

IN THE COURT OF APPEALS OF IOWA

No. 6-478 / 06-0790
Filed June 28, 2006

**IN THE INTEREST OF M.V.P.,
Minor Child,**

**M.G., Mother,
Appellant.**

Appeal from the Iowa District Court for Pottawattamie County, Kathleen A. Kilnoski, District Associate Judge.

A mother appeals from a juvenile court order terminating her parental rights to one child. **AFFIRMED.**

William F. McGinn, Council Bluffs, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Dawn Eimers, Assistant County Attorney, for appellee.

Scott Strait, Council Bluffs, for father.

Roberta Megal, Council Bluffs, guardian ad litem for minor child.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

MILLER, J.

Marsha is the mother, and Thomas is the father, of Malachi, born in March 1996. Marsha appeals from a May 2006 juvenile court order terminating her parental rights to Malachi. The order also terminated Thomas's parental rights, and he has not appealed. We affirm.

Malachi and Marsha came to the attention of the Iowa Department of Human Services (DHS) in July 2003 when Marsha was arrested because Malachi, who was seven and one-half years old, had not yet attended school. Malachi was taken into protective custody. He has thereafter remained in the legal custody of the DHS. Malachi was initially placed in shelter care, during which he engaged in aggressive and assaultive behavior, tried to climb out of a window, and would express his anger and frustration by growling while crawling on all fours.

During his stay in shelter care Malachi was hospitalized briefly because of his behaviors. After his shelter care he was placed in the physical custody of his maternal great uncle from August through October 2003. The great uncle asked for Malachi to be removed from his home and placed elsewhere because Malachi was cruel to an animal in the home and Malachi's "animalistic behaviors" were causing the great uncle problems with his fiancée. Malachi was then placed in the home of a paternal aunt and her husband, where he has remained since November 2003.

In September 2003 the juvenile court adjudicated Malachi a child in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(c)(2) (2003) (child has suffered or is imminently likely to suffer harm due to parent's failure to

supervise) and (n) (parent's mental condition results in child not receiving adequate care). The adjudication was based on Marsha's severe mental problems and resulting failure to properly supervise Malachi, including but not limited to a failure to enroll him in school

Services were offered and provided to Marsha, Malachi, and to a lesser extent to Thomas, during a period of two and one-half years. In April 2005 Malachi's paternal aunt and her husband were, in a probate proceeding, appointed as Malachi's legal guardians. In January 2006 Malachi's attorney and guardian ad litem in the CINA proceeding filed a petition for termination of parental rights. Following a hearing the juvenile court filed detailed and comprehensive findings of fact, conclusions of law, and an order terminating parental rights. The court ordered Marsha's parental rights terminated pursuant to Iowa Code sections 232.116(1)(d) (2005) (child adjudicated CINA for abuse or neglect by parent, parent offered or received services but circumstances which led to adjudication continue to exist) and (f) (child four or older, adjudicated CINA, removed from home twelve of last eighteen months, cannot be returned home at present time). Marsha appeals.

We review termination proceedings de novo. Although we are not bound by them, we give weight to the trial court's findings of fact, especially when considering credibility of witnesses. The primary interest in termination proceedings is the best interests of the child. To support the termination of parental rights, 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) (citations omitted).

As pointed out by the State in its response to Marsha's petition on appeal, the nature of Marsha's claim or claims of juvenile court error is not clear. We do,

however, read her statement that “[t]he department failed to make the appropriate effort to reunite Marsha with her child” as a claim that the DHS did not make reasonable efforts to reunify her with Malachi. For several reasons we find Marsha entitled to no relief on this claim of error.

