IN THE COURT OF APPEALS OF IOWA

No. 6-995 / 06-1700
Filed January 18, 2007

IN THE INTEREST OF A.P. and T.M., Minor Children,

M.M., Father,
Appellant,

E.M., Mother,
Appellant.

Appeal from the Iowa District Court for Clinton County, Arlen J. VanZee, District Associate Judge.

A mother and a father each appeal from a juvenile court order terminating their parental rights. **AFFIRMED ON BOTH APPEALS.**

John J. Wolfe of Wolfe Law Office, Clinton, for appellant-father.

David M. Pillers of Pillers & Richmond, DeWitt, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Joel Walker, County Attorney, and Ross Barlow, Assistant County Attorney, for appellee.

Edward Kross of Van Scoy & Kross, Clinton, guardian ad litem for minor children.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Evelyn is the mother of Alexis, born in November 2002, and Tiffanie, born in October 2004. Michael is Tiffanie's father. Evelyn and Michael appeal from an August 2006 juvenile court order terminating Evelyn's parental rights to the two children and Michael's parental rights to Tiffanie. The order also terminated the parental rights of Alexis's father, and he has not appealed. We affirm on both appeals.

The children were removed from Evelyn and Michael in early December 2004 when Alexis was brought to a local hospital suffering from first and second degree burns of her lower body. She was airlifted to the burn unit at the University of Iowa Hospitals and Clinics. Her burns covered forty-seven percent of her body surface. Alexis was also diagnosed as failing to thrive and being infested with lice.

The juvenile court ordered the children placed in the temporary custody and guardianship of the Iowa Department of Human Services (DHS) for placement in family foster care. Pursuant to subsequent orders Tiffanie has remained in the custody and guardianship of the DHS and been placed in family foster care, as has Alexis after she spent over two weeks in the burn unit. The children have been together in the same foster family home since Alexis's release from the burn unit. Alexis suffers from some permanent scarring.

In January 2005 each of the children was adjudicated to be a child in need of assistance (CINA) pursuant to Iowa Code section 232.2(6)(b) (2005) (child whose parent or other member of the household has physically abused or neglected the child or is imminently likely to abuse or neglect the child). At a

subsequent dispositional hearing a question arose as to whether the adjudication was based on abuse or on neglect. Following discovery and continuances a hearing to address the question was held. In a December 2005 order the juvenile court found the evidence clear and convincing that Alexis had been physically abused by Evelyn placing or dipping her in very hot water.

In May 2006 the State filed petitions for termination of parental rights. Following July hearings the juvenile court terminated Evelyn's parental rights pursuant to Iowa Code sections 232.116(1)(d) (Alexis and Tiffanie), (h) (Alexis and Tiffanie), and (m) (Alexis), and terminated Michael's parental rights to Tiffanie pursuant to sections 232.116(1)(d), (e), and (h). Evelyn and Michael both appeal.

> 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).

On appeal Evelyn raises three issues, as follow:

> THE STATE MAY NOT PENALIZE THE MOTHER FOR NONCOMPLIANCE WITH A COURT ORDER IMPINGING ON HER RIGHT AGAINST SELF INCRIMINATION.
>
> THE GROUNDS FOR TERMINATION OF PARENTAL RIGHTS WERE NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE.
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> THE TRIAL COURT ERRED IN FINDING THAT THE DEPARTMENT HAD PROVIDED REASONABLE EFFORTS.

The State argues Evelyn has failed to preserve error on, and/or has waived, each of these issues. We assume, without so deciding, that error has been preserved

and the issues have not been waived, and proceed to address the merits of Evelyn's claims. We deal with the three issues largely together.

On December 7, 2005, the juvenile court found that Evelyn had intentionally caused Alexis's burn injuries. A DHS case permanency plan dated December 13, 2005, was presented to the court for possible approval at a December 28, 2005 hearing held to review services being provided and determine whether additional services were necessary. Evelyn objected to one of the numerous requirements of the plan, that she "take responsibility for physically abusing Alexis [ ] by processing with the provider the events that lead (sic) up to, during and after the abuse occurred." Evelyn was facing a then-pending class "C" felony child endangerment charge, and upon advice of her attorney chose not to testify at the December 28 hearing. Although the record is not clear as to what objection Evelyn made to the case plan in the juvenile court, on appeal she asserts she objected on the ground the quoted language required her to admit guilt.

Following the December 28 hearing the juvenile court apparently held its ruling in abeyance, as its resulting order was not dated and filed until January 25, 2006. In the meantime, on January 19, 2006, Evelyn entered a guilty plea, accepted by the district court, to the lesser-included crime of child endangerment resulting in bodily injury, a class "D" felony. On or about January 24, 2006, Evelyn withdrew her objection to the December 13 case permanency plan, and on January 25 the juvenile court approved and adopted the plan. In February 2006 the district court sentenced Evelyn to a term of no more than five years imprisonment on her class "D" felony conviction.

The essence of Evelyn's first issue is that the termination of her parental rights was in some manner related to and based upon her exercise of her refusal to admit, as arguably required by the case permanency plan presented on December 28, 2005, that she had physically abused Alexis. Her third issue claims the services provided to her were based upon her having physically abused Alexis and were improper and inadequate because she had not admitted the abuse, no attempt was therefore made to determine what other services would benefit her, and no services were provided after she was incarcerated.

