IN THE COURT OF APPEALS OF IOWA

No. 7-196 / 96-2119

IN THE INTEREST OF P.R.Z., JR., Minor Child,

P.Z., Sr., Father,
Appellant,

M.Z., Mother,
Appellant.

Appeal from the Iowa District Court for Woodbury County, Brian L. Michaelson, Associate Juvenile Judge.

The father and mother of minor child, P.R.Z., Jr., appeal a district court order terminating their parental rights. **AFFIRMED.**

Randy S. Hisey, South Sioux City, Nebraska, for appellant father.

Lesley D. Rynell of Law Offices of Dennis J. Mahr, Sioux City, for appellant mother.

Thomas J. Miller, Attorney General, Chris C. Odell, Assistant Attorney General, and Dewey P. Sloan, Assistant County Attorney, for appellee State.

John C. Polifka of Juvenile Law Center, Sioux City, guardian ad litem for minor child.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

HUITINK, P.J.

M.Z. and P.Z. appeal the termination of their parental rights to their son Patric.

I. Background Facts and Proceedings.

M.Z., age twenty-five, and P.Z., age twenty-six, are the parents of Patric, born May 5, 1995. Patric is the youngest of the couple's three children. In June 1994, the Woodbury County Juvenile Court entered an order terminating both parents' rights to the other two children as well as terminating M.Z.'s rights to her daughter not fathered by P.Z.

Patric was removed from M.Z.'s care in February 1996 after he was diagnosed with a suspicious traverse fracture of his right femur. The attending physician found M.Z.'s explanation for the injury to be improbable. The nursing staff at the hospital noted Patric's filthy condition and signs of inadequate care. A founded child abuse report was later filed against the mother in connection with the incident. At the time of the removal, P.Z. was incarcerated and M.Z. was living with another man who had a lengthy criminal history.

Following a contested hearing, Patric was adjudicated a child in need of assistance pursuant to Iowa Code sections 232.2(6)(b) (physical abuse) and 232.2(6)(c)(2) (failure to supervise) (1995). M.Z. was not present at the dispositional hearing held in June 1996 due to incarceration for a probation violation. The parties stipulated to continued foster care placement. The case permanency plan

recommended supervised visitation for M.Z. twice weekly but did not recommend services. Visits were soon discontinued due to concerns that the visits were upsetting to the child.

By the time of the termination hearing in September 1996, the mother's probation had been revoked and she was incarcerated. She had also pled guilty to a charge of third-degree burglary and agreed to serve the sentence concurrently with the sentence for her prior forgery conviction. The date of her release is unknown.

P.Z. was incarcerated shortly after Patric's birth. He remained there until he escaped from custody in September 1995. Following his capture in December 1995, P.Z. was reincarcerated. He has not seen his son since that time. P.Z. was scheduled to appear before the parole board in January 1997 but did not expect to be released until at least March 1997 upon completion of a chemical dependancy program.

In October 1996 the juvenile court terminated the parental rights of the mother pursuant to Iowa Code sections 232.116(1)(d), (f), and (g) (1995), and also the rights of the father pursuant to sections 232.116(1)(b), (d), (f), and (g).

The court observed that "beyond prison or jail-based programs, neither the mother or the father have made any affirmative moves to assume parental responsibilities for this child." The court noted the testimony of the service providers indicating the parents had been receiving reunification services for two to three years and additional services would not be of any benefit. The court opined both parents

"have a history of making promises to change without ever making a genuine effort to do so." The court considered M.Z.'s inability to "meaningfully interact with Patric during visitations" or to maintain "significant and meaningful contact" with the child. The father "sought no contact with Patric, Jr. for seven months by phone or letter or gift." Finally, the court emphasized that Patric had integrated into his present foster home and his foster parents were interested in adopting him. Accordingly, the juvenile court determined termination of the parents' rights was in Patric's best interests.

