IN THE COURT OF APPEALS OF IOWA

No. 1-723 / 11-1204
Filed October 5, 2011

IN THE INTEREST OF A.T.-M.,
Minor Child,

J.P., Father,
Appellant.

Appeal from the Iowa District Court for Linn County, Barbara H. Liesveld, District Associate Judge.

A father appeals from a juvenile court order terminating his parental rights to a child. **AFFIRMED.**

Judy Goldberg, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Kelly J. Kaufman, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., Mullins, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

Javon is the father, and J.T. the mother, of A.T.-M., who was born in December 2009 and was seventeen months of age at the time of a May 2011 termination of parental rights hearing. Javon appeals from a July 25, 2011 juvenile court order terminating his parental rights to A.T.-M. (The order also terminated J.T.'s parental rights, and she has not appealed.) We affirm.

Javon and J.T. had engaged in a social and sexual relationship over a period of several months. Javon became aware of J.T.'s pregnancy. At the time of A.T.-M.'s birth Javon was residing in a residential correctional facility, having been granted probation upon conviction for theft in the first degree.[1]

A.T.-M. was removed from parental custody on February 16, 2010, by a temporary removal order of the juvenile court. J.T. had been arrested on an out-of-state warrant for forgery. One week earlier Javon had escaped from the residential correctional facility, and his whereabouts were unknown to the Iowa Department of Human Services (DHS). The temporary removal order placed A.T.-M. in the legal custody of the DHS and authorized the DHS to place him with a relative in lieu of family foster care.

A.T.-M. was initially placed with a lady who was believed to be a relative of J.T. When it was discovered that the lady was not a relative, the court authorized continued placement with her as a suitable adult. In mid-June 2010 A.T.-M. was

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[1] Javon, thirty-two years of age at the time of the termination hearing, had a lengthy recent history of alcohol abuse and criminal activity. His convictions include convictions in 2007 for driving while license denied, intoxication, domestic abuse, and three OWIs; convictions in 2008 for OWI third offense, driving while license barred (two convictions), and theft in the first degree; and a 2010 conviction for escape (from the residential correctional facility).

placed in the home of his maternal great uncle and the great uncle's wife. He has thereafter remained in the legal custody of the DHS and placement in the physical custody of the maternal great uncle.

When A.T.-M. was removed, J.T. informed the DHS that each of three individuals was potentially A.T.-M.'s father. The child in need of assistance (CINA) petition originally filed in January 2010 listed only one of the three, not Javon, as the father. When paternity testing showed him not to be the father, an August 2010 amendment to the petition deleted the first name and replaced it with the names of Javon and the other male as putative fathers.

A petition seeking termination of Javon's and J.T.'s parental rights was filed in September 2010. By January 2011 Javon's probation had been revoked and he was serving a sentence of no more than ten years at the Fort Dodge correctional facility on his conviction for theft in the first degree. He was served with notice of the CINA and termination proceedings on January 14, 2011. In the meantime, the termination case had proceeded to hearing, but not to judgment, as to J.T.

On February 1, 2011, Javon requested paternity testing to determine if he was A.T.-M.'s father. On February 14 the juvenile court adjudicated A.T.-M. to be a CINA as to Javon and, at Javon's request, continued a dispositional hearing to March 31. A March 16 paternity report showed Javon to be A.T.-M.'s father. Javon received the report on March 29.

The juvenile court held a combined dispositional/termination hearing on May 12, 2011. The court subsequently ordered Javon's parental rights

terminated pursuant to Iowa Code sections 232.116(1)(b), (e), and (h) (2011). Javon appeals.

> We review termination proceedings de novo. Although we are not bound by them, we give weight to the trial court's findings of fact, especially when considering credibility of witnesses. The primary interest in termination proceedings is the best interests of the child. 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) (citations omitted).

Javon first asserts the juvenile court erred in terminating his parental rights "without providing reasonable efforts." He points to the court's statement in its May 17, 2011 dispositional order that "reasonable efforts have not been made, as the father is currently incarcerated."

The evidence at trial, in particular the testimony of the DHS social worker/case manager involved in this case, shows that the only service requested by Javon (other than paternity testing) up to the dispositional/termination hearing was to have contact with the maternal great uncle in order to know how A.T.-M. was doing. The DHS helped arrange such contacts, and Javon had been able to call and speak with the great uncle three times and had corresponded with him twice. In addition, the DHS sought, and eventually received from Javon, information for a social history, which was provided to the juvenile court. The DHS also arranged for the paternity testing that established Javon as A.T.-M.'s father.

The evidence further shows that the DHS is unable to provide direct services to an imprisoned person, such as Javon was at the relevant times

during the CINA and termination proceedings, and that any services have to be provided by or received through the prison system. After being provided with proof he was A.T.-M.'s father, Javon had enrolled in but apparently not yet started a parenting class available through the prison. As discussed further below, he hoped that within a few months he would be able to participate in a substance abuse program.

"The services required to be supplied an incarcerated parent, as with any other parent, are only those that are reasonable under the circumstances." *In re S.J.*, 620 N.W.2d 522, 525 (Iowa Ct. App. 2000). The record made at the dispositional/termination hearing shows that the DHS sought and secured information for a social history, arranged requested paternity testing, and helped arrange the contacts Javon was able to have with the maternal great uncle who had A.T.-M.'s physical custody. The DHS provided all of the services that it could, given Javon's incarceration. We read the above-quoted language from the juvenile court's dispositional order as simply recognizing that under the circumstances the DHS was unable to provide any services other than the several that it had provided. We affirm on this issue.

