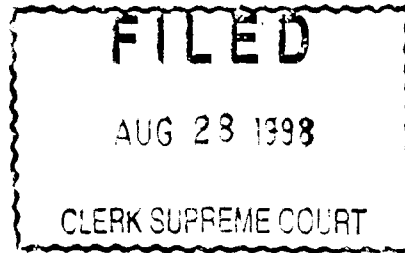


IN THE COURT OF APPEALS OF IOWA

No. 8-309 / 97-2161

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

A.F., Mother,
Appellant.



Appeal from the Iowa District Court for Polk County, Karla Fultz, Juvenile Judge.

Mother appeals the juvenile court's order terminating her parental rights.

AFFIRMED IN PART; REVERSED IN PART.

Marcia L. Schober, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Chris Odell, Assistant Attorney General, and Cory McClure, Assistant County Attorney, for appellee-State.

Jane Rosien, Des Moines, guardian ad litem for minor children.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

PER CURIAM.

Angela, the mother of Tyler, born February 6, 1992, Taylor, born May 28, 1993, and Tanner, born November 22, 1995, appeals the juvenile court's order terminating her parental rights. She contends her constitutional due process and equal protection rights were violated by combining the children in need of assistance and termination proceedings. She also claims Iowa Code section 232.116(1)(h)(1997) is unconstitutional on its face and as applied to her. Angela further argues the State failed to show her oldest child was in need of assistance and termination was in the children's best interest. We affirm in part and reverse in part.

On December 7, 1996, Tanner was removed from Angela's custody following a report he was severely injured by Donnie, Angela's boyfriend. Tanner's injuries included multiple bony irregularities of the skull with multiple bumps over the entire cranium, multiple bruises covering his body, deep abrasions over his forehead, burn-type injuries on his face from his nose to his lower lip and to his cheeks, the teeth of the child had been forced through his lower lip and up to the top of his mouth, swollen eyes, an abrasion around his neck, a burn-type injury over the entire genital region involving the peripubital area, penis, scrotum, and perineal region, rectal tears, and a basilar skull fracture, all sustained over the course of ten days.

The State filed criminal charges against Angela and Donnie. Angela and Donnie were named perpetrators in what are termed "founded child abuse reports."

000098

Donnie was found to have inflicted physical injury. Angela was found to have committed abuse by omission in that she failed to provide adequate shelter and proper supervision.

In December 1996, the State filed a petition alleging the children were in need of assistance, followed in January 1997 by a petition to terminate parental rights pursuant to Iowa Code section 232.116(1)(h).¹ The proceedings were consolidated. There was a hearing in April. The juvenile court terminated Angela's rights on September 30, 1997. The court found all three children were in need of assistance as defined in Iowa Code sections 232.2(6)(b),² (c)(2),³ and (d).⁴ It further found abuse

¹ Iowa Code section 232.116(1)(h) provides:

h. The court finds that all of the following have occurred:

(1) The child meets the definition of child in need of assistance based on a finding of physical or sexual abuse or neglect as a result of the acts or omissions of one or both parents.

(2) There is clear and convincing evidence that the abuse or neglect posed a significant risk to the life of the child or constituted imminent danger to the child.

(3) There is clear and convincing evidence that the offer or receipt of services would not correct the conditions which led to the abuse or neglect of the child within a reasonable period of time.

² Iowa Code section 232.2(6)(b) provides:

6. "Child in need of assistance" means an unmarried child:

....

b. Whose parent, guardian, other custodian, or other member of the household in which the child resides has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.

³ Iowa Code section 232.2(6)(c)(2) provides:

6. "Child in need of assistance" means an unmarried child:

and neglect posed significant risks to the children, and they could not be returned to Angela's care within a reasonable period of time.

On appeal, Angela first argues her constitutional due process and equal protection rights were violated by the combined adjudicatory and termination proceedings. The State asserts Angela did not preserve these issues for appeal. 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 (1985). We will not address an issue raised for the first time on appeal, even constitutional claims. *In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993).

Before the hearing began, Angela raised a "jurisdictional" issue, arguing the combined hearings were incompatible because "you cannot have an adjudication and dispositional requirement of the code on one hand and a termination on the other when the termination will effectively knock out the adjudication." At the very end

....
c. Who has suffered or is imminently likely to suffer harmful effects as a result of either of the following:

....
(2) The failure of the child's parent, guardian, custodian, or other member of the household in which the child resides to exercise a reasonable degree of care in supervising the child.

