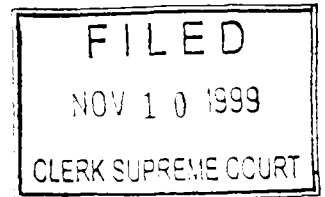


IN THE COURT OF APPEALS OF IOWA

No. 1999-229 (9-453) / 99-0351

Filed November 10, 1999



IN THE INTEREST OF

**A.M. and D.M.,
Minor Children,**

**J.M., Father,
Appellant.**

Appeal from the Iowa District Court for Jasper County; Thomas W. Mott,
District Associate Judge.

Father appeals from juvenile court order terminating his parental rights. He contends the court erred in terminating because (1) he was not offered family reunification services, (2) his absence is due to his commitment to an institution pursuant to Iowa Code section 232.116(3)(e) (1999), and (3) termination is not in the best interests of the children. **AFFIRMED.**

John E. Billingsley of Walker, Knopf & Billingsley, Newton, for appellant.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, and **Scott Nicholson**, Assistant County Attorney, for appellee-State.

Phil Reser, Des Moines, guardian ad litem for minor child.

Heard by Sackett, C.J., and Zimmer and Miller, J.J.

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MILLER, J.

A father appeals the termination of his parental rights to two children. He claims his parental rights should not be terminated because (1) no family reunification services were provided to him; (2) his absence is due to his incarceration in an institution; and (3) termination is not in the best interests of the children because a set of former foster parents and a set of present foster parents each may wish to adopt the children. The mother's parental rights were also terminated, but are not at issue in this appeal. We affirm.

J.M. is the father, and L.(N.)J. is the mother, of two boys, A.M., born July 30, 1996 and D.M. born July 31, 1997. J.M. and L.(N.)J. were never married, and in fact, at the time of A.M.'s conception and birth, L.(N.)J. was married to M.N., who was incarcerated. On July 7, 1997, J.M. was sentenced to a term of no more than ten years imprisonment for possession of a controlled substance, amphetamine, with intent to deliver, a class "C" felony. J.M. has been incarcerated throughout the entirety of his youngest son's life.

Twelve days after he was born, D.M. was adjudicated a child in need of assistance (CINA), due to the fact he tested positive for illegal drugs at birth. See Iowa Code § 232.2(6)(o) (1999). The state filed an application for an order for temporary removal on behalf of each of the two boys on February 2, 1998 and on the same date the court ordered the boys removed from L.(N.) J.'s home and placed with the Iowa Department of Human Services (DHS). By an order based on a stipulation

of the parties, **A.M. was adjudicated a CINA on March 13, 1998, pursuant to Iowa Code section 232.2(6)(c)(2).** Both boys were placed in foster homes.

The state filed a petition for termination of parental rights and termination of parent-child relationship on November 17, 1998 against both parents regarding both boys. The court held a hearing on the petition on January 7, 1999, and subsequently received J.M.'s testimony by deposition and terminated the parental rights of M.N. to A.M. The juvenile court entered its order terminating J.M.'s and L.(N.) J.'s parental rights as to both boys on February 11, 1999, finding (1) clear and convincing that the elements of Iowa Code section 232.116(1)(g) and Iowa Code section 232.116(1)(k) had been met, (2) the state had provided reasonable services to reunite the boys with their parents, and (3) that the termination was in the boys' best interests. Only J.M. appeals.

Appellate review of proceedings to terminate a parent-child relationship is de novo; thus it is our duty to review the facts as well as the law and adjudicate rights anew on those propositions properly preserved and presented to us. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981) (citations omitted). We accord weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses whom that court heard and observed firsthand, but we are not bound by those findings. *Id.*

Central to a determination of this nature are the best interests of the child. In this connection, we look to the child's long-range as well as immediate interests. *Id.*

Hence, we necessarily consider what the future likely holds for the child if returned to his or her parents. *Id.* 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 that parent is capable of providing. *Id.*

J.M. does not dispute that the elements of Iowa Code sections 232.116(1)(g) and 232.116(1)(k) were proved by the state by clear and convincing evidence. He instead argues that (1) the state offered no services to him to reunite him with his sons, (2) termination was inappropriate because his absence was due to his incarceration in an institution, and (3) the termination is not in the best interests of the children as it would lead to a fight over the boys by rival foster parents in attempts to adopt the boys. We take each argument in turn.

