IN THE COURT OF APPEALS OF IOWA

No. 0-375 / 00-91
Filed October 13, 2000

IN THE INTEREST OF
K.D., T.W., and A.W.,
Minor Children,

H.W., Father of T.W.,
Appellant,

S.V., Mother,
Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, Michael J. Newmeister, District Associate Judge.

Mother and father appeal the termination of their parental rights. **AFFIRMED.**

Mark C. Meyer of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, for appellant-father.

John D. Hedgecoth of Terpstra & Epping, Cedar Rapids, for appellant-mother.

Thomas J. Miller, Attorney General, Charles K. Phillips, Assistant Attorney General, and Susan Conn, Assistant County Attorney, for appellee-State.

Leslie Stokke, Cedar Rapids, attorney and guardian ad litem for the minor children.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ.

[redacted] J.

Susan V. and Henry W. appeal the termination of their parental rights. Susan contends: (1) insufficient evidence supported termination of her parental rights to her three children, Kyler D., Trenton W. and Autumn W.; (2) the State failed to make reasonable efforts to reunite her with her children; and (3) the juvenile court abused its discretion in terminating her parental rights, even if the statutory grounds for termination were met. Henry argues: (1) there was not clear and convincing evidence to support termination under Iowa Code section 232.116(k); (2) reasonable efforts were not made to reunite Henry with his son, Trenton; and (3) the record does not show a knowing and intelligent waiver of Henry's right to testify at the termination proceeding. We affirm.

Susan is the mother of all three children in this proceeding. Kyler was born in October of 1996 and Autumn in December of 1998. Alan V. is their father. Alan's parental rights are not at issue in this appeal. Trenton was born in November of 1997 and his father is Henry W.

The parents in this case have histories of abusive behavior, chronic unemployment, and dysfunctional relationships. Henry married Clementine in April of 1993 and they have two children who are not involved in this appeal. He has a prior conviction for delivery of a controlled substance from August of 1996. Henry was also involved in three abuse reports concerning a child other than Trenton. The record does not indicate Henry worked much during the entire time this case was pending. Susan carried on a ten-month relationship with Henry from March of 1997 to January of 1998. Susan married Alan in February of 1998, apparently to spite Henry after a dispute. Susan has a sporadic work

history and criminal convictions for third-degree theft and assault on a three-year-old half-sister of Trenton. Susan has been diagnosed with attention deficit hyperactivity disorder (ADHD).

In February of 1998, Kyler and Trenton first came to the attention of the Iowa Department of Human Services after concerns were raised about their parents' failure to meet medical and basic needs. Susan and Alan then left Iowa for Arkansas and took the boys with them. In March of 1998, the children were retrieved, adjudicated children in need of assistance (CINA), and placed in foster care.

In the following months, the children remained in foster care. Kyler exhibited behavioral problems. He was functioning at a ten-month-old level, although he was nearly two years old at the time. Trenton had severe respiratory concerns. A throat specialist concluded he was not digesting stomach acid and it was entering his esophagus and affecting his breathing. The doctor ordered Trenton not to have any contact with cigarette smoke. Trenton has been hospitalized several times due to pneumonia.

Meanwhile, Susan returned to Iowa, was evicted from her apartment and remained unemployed most of the time. She was arrested in July of 1998 for theft. She advised a DHS case worker that she was again pregnant and had a December 1998 due date. Although she did obtain a psychological evaluation as earlier ordered by the juvenile court, she failed to become involved with substance abuse treatment. After a review of these circumstances, the juvenile court continued foster care and scheduled another review for November of 1998.

In the interim, supervised visitations between the parents and children were permitted. Susan's visits took place at her grandmother's home. DHS found the grandmother became the primary caretaker of the children during such visits. The location of the visits were changed. DHS workers reported Susan focused more on the case worker at the visits than on the children. She also appeared to have difficulty supervising and interacting with more than one child at a time. Visits between Henry and Trenton also presented problems. Although Trenton is not to be around smoke, smoke residue on Henry's clothing and in his apartment caused concerns about his contact with Trenton.

The parties' progress was again reviewed in November 1998 by the juvenile court. Kyler's behavior had improved in foster care, however, Trenton's health did not. Susan was homeless at the time and living in a women's shelter, however, she had maintained employment for several months. There had been transition in Henry's home. His two daughters from his marriage had been placed in foster care. The DHS report to the court indicated a concern about the length of time Kyler and Trenton had already spent in foster care. It also expressed concern about Susan's ability to care for the children, particularly with the prospect of a newborn in the home. After a review of the case in November 1998, the juvenile court continued the foster care placement.

