parents' physical custody for the requisite period of time. Randy argues the State "did not make any significant attempt to increase visitation or otherwise reunify child and father, after the termination petition was filed." This implicates the reasonable efforts requirement of section 232.102(5)(b) ("If the court transfers custody of the child, . . . reasonable efforts shall be made to make it possible for the child to safely return to the family's home.").

The initial termination petition was filed in April 2011. Randy did not request or begin visitation until late June 2011. He did not request that the court order increased visitation until about a month before the termination hearing in October 2011. Reasonable efforts may include a visitation arrangement designed to facilitate reunification while protecting the children from the harm responsible for the removal. *In re M.B.*, 553 N.W.2d 343, 345 (Iowa Ct. App. 1996). The nature and extent of visitation is controlled by the best interests of the children. *Id.* At the time Randy began visitation in June 2011, the children had not had contact with him since before he was incarcerated. He had waited over eight months after his release before beginning visitation. The case permanency plan goal was reunification of the children with the mother. When movement in that direction failed by the summer of 2011, Randy had waited until

the eleventh hour to work toward reunification. “Children simply cannot wait for responsible parenting. Parenting . . . must be constant, responsible, and reliable.” *In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990). Our legislature has carefully constructed a time frame to provide a balance between the parent’s efforts and the children’s long-term best interests. See Iowa Code § 232.116(1)(f) (eighteen months); see also *In re C.B.*, 611 N.W.2d 489, 494 (Iowa 2000). We conclude the department’s decision to start visitation slowly and to increase it only gradually was reasonable under the circumstances. Clear and convincing evidence supports termination under section 232.116(1)(f).

Randy also contends termination is not in the children’s best interests. Having found a statutory ground for termination, we consider “the circumstances described in section 232.116(2) that drive the actual decision-making process.” *D.W.*, 791 N.W.2d at 708. “In deciding whether to terminate parental rights based on a particular ground, we must give primary consideration to ‘the child[ren]’s safety, . . . the best placement for furthering the long-term nurturing and growth of the child[ren], and . . . the physical, mental, and emotional condition and needs of the child[ren].” *Id.* (quoting section 232.116(2)). Randy argues “that simply given the opportunity to prove his capabilities as a parent,” he would be able to regain custody of the children. He argues termination would be detrimental based on the closeness of the parent-child bond. See Iowa Code § 232.116(3)(c). Randy also argues the children are bonded to each other, termination would separate them, and three of the five do not have prospective adoptive placements.

Considering Randy's past actions and lack of performance as a parent, we cannot conclude returning the children to his care is the best placement for furthering their long-term nurturing and growth and meeting their physical, mental, and emotional needs. Randy has not been there for them in the past and waited until it was fairly clear they could not be returned to their mother's care before becoming involved. Although the record reflects there is some parent-child bond, such as is evidenced by the children beginning to call Randy "Dad," Randy points to no evidence and we find none, that would support the conclusion terminating the parent-child bond would be detrimental to the children. The court did not err in declining to terminate Randy's parental rights based on the discretionary "exception" in section 232.116(3)(c). We recognize termination likely will result in the children being separated, and that factors into our decision, but we conclude, under the circumstances before us, termination of Randy's parental rights is in the best interests of these children.

Finally, Randy contends the court erred in denying his motion for new trial. Because we review the record *de novo*, we need not address this claim. We note, however, that some of the claims Randy raised in his motion for new trial involve events and information that are not in the record. We do not consider them. See Iowa R. App. P. 6.801 (defining the composition of the record on appeal).

Having found clear and convincing evidence supports a statutory ground for termination, termination is in the best interests of these children, and no

discretionary ground would prevent termination, we affirm the termination of Randy's parental rights to all five children.

AFFIRMED.