⁴ Iowa Code section 232.2(6)(d) provides:

6. "Child in need of assistance" means an unmarried child:

....
d. Who has been, or is imminently likely to be, sexually abused by the child's parent, guardian, custodian or other member of the household in which the child resides.

of the hearing, Angela's attorney renewed the earlier motion stating, "These procedures are unconstitutional in that they are violating due process for my client. We have a CINA adjudication proceeding and also the termination statute which do not square with each other." The court asked whether this was the same motion made at the beginning, with no additions. Counsel agreed. The court said it would consider the motion as if it had been dictated into the record again. Counsel asked for permission to file a trial brief in support of the motion, but did not file any trial brief. We conclude the mere mention of the term "due process" in renewing the "jurisdictional" motion is not sufficient to put before the court the due process and equal protection arguments which are now made on appeal. We determine Angela failed to preserve this claim for review.

Angela made an equal protection claim in a 179(b) motion. The motion alleged Angela is a member of a protected class by state and federal law and the court found she was not entitled to equal protection under Iowa code chapter 232. Angela is not a member of a protected class in a termination of parental rights proceedings. Angela's motion further alleged she was denied equal protection because the court "failed to reconcile the dichotomy of the proceedings." Raising an equal protection argument for the first time by a 179(b) motion is not timely. In addition, the 179(b) motion was not timely because it was filed more than ten days after the court's decision. *See* Iowa R. Civ. P. 247. Angela failed to preserve this issue for appeal.

Angela next argues Iowa Code section 232.116(1)(h) is unconstitutional on its face and as applied to her. She advances this subsection does not provide for “reasonable efforts” to reunite the family as defined in section 232.102. *In re T.C.*, 522 N.W.2d 106, 108 (Iowa App. 1994). She claims reasonable efforts to reunite the child and parent are required in every case prior to termination. *See, e.g., In re A.B.*, 554 N.W.2d 291, 294 (Iowa App. 1996); *In re T.C.*, 522 N.W.2d at 108. A party challenging a statute on constitutional grounds must do so at the earliest available time in the progress of the case. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997); *State v. Allen*, 304 N.W.2d 203, 206 (Iowa 1981). Because this issue was not preserved for review, we do not address it.

Angela also contends the State did not show Tyler was a child in need of assistance. Tyler had been living with Angela's maternal grandmother for approximately one year prior to the abuse of Tanner. He was not with Angela when Tanner was abused. The State's petition to terminate parental rights alleged only that Angela's parental rights should be terminated “within the meaning of section 232.116(1)(h).” Concerning Tyler being in need of assistance, the court only found “Tyler is with his grandparents, Mr. and Mrs. Rice, and he has regular contact with his father and is also doing well.” Yet, in its conclusions of law, the court concluded all three children were in need of assistance under Iowa Code sections 232.2(6)(b), (c)(2), and (d). The court concluded, “The facts and circumstances surrounding

Tanner's removal from the home on December 7, 1996, his medical condition upon removal, and the subsequent removal of the other two children from Angela's care as set forth in the Findings of Fact above constitute sufficient basis for adjudicating Tyler, Taylor, and Tanner children in need of assistance."

However, the State has not met its burden under section 232.116(1)(h) to terminate Angela's parental rights to Tyler. Termination of parental rights on a ground not set forth in the petition violates due process. *In re D.E.D.*, 476 N.W.2d 737, 739-40 (Iowa App. 1991). Section 232.116(1)(h) requires a finding the child is imminently likely to be abused or neglected. Because Tyler was not living in the home when Tanner was abused and apparently had little contact with Angela, the record does not support a finding Tyler was imminently likely to be abused. The State did not plead any other ground for termination of Tyler. The concern that Tyler may be abused if Angela's parental rights are not terminated is alleviated by the fact legal custody of Tyler has been placed with Don and Cindy Rice, Tyler's paternal grandparents. There is no evidence Angela has continuing contact with Tyler. We therefore reverse the termination of Angela's parental rights to Tyler.

Finally, Angela asserts the State failed to show termination was in the children's best interest. In addition to meeting the statutory requirements, termination must be in the best interests of the child. *In re C.W.*, 554 N.W.2d 279, 282 (Iowa App. 1996) (citing *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1992) and *In re D.W.K.*,

365 N.W.2d 32, 34-35 (Iowa 1985)). We find clear and convincing evidence in the record termination is in the children's best interests. None of them could safely be returned to Angela's care. Even assuming "reasonable efforts" were made to address Angela's problems, it is likely the statutory periods in sections 232.116(1)(e) (twelve months) or (g) (six months) would pass with the children unable to be returned to Angela's care. Hence, termination under either of those sections could occur even if termination were not proper under section 232.116(1)(h). Further delay is not in the children's best interests.

For the reasons set forth above, we affirm the juvenile court's termination of Angela's parental rights to Tanner and Taylor. We reverse the termination of Angela's parental rights to Tyler because the State did not provide clear and convincing evidence of the element in section 232.116(1)(h)(1).

AFFIRMED IN PART, REVERSED IN PART.