IN THE COURT OF APPEALS OF IOWA

No. 0-764 / 00-1146
Filed February 28, 2001

FILED
FEB 2 8 2001
CLERK SUPREME COURT

IN THE INTEREST OF L.B., Minor Child,

D.R., Father,
Appellant.

Appeal from the Iowa District Court for Dubuque County, Jane Mylrea, District Associate Judge.

Father appeals from the juvenile court order terminating his parental rights to one of his children. He contends the court erred in (1) finding that the State met its burden in proving termination under Iowa Code section 232.116(1)(g) (1999), and (2) determining termination was in the child's best interests. **AFFIRMED.**

Francis J. Lange of Lange & Neuwoehner, Dubuque, for appellant.

Thomas J. Miller, Attorney General, and Charles K. Phillips, Assistant Attorney General, for appellee-State.

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

MILLER, J.

D.R. (Donald) appeals from the juvenile court order terminating his parental rights to his minor child Luke. He contends the juvenile court erred in finding the State met its burden of proving that the child could not be returned to his custody and determining termination was in the child's best interest. We affirm.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS

Donald and Dolly are the parents of Michael, born February 21, 1996 and Luke, born May 27, 1998. Donald and Dolly never married. Both were twenty-three years of age at the time of the termination hearing. Donald also has another child, Christel, born August 7, 1999, with Natasha. This appeal involves only the termination of Donald's parental rights to Luke.

After Donald and Dolly's first son Michael was born the couple split up and Dolly went to live with her grandmother. When Donald attempted to visit Michael and Dolly her grandmother told him to leave and that she had gotten a no contact order against him prohibiting him from visiting them. Donald believed there was a no contact order, although he never saw one, and apparently respected this alleged no contact order. In December of 1998 Donald was served with a paternity action alleging he was the father of both Michael and Luke and seeking child support. This was the first time he knew anything about Luke.

The Department of Human Services (DHS) removed Luke from Dolly's custody on September 10, 1999 due to child neglect. He was returned to Dolly, and removed a second time on October 19, 1999 upon a second founded report of neglect. Luke was adjudicated a child in need of assistance on October 29,

1999, pursuant to Iowa Code sections 232.2(6)(c)(2) (1999) and 232.2(6)(g) on the stipulated grounds that Dolly was unable to exercise a reasonable degree of care in supervising the child and failed to exercise a minimal degree of care in providing the child with adequate food, clothing, or shelter. The State then filed a termination petition on April 19, 2000 and the juvenile court terminated both Dolly and Donald's parental rights. Dolly's parental rights were voluntarily terminated under Code section 232.116(1)(a) and are not at issue in this appeal.

Donald's parental rights to Luke were terminated by the court under Iowa Code section 232.116(1)(g). The juvenile court found Luke to be three years of age or younger, that he had been adjudicated a "Child in Need of Assistance" pursuant to section 232.96, he had been removed from the physical custody of the parents for the last six consecutive months, and that there was clear and convincing evidence he could not be returned to Donald's custody as provided in Code section 232.102 at the time of the termination proceedings.

Included among the many reasons given by the juvenile court for its determination were: the fact Donald was homeless at the time of termination; Donald's inability to provide proper supervision and safe care for Luke and meet Luke's specific needs due to his own somewhat low cognitive functioning; Donald's violent past and anger issues, including being on medication for his intermittent explosive disorder, his multiple arrests as a juvenile and at least two as an adult regarding anger-related charges, and the current no-contact order resulting from a recent domestic violence incident involving his girlfriend while his ten-month old daughter was in his physical care; and Donald's apparent lack of any support system to help him with the child at that time. The juvenile court

found it would not be in the best interests of Luke to be returned to his father's custody,

> due to concerns regarding supervision and risk of abuse or neglect. Further, their bond is not strong and the child requires permanency as soon as possible and the father would not be able to meet Luke's long-term needs. The child is adoptable and is in a placement which would currently offer him such permanency.

Donald appeals contending the juvenile court erred in finding that the State met its burden for termination under section 232.116(1)(g) and in determining that termination was in Luke's best interest.

