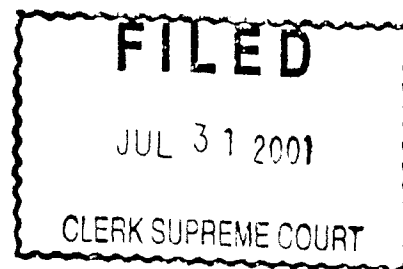


IN THE COURT OF APPEALS OF IOWA

No. 1-312 / 00-1491
Filed July 31, 2001



IN THE INTEREST OF
A.S.A, Minor Child,

M.A.M., Father,
Appellant.

Appeal from the Iowa District Court for Woodbury County, Patrick H. Tott,
Associate Juvenile Judge.

Father appeals from the order terminating his parental rights to his
daughter. **AFFIRMED.**

Harold K. Widdison of Richard Rhinehart & Associates, Sioux City, for
appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, and Marlene Loftus, Assistant County Attorney, for appellee-
State.

Carol Chase, Sioux City, guardian ad litem for minor child.

Considered by Habhab, R. Peterson, and C. Peterson, Senior Judges.*

*Senior Judges assigned by order pursuant to Iowa Code § 602.9206
(2001).

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R. PETERSON, S.J.

The father, M.A.M., appeals from the district court order terminating his parental rights to his daughter, A.S.A. He contends (1) the court erred in admitting a case permanency plan into evidence; (2) the court erred in requiring him to enroll in and complete a sex offender treatment program because it violated his constitutional rights and was an improper basis for termination; and (3) the State failed to present sufficient evidence to terminate his rights under Iowa Code sections 232.116(1)(c); 232.116(1)(e); and 232.116(1)(h) (1999). We affirm.

Background and Proceedings. T.J. and M.A.M. are the parents of A.S.A. who was born on November 22, 1990. T.J. and M.A.M. were never married. A.S.A. lived with T.J. and M.A.M. exercised visitation. T.J.'s parental rights are not an issue.

In January and February of 1996, there were three incidents of abuse that had been perpetrated upon A.S.A. Two of the incidents were sexual in nature. Those responsible for this sexual abuse were two babysitters. The third incident concerning A.S.A. involved a cut on her left leg approximately one and one-half inches in length which she received when she was struck with a stick by T.J. A.S.A. indicated she was struck with a hanger by T.J. on her upper left thigh.

M.A.M. filed a petition for custody of A.S.A. On June 13, 1996, the matter came before the court for hearing. T.J. did not appear and was found to be in default. The court then awarded T.J. and M.A.M. joint custody of A.S.A. with the primary physical care being with M.A.M. T.J. was granted reasonable rights of

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visitation, but there were some limitations on her visitation because of the previous child abuse by T.J.'s teenage and adult male friends.

In June 1997, when A.S.A. was visiting T.J., T.J. noticed she had nits in her hair and she had a skin condition on her hands. T.J. took her to the emergency room of St. Luke's Medical Center. The examination revealed she had lice in her hair and scabies on her hands.

They left the emergency room, however, they returned approximately one-half hour later. At that time, T.J. said for no apparent reason A.S.A. made a disclosure that "daddy touched me."

The interview of A.S.A. was conducted by the Department of Human Services (DHS) at the hospital that evening. A.S.A. told the interviewer her dad touched her on her private part and "dad puts his private part in my private part." A.S.A. stated this had been occurring since M.A.M.'s wife, Kimberly, moved out of the residence where she was living with M.A.M. In a subsequent interview M.A.M. denied ever having done anything sexually inappropriate with A.S.A.

In a subsequent interview at the Marion Health Center on June 23, 1997, A.S.A. again described the things she accused M.A.M. of doing to her which are in the nature of sexual abuse.

On July 3, 1997, a petition was filed alleging A.S.A. was a child in need of assistance. The matter was set for hearing on August 11, 1997, and, in the meantime, the temporary care, custody, and control of A.S.A. was awarded to T.J.

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On January 28, 1998, A.S.A. was adjudicated a child in need of assistance pursuant to Iowa Code sections 232.2(6)(b), (c), (d), and (n). The court found, among other things, M.A.M. had committed sexual abuse upon A.S.A.

On May 22, 1998, the matter came before the court for a dispositional hearing. Since the time A.S.A. was adjudicated a child in need of assistance, she had been diagnosed as having tourettes syndrome. Because of this syndrome, it is important A.S.A. live in an environment that is stable and consistent with a set of rules and consequences. Custody of A.S.A. was placed with DHS for relative placement. It had been determined A.S.A.'s grandmother, P.H., had indicated a willingness to have A.S.A. placed with her and a home study had approved of that placement. Visitation was also authorized for T.J. and M.A.M. at the discretion of A.S.A.'s therapist, the department, and A.S.A.'s guardian ad litem.

