IN THE COURT OF APPEALS OF IOWA

No. 1-500 / 01-0274
Filed August 29, 2001

FILED
AUG 29 2001
CLERK SUPREME COURT

IN THE INTEREST OF C.G., C.G., and R.G.,
Minor Children,

T.S., Mother,
Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen C. Gerard, II, District Associate Judge.

Mother appeals from the termination of her parental rights. **AFFIRMED.**

David Burbidge of Johnston & Nathanson, P.L.C., Iowa City, for appellant.

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

Sally Heckman Peck, Iowa City, for minor children.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

HECHT, J.

Thereasa S. appeals from an order terminating her parental rights to three minor children. On appeal she contends (1) the terminations were not supported by sufficient evidence; (2) reasonable services were requested but not provided to her; (3) her imprisonment is not a proper ground for the terminations; (4) the juvenile court failed to consider placement of the children with their maternal grandmother; (5) her mental health condition is not a proper ground for the terminations; (6) the juvenile court erred by failing to permit her an opportunity to present rebuttal evidence; (7) the terminations are not in the children's best interests; and (8) the juvenile court's termination order is based on "erroneous facts and speculative evidence." We affirm.

I. Background Facts and Proceedings. Thereasa is the biological mother of six children: Matthew, born April 4, 1981; Stephen, born June 22, 1983; Andrew, born February 20, 1987; Ryan, born October 12, 1994; Christopher and Cordero, twins born on July 28, 1996. Of the six children, only the twins have the same father.

The Department of Human Services' (DHS) involvement with the family began in 1985. Thereasa participated in voluntary family centered services and mental health services through 1994. In 1994, two of the children, Matthew and Stephen, were placed in the care and guardianship of their maternal grandmother, Patricia, who raised them. The third eldest child, Andrew, was placed and remains with his father.

While involved in an abusive relationship, Thereasa attempted suicide in 1992 and 1993, and received in-patient mental health treatment. She was diagnosed with bipolar disorder, a condition that requires a consistent regimen of medications. Thereasa, who has struggled with chemical dependency issues, tested positive for opiates at the time of Ryan's birth on October 12, 1994. Ryan was adjudicated a child in need of assistance in early 1995. Thereasa was cooperative with services, and the case was closed in March of 1996.

On April 23, 1998, Thereasa was charged with the crime of child endangerment after Ryan, then three and one-half years old, crossed a busy street alone and was found in a grocery store. Thereasa pled guilty and was placed on probation for one year. On June 12, 1998, the State filed petitions alleging Ryan, Christopher, and Cordero were in need of assistance. On August 26, 1998, after a contested hearing, the juvenile court found the children were in need of assistance pursuant to Iowa Code sections 232.2(6)(b) and (c)(2) (1997). The children remained in Thereasa's care, but under the protective supervision of DHS. On October 30, 1998, family centered services were terminated when it was believed Thereasa had shown she was willing, capable, and determined to provide proper care for the children. However, the services were reinstated in December of 1998, because Thereasa was overwhelmed with her parental responsibilities.

Thereasa was arrested on August 24, 1999, and charged with extortion. On September 3, 1999, the State filed an application for revocation of her probation. Probation was revoked and Thereasa served ninety days in jail on the

child endangerment charge. An emergency removal order was entered on November 4, 1999, and the children were placed in foster care. A psychiatric evaluation completed in December of 1999 included a guarded assessment of Thereasa's capacity to live independently:

> Given the cognitive deficits noted above, reservations are raised regarding her capacity for independent self-care, parenting skills, and compliance/medication management, especially given her history of substance abuse in addition to chronic bipolar disorder. If her current cognitive performances are any indication, she would probably require at least daily monitoring.

Thereasa was arrested again on December 27, 1999. Thereasa subsequently pled guilty to theft in the second-degree, burglary in the second-degree, and three forgery charges and was sentenced on June 2, 2000, to ten years in prison. In July of 2000, the State filed petitions to terminate her parental rights to Ryan, Christopher, and Cordero. Thereasa was incarcerated at the time of the hearing on the termination petitions. Her discharge date is October 11, 2004, but she will be eligible for parole in November of 2001. On January 25, 2001, the juvenile court entered an order terminating Thereasa's rights to the three children.[1]

II. Scope of Review. Our review in termination proceedings is de novo. *In re J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984); *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa Ct. App. 1997).