It is important to note that although Evelyn claims the services, based in part upon her having physically abused Alexis, were therefore improper and inadequate, Evelyn eventually acknowledged the intentional abuse and pled guilty to and was convicted of felony child endangerment. Services to Evelyn had begun at about the time the children were adjudicated CINA and continued until Evelyn's imprisonment. The services were extensive, are in large part noted and summarized at pages eight through ten of the juvenile court's detailed, thorough, and carefully considered twenty-page termination ruling, and thus need not be listed in detail in this opinion. We find no merit in Evelyn's claim that her parental rights were terminated, or that she was in any other manner penalized, for not testifying at the December 28, 2005 hearing or for objecting, from December 28, 2005 to about January 24, 2006, to one requirement of a case permanency plan. Neither do we find any merit to her claim the DHS did not provide reasonable efforts or services designed to effect reunification of the children with her. We note that she does not claim or show that she requested further or additional services after being imprisoned in February 2006.

As noted above, Evelyn also claims the grounds for termination were not proved. When the trial court terminates parental rights on more than one statutory ground, we need only find grounds to terminate under one of the provisions relied on by the trial court in order to affirm. *In re A.J.*, 553 N.W.2d 909, 911 (Iowa Ct. App. 1996). We choose to focus on section 232.116(1)(h) (child three or younger, adjudicated CINA, removed from parents at least six of last twelve months, cannot be returned to custody of parents as provided in section 232.102). The fourth element is proved when the evidence shows the child cannot be returned to the parent because the child remains in need of assistance as defined by section 232.2(6). *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 that supported the child's initial removal from the home. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992).

The first three elements of section 232.116(1)(h) were clearly proved. For two reasons we find the fourth proved as well. First, the juvenile court's findings include, in part, the following:

> Before Evelyn was incarcerated, she was unable to demonstrate that she was internalizing any of the educational material, verbal and handouts, that [a service provider], AEA, and [another service provider] taught her. The providers would have to remind Evelyn and direct her each week and she would only spend a few minutes doing what she was instructed. AEA workers and other providers repeated how important the skills were to the children, but Evelyn did not seem interested. Evelyn could not even demonstrate taking a shirt off Tiffanie without hurting Tiffanie and making her cry.
>
> Evelyn has never taken responsibility for her actions which led to the children being adjudicated. . . .
>
> Evelyn does not want to interact verbally with the children by talking out loud. She says that she does not like to talk out loud to

> the children; and as she sits with the children, she does not interact verbally as she should with the children. Because her apartment was seldom clean at visits and because it was not safe for little children due to numerous objects on the floor, workers questioned whether she was taking her medication. Dirty dishes would be in the sink and on the counter. The highchair had dried up food on it and several times had hardened scrambled eggs that had not been cleaned from the previous week. Evelyn did later tell the providers that she did not have money for her medication.
>
> During visits by service providers, Evelyn has exhibited some alarming anger outbursts. On one visit, she grabbed a phone from [a service provider] and struck her. She has yelled at providers because she did not want to stay home and clean house and cook and also yelled at providers when she wanted to go out with her friends.
>
> . . . .
>
> Evelyn has not shown any sign that she understands her children's needs nor has she shown signs that she was interested in learning and internalizing her children's needs. Evelyn has not shown an ability to put her children's needs ahead of her own agenda.

Upon our de novo review we fully agree with these findings, which are amply supported by the record, and adopt them as our own.

Second, at the time of the termination hearing Evelyn had served only five months of a prison sentence of no more than five years.

We conclude the children could not be returned to Evelyn without being in imminent danger of abuse or neglect that would render them CINA and that the State thus proved the fourth element of section 232.116(1)(h).

Michael claims the State did not prove that Tiffanie could not be returned to his custody at the time of the termination hearing. This claim implicates the second element of section 232.116(1)(d) (parent was offered or received services but circumstance that led to CINA adjudication continues to exist) and the fourth element of section 232.116(1)(h) (child cannot be returned to custody of parent as provided in section 232.102).

Michael married Evelyn in January 2005. The juvenile court found that he had been subject to ongoing physical abuse, screaming, and verbal abuse by Evelyn. It also found that when a service provider had been assaulted by Evelyn during a supervised, in-home visit Michael "did not come to help but purposefully stayed out of the way in the bedroom knowing the conflict was occurring." The juvenile court further found, in part:

> Mike has not sought any kind of counseling for this domestic abuse even though it has been offered. He has not sought out any type of marriage counseling or how to live with a bipolar partner even though this was suggested to him.
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> . . . .
>
> Mike's ability to internalize the importance of following AEA and provider suggestions about working and playing with the children has not improved. Mike does not put any expectations on the children unless providers direct him to do so. . . .
>
> Michael does not exhibit good verbal skills in encouraging Tiffanie with her delayed speech. He will lay on the floor and for the most part watch Alexis play with little verbal interaction. Tiffanie relies on the providers to interact with her.
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> Despite all of the services being offered, visits have not progressed beyond supervised visits. Both [of two service providers] conclude that [Michael has] not been able to demonstrate an ability to meet the children's needs.

We agree with and adopt these findings. We also agree with the State's argument that Michael has not advanced past fully supervised visits; he intends to maintain a relationship with Evelyn who intentionally, severely burned her other child; he has been unable or unwilling to protect that child from Evelyn's actions; and he has not demonstrated the ability or willingness to protect either himself or Tiffanie from Evelyn's violence. We conclude, as the juvenile court did, that the State has proved the grounds for termination of Michael's parental rights to Tiffanie pursuant to sections 232.116(1)(d) and (h). We need not

address his remaining claim, that the State did not prove the section 232.116(1)(e) grounds for termination.

AFFIRMED ON BOTH APPEALS.