

IN THE COURT OF APPEALS OF IOWA

No. 2-357 / 12-0519
Filed May 9, 2012

**IN THE INTEREST OF M.M.T.,
Minor Child,**

**M.J.T., Father,
Appellant.**

Appeal from the Iowa District Court for Pottawattamie County, Craig M. Dreismeier, District Associate Judge.

A father appeals from the order terminating his parental rights.

AFFIRMED.

Michael Hooper, Council Bluffs, for appellant.

Mark Rater, Council Bluffs, for mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Matthew Wilber, County Attorney, and Eric Strovers, Assistant County Attorney, for appellee State.

Sara Thalman of Rouwenhorst & Rouwenhorst, P.C., Council Bluffs, for minor child.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

A father appeals the termination of his parental rights to his child. Upon our de novo review, we affirm.

I. Background Facts and Proceedings.

M.T. is the father and M.F. is the mother of M.M.T., born in July 2007.¹ The parents have a history of domestic violence. The child came to the attention of the Iowa Department of Human Services (Department) in May 2010, after an incident of violence between the parents: the mother reported the father had “strangled her for just a few seconds” and later punched her in the mouth. The father was arrested and charged with domestic assault with injury.

Shortly thereafter, the father was charged with assault with a deadly weapon, a felony, after he hit someone with a baseball bat, and he was placed in jail. He has been in jail or prison for the remainder of the child-in-need-of-assistance (CINA) proceedings. Prior to his incarcerations, the father was a stay-at-home dad and cared for the child’s needs.

The child was removed from the mother’s care in November 2010 and placed in the care of relatives. The State subsequently filed a petition alleging the child to be a CINA. Following a hearing on the petition, the child was adjudicated a CINA by the juvenile court.

Ultimately, the mother was offered services and made minimal progress towards reunification with the child. The father remained incarcerated throughout the case, with a tentative discharge date of June 2015.² In December 2011, the

¹ The mother’s parental rights are not at issue in this appeal.

² The father is eligible to go before the parole board in June 2013.

State filed a petition to terminate the parents' parental rights. Following a trial on the termination petition, the juvenile court entered its order terminating the father's parental rights on numerous grounds. The court, however, granted the mother additional time for reunification.

On March 15, 2012, the father filed his notice of appeal of the court's termination order. The next day, he filed a motion for a new trial before the juvenile court, asserting the court's termination order was "not sustained by sufficient evidence or is contrary to law." The juvenile court later denied the father's motion.

II. Scope and Standards of Review.

We review the juvenile court's decision to terminate parental rights de novo. See *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). The State must prove grounds for termination by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006).

III. Discussion.

On appeal, the father argues the State failed to prove the grounds for termination by clear and convincing evidence, termination was not in the child's best interests, the Iowa Code section 232.116(3) (2011) considerations applied to save his relationship with the child, the State failed to provide to him reasonable services for reunification, and the juvenile court erred in denying his motion for a new trial. We address his arguments in turn.

A. Grounds for Termination.

The juvenile court terminated the father's parental rights on numerous grounds. We need only find termination is appropriate on one ground to affirm.

In re S.R., 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). Upon our de novo review of the record, we find clear and convincing evidence supports termination of the father's parental rights under Iowa Code section 232.116(1)(f).

The legislature incorporated a twelve-month limitation for children in need of assistance aged four or older. Iowa Code § 232.116(1)(f)(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 Iowa Code § 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.

Here, the child first came to the attention of the Department in May 2010. The father was incarcerated thereafter for the remainder of the case. The statutory period expired with no evidence the father could safely parent the child, given his incarceration. It appears the father will not be released from prison for another year to three years, and clearly the child could have been returned to his care at time of the termination hearing. The father makes no argument on appeal that the child could be returned to his care at the time of the termination hearing.³ Accordingly, we find the State proved by clear and convincing

³ Although the father argues the child could have been returned to the mother's care at the time of the termination hearing, he lacks standing to assert such an argument. See *In re D.G.*, 704 N.W.2d 454, 460 (Iowa Ct. App. 2005) (stating that one parent cannot assert facts or legal positions pertaining to the other parent). Moreover, even had the child been returned to the mother's care, the father would not derive a vicarious benefit therefrom to avoid termination of his parental rights. See *In re N.M.*, 491 N.W.2d 153, 155 (Iowa 1992) (interpreting the term "parents" [relative to Iowa Code section 232.116(1)(e) (1991) now numbered 232.116(1)(f)] as either plural or singular as required by Iowa Code § 4.1(3) and concluding that children's best interests are not

evidence the child could not be safely returned to the father's care at the time of the hearing.