J.M. first argues the termination of his parental rights was not justified because the state did not offer family reunification services to him. Before parental rights may be terminated, the state must make reasonable efforts to reunite a family by providing reasonable services in an attempt to eliminate the need for removal. *In re E.K.*, 568 N.W.2d 829, 831 (Iowa App. 1997); *In re A.B.*, 554 N.W.2d 291, 294 (Iowa App. 1996). However, it is the parent's responsibility to demand services if they are not offered, *In re H.L.B.R.*, 567 N.W.2d 675, 679 (Iowa App. 1997), and to do so prior to the termination hearing when the case plan is entered. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997); *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994). To raise this issue on appeal an appellant must have presented it before the juvenile

court at the termination hearing. See *In re Interest of J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997). J.M. did so.

What reasonable efforts the state must make to reunite a family are dependent on the circumstances of the family. Here, J.M. was incarcerated at the time his children were adjudicated CINA and at the time of termination. He was provided copies of the case permanency plans and notices of hearings. The DHS brought his children to him for visitation at the penal institutions where he was incarcerated. It did so every other weekend. J.M. has not stated what other services the state should have offered him. He does not claim, and the record does not show, that he demanded additional services before the termination hearing. If he felt the services that were being provided were inadequate, it was his obligation to demand additional services and to do so before the termination hearing. By not doing so, he waived his right to claim that termination is barred on this ground.

In *In re E.K.*, we held that the father's incarceration was due to his own actions and he could not fault DHS for being unable to provide services while he was in prison. *In re E.K.*, 568 N.W.2d 829, 831 (Iowa App. 1997). We affirmed termination despite lack of services under those circumstances. *Id.* J.M. attempts to distinguish this case by noting that the father in *In re E.K.* had greatly lengthened his incarceration time by a failed escape attempt and had had no meaningful contact with his children. He argues that, in contrast to the father in *In re E.K.*, he is being prepared for release and that he has seen his sons regularly. However, as of the time

of trial in this case J.M. had been incarcerated for the last one and one-half years of A.M.'s two and one-half years of life, had been incarcerated all of D.M.'s one and one-half years of life, would not conclude the mandatory minimum portion of his sentence for another one and one-half months, did not know when he might be released on work release or parole, might remain under close supervision if and when released on work release or parole, and had only seen his sons for two hours per month over the preceding one and one-half years. Under such circumstance, we find the services that DHS had provided to be reasonable.

J.M. next argues that the court should not terminate his parent rights because his absence is due to his commitment to an institution. The Code of Iowa, section 232.116(3)(e) provides that:

The court need not terminate the relationship between the parent and child if the court finds . . .

... [t]he absence of a parent is due to the parent's admission or commitment to any institution . . .

The term "institution," as used in section 232.116(3)(e) is not intended to include penal institutions. *In re J.V.*, 464 N.W.2d 887, 890 (Iowa App. 1990). Further, that section contains discretionary, not mandatory, language. Thus, it is within the sound discretion of the court, based upon the unique circumstances before it and the best interests of the child, whether to apply this section to save the parent-child relationship. *Id.* (We further note that the legislature chose to make parental incarceration a permissible factor in determining what is in the best interests of a

child. **See Iowa Code § 232.116(2)(a) (1999)).** The evidence does not support a discretionary decision to not terminate J.M.'s parental rights in this case.

Finally, J.M. argues that termination is not in the best interests of the children because it would engender a custody conflict between two potential adoptive families. He points out that on the day of the termination hearing both a couple who had had A.M. and D.M. in foster care until late August 1998, and a couple who had had them in foster care since late August 1998, filed requests that guardianship and custody of the boys be placed with them in the event of termination, each couple further stating they intended to seek to adopt the boys. J.M. urges that litigation between the two couples will keep the boys in parentless limbo and frustrate their best interests and the purposes of termination.

J.M.'s argument is imaginative, but unconvincing. Suggestions of impending litigation that will slow adoption in this case are based on little or nothing more than speculation and conjecture. Further, J.M.'s argument is in essence that when a court arrives at a discretionary decision to terminate or not to terminate, it should be more reluctant to terminate when more than one family is interested in adopting than when only one (or none?) is. We cannot accept this argument.

We conclude the fact that two families appear interested in adopting A.M. and D.M. serves as no basis for declining to terminate parental rights when termination is otherwise fully supported and justified by the record.

AFFIRMED.

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