IN THE COURT OF APPEALS OF IOWA

No. 5-739 / 95-1410

IN THE INTEREST OF C.W., Minor Child,

P.W., Father,

Appellant.

FILED
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CLERK SUPREME COURT

Pursuant to Iowa Supreme Court Rule 8.1, page five of the above-captioned case, filed February 28, 1996, is corrected as shown by the attached substituted page five. The former page five is to be discarded.

Done this 29th day of February, 1996.

Maynard J. V. Hayden
Acting Chief Judge

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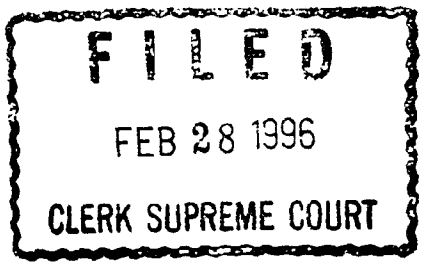
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No. 5-739 / 95-1410



IN THE INTEREST OF C.W., Minor Child,

P.W., Father,

Appellant.

Appeal from the Iowa District Court for Johnson County, Patrick R. Grady, Judge.

Father appeals the juvenile court's order terminating his parental rights. **AFFIRMED.**

Davis L. Foster, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Diane Stahle, Special Assistant Attorney General, Judy Sheirbon, Assistant Attorney General, and Debra Minot, Assistant County Attorney, for appellee-State.

Sally Weyer of Bergan & Weyer, Iowa City, guardian ad litem for minor child.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HABHAB, P.J.

Paul and Michelle are the parents of C.W., born October 3, 1993. On November 26, 1993, Paul and Michelle took C.W. to the hospital because she had a blood spot in her eye and appeared to have had a seizure. Doctors concluded C.W.'s symptoms, consisting of retinal hemorrhaging, subarachnoid hemorrhaging, bruising around the forehead, eyes, and ears, cerebral edema, damage to the optic nerve, and seizures, were consistent with shaken baby syndrome. In addition, doctors found C.W. had a fresh ankle fracture and a week-old spiral fracture of her long arm bone. A report of suspected child abuse was made to the Department of Human Services (DHS).

Michelle agreed C.W. should be placed in family foster care upon her release from the hospital. Paul was charged with two counts of child endangerment and a no contact order was entered prohibiting him from having contact with C.W. Despite Paul's and Michelle's denials Paul was responsible for C.W.'s injuries, the DHS investigation resulted in a founded report of physical abuse of C.W. by Paul. In December 1993, the State filed a petition alleging C.W. was a child in need of assistance (CINA) pursuant to Iowa Code section 232.2(6)(b) (1993). The parties stipulated C.W. was a child in need of assistance. Although the court continued C.W.'s DHS placement following a January 1994 emergency removal hearing, no adjudication order was filed.

Following an April 1994 dispositional hearing, C.W.'s placement with DHS was continued. In May 1994, C.W. was placed with her maternal aunt, where she remains to date. By a September nunc pro tunc order, the April dispositional order was amended to reflect C.W. was adjudicated CINA.

In July 1994, Paul's trial on two counts of willful injury and two counts of felony child endangerment ended in a hung jury. Although he continued to deny he caused injury to C.W., Paul entered an *Alford* plea to two counts of misdemeanor child endangerment on January 25, 1995. He was sentenced to two consecutive two-year terms of imprisonment on February 24, 1995.

In May 1995, the State filed a petition to terminate Paul's and Michelle's parental rights over C.W. Michelle signed a consent to the termination.

Following a hearing, the court terminated Paul's parental rights pursuant to Iowa Code section 232.116(1)(g). The court found clear and convincing evidence C.W. could not be returned to Paul based on the "severe physical abuse visited upon the child by the father, his failure to accept responsibility for the abuse, his cognitive and social disabilities, as well as his failure to participate in services." The court addressed Paul's challenge he was not provided services by DHS; however, it found Paul's challenge was untimely.

Paul appeals.

I. ***Scope of Review.*** Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1984) *cert. denied sub nom. J.G. v. Tauke*,

469 U.S. 1222 (1985). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those determinations. *Id.* at 491-92.

II. ***Reasonable Services.*** Paul contends the State failed to provide reasonable services prior to the termination of his parental rights. The State has an obligation to make reasonable efforts to provide services designed to preserve the family unit. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994). The parents have a corresponding responsibility to demand services prior to the termination hearing. *Id.* Challenges to the plan for reunification should come when the plan is entered. *Id.*

The case permanency plan was proposed in March 1994. As it related to Paul, the plan called for Paul to resolve his criminal difficulties and not to have contact with C.W. The plan further provided Paul would be included in later case permanency plans as appropriate. The plan was adopted by the district court in a hearing on April 14, 1994. The plan was reaffirmed by subsequent orders on August 12, 1994 and October 13, 1994. Paul's attorney received copies of the DHS review of the case permanency plan and copies of the district court's orders reaffirming the plan. In the October 13, 1994 order, the district court stated all parties concurred prior orders should continue without change. The district court also advised counsel they were to review the records of the juvenile case, the court orders, the court reports, all psychiatric and psychological information, and all DHS reports with their clients.

