

IN THE COURT OF APPEALS OF IOWA

No. 2-587 / 12-0805
Filed August 8, 2012

**IN THE INTEREST OF N.P., M.P., A.P., and X.P.,
Minor Children,**

R.P. Sr., Father
Appellant.

Appeal from the Iowa District Court for Polk County, Colin Witt, District Associate Judge.

A father appeals from the order terminating his parental rights.

AFFIRMED WITH DIRECTIONS.

Jacob L. Mason of JL Mason Law, P.L.L.C., Ankeny, for appellant father.

Donald L. Williams, Des Moines, for mother.

John C. Heinicke of Kragnes & Associates, P.C., Des Moines, for K.C.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appellee State.

Paul L. White of Juvenile Public Defender's Office, Des Moines, attorney and guardian ad litem for minor children.

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

DOYLE, J.

The father challenges the termination of his parental rights to his children, arguing the Iowa Department of Human Services (Department) failed to comply with the relative notice requirements of Iowa Code section 232.84 (2011). We affirm.

T.P. is the mother and R.P. is the father of the four children at issue in this appeal.¹ In late 2006, the father was charged with multiple counts of robbery and placed in jail. He was convicted of the charges in 2007, sentenced to thirty-five years in prison, and incarcerated. His tentative discharge date from prison is 2036, and he will not be eligible for parole for at least eight more years. He last saw these children before his arrest in 2006.

This family has a history of involvement with the Department. In 2004, the father had a founded child abuse report for failing to provide proper supervision to two of the children. The mother had a founded child abuse report in 2009 and a confirmed child abuse report in 2007 for failing to provide proper supervision to the children. The instant case began in October 2010, after the mother attempted to commit suicide. The mother was rushed to the hospital by her paramour accompanied by the children. The mother and her paramour also tested positive for methamphetamine. The children were adjudicated as children in need of assistance (CINA) in December 2010, and the case goal at that time was reunification of the children with the mother. Reunification of the children with the father was never an option because of his incarceration.

¹ The termination of the parental rights of the mother, the legal father, and the biological father of X.P. are not at issue in this case.

By June 2011, the mother had stopped participating in services and reunification with the mother was no longer an option. The State filed its petition to terminate the parents' parental rights in August 2011, and a hearing on the petition was held in October 2011. Ultimately, the juvenile court found the State proved grounds for termination of the parents' parental rights, termination of the parents' parental rights was in the best interests of the children, and none of the factors enumerated in Iowa Code section 232.116(3) applied to save the parents' parental rights.

The father now appeals, arguing the Department failed to comply with the relative notice requirements of Iowa Code section 232.84 (2011).² The father asserts that had the Department done so, section 232.116(3)(a)'s relative-placement consideration could have preserved his parental rights. We review his claims de novo. *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011).

42 U.S.C. section 671 (2011) sets forth numerous conditions a state must satisfy to receive federal funding for foster care and adoption assistance. Relevant here, a state is required to have a plan for foster care that "provides that the [s]tate shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant [s]tate child protection standards." 42 U.S.C. § 671(a)(19). Additionally, a state must have a plan that provides, among other

² The father also asserts a due process claim for the Department's failure to provide the section 232.84 notice. However, as a general rule, an issue not presented in the juvenile court may not be raised for the first time on appeal. *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994). "Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal." *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003). The juvenile court's ruling did not address the father's due process claim raised here. Accordingly, he has not preserved error for our review on this issue, and we continue to his other claim.

things, that within thirty days after a child is removed from a parent's custody, the state "shall exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives of the child" of the child's removal from the parent's custody and certain other specified information.³ *Id.* § 671(a)(29). Iowa Code sections 232.84, .99(4), and .102 are consistent with these mandates.

Iowa Code section 232.99(4) provides that "[w]hen the dispositional hearing is concluded, the court shall make the least restrictive disposition appropriate considering all the circumstances of the case." If the court does not suspend judgment and continue the proceedings as provided in section 232.100, or permit the child's parent to retain custody, the next least restrictive disposition is to transfer custody to a relative of the child. Iowa Code § 232.102; *see also In re N.M.*, 528 N.W.2d 94, 97 (Iowa 1995) ("The home of a relative is considered less restrictive than placement in a private agency, facility or institution or placement with the department of human services. Thus, [Iowa Code] chapter 232 favors relative placements over nonrelative placements." (citations omitted)).

