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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-114 / 89-1808

IN THE INTEREST OF L.H., A Minor Child

L.H., Father,

Appellant.

109

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Juvenile Referee, and Vincent Hanrahan, Associate Judge.

The natural father appeals the termination of his parental rights to his minor son. **AFFIRMED.**

William F. Denman, Des Moines, for appellant father.

Thomas J. Miller, Attorney General; Gordon E. Allen, Deputy Attorney General; and Judy Sheirbon, Assistant Attorney General; for appellee State.

Randall C. Wilson, Des Moines, guardian ad litem, for appellee child.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

This child (L.H. Jr.) was born November 6, 1984. His parents are married to each other. They have had several lengthy separations; their marriage has a history of violence, strife, and turmoil.

On March 30, 1988, this child was adjudicated to be a child in need of assistance (CINA). On October 20, 1989, an order issued by the Polk County, Iowa, Juvenile Court terminating the parental rights between this child and his mother and father (L.H. Sr.). The juvenile court relied upon Iowa Code section 232.116(1)(e), which authorizes termination if a child has been adjudicated CINA, has been in foster care for twelve of the last eighteen months, and cannot safely be returned to the parents' care.

The father appeals; the mother has not appealed. We affirm.

On appeal L.H. Sr. claims the court erred in refusing to order him returned from the Iowa Mens Reformatory to be present at the termination hearing. He also claims the State failed to show by clear and convincing evidence the child would suffer harm if reunited with him.

Appellate review of termination proceedings is de novo. In Interest of W.G., 349 N.W.2d 487, 491 (Iowa 1984), cert. denied, 469 U.S. 1222, 105 S. Ct. 1212, 84 L. Ed. 2d 353 (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.

I.

With regard to appellant's first claim on appeal, the relevant facts show L.H. Sr. was incarcerated in prison at the Iowa Men's Reformatory at Anamosa, Iowa. The court appointed an attorney to represent him. On September 18, 1989, the court issued an order setting trial of the termination proceedings for October 20, 1989. Appellant made no formal request or application to be present at the trial before the trial date. On the morning of trial appellant's attorney orally moved for a continuance on the grounds his client was not present. He stated to the court appellant was in Anamosa serving time and would be there for the next eighteen months. Also, appellant would like to be present. Additionally, he stated he had made a request earlier through Judge Hanrahan's office to bring him back, and was told it was not the judge's policy to bring prisoners back.

The trial court received the court file and determined both parents had adequate notice of the trial date served upon them. The trial court denied the motion to continue and appellant's request for him to be transported from Anamosa.

L.H. Sr. claims on appeal based on Iowa Code section 232.91 and the sixth amendment right to confrontation he had the right to be present at the termination hearing. Section 232.91 provides as follows:

> Any hearings or proceedings under this division subsequent to the filing of a petition shall not

> take place without the presence of the child's parent, guardian, custodian, or guardian ad litem in accordance with and subject to section 232.38.

Section 232.38 is not involved here.

We note attorney Randall C. Wilson was appointed attorney and guardian ad litem for the child. He has acted on behalf of this child throughout the proceedings at the trial court level as well as on appeal. Thus, the requirement for the child's representation and protection of his interests have been fulfilled.

This record is devoid of any timely filed request by L.H. Sr. to be transported from Anamosa to Polk County, Iowa, so he could personally be present at the termination hearing. We determine this constitutes negligence on his part. As such, he has waived his physical presence at the proceedings held on October 20, 1989. Our supreme court has held negligence in the assertion of a right constitutes a waiver. State v. McGuinnis, 243 N.W.2d 583, 587-87 (Iowa 1976). Appellant was represented by experienced counsel at the trial court level as well as on appeal. Appellant's written statement of his account of his background, conduct, and actions was admitted at trial and considered by the juvenile referee as well as by this court on appeal.

We determine the juvenile referee did not err or commit an abuse of discretion in refusing to order appellant transported from prison to the termination hearing. Also, no error or abuse of discretion was committed by the juvenile referee in denying a continuance for that reason. We affirm on these issues.

