

IN THE COURT OF APPEALS OF IOWA

No. 9-400 / 09-0564
Filed July 2, 2009

**IN THE INTEREST OF D.T.,
Minor Child,**

**E.L.R., Mother,
Appellant,**

**D.M.T., Father,
Appellant.**

Appeal from the Iowa District Court for Polk County, Karla J. Fultz,
Associate Juvenile Judge.

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

Todd E. Babich of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines,
for appellant mother.

Christopher Kragnes of Kragnes & Associates, P.C., Des Moines, for
appellant father.

Thomas J. Miller, Attorney General, Kathrine E. Miller-Todd, Assistant
Attorney General, John P. Sarcone, County Attorney, and Annette Taylor,
Assistant County Attorney, for appellee State.

Christine Bisignano, Windsor Heights, for minor child.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

A mother and father appeal separately from the order terminating their parental rights. Upon our de novo review, we affirm on both appeals.

I. Background Facts and Proceedings.

D.M.T. is the father and E.R. is the mother of D.T. Both parents have a history of criminal activity. The father has a history of mental illness, disability, and assaultive and threatening behavior. He has taken medication and received services for mental illness in the past. The father receives Supplemental Security Income due to his disability. The mother has a long history of services including individual therapy, parenting classes, and placement at both the Iowa Juvenile Home and House of Mercy. In 2002 the mother's parental rights to another child were terminated.¹ In that case, reasonable services were offered to the mother to alleviate the problems that led to the removal and adjudication of the child, but the mother failed to cooperate with or utilize the services.

D.T. was born in October 2004. D.T. lived with the mother for approximately eight months until the mother was sent to prison. In approximately 2006, the mother was transferred to the Women's Residential Correctional Facility in Des Moines. While at the facility, the mother attended groups as required and completed a parenting class. She was allowed visitation with D.T., and for approximately three months, D.T. was in the mother's care at the facility. However, the mother violated the program's rules, and her parole was revoked. The mother was subsequently incarcerated in the Mitchellville Women's Correctional Facility. While in the Mitchellville facility, the mother took parenting,

¹ D.M.T. is not the father of this child.

victim impact, and criminality classes. She also received her GED and started taking college courses. While in prison, she attempted to arrange several visitations with D.T., but her requests were denied. The mother last saw D.T. in 2006.

The father and the father's mother, D.T.'s grandmother, cared for D.T. while the mother was incarcerated. D.T. first came to the attention of the Iowa Department of Human Services (Department) after it was reported that the father was abusing drugs. The report was ultimately founded. On April 14, 2006, the State filed a child in need of assistance (CINA) petition concerning D.T. The juvenile court confirmed and adjudicated D.T. a CINA on May 25, 2006, and D.T. was placed with the paternal grandmother.

At that time, the father was offered services including a substance abuse assessment, medication management services, ongoing individual therapy, random urinalysis testing, and family team meetings. He completed the substance abuse assessment but did not follow through with the recommended treatment, and he did not follow through with his appointments for medication management services and therapy. The father continued to use marijuana.

In approximately July 2006, the father stated that he was not working towards reunification with D.T. and wanted D.T. to remain with D.T.'s paternal grandmother. A family team meeting was held on July 6, 2006, to discuss long-term planning options in regards to D.T. Because the mother was incarcerated and the father acknowledged his inability to care for D.T., it was recommended that a long-term guardianship of D.T. be established with D.T.'s paternal grandmother. On July 13, 2006, the juvenile court entered its CINA disposition

order adopting the case permanency plan recommending that a long-term guardianship of D.T. be established with D.T.'s paternal grandmother. In March 2008, D.T.'s paternal grandmother was appointed D.T.'s guardian, and the underlying CINA case was dismissed.

On July 30, 2008, D.T. was removed from D.T.'s guardian's care and custody after it was reported that D.T. was exposed to criminal violence and domestic abuse and that D.T.'s guardian allowed wanted criminals direct access to D.T. D.T. tested positive for cocaine and was placed in foster care. The State subsequently filed a CINA petition, and D.T. was again adjudicated CINA on August 25, 2008.

