

IN THE COURT OF APPEALS OF IOWA

No. 3-807 / 13-0889
Filed October 23, 2013

**IN THE INTEREST OF J.A. and A.A.,
Minor Children**

T.A., Father,
Appellant.

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge.

A father appeals the termination of his parental rights to two children.

AFFIRMED IN PART, AND VACATED AND REMANDED IN PART.

Michael J. Bandstra, Des Moines, for appellant father.

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

Samantha Gronewald of Sullivan & Ward, P.C., West Des Moines, for mother.

John P. Jellineck of Public Defender Office, Des Moines, attorney and guardian ad litem for minor children.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

MULLINS, J.

A father appeals from a juvenile court order terminating his parental rights to two of his children, A.A. (born December 2008) and J.A. (born 2011), under Iowa Code section 232.116(1)(h) (2013). He argues the State failed to prove the grounds to terminate his parental rights pursuant to Iowa Code section 232.116(1)(h) and to make reasonable efforts toward reunification. On September 5, 2013, we filed a decision in which we affirmed as to J.A. and vacated and remanded as to A.A. We subsequently granted the State's petition for rehearing and pursuant to rule 6.1204 vacated our prior decision. After rehearing, we affirm as to J.A. and vacate and remand as to A.A..

I. Background Facts & Proceedings

On October 10, 2012, the State petitioned to terminate both the mother's and father's parental rights pursuant to Iowa Code section 232.116(1)(h). The juvenile court held hearings on December 13, 17, and 18, 2012. The hearing then was delayed, due to scheduling and docketing issues, and the court did not complete hearing all testimony until March 22, 2013. The juvenile court heard testimony from the mother, the father, the court-appointed special advocate (CASA), the father's therapist, A.A.'s therapist, the maternal aunt, and the Family Safety, Risk and Permanency (FSRP) family consultant. The mother consented to termination of her parental rights.¹

The family first came to the attention of the Iowa Department of Human Services (DHS) in July 2010, before the birth of J.A. The juvenile court entered a

¹ The mother does not appeal termination of her parental rights.

temporary removal order for A.A., following allegations of drug use and physical abuse. The juvenile court placed A.A. in the care of the maternal great grandmother. The parents consented to the temporary removal. The juvenile court adjudicated A.A. a child in need of assistance on August 17, 2010, based on the mother's and father's substance abuse. The court ordered the parents to participate in FSRP services, substance abuse evaluation and treatment, parenting classes, and drug testing. During review hearings between that date and June 2011, the mother and father struggled with drug and alcohol use. The mother and father have a long history of substance abuse and domestic violence. During this time the father was largely unresponsive to services and regularly used drugs and alcohol.

In March 2011, the mother entered House of Mercy, and the juvenile court permitted A.A. to join her there. A.A.'s sibling, J.A., was born in 2011, while the mother resided at House of Mercy. After the mother was discharged from House of Mercy, she continued receiving outpatient treatment, and both children remained with her until February 23, 2012. The parties were scheduled for a review hearing on that date. However, in the early morning, the father appeared at the family home intoxicated and assaulted the mother in front of the children. The father choked the mother and punched her in the face. A.A., who was three years old at the time, tried to prevent the assault, screaming at the father to stop. The mother appeared at the hearing later that morning with a bruised neck and blackened eyes. Following this event, the juvenile court removed A.A. and J.A. and placed them back in the maternal great grandmother's home, but allowed the

mother to reside there with them. At a review hearing on March 9, 2012 the juvenile court returned the children to the mother.² On April 10, 2012, the juvenile court adjudicated J.A. a child in need of assistance and confirmed placement of both children in the mother's care, so long as she returned to and remained at House of Mercy. However, on April 30, 2012, the mother chose to leave House of Mercy before completion of her treatment. On May 14, 2012, the court placed the children in the care of the maternal aunt and uncle, where they remained through the last day of the termination hearing.³

The father finally sought therapy for substance abuse and anger management, attending his first session with a substance abuse counselor on May 8, 2012. Although the father testified at the termination hearing that he stopped drinking and using drugs after the February 23, 2012 incident, his psychosocial assessment social history form from the May 8, 2012 appointment indicated his last use of alcohol was "last Friday." The father began having therapy appointments once a week. This lasted from May to July 2012. In July he cut back to once every two weeks because his work schedule made attending difficult. In October he resumed once-a-week therapy, following an incident at a family team meeting where he became angry and displayed aggression toward the mother, the CASA worker, and a FSRP worker. At the termination hearing,

² Placement with the maternal great grandmother had been fifteen days, on this occasion.

