IN THE COURT OF APPEALS OF IOWA

No. 2-220 / 12-0217
Filed April 11, 2012

IN THE INTEREST OF T.J.,
Minor Child,

H.J., Mother,
Appellant.

Appeal from the Iowa District Court for Webster County, James A. McGlynn, Associate Juvenile Judge.

A mother appeals a district court's order terminating her parental rights. **AFFIRMED.**

Sarah L. Smith of Bennett, Crimmins & Smith, Fort Dodge, for appellant mother.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, Ricki Osborn, County Attorney, and Jennifer Bonzer, Assistant County Attorney, for appellee State.

Christopher S. O'Brien of O'Brien Law Office, Fort Dodge, for appellee father.

Derek J. Johnson of Derek Johnson Law Office, Fort Dodge, attorney and guardian ad litem for minor child.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

A mother appeals a district court's order terminating her parental rights. We find an additional six months to work toward reunification would not have changed the outcome in this case and termination was in the best interests of the child. Moreover, because the evidentiary claims were not preserved, lacked merit, or the mother's constitutional rights were not violated in the course of these proceedings, we affirm.

I. Background Facts and Proceedings

T.J., born in 2009, is the son of Heather and Zachary, both lower-functioning adults. This family came to the attention of the Iowa Department of Human Services (DHS) in late June 2010, due to concerns T.J. was not being appropriately cared for, the condition of the family's apartment was unsanitary, and the relationship between the parents was tumultuous. A child in need of assistance (CINA) assessment followed.

DHS began by assisting Heather and Zachary in cleaning up their apartment in order to make it safe for T.J.[1] The family was visited on a daily basis through safety services, which evolved into Family Safety, Risk, and Permanency (FSRP) services. In addition to unsanitary living conditions,

[1] DHS reports from the month of July 2010 indicate the apartment had cat and dog feces on the floor in T.J.'s room and the kitchen, the apartment was cluttered with at least twenty to twenty-five black garbage bags in the living room and bedroom, and uneaten food was left strewn about. DHS also noted it would not be safe for T.J. to be on the floor, except in his bedroom if a clean blanket was laid over the "soiled and smelly carpet." The family also had two cats and one dog and it was noted that "the smell of urine and feces is overpowering." On a July 20, 2010 visit, DHS noted the family's dog had "fleas crawling all over his stomach." While Heather and Zachary made some efforts to improve the apartment, by the time of DHS's July 29, 2010 report, it was noted, "Unfortunately, some of what has been cleaned and organized is already starting to look like it did in the beginning."

Heather and Zachary also admitted there was domestic violence in their relationship.

On August 3, 2010, Officer Roger Porter attempted to serve an arrest warrant on Heather as she had been charged with sexual abuse of her younger sister. Officer Porter spotted Heather while she was walking down the street with Zachary and pushing T.J.—then almost eight months old—in a stroller. When the officer informed Heather she was under arrest, Zachary shoved the baby stroller down the sidewalk and it hit a tree. Fortunately, the child was not injured. The officer charged Zachary with child endangerment and both parents were taken to jail. DHS filed a petition for an ex parte order for temporary removal, which the district court approved. On September 29, 2010, T.J. was adjudicated CINA pursuant to Iowa Code section 232.2(6)(n) (2009) (parent's mental capacity or condition, imprisonment, or drug or alcohol abuse results in child not receiving adequate care).

Because of the incidents with her sister, Heather was charged with and pleaded guilty to lascivious acts with a child, a class D felony, in violation of Iowa Code section 709.8(3). Judgment was entered against her on November 22, 2010, and she was placed on probation for a period of three years. Under the terms of her probation, Heather was prohibited from having contact with minors, with the exception of contact with T.J., if supervised. This service was provided by Children and Families of Iowa. Also under the terms of her probation, Heather was to reside in a halfway house; she complied and was eventually discharged with maximum benefits. Following her discharge, Heather lived in the home of a male friend, as she and Zachary had separated. The friend had seven cats and

due to the unsanitary condition of that house, T.J. could not attend visits there. After a falling out between Heather and her friend she moved in with an elderly woman. The woman's house was also not appropriate for T.J. as it was unkempt and the woman had several dogs. To her credit, Heather worked to cleanup the house and DHS allowed Heather to have visits with T.J. at the house from August to November 2011. When T.J.'s allergies flared up due to the presence of so many animals, visits at the house were discontinued.

The State filed a petition for termination of parental rights on October 10, 2011, which came on for hearing on January 13, 2012. The district court terminated Heather's parental rights pursuant to Iowa Code section 232.116(1)(h) (child under three, adjudicated CINA, removed from parent's physical custody at least six of last twelve months, child cannot be returned to parent's custody) (2011). Heather appeals.[2]

II. Standard of Review

Our review of proceedings to terminate parental rights is de novo. *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011). 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). 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.* Our paramount concern in termination of parental rights proceedings is the best interests of the child. *Id.*

[2] Zachary's parental rights were terminated under Iowa Code section 232.116(1)(a) (parent voluntarily consents to termination) and (h). He does not appeal.

