

IN THE COURT OF APPEALS OF IOWA

No. 8-203 / 08-0261

Filed April 9, 2008

**IN THE INTEREST OF E.B.,
Minor Child,**

**M.V.B., Mother,
Appellant.**

Appeal from the Iowa District Court for Polk County, Joe E. Smith, District Associate Judge.

A mother appeals from the order terminating her parental rights.

AFFIRMED.

Amanda Demichelis of Demichelis Law Firm, Chariton, for appellant mother.

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

Ryan Weese, West Des Moines, for intervenors.

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

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

MAHAN, P.J.

May appeals the district court's order terminating her parental rights to her daughter, Elise. We affirm.

I. Background Facts and Proceedings.

Elise, age six at the time of termination, is the daughter of May. Elise has been out of May's care and custody since November 2004, when May was arrested in Polk County and subsequently extradited to Texas on arson charges. May had set fire to a home in Elise's presence, which caused continuing nightmares and an eventual diagnosis of post-traumatic stress disorder (PTSD) for Elise. May was later convicted for arson and imprisoned in Texas. At the time of Elise's first removal, she was placed by the Iowa Department of Human Services (DHS) in a foster home under DHS supervision.¹ Friends of May's from Texas were granted guardianship over Elise at May's request, and following the court's order in February 2005, they moved with her to Texas, and the child in need of assistance (CINA) petition was dismissed.

About three months later, the guardians placed Elise back in the care of her foster parents in Iowa and gave power of attorney over Elise to the foster parents. They did not inform DHS they were no longer caring for Elise. When DHS learned Elise was living with the Iowa foster parents and guardianship had been relinquished, another CINA petition was filed in March 2006. The guardianship was dissolved by the Polk County, Iowa, district court and the matter set for adjudication in May 2006. Meanwhile, May's attorney in Texas was attempting to have the matter moved to Texas where there was also a

¹ The whereabouts of the father are unknown, and he does not appeal from termination.

pending child abuse/neglect case. The Iowa court initially continued adjudication, and ultimately issued a stay in October 2006 in light of the open Texas case concerning Elise. The matter then languished for several months due to uncertainty concerning whether Iowa or Texas had jurisdiction of the child. Texas finally dismissed its case in April 2007, and the Iowa court continued with removal, adjudication, and disposition in May 2007. Elise was adjudicated CINA under Iowa Code section 232.2(6)(c)(2) (2005) (child is likely to suffer harm due to parent's failure to exercise care in supervision), (j) (child is without a parent, guardian, or other custodian, and (n) (parent's imprisonment results in child not receiving adequate care). May appealed the court's order, which this court affirmed by *In re E.B.*, No. 07-0840 (Iowa Ct. App. 2007). Termination proceeded and the district court issued its order in January 2008. May appeals.

II. Scope and Standards of Review.

We review termination of parental rights de novo. *In re Z.H.*, 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). Grounds for termination must be proven by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). Our primary concern is the best interests of the child. *Id.*

III. Issues on Appeal.

A. Clear and Convincing Evidence & Additional Time.

May first argues she should have been given an additional six months to work toward reunification, and the State failed to prove the ground for termination by clear and convincing evidence. It is undisputed at the time of hearing that May was incarcerated in Texas. She was not aware of a formal release date, but the record reflects her release could be as late as 2009. Although May believed

she would be paroled to a half-way house in Houston where she could care for Elise, this assumes she would be capable of caring for Elise immediately, which was clearly not the case. May did participate in parenting classes while incarcerated, wrote Elise letters, sent her pictures, and otherwise attempted to keep in touch with her daughter. However, the mental injuries suffered by Elise at May's hands are directly attributable to May's actions and care for Elise. Up to the time of hearing, Elise's therapist thought it was endangering her mental health and progress for Elise even to read letters written by May. The therapist also testified that reunification could not be achieved in an additional six months, assuming May was released immediately, though a transition plan could be implemented to allow a building of the relationship.

May's parental rights were terminated pursuant to section 232.116(1)(f) (2007) (child age four or older, adjudicated CINA, removed for twelve of last eighteen months, and child cannot be returned to parent's custody), and the record clearly supports May's inability due to her incarceration to resume Elise's care at the time of hearing. "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). The general rule is unavailability of parent as a result of being incarcerated is no excuse, and the incarcerated parent must take full responsibility for the conduct which has resulted in her confinement. *In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa Ct. App. 1994). We believe the district court properly denied additional time for reunification efforts, due to the circumstances in this

case. Clear and convincing evidence supports termination, and we affirm on this issue.