In the review of the case permanency plan date February 10, 1995, DHS stated in part:

> The child's father, Paul, who is the perpetrator of the founded child abuse involving "Shaken Baby Syndrome" and other injuries, has plead guilty to two counts of Aggravated Child Endangerment under an Alford Plea. Paul agreed to accept two years on each count. Sentencing has not taken place yet. A no contact order remains in effect between Paul and [C.W.]. Paul has not received services through DHS. Paul is currently involved with the Department of Corrections pre-sentence investigation process. He is reporting that Michelle is responsible for the abuse of [C.W.]. Paul and Michelle, [C.W.]'s mother, continue to be involved with one another. Michelle is pregnant with Paul's baby. Her due date is not known. Michelle has not been open about this pregnancy to DHS. She spoke to Carolyn about not applying for medical assistance and not receiving any pre-natal care as she did not want DHS to find out about the pregnancy.
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> . . . .
>
> Problem number two expects Paul to resolve his criminal difficulties and not have contact with [C.W.]. The case plan states that Paul will be included in the case plan at a later time. Paul has not had contact with [C.W.]. He is working on resolving his criminal difficulties that are the result of the abuse of [C.W.]. It is not appropriate to include Paul in the case plan. It is believed that his parental rights should be terminated.

The district court reaffirmed the case permanency plan on February 17, 1995. Also on February 17, 1995, Paul filed a Response to Court Report in which he contended (1) the court report erroneously stated Paul was the perpetrator of the child abuse; (2) no services had been provided; and (3) termination at that time would be inappropriate. This was the first time there is any evidence of Paul making a demand for services since the case permanency plan was originally submitted to the district court in March 1994. A petition to terminate Paul's parental rights was subsequently

filed by DHS on March 9, 1995.

Paul and his attorney were continually aware of what the case permanency plan provided from the beginning. Paul was out of jail on bond from February 1994 until the time he was sentenced in February 1995. Paul knew the name of his social worker and knew how to get in contact with her; yet he made no attempt to contact her or DHS to request services. Indeed, it was not until February 17, 1995 that Paul made his first request for services. This request was clearly in response to DHS's recommendation to terminate his parental rights in the February 1995 review of the case permanency plan. It was not until termination became imminent he chose to make his request for services. Paul had an entire year, during which both he and his attorney were fully and completely aware of the substance of the case permanency plan, to request services for Paul. Yet, he neglected to do so until February 17, 1995. We affirm the district court on this issue.[1]

III. ***Statutory Criteria.*** Paul next contends there was not clear and convincing evidence to support terminating his parental rights. Iowa Code section 232.116(1)(g) (1993) permits the juvenile court to terminate the parent-child relationship if the court finds 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.

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[1] We find Paul's contract argument to be without merit.

> (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.

Paul concedes the State has proved the first three elements of section 232.116(1)(g) by clear and convincing evidence. The sole issue is whether the State met the fourth element.

Paul's primary contentions are the district court improperly used both Paul's *Alford* plea and Paul's contentions of innocence in determining C.W. could not be returned to Paul. Paul disputes the district court's findings his failure to participate in services and his cognitive and social disabilities also provide clear and convincing evidence C.W. cannot be returned to him. We find the district court properly determined there was clear and convincing evidence C.W. could not returned to Paul.

The district court's findings stated, in part:

> The Court first finds that the father was the person who inflicted the injuries upon the child. This is based on the evidence surrounding the incidents which led to the severe injuries to the child and the fact that the father has entered valid pleas of guilty to two counts of Child Endangerment. The Court finds that it may rely on the father's *Alford* plea as a valid plea and make a determination that the father did inflict the injuries.

From our de novo review of the record, we agree with that part of the trial court's ruling which determined there was clear and convincing evidence C.W. would not be returned to the custody of Paul. The district court's reliance upon the evidence

surrounding the incidents of abuse was proper. We specifically find the district court's determination Paul inflicted the injuries is a valid finding based upon its evaluation of facts surrounding the incidents. With this determination, we need not address the question of whether, under the circumstances here, an *Alford* plea can be relied upon in determining whether a child can be returned to the custody of his or her parents.

