IN THE COURT OF APPEALS OF IOWA

No. 0-372 / 99-1841
Filed September 27, 2000

IN THE INTEREST OF T.S.H., Minor Child,

R.H., Mother,
Appellant,

L.L.H., Father,
Appellant.

FILED
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CLERK SUPREME COURT

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

The mother and father of minor child T.S.H. appeal a district court order terminating their parental rights. **AFFFIRMED.**

Amy L. Evensen of Larson & Evensen, Iowa City, for appellant mother.

Dennis A. Bjorkland, Coralville, for appellant father.

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

Christine E. Boyer, Iowa City, guardian ad litem for minor child.

Heard by Vogel, P.J., and Miller and Hecht, JJ.

VOGEL, P.J.

Rochelle and Lashamus, the natural parents of Tiona, appeal the district court order terminating their parental rights. We find Lashamus failed to preserve error as to his due process issues and the record reflects clear and convincing evidence to terminate his parental rights under Iowa Code sections 232.116(1)(b), (d), and (g) (1999). We also find the record contains clear and convincing evidence to terminate Rochelle's parental rights under Iowa Code sections 232.116(1)(b), (d), (g) and (k) (1999). We affirm.

Background facts. Lashamus and Rochelle were living in Georgia at the time Rochelle became pregnant. About halfway through the pregnancy, Lashamus was incarcerated with a ten-year prison sentence on drug charges. Tiona was born in October 1997. Rochelle took Tiona to see Lashamus one time before she moved to Iowa in February 1998. Lashamus was not eligible for parole until sometime between October 1999 and March 2001. He attempted to send letters to Rochelle's family but had no contact with Tiona beyond the one visit Rochelle made to the prison.

After moving to Iowa, Rochelle became involved in an abusive relationship and began using illegal narcotics, including marijuana, crack and cocaine and became severely addicted. After leaving Tiona in the home unattended in October 1998, Rochelle pled guilty to child endangerment. She was given a deferred judgment and Tiona remained in her care. In February 1999, she left Tiona in the care of a recent acquaintance for approximately one month, with minimal contact, while she engaged in daily drug use. Tiona was then removed

and placed in foster care. Rochelle attended several visits with Tiona in March 1999 but did not make use of the entire visitation time given to her, often arriving late or leaving early. In April 1999, she dropped out of contact with the Department of Human Services (DHS) for several weeks. When she attempted to resume visitations with Tiona, Rochelle was unable to comply with the DHS requirements of remaining sober and seeking a substance abuse and psychological evaluation. Consequently, visits were denied. Rochelle was voluntarily admitted into various drug rehabilitation programs on four separate occasions, only to check herself out of the programs within a two-week period. Lashamus and Rochelle's parental rights to Tiona were terminated on October 21, 1999. They now appeal this decision.

Scope of review. We review proceedings to terminate parental rights de novo - - we review the facts as well as the law and adjudicate parents' rights anew. *In re Dameron,* 306 N.W.2d 743, 745 (Iowa 1981). We give weight to the findings of the juvenile court, particularly with respect to the credibility of witnesses, but are not bound by them. *In re L.L.,* 459 N.W.2d 489, 493 (Iowa 1990); *In re R.R.K.,* 544 N.W.2d 274, 275 (Iowa App. 1995); Iowa R. App. P. 14(f)(7).

Due process. Lashamus first argues he was denied the right of due process under the 14th Amendment of the United States Constitution, as he was not permitted to testify at trial. Lashamus was incarcerated in a Georgia facility during the termination proceeding. He filed a motion for transport to allow him to personally testify at the hearing. The court, apparently unaware of the interstate

travel required, granted the motion in September 1999. The order was vacated a week later. Lashamus then filed a motion to permit him to testify by telephone. The motion was granted in October 1999, directing Lashamus' counsel to arrange the communication. On the morning of the scheduled trial, an unreported, in-chambers discussion was held. When the hearing began, the court stated:

> [T]he Court notes that an ex parte order was entered on October 1st, which provided that arrangements would be made to permit the minor child's father to testify by telephone. The Court is aware from the record that the minor child's father is incarcerated in the State of Georgia. The Court previously advised counsel for the minor child's father that telephonic testimony was not going to be permitted under the circumstances, and the prior Order of the Juvenile Court is vacated in that regard.

Lashamus' counsel then made a statement to the court for her client but did not present testimony on his behalf. He now alleges his constitutional right to due process was violated by the court's failure to allow him to testify in his own behalf.

