IN THE COURT OF APPEALS OF IOWA

No. 9-1071 / 09-1686
Filed April 21, 2010

IN THE INTEREST OF K.E., R.E., and W.E.-H.
Minor Children

A.J.E., Mother,
Appellant,

A.W.E., Father of W.E.-H.,
Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen C. Gerard II, District Associate Judge.

A mother and father appeal separately from the order terminating their parental rights. **AFFIRMED ON BOTH APPEALS.**

Noelle Murray, Coralville, for appellant-mother.

Jon Kinnamon, Cedar Rapids, for appellant-father of W.E.-H.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Janet Lyness, County Attorney, and Kristin L. Parks, Assistant County Attorney, for appellee-State.

Shelly J. Mott, attorney and guardian ad litem for minor child.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

SACKETT, C.J.

A mother and father appeal separately from the juvenile court order terminating their parental rights.[1] The mother contends the court erred in ordering termination because (1) termination is not in the best interests of the children due to the strong parent-child bond, and (2) clear and convincing evidence does not support termination under Iowa Code section 232.116(1)(i) (2009). The father contends the court erred in ordering termination because (1) clear and convincing evidence does not support the statutory grounds cited by the court, (2) judicial estoppel should apply to prevent termination, (3) the father was denied his right of confrontation, and (4) the rebuttable presumption of custody with a parent was not overcome. We affirm on both appeals.

The mother is the mother of all three children at issue. W.E.-H. is the only child at issue of the father.[2] The children came to the attention of the Department of Human Services in August of 2008 during a child protective services assessment based on an unfit home complaint. The children were removed in September and placed in foster care, where they remained during the pendency of these proceedings. In October, all parties stipulated to a finding the children were in need of assistance. In January of 2009, all parties stipulated to a dispositional order that continued the children's placement in foster care.

We review termination proceedings de novo. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993). Although we are not bound by them, we give weight to the trial

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[1] The State responded to both parents' briefs in a single brief and filed a motion to allow overlength brief. The State's motion is granted.

[2] The court also terminated the rights of all unknown and putative fathers. They have not appealed.

court's findings of fact, especially when considering credibility of witnesses. Iowa R. App. P. 6.904(3)(*g*); *In re M.M.S.*, 502 N.W.2d 4, 5 (Iowa 1993). The parent-child relationship is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511, 519 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15, 35 (1972). The State has the burden of proving the grounds for termination by clear and convincing evidence. *In re T.A.L.*, 505 N.W.2d 480, 483 (Iowa 1993).

Mother. *Statutory Grounds.* The mother contends there was not clear and convincing evidence "that the offer or receipt of services would not correct the conditions that led to the abuse or neglect of the child within a reasonable amount of time as provided in Iowa Code section 232.116(1)(i)." The court terminated the mother's parental rights under sections 232.116(1)(e), (g), and (h). The court did not terminate her parental rights under section 232.116(1)(i). The mother has not challenged any of the statutory grounds for termination cited by the court. *See* Iowa R. App. P. 6.903(2)(*g*)(3) ("Failure in the brief to state . . . an issue may be deemed waiver of that issue.")

Best Interests. The mother also contends termination is not in the best interests of the children, considering the parent-child bond, particularly the strong bond with the oldest child. This claim implicates our analysis under sections 232.116(2) and (3). We consider whether to terminate by applying the factors in section 232.116(2) to determine if termination is in the child's best interests. *See In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). Then, if the factors require

termination, we must then determine if an exception under section 232.116(3) exists so we need not terminate. *See id*.

In considering a child's interests, "the court shall give primary consideration to the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional condition and needs of the child." Iowa Code § 232.116(2).

> In seeking out those best interests, we look to the child's long-range as well as immediate interests. This requires considering what the future holds for the child if returned to the parents. When making this decision, we look to the parents' past performance because it may indicate the quality of care the parent is capable of providing in the future.

In re J.E., 723 N.W.2d 793, 798 (Iowa 2006) (quoting *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997)).

The children exhibited significant developmental delays when removed from the mother's care, which have been overcome for the most part since their removal. The mother's poor hygiene affected the children. There is evidence she has difficulty supervising all three children at once, leading to concerns about their safety. During visitation, the mother did not participate in activities with the children that would encourage their mental and emotional development—until after the termination proceedings began. The instability in the mother's own relationships with men contributes to her inability to nurture her children properly and to meet their physical, mental, and emotional needs. Applying the factors in section 232.116(2), we conclude termination of the mother's parental rights is proper. *See P.L.*, 778 N.W.2d at 37 (outlining a best-interests analysis).

Iowa Code section 232.116(3) lists exceptions to termination in certain enumerated circumstances, including "that the 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) (2009). However, a strong parent-child relationship 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). The exceptions to termination in section 232.116(3) are permissive, not mandatory. *See In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997); *see also P.L.*, 778 N.W.2d at 38 (allowing a court not to terminate if an exception applies).

