

IN THE COURT OF APPEALS OF IOWA

No. 3-807 / 13-0889
Filed September 5, 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.

VACATED AND REMANDED IN PART, AND AFFIRMED IN PART.

Mike 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 Jellineck, 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 323.116(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 provide reasonable efforts toward reunification. 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 foster mother, 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 of 2010. The juvenile court entered a 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

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

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 brother, 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. On April 10, 2012, the juvenile court adjudicated J.A. a child in need of assistance, and returned both children to 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, and the court placed the children in the care of the maternal aunt and uncle on May 14, 2012.

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, 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 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 also 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 he exhibited, including aggression, biting, hitting, kicking, head-butting, and having tantrums. The child therapist testified that A.A. is developmentally delayed and his behaviors are regressed. The therapist attributed these behaviors to his "lack of permanency, lack of consistency, the trauma that he 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 is crucial for development. She indicated that if the caregiver does not do the recommended therapeutic activities with A.A., his 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 his pediatrician indicated to the maternal aunt and uncle place him at a high risk of an autism diagnosis. 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).

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 State show that each child in issue is three years of age or less. In the termination order, the juvenile court found that "[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.² In *In re N.N.*, 692 N.W.2d 51 (Iowa 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 that "at the time of the [termination] hearing," the

² This court has already held that section 232.116(1)(h) applies to a child who is past her third birthday, but one day short of her fourth birthday. *In re N.N.*, 692 N.W.2d 51, 53-54 (Iowa Ct. App. 2004).

child was the appropriate age. *N.N.*, 692 N.W.2d at 53.³ Here, the termination hearings concluded on March 23, 2013. Upon our review of the record, we find A.A. was four years and three months old on that date. Therefore 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 in error.⁴

The father concedes the first three elements of the termination grounds as to J.A.. At issue 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 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

³ In another unpublished case, *In re N.J.*, No. 05-2049, 2006 WL, 624898 at *3 (Iowa Ct. App. Mar. 15, 2006), this court stated that "[t]he time for determining [the child's] age, and thus which age-related statutory provision or provisions might apply to her, is the conclusion of the termination hearing."

⁴ On our de novo review we cannot ignore the unfortunate fact that delays in the completion of the termination hearing as to A.A. were not completed until after A.A. turned four years of age. In view of the range of interests impacted by the ruling, including the failure to satisfy a clear statutory requirement, we will consider this issue sua sponte. See *Top of Iowa Co-op. v. Sime Farms, Inc.*, 608 N.W. 2d 454, 470 (Iowa 2000).

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 find 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 made reasonable efforts toward reunification. We affirm as to J.A.

VACATED AND REMANDED IN PART, AND AFFIRMED IN PART.