

IN THE COURT OF APPEALS OF IOWA

No. 1-684 / 11-1102
Filed September 21, 2011

**IN THE INTEREST OF K.N. and K.M.N.,
Minor Children,**

**B.E.N., Father,
Appellant.**

Appeal from the Iowa District Court for Polk County, Constance Cohen,
Associate Juvenile Judge.

A father appeals the termination of his parental rights. **AFFIRMED.**

Jacob Mason, Ankeny, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
County Attorney, John Sarcone, County Attorney, and Andrea S. Vitzthum,
Assistant County Attorney, for appellee.

Nancy Pietz, Des Moines, for mother.

Kimberly Ayotte, Youth Law Center, attorney and guardian ad litem for
minor children.

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

TABOR, J.

A father challenges the termination of his parental rights to his son, K.M.N.¹ He argues that we should place both his biological child and his child's half-brother in the paternal grandmother's care and restore his parental rights because the Department of Human Services (DHS) did not comply with Iowa Code section 232.84's (2009) notice requirements. Had it done so, the father asserts, Iowa Code section 232.116(3)(a)'s relative-placement consideration may have preserved his parental rights.

Because the father did not give the juvenile court a chance to decide his claim that his parental rights should not have been terminated as a consequence of DHS's failure to comply with section 232.84(2)'s notice requirements, and because the juvenile court did not rule on that issue, that claim is not preserved for our review. We decline to reach the merits.

I. Background Facts and Proceedings

K.M.N. was born in May 2008. In March 2010, K.M.N.'s mother gave birth to a second son, K.L.N. K.L.N. has a different father whose parental rights were also terminated in the juvenile court's ruling—a decision not contested here.

K.M.N. and his half-brother came to the attention of DHS as the result of allegations that the mother and father had multiple domestic altercations in the children's presence and that the mother and father were homeless. Erin Stiles, the DHS caseworker assigned to this family, testified the paternal grandmother attended a family team meeting in September 2010 and indicated her desire to

¹ K.M.N.'s mother had a second child, K.L.N., with a different man; neither the mother nor the father of the second child appeals the termination of their parental rights.

have only K.M.N., her biological grandchild, placed with her if the juvenile court became involved. Stiles testified further that the mother and father in this appeal did not want to place only K.M.N. with the grandmother. In her testimony, the paternal grandmother denied stating she wanted only K.M.N. placed with her and said she was willing to care for both children.

On October 25, 2010, the State filed petitions alleging K.M.N. and K.L.N. were children in need of assistance (CINA) and also filed an application to remove the children, which the court granted.² The children were placed in the temporary custody of a pre-adoptive foster family because, the juvenile court found, “there was no appropriate family placement available at that time.”

Following an adjudicatory and removal proceeding on November 24, 2010, the juvenile court found that the mother stipulated to the need for ongoing removal and both fathers were in prison and took no position. That same day, the court adjudicated K.M.N. and K.L.N. to be in need of assistance pursuant to Iowa Code sections 232.2(6)(b), (c)(2), and (n). The court continued the two children in foster care.

On April 11, 2011, the State filed a petition requesting that the court terminate parental rights.³ At the termination hearing on June 20, 2011, K.L.N.’s father voluntarily consented to the termination of his parental rights. However, the mother and father of K.M.N. objected to the termination of their rights and

² The court pointed out that mother indicated “that her great-grandmother was Sioux and Cherokee; however, no one in her family is registered with a tribe, so there is no current evidence to support the applicability of the Indian Child Welfare Act.”

³ The juvenile court previously terminated the mother’s parental rights to another child, A.W., in February 2004.

requested an extension of six months to reunify. K.M.N.'s father testified at the termination hearing that he wanted his mother to be considered for placement of the children.

