IN THE COURT OF APPEALS OF IOWA

No. 7-348 / 07-0592
Filed June 13, 2007

IN THE INTEREST OF S.W. AND S.W.,
Minor Children,

T.R.W., Mother,
Appellant.

Appeal from the Iowa District Court for Lee (South) County, Gary R. Noneman, District Associate Judge.

A mother appeals from the termination of her parental rights to two children. **AFFIRMED.**

Thomas D. Marion of Norman & Marion, Keokuk, for the appellant mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Michael Short, County Attorney, and David Andrusyk, Assistant County Attorney for the appellee.

Artemio M. Santiago of the Hoyer Law Firm, L.C., Fort Madison, for the appellee father.

Kendra Abfalter, Assistant Public Defender, Keokuk, guardian ad litem for the minor children.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

BAKER, J.

Tonya is the mother of Shelby, who was born in 2004, and Selena, who was born in 2003. Both children were removed from the care of their mother in July of 2005, after Selena suffered a serious injury to her vaginal area. Tonya initially attempted to blame the girls' father, Dwight, for the abuse, and she later attempted to blame the child's ten-year-old sister.[1] However, subsequent investigation revealed that only the mother could have caused the injury, and an investigator concluded she had committed the act.

On September 1, 2005, the children were adjudicated to be in need of assistance (CINA). Since that time, both children have resided in foster care. In December of 2005, the mother was convicted of child endangerment based on the incident noted above. Finding that the progress made by the mother following the offer and receipt of services was inadequate to warrant reunification, the State filed a petition seeking to terminate her parental rights to the girls in December of 2006. Following a hearing, the court granted the State's request and terminated the mother's parental rights to her daughters under Iowa Code section 232.116(1)(h) (2007). The mother appeals from this order.[2]

We review termination orders de novo. *In re R.F.*, 471 N.W.2d 821, 824 (Iowa 1991). Our primary concern is the best interests of the child. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). The grounds for termination must be proved by clear and convincing evidence. *In re T.B.*, 604 N.W.2d 660, 661 (Iowa 2000).

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[1] The interests of that sibling are not at issue in this appeal.
[2] The father has not appealed.

Tonya first argues DHS "refused to provide adequate services to promote reunification . . . ." While it is clear that the State must make reasonable efforts aimed at reunification, *see In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000), it is also true that when a parent fails to demand services other than those provided, the issue of whether services provided were adequate has not been preserved for appellate review. *In re S.R.*, 600 N.W.2d 63, 65 (Iowa Ct. App. 1999). Although the mother now asserts a request for overnight visitations, there is no indication in the record that she ever demanded more or different services. The mother has therefore failed to preserve error on her claim that the State failed to make reasonable efforts to reunite her with her children. We affirm on this issue.

Assuming, however, that the issue is preserved, her claim is refuted by the record. Services were offered and provided to Tonya for over a year. The major problem preventing reunification was not a failure of reasonable efforts toward reunification, but rather was Tonya's failure or inability to avail herself of and benefit from necessary and offered services. In this case, overnight visitation is not required where the circumstances do not warrant it. *In re M.B.,* 553 N.W.2d 343, 345 (Iowa Ct. App. 1996) ("Visitation, however, cannot be considered in a vacuum. It is only one element in what is often a comprehensive, interdependent approach to reunification. If services directed at removing the risk or danger responsible for a limited visitation scheme have failed its objective, increased visitation would most likely not be in the child's best interests."). We find the State made reasonable efforts toward reunification and Tonya's claim to the contrary is without merit.

The mother next maintains the termination of her rights "violates constitutional protected relationships and would result in a violation of public policy by separating siblings." We agree there is a preference for keeping siblings together. *In re A.M.S.*, 419 N.W.2d, 723, 734 (Iowa 1988). "However, this preference is not absolute. Our ultimate concern is the best interests of the child." *In re J.E.*, 723 N.W.2d 793, 800 (Iowa 2006).

To the extent this argument raises a constitutional issue, we find it not preserved for appellate review. *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003) (holding even constitutional issues cannot be raised for the first time on appeal). The juvenile court's termination order does not address the separation of the girls from their older sister, and therefore the issue has not been preserved for appeal. *See Id.* Regardless, as will be indicated in the following section of this opinion, even if the sibling issue had been preserved, we would hold that the termination was still supported by the evidence and in the girls' best interests. *See, e.g.*, *In re J.E.*, 723 N.W.2d at 800.

Finally, the mother contends the State failed to submit clear and convincing evidence that the children could not be returned to her custody as of the date of the termination hearing. In particular, she maintains that at the time of the hearing, she could provide adequately for the housing and economic needs of the children. Upon our careful de novo review of the record, we disagree. Without conceding that she could provide for the strictly *material* needs of the children, Tonya clearly lacks the insight and instincts necessary to providing safe care and nurturance of two young children.

The juvenile court recognized three "key issues" that it felt limited her parenting ability: her limited cognitive ability including a learning disorder that makes her largely unable to comprehend written instructions, ongoing mental health issues, and her lack of residential stability. We believe these issues preclude the return of the children's care to their mother. The mother continues to struggle applying and internalizing some of the basic parenting requirements. She failed to adequately child safety-proof her home despite guidance on how to do so. Service providers reported frequently having to intervene with the mother and children due to safety concerns. Moreover, she has difficulty parenting the older daughter alone without the added stressful situations that arise from raising and supervising two additional toddlers.

The mother's low level of intellectual functioning has caused safety concerns to service providers. She has balked at being taught parenting skills from an instructor who taught from a book. Despite being counseled on the directions for a certain medication, she almost over-medicated one child due to her failure to apply that counseling to a real-life situation. Her mental health issues, including diagnoses of bipolar disorder, depression, and ADHD, have also impacted her ability to provide care to her children.

These safety concerns weighed heavily on the juvenile court's decision, and we likewise find them significant. *See In re J.E.*, 723 N.W.2d at 801 (Cady, J., concurring specially) ("A child's safety and the need for a permanent home are now the primary concerns . . ."). Based on her prior behaviors, there is a strong possibility the mother may never be able to provide for these children's basic needs. *See id.* (noting a parent's past performance is indicative of the quality of

care the parent will provide in the future). We therefore affirm the termination of the mother's parental rights.

AFFIRMED.