B. Best Interests and Iowa Code section 232.116(3) Considerations.

If a statutory ground for termination is determined to exist, the court may terminate a parent's parental rights. *P.L.*, 788 N.W.2d at 37. In considering whether to terminate, the court must then apply the best-interest framework established in section 232.116(2). *Id.* The legislature highlighted as primary considerations: the children's safety, the best placement for furthering the long-term nurturing and growth of the children, and the physical, mental, and emotional condition and needs of the children. *Id.*; see also Iowa Code § 232.116(2). "A child's safety and the need for a permanent home are now the primary concerns when determining a child's best interests." *J.E.*, 723 N.W.2d at 801 (Cady, J., concurring specially). Those best interests are to be determined by looking at the child's long-range as well as immediate interests. *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997). We are to consider what the future likely holds for the child if the child is returned to their parents. *In re J.K.*, 495 N.W.2d 108, 110 (Iowa 1993). Insight for that determination is to be gained from evidence of the parents' past performance, for that performance may be indicative of the quality of the future care that the parent is capable of providing. *In re L.L.*, 459 N.W.2d 489, 493-94 (Iowa 1990); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

served by an interpretation preventing "termination of the noncustodial parent's rights when the children are placed in the separate home of the other parent.")

Additionally, even if a court finds termination appropriate under section 232.116(2), a court need not terminate the relationship between the parent and children if any of the enumerated circumstances contained in section 232.116(3) exist. See *P.L.*, 778 N.W.2d at 37. However, the exceptions set forth in 232.116(3) have been interpreted as permissive, rather than mandatory. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). In determining whether to apply this section, we consider the child's long-term and immediate best interests. See *P.L.*, 778 N.W.2d at 37. A court has discretion, based on the unique circumstances of each case and the best interests of the child, whether to apply this section to save the parent-child relationship. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993).

In finding termination of the father's parental rights was in the child's best interests, the juvenile court found:

[The father's] circumstance is unique because of his incarceration. This child needs permanency and [the father] has not been able to give this to her for at least the past twenty months and won't be able to do such for at least the next sixteen months if not longer because of his incarceration. His incarceration prohibits him from having any meaningful contact with [the child]. Any bond he enjoyed with [the child] ended when he was placed in jail. Although this court's order effectively gives the child's mother the opportunity for reunification, it was the physical, verbal and mental abuse within this relationship which brought everything to juvenile court in the first place. [The mother's] success in the future will involve being free from abusive relationships. By terminating [the father's] parental rights, this potential barrier will be eliminated. In giving primary consideration to the child's safety, to the best placement for furthering her long term nurturing and growth of the child and to the physical, mental, and emotional condition and needs of the child, the court find that the petition as it relates to [the father] should be granted so that this child can have permanency in her life.

Upon our de novo review, we agree with the juvenile court's conclusion. Although the child is in the care of relatives, under the facts and circumstances in this case and considering the child's long-term and immediate best interests, we agree with the juvenile court that termination of the father's parental rights is in the child's best interests, and we find no abuse of discretion in the court's declination to invoke section 232.116(3). Although the father testified he had a bond with the child prior to his incarceration, there is no evidence that a close bond exists now, almost two years later. We note the child is doing well in the care of the relatives, and the relatives are willing to adopt the child should the child not be reunited with the mother. Accordingly, we affirm on these issues.

C. Reasonable Services.

While the State has an obligation to provide reasonable reunification services, the parent has an equal obligation to demand other, different, or additional services *prior to the termination hearing.*" S.R., 600 N.W.2d at 65 (emphasis added). When a parent alleging inadequate services fails to demand services other than those provided, the issue of whether services were adequate is not preserved for appellate review. *Id.*; *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994).

On appeal, the father argues the Department should have made visitation arrangements between him and the child. However, there is no evidence the father ever requested any services prior to the termination hearing. We therefore find he has not preserved error on this issue.

D. Motion for a New Trial.

To preserve error for appellate review, a party must alert the trial court to the issue at a time when the court can take corrective action. *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006). However, once an appeal is perfected by filing a notice of appeal, the appellate court has jurisdiction and the juvenile court loses jurisdiction over the merits of the controversy. *In re B.L.*, 470 N.W.2d 343, 347 (Iowa 1991); *see also IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 628 (Iowa 2000).

Here, the father filed his notice of appeal before filing his motion for a new trial before the juvenile court. The father's notice of appeal therefore divested the juvenile court of jurisdiction to consider the father's motion. *See id.* By perfecting his appeal, the father abandoned his motion, and the juvenile court's ruling on that motion can be given no effect. *See IBP, Inc.*, 604 N.W.2d at 628. Accordingly, the father failed to preserve the issue for appellate review.

IV. Conclusion.

Upon our de novo review, we find the State proved by clear and convincing evidence grounds for the termination of the father's parental rights under Iowa Code section 232.116(1)(f). Although the child is in the care of relatives, under the facts and circumstances in this case and considering the child's long-term and immediate best interests, we agree with the juvenile court that termination of the father's parental rights is in the child's best interests, and we find no abuse of discretion in the court's declination to invoke section 232.116(3). Finally, we find the father's failed to preserve for our review his claims that the State failed to provide him reasonable reunification services and

that the juvenile court erred in denying his motion for a new trial. We therefore affirm the judgment of the juvenile court.

AFFIRMED.