Javon next asserts the State did not meet its burden to prove his parental rights should be terminated pursuant to any one or more of the three statutory grounds relied on by the juvenile court.

Iowa Code section 232.116(1)(h) provides that a juvenile court may order termination of parental rights if it finds that the child:

> (1) is three or younger, (2) has been adjudicated a CINA, (3) has been removed from the physical custody of the child's parents for at

> least six of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days, and (4) cannot be returned to the custody of the child's parents at the present time.

Javon asserts the State did not prove the third and fourth elements of section 232.1106(1)(h). As to the third element, he argues that because he had only been proved to be A.T.-M.'s father about one and one-half months prior to the termination hearing, A.T.-M. had only been removed from him that period of time and not the required six months.

Section 232.116(1)(h)(3) speaks of a child's removal from the "physical custody" of the parents. Pursuant to the juvenile court's orders, since mid-February 2010 A.T.-M. has been continuously removed from his parents, placed in the legal custody of the DHS, and placed in the home of persons other than his parents, initially with a presumed relative, then with a suitable adult when the original placement was determined not to be a relative, and since mid-June 2010 with a relative, the maternal great uncle. We conclude that A.T.-M. has been removed from the physical custody of his parents since mid-February 2010, and that the State proved the third element by clear and convincing evidence.

Javon asserts the fourth element has not been proved by clear and convincing evidence because A.T.-M. could have been returned to his custody six months after he was proved to be A.T.-M.'s father. This element is proved when the evidence shows the child cannot be returned to the parent without remaining a CINA. *In re R.R.K.*, 544 N.W.2d 274, 277 (Iowa Ct. App. 1995). The threat of probable harm will justify termination of parental rights, and the

perceived harm need not be the one that supported removal from the home. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992).

The fourth element requires proof at the termination hearing that the child cannot be returned to the custody of the child's parents "at the present time." This language of necessity refers to the time of the termination hearing. At the time of that hearing Javon was imprisoned, with a tentative discharge date of April 30, 2014. He was to appear before the parole board in late June or early July 2011. He hoped, but had no assurance, that he would subsequently be able to participate in and complete a three-month substance abuse program and thereafter be paroled to reside in a residential correctional facility and participate in work release beginning in about October 2011. We conclude the State proved by clear and convincing evidence that within the meaning of the fourth element A.T.-M. could not be returned to Javon at the time of the termination hearing.

Although the juvenile court relied on three separate statutory provisions to terminate Javon's parental rights, we need only find grounds under one of those provisions in order to affirm the juvenile court. *R.R.K.*, 544 N.W.2d at 276. Having found the State proved grounds for termination pursuant to section 232.116(1)(h), we need not and do not address the other two provisions relied on by the court.

Finally, Javon asserts termination of his parental rights was not in A.T.-M.'s best interest as he was in the legal custody of a relative. He cites section 232.116(3)(a), which provides that (even when grounds for termination have

otherwise been proved) the court need not terminate parental rights if "a relative has legal custody of the child."

The State does not challenge Javon's assertion that A.T.-M. is in the "legal custody" of a relative, the maternal great uncle. We will therefore assume, without so deciding, that such is true.[2]

As noted above, at the time of the termination hearing Javon was serving a long-term sentence with tentative discharge date of April 30, 2014, but hoped to be released to work release while placed in a correctional facility in about October 2011. He has never met A.T.-M., and thus has no bond or even a relationship with him. A.T.-M. had been in the home of his maternal great uncle for eleven months, and he is extremely closely bonded to him and his wife. The great uncle and his wife are ready, willing, and able to adopt A.T.-M. if Javon's parental rights are terminated. The DHS case manager opined that because of Javon's history of alcohol abuse, even after he was released from prison and a half-way house he would need an extended period, at least an additional six months, to demonstrate an ability to avoid substance abuse, maintain employment, and maintain stable housing, before placing A.T.-M. with him could be considered. She recommended termination of Javon's paternal rights, opining it was in A.T.-M.'s best interest so that he would be able to remain in the home of

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[2] We nevertheless do note that relevant statutes distinguish between "physical custody," *see, e.g.,* Iowa Code §§ 232.116(1)(f)(3) and 232.116(1)(h)(3), and "legal custody," *see id.* § 232.116(3)(a), and that pursuant to all orders of the juvenile court in this case it appears that A.T.-M. has been in the legal custody of the DHS throughout these proceedings.

the maternal great uncle. A.T.-M.'s attorney and guardian ad litem concurred in the recommendation of the DHS case manager.

The provisions of section 232.116(3) are permissive, not mandatory. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). The court uses its best judgment in applying the factors contained in that statute. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). "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). When the statutory grounds for termination of parental rights exists, the needs of a child are generally promoted by termination. *In re L.M.F.*, 490 N.W.2d 66, 68 (Iowa 1992).

Termination of parental rights has been found appropriate when the child is likely to be adopted by grandparents. *In re D.K.K.*, 500 N.W.2d 54, 57 (Iowa 1993). Here, A.T.-M. is likely to be adopted by a great uncle and great aunt, an insubstantial distinction from the facts in *D.K.K.* Given A.T.-M.'s young age, the complete absence of Javon from his life to date, the strong bond between A.T.-M. and his maternal great uncle and great aunt, and his need for security, stability, and permanency, we conclude that the section 232.116(3)(a) exception should not preclude the otherwise appropriate termination of parental rights in this case. We therefore affirm the judgment of the juvenile court.

AFFIRMED.