On June 29, 1998, M.A.M. filed a notice of appeal from the adjudicatory order filed January 27, 1998, and the dispositional order dated June 4, 1998. On September 21, 1998, a dispositional review hearing was held. At that time, the court personally addressed M.A.M. advising him he would need to participate in a sexual offender treatment program before the court would give consideration to any resumption of contact with A.S.A. He had no visitations with her since the last court hearing. The court then ordered M.A.M. to undergo a sexual offender evaluation and comply with the recommendations of that evaluation.

On October 27, 1998, the matter came before the court on M.A.M.'s application for an order concerning a sexual offender evaluation. The court and all parties agreed M.A.M. would undergo a sexual offender evaluation in accordance with the directives set forth in the court's order dated September 1, 1998, and September 29, 1999. The court then again ordered M.A.M. undergo a sexual offender evaluation and comply with the recommendations of that evaluation.

On December 16, 1998, the matter came before the court for a review/motion to reconsider hearing. The court found M.A.M. resisted any further sexual offender evaluation. M.A.M. indicated through his pleadings he is unwilling to participate in treatment if he is required to admit the sexual abuse. M.A.M. indicated if he is required to obtain a "second" sexual offender evaluation, he desires Dr. Dan Rogers perform the evaluation. The court ordered the sexual offender evaluation be conducted by Dr. Dan Rogers upon M.A.M.

On June 16, 1999, the matter came before the court for a review/permanency/motion for visits and motion for psychological therapy hearing. M.A.M. had completed a psychological assessment with Dr. Rogers. This indicated he would benefit from psychotherapy for underlying depression and immaturity. The report indicated there were no accepted scales to determine sexual abuse behavior or the risk of recidivism, yet at the conclusion of Dr. Roger's report, he indicated M.A.M.'s "risk of recidivism is much lower than that of the average person found guilty of a sexual crime."

A.S.A. continued receiving therapy and continues to assert she was sexually abused by M.A.M. She also claims M.A.M. was physically and verbally abusive to her and indicates she is afraid of her father and does not want to see him. A.S.A.'s therapist continues to recommend she have no contact with M.A.M. Custody was continued with DHS and A.S.A. continued to reside with her maternal grandmother.

M.A.M. had requested psychotherapy, however, the court did not find it would address the underlying sexual abuse issues and its treatment and denied funding of therapy until such time as the primary issues are addressed. The court further denied M.A.M.'s motion for visitation with A.S.A.

On July 23, 1999, M.A.M. filed a notice of appeal to the supreme court from the juvenile court's order denying his request for visitation with A.S.A. On the same day, our court, in an unpublished opinion, *In re A.S.A.*, No. 98-1141 (Iowa Ct. App. July 23, 1999), affirmed the juvenile court's order adjudicating A.S.A. to be a child in need of assistance and finding M.A.M. had sexually abused her. On October 29, 1999, the Iowa Supreme Court denied a request by M.A.M. for further review. On February 8, 2000, the petition was filed to terminate M.A.M.'s parental rights in A.S.A. pursuant to Iowa Code sections 232.116(1)(c), (e), and (h).

A hearing was held on M.A.M.'s application filed on November 3, 1999, requesting visitation and reunification efforts be instituted between M.A.M. and A.S.A. A supervised visitation took place between A.S.A. and M.A.M. on January 12, 2000. A.S.A. was described as being very apprehensive prior to the visit, but

both M.A.M. and A.S.A. acted appropriately during the visit. Subsequent to the visit A.S.A. remained scared of M.A.M., however, was happy to see him. The court denied M.A.M.'s application for visitation concluding although A.S.A. was happy to see M.A.M. and expressed a desire to see him again, it was equally clear she remains afraid of him and confused. The court further concluded because the termination hearing was scheduled approximately one month away, it would be traumatic for A.S.A. to just have begun having visits with M.A.M. only to have them cease should his rights be terminated.

On March 30, 2000, the supreme court granted M.A.M.'s motion for a limited remand of his appeal of the juvenile court's order of June 24, 1999. The record was supplemented and the visitation orders of June 24, 1999, and March 20, 2000, came before this court. On January 10, 2001, this court affirmed the juvenile court's orders of June 24, 1999, and March 20, 2000. *In re A.S.A.*, No. 99-1157 (Iowa Ct. App. Jan. 10, 2001).

The petition to terminate M.A.M.'s parental rights came before the court in April 2000. On August 12, 2000, an order was filed terminating M.A.M.'s parental rights to A.S.A. pursuant to Iowa Code sections 232.116(1)(c), (e), and (h).

