FILED
APR 12 2000
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-067 / 99-0288
Filed April 12, 2000

IN THE INTEREST OF
D.I., C.I., and T.H.,
Minor Children,

T.H., Father,
Appellant/Cross-Appellee,

T.H., Mother,
Appellant/Cross-Appellee,

D.I., C.I., and T.H., Minor Children,
Cross-Appellants.

Appeal from the Iowa District Court for Polk County, Karla J. Fultz, Associate Juvenile Court Judge.

Father and mother separately appeal the termination of their parental rights. The father and mother both contend (1) the State failed to use reasonable efforts to reunite them with their children, and (2) there was no clear and convincing evidence the children could not be returned to their individual care at the time of the termination hearing. The children cross-appeal, contending the mother's parental rights should also have been terminated pursuant to Iowa Code section 232.116(1)(k), in addition to the statutory ground relied on by the juvenile court. **AFFIRMED.**

Blair A. Bennett, Des Moines, for appellant-father.

Catherine K. Levine, Des Moines, for appellant-mother.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, and Jennifer Navis, Assistant County Attorney, for appellee-State.

Heard by Huitink, P.J., and Streit and Miller, JJ.

MILLER, J.

The mother of Cody, Dylan and Travis and the father of Travis appeal the termination of their parental rights. Each contend the State did not prove by clear and convincing evidence all the required elements of each subsection of the Code under which the court terminated their respective parental rights. Both parents also contend the State did not provide reasonable services prior to termination. The children cross-appeal, contending the mother's parental rights should also have been terminated pursuant to Iowa Code section 232.116(1)(k), in addition to the statutory ground relied on by the juvenile court. We affirm.

I. Factual and Procedural Background

Tammie is the mother of three children: Cody, Dylan and Travis. Todd is the father of Travis. In August 1993, the three boys were adjudicated to be children in need of assistance (CINA) and removed from the home due to parental substance abuse and mental health problems. Court supervision of this case ended in October 1995. In October 1997, Todd reported Tammie once again was using drugs, crank being her choice drug, was not coming home to care for the children, and he did not know when she would return. Todd further reported he also was using crank, was in immediate need of mental health services because he was hearing voices in his head, and was unable to care for the children. Based on this information, a CINA petition was filed in October 1997, alleging the children to be CINA pursuant to Iowa Code sections 232.2(6)(c)(2) and 232.2(6)(n). Todd consented to the children's placement in the care, custody and control of the Department of Human Services (DHS) for placement in a foster home pending hearing on the CINA petition. A December 22, 1997 CINA adjudication order

continued the children's custody with the DHS. It ordered preparation of a Case Permanency Plan.

The three boys are special needs children. They were initially placed together in a treatment level foster home. Cody, however, exhibited behaviors so extreme that he was placed in Healthway's sub-acute unit for about one week to stabilize his behaviors. After foster home placements, Cody was again admitted to Healthway Crisis Stabilization Unit. Cody is diagnosed with ADHD and bi-polar disorder with psychosis and explosive features. All three boys are still in need of extensive counseling as a result of the abuse and neglect they suffered at the hands of Todd. Further, Travis is mentally retarded.

The State filed its petition to terminate the parental rights of Todd and Tammie on October 31, 1998. The petition requested termination of Tammie's parental rights pursuant to Iowa Code sections 232.116(1)(e) and (1)(k) and termination of Todd's parental rights pursuant to Iowa Code sections 232.116(1)(d) and (1)(e). After hearing, the juvenile court terminated Todd and Tammie's parental rights pursuant to section 232.116(1)(e) only.[1] The State also petitioned for the termination of Cody and Dylan's biological father's parental rights. He consented to termination, and his parental rights are not at issue in this appeal.