³ This placement was ten months and eight days long.

the father acknowledged that incident and that he had been unable to control his emotions at the time.

The substance abuse counselor's testimony at the December 2012 termination hearings was that, to be a good parent, the father needed to work on his mental health issues, relapse prevention, and a recovery plan for his substance abuse issues. Although DHS did not require the father to attend Alcoholics Anonymous (AA) or Narcotics Anonymous (NA), the counselor testified that he wanted the father to investigate them but that the father had not done so. The counselor had only begun to see real progress in the father's counseling goals in the two months preceding the December 2012 termination hearings. The counselor acknowledged it could take years to address all of the father's issues and that the children are at risk until the father adequately resolves them. The counselor also acknowledged that although the father had made progress, he had a long way to go. At the March 22, 2013 termination hearing, the father testified that of thirty-five scheduled appointments with the substance abuse counselor, he had missed thirteen, just over one-third. At that hearing, the counselor's report was the same—the father had made progress but had more work to do.

Both the father and the counselor testified that their therapy sessions focused on substance abuse issues, not on the father's domestic violence or anger management issues. At the termination hearing, the counselor testified that he was in fact not aware of the February 23, 2012 incident of domestic violence nor that the children were involved in it. He also was not aware that

there were two founded child abuse reports against the father for physical abuse of A.A. The father acknowledged he sometimes purposefully did not communicate with the CASA and FSRP workers when they tried to contact him.

A.A. began seeing a child therapist in September 2012 when the maternal aunt and uncle became concerned about behaviors the child exhibited, including aggression, biting, hitting, kicking, head-butting, and having tantrums. The child therapist testified that A.A. was developmentally delayed and his behaviors were regressed. The therapist attributed these behaviors to A.A.'s "lack of permanency, lack of consistency, the trauma that A.A. has endured, the history of domestic violence, drug use" and the lack of adequate supervision in the home that is the result of these factors. The therapist noted that at A.A.'s age and developmental level, having a stable, consistent home and caregiver was crucial for development. She indicated that if the caregiver does not do the recommended therapeutic activities with A.A., A.A.'s behaviors and trauma will persist. At the March 2013 termination hearing, A.A. had been in therapy for around five months, and the father had attended only one therapy session but had not otherwise communicated with the therapist.

J.A. also exhibits behaviors such as head banging that J.A.'s pediatrician told the maternal aunt and uncle indicate a high likelihood he would be diagnosed with autism. J.A.'s pediatrician referred J.A. to a clinic to be assessed for autism. Meanwhile, the FSRP consultant in the case believed a more expeditious appointment could be made at another clinic and asked the father to make the appointment, providing him with the phone number. When the father

did not make the appointment, she reminded him on two occasions and gave him the phone number again. Ultimately, the father did not make the call until a month after the initial request. The juvenile court entered an order terminating both parents' parental rights on May 31, 2013. The father appeals.

II. Standard of Review

We review a juvenile court order terminating parental rights de novo. *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011). We give weight to the factual determinations of the juvenile court but are not bound by them. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). Our primary concern is the best interests of the child. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). “[W]e review matters of statutory interpretation for correction of errors at law.” *In re A.H.B.*, 791 N.W.2d 687, 689 (Iowa 2010).

III. Analysis

The father contends that the State failed to prove by clear and convincing evidence the grounds to terminate his parental rights pursuant to Iowa Code section 232.116(1)(h), and that the State failed to make reasonable efforts towards reunification.

A. Iowa Code section 232.116(1)(h)

To terminate parental rights under section 232.116(1)(h), the State must prove by clear and convincing evidence that (1) the child is three years of age or younger, (2) the child has been adjudicated in need of assistance, (3) the child 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) the child cannot be returned to the custody of the child's parents at the time of termination.

