IN THE COURT OF APPEALS OF IOWA

No. 8-110 / 07-2169
Filed February 27, 2008

IN THE INTEREST OF H.D. and R.M.,
Minor Children,

N.K.B., Father,
Appellant,

S.M.J.D., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Louise Jacobs, District Associate Judge.

A father and mother appeal from the order terminating their parental rights. **AFFIRMED AS TO MOTHER'S APPEAL; REVERSED AND REMANDED AS TO FATHER'S APPEAL.**

Marc Elcock, West Des Moines, for appellant father.

William Sales of Sales Law Firm, P.C., for appellant mother.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Chris Gonzales, Assistant County Attorney, for appellee State.

Charles Fuson of the Youth Law Center, Des Moines, for minor children.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Suzanne is the mother of Hannah and Riley, and Nole is the father of Hannah. They each appeal the termination of parental rights to her children and his child.[1] Upon our consideration of the record and arguments of the parties, we affirm termination of Suzanne's parental rights to her daughters but reverse termination of Nole's parental rights to Hannah.

I. Background Facts and Proceedings.

Hannah and Riley, ages one year and two years, eleven months respectively at the time of termination, first came to the attention of the Iowa Department of Human Services (DHS) in December 2006 when a child protective assessment was opened based upon information concerning risk to the children. In mid-February 2007 Suzanne's paramour and Riley's father, Joseph, was arrested for domestic abuse assault and child endangerment, for physically abusing both Suzanne and Riley. Investigation showed that Suzanne had been previously aware of abuse by Joseph against Riley but failed to report or otherwise address it. The children were removed from the home because of protective concerns due to the domestic abuse and Suzanne's parenting skills. The girls were adjudicated children in need of assistance (CINA) on March 20, 2007.

Following receipt of services by Suzanne and attempts by DHS to involve Nole in the case and provide him reunification services, the termination hearing was held in mid-November 2007. The district court found clear and convincing

[1] The parental rights of Joseph, Riley's father, were also terminated, but he does not appeal.

evidence supported termination of parental rights pursuant to Iowa Code sections 232.116(1)(b) (2007) (abandonment);[2] 232.116(1)(d) (child adjudicated CINA for abuse or neglect by parent; circumstance which led to adjudication continues despite offer or receipt of services); 232.116(1)(e) (child CINA, child removed for six months, parent has not maintained significant and meaningful contact with the child) and 232.116(1)(h) (child age three or younger; adjudicated CINA; removed for six of last twelve months, and cannot be returned to parents at time of hearing).[3] The court also concluded termination was in Hannah's and Riley's best interests, as they had bonded with their foster home placement. By order dated December 17, 2007, the parental rights of Suzanne, Joseph, and Nole were terminated. Suzanne and Nole appeal.

II. Scope and Standards of Review.

We review termination of parental rights de novo. *In re J.E.,* 723 N.W.2d 793, 798 (Iowa 2006). Grounds for termination must be proved by clear and convincing evidence. *In re Z.H*., 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). Where the district court terminated the parental rights on more than one statutory ground, we will affirm if at least one ground has been proved by clear and convincing evidence. *In re R.R.K.,* 544 N.W.2d 274, 276 (Iowa Ct. App. 1995). Our primary concern is the best interests of the children. *Z.H*., 740 N.W.2d at 651.

---

[2] This ground only applied to termination of Joseph's and Nole's parental rights.

[3] The substantive analysis portion of the district court's ruling separately discusses the facts supporting termination of both Nole's and Joseph's parental rights under each of the four grounds listed above, although the order portion only terminates Nole's and Joseph's rights under section 232.116(1)(f), which was not alleged in the termination petition. This appears to be a clerical error by the district court, and our reversal of Nole's termination under the other grounds renders his due process argument as to this error moot.

III. Issues on Appeal.

A. Suzanne.

Suzanne asserts several arguments on appeal against termination of her parental rights by the district court. Her first challenge is that DHS failed to provide adequate services to her during the pendency of the case to promote reunification. A parent's challenge to services by the state should be made when they are offered, not when termination of parental rights is sought after services have failed to remedy a parent's deficiencies. *In re C.W.*, 522 N.W.2d 113, 117 (Iowa Ct. App. 1994). Suzanne fails to indicate that she requested or otherwise challenged the adequacy of services prior to the termination hearing. We conclude that this issue has been waived and do not address it on appeal.