On July 6, 2011, the juvenile court concluded termination of all three parents' rights is "in [the children's] best interest and would be less detrimental than the harm that would be caused to them by continuing the parent/child relationships," noting the father has "displayed [a] lifestyle[] of criminal activity, substance abuse, and mental health issues." The father was incarcerated at the time of the hearing. The juvenile court wrote: "His discharge date is not until November 16, 2014, and the Court cannot rely on the possibility of him being released earlier than that." The juvenile court explained that K.M.N and K.L.N. "have waited more than a year for their parents to choose their safety, permanency, and well-being over their criminal behaviors and mental health problems. [K.M.N.] and [K.L.N.] need and deserve more."

With respect to placement with the paternal grandparents, the juvenile court explained that the grandparents' "commitment to both children has fluctuated" and they "have clearly not made the children a priority in their lives." The court noted the grandmother "did not contact DHS until April, 2011," that it took her

over five months after the [children] were removed from [their parent's] care to contact DHS to request visitation . . . and to request of the Court that both [children] be placed with her. It then took another month before she had her home approved for placement. She did not start taking any foster parenting classes until two months after the Termination of Parental Rights Petition was submitted. These classes are a necessary precedent before [the children] could be placed in her home.

The court concluded that “[p]lacement with [the paternal grandparents] would not be in their best interest at this time, but should remain a potential concurrent plan once foster care licensing is established.” The court explained that the children’s foster parents “are ready, willing, and able to meet their long-term needs for nurturing and growth” and determined the foster parents “are in the best position to provide for [the children’s] long-term nurturing and care.” The court, therefore, terminated the father’s parental rights pursuant to Iowa Code sections 232.116(1)(d), and (h) (2011).

In his appeal, the father asks us to reverse the termination of his parental rights with respect to K.M.N. and to place both children with the paternal grandmother. He argues DHS failed to notify the paternal grandparents within thirty days of the children’s removal as required by Iowa Code section 232.84(2).⁴ He asserts that if DHS had provided the paternal grandparents written notice of the children’s removal from their parents, the grandparents “would have had adequate time to declare their intent to be a placement option,” and could have assumed custody of the children. As a result, he contends, his “parental rights . . . could have been preserved” because Iowa Code section

⁴ Iowa Code section 232.84(2) provides as follows:

Within thirty days after the entry of an order under this chapter transferring custody of a child to an agency for placement, the agency shall exercise due diligence in identifying and providing notice to the child’s grandparents, aunts, uncles, adult siblings, and adult relatives suggested by the child’s parents, subject to exceptions due to the presence of family or domestic violence.

232.116(3)(a)⁵ “allows the court to make exceptions to the termination of parental rights where ‘[a] relative has legal custody of the child.’”

He asserts that the court “found that [he] had a clear love for the children [, . . . cared for both children prior to his detention], . . . continued to make contact with the children” during his incarceration, and “accepted services during his incarceration.” He argues that “[t]hese factors, coupled with relative placement, may have mitigated the Court’s determination to terminate parental rights in light of the best interests of the child.”

The State counters by arguing that the father lacks standing to contest the DHS’s failure to comply with section 232.84(2) because the provision “was not passed for the protection of the *father’s* rights.” It further argues that the section “is not relevant to the termination proceeding” because the “only relevant issue” was whether placing the children with “the paternal grandmother [was] in the best interests of the children.” The State argues, in addition, that a court has discretion in deciding whether to preserve parental rights pursuant to section 232.116(3)(a)’s relative-placement exception and that “[o]nce the grounds for termination have been met, it is usually in the best interests of the child for termination of parental rights to occur even if the child is in relative placement.” The State further asserts the “paternal grandmother was aware of these proceedings from the very beginning,” noting that “[s]he attended a family team meeting in September 2010.” It also points out the grandmother testified at the

⁵ Iowa Code section 232.116(3)(a) provides that the court “need not terminate the relationship between the parent and child if the court finds any of the following: A relative has legal custody of the child.”

termination hearing “that she had known about the removal for awhile and . . . was aware that her son had counsel in the proceedings, yet she chose not to appear at any hearing until April 2011.”