II. STANDARD OF REVIEW

We review termination proceedings de novo. Iowa R. App. P. 4; *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). Accordingly, we review both the facts and the law and adjudicate rights anew. *In re T.A.L.*, 505 N.W.2d 480, 482 (Iowa 1993). We give weight to the factual determinations of the juvenile court, especially when considering the credibility of witnesses, but are not bound by them. *Id.* The grounds for termination must be proven by the State by clear and convincing evidence. *In re E.K.*, 568 N.W.2d 829, 831 (Iowa Ct. App. 1997). Our primary concern is the best interests of the child. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa App. 1996).

III. MERITS

Donald challenges the juvenile court's finding as to the last requirement under Code section 232.116(1)(g), that there be "clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time." Iowa Code § 232.116(1)(g)(4). The requirement under subsection (4) is met when it is shown by clear and

convincing evidence that the child cannot be returned to the parent because the child remains in need of assistance as defined by section 232.2(6). *In re E.B.L.*, 501 N.W.2d 547, 550 (Iowa 1993); *In re R.R.K.*, 544 N.W.2d 274, 277 (Iowa Ct. App. 1995); *see also In re M.W.*, 458 N.W.2d 847, 850 (Iowa 1990).

Based on our de novo review of the record we agree with the juvenile court's determinations. As set forth below we find clear and convincing evidence that several of the factors enumerated under section 232.2(6) are present here demonstrating that Luke remains a child in need of assistance and thus custody cannot be given to Donald at the present time.

There is testimony in the record from Donald's primary service providers that they felt Donald would be unable to provide appropriate safe care and supervision of Luke at the time of termination and they would not recommend that Luke be placed in his father's custody. Due to Donald's low intellectual functioning, his violent past, and anger management problems he is unable to maintain appropriate safe parenting and supervision of the child. Service providers testified as to concerns with Donald's inability to retain basic information concerning supervision and discipline of children. In fact, Donald never progressed to the point where he could have unsupervised visits with Luke due to concerns of Donald's case manager for Luke's safety. She testified that Luke could not be placed in Donald's care in the near future without placing Luke at risk. The conclusion of both service providers was that Donald was unable to exercise a reasonable degree of care in supervising Luke. *See* Iowa Code §232.2(6)(c)(2). Based on all of the evidence in the record we must agree.

Second, based on Donald's own testimony, at the time of termination he was homeless, did not know where he would live if he got custody of Luke, and admitted he would be unable to provide adequate care for Luke at that time. Thus, it is clear Donald was at a minimum unable to supply Luke with shelter. *See* Iowa Code §232.2(6)(g).

Finally, there are the issues of Donald's mental capacity and condition. Encompassed in these are concerns regarding his low cognitive functioning level and his problems with anger management. While one of Donald's therapists testified that he did not think Donald's low intellectual functioning was a significant problem and the test which found Donald's I.Q. to be in the 70's is approximately four years old, we believe there is other sufficiently clear and convincing evidence in the record that Donald's low functioning does in fact affect his ability to parent a small child such as Luke. A parent must do more than provide expert testimony that says he or she *could* care for a child, he or she must show they can in fact care for the child. *See In re A.C.*, 415 N.W.2d 609, 614 (Iowa 1987).

Donald's low cognitive abilities make it difficult for him to concentrate on Luke's needs and he is easily distracted. Donald becomes overly engrossed in the toys he and Luke play with, often at the expense of Luke's safety. He allowed Luke to put a Lincoln Log in his mouth on one occasion and to stand on the edge of a chair on another. While Donald did apparently benefit somewhat from parenting skills training he could not retain the skills he had been taught from one visit to the next and thus his skills were not improving. In addition, while he was apparently able to watch his ten-month old daughter for up to eight

hours at a time successfully, this occurred only in a setting where he had support from his girlfriend and facilities and supplies provided by her. His apparent ability to baby-sit for an eight-hour period is a far cry from being able to handle the responsibility of being the sole caretaker of a two-year old with developmental problems on a full time basis entirely on his own.