Suzanne next contends that clear and convincing evidence does not support termination of her parental rights under sections 232.116(1)(d), (e) or (h). The record at termination supports the following facts: Suzanne's intellectual functioning level is lower than average, having been diagnosed with Dysthymic Disorder, depression, and borderline intelligence, although not low enough to be considered for more in-depth adult services which all service providers in the case agreed would be necessary to accomplish reunification with her children. Although DHS provided a myriad of services, including in-home services, supervised visitation, Early Access services, Visiting Nurse services, protective daycare, family team meeting, individual therapy, medication management through Broadlawns Hospital, attachment assessment and dyadic therapy, services through the Young Women's Resource Center, adult services through Easter Seals, and psychological evaluation through Pediatric and Family

Psychology, Suzanne continued to struggle with progress during pendency of the case. Suzanne participated in the services provided, but failed to progress to semi-supervised or unsupervised visitation with her children in the eight months between adjudication and the termination hearing. According to service providers, she remains unaware of safety precautions necessary for her young children and "requires constant monitoring during visitation to ensure the safety of the children." Suzanne's simultaneous management of both children's needs continued to show need for improvement, and she continued to demonstrate an inability to internalize and incorporate the parenting skills training and services provided to her to promote reunification. All service providers and the DHS caseworker concluded that Suzanne was not close to achieving or even attempting unsupervised visitation at the time of termination, and would not be ready for such a development for an extensive time period.

While she has consistently cooperated with services and attended visitation, we find there is sufficient proof that Suzanne remains unable to provide for her children's needs on a consistent, long-term basis. *Z.H.*, 740 N.W.2d at 651, (citing *In re L.L.,* 459 N.W.2d 489, 495 (Iowa 1990)) (stating "Parenting cannot be turned off and on like a spigot. It must be constant, responsible, and reliable."). Therefore, we conclude clear and convincing evidence exists that Hannah and Riley cannot be returned to Suzanne's care at this time. Because we find statutory grounds for termination under section 232.116(1)(h), we need not address the arguments pertaining to the other statutory grounds supporting termination by the district court or by Suzanne on appeal. *See In re S.R.,* 600 N.W.2d 63, 64 (Iowa Ct. App. 1999) ("When the juvenile court terminates

parental rights on more than one statutory ground, we need only find grounds to terminate under one of the sections cited by the juvenile court to affirm."). Suzanne notes that her strong bond with the girls evidences that termination is not in their best interests. While a strong bond between parent and child is a special circumstance that militates against termination when the statutory grounds have been satisfied, *see* Iowa Code § 232.116(3), it is not an overriding consideration but merely a factor to consider. *In re N.F.,* 579 N.W.2d 338, 341 (Iowa Ct. App. 1998). In determining Hannah's and Riley's best interests, we look to both their long-term and immediate needs. *Z.H.*, 740 N.W.2d at 652. A child should not be forced to endlessly await the maturity of a natural parent. *Id.* at 494. At some point, the rights and needs of the child rise above the rights and needs of the parent. *In re J.L.W.,* 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). We conclude termination of Suzanne's parental rights are also in the girls' best interests and affirm termination.

B. Nole.

Nole appeals, arguing that the record does not support termination of his parental rights to Hannah by the requisite level of proof. 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). "Clear and convincing evidence" means "there must be no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence." *Id.* There is no dispute by Nole that Hannah is younger than three years, has been adjudicated CINA, and has been removed from her parents for at least six of the

last twelve months. Nole challenges the evidence of abandonment under subsection 232.116(1)(b), and the last statutory requirements under subsections (d) (circumstances giving rise to adjudicatory harm continue to exist despite receipt of services); (e) (parent's failure to maintain significant and meaningful contact); and (h) (child cannot be returned to care of parent at time of termination).

The circumstances surrounding Nole's fathering of Hannah can be described as murky from the record, at best. Nole is married but separated and not residing with his wife. He has a history of criminal activity, including domestic abuse assault and burglary, and a past child protective assessment involving him and another of his biological children. Nole and Suzanne apparently dated inconsistently for a time, which led to Hannah's conception sometime in early 2006 and after which Nole did not have contact with Suzanne. Suzanne did not inform DHS immediately upon the children's removal that someone other than Joseph was Hannah's biological father. When DHS did eventually have that information from Suzanne, she asserted that Nole was never told about the pregnancy and was not aware he was Hannah's father. Suzanne contradicted this statement during the pendency of the CINA case, but reiterated in her termination hearing testimony that Nole didn't know about Hannah. Once DHS knew about Nole, attempts were made to contact him for paternity testing, which were unsuccessful. Only through a DNA sample obtained from Nole and on file in another matter was DHS able to confirm Hannah's paternity.

