

IN THE COURT OF APPEALS OF IOWA

No. 9-009 / 08-1970
Filed February 4, 2009

**IN THE INTEREST OF S.A., J.P., and C.A.,
Minor Children,**

**T.L.A., JR., Father,
Appellant.**

Appeal from the Iowa District Court for Hamilton County, James A. McGlynn, Associate Juvenile Judge.

A father appeals from a juvenile court permanency order in a child in need of assistance case. **AFFIRMED.**

Dani L. Eisentrager, Eagle Grove, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and Patrick Chambers, County Attorney, for appellee.

James McCarthy, Fort Dodge, for mother.

Justin Deppe, Jewell, guardian ad litem for minor child.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

MILLER, J.

Tim appeals from the juvenile court's permanency review order continuing placement of his two children for an additional period of up to six months while developing and implementing a plan designed to transition the children to their mother's home. We affirm.

Carol is the mother of a ten-year-old son and seven-year-old and six-year-old daughters ("the children"). Tim is the father of the daughters, but is not the father of Carol's son. The son has lived with Carol and Tim and his half-sisters and it appears that until recently he has perhaps believed Tim to be his father.

The children were adjudicated children in need of assistance (CINA) in August 2006 and placed in Carol's custody, subject to supervision by the Iowa Department of Human Services (DHS). As of October 2006 they were placed in the custody of Carol and Tim alternately, when the juvenile court granted concurrent jurisdiction to the district court to entertain an action for a dissolution of Carol and Tim's marriage. Carol and Tim were then separated.

In February 2007 the juvenile court placed custody of the children with the DHS, for placement commensurate with each child's needs. The order expressly approved placement with Tim's parents, with whom the children were by then residing. The children have thereafter resided with them.

In September 2007 the juvenile court ordered that custody remain with the DHS for an additional six months to allow additional time to achieve reunification of the children with a parent. The State subsequently filed a petition seeking termination of all three parents' parental rights. The court held a combined CINA

permanency review hearing and termination of parental rights hearing on August 1, October 20, and December 1, 2008.

During that portion of the hearing held on October 20 the State and Carol each completed presentation of their evidence and rested. Before entering the courtroom on December 1, the juvenile court informed counsel and the DHS representatives in chambers that it had concluded termination of parental rights was not supported by clear and convincing evidence, the State's petition would be dismissed, and the hearing would continue on the question of permanency. Upon convening in the courtroom the court made a record of its discussions with counsel and the DHS, and the permanency hearing continued. Following the hearing the court entered an order in the termination case on December 1, dismissing the State's petition. In this CINA case the court entered a permanency review order. The order continued placement of the children for up to six months, during which all parties were required to develop and implement "a plan of transition to return the children to the mother's custody with a schedule of visitation for the fathers." Tim appeals.

Appellate review of a permanency order is *de novo*. *In re N.M.*, 528 N.W.2d 94, 96 (Iowa 1995). The best interests of the children control the court's decision in granting a permanency order in a child custody matter. *Id.* There is a rebuttable presumption that parental custody serves the children's best interests. *Id.* We give weight to the juvenile court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g).

Tim claims the DHS failed to make reasonable efforts to reunify the children with him.¹ For three reasons we find no entitlement to relief on this ground. First, as the State urges, Tim has waived this claim by not pointing out, even generally, how or where the issue was preserved for review. See Iowa R. App. P. 6.14(1)(f) (requiring that a party's brief "state *how* the issue was preserved for review, with references to the places in the record where the issue was raised and decided.") (emphasis added). Second, as the State also urges, even if Tim raised such a claim in the juvenile court he did not obtain any ruling addressing or resolving it, and has thus not preserved error on it. See *Benevides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) ("Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal."). Third, although Tim asserts that a failure to provide in-home, unsupervised visitations, and the lack of a contract of expectations for him, constituted a failure to make reasonable efforts toward reunification, the record demonstrates that a lack of progress toward reunification was instead the result of other factors discussed below in addressing Tim's other claim of juvenile court error.

Tim claims it is not in the children's best interest to be returned to Carol's care.² He relies primarily on (1) Carol's lack of honesty in claiming he had

¹ We presume he is referring to the two daughters, as he is not the father of Carol's ten-year-old son and has no legal parental rights to him.

² As a preliminary matter we note that, contrary to the implication of Tim's claim, the juvenile court in fact did not order the children returned to Carol. Instead, it modified the permanency order to provide for continued placement of the children with Tim's parents for six months, during which efforts are to be made to transition the children to Carol, and after which a hearing is to be held to further consider the question of permanency.

sexually abused her then seven-year-old son, (2) Carol's attempts to secure an order that he have no contact with the children when she recently obtained an order that he have no contact with her, and (3) an assertion that Carol caused the children a great deal of emotional distress by telling them things that were not true,³ and that it is in the children's best interest to be placed in the custody or guardianship of his parents.

Some two years before the combined permanency review/termination hearing, Carol alleged Tim had sexually abused her son, an allegation later determined to be unfounded. In its order the juvenile court expressly noted and considered what it described as Carol's "sorry past history" as well as the children's feelings and attachment to the grandparents. It also noted, however, that the persons who had been providing services to Carol for many months "clearly supported" her efforts to have the children returned to her rather than supporting the DHS position, termination. The court also expressly considered and provided for any transition of the children to Carol to take place over a period of months, as they had been with their grandparents for over one and one-half years.

The juvenile court found that Tim has a lengthy history of anger management problems and assaultive behavior, including convictions for domestic abuse of his mother and child endangerment for assaulting Carol's then seven-year-old son. The evidence shows that at least one of his visitations with the children had to be ended when Tim became angry and started yelling when

³ Tim does not identify any untrue things he claims Carol told the children.

he was accidentally struck in the eye by a “paper dart” thrown by his girlfriend’s son, and that he later berated, cursed, and threatened a service provider for suspending that visitation. When informed immediately before the continuation of the hearing on December 1 that his parental rights would not be terminated, Tim became very angry and engaged in yelling, vulgar language, and perhaps pounding things with his fists, an incident heard by numerous people and observed by some. Tim nevertheless in general denies that he has a problem with assaultive behavior and anger management, and sees no need to seek counseling or otherwise attempt to change his behavior.

The attorney and guardian ad litem for the children believes it is in the children’s best interest to be returned to Carol. As he notes, the evidence shows and the juvenile court found that Carol had made significant progress and substantially fulfilled all expectations, including maintaining a stable residence, maintaining employment, and having appropriate visitations with the children. By way of contrast, the evidence also shows that Tim was self-employed, but perhaps only minimally so, as he was receiving unemployment compensation; that he was residing with a girlfriend, who was employed; and that some of his visitations with the children involved inappropriate behavior on his part.

As previously noted, there is a rebuttable presumption that parental custody serves the children’s best interests. Based on our de novo review, we agree with the conclusion of the juvenile court that a permanency goal of continued placement of the children with their grandparents for an additional period of up to six months while providing visitations for their fathers and making

efforts to transition their return to Carol's custody is in the children's best interest.

We therefore affirm the juvenile court's permanency review order.

AFFIRMED.