

IN THE COURT OF APPEALS OF IOWA

No. 3-534 / 13-0552

Filed June 12, 2013

**IN THE INTEREST OF T.M. AND E.M.,
Minor Children,**

**M.M., Father,
Appellant.**

Appeal from the Iowa District Court for Fayette County, Alan D. Allbee,
Associate Juvenile Judge.

A father appeals from the termination of his parental rights to his two
children. **AFFIRMED.**

Brannon Burroughs, Sumner, for appellant father.

Thomas J. Miller, Attorney General, Katherine S. Miller-Todd, Assistant
Attorney General, W. Wayne Saur, County Attorney, and Nathan J. Lein,
Assistant County Attorney, for appellee State.

Thomas Katsumes, Elgin, for appellee mother.

John Sullivan, Oelwein, attorney and guardian ad litem for minor children.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

A father appeals from the termination of his parental rights to two children, T.M. and E.M., arguing clear and convincing evidence did not exist for the termination of his parental rights, and the department of human services (DHS) failed to make reasonable efforts to facilitate reunification. We affirm, finding clear and convincing evidence supports termination, and reasonable efforts were made to unify the children with their father.

I. Facts and proceedings.

In March of 2012, a report was made to DHS that T.M. and E.M.'s mother was using methamphetamine in the presence of the children, and that the children were playing with needles.¹ Investigation into the allegation showed the mother was using methamphetamine. The children were removed on April 2, 2012, and adjudicated children in need of assistance (CINA) later that month. The children's father was incarcerated for a repeat sex offense at this time. A dispositional hearing was held June 1, and custody was transferred to DHS for placement in foster care. The father was released on parole from prison later that month and moved to a residential facility.

The father has a history of sex offenses; he exposed himself to two adult women—one in 2006 and another in 2007. He was incarcerated for these two offenses and released in 2008. He was then charged with failure to register as a sex offender, possession of controlled substances, and possession of precursors to the manufacture of methamphetamine. In 2010, he again exposed himself to

¹ The mother continued to have problems with methamphetamine use and mental illness. Her rights to both children were terminated. The mother's termination is not at issue on this appeal.

two females, this time two twelve-year-olds, and was sent to prison. A psychosexual report conducted of the father showed his profile was similar to a reference group of child molesters.

E.M. was born after the father was again incarcerated; T.M. was born the year prior. The children have had very limited interaction with their father. After he was put on parole in June of 2012, he was restricted from having contact with any children, including his own. DHS and the department of corrections eventually worked out a system where the father could meet with the children, initially for thirty-five minute sessions at a time, though the meetings tended to be sporadic and held in public places. These visits began in September of 2012. At a permanency review hearing in November of 2012, the court found it was not likely the children could be returned to either parent with an additional six months of services, noting:

This decision is especially difficult as respects the children's father who during his short period of release from incarceration has done all that has been asked of him. Sadly, all he can do is likely not going to be enough given the history and the children's ages. To his credit, the children's father has participated in all hearings concerning his children, whether by telephone from prison or in person after his release. He has been respectful to the court and fully cooperative with the Department of Human Services and direct service providers. The court must make its decision, however, not on hope but on the likely outcome. The best predictor of future conduct is past behavior. Past behavior with regard to sexual offenses and drug use does not bode well in the long-term. While a year of law abiding sobriety would enable the children's father to demonstrate that he has in fact changed, the children should not be required to wait that long for a permanent home.

The duration of visits increased to approximately one hour each week in mid-November, held in the father's apartment. However, DHS did not increase the frequency beyond once a week out of concern that the children were still in

the process of getting to know their father, and that an hour was “about the maximum that [the father could] manage having the children.” As part of his release, he was still restricted from contact with any other minors. DHS frequently communicated with his parole officer, attempting to determine whether unsupervised visitation or custody could be allowed in the future.

In January, the father struggled with making the necessary arrangements to meet with the children at the scheduled time. His visitation time increased to one and a half hours. Halfway through January, the visitation time was increased to two hours, then two and a half hours. In February, these visits were extended to three hours. However, the father struggled to take advantage of the increased visitation, alleging the visitation interfered with meetings with his parole officer. DHS investigated the conflict and found his claim to be false.

