IN THE COURT OF APPEALS OF IOWA

No. 2-376 / 92-491

FILED
SEP 29 1992
CLERK SUPREME COURT

IN THE INTEREST OF T.S. and F.S., Minor Children.

T.S. a/k/a A.J.T. Jr., Natural Father,

Appellant.

Appeal from the Iowa District Court for Polk County Juvenile, Vincent M. Hanrahan, Judge.

Father appeals from the juvenile court's termination of his parental rights. **AFFIRMED.**

J. Michael Mayer, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, Judy Sheirbon, Assistant Attorney General, and Karen Romano, Assistant County Attorney, for appellee State.

Karla Fultz of the Fultz Law Office, Des Moines, for mother.

Michelle Chenoweth of the Youth Law Center, Des Moines, guardian ad litem for T.S. and F.S.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

On March 29, 1991, the juvenile court granted the State's application for placement of T.S. and F.S. in the temporary custody of the Department of Human Services (DHS) for foster care. The State filed the application in response to the children's mother's consent to temporary removal of the children from her custody and placement in foster care. The mother planned to enter the hospital for psychiatric care and the father was in prison.

On May 23, 1991, the juvenile court adjudicated T.S. and F.S. to be children in need of assistance. On November 1, 1991, the State filed a petition to terminate the rights of the children's parents.

The mother consented to the termination, and the district court ordered her parental rights terminated. The district court also terminated the parental rights of the father. His rights were terminated pursuant to Iowa Code section 232.116(1)(i).

Section 232.116(1)(i) provides for the termination of a parent's rights when the children have been adjudicated in need of assistance and the parent has been incarcerated and is "unlikely" to be released within the next five years. The father was serving a twenty-five year sentence for sexual abuse in the second degree concurrent with a five-year sentence for lascivious acts with a child. The court found that he was unlikely to be released within the next five years. The father now appeals.

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, 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. Constitutionality of Iowa Code § 232.116(1)(i) (1991)

The father, A.T., claims the use of the word "unlikely" renders Iowa Code § 232.116(1)(i)(2) unconstitutionally vague and overbroad. The State alleges A.T. failed to preserve this claim for appeal. We agree.

Even constitutional issues cannot be raised for the first time on appeal. State v. Holderness, 301 N.W.2d 733, 738 (Iowa 1981); See also In re D.W.,385 N.W.2d 570, 573 (Iowa 1986). We have thoroughly examined the record, and find no evidence to indicate A.T. raised this issue with the lower court. In addition, the trial court judge's order makes no mention of the issue nor was there a ruling on the issue. We find A.T. did not properly raise this issue with the lower court and we will not consider it on appeal.

II. Termination

A.T. next contends the State failed to prove by clear and convincing evidence that he was unlikely to be released from prison within the next five years. He contends his

case is currently on appeal and he may be granted a new trial. He further contends he has not received any type of disciplinary reports. We disagree.

Iowa Code section 232.116(1)(i) (1989) permits the juvenile court to terminate the parent-child relationship if:

> (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 pursuant to section 232.102, [and]
> (2) . . . 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.

A.T. began serving twenty-five year and five-year concurrent prison sentences following his conviction for second degree sexual abuse and lascivious acts with a child. He is currently appealing his conviction. He began serving his sentence on May 3, 1991. His scheduled discharge date is September 12, 2005, although his sentence is subject to annual review by the Iowa State Parole Board.

In a letter from Warden John A. Thalacker, dated October 4, 1991, the standard procedure for those convicted of offenses such as those for which A.T. was convicted, includes transfer to Mt. Pleasant Correctional Facility for sexual offenders treatment, then transfer to the Iowa Medical Classification Center for evaluation prior to release. A.T. has not been released by the parole board to begin that process. Warden Thalacker further indicated that it would not be unusual for A.T. to be incarcerated at least five years prior to a return to the community.

We affirm the trial court's termination of A.T.'s parental rights.

AFFIRMED.