III. Evidentiary Issues

Heather contends the district court erred in entering certain evidence in violation of the Confrontation Clause and her due process rights under the Federal and State Constitutions. At the termination hearing, Heather made a blanket objection to the State's exhibits 1 through 6 on hearsay and Confrontation Clause grounds; she did not object on due process grounds. She now contests the admission of the State's exhibits 4 (incident report in Zachary's child endangerment criminal case) and 6 (incident report in Heather's underlying criminal case, DHS's child protective service assessment summary, transcript of interview with Heather), and to the district court taking judicial notice of Webster County Criminal Case No. AGCR340470 (State's exhibit 3—Zachary's order deferring judgment in child endangerment case), Webster County Criminal Case No. FECR-340468 (State's exhibit 5—Heather's judgment for lascivious acts with a child), and the underlying CINA file.[3] The district court determined the interview with Heather, which was part of the State's exhibit 6, was not hearsay. With respect to the remaining evidence the court stated it would "allow the evidence and give it the weight that . . . it is entitled to receive in each case."

We question whether error has been preserved by the vague constitutional claims made both at the district court and on appeal, but choose to address them. Heather never objected to any of the evidence on due process grounds nor did she object when the State requested the district court take

[3] We decline to consider the merits of whether State's exhibit 4 was improperly admitted, as it was the criminal case file pertaining to Zachary, not Heather. Similarly, the file from Webster County Criminal Case No. AGCR340470 (State's exhibit 3) pertained to Zachary, not Heather.

judicial notice of the underlying CINA file. We therefore decline to consider these arguments on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issue must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Heather objects to the admission of the incident report in her underlying criminal case and a DHS child protective service assessment summary as violative of the Confrontation Clause. She similarly objects to the court taking judicial notice of the judgment in her underlying criminal case, Webster County Criminal Case No. FECR-340468 (State's exhibit 5). Our supreme court has held that the Sixth Amendment's Confrontation Clause does not apply to civil CINA proceedings. *In re E.H. III*, 578 N.W.2d 243, 246 (Iowa 1998). Moreover, because Heather did not advance a separate argument for a different interpretation of the Confrontation Clause under the Iowa Constitution, we will not apply a different standard for state constitutional purposes. *See State v. Effler*, 769 N.W.2d 880, 895 (Iowa 2009) (Appel, J., specially concurring) ("[W]e generally decline to consider an independent state constitutional standard based upon a mere citation to the applicable state constitutional provision.").

IV. Termination

Heather does not dispute the grounds for termination were met under Iowa Code section 232.116(1)(h). Instead, she asserts she should have been granted an additional six months to work toward reunification with T.J. and that termination was not in T.J.'s best interests.

We conclude the record shows otherwise. At the termination hearing, Heather's probation officer, Judy Barton, testified that Heather's performance in

the sex offender treatment program will affect her ability to have future contact with minors. Heather had not yet enrolled in a treatment program and Barton testified that once she did enroll, it would be a *minimum* of nine to twelve months before Heather could have the restrictions on her contact with minors—including T.J.—lifted. Ann Jones of Families First testified that although Heather had made progress in the previous six months, she did not know if an additional six months would make a difference. The district court denied an additional six months and we agree. As Heather had not yet enrolled in a sex offender treatment program, it would take a minimum of nine to twelve months in order to even consider modifying the restriction regarding contact with minors, making the six-month time frame unrealistic.

We also agree with the district court that termination of Heather's parental rights is in T.J.'s best interests. As noted throughout the record, T.J. has many developmental problems that Heather is ill-equipped to handle. He has been diagnosed with an eating disorder based on his inability to swallow solid foods or chew; it was noted he may also be behind in developing his speech skills. T.J. has been working with an occupational therapist and a teacher to address these issues. Although Heather often attends T.J.'s therapy appointments with the foster mother, Jones noted Heather does not follow through with the recommendations she has been given with respect to these issues. Heather is not able to meet T.J.'s special needs, and she struggles to address her own needs. Heather currently attends therapy for victimization issues associated with the abuse she previously experienced and must next enroll in a sexual offender treatment program to address the sexual abuse she perpetrated. Although the

district court noted that Heather loves T.J., our court has recognized that "[t]he crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." *In re D.A., Jr.*, 506 N.W.2d 478, 479 (Iowa Ct. App. 1993). T.J. has been in the same foster home since the incident on August 3, 2010. He is doing well and is bonded to his foster parents and foster siblings; his needs are being met. We therefore conclude termination of Heather's parental rights is in T.J.'s best interests.

As an alternative to termination, Heather argues the court should have ordered guardianship or permanent placement with her mother, Tammy. Our paramount concern is the best interests of the child. *C.B.*, 611 N.W.2d at 492. In the past six months, Tammy has only seen T.J. three or four times. Moreover, Tammy has had her own issues with her children, requiring involvement by DHS. Based on her past history of poor decision making, we agree with the district court that it is not in T.J.'s best interests to be placed with Tammy. We therefore affirm as to this issue.

V. Ineffective Assistance of Counsel

Finally, Heather sets forth a vague and general assertion that her trial counsel may have been ineffective. In advancing an ineffective-assistance-of-counsel claim, Heather must establish (1) counsel's performance was deficient and (2) actual prejudice resulted. *In re C.M.*, 652 N.W.2d 204, 207 (Iowa 2002). As Heather proved neither element, this claim must fail.

AFFIRMED.