The record does not indicate Lashamus raised a due process argument when the trial court vacated the order allowing telephonic testimony. He did not move to continue the hearing to allow time for the taking of his deposition[1] or affidavit or move to keep the record open to allow such evidence to be submitted to the court. Although we recognize the court's last-minute rescinding of the order for telephonic testimony may have severely hampered Lashamus from

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[1] "A person confined in a penitentiary or jail in the state may, by order of any court of record, be required to be produced for oral examination in the county where the person is imprisoned, and in a criminal case in any county in the state; but in all other cases the person's examination must be by a deposition." Iowa Code § 622.82.

pursuing a defense, he failed to take the appropriate steps to preserve the error for our review. We are forced, therefore, to find his due process claim was not preserved. Matters not raised in the trial court, including constitutional questions, cannot be asserted for the first time on appeal. *In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993).

Clear and convincing evidence as to Lashamus. Lashamus further asserts the State failed to present the clear and convincing evidence necessary to terminate his parental rights under Iowa Code sections 232.116(1)(b), (d), and (g) (1999). The above-referenced sections pertain to parental abandonment, failure to provide significant and meaningful contact with the child, and an inability to return the child into the parent's custody at the time of the hearing.

At the time of the termination hearing Lashamus was incarcerated in Georgia. He had only seen Tiona one time when she was an infant and had maintained no contact of any kind with Tiona during his incarceration. He also failed to pay any child support for her care. Lashamus's incarceration cannot serve as an excuse for his behavior. *In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa App. 1994). An incarcerated parent must take full responsibility for the conduct, which has resulted in his confinement. *Id.* Accordingly, we find the record contains the clear and convincing evidence necessary to terminate Lashamus' parental rights.

Clear and convincing evidence as to Rochelle. Rochelle contends the State failed to present the clear and convincing evidence necessary to terminate her parental rights under Iowa Code sections 232.116(1)(b), (d), (g) and (k)

(1999). The above-referenced sections pertain to parental abandonment, failure to provide significant and meaningful contact with the child, an inability to return the child into the parent's custody at the time of the hearing, and substance abuse by the parent that prevents the child's return to the home.

Rochelle's behavior toward Tiona reflects a pattern driven by substance abuse. She has repeatedly left the child alone or with an inappropriate caregiver, failing to provide for Tiona's physical needs during her absences. Periodically, she would involve herself with the child for a short time, only to repeat the pattern of neglect. After Tiona's removal to a foster home, Rochelle attended visits during March of 1999, often arriving late or leaving early, and once smelling of marijuana. She was unavailable for contact for two weeks during early April, missing several scheduled visits with Tiona. When she re-established contact with DHS, she was informed she would not be allowed to visit Tiona until she had made efforts to stay sober and establish some stability in her life. Unable to make satisfactory progress, she had not seen her child since March of 1999.

The only effort made by Rochelle to facilitate a return of her daughter was her multiple admissions to drug rehabilitation programs. She was admitted to various drug programs on four separate occasions from June 7th to the 17th, August 10th to the 17th, September 2nd to the 12th, and September 13th to the 19th. Unfortunately, she checked herself out of each program after several days to return to her life of drug abuse. She did not make any other efforts toward providing a stable home environment for herself and Tiona until days before the termination hearing. She was, at that point, fifteen days sober, twelve of which

were during her incarceration in the county jail, and had moved in with a friend who was attempting to help her achieve sobriety. She was also enrolled to attend another rehabilitation program. Her last-minute effort to fix her problems three days before the hearing is insufficient. We gain insight into the child's prospects by reviewing evidence of the parent's past performance - - for it may be indicative of the parent's future capabilities. *In re K.F.*, 437 N.W.2d 559, 560 (Iowa 1989).

Rochelle, admittedly, could not have the child returned into her custody at the time of the termination hearing. "Children simply cannot wait for responsible parenting. Parenting cannot be turned off and on like a spigot. It must be constant, responsible, and reliable." *L.L.*, 459 N.W.2d at 495. A child need not endlessly await the maturity of his or her natural parent. *In re T.D.C.*, 336 N.W.2d 738, 744 (Iowa 1983). "At some point, the rights and needs of the child rise above the rights and needs of the parents. The legislature, through section 232.116 directs us to that point." *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997). We find the record contains clear and convincing evidence to terminate Rochelle's parental rights to Tiona. Accordingly, we affirm.

AFFIRMED.