

IN THE COURT OF APPEALS OF IOWA

No. 1-885 / 11-1597
Filed December 7, 2011

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

**A.J.R., Father,
Appellant.**

Appeal from the Iowa District Court for Polk County, Carol S. Egly, District Associate Judge.

A father appeals from the order terminating his parental rights.

AFFIRMED.

Nicholas Bailey of Bailey Law Firm, P.L.L.C., Mitchellville, for appellant father.

Thomas J. Miller, Attorney General, Janet Hoffman, Assistant Attorney General, John P. Sarcone, County Attorney, and Kevin Brownell, Assistant County Attorney, for appellee State.

Erin Mayfield of the Youth Law Center, Des Moines, for minor child.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

DANILSON, P.J.

A father appeals the termination of his parental rights to his daughter. He contends the State failed to prove the grounds for termination by clear and convincing evidence and termination is not in the child's best interests. The child is under three years of age; has been adjudicated a child in need of assistance (CINA); and has been removed from the physical custody of the father for at least six months. Considering the father's criminal history, lack of contact with the child, minimal participation in these proceedings, and unaddressed mental health concerns, we conclude there is clear and convincing evidence the child cannot be returned to his care at this time. Termination is in the child's best interests. We affirm termination of the father's parental rights.

I. Background Facts and Proceedings.

S.D. was born in January 2011 and was nine months old at the time of a September 2011 termination of parental rights hearing. The father appeals from the September 15, 2011 juvenile court order terminating his parental rights to S.D. The order also terminated the mother's parental rights, but she has not appealed.

The mother and father engaged in a casual sexual relationship. At that time, the father lived with his mother and her boyfriend. The father has a criminal record, including theft, burglary, trespass, and several assault charges. He is mildly mentally retarded. He is not employed, but receives monthly social security disability payments.

The mother is married to another man, Ed, who was incarcerated for a period of time before and after S.D.'s birth. Ed instructed he did not want any

involvement with the child. The mother left Iowa to give birth to the child in Nebraska due to prior involvements with the Iowa Department of Human Services that resulted in the termination of her parental rights to four other children. She has a history of being institutionalized in mental hospitals in Iowa and has been diagnosed with schizophrenia and bi-polar disorder.

An order for removal was entered by the court on March 3, 2011, due to the mother's inability to care for S.D. The child has been in the custody of DHS with placement in foster family care since that time. Three of the mother's other children, S.D.'s half-siblings, were previously adopted by the foster family in which S.D. was placed. S.D. was adjudicated a CINA on March 22, 2011.

On April 15, 2011, paternity testing confirmed A.J.R. was S.D.'s biological father. He was offered supervised visitation with the child and a number of other services. He did not consistently attend visitation. When he did, there were concerns about his ability to provide proper care to the child. He received guidance and information about parenting skills.

On May 16, 2011, the father informed caseworkers he was leaving Des Moines and moving to Greenfield, Iowa, to live with some friends. He instructed that he would not be attending visits with the child until he returned and told caseworkers to "stop calling [him]." He reported he would return around June 20, 2011, and would be obtaining an apartment at that time.

In a dispositional order filed May 27, 2011, the juvenile court suspended the child's contact with the father until he contacted DHS to arrange visits. The father's attorney reported he had not had contact with the father. The court also ordered the father to comply with case plan recommendations, including mental

health evaluation and treatment, individual therapy, drug testing, further services from Easter Seals and Link Associates, and parenting education classes. Attempts to reach the father in June 2011 were unsuccessful. Caseworkers reported that his phone number was disconnected.

On July 13, 2011, the father contacted DHS. It was the first contact he made with DHS since May 2011. It would also be the father's last contact with DHS. He requested visits with the child. A meeting was scheduled for July 19, 2011, to discuss visitation. The father did not show up for this meeting. On August 15, 2011, the father's attorney informed DHS he had learned the father had moved to Colorado.

A review hearing took place on August 16, 2011. The father appeared. He submitted his updated address in Colorado to the juvenile court. The court directed the State to file a termination petition and DHS to consider a "relative option made by the father."

The State filed its petition to terminate parental rights on August 19, 2011. A termination hearing took place on September 14, 2011. The father did not appear. The father's attorney stated he had not been able to make contact with the father since the August review hearing. However, it was confirmed the father was served with the termination petition at the Colorado address he had previously given the court. The State, guardian ad litem, and caseworkers recommended termination of the father's parental rights. The following day, the

juvenile court entered its order terminating the father's parental rights pursuant to Iowa Code section 232.116(1)(b), (d), (e), and (h) (2009). He now appeals.¹

II. Standard of Review.

We conduct a de novo review of termination of parental rights proceedings. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). Although we are not bound by the juvenile court's findings of fact, we do give them weight, especially in assessing the credibility of witnesses. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). An order terminating parental rights will be upheld if there is clear and convincing evidence of grounds for termination under section 232.116. *Id.* Evidence is considered "clear and convincing" when there are no "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *Id.*

III. Analysis.

Iowa Code chapter 232 termination of parental rights follows a three-step analysis. See *P.L.*, 778 N.W.2d at 39. The court must initially determine whether a ground for termination under section 232.116(1) (2011) is established. *Id.* If a ground for termination is established, the court must next apply the best-interest framework set out in section 232.116(2) to decide if the grounds for termination should result in a termination of parental rights. *Id.* If the statutory best-interest