On February 15, 2013, the father filed a motion for reasonable reunification services. He argued he should be allowed monitored or unsupervised visitation. This motion was denied, as the department of corrections had not yet approved the father for monitored or unsupervised visits with the children. After this decision, the department of corrections agreed that the father could be moved to monitored, and then unsupervised visits, however, DHS was not comfortable with the move at that time. The children had begun to exhibit regressing behavior in the visits and one of the children was unwilling to attend visitation. The visits remained supervised until termination.

Prior to the termination hearing, the mother revealed she was again pregnant after reconnecting with the father in January 2013. He failed to report the sexual encounter as required by the conditions of his parole. He initially

denied the contact, but later admitted it at the termination hearing; this raised concerns for the father's parole officer and DHS case workers.

A hearing was held to determine whether the parental rights of the father and mother should be terminated on March 22, 2013. The father, the mother, the children's foster mother, the children's social worker, the father's psychologist, the children's therapist or case worker, the mother's substance abuse counselor, and the father's parole officer all testified. The children's foster mother testified that the children exhibited behavioral difficulties before and after visits with the father, and that the children did not seem to understand he was their father. The children's therapist or case worker reported the father cancelled five of the twenty-four scheduled weekly visits, and the father struggled to communicate with the children. The worker stated she did not feel comfortable moving the father to monitored or unsupervised visitation because he did not take full advantage of the time he was given and because of the children's behavior towards the father.

The court terminated the father's parental rights, concluding that returning the children to the father's home would subject the children to a likelihood of neglect and imminent risk of harm due to lack of proper supervision. While it recognized the father's efforts to improve, it also found the children required permanency, which was not going to be possible in a short period of time. The father appeals from this proceeding.

II. Analysis.

We review the district court's termination of parental rights *de novo*. *In re A.B.*, 815 N.W.2d 764, 773 (Iowa 2012). We give weight to the factual findings of

the district court, especially to its credibility determinations, but we are not bound by them. *Id.*

A. Clear and convincing evidence.

The father's rights were terminated under Iowa Code section 232.116(1)(h), which provides a parent's rights may be terminated where:

h. The court finds that all of the following have occurred:

- (1) The child is three years of age or younger.
- (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
- (3) The child has been removed from the physical custody of the child's parents for at least six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.
- (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

The father specifically takes issue with subpart four, contending the court lacked clear and convincing evidence that the children could not be returned to him at this time.

The father has never had unsupervised contact with the children, and the children have behavioral difficulties with the limited contact they had with their father prior to termination. He struggles to communicate with the children. He has been on parole from his incarceration for a repeat sex offense for less than a year. Risks of recidivism are still present. Our statutory termination provisions "are designed to prevent probable harm to the child and the State is not required to wait until actual harm has occurred before moving to terminate a parent's rights." *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). There is clear and convincing evidence the children cannot be returned to the father's care at this time.

B. Reasonable efforts.

The father next argues DHS improperly denied his move to unsupervised visitation. At the time of his motion for reasonable efforts, the department of corrections had not cleared him for unsupervised visitation as part of his parole. DHS, therefore, could not implement his request. The motion was filed February 15, 2013. The termination hearing was held approximately a month later. Reasonable efforts include “visitation designed to facilitate reunification while providing adequate protection for the child.” *In re C.B.*, 611 N.W.2d 489, 493 (Iowa 2000).

The father’s request was made while he was failing to take advantage of his current visitation schedule, was struggling with communication with the children, and had failed to comply with the provisions of his parole for reporting sexual encounters. Further, until very shortly before the termination hearing, the department of corrections resisted any unsupervised or monitored visitation for the father. We find DHS made reasonable efforts towards reunification. *See id.* (Recognizing our juvenile justice statutes “not only reflect the critical role of reasonable efforts from the very beginning of intervention, but recognize a child’s right to appropriate custodial care and the important element of time”).

AFFIRMED.