M.Z. appeals the termination order asserting the State did not make reasonable efforts to reunite her with her son. She also argues the State did not establish by clear and convincing evidence that she failed to maintain significant and meaningful contact with Patric. Finally, M.Z. challenges the court's finding that termination of her parental rights is in Patric's best interests.

P.Z. has also appealed the court's order. He argues the court erroneously based the termination of his rights on his incarceration. P.Z. also contends the evidence presented by the State did not overcome the presumption in favor of placement with the biological parent. He asserts termination would be detrimental to Patric due to the closeness of the father-son relationship. Finally, P.Z. argues that pursuant to section 232.116(3), reasons exist not to terminate his parental rights.

II. Standard of Review.

Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1989), *cert. denied sub nom., J.G. v. Tauke,* 469 U.S. 1222 (1985). We give weight to the findings of fact made by the juvenile court, but we are not bound by them. *Id.* at 491-92.

The primary concern in termination proceedings is the best interests of the child. Iowa R. App. P.14(f)(15); *In re Dameron,* 306 N.W.2d 743, 745 (Iowa 1981):

> We look to the child's long-range, as well as immediate interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventive as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App 1988) (citing *Dameron*, 306 N.W.2d at 745).

III. Termination of Mother's Parental Rights.

The State concedes M.Z. was not offered any services to facilitate reunification. The State also acknowledges M.Z. requested services prior to the termination hearing. However, the State emphasizes M.Z. failed to successfully participate in numerous services provided in connection with prior adjudications thereby justifying the denial of further remedial efforts.

The State is required to make reasonable efforts to reunite the parent and child prior to termination. *In re C.L.H.*, 500 N.W.2d 449, 453 (Iowa App. 1993). In proceedings to terminate parental rights, the reasonableness of services the State has offered in an effort to preserve the family should be very carefully scrutinized. *In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993).

M.Z.'s case presents a difficult question for the court: does the "reasonable efforts" standard require that reunification services be offered under *all* circumstances? We conclude it does not. Here we have a case where both parents were offered numerous services over a two and one-half to three year period in conjunction with the adjudication of their other three children. These services included family and marital counseling, parenting classes, homemaker services, home health care services, and individual mental health counseling. Their rights to these children were terminated in June 1994. In the termination order, the court described the "second and third chances" provided to the parents and their "promises [that] were seldom kept." Despite the efforts of the agencies devoted to the reunification of this family, the parents consistently failed to satisfactorily participate in the available programs. We consider this history when assessing the State's response to the present adjudication. *See, e.g., In the Interest of S.N.,* 500 N.W.2d 32, 34 (Iowa 1993) (case history records are entitled to much probative force when a parent's record is being examined).

We also note the record reveals little has changed since the termination of M.Z.'s other three children. Since the 1994 termination, she has continued to live a nomadic lifestyle marked by homelessness, criminal activity, and unstable relationships. Moreover, the event precipitating the proceedings in this case was an incident of serious physical abuse for which the mother continues to deny responsibility. Under the circumstances, we conclude the State reasonably assessed the futility of offering the same myriad of services.

M.Z. did not object to the case permanency plan recommending no services nor did she pursue her motion to resume visitation and request for reunification services. M.Z. had an obligation to demand services prior to the termination hearing. *In the Interest of B.K.K.*, 500 N.W.2d 54, 57 (Iowa 1993); *In the Interest of L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994). It is too late to challenge a reunification plan at the termination hearing. *Id.* Accordingly, we reject her arguments based on lack of reasonable efforts to achieve reunification.

We reject M.Z.'s argument that the statutory requirements for termination have not been met. The court based the termination on three alternate grounds, however, we may affirm the decision by finding sufficient evidence to support any one of the grounds asserted. *See* Iowa Code § 232.116(1); *In Interest of R.R.K.*, 544 N.W.2d 274, 276 (Iowa App. 1995). In 1994, the court terminated M.Z.'s rights with respect to her three daughters. The State presented clear and convincing evidence that M.Z.

has not been responsive to services in the past and additional time for rehabilitation would not be beneficial. *See* Iowa Code § 232.116(1)(f).[1] Accordingly, we affirm on this issue.