Section 232.116(1)(h) requires that the court find each child in issue is three years of age or less. In the termination order, the juvenile court found "[a]t the time of the filing of the petitions, each Child was three years of age or less." For termination of parental rights, however, the child's age must be determined upon the date of completion of the termination hearings. In *In re N.N.*, 692 N.W.2d 51 (Iowa Ct. App. 2004), a parent challenged a termination pursuant to section 232.116(1)(h) where the child was older than three but less than four. This court affirmed, holding at the time of the termination hearing the child was the appropriate age. *N.N.*, 692 N.W.2d at 53-54. Here, the termination hearings concluded on March 23, 2013. Upon our de novo review of the record, we cannot ignore the unfortunate fact that delays in the completion of the termination hearing resulted in the final day of the hearing occurring when A.A. was four years and three months old.

In its petition for further review, the State argues that the case of *In re M.T.*, 613 N.W.2d 690 (Iowa Ct. App. 2000) and an unpublished opinion of this court⁴ are authority in support of affirming the termination as to A.A. The facts in *M.T.* are very similar to the facts in the present case. The termination petition alleged, among the other statutory requirements, that the child was three years of age or younger and that the child had been placed outside the home six of the last twelve months or six consecutive months and any trial period at home was

⁴ *In re T.R.*, No. 09-0211, 2009 WL 1677234 (Iowa Ct. App. June 17, 2009) (citing to *M.T.*).

less than thirty days. The child turned four years old before the conclusion of the hearings. After oral arguments in the case, this court ordered a limited remand to allow the State to amend its petition to allege that termination should proceed under the section applicable for a four-year-old. *Id.* at 693. On that remand, the petition was amended to conform to the proof to satisfy the out-of-home placement requirement applicable to a four-year-old. *Id.*

There is nothing in *M.T.* that would support an argument that a child who has turned four years of age prior to the conclusion of the hearing on a petition to terminate parental rights can have parental rights terminated under section 232.116(1)(h). In fact, *M.T.* specifically supports a determination that the petition must be amended to allege the age of the child on the date of the last hearing, and the evidence must then support termination under the age-appropriate section, 232.116(1)(f). While the facts in *M.T.* were such that an amendment to conform to the evidence could be satisfied, that is not the case here. On our de novo review, we find that even if we granted a limited remand as was done in *M.T.* to allow the State to amend its petition—an option we considered when we first filed our decision in this case—the facts would not satisfy the combined section 232.116(1)(f)(1) and (3) requirement that for termination of a child four years of age or older, the child must have “been removed from the child’s parents for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.” Iowa Code § 232.116(1)(f). As of the last day of the termination hearing, A.A. had been in placement for ten months and twenty-three days of the previous eighteen

months, thus, failing to satisfy either alternative requirement for out-of-home placement.

On rehearing the State also argues the father did not contest the age issue in juvenile court, and thus the issue was not preserved for appeal. We agree the father did not contest the age issue in juvenile court, and he did not raise it on appeal. He did, however, in his first issue on appeal allege “The State failed to prove termination of parental rights pursuant to Iowa Code Section 232.116(1)(h).” Clearly, the juvenile court considered the age of the children, found A.A. was three years old when the petition was filed and concluded that all the elements of section 232.116(1)(h) had been satisfied.

“If [a trial] court’s ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court’s reasoning is ‘incomplete or sparse,’ the issue has been preserved.” *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (emphasis in original). On our de novo review, we determine that the age issue is not a disputed fact, but is a matter of statutory interpretation: Did the juvenile court correctly interpret the statute to allow satisfaction of the age requirement by a child who was three years old when the petition was filed but who turned four years old prior to the last day of the termination hearing?

We recognize our obligation to construe the law in resolving legal issues presented on appeal independent of any construction advocated by the parties. The arguments of the parties do not constrain us in our obligation to search for and apply controlling law to resolve legal issues. See *Rants v. Vilsack*, 684 N.W.2d 193, 211-12 (Iowa 2004) (applying controlling law to reach a result not advocated by either party).

Feld v. Borkowski, 790 N.W.2d 72, 78 n.4 (Iowa 2010).