II.

Appellant claims the third requirement of Iowa Code section 232.116(1)(e) was not met. That requirement is the State must prove by clear and convincing evidence the child cannot be returned to the custody of the child's parents as provided in section 232.102.

In view of appellant's claim, we deem it appropriate to set forth some of the relevant facts.

On July 6, 1987, the child's mother took him to a hospital for an examination. Dr. Shak's exam revealed evidence of current and healed anal trauma caused by a penile-sized object. The father was considered a suspect. The child indicated it was his father. The child was determined to be a child in need of assistance on March 20, 1988. Custody of the child remained with his mother until he was removed on May 13, 1988. He was placed in a foster home and in the custody of the Iowa Department of Human Services. He has remained in this placement.

The father was under a no-contact order and was prohibited from seeing the child. Appellant violated the no-contact order repeatedly. The child was exposed to continual physical abuse and violence between his parents and also by his mother's friends. Appellant has failed to follow through with counseling and evaluation plans. The father was charged with attempted murder for firing gunshots at the mother and her boyfriend. In April 1989, he was jailed and charged with second-degree burglary. The

mother was last seen in Des Moines during the summer of 1989. Her present whereabouts are unknown. She had taken up with the low-life of Des Moines. Persons who were involved in drugs, sex, and prostitution.

In his written statement to the court he professes love for his son and pleads with the court to "not take away all I have." The father speaks Spanish and is not fluent in English. He had an interpreter during the court proceedings.

In termination proceedings our central concern is the long-term, as well as immediate, best interests of the children. In Interest of Dameron, 306 N.W.2d 743, 745 (Iowa 1981). We consider what the future holds for this child if returned to his father. Id. Essential to the evaluation of a child's best interests is an examination of the parent's past performance, from which valuable insight may be gleaned as to the future quality of care the parent is able to provide. In Interest of O'Neal, 303 N.W.2d 414, 423 (Iowa 1981). The past behavior of the parent is an important factor to be considered by the court. In Interest of M.H., 367 N.W.2d 275, 278 (Iowa App. 1985). Iowa statutory termination provisions are preventative as well as remedial. Interest of Dameron, 306 N.W.2d at 745. They are designed to prevent probable harm to a child. Id.

The State must prove by clear and convincing evidence the allegations contained in the termination petition. Iowa Code § 600A.8. See In Interest of C.M.T., 433 N.W.2d

55, 56 (Iowa App. 1988); Santosky v. Kramer, 455 U.S. 745, 770, 102 S. Ct. 1388, 1402, 71 L. Ed. 599, 617 (1982). Termination may occur under Iowa Code section 232.116(1)(e) if the juvenile court finds: (1) the child has been adjudicated a child in need of assistance pursuant to section 232.96; (2) the custody of the child has been transferred form the child's parents for placement pursuant to section 232.102 for at least twelve of the last eighteen months; and (3) there is clear and convincing evidence the child cannot be returned to the custody of the child's parent as as provided in section 232.102. In Interest of A.C., 415 N.W.2d 609, 612 (Iowa 1987).

The issue in dispute herein concerns whether there is clear and convincing evidence the child cannot be returned to his father's custody. This third requirement of section 232.116(1)(e) is met when the child cannot be returned to the parental home because the definitional grounds of a child in need of assistance, Iowa Code section 232.2(6), exist. In Interest of A.M.S., 419 N.W.2d 723, 725 (Iowa 1988).

Upon our review of the record in this case, we determine there is clear and convincing evidence this child would be in imminent threat of those harms detailed in section 232.2(6) if he was returned to his parent's care. We make this determination after specifically examining the parents' past performance, as it may be indicative of the quality of future care the parents are capable of providing. See O'Neal, 303 N.W.2d at 423.

We affirm the juvenile court on this issue.

AFFIRMED.

Schlegel, P.J., concurs; Sackett, J., specially concurs without opinion.