II. Scope and Standard of Review

[1] The State's petition requested Todd's parental rights be terminated pursuant to Code sections 232.116(1)(d) and (1)(e). In the termination order, the court finds "all the allegations of the petition have been proven by clear and convincing evidence, except as to 232.116(1)(b) as to [Todd]...." We believe this is a typographical error in the termination order as section 232.116(1)(b) was not pled by the State as to Todd. Instead, we believe the juvenile court meant "...except as to 232.116(1)(d) as to [Todd]...." Accordingly, the State's argument Todd's termination should be affirmed for failure to brief the order of termination pursuant to 232.116(1)(d) is without merit.

Appellate review of proceeding to terminate a parent-child relationship is de novo; thus it is our duty to review the facts as well as the law and adjudicate rights anew on those propositions properly preserved and presented to us. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). We accord weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses, whom that court heard and observed firsthand, but we are not bound by those findings. *Id.*

Central to a determination of this nature are the best interests of the child. *Id.* In this connection, we look to the child's long-range as well as immediate interests. *Id.* Hence, we necessarily consider what the future likely holds for the child if returned to his or her parents. *Id.* Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care that parent is capable of providing. *Id.*

III. Merits

A. Termination of Tammie's Parental Rights

Tammie argues the State did not prove the fourth element of termination pursuant to the Code of Iowa, section 232.116(1)(e). That subparagraph provides that the court must find

> (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

Iowa Code § 232.116(1)(e)(4). The requirement of section 232.116(1)(e)(4) is met when a child cannot be returned to the parental home after twelve months because the definitional grounds of a "child in need of assistance" still exist. *See*

In re A.B., 554 N.W.2d 291, 293-94 (Iowa App. 1996) (citing *In re K.L.C.*, 372 N.W.2d 223, 228 (Iowa 1985)).

At the time of the termination hearing, Tammie was residing at the House of Mercy. She testified if the children were returned to her, the two younger children could reside with her at the House of Mercy until she moved out on her own. The oldest son would not be able to spend the night at the House of Mercy due to his age and policy reasons, so Tammie's plan was to have him spend time with her and his younger brother's during the day, and sleep at her parent's house at night. Upon her release from the House of Mercy, she intended to get a job in order to financially support herself and her three special needs children, even though she had not yet completed her GED. She testified she would comply with any court-ordered services if the children were returned to her, despite the fact she had not done so prior to the termination proceedings.

From August until October 1998, Tammie did nothing toward meeting the goals of the case permanency plan. Although she was referred to the House of Mercy in January 1998, she did not want to be involved with the program at that time. She finally interviewed for the House of Mercy in October 1998 and entered the program after the petition to terminate was filed. Upon admission she tested positive for illegal substances. The juvenile court found Tammie

> has not consistently participated in the offered services. She discontinued any contact with service providers in August, 1998, and did not participate again until November, 1998. She requested no visits, attended no therapy, substance abuse treatment and did nothing to reunify with her children.

Our independent review of the record confirms this finding. Further, one visit was allowed in December 1998 while Tammie was in the House of Mercy. The

juvenile court found; and we find ample support in the record, that "[t]he visit was not a positive one. Their behaviors regressed significantly. Therapists described a six month loss of therapeutic progress for Dylan and Cody."

The core of Tammie's problems stem from her lack of understanding the problems her lifestyle has created for her children. Her lack of cooperation with services convinces us the problems that led to the removal and adjudication of Travis, Dylan and Cody as CINA have not been remedied to any extent, and return of the children to her care would place the children in a position to suffer further adjudicatory harm. This is at least the second time Tammie has had treatment ordered for drug abuse. There is no substantial basis in the record to believe her prognosis is good, or that she will cooperate with services. A good prediction of the future conduct of a parent is to look at past conduct. *See, e.g., In re N.F.*, 579 N.W.2d 338, 341 (Iowa App. 1998). Nothing has changed in Tammie's ability to parent her children since the 1997 CINA adjudication. Thus, the juvenile court did not err in finding clear and convincing evidence that at the present time the children would continue to suffer adjudicatory harm as defined in section 232.2(6) if returned to Tammie. We find termination proper under section 232.116(1)(e).