Standard of Review. We review proceedings to terminate parental rights de novo. Iowa R. App. P. 4. We review the facts as well as the law and adjudicate parents' rights anew. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). We give weight to the findings of the juvenile court, particularly with respect to the credibility of the witnesses, but are not bound by them. *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990); *In re R.R.K.*, 544 N.W.2d 274, 275 (Iowa Ct.

App. 1995); Iowa R. App. P. 14(f)(7). Our primary concern in termination proceedings is the best interest of the child. *R.R.K.*, 544 N.W.2d 275.

Discussion. M.A.M.'s first contention is the trial court erred in admitting into evidence the case permanency plan dated April 10, 2000. This plan included an additional requirement for M.A.M. that he "participate in sexual offender treatment program and follow all recommendations."

The juvenile court had entered a pretrial conference order setting the termination hearing for April 20 and 26, 2000. A discovery deadline and pretrial motion deadline was set for April 3, 2000. All witness lists and exhibit lists were to be exchanged by that date.

Evidentiary issues are reviewed for an abuse of discretion. *State v. Most*, 578 N.W.2d 250, 253 (Iowa Ct. App. 1998). In order to show an abuse of discretion, it must be shown the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

Although this was the first time the case permanency plan contained a requirement M.A.M. participate in a sexual offender treatment program and follow its recommendations, it was not the first time it had come up in these proceedings.

At the dispositional hearing on September 21, 1998, the court personally addressed M.A.M. and advised him he would need to participate in a sexual offender treatment program before any consideration would be given to the resumption of contact between M.A.M. and A.S.A. The order entered on that date by the court indicates "[M.A.M.] acknowledge his understanding of this

responsibility." The order required M.A.M. undergo a sexual offender evaluation and comply with the recommendations of that evaluation.

On December 16, 1998, in a review proceeding, M.A.M. indicated he was unwilling to participate in a treatment program if he was required to admit to sexual abuse of A.S.A. He also indicated if he was required to obtain a second sexual offender evaluation, he desired a specific individual to perform that evaluation. The order entered as a result of that hearing required M.A.M. undergo a sexual offender evaluation.

On June 16, 1999, the matter came before the court for a review hearing. M.A.M. had completed a psychological assessment which indicated he would benefit from psychotherapy for his underlying depression and immaturity. The court refused to authorize psychotherapy until such time as primary issues are addressed.

Based on the foregoing, it is clear M.A.M. was aware of the court's requirement he participate in a sexual offender treatment program. Accordingly we find the juvenile court did not abuse its discretion in receiving the report. It merely added what the juvenile court had already required.

M.A.M. next contends requiring him to enroll and complete a sexual offender treatment program violated his constitutional rights under the Fifth Amendment of the U.S. Constitution because it required him to admit to the abuse. We have reviewed the record and are unable to find any indication the trial court ruled on this issue. Issues not presented to and not passed on by the trial court cannot be raised on appeal. *Shill v. The Careage Corp.*, 353 N.W.2d

416, 420 (Iowa 1984). An appellate court will not address an argument the district court did not have an opportunity to consider. *Vincent v. Four M. Paper Corp.*, 589 N.W.2d 55, 64 (Iowa 1999).

We note the record does contain an indication M.A.M. did not want to participate in any program that required him to admit to the abuse. If these instances in the proceedings before the juvenile court were intended to raise that issue, it was not addressed in any of the rulings by the juvenile court. The burden of demanding a ruling rests on the party desiring it. *Blunt, Ellis & Loewi, Inc. v. Igram*, 319 N.W.2d 189, 195 (Iowa 1982). If a request for a ruling is not made, the party cannot predicate an error on the failure of a ruling. *Id.* M.A.M. has not preserved error on this issue.

M.A.M. next contends the State failed to present clear and convincing evidence to terminate his rights in accordance with Iowa Code section 232.116(1)(c). M.A.M. contends in argument he was not offered any services to correct the circumstances which led to A.S.A.'s adjudication as a child in need of assistance. On September 22, 1998, the juvenile court advised M.A.M. he would need to participate in a sexual offender treatment program. On September 29, 1998, the juvenile court ordered DHS to provide funding to pay for a sexual offender evaluation for M.A.M. as well as any recommended therapy, counseling, or follow-up services.

Had M.A.M. participated in sexual offender treatment, funding was available for any recommended therapy, counseling, or other follow-up services for him. Before any meaningful change can occur, a parent must acknowledge

what abuse has occurred. *In re T.J.O.*, 527 N.W.2d 417, 421 (Iowa Ct. App. 1994).