Finally, we conclude that termination of M.Z.'s parental rights is in Patric's best interests. M.Z. continues to deny any responsibility for the incident which led to his removal in February 1996, despite medical evidence revealing a serious injury consistent with abuse. Furthermore, Patric could not be returned to his mother's care until her release from prison and additional time for services. We will not force Patric to wait indefinitely for M.Z. to decide she is ready to assume the responsibility of parenting him. *See In re T.D.C.*, 336 N.W.2d 738, 744 (Iowa 1983). Her assertions predicting uncertainty for Patric following termination are without merit. Accordingly, we find termination of her parental rights was in Patric's best interests.

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[1] Iowa Code section 232.116(1)(f) permits the court to terminate parental rights if it finds all of the following have occurred:

> (1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
> (2) The court has terminated parental rights pursuant to section 232.117 with respect to another child who is a member of the same family.
> (3) There is clear and convincing evidence that the parent continues to lack the ability or willingness to respond to services which would correct the situation.
> (4) There is clear and convincing evidence that an additional period of rehabilitation would not correct the situation.

IV. Termination of Father's Parental Rights.

P.Z. argues the court improperly based the termination of his parental rights solely on his present incarceration. The court cited several factors supporting the termination including P.Z.'s failure to maintain contact with his son through phone calls or letters for over seven months and also his refusal to cooperate with the terms of his incarceration. Furthermore, the court emphasized the circumstances resulting in the termination of rights to his other two children. Accordingly, we reject this argument.

P.Z. asserts the record contains no evidence of a bond between Patric and his foster family or that his prospective parents are capable of providing for his special needs. Rather, P.Z. asserts termination would be detrimental to Patric due to the bond shared between father and son. *See* Iowa Code § 232.116(3) (1995).[2] He contends

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[2] We reject P.Z.'s argument that pursuant to section 232.116(3)(e), his absence due to incarceration mitigates against termination and that the court abused its discretion by failing to consider this factor. Section 232.116(3)(e) states as follows:

> The court need not terminate the relationship between the parent and child if the court finds any of the following:
>
> . . .
>
> e. The absence of a parent is due to the parent's admission or commitment to any institution, hospital or health facility or due to active service in the state or federal armed forces.
>
> . . .

Prison is not considered an "institution" for purposes of this statute. *In re J.V.*, 464 N.W.2d 887, 890 (Iowa App. 1990). Accordingly, P.Z. is not entitled to avail himself of this provision.

the evidence presented fails to overcome the presumption in favor of placement with the biological parent.

This argument is without merit. P.Z. began his prison sentence shortly after Patric's birth. While in prison, he demonstrated little interest in establishing a relationship with his son. Other than his own assertions, there is no showing in the record to indicate a bond exists between P.Z. and his son. P.Z. prolonged his sentence by escaping from custody in October 1995. He has not seen his son since he was reincarcerated in December 1995. P.Z., by his actions, bears responsibility for the absence of a relationship with Patric. *See In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa App. 1994) (unavailability to parent as a result of being incarcerated is no excuse for parent's conduct for purposes of proceedings to terminate parental rights); *see also In re J.S.*, 470 N.W.2d 48, 51 (Iowa App. 1991) (incarcerated parent must take responsibility for conduct leading to the confinement). We will not perpetuate Patric's foster care status while P.Z. resolves his legal troubles. *See In re J.L.P.*, 449 N.W.2d 349, 353 (Iowa 1989). Accordingly, we find the presumption favoring placement with the biological parent was rebutted by overwhelming evidence in this case. Furthermore, P.Z. failed to present evidence that the termination would be detrimental to Patric due to a close parent-child relationship.

We have carefully considered the arguments raised by P.Z. and find that none cast doubt on the juvenile court's decision. We affirm the termination of his parental rights.

AFFIRMED.