B. Best Interests & Parental Bond.

May also contends termination is not in Elise's best interests due to the bond she shares with her mother, falling particularly under an exception of section 232.116(3)(c). At the time of termination hearing, this statutory consideration was not raised although the bond between mother and daughter was in argument. A strong bond between parent and child is a special circumstance which mitigates against termination when the statutory grounds have been satisfied. Iowa Code § 232.116(3). Yet 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). Termination may be avoided if the court finds "termination would be detrimental to the child at the time due to the closeness of the parent-child relationship." Iowa Code § 232.116(3)(c). The factors in section 232.116(3) are permissive, not mandatory, and it is in the court's discretion, based on the unique circumstances of the case and the best interests of the child, whether to apply such factors. *In re A.J.*, 553 N.W.2d 909, 916 (Iowa Ct. App. 1996).

Elise had been out of her mother's care for over three years, or about half her life, at the time of hearing. The reason for removal was due to May's criminal activity, which Elise witnessed and was severely traumatized by. She has been diagnosed with PTSD, as well as reactive attachment disorder impairing her ability to form relational attachments to caregivers and others. Moreover, there was testimony from Elise's therapist that her relationship bond with her mother

had diminished with the passage of time. We conclude the bond between May and Elise is not an impediment to nor would be harmed by termination, especially considering May remains unable to meet Elise's needs and that she is adoptable. See *N.F.*, 579 N.W.2d at 342. "The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997) (quoting *In re D.A.*, 506 N.W.2d 478, 479 (Iowa Ct. App. 1993)). "Children simply cannot wait for responsible parenting." *Id.* (quoting *In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990)). In looking to her long-range as well as immediate interests, we conclude termination of May's parental rights is in Elise's best interests. See *J.L.W.*, 570 N.W.2d at 781. We affirm termination on this issue.

C. Ineffective Assistance of Counsel & Reasonable Efforts.

May's final assertion of error on appeal is that her trial counsel failed to explore during testimony and otherwise provide evidence concerning the adequacy of services provided to her by DHS. Ineffective assistance of counsel in a termination proceeding may be raised by direct appeal. *In re J.P.B.*, 419 N.W.2d 387, 390 (Iowa 1988). The standard is the same adopted for counsel appointed in a criminal proceeding. *Id.* At May's request, her lawyer was removed from the case, and new counsel was appointed for the termination hearing. To show ineffective assistance of trial counsel, May has the burden to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999). We affirm if proof of either element is lacking. *Id.*

By the time of the termination hearing, May's alleged objection to or requests for additional services had only been made to DHS and were never part of the court record. No formal actions were taken by May or her attorney during the adjudication and disposition phase to challenge services before the district court. While DHS has an obligation to make reasonable efforts toward reunification, a parent has an equal obligation to demand other, different, or additional services prior to a permanency or termination hearing or the issue is considered waived for further consideration on appeal. *In re A.A.G.*, 708 N.W.2d 85, 91 (Iowa Ct. App. 2005). In general, if a parent fails to request other services at the proper time, the parent waives the issue and may not later challenge it at the termination proceeding. See Iowa Code § 232.99(3); *In re S.R.*, 600 N.W.2d 63, 65 (Iowa Ct. App. 1999); *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa Ct. App. 1994) (parent must demand services if he or she feels they are inadequate prior to termination). If a parent has a complaint regarding services, the parent must make such challenge at the removal, when the case permanency plan is entered, or at later review hearings. *In re C.H.*, 652 N.W.2d 144, 148 (Iowa 2002). Moreover, voicing complaints regarding the adequacy of services to a social worker is not sufficient: a parent must inform the juvenile court of such challenge. *Id.*

We conclude May has failed to show a duty on behalf of her termination hearing counsel to raise the reasonable services and reunification efforts issue. May had already lost the opportunity by the time of termination to object to reunification services offered to her. Therefore, her attorney at the hearing was under no obligation to raise a worthless issue, nor would the outcome of

termination have changed due to the rules regarding challenges to services.² *Gant*, 597 N.W.2d at 504 (stating that prejudice must be shown, in that but for counsel's conduct the outcome of the proceeding would have been different). We conclude no ineffective assistance of counsel occurred on the ground urged by May, because the time for challenges to reasonable services had already passed. We affirm termination of May's parental rights.

AFFIRMED.

² May's primary contention is that more efforts at keeping contact with Elise via telephone and visitation were not implemented as part of the case plan. What constitutes reasonable services varies based upon the requirements of each individual case. *C.H.*, 652 N.W.2d at 147. Generally, in making reasonable efforts to provide services, the State's focus is on services to improve parenting. *In re C.B.*, 611 N.W.2d at 493. The concept of reasonable efforts broadly includes "a visitation agreement designed to facilitate reunification while protecting the child from the harm responsible for the removal." *In re M.B.*, 553 N.W.2d 343, 345 (Iowa Ct. App. 1996). Elise's removal and subsequent adjudication was prompted by May's criminal activity in her presence that caused significant mental and emotional trauma. Due to the recommendations to preserve Elise's mental stability and improvement and May's unavailability by her incarceration in Texas, contact was not recommended or pursued.