M.A.M. next contends the State failed to present clear and convincing evidence as required by Iowa Code section 232.116(1)(e) sufficient to terminate his parental rights. In argument, M.A.M. contends he was not offered services by DHS. We have previously addressed that issue.

He also contends, in this regard, attempts to comply with the directive he get a sexual offender evaluation and follow through with any recommendations were repeatedly blocked by the juvenile court. On September 10, 1997, the juvenile court authorized M.A.M. to retain the services of Dr. James Snowden at state expense to conduct a sexual offender evaluation of him. On September 29, the juvenile court authorized funding for a sexual offender evaluation for M.A.M. as well as any recommended therapy, counseling, or other follow-up services. On October 28, 1998, the juvenile court authorized funding for a sexual offender evaluation of M.A.M. by either Dr. Snowden or a psychologist or therapist from the sexual offender treatment program at the Boys & Girls Home and Family Services Center. On June 16, 1999, M.A.M. did request funding for psychotherapy for his underlying depression and immaturity. The juvenile court did deny that request until such time as the "primary issues are addressed." On March 21, 2000, the court denied M.A.M.'s application for experts reasoning Dr. Rogers and Dr. Denise Marandola had been previously appointed as experts for him and had previously provided evidence in prior proceedings. Based on the foregoing, we conclude the juvenile court did not repeatedly block M.A.M.'s

request for a sexual offender evaluation and follow through on any recommendations.

M.A.M. in argument contends A.S.A. is not afraid of him and could be returned to his custody. The juvenile court at the termination hearing found while A.S.A. interacted with M.A.M. on a recent visitation and she has indicated some curiosity about her family, she did not have any desire to see M.A.M. again and she was clearly still very afraid of M.A.M. We defer to the juvenile court's findings.

M.A.M. contends in argument the evidence does not support the determination he sexually abused A.S.A. It has been previously determined by this court M.A.M. sexually abused A.S.A. *In re A.S.A.*, No. 98-1141 (Iowa Ct. App. July 23, 1999). He cannot raise that claim at this point. See *Wayland v. Conley*, 621 N.W.2d 681, 685 (Iowa 2000).

M.A.M. next contends the State failed to present clear and convincing evidence as required by Iowa Code section 232.116(1)(h) sufficient to terminate his parental rights. M.A.M. contends in argument he did not sexually abuse A.S.A. and most services had been offered to him to correct the conditions which led to the alleged abuse and there is no evidence he constitutes an imminent danger or significant risk to A.S.A.

Services have been authorized for M.A.M., but he has elected not to pursue them because he refuses to acknowledge he sexually abused A.S.A. which is a precursor to the services offered. Returning A.S.A. to M.A.M.'s custody constitutes a significant danger or risk to A.S.A.

M.A.M. filed a reply brief in which he contends: "his Fifth Amendment rights against self-incrimination were violated when the trial court failed to make any inquiry using factors set out in *Warren v. United States*, 436 A.2d 821, 830 (D.C. 1981), in allowing the videotaped interview made of A.S.A. by the Child Protection Services in evidence." *State v. Castaneda*, 621 N.W.2d 435, 447 (Iowa 2001). The issue in *Warren* was the defendant's right of confrontation, including cross-examination which is contained in the Sixth Amendment.

A review of the file reveals M.A.M. did not raise this objection before the juvenile court and, consequently, it cannot be raised on appeal. *Shill*, 453 N.W.2d at 420. An appellate court will not address an argument the district court did not have an opportunity to consider. *Vincent*, 589 N.W.2d at 64.

M.A.M. also contends the State breached an agreement to include the transcript of the videotaped interview of A.S.A. made by the Child Protection Center. After the hearing where M.A.M. offered the transcript and the court refused to admit the transcript, the court entered an order containing the following language;

the videotape of the interview has already been viewed by the court and accepted into evidence. The transcript was prepared after the fact and there are several qualifications made by the transcriber. The actual videotape is clear the best evidence of what happened at the interview and the admission of the transcript into evidence would only serve to create possible confusion.

The court did not abuse its discretion in refusing to admit the transcript.

In conclusion, we find the trial court did not err in admitting the case permanency plan into evidence on April 10, 2000, and there is clear and convincing evidence M.A.M.'s parental rights should be terminated in accordance

with Iowa Code sections 232.116(1)(c), (e), and (h). It is in the best interest of A.S.A. to terminate M.A.M.'s parental rights. M.A.M. has failed to preserve error with respect to his objections that requiring him to complete a sex offender treatment program violates his constitutional rights under the Fifth Amendment and the admission of a videotaped interview of A.S.A. violated his rights of confrontation and cross-examination under the Sixth Amendment.

AFFIRMED.