IN THE COURT OF APPEALS OF IOWA

No. 0-137 / 99-1698
Filed May 10, 2000

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CLERK SUPREME COURT

IN THE INTEREST OF D.R., Minor Child,

D.F., Mother,
Appellant.

Appeal from the Iowa District Court for Scott County, Michael A. Woods, Associate Juvenile Judge.

Mother appeals the juvenile court order terminating her parental rights. **AFFIRMED.**

Cheryl N. Newport and Stephen W. Newport of Newport & Newport, P.L.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, and Kathrine S. Miller-Todd, Assistant Attorney General, for appellee-State.

Robert S. Gallagher, Davenport, guardian ad litem for minor child.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

[redacted] appeals the juvenile court order terminating her parental rights. Because we find there was clear and convincing evidence supporting the termination, we affirm.

Background facts. Dylan, born to Diane on February 26, 1988, came to the attention of the Department of Human Services (DHS) in October 1996. Facing several delinquency charges, the State agreed to drop the charges if DHS filed a child in need of assistance (CINA) petition. Dylan remained in his mother's care until April 1997 and then was shuffled through several placement options in an attempt to find a suitable environment for him. Dylan is a troubled child with severe psychological problems, including dealing with the sudden and traumatic death of his father and exhibiting negative behaviors. Dylan was adjudicated CINA due to Diane's neglect of his physical care. He was frequently left home alone and not provided with proper care or supervision. Diane suffers from alcoholism and substance abuse problems. She has had recent periods of incarceration, where she received treatment for her substance abuse problems. However, upon her release, she was unable to remain sober and meet the case plan requirements to regain care of Dylan. Diane alleges she has maintained regular contact with Dylan throughout her periods of incarceration by phone and mail. Diane asserts it is not in Dylan's best interests to terminate her parental rights as they share a very close bond.

Scope of review. We review proceedings to terminate parental rights de novo – we review the facts as well as the law and adjudicate parents' rights

and *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). We give weight to the findings of the juvenile court, particularly with respect to the credibility of witnesses, but are not bound by them. *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990); *In re R.R.K.*, 544 N.W.2d 274, 275 (Iowa App. 1995); Iowa R. App. P. 14(f)(7).

Our primary concern in a termination proceeding is the best interests of the child. *R.R.K.*, 544 N.W.2d at 275. Those best interests are determined by looking at the child's long-range as well as immediate interests. *L.L.*, 459 N.W.2d at 493. We consider what the future likely holds for the child returned to his or her parents, using past performance as indicative evidence of the quality of future care that the parent is capable of providing. *Dameron*, 306 N.W.2d at 745; *In re T.T.*, 541 N.W.2d 552, 555 (Iowa App. 1995).

Clear and convincing evidence. Diane claims the court erred in determining there was clear and convincing evidence to terminate her parental rights as the State failed to meet all of the elements under Iowa Code sections 232.116(1)(b), (d), and (h) (1999). If any one of the grounds listed in Iowa Code section 232.2(6) can be proven by clear and convincing evidence, there is a sufficient basis for the termination. *In re M.W.*, 458 N.W.2d 847, 850 (Iowa 1990).

Diane claims the State failed to prove she did not maintain "significant and meaningful contact" and made no reasonable efforts to resume care of Dylan as required under Iowa Code section 232.116(1)(d). However, she has not had contact with Dylan since April 1999. Upon her release from prison in December

[redacted] to resume visitation with Dylan due to her inability to remain [redacted] or begin working toward the goals of reunification with her son. Her lack of reasonable efforts to resume care of Dylan stemmed from her own poor life choices.

Diane further contends there was no finding of physical or sexual abuse against Dylan as required by Iowa Code section 232.116(h). However, there is a third alternative under this section, that the child has been *neglected* by a parent. The State offered evidence that Dylan was often left unsupervised for extended periods of time while Diane went out. She failed to provide for his physical needs, even leaving him home alone for several days at a time. There was clear and convincing evidence of neglect.

Diane further alleges the termination is contrary to Dylan's best interests. She asserts the trial court's specific findings as to this issue in the April 1999 hearing establish this fact. The trial court, at that hearing, determined Dylan, then age eleven, was strongly opposed to the termination, was reacting with negative behaviors, and was not a viable candidate for adoption at that time. Accordingly, the trial court found termination was not in Dylan's best interests and continued the hearing until October 4, 1999. By this time, Dylan was adjusting better to his present environment and was then thought to be a candidate for adoption. Amy Huntington, Dylan's caseworker, revised her previous opinion, stating that termination would now be in Dylan's best interests as it would allow him to move on with his life and establish some permanency. We agree with the trial court in determining termination of Diane's parental rights was in Dylan's best interests.

[redacted] preserved. Diane asserts the trial court's decision was improp[redacted] several errors made by the court during the termination process. The State contends Diane failed to preserve error on these issues by failing to raise them before the termination hearing. Matters not raised in the trial court, including constitutional questions, cannot be raised for the first time on appeal. *In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993).

A. Failure to appoint an attorney to represent Dylan. Diane alleges the trial court erred in failing to appoint a separate attorney to represent the wishes of Dylan. The State argues we need not address this issue as Diane failed to raise the issue to the trial court thereby not preserving error. We agree that even a constitutional question is raised too late when it is raised for the first time on appeal. *Id.* We choose to address the issue under Diane's fallback argument, that it could not have been raised earlier, as Dylan had no one representing his wishes who could have properly raised the issue at trial.