Another report was prepared for a February 1999 review. Services of family therapy, supervised visitation and parenting skill development had been provided. Susan gave birth to Autumn in December of 1998. Because of Susan's progress with services, Autumn was allowed to stay in the home. Susan had found a home for herself and began working at Taco Bell. However, DHS

became concerned about Susan resuming her relationship with Henry. Due to Henry's controlling behavior and his own resistant attitude to services with regard to his two daughters from another relationship, DHS believed he would impact Susan's ability to make sufficient progress and get her sons back. There were also concerns about Henry's substance abuse and history of domestic abuse. In January of 1999, Susan agreed to voluntary foster care placement for Autumn. Later that same month, Henry was accused of striking his oldest daughter, resulting in her hospitalization. His wife instituted a no contact order against him and Henry was arrested for violating that order. Susan also reported Henry's wife assaulted her.

Unbeknownst to service providers, Susan and Henry had recently resumed their relationship and began living together. Susan's progress deteriorated thereafter. Despite a court order, Susan refused several times to provide urine samples but after finally agreeing to a test, the result was negative. Henry tested positive for marijuana. During supervised visits, Susan required constant direction to interact with Kyler. She displayed little contact with or affection for Trenton. She sometimes missed visits, was disagreeable with service providers and on two occasions, used corporal punishment with Kyler. In February of 1999, Susan stipulated to Autumn's removal from the home, which was due in large part to Henry living with Susan.

Henry remained intractable regarding services from the beginning. With regard to Henry's visits, DHS continued to have concerns Henry was exposing Trenton to smoke. Trenton would have problems breathing after visiting Henry and on at least one occasion had to be hospitalized. Henry was told about

Trenton's health problems but continued to smoke. Henry also persisted with substance abuse and claimed he would lie on a substance abuse evaluation to avoid diagnosis and treatment.

In March of 1999, Alan and Susan stipulated to Autumn's CINA status and the child continued in foster care. On March 25, 1999, the State petitioned to terminate Susan's parental rights to Kyler and Trenton and Henry's parental rights to Trenton. On June 28, 1999, the State petitioned to terminate Susan's parental rights to Autumn. Trial was held in August and September of 1999. On December 28, 1999, the juvenile court terminated Susan's parental rights to all three children pursuant to Iowa Code sections 232.116(1)(c) and (g) (1999). The court terminated Henry's parental rights to Trenton under Iowa Code sections 232.116(1)(c), (g) and (k).

Susan and Henry now appeal. Susan contends: (1) insufficient evidence supported termination of her parental rights to her three children, Kyler D., Trenton W. and Autumn W.; (2) the State failed to make reasonable efforts to reunite her with her children; and (3) the State failed to meet its burden of final persuasion, even if the statutory grounds for termination were met. Henry argues: (1) there was not clear and convincing evidence to support termination under Iowa Code section 232.116(k); (2) reasonable efforts were not made to reunite Henry with his son Trenton; and (3) the record does not show a knowing and intelligent waiver of Henry's right to testify at the termination proceeding.

I. Scope of Review. We review termination proceedings de novo. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa App. 1999) (citation omitted). The grounds for termination must be proven by clear and convincing evidence. *Id.* (citation

[illegible]. Our primary concern is the best interest of the children. *Id.* (citation omitted).

II. Susan's Appeal. A. Sufficiency of the Evidence. Susan contends the State failed to meet its burden. The juvenile court terminated her parental rights pursuant to Iowa Code sections 232.116(1)(c) and (g). Section 232.116(1)(c) provides for termination of parental rights if:

> c. The court finds that both of the following have occurred:
> (1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.
> (2) Subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

Section 232.116(1)(g) permits termination when all of the following have occurred:

> (1) The child is three years of age or younger.
> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
> (3) The child has been removed from the physical custody of the child's parents for at least six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.
> (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

Susan essentially argues the last elements of each subsection have not been met.

We find clear and convincing proof of these elements. The children could not be returned to Susan's care and conditions which led to the CINA

adjudication continued to exist. She did progress with services for a time. However, she resumed her relationship with Henry, a man whom she had earlier reported as the source of problems in her life. Her progress deteriorated rapidly. Susan was unable to handle the children even during supervised visits. She has not maintained regular employment or a clean apartment. She failed to take any responsibility for abuse or neglect incidents, instead finding an excuse or a conspiracy against her. At the time of trial, the children had been in foster care for approximately a year and a half, yet Susan had made no progress. In fact, she had retreated into her abusive relationship with Henry, despite admonitions from service providers that this action might cause her to lose her children. We affirm the termination of Susan's parental rights to all of her children.