After D.T.'s removal from the guardian's care and second CINA adjudication, services were offered to the father including supervised visitation, random urinalysis testing, and family team meetings. The Department recommended that the father attend therapy, address anger management issues, and participate in random drug screens. The father requested visitation with D.T. and was to contact the in-home provider to set up visitation. However, the father did not contact the provider to set up visitation. The father's last contact with D.T. was in July 2008. The father provided a drug screen on October 3, 2008, that tested positive for marijuana; he did not provide any other drug screens as requested.

On November 3, 2008, the State filed its motion to waive reasonable efforts. Among other things, the State asserted the offer or receipt of services would not correct the conditions that led to the abuse or neglect within a reasonable period of time. Additionally, the State asserted the mother's rights

had been terminated to another child who is a member of the same family and the offer or receipt of services within a reasonable time would not likely correct the conditions that led to removal. The juvenile court ultimately ruled that the reasonable efforts motion was moot because the State informed the court it intended to file a petition to terminate the parents' parental rights. On December 22, 2009, the State filed its petition to terminate the parents' parental rights.

In January 2009, the mother was paroled and transferred to a halfway house in Waterloo. She began working full-time as a dishwasher as part of her parole.

Hearing on the State's petition to terminate the parents' parental rights was held on February 26, 2009. The father did not appear at the hearing. The mother appeared and testified that the last time she saw D.T. was in 2006, explaining that she had been irresponsible and in and out of prison. She acknowledged that she was unable to resume care for D.T. at that time, but testified she was to be released from the halfway house on April 22, 2009, and would be able to be reunited with D.T. then. She testified she had not abandoned D.T. She stated she maintained her relationship with D.T. by talking with D.T. on the phone, writing to D.T., and keeping in contact with her family. She testified she called D.T. while D.T. had visitation with the grandmother. The Department's case worker testified that D.T.'s foster home is committed to D.T. and is willing to adopt D.T. should D.T. become available for adoption.

On March 31, 2009, the juvenile court entered its order terminating the mother's parental rights pursuant to Iowa Code section 232.116(1)(g) (2007)

(child CINA, parent's rights to another child were terminated, parent does not respond to services) and terminating both parents' parental rights pursuant to section 232.116(1)(b) (abandonment), (d) (child CINA for physical or sexual abuse (or neglect), circumstances continue despite receipt of services), and (i) (child meets definition of CINA, child was in imminent danger, services would not correct conditions). The court found the Department had been involved with the family since 2006 and little to no progress had been made towards addressing the issues that brought them to the court's attention. As to the mother, the court found the credibility of the mother's report that she continued to have telephone contact with D.T. during the guardian's supervised visits after July 2008 to be very suspect, as there was no evidence in the Department case worker's reports that the calls were taking place during the supervised visits. The court concluded termination was in D.T.'s best interests.

The father and mother appeal separately.

II. Scope and Standards of Review.

We review termination proceedings de novo. *In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005). Although we give weight to the juvenile court's findings of fact, we are not bound by them. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). The grounds for termination must be supported by clear and convincing evidence. *In re T.B.*, 604 N.W.2d 660, 661 (Iowa 2000). Evidence is clear and convincing when it leaves no serious or substantial doubt about the correctness of the conclusion drawn from it. *In re D.D.*, 653 N.W.2d 359, 361 (Iowa 2002). Our primary concern in termination cases is the best interests of the child. *In re A.S.*, 743 N.W.2d 865, 867 (Iowa Ct. App. 2007).

III. Discussion.

On appeal, both parents argue the State failed to establish by clear and convincing evidence grounds for termination. Additionally, the father contends the court erred in determining termination was in D.T.'s best interests and in determining termination was necessary, as D.T. was in the legal guardianship of a relative. We address each argument in turn.

A. Grounds for Termination.

When the juvenile court terminates parental rights on more than one statutory ground, we only need to find grounds to terminate under one of the sections cited by the court in order to affirm the court's ruling. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). In this case, we choose to focus our attention on section 232.116(1)(b) as the basis for termination. Section 232.116(1)(b) permits termination of parental rights if "[t]he court finds that there is clear and convincing evidence that the child has been abandoned or deserted."