The issue stems from the fact that the guardian ad litem appointed for Dylan in this case was also the party who brought the petition and carried the burden of proof for terminating parental rights. Diane claims that Dylan retained strong objections to the termination of her parental rights, even threatening suicide if the court granted this petition. Because of Dylan's feelings, Diane contends the court should have appointed a separate attorney to represent his desires to the court.

We must determine whether, when the guardian ad litem is the petitioner advocating termination of parental rights, there is an irreconcilable conflict of

[redacted] of the guardian ad litem and that of the attorney for the child. [redacted] Code section 232.111(1) states:

> A child's guardian, guardian ad litem, or custodian, the department of human services, a juvenile court officer, or the county attorney may file a petition for termination of the parent-child relationship and parental rights with respect to a child.

Iowa Code section 232.113(2) states:

> Upon the filing of a petition the court shall appoint counsel for the child identified in the petition as a party to the proceedings. The same person may serve both as the child's counsel and as guardian ad litem.

There is no mandatory provision in the code that would require appointment of separate counsel for a child when the petitioning party is the guardian ad litem. However Iowa Code section 232.112(2) provides:

> Prior to the service of notice on the necessary parties, the juvenile court shall appoint a guardian ad litem for a child if the child does not have a guardian or guardian ad litem or if the interests of the guardian or guardian ad litem conflict with the interests of the child. Such guardian ad litem shall be a necessary party under subsection 1.

A conflict of interest was addressed in another case, in an ineffective assistance of counsel context. *In re J.P.B.*, 419 N.W.2d 387, 392 (Iowa 1988). The court acknowledged the apparent conflict of interest when the same attorney represented multiple children in the same family, who had different desires as to the outcome of the proceedings. *Id.* The court noted the immaturity of a child can prevent the child-client from being able to determine what is in their own best interests. *Id.* For example, a child may express an interest in retaining a legal bond with a biological parent but that may be decidedly not in the best interests of the child. *Id.* For this reason, the guardian ad litem must represent the best

[redacted] while also making the court aware of the wishes of the child. *Id.* In Dylan's case, the trial court was fully aware of Dylan's sentiments regarding the proceeding, stating in its April 15, 1999, ruling:

> The child is extremely bonded to his mother and the Court believes that the mother is also bonded to the child. The child threatens to commit suicide if the mother's parental rights are terminated.

The court was also aware of the position held by the guardian ad litem in bringing the termination action. Although Dylan's opposition to the termination was prevalent at the April hearing, Dylan's outlook had changed by the October hearing and the reports indicated that he was doing well in his placement and did not reflect any suicide threats if the termination was completed. Dylan had been more open in therapy sessions and his negative behaviors, including stealing and inappropriate sexual behaviors, had subsided. He had not had contact with Diane since April 1999. His caseworker testified his behavior improved during periods where he had no contact with Diane.

While we recognize the inherent conflict raised by Diane, we find the trial court was keenly aware of the situation. Therefore, Dylan was not prejudiced by the role assumed by his guardian ad litem.

B. Failure to grant Diane new counsel. Diane next asserts the trial court erred by refusing to grant her request for new trial counsel. Because she did not feel her attorney was competently representing her interest in retaining custody of her child, Diane wrote a letter dated January 29, 1999, to the court requesting different representation. The court responded by directing her attorney to address Diane's concerns. Diane did not bring this issue to the further attention

[redacted] there was no reason for the court to assume the situation had not been remedied. If the problem continued, Diane should have once again brought the issue before the court for a decision, offering the trial court an opportunity to further address this issue. Having failed to do so until the appeal, Diane did not preserve error on this issue. *C.D.*, 508 N.W.2d at 100.

C. Failure to hold a permanency hearing. Diane asserts the trial court failed to hold a permanency hearing regarding placement of Dylan as required by Iowa Code section 232.104. Diane did not lodge this objection prior to this appeal. Therefore, she is barred from raising this issue for the first time on appeal. *Id.*

D. Continuance of the termination hearing. The termination hearing began on April 13, 1999. The court determined a termination of parental rights would not be in Dylan's best interests at this time and continued the hearing for six months, to allow Diane "one last opportunity to get her life in order." Diane contends Iowa Code section 232.117 requires the trial court to either dismiss the petition or terminate her parental rights rather than continue the hearing for another six months. Again, however, Diane failed to contest the continuance or request a re-filing of the termination petition. She cannot now raise this issue for the first time on appeal. *Id.*

E. DHS failed to provide reasonable efforts for reunification. Diane also claims DHS failed to make reasonable efforts to reunite her with her son. She alleges she was not offered enough services or provided enough opportunity to interact with Dylan in order to meet the goals and allow for a reunification.

[redacted] must make reasonable efforts to provide services to eliminate the need for removal. *See* Iowa Code section 232.102(7) (1999). "While the State has the obligation to provide reasonable reunification services, the Mother had the obligation to demand other, different or additional services prior to the termination hearing." *In re S.R.*, 600 N.W.2d 63, 65 (Iowa App. 1999). Diane had an obligation to demand services prior to the termination hearing. *In re B.K.K.*, 500 N.W.2d 54, 57 (Iowa 1993). She failed to preserve error on this issue as well.

Although Diane was denied visitation during her incarceration, the court, upon her release, ordered DHS to establish a visitation plan. However, the court required Diane to begin working on the case plan requirements and abstain from the use of controlled substances before visitation would commence. She failed to meet these requirements, was arrested again and, thereby, missed the opportunity to resume visitation with Dylan.

Based on our review of the record, we find there was clear and convincing evidence to terminate Diane's parental rights to her son, Dylan. We also find it was in his best interests to do so. Having failed to preserve error regarding the remaining issues, we affirm the termination of Diane's parental rights.

AFFIRMED.