IN THE COURT OF APPEALS OF IOWA

No. 0-556 / 00-0913
Filed October 25, 2000

FILED
OCT 2 5 2000
CLERK SUPREME COURT

IN THE INTEREST OF
B.S. and E.S.,
Minor Children,

D.S., Father,
Appellant.

Appeal from the Iowa District Court for Benton County, Susan Flaherty, District Associate Judge.

Father appeals from the juvenile court's order terminating his parental rights. He contends the court erred because there was not clear and convincing evidence supporting its decision to terminate his parental rights. **AFFIRMED.**

Mark Mossman of Mossman & Mossman, L.L.P, Vinton, for appellant.

Thomas J. Miller, Attorney General, Tabitha Gardner, Assistant Attorney General, and David C. Thompson, County Attorney, for appellee-State.

Robert Fischer of Fischer Law Firm, L.L.P., Vinton, guardian ad litem for minor children.

Heard by Sackett, C.J., and Streit and Vaitheswaran, JJ.

SACKETT, C.J.

Damon appeals from an order terminating his parental rights to his daughter, Elicia, born in June of 1996, and his son, Blake, born in June of 1997. Damon contends (1) the Department of Human Services failed to make reasonable efforts to reunite his family; (2) there is not clear and convincing evidence supporting termination; (3) termination is not in the best interest of the children; and (4) according to Iowa Code section 232.116(3)(a) termination should have been avoided because the children's grandfather and his wife currently have legal custody of the children. We affirm.

Damon lived with the children's mother, Jericho,[1] from July of 1995 until February 1997. In September of 1997 Jericho was arrested for a probation violation and incarcerated for seven months. Jericho's father and his wife took custody of the children. On October 22, 1997 Damon was arrested. He was subsequently convicted of burglary in the third degree, OWI first offense and interference with official acts and sentenced to an indeterminate term not to exceed five years. He was incarcerated during the trial of this action in juvenile court but anticipated he would be released early in 2000.

Shortly after Elicia and Blake went to live with their maternal grandfather, his wife, Lynn, went to office of the Iowa Department of Human Services in Benton County seeking assistance in caring for the children. As a result of this contact on September 16, 1997 a petition was filed seeking to have Elicia and Blake found to be children in need of assistance. Damon, through his attorney in

[1] Jericho's parental rights were terminated on May 9, 2000 pursuant to Iowa Code § 232.226(1)(d) and (g). Jericho did not appeal the termination.

a December 16, 1997 proceeding, agreed the children were children in need of assistance as alleged in the State's petition. The State's petition had alleged the children were children in need of assistance as defined by Iowa Code Section 232.2(6)(n) (1997).[2] At that time the juvenile court found the children in need of assistance and provided they remain in the custodial care of their maternal grandparents[3] under the supervision of the department. A case permanency plan was filed on February 12, 1998. As to Damon the plan stated he had been sentenced to twenty-five years in prison and the department had not received any contact from him.

A petition to terminate parental rights was filed on March 2, 1999. A hearing was held. The juvenile court terminated the parental rights of Damon and Jericho pursuant to Iowa Code sections 232.116(1)(d) and (g) on May 5, 2000.[4]

We review de novo. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993). We may review the facts as well as the law and adjudicate a parent's rights anew. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

Damon claims reasonable services were not offered to reunite him with Elicia and Blake. Reasonable services must be provided to attempt to reunite a family before the State can terminate parental rights. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994).

---

[2] Iowa Code § 232.2(6)(n) provides:

> 6. *"Child in need of assistance"* means an unmarried child:
>
> *n.* Whose parent's or guardian's mental capacity or condition, imprisonment, or drug or alcohol abuse results in the child not receiving adequate care.

[3] Though Lynn was only a step grandparent the order appears to refer to her.

[4] The nine-month period of time between the termination hearing and the order terminating parental rights appears to have resulted from an investigation into the applicability of the Indian Child Welfare Act.

The State's brief does not address this issue. Nothing was done to assist Damon to correct any deficiencies as a parent or to reunify him with his children. Damon made two calls to social workers but the State contends he failed to respond to requests the workers made. Damon contends and the evidence shows he was in contact with the children's mother and manifested an intention and desire to be in contact with his children. The State contends the mother never relayed this information to it.