B. Termination of Todd's Parental Rights

Todd's parental rights were terminated pursuant to Code section 232.116(1)(e) only.[2] Like Tammie, he argues the State did not prove the fourth element of termination pursuant to Iowa Code section 232.116(1)(e). He claims the State did not present clear and convincing evidence Travis could not be

[2] *See supra* note 1.

returned to his home after twelve months because the definitional grounds of a "child in need of assistance" still exist. *See In re A.B.*, 554 N.W.2d 291, 294 (Iowa App. 1996) (citing *In re K.L.C.*, 372 N.W.2d 223, 228 (Iowa 1985)). Specifically, he argues although he didn't currently have room for Travis he could provide room immediately. He also argues that his willingness to divorce Tammie, if it would help her get the three children back, demonstrates his ability to take Travis back.

Clearly, even given this self-described "selflessness," Travis would still meet the definitional grounds of a "child in need of assistance." Todd left the termination hearing on the first day and did not return. He did not complete parenting classes or individual therapy, and was very sporadic in providing court-ordered UA's. He did not take his prescription drug to aid him in controlling his diagnosed psychotic disorder. He continued to use methamphetamines the month the termination petition was filed, and testified his last substance abuse treatment was in either 1991 or 1993. Todd testified even if the court did not terminate his parental rights, he still would not comply with a court order to attend psychiatric therapy or family therapy. It had been almost a year prior to the termination hearing since Todd had last seen his son. These facts lead us to conclude clear and convincing evidence was presented by the State that because of Todd's behavior and lack of willingness to seek and accept appropriate services, Travis would remain a child in need of assistance if returned to Todd. The juvenile court did not err in finding clear and convincing evidence to support the termination order pursuant to Code section 232.116(1)(e).

C. Reasonable Efforts to Provide Services

Both Tammie and Todd contend that the State did not provide reasonable services before terminating their respective parental rights. Before parental rights may be terminated, the State must make reasonable efforts to reunite a family by providing reasonable services in an attempt to eliminate the need for removal. Iowa Code §§ 232.102(7), (9)(a) (1997); *In re E.K.*, 568 N.W.2d 829, 831 (Iowa App. 1997); *In re A.B.*, 554 N.W.2d 291, 294 (Iowa App. 1996). However, it is the parent's responsibility to demand services if they are not offered, *In re H.L.B.R.*, 567 N.W.2d 675, 679 (Iowa App. 1997), and to do so prior to the termination hearing when the case plan is entered. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997); *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994). To raise this issue on appeal an appellant must have presented it before the juvenile court at the termination hearing. *See In re Interest of J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997).

We question whether either parent has preserved this issue for our review. Aside from Tammie's request for an order "delineating further visitation," filed six days before the termination hearing, neither parent demanded services prior to the termination hearing. Further, even if either parent had preserved error, we find that an abundance of services were provided and offered in an effort to reunite this family. The trial court's order listed over twenty separate services offered to the family during the present proceedings, and the termination petition listed even more that had been offered since September 1993. Many of those services were not utilized by either parent, and we will not now hear them complain that not enough services were offered. As the saying goes, "You can

lead a horse to water, but you can't make it drink." Our de novo review of the record satisfies us the services provided and offered were more than reasonable, even though neither Tammie nor Todd was wiling to take advantage of many of them.

IV. Children's Cross-Appeal

The children contend on cross-appeal the juvenile court erred by not also terminating Tammie's parental rights under section 232.116(1)(k). Because we have affirmed the termination under section 232.116(1)(e), we need not reach the children's argument. *In re S.R.*, 600 N.W.2d at 64 (holding "[w]hen the juvenile court terminates parental rights on more than one statutory ground, we need only find grounds to terminate under one of the sections cited by the juvenile court to affirm.").

AFFIRMED.