There is the additional serious concern of Donald's mental *condition*, aside from the issues discussed above regarding his mental *capacity*. Specifically, Donald has been diagnosed with intermittent explosive disorder as well as a non-specific depressive disorder and is currently on dilantin to control his temper. There is evidence he has not always consistently taken this medication. Donald had numerous arrests as a juvenile and two already as an adult involving anger-related charges. Furthermore, only two weeks prior to the termination hearing a no-contact order was issued against him based on a domestic violence incident involving him and his girlfriend while his ten-month old daughter was in his care. Although the medication has apparently helped Donald manage his anger it is apparent that it has not alleviated the problem altogether. Therefore, we find that Donald's mental capacity and condition result in his inability to provide Luke with adequate care and put Luke at risk of abuse or neglect. *See* Iowa Code §§ 232.2(6)(n) and 232.2(6)(b).

For the reasons set forth above we find the State met its burden of proof that under Iowa Code section 232.116(1)(g)(4) by proving by clear and convincing evidence that Luke could not be placed in his father's custody at the time of the termination hearing.

The controlling standard applied in cases involving the termination of parental rights is the best interest of the children involved. *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 the performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to the child.

In re R.K.B., 572 N.W.2d 600, 601 (Iowa 1998) (quoting *In re C.M.W.*, 503 N.W.2d 874, 875 (Iowa Ct. App. 1993)). It is well established there exists a parental interest in maintaining the integrity of the family unit. *In re Dameron*, 306 N.W.2d at 745. This interest, however, is not absolute and may be forfeited by certain parental conduct. *Id.* The State has a duty to assure that every child within its borders receives proper care and treatment and it must intercede when parents abdicate that responsibility. *Id.*

Despite all of the deficiencies in Donald's ability to adequately care and provide for Luke at the time of termination discussed above, Donald argues the termination of his parental rights was not in Luke's best interest because he was progressing in his cognitive abilities and parenting skills with the help of the service providers and with more time he would have been able to take custody of Luke. We do not agree.

First, based on the reports from his service providers, it does not seem Donald's cognitive or parenting skills were improving as he alleges. His DHS case manager testified at the termination proceedings that Donald would not progress with additional time as they had addressed the same issues repeatedly

for over seven months with no significant improvement. Additional time would have been of little use.

Second, it is not our public policy to force children to wait interminably for their parents to be able to parent them. Luke was twenty-four months of age at the time of the termination hearing. Donald had no contact with Luke until Luke was almost seventeen months of age and thereafter had only supervised visitation with him. Luke had been removed from the physical custody of Dolly and Donald and placed in foster care for about seven months at the time of the termination hearing. A child needs the stability of a permanent home. A child should not be forced to endlessly suffer the parentless limbo of foster care. *In re S.N.*, 500 N.W.2d 32, 35 (Iowa 1993). "The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." *In re A.C.*, 415 N.W.2d at 613. "Children simply cannot wait for responsible parenting. Parenting cannot be turned off and on like a spigot. It must be constant, responsible, and reliable." *In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990). It is not in Luke's best interest to make him wait any longer for permanency than he already has. Even if with additional efforts Donald would eventually be able to take custody of Luke, which we seriously doubt under the facts shown by the evidence, it is clear that at the time of termination Donald was unable to take custody. We find termination of Donald's parental rights to Luke is in Luke's best interest in order that he may acquire the stability and permanency he needs and deserves.

IV. CONCLUSION

Based on our de novo review of the entire record we conclude there was clear and convincing evidence that Luke continued to be a child in need of assistance at the time of termination under Iowa Code section 232.2(6) and thus custody could not be placed with Donald at that time. The State met its burden of proof to show termination was appropriate under Iowa Code section 232.116(1)(g). Furthermore, based on Donald's inability to assume responsibility for Luke, together with the policy that children should not have to endlessly suffer the limbo of foster care while waiting for their natural parent to gain the maturity, responsibility and skills necessary to face their own problems and become good parents, we find termination to be in Luke's best interest.

AFFIRMED.