"Abandonment of a child" means the relinquishment or surrender, without reference to any particular person, of the parental rights, duties, or privileges inherent in the parent-child relationship. Proof of abandonment must include both the intention to abandon and the acts by which the intention is evidenced. The term does not require that the relinquishment or surrender be over any particular period of time.

Iowa Code § 232.2(1). Two elements are necessary to establish abandonment: (1) the giving up of parental rights and responsibilities as demonstrated by the party's conduct and (2) an accompanying state of mind that shows intent to forego these rights and responsibilities. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa Ct. App. 1996) (citing *In re D.M.*, 516 N.W.2d 888, 891 (Iowa 1994)). "Parental responsibilities include more than subjectively maintaining an interest in a child.

The concept requires affirmative parenting to the extent it is practical and feasible in the circumstances.” *Id.*

“[S]ignificant and meaningful contact” includes, but is not limited to, the affirmative assumption by the parents of the duties encompassed by the role of being a parent. This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parents establish and maintain a place of importance in the child’s life.

Iowa Code § 232.116(1)(e)(3).

In this case, the mother cared for D.T. the first eight months of D.T.’s life and was then incarcerated. After she was paroled and placed in a facility where she could be reunited with D.T., she violated the program’s rules and her parole was revoked. This was the last time the mother saw D.T. D.T. came to the attention of the Department in 2006 due to the father’s drug use and the mother’s incarceration. The father acknowledged in 2006 he was unable to care for D.T. and requested D.T. be placed with D.T.’s grandmother. The father was offered but did not participate in services. The mother has not seen D.T. since 2006, and the father has not seen D.T. since 2008. D.T. has been abandoned by D.T.’s parents as evidenced by the parents’ lack of motivation/interest in assuming a parental role by failing to involve themselves in services and visitations, failing to provide any emotional or financial support, and continued involvement in criminal activities, resulting in ongoing incarcerations. We therefore find clear and convincing evidence supporting termination of the parents’ parental rights because they abandoned D.T.

B. Best Interests.

The father next contends termination was not D.T.'s best interests. As stated above, our primary concern in termination cases is the best interests of the child. *A.S.*, 743 N.W.2d at 867. "A child's safety and the need for a permanent home are now the primary concerns when determining a child's best interests." *In re J.E.*, 723 N.W.2d 793, 801 (Iowa 2006) (Cady, J., concurring specially). Those best interests are to be determined by looking at the child's long-range as well as immediate interests. We are to consider what the future likely holds for the child if that child is returned to his or her parents. Insight for that determination is to be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care that the parent is capable of providing. *In re L.L.*, 459 N.W.2d 489, 493-94 (Iowa 1990); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). Case history records are entitled to much probative force when a parent's record is being examined. *Harter v. State*, 260 Iowa 605, 608-09, 149 N.W.2d 827, 829 (1967).

On our de novo review of the record, we find termination of the father's parental rights is in D.T.'s best interests. There was no evidence in this record to establish that additional time would yield any different result. D.T. should not be forced to wait for permanency. See *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987) ("[P]atience with parents can soon translate into intolerable hardship for their children."). "At some point, the rights and needs of the child rise above the rights and needs of the parents." *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). D.T.'s foster home is committed to D.T. and is willing to adopt D.T. should he become available for adoption. D.T. should not be forced to endlessly suffer

the parentless limbo of foster care. *In re J.P.*, 499 N.W.2d 334, 339 (Iowa Ct. App. 1993). We conclude that the father's argument is without merit and termination is in the child's best interests.

C. Child in Legal Guardianship of a Relative.

The father last contends that termination of his parental rights was unnecessary because D.T. was in the legal guardianship of a relative. Termination may be avoided if "[a] relative has legal custody of the child." Iowa Code § 232.116(3)(a). 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). We find no abuse of discretion in the circumstances before us.

IV. Conclusion.

Because we find clear and convincing evidence supporting termination of both parents' parental rights, termination is in the child's best interests, and the juvenile court did not abuse its discretion in terminating the father's parental rights because the child is in the legal guardianship of a relative, we affirm the juvenile court's decision terminating both parents' parental rights.

AFFIRMED ON BOTH APPEALS.