From our review of the record we find there is evidence of a bond between the mother and the oldest child. He is the only child who was "sad" at the end of visits. We do not find evidence, however, that would lead us to the conclusion "termination would be detrimental to the child due to the closeness of the parent-child relationship." Iowa Code § 232.116(3)(c). No exception enumerated in section 232.116(3) applies under the facts before us.

We affirm the termination of the mother's parental rights.

Father. *Statutory Grounds.* The father contends clear and convincing evidence does not support termination under either section 232.116(1)(g) or section 232.116(1)(h). We may affirm the termination grounds exist under any of the sections cited by the juvenile court. *See In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999).

The father argues the court erred in considering evidence of events that occurred after the petition for termination was filed. We disagree. Section

232.116(1)(h)(4), for example, requires the court to find the child cannot be returned to a parent's care "at the present time." We agree the father was making good progress toward reunification prior to the time the State filed the petition for termination of his parental rights, as evidenced by the March 2009 recommendation that he be given six additional months to pursue reunification. His subsequent actions and resulting changes in circumstances, however, demonstrate the child could not be returned to his care as hoped. Of particular concern are the father's abuse of alcohol, the criminal charges he faced at the time of the termination proceedings, and the loss of his employment and housing appropriate for his child. We find clear and convincing evidence the child could not be returned to the father's custody at the time of the termination and affirm on that ground. Because we affirm the termination under section 232.116(1)(h), we need not address the father's arguments concerning section 232.116(1)(g) and whether W.E.-H. is a child in the "same family" as the child the father had in Alabama. We also need not address the father's challenges concerning the evidence his parental rights to a child in Alabama were terminated.

The father also contends judicial estoppel should have prevented the State from pursuing termination before the recommended additional six months for reunification had passed. The State recommended an additional six months in March of 2009. It filed the petition for termination in late May. The father argues the State knew all the grounds alleged in the petition when it made the recommendation for an additional six months in March. He also argues that the March recommendation "contravened the statutory grounds alleged in the

termination petition that 'an additional period of time would not correct the situation.'" This argument concerns the statutory grounds in section 232.116(1)(g), which we need not address as we have found grounds for termination under section 232.116(1)(h).

Although judicial estoppel was raised during the termination proceedings, the termination order does not address the issue. It is not preserved for our review. *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003); *see Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Concerning the change in the child's placement just before the termination, the father also contends the placement of the child in a pre-adoptive "directs the termination considerations away from the reasonable efforts needed to be accorded to the father." His contention, however, runs contrary to the express statutory language providing for concurrent planning:

> If reasonable efforts to place a child for adoption or with a guardian are made concurrently with reasonable efforts as defined in section 232.102, the concurrent goals and timelines may be identified. Concurrent case permanency plan goals for reunification, and for adoption or for other permanent out-of-home placement of a child shall not be considered inconsistent in that the goals reflect divergent possible outcomes for a child in an out-of-home placement.

Iowa Code § 232.2(4)(h). The father correctly states that reasonable efforts must be made in support of reunification and that the court never waived reasonable efforts concerning the father. He argues, without any specifics, that "the termination proceeding constituted a suspension of reasonable efforts" and "did

not allow adequate time for the State to support the father." The father does not point to any reunification efforts that were suspended or any additional services he requested that were not provided. The State "has an obligation to make reasonable efforts toward reunification," but a parent "has an equal obligation to demand other, different, or additional services" in a timely manner. *In re A.A.G.*, 708 N.W.2d 85, 91 (Iowa Ct. App. 2005).

The record reveals the services offered to the family included foster care, supervised visitation, mental health evaluations and treatment, domestic violence services, AEA intervention services, Title XIX, FSRP services, case management, and family team meetings. We do not find the father requested different or additional services that were not provided. We conclude this claim is without merit.

The father argues the change in placement just prior to the termination proceedings "interposed a de facto contrary presumption to the rebuttable presumption" a child's interests are best served by parental custody. *See In re Chad*, 318 N.W.2d 213, 218 (Iowa 1982) (acknowledging a rebuttable presumption in favor of parental custody). We cannot agree that the statutory provisions allowing concurrent case permanency plan goals are contrary to the parental-custody presumption. We conclude, however, that in the circumstances presented in the record before us, the presumption in favor of parental custody was rebutted. The State made more than reasonable efforts to reunify the father with his child, but his own actions prevented reunification. Furthermore, the

termination order does not address this specific claim. *See K.C.*, 660 N.W.2d at 38 (concerning preservation of issues for appellate review).

We have carefully considered all of the claims raised. Any not specifically addressed are either not preserved for our review or are without merit. We affirm the termination of the father's parental rights to his child.

AFFIRMED ON BOTH APPEALS.