Additionally, section 232.84, at issue here, satisfies the relative notice mandated by the federal government:

1. For the purposes of this section, unless the context otherwise requires, "agency" means the department
2. Within thirty days after the entry of an order under this chapter transferring custody of a child to an agency for placement, the agency shall exercise *due diligence in identifying and providing notice to the child's grandparents*, aunts, uncles, adult siblings, and

³ The statute also requires that the state's plan provide that reasonable efforts be made "to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless the [s]tate documents that such a joint placement would be contrary to the safety or well-being of any of the siblings" 42 U.S.C. § 671(a)(31).

adult relatives suggested by the child's parents, subject to exceptions due to the presence of family or domestic violence.

3. The notice content shall include but is not limited to all of the following:

a. A statement that the child has been or is being removed from the custody of the child's parent or parents.

b. An explanation of the options the relative has under federal, state, and other law to participate in the care and placement of the child on a temporary or permanent basis. The options addressed shall include but are not limited to assistance and support options, options for participating in legal proceedings, and any options that may be lost by failure to respond to the notice.

c. A description of the requirements for the relative to serve as a foster family home provider or other type of care provider for the child and the additional services, training, and other support available for children receiving such care.

d. Information concerning the option to apply for kinship guardianship assistance payments.

(Emphasis added). When considered together, these statutes make sense. If relative placement is preferred, what better way to get relatives involved early in the case than by notifying them of the custody transfer and of their options for getting involved and for supporting their child relative?

The Department sent no notice to the paternal grandmother, nor was the general information to be contained in the notice, as described in subsection 232.84(3), ever provided or explained to the grandmother in writing or verbally. At the termination hearing, the Department conceded it did not comply with section 232.84. The juvenile court described the Department's failure to provide the required notice as "unfortunate." Unfortunate indeed—and inexcusable. Had the grandmother received the 232.84 notice with the information the statute requires, she would have been informed of her options to participate in the care and placement of the children. She would have been informed about available

assistance and support options. And most importantly, she would have been informed of her options for participating in the legal proceedings.

There is no question the Department was aware early on in the case that the grandmother and the children's father wanted the children to be placed with the grandmother. Despite numerous requests, placement with the grandmother was never considered by the Department, even when the mother was considering voluntarily terminating her parental rights early on in the case. Had this placement been considered when the children were first placed in a nonrelative's custody in mid-November 2010, or when they were again moved to nonrelative placements in December 2010, these children might have had a chance to stay together in the same home, transition to new schools, and form new community supports with their grandmother. When the mother agreed to terminate her parental rights in June 2011, there was still time for these children to be placed with their grandmother. While we agree with the juvenile court that the grandmother in this case was aware of the proceedings and could have done more, such as moving to intervene in the proceedings, attending the Iowa proceedings, and making arrangements to travel from the nearby state of Kansas for periodic visits with the children, the record evidences the Department provided her no meaningful assistance and did nothing to facilitate placement with the grandmother, and in fact, discouraged it.

At the time of the termination hearing, the children had been in nonfamily foster care for not quite a year. Given the time the children had been with their foster families and the stability they had gained, the Department, the State, and the children's guardian ad litem all argued the children could not now be moved;

staying put was in their best interests. The juvenile court reached the same conclusion. Considering the ultimate goal of chapter 232, to best serve the children's welfare, we are compelled to do likewise. See Iowa Code § 232.1; *N.M.*, 528 N.W.2d at 97.

As the remedy for the Department's failure to comply with the notice requirements of section 232.84, the father seeks reversal of the juvenile court order terminating his rights to his children, compliance by the Department with section 232.84's notice requirement, and completion of an Interstate Compact on the Placement of Children as it relates to the grandmother. Regrettably, section 232.84 is silent as to the remedy for failure to comply with its notice requirements. Addressing the failings of the adults in this case by a reversal of the juvenile court's termination order would run counter to the over-arching consideration in all termination of parental rights cases—the best interests of the children. *In re T.P.*, 757 N.W.2d 267, 275 (Iowa Ct. App. 2008). The children have now been in nonfamily foster care for more than a year and half. Given the children's history and their current mental and emotional needs, to uproot them now would do more damage than good.

Although we disagree with the remedy sought by the father, we believe the failing by the Department can and should be minimized by requiring the Department to immediately notify the designated family members identified in section 232.84. The family members should be notified that the court has terminated the parental rights of N.P.'s parents; the child's placement shall remain with the foster family unless "the court orders otherwise based upon the best interests of the child" as provided in section 232.120; and that they may

seek to serve as permanent adoptive parents. The notice shall also include any other applicable rights or options otherwise required by section 232.84(3) which have not dissipated by the delay in giving such notice.

Assuming the father has standing to challenge the Department's failure to provide the section 232.84 notice to the grandmother and considering the children's situation in light of the goal of serving the children's long-term and immediate best interests, we see no other option than to continue these children's placements in their foster homes. We therefore affirm the decision of the juvenile court to terminate the father's parental rights.

AFFIRMED WITH DIRECTIONS.