III. Sufficiency of the Evidence. The juvenile court found the State had provided sufficient grounds for termination of parental rights under Iowa Code section 232.116(1)(c) (2001). Thereasa contends the record does not contain

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[1] The parental rights of the two fathers of the three children were also terminated. The fathers' rights are not at issue in this appeal.

clear and convincing evidence to support a finding the circumstances that led to the CINA adjudication continued to exist at the time of the termination hearing. In particular, she contends the juvenile court failed to give sufficient weight to the evidence tending to establish (1) her substance abuse problems were not substantial after the CINA adjudication in August of 1998; (2) her ability to provide the children's needs during periods when her mental illness is controlled with medication; (3) she received positive feedback from the children's service providers[2] until late October of 1999; (4) remarkable developmental progress by the children during the six months after the CINA adjudication was filed; and (5) her behavioral deterioration in 1999 resulted from improper dosages of medications ingested for control of her illness.

The grounds for termination must be proven by clear and convincing evidence. *In re E.K.*, 568 N.W.2d 829, 831 (Iowa Ct. App. 1997). We give weight to the juvenile court's findings of fact, especially those regarding the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). The welfare and best interest of the children are the governing concerns. *J.R.H.*, 358 N.W.2d at 317; *In re Henderson*, 199 N.W.2d 111, 120 (Iowa 1972). Our primary concern is the best interests of the children. *In re T.B.*, 604 N.W.2d 660, 662 (Iowa 2000).

We find clear and convincing evidence in the record establishing the circumstances that led to the adjudication continued to exist at the time of the

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[2] A DHS representative testified at the termination hearing that the providers' reports were couched in positive terms despite the authors' belief the mother's and children's progress was not acceptable.

termination hearing. While it appears Thereasa's functioning was improved at times when she was properly medicated prior to October of 1999, the overwhelming evidence in the record shows her periods of relative stability have not been of sufficient longevity to permit her to benefit from services and act as an effective parent to the children. Furthermore, Thereasa's criminal history and subsequent imprisonment conclusively establish the children were still in need of assistance at the time of the termination hearing.

IV. Reasonable Services. Thereasa contends she requested services to assist her with money management, relationships with men, and obtaining mental health treatment. The State contends error was not preserved on this issue because Thereasa failed to make a timely request of such services. In reply, Thereasa contends she should be excused from requesting additional services because the reports of service providers deceived her to believe she and the children were making adequate progress. We conclude this issue was presented to the juvenile court and error was preserved. However, we find reasonable services were provided to Thereasa and her children commencing in 1985 and continuing through the pendency of this action. Given the long history of services to the family, we find any failure of DHS to provide additional services did not affect the outcome in this case. *See In re C.B.*, 611 N.W.2d 489, 495 (Iowa 2000) (holding the failure of DHS to provide visitation in the last months before termination did not impact the outcome of the case where parent failed to respond to services until after the statutory limitation had expired).

V. Imprisonment. Thereasa contends section 232.116(1)(e) cannot serve as the statutory basis to terminate parental rights of one who is incarcerated. She contends imprisonment may only constitute a ground for termination under section 232.116(1)(h).[3] Thereasa asserts because the State failed to rely on section 232.116(1)(i), the court must anticipate her release from prison when considering the petition to terminate under section 232.116(1)(e). Although it is true the legislature adopted a separate subsection to authorize termination of the parental rights of imprisoned parents, we reject Thereasa's contention a parent's imprisonment cannot be considered a factor bearing upon the merits of the State's claim under other subsections of the statute. For example, we consider the fact of imprisonment in this case on the issue of whether the children can at the present time be returned to Thereasa. *See* Iowa Code § 232.116(1)(e)(4) (2001).

Thereasa argues on appeal that her "constitutional rights" were violated by the juvenile court's consideration of imprisonment as a basis for termination under section 232.116(1)(e). She does not specify what rights she claims were

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[3] We assume Thereasa intended to cite section 232.116(1)(i) which provides parental rights may be terminated if the court finds that both of the following have occurred:

> (1) The child has been adjudicated a child in need of assistance pursuant to section 232.96 and custody has been transferred from the child's parents for placement pursuant to section 232.102.
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> (2) The parent has been imprisoned for a crime against the child, the child's sibling, or another child in the household, or the parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of five or more years.

Iowa Code § 232.116(1)(i) (2001). Since it is apparent Thereasa intended to refer to this statute, we will consider this argument despite the citation to the incorrect subsection.

violated and fails to disclose how this claimed error was preserved in the juvenile court. Accordingly, we do not consider this contention.