II. Scope & Standard of Review

We review termination proceedings de novo. *In re R.J.*, 495 N.W.2d 114, 115 (Iowa Ct. App. 1992). We give weight to the juvenile court’s findings of fact, especially when considering witnesses’ credibility, but we are not bound by those determinations. *Id.* Our primary concern in termination-of-parental-rights proceedings is the best interests of the children. *Id.*

III. Analysis

A. Preservation of Error

The State asserts the father did not preserve his argument that DHS’s failure to comply with the notice requirements of Iowa Code section 232.84 should preclude termination of his parental rights. The State asserts that “the termination order does not address this issue,” there was “no reference to Iowa Code section 232.84 in the CINA or termination proceedings,” and “[n]o party objected to foster care placement at the adjudication or the disposition hearings.” It argues that “[t]he appropriate time to address this issue was in the CINA proceedings.” As the State points out, the father does not explain on appeal how he preserved the issue for our review.

“As a general rule, an issue not presented in the juvenile court may not be raised for the first time on appeal.” *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994); *R.J.*, 495 N.W.2d at 117; *see also Meier v. Senecaut*, 641 N.W.2d

532, 537 (Iowa 2002). If a party presents an issue to the court but the court does not rule on that issue, “the party raising the issue must file a motion asking the court for a ruling in order to preserve the issue for appeal.” *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995); see also *Meier*, 641 N.W.2d at 538–39. To find that error was preserved, “the record must at least reveal the court was aware of the claim or issue and litigated it.” *Meier*, 641 N.W.2d at 540. We employ these preservation principles because “[i]t is not a sensible exercise of appellate review to analyze facts of an issue ‘without the benefit of a full record or lower court determination[.]’” *Id.* at 537 (citation omitted).

After reviewing the record, we conclude the father did not preserve his claim for our review because he neither raised the issue before the juvenile court nor secured a ruling from the juvenile court on the issue now presented.⁶ The only reference to the notice provision in the record appears to be the following argument, advanced by the mother’s attorney at the June 20, 2011 proceedings:

I think that the evidence in this case is also clear, in terms of relative placement, that this is another situation where the relatives of these children were not specifically advised, as is required under Iowa law, that they need to be considered as a placement up front. . . . And I don’t think that there’s been any showing that the grandparents were advised, Hey, you need to take action now, not after months and months of time have gone by.

⁶ We note the distinction between the notice to necessary parties required by section 232.112 and the notice to grandparents and other adult relatives required by section 232.84. See generally *In re S.P.*, 672 N.W.2d 842, 846 (Iowa 2003) (addressing father’s claim that termination of parental rights was improper due to lack of notice, even though father filed no posttrial motions and waited for appeal to mount challenge). In this case, we do not reach the question whether a grandparent claiming not to have received proper notice under section 232.84 would be required to preserve the issue before raising it on appeal.

To the extent the above passage could be construed as advancing the father's section 232.84 argument, the juvenile court did not address the claim in its termination order. Rather, the court limited its analysis to considering each parent's conduct in light of the grounds for termination outlined in Iowa Code section 232.116. Although the decision provides that the paternal grandparents "should remain a potential concurrent plan once foster care licensing is established," the court never discussed the notice provided to the grandparents or the consequence of failing to provide them notice. In fact, the decision never mentions section 232.84. In short, the court did not rule on the issue and, critically, the father never filed a motion asking the court for a ruling to preserve the issue for appeal. See *In re A.M.H.*, 516 N.W.2d 867, 872 (Iowa 1994) (finding mother waived appellate claim by not raising issue through motion to enlarge or amend).

As a result, we do not have a full record or lower court determination to review. See *Meier*, 641 N.W.2d at 537. Because the father did not squarely present the statutory notice issue to the juvenile court, and because the juvenile court did not rule on that issue, the claim is not preserved for our review. The father does not contest the statutory grounds for terminating his parental rights. Accordingly, we affirm.

AFFIRMED.