The State did little or nothing by way of offering services to Damon. In fact, one of the workers on the case testified she told the grandfather and Lynn that they should not tell the children Damon was their father. This probably was in part the result of the misinformation the State had as to the term or length of Damon's incarceration. However, Damon, despite being represented by an attorney in the initial proceedings, made no specific requests for service to the court or to the department to implement specific services.

The fact a parent is incarcerated does not preclude the parent from being provided services to correct parenting deficiencies. The services required to be supplied an incarcerated parent as with any other parent are only those that are reasonable under the circumstances. The nature of the offense, the age of the children, the bonding the children have or don't have with their parent, the nature of parenting deficiencies, the physical location of the child and the parent, the limitations on the place of confinement, the services available in the prison setting, the length of the parent's sentence are all factors among others that need be weighed in determining what services are reasonable under the circumstances. Because Damon made no request for reasonable services until

the termination hearing we need not and do not address what services would have been reasonable to offer him under the circumstances.

Damon next contends under Iowa Code section 232.116(3)(a) termination should have been avoided because Jericho's father and stepmother currently have legal custody of the children. Iowa Code section 232.116(3) has been interpreted to be permissive, not mandatory. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997); *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa App. 1993). It is within the sound discretion of the juvenile court, based upon the unique circumstances before it and the interests of the child, whether to apply this section. *See In re J.V.*, 464 N.W.2d 887, 890 (Iowa App. 1990). We find the juvenile court did not abuse its discretion in not applying Iowa Code section 232.116(3)(a).

Damon claims the State failed to establish by clear and convincing evidence the statutory elements for termination under Iowa Code sections 232.116(1)(d) and (g). The State has the burden of proving the grounds for termination by clear and convincing evidence. *In re T.A.L.*, 505 N.W.2d 480, 483 (Iowa 1993). We need only find grounds to terminate under one of the sections cited by the juvenile court to affirm. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa App. 1999).

Iowa Code section 232.116(1)(d) (1999) permits the juvenile court to terminate the parent-child relationship if the court 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 child has been removed from the physical custody of the child's parents for a period of at least six consecutive months.
> (3) There is clear and convincing evidence that the parents have not maintained significant and meaningful contact with the child during the previous six consecutive months and have made no reasonable efforts to resume care of the child despite being given the opportunity to do so. For the purposes of this subparagraph, *"significant and meaningful contact"* includes but is not limited to the affirmative assumption by the parents of the duties encompassed by the role of being a parent. This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parents establish and maintain a place of importance in the child's life.

Iowa Code § 232.116(1)(d) (1999).

Damon was incarcerated during the entire period of these proceedings. During that time he and Jericho corresponded by letter. His letters made references to the children and included homemade birthday cards for them. Jericho's letters provided Damon with telephone numbers of department caseworkers and told him to contact them in regard to the children. Damon made at least two telephone calls to one worker. Jericho provided Damon with her father's address so he could write the children directly. In one letter Jericho wrote:

> "Damon, if you write to my dad, and let him know that you do want to see them (children) he will arrange to bring them to you. You also need to call the kids' caseworker, Mindy Juel, and tell her you want to see the kids. It's the same thing I have to do, we have to show interest. I know that it sucks right now, but we have to play by their rules, ok? Her phone number is (319) 472-4647 or 472-4746. Call between 10:00 a.m. or 4:00 p.m. Monday through Friday as soon as you can, you can call collect as much as you want to. ***

Damon did not write directly to the children nor has he spoken with them during time he was incarcerated. Damon has not provided any financial

assistance to his children. He made no effort to request visitation with the children or to seek services that would have improved his parenting skills. Giving the required credence to the factual findings of the juvenile court we find there is clear and convincing evidence to support termination.

The record shows Jericho's father and stepmother have indicated they are willing to adopt Elicia and Blake and the children have made a good adjustment in their home. There is evidence the children have a strong bond with these people. We trust the State and the guardian ad litem will make a concerted effort to see that the children are adopted at the earliest possible date.

We affirm the decision of the juvenile court terminating Damon's parental rights to Elicia and Blake.

AFFIRMED.