VI. Placement With Maternal Grandmother. Thereasa next contends the three children should have been placed with their maternal grandmother who raised two of their siblings and was willing and able to provide care for these children as well. Iowa Code section 232.116(3)(a) gives the court discretion to reject the termination remedy if a relative has legal custody of the child. This statute has been interpreted as permissive, not mandatory. *J.L.W.*, 570 N.W.2d at 781; *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). It is within the sound discretion of the juvenile court based upon the unique circumstances before it and the interests of the child, whether to apply this section. *J.L.W.*, 570 N.W.2d at 781. We must consider a child's long-range and immediate best interests. *In re A.B.*, 492 N.W.2d 446, 450 (Iowa Ct. App. 1992). Placement of a child with a relative under a permanency order is not a legally preferable alternative to termination of parental rights. *In re L.M.F.*, 490 N.W.2d 66, 67-68 (Iowa Ct. App. 1992). We have deferred to the trial court in such matters because the trial court is closer to the parties and is able to observe the family dynamics. *In re D.E.D.*, 476 N.W.2d 737, 738 (Iowa Ct. App. 1991). Accordingly, we affirm on this issue.

VII. Thereasa's Mental Health. Thereasa contends the State failed to present clear and convincing evidence her mental disability prevents her from properly parenting her children. A parent's mental disability, while not alone sufficient to terminate parental rights, can be a contributing factor to the parent's

inability to perform essential parenting functions, and termination can be appropriate where a parent lacks the capacity to meet a child's present and future needs. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993); *In re T.T.*, 541 N.W.2d 552, 556 (Iowa Ct. App. 1995). The crucial question is not whether the parent, in a period of mental stability, is equal to the task of parenting. *In re K.F.*, 437 N.W.2d 559, 563 (Iowa 1989). The decisive question is whether the parent, if allowed to resume the child's care, would remain in remission and maintain a stable home. *Id.* A parent's mental disability is a proper factor to be considered in determining whether termination is necessary to serve the child's best interests. Termination is appropriate when the disabled parent lacks the capacity to meet the child's present needs as well as the capacity to adapt to the child's future needs. *In re A.M.S.*, 419 N.W.2d 723, 734 (Iowa 1988).

We conclude Thereasa's mental health was properly considered by the juvenile court. We find clear and convincing evidence Thereasa has been unable to overcome the cyclical ravages of her bipolar disorder. Her long history of mental instability clearly establishes she is unable to consistently provide the stable parenting needed by her children. We affirm on this issue.

VIII. Rebuttal Evidence. Thereasa requested and was denied an opportunity to present a rebuttal affidavit. She contends on appeal she was denied procedural due process under the United States and Iowa Constitutions. This contention was not raised in the juvenile court, and is waived. *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994).

IX. Best Interests of the Children. Thereasa contends the juvenile court should have refused the State's prayer for termination because clear and convincing evidence established severance of the parent-child relationships would be detrimental to the children. *See* Iowa Code § 232.116(3)(c). She asserts the closeness of her bond to the children and their sibling bonds to each other make termination contrary to the children's best interests. Resolution of this issue is within the sound discretion of the juvenile court. *In re A.J.*, 553 N.W.2d 909, 916 (Iowa Ct. App. 1996). We have deferred to the juvenile court in such matters because that court is closer to the parties and is able to observe the family dynamics. *D.E.D.*, 476 N.W.2d at 738.

Thereasa has been involved with services from time to time since 1985. In spite of this, her three older children were removed from her care and placed in guardianship and custody of relatives. After Ryan's birth, juvenile court proceedings were instituted, and the child remained in the juvenile system until March of 1996. After Christopher and Cordero were born, services were again provided to Thereasa. Notwithstanding intensive services at that time, the children were removed in November of 1999. Thereasa has been incarcerated since the Fall of 1999. This long and unfortunate history constitutes clear and convincing evidence supporting our finding termination is in the best interests of the children.

X. Conclusion. Finally, we note on page six of the juvenile court's order references were made to names that have no apparent relationship to this case. While that is inappropriate and reflects some inattention to the drafting of the

decision, we have carefully reviewed the record, and agree with the disposition reached by the juvenile court. Although we have not addressed all of the arguments raised by Thereasa, we have carefully considered them. Those we have not addressed lack merit, or were not preserved. Accordingly, we affirm the juvenile court's termination of her parental rights.

AFFIRMED.