The juvenile court in this case fully considered the age requirement. Thus, we do not have an error preservation issue. The father's failure to argue the age issue on appeal, for which there are no questions of fact, does not prohibit us from resolving the legal issue of whether the juvenile correctly construed, interpreted, and applied the statutory requirements.⁵ We conclude that the juvenile court improperly terminated the parental rights as to A.A. under section 232.116(1)(h) upon a finding that the child was three years of age or younger as of the date of the filing of the petition to terminate. The law requires the age of the child to be determined as of the last day of the termination hearing. As the child was four years old by the time of the last day of the termination hearing, the juvenile court's termination of the father's parental rights under section 232.116(1)(h) for a child "three years of age or less" was a result of a legal error.

Now considering termination as to J.A., the issue the father raises in this appeal is whether the State proved by clear and convincing evidence that the child could not be returned to the father's care at the time of termination. The State satisfies this element by presenting clear and convincing evidence that the child has suffered or is imminently likely to suffer an adjudicatory harm if returned to the parent. See Iowa Code §§ 232.116(1)(h), .102(5)(a)(2), .2(6)(c). It is sufficient to show that the child is imminently likely to suffer an adjudicatory harm; the State need not show that circumstances leading to the original adjudication

⁵ We emphasize that this determination is made on the undisputed facts of this case and the settled law we apply to those facts. We are also mindful of the constitutional implications of terminating parental rights and the legislature's statutory scheme designed to balance the interests of parents, children and the State. *In re P.L.*, 778 N.W.2d 33, 38-39 (Iowa 2010); *In re A.M.H.*, 516 N.W.2d 867, 870-71 (Iowa 1994).

continue to exist at the time of the termination. *In re A.M.S.*, 419 N.W.2d 723, 725 (Iowa 1988).

We find clear and convincing evidence that J.A. could not be returned to the father's care. The father has only recently made progress in his substance abuse treatment, with his therapist acknowledging he has a long way to go. He has no other support for his substance abuse issues. The therapist wants him to enroll in AA or NA, but he has not done so. Although he testified he had been sober since February 23, 2012, his May 8, 2013 evaluation acknowledged his last drink was the preceding Friday. His therapy does not include a strong focus on the anger management and domestic abuse issues that led to the removal. He did not even inform his therapist about the February 23, 2012 attack and the involvement of his children in that attack. In the domestic abuse and anger management areas, the therapist also testified the father had made progress but had a long way to go. It is well-settled law that we cannot deprive a child of permanency after the State has proved a ground for termination under section 232.116(1) by hoping the parent will one day be able to provide a stable home. *In re P.L.*, 778 N.W.2d 33, 41 (Iowa 2010). The substance abuse and domestic violence have already had a significant impact on the children. J.A. continues to have special needs and requires consistency and a permanent home. We find that the father has not adequately addressed the issues of substance abuse, domestic violence, and anger management that led to the removal. Consequently, the risk of future harm remains if J.A. is returned to him. Termination as to J.A. was proper under section 232.116(1)(h).

B. Reasonable Efforts

The requirement that the State make reasonable efforts toward reunification is not a substantive requirement of terminating a party's parental rights. *In re C.B.*, 611 N.W.2d 489, 493 (Iowa 2000). The State is required to show reasonable efforts as part of its proof that the child cannot be returned safely to the parent. *Id.* Our focus is on the services the State provided and the parent's response. *Id.* at 494.

The DHS has been involved with this family since 2010 due to the parents' illegal drug use. Even after A.A. was adjudicated a child in need of assistance, the father continued drinking and using drugs, culminating in the February 23, 2012 attack against the mother. He was ordered to attend substance abuse counseling from the time the court adjudicated A.A. a child in need of assistance in August 2010 and failed to do so until May 2012. The counselor had only seen progress in the two months before the December 2012 termination hearing. Since May 2012, the father had missed and failed to reschedule over one-third of his appointments. The father's engagement with service providers before February 2012 was minimal, and the father has acknowledged his avoidance of them. We find the State made reasonable efforts.

IV. Conclusion

We conclude the statutory age requirement for termination of the father's parental rights as to A.A. is not satisfied. We vacate the termination order and remand as to A.A. We find the State proved grounds for terminating the father's

parental rights as to J.A. by clear and convincing evidence, and the State made reasonable efforts toward reunification. We affirm as to J.A.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.