Paul also argues his contentions of innocence were misused by the district court in determining C.W. could not be returned to him. Paul contends by forcing him to accept responsibility for his actions before the conclusion of the criminal proceedings against him deprives him of his constitutional right against self-incrimination. First, Paul's argument must fail since the criminal proceedings were indeed resolved prior to the termination hearing. Second, this issue has previously been addressed in *In re H.R.K.*, 433 N.W.2d 46 (Iowa App. 1988). In *H.R.K.*, the court stated a parent's recognition and acknowledgement of abuse is essential in meeting the child's needs. *H.R.K.*, 433 N.W.2d at 50. This is because no meaningful change will occur without such recognition. *Id.* Thus, we find Paul's argument is without merit.

Paul's final two contentions regarding this issue are the district court, in making its determination to terminate Paul's rights, improperly relied upon Paul's cognitive and social disabilities and a finding Paul did not participate in services. We find these contentions are without merit.

There exists a parental interest in the integrity of the family unit, but this interest is not absolute and may be forfeited by certain conduct. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). The State has the duty to see that every child within its borders receives proper care and treatment, and must intercede when parents abdicate that responsibility. *In re I.L.G.R.*, 433 N.W.2d 681, 689 (Iowa 1988). The termination statutes are preventative as well as remedial. *Dameron*, 306 N.W.2d at 745. "So the statutory presumption that a child's best interest will be served by leaving the child with the child's parent is not conclusive." *In re L.L.*, 459 N.W.2d 489, 494 (Iowa 1990). Insight for the determination of whether a child can be returned to the parent is to be gained from evidence of the parents' past performance, for it is that performance which may be indicative of the quality of future care that parent is capable of providing. *L.L.*, 459 N.W.2d at 493-94. "Children cannot wait for responsible parenting. Parenting cannot be turned off and on like a spigot. It must be constant, responsible, and reliable." *Id.* at 495. Based upon our de novo review of the record, we conclude there is clear and convincing evidence C.W. cannot be returned to Paul. Consequently, we find the requirements of section 232.116(1)(g) have been satisfied.

IV. ***Best Interests of the Child.*** Paul contends there is not clear and convincing evidence C.W.'s best interests will be served by terminating Paul's parental rights. In cases involving the termination of parental rights, our paramount concern is the best interests of the child. *L.L.*, 459 N.W.2d at 493. In determining

what these best interests are, we look at the child's long-range as well as immediate interests. *Id.* We must consider what the future would hold for the child if the child is returned to the parent. *Id.* at 493-94. In making this determination, we look to the parent's past performance since it is this performance which may indicate the quality of care the parent is capable of providing in the future. *Id.* at 494.

As was discussed previously, Paul's continued denial of responsibility for the injuries C.W. received is a large part of the reason Paul has not received services up the point of termination. Paul's lack of desire to receive services, as evidenced by his first and untimely request for services, also had an impact on his failure to receive services. Further, Paul is presently incarcerated due to his *Alford* plea on the charges injuring C.W.[2]

C.W., on the other hand, has, at the time of the termination, been out of her parents' custody for seventeen of the nineteen months she has been alive. She has been in the custody of her maternal aunt for approximately one year. The aunt has shown an ability to meet C.W.'s medical, emotional, and physical needs. The caseworker felt the aunt could make the proper parenting decisions in C.W.'s best interests. [redacted] caseworker testified the aunt would be a good adoptive parent. We

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[2] Incarceration can be a consideration in finding a parent is unavailable and unable to fulfill his or her parenting responsibilities. *See In re D.P.*, 465 N.W.2d 313, 314-15 (Iowa App. 1990) ("[The mother] claims her absence has been occasioned by the fact that she was institutionalized. We do not find this mother's incarceration for intentional violation of statutes a reason not to terminate. We reject her argument on this ground.").

find the best interests of the child would be served through a termination of Paul's parental rights.

V. *Constitutional Claim.* Paul's final claim is the district court violated Paul's constitutional rights in terminating his parental rights. Paul first claims he was forced to choose between giving up his Fifth Amendment right against self-incrimination by admitting to abusing C.W. and giving up his fundamental right to parent his own child by refusing to admit he committed the abuse. Second, Paul argues the termination violates his substantive due process rights.

We find Paul has failed to preserve error on these constitutional issues. Matters not raised in the trial court, including constitutional issues, cannot be asserted for the first time on appeal. *In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993). As the issues were not properly presented to the district court, we will not consider them on appeal.

Upon consideration of all arguments raised by the parties on appeal, we affirm the district court's decision to terminate Paul's parental rights.

AFFIRMED.