All communication from DHS to Nole concerning Hannah's CINA case was sent to the address of his girlfriend, SueAnn. It is undisputed that DHS had

no confirmation from Nole before he was served with the termination petition at his workplace that he was aware of the proceedings. Nole testified at trial that, although his children stayed with SueAnn as does he for the week or two a month he's not out of town for work, he actually had a different legal address at his sister's residence that was reflected on his driver's license. He testified that he was unaware he was Hannah's father, of the CINA case, or of DHS's attempts to contact him until about a month before the termination hearing. At that time, Nole contacted DHS and met with the caseworker at least once but no services were extended to Nole during the pendency of the case. Nole requested placement of Hannah with him, and testified that he altered his employment to a more traditional schedule to be home on a regular basis. The matter proceeded to termination, where the district court found:

> [Nole] has never been a part of Hannah's life. He already has five children of his own. At least for the last year, his employment has required him to be out of town as much as three weeks a month. He states he now sought employment which would not require him to be out of town so much. He is living with SueAnn, who has been the subject of a child protective assessment, as has Nole. . . . Given his history, his current living arrangements, his most recent employment requiring him to be out of town often, there would be a period of time before the court could consider placing the child in his care. It would take a period of time for him to even develop a relationship with the child. She should not have to wait longer because Nole did not act on the information sent.
>
> Nole B., the biological father of Hannah, has never visited, spoken with, or written to her. According to him, after engaging in intimate relationships with Suzanne, he never had contact with her again. He also claims he never received the mail from DHS regarding the child which was sent to the home of his girlfriend where he lived whenever he was not out of town. He didn't participate in any services being offered because he did not respond to written communication regarding the child.

Testimony at trial reveals that bonding between Nole and Hannah could occur in as little as six months due to her young age. Although she acknowledged this possibility, the DHS caseworker was zealous in her testimony that Nole could do nothing at the time of termination to work towards reunification in her opinion. Despite the above conclusions of the juvenile court, we conclude clear and convincing evidence does not exist on this record supporting that Nole knew about Hannah before October 2007. Therefore, he cannot be said to have abandoned her by clear and convincing evidence. Likewise, any lack of significant and meaningful contact for purposes of 232.116(1)(e) cannot be said to have been proved by the requisite standard. This subsection requires clear and convincing evidence that a parent has made "no reasonable efforts to resume care of the child despite being given the opportunity to do so." This subsection has not been shown by clear and convincing evidence.

Finally, we cannot conclude clear and convincing evidence existed at the time of termination that Hannah would face adjudicatory harm as envisioned by subsections 232.116(1)(d) and (h) if placed in Nole's care, since he received no services to promote or evaluate that possibility. The reasonable efforts (to provide reunification services) requirement is not a strict substantive requirement for termination. *In re C.B.,* 611 N.W.2d 489, 493 (Iowa 2000). Instead, the services provided by DHS to reunify parent and child after removal impact the State's burden of proving the child cannot be safely returned to the care of a parent. *Id.* At the termination hearing, Nole requested placement and testified he would accept any services provided to facilitate placement of Hannah with him. Due to the lack of clear and convincing evidence on Nole's knowledge of

Hannah's paternity before October 2007 and the lack of proof of services demonstrating that Hannah may not be placed with him without the risk of adjudicatory harm, we reverse termination of Nole's parental rights under sections 232.116(1)(b), (d), (e), and (h). We do not make any assumptions, conjecture, or speculation about Nole's success with services or that the grounds for termination may well be proved at a later date. We only conclude that the State failed to prove grounds for termination by clear and convincing evidence as of November 2007 for the above-stated reasons. Nole should be provided services by DHS to determine if Hannah could be placed in his care in the future. We remand to the district court for entry of an order consistent with this opinion.

AFFIRMED AS TO MOTHER'S APPEAL; REVERSED AND REMANDED AS TO FATHER'S APPEAL.