¹ The State contends the father failed to properly preserve any of the issues raised on appeal because the father failed to appear at the termination hearing and did not object to evidence presented, offer evidence, or raise any issue before the juvenile court. Indeed, the juvenile court granted the father's attorney's motion to withdraw as counsel at the termination hearing due to the attorney's lack of contact with the father. However, in a September 27, 2011 order, subsequent to the termination of parental rights order, the juvenile court appointed counsel for the father "retroactive to the date the termination petition was filed on August 19, 2011." Because of these circumstances related to counsel, we will address the arguments made by counsel on appeal as if the issues were raised and properly preserved before the juvenile court.

framework supports termination of parental rights, the court must finally consider if any statutory exceptions or factors set out in section 232.116(3) weigh against termination of parental rights. *Id.*

A. Grounds for Termination.

The father contends clear and convincing evidence does not support termination under Iowa Code sections 232.116(1)(b), (d), (e), and (h). We may affirm the termination if facts support the termination of a parent's rights 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). We focus our analysis in this appeal on section 232.116(1)(h). Termination is appropriate under that section where the State has proved the following:

- (1) The child is three years of age or younger.
- (2) The child has been adjudicated CINA.
- (3) The child has been removed from the physical custody of the parents for at least six of the last twelve months.
- (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents at the present time.

Iowa Code § 232.116(1)(h). The father asserts the State did not prove the third and fourth elements of section 232.116(1)(h).

As to the third element, he argues that because he had only been proved to be S.D.'s father on April 15, 2011, five months prior to the termination hearing on September 14, 2011, S.D. 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 March 3, 2011, S.D. has been continuously removed from her parents, placed in the legal custody of the DHS, and placed in

a foster family home. At all times the father was the biological father of S.D. He simply was not adjudicated the father until the decree or order was entered reaching this conclusion. Iowa Code section 232.116(1)(h) does not require the six month period to begin upon being adjudicated the father. Moreover, our supreme court has previously relied upon evidence of a father's indifference before paternity was established in approving the father's termination for abandonment under Iowa Code chapter 600A. *In re M.M.S.*, 502 N.W.2d 4, 5-8, (Iowa 1993). Here, we believe that the State may rely upon the evidence that S.D. was never in the father's custody before paternity was established to satisfy the six month requirement in section 232.116(1)(h). We conclude the State proved the third element by clear and convincing evidence.

The father also asserts the fourth element has not been proved by clear and convincing evidence because there was not sufficient evidence "that the child could not be returned to [his] custody." 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." Iowa Code § 232.116(1)(h)(4). This language of necessity refers to the time of the termination hearing. At the time of that hearing, the father had only inconsistently attended supervised visitation with the child from April 15 to

May 15, 2011. The father had not seen the child since May 15, 2011, and had only had one contact with DHS and one contact with his attorney since that time. The father has a criminal history, as well as unresolved mental health concerns. There is no evidence he has been employed. There is no evidence he has suitable housing. We conclude the State proved by clear and convincing evidence that within the meaning of the fourth element S.D. could not be returned to the father at the time of the termination hearing.

B. Factors in Termination.

Even if a statutory ground for termination is met, a decision to terminate must still be in the best interests of a child after a review of section 232.116(2). *P.L.*, 778 N.W.2d at 37. The father contends termination is not in the child's best interests. He alleges that, "[d]ue to the court's cut-off in contact between him and his daughter, he has had no opportunity through little fault of his own to develop a significant bond with S.D." He also states that "he wished for Sherry Jackson to be considered as a long term placement."

In determining the child's best interests, this court's primary considerations are "the child's safety, the best placement for furthering the long-term nurturing and growth of the child, and the physical, mental, and emotional condition and needs of the child." *Id.* Taking these factors into account, we conclude the child's best interests require termination of the father's parental rights. As the juvenile court observed:

S.D. has never had a bond with her father. She was with her mother for six weeks after her birth. However, for S.D., there is no longer any bond with her parents. Her needs have been met for over six months by her foster family. She is now nine months old and knows the foster family and her half-siblings as her own.

True, the juvenile court suspended the child's contact with the father on May 27, 2011. However, the court's action was only *after* the father had informed caseworkers on May 16, 2011, that he was leaving Des Moines, would not be attending visits with the child, and to "stop calling [him]." And, the father's long-term placement recommendation was made three days prior to the State's filing of the termination petition and three months after the father had last had contact with S.D. The father has not shown any sort of genuine desire, effort, or ability to provide S.D. with the safety, care, and permanency she needs and deserves.

C. Exceptions or Factors against Termination.

Finally, we give consideration to whether any exception or factor in section 232.116(3) applies to make termination unnecessary. The factors weighing against 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). The court has discretion, based on the unique circumstances of each case and the best interests of the child, whether to apply the factors in this section to save the parent-child relationship. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). Under these circumstances, we cannot maintain a relationship where there exists only a possibility the father could become a responsible parent sometime in the unknown future.

IV. Conclusion.

There is clear and convincing evidence that grounds for termination exist under section 232.116(1), termination of parental rights is in the child's best

interests pursuant to section 232.116(2), and no consequential factor weighing against termination in section 232.116(3) requires a different conclusion. We affirm termination of the father's parental rights.

AFFIRMED.