First, by not even suggesting what services should have been provided but were not provided, Marsha has waived the issue. See Iowa R. App. P. 6.14(1)(c) (failure to argue an issue may be deemed waiver of that issue); *In re W.R.C.*, 489 N.W.2d 40, 41 (Iowa Ct. App. 1992) (same). Second, Marsha makes no claim that the issue was raised at any time before this appeal, we have found nothing indicating it was raised earlier, and by not raising it before the termination hearing Marsha has not preserved error. *In re S.R.*, 600 N.W.2d 63, 65 (Iowa Ct. App. 1999). Finally, her claim has no substantive merit. As shown by the evidence and the juvenile court’s findings, the services offered included substance abuse evaluations; drug screens; family-centered services, including supervised visits, individual therapy, and parent skill training; psychological and psychiatric evaluations and treatment for Marsha and Malachi; psychosocial evaluation for Marsha; and an Interstate Compact on the Placement of Children study of the home of Malachi’s paternal aunt and her husband.

The State points out that Marsha appears to make no claim of error with respect to the juvenile court’s determination that the essential elements for termination pursuant to section 232.116(1)(f) were proved, and asserts error was therefore not preserved on any such claim. We believe that because the juvenile court clearly addressed and ruled on the grounds for termination pursuant to section 232.116(1)(f) the State’s point more correctly raises an issue of waiver,

rather than error preservation. We nevertheless choose to address the question of whether the elements of that provision were proved.

The only element of section 232.116(1)(f) that reasonably might be disputed is the fourth, whether Malachi could be returned to Marsha at the time of the termination hearing. Malachi, by reason of Marsha's past failures to have him attend school, set appropriate boundaries for him, direct and supervise him, and when necessary discipline and control him, has continuing developmental deficits and emotional and behavioral problems which, with appropriate structure, supervision, and direction are dramatically improving. Marsha has been cooperative with and successfully completed many offered services. She maintains employment and a stable residence. However, she has serious mental problems yet declines to take recommended medication and will not participate in recommended psychotherapy. Marsha remains unable or unwilling to set appropriate boundaries for Malachi, direct and supervise him, and when necessary control and discipline him.

We conclude, as the juvenile court did, that Malachi has special needs that Marsha is unable or unwilling to deal with and he could not be returned to her at the time of the termination hearing. We further conclude the essential elements for termination pursuant to section 232.116(1)(f) were proved. We need not and do not address whether the essential elements for termination pursuant to section 232.116(1)(d) were also proved. See *In re A.J.*, 553 N.W.2d 909, 911 (Iowa Ct. App. 1996) (noting that when the juvenile court terminates parental rights on more than one statutory ground, in order to affirm we need only find grounds to terminate under one of provisions relied on by that court).

Marsha claims termination of her parental rights is not in Malachi's best interest. We disagree. Malachi is a special needs child who receives special education services and needs firm structure in his life. Marsha is unable or unwilling to set boundaries for him and properly supervise him. Malachi is not bonded with her, and does not look to her for emotional support. His paternal aunt and her husband are licensed foster parents, are Malachi's legal guardians, and wish to adopt him if parental rights are terminated. Malachi looks to them for emotional support, has lived with them for almost two and one-half years, is strongly bonded to them, and desires to be adopted by them. We agree with the juvenile court that termination of Marsha's parental rights is in Malachi's best interest.

Marsha asserts that because of the nature of the relationship between herself and Malachi a disposition and an order in accordance with any of Iowa Code sections 232.100, 232.101, 232.102, or 232.104, made pursuant to section 232.117(4) (sic, section 232.117(5)), would have better served Malachi's best interest than would termination of parental rights. However, neither any such issue, nor any issue regarding a finding pursuant to section 232.116(3)(c) that termination would be detrimental to the child due to the closeness of the parent-child relationship, was either passed upon by the juvenile court or pursued by way of a post-ruling motion. We conclude error has not been preserved on any such issues. See *In re C.D.*, 508 N.W.2d 97, 100 (Iowa Ct. App. 1993) (holding a matter not raised in the trial court cannot be asserted for the first on appeal). A motion pursuant to Iowa Rule of Civil Procedure 1.904(2) is essential to preservation of error when a trial court does not resolve an issue. *In re A.M.H.*,

516 N.W.2d 867, 872 (Iowa 1994); *State Farm Mut. Auto. Ins. Co. v. Pflibsen*,
350 N.W.2d 202, 206-07 (Iowa 1984).

AFFIRMED.