B. Reasonable Efforts. Susan contends the State failed to make reasonable efforts to reunite her with her children or provide services which reasonably accommodated her ADHD diagnosis, in violation of the Americans with Disabilities Act (ADA). The ADA prohibits a public entity from discriminating against disabled people by excluding them from participation in or denying them benefits of public services, programs, or activities. *In re C.M.*, 526 N.W.2d 562, 566 (Iowa App. 1994) (citation omitted). The ADA requires the public entity to make a "reasonable accommodation" to allow the disabled person to receive the services or to participate in the public entity's programs. *Id.* (citation omitted).

We find error has not been preserved on this issue. *See id.* (declining to consider on appeal same issue because it was not raised before the juvenile court). Not only the sufficiency of services but also the issue of reasonable accommodation should be raised at the removal or review hearing or when

services are offered. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994); *see also In re C.B.*, 508 N.W.2d 97, 101 (Iowa App. 1993). It is too late to challenge the service plan at the termination hearing. *L.M.W.*, 518 N.W.2d at 807. No evidence appears in the record that Susan challenged the services at the appropriate times. Furthermore, she has not and does not now suggest what services should have been offered. The ADA specifically defines the term 'disability.' We have no evidence on which to base a conclusion whether Susan's ADHD falls within that definition. For example, we cannot ascertain from this record the nature and extent of her asserted disability or what types of services might best assist her. Susan herself testified that ADHD was not a major problem for her, as did the evaluating psychologist. We conclude error was not preserved and we decline to address this issue.

C. Best Interests of the Children. Susan points out it is within the juvenile court's discretion not to terminate parental rights, even where the grounds for termination have been met. We find Susan's argument in this respect to be a regurgitation of her earlier argument regarding sufficiency of the evidence. We conclude it is in the children's best interests that Susan's parental rights be terminated for reasons already set forth in this opinion.

III. Henry's Appeal. A. Sufficiency of the Evidence. Henry challenges the sufficiency of the evidence under section 232.116(1)(k). Henry's parental rights were terminated under two other grounds—sections 232.116(1)(c) and (g). He fails to challenge the evidence to support these grounds. When the juvenile court terminates parental rights on more than one statutory ground, we need only

[redacted] under one of the sections cited by the juvenile court to affirm. *See S.R.*, 600 N.W.2d at 64 (citation omitted).

We conclude termination is supported under the remaining grounds. Trenton could not be placed in Henry's care at the time of termination and the grounds for CINA adjudication continued to exist. Henry has other children who are also in foster care. He is a controlling figure. He has verbally assaulted case workers and shown little desire to cooperate with DHS to have his children returned. Henry shows little regard for his son's health concerns, which are severe. He has no inclination to quit smoking or abusing marijuana. He also has a history of domestic abuse and child abuse reports. None of the case workers believed he was prepared to take on the responsibility of caring for Trenton full time. We affirm the termination of Henry's parental rights to Trenton.

B. Reasonable Efforts. Like Susan, Henry argues the State failed to make reasonable efforts to reunite him with his son. While the State has the obligation to provide reasonable reunification services, a parent has the obligation to demand different or additional services *prior* to the termination hearing. *See S.R.*, 600 N.W.2d at 65 (citation omitted). Henry failed to preserve this argument by demanding additional services prior to termination. *See id.* (citation omitted) (concluding mother failed to preserve issue of adequacy of services for appellate review where she did not demand services other than those provided).

C. No Record Waiver of Right to Testify. Henry asks us to hold that when a parent does not testify at the termination hearing, we may not presume a

waiver of the parent's right to testify from a silent record. Instead, a waiver must occur in person and on the record.

In making this argument, Henry analogizes to the criminal context. The analogy is a faulty one. We are unaware of any obligation of the trial court in a criminal case, where individual liberty is at stake, to halt proceedings and inform a defendant of the right to testify. Iowa Code section 232.112 does provide "necessary parties to a termination of parent-child relationship proceeding . . . are entitled to receive notice and an opportunity to be heard, ..." We conclude Henry received many opportunities to be heard. This case was not one where the trial court or anyone else was trying to prevent Henry from testifying or making any kind of record on his own behalf. He was represented by counsel at all relevant times and the State's witnesses were cross-examined. He surely knew of a parent's ability to testify at the termination hearing—Susan testified. We find no authority, and none has been cited to us, to support Henry's argument. We affirm the termination of Henry's parental rights to Trenton.

AFFIRMED.