IN THE COURT OF APPEALS OF IOWA

No. 0-284 / 99-2016
Filed July 26, 2000

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CLERK SUPREME COURT

IN THE INTEREST OF

E.C.-O.,
Minor Child,

L.B., Mother,
Appellant.

Appeal from the Iowa District Court for Woodbury County, Brian Michaelson, Associate Juvenile Judge.

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

Elizabeth A. Rosenbaum, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Dewey P. Sloan, Assistant County Attorney, for appellee-State.

Lesley Rynell of Juvenile Law Center, Sioux City, guardian ad litem for minor child.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

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MILLER, J.

Appellant/Mother Lisa appeals the termination of her parental rights to her daughter, Elizabeth. On appeal, Lisa contends (1) Iowa Code section 232.102(12) is unconstitutional; (2) the State did not prove by clear and convincing evidence all the required elements of each provision of the Code under which the court terminated her parental rights; (3) the State failed to provide reasonable services; and (4) termination is not in Elizabeth's best interest. We affirm.

Elizabeth's parents, Lisa and Darrell, both suffer from severe mental impairments. Lisa is twenty-eight years of age, has an IQ of 84, and suffers from schizophrenia, schizoid personality disorder, avoidant personality disorder, narcissistic personality disorder, borderline intellectual functioning and an impairment of adaptive functioning. Darrell's IQ is in the 60s, and it is believed he suffers from either fetal alcohol effect or birth trauma injuries.

Lisa and Darrell met in the early to mid 1990s and they developed a relationship in 1995. Darrell and Lisa's first daughter was born in August 1997.[1] Less than two weeks after Alecia was born, Alecia was placed in foster care by *ex parte* order because neither Lisa nor Darrell were able to take care of her.

Alecia was subsequently adjudicated to be a child in need of assistance (CINA). Lisa then completed a psychological evaluation, which concluded she could not handle the demands of a child because she had no idea of the real functioning of a baby and its needs and how to meet those needs, and it was not likely therapy would be beneficial On December 7, 1998, Lisa and Darrell's

[1] At age seventeen, Lisa gave birth to a girl as the result of sexual abuse perpetrated by her mother's boyfriend. This daughter was placed for adoption.

parental rights to Alecia were terminated. This court affirmed, finding "[f]urther efforts [additional time and services] would be futile and unavailing." *In re A.B.*, No. 99-45 (Iowa App. Oct. 27, 1999).

Elizabeth was born to Lisa and Darrell on December 28, 1998. One day after Elizabeth's birth, the Iowa Department of Human Services (DHS) applied for and was granted an *ex parte* removal order pursuant to Iowa Code section 232.78. The reasons listed in support of the application were Lisa's parental rights with her daughter, Alecia, had been terminated just three weeks earlier; that that termination took place only after the DHS had provided many services to Lisa and Darrell to accommodate their special needs; and because of this past history, the DHS felt "due to the functioning level of Lisa [ ] and Darrell [ ] . . . this newborn baby girl would be in imminent danger if she was allowed to be discharged with Lisa [ ] and Darrell [ ]." A CINA petition was filed on December 31, 1998, alleging Elizabeth to be CINA as defined in Iowa Code sections 232.2(6)(b), (6)(c)(2) and (6)(n). As a result of a temporary removal/adjudicatory hearing held on February 17, 1999, Elizabeth adjudicated to be CINA, and she remained in foster care.

The CINA dispositional hearing was held on May 5, 1999, and the court filed its order May 7, 1999. The court received into evidence a paternity test that established Darrell as the father of Elizabeth. It also received evidence that Lisa denied being mentally ill and claimed she had been "cured by the Lord". The juvenile court ordered the requirement of "reasonable efforts" be waived, finding (1) the parental rights of the couple had previously been terminated with respect to a another child despite the offer of a "myriad of services;" and (2) clear and

convincing evidence "the offer or receipt of additional services would not be likely within a reasonable period of time to correct the conditions which led to the removal of Elizabeth." *See* Iowa Code § 232.102(12)(c).

A permanency hearing was held on June 30, 1999. Neither parent appeared. The court ordered the county attorney to file a petition to terminate parental rights, which was done in August 1999. In it the State alleged Lisa and Darrell's parental rights to Elizabeth should be terminated pursuant to Iowa Code sections 232.116(1)(c), (f), and (g). The juvenile court held hearing on the petition on November 10, 1999, and filed its termination order six days later, ordering the termination of Lisa and Darrell's parental rights pursuant to Iowa Code sections 232.116(1)(f) and (g). Only Lisa appeals. She continues to reside with Darrell. For convenience and clarity we address her claims in a somewhat different order than presented.

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). 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. *Id.* 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 care that parent is capable of providing. *Id.*

Lisa first contends the State did not offer reasonable services prior to the termination of her parental rights. Generally, 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, when, as in this case, the juvenile court finds by clear and convincing evidence any one or more "aggravated circumstances" specified in Iowa Code section 232.102(12), the court may order the requirement of "reasonable efforts" be waived. Iowa Code § 232.102(12) (1999). On appeal, Lisa contends "Iowa Code section 232.102(12) not only contradicts years of Iowa case law, but also is unconstitutional."

Lisa has not preserved error on the constitutionality of Iowa Code section 232.102(12) (1999). As was stated in *Long v. Long*, 255 N.W.2d 140 (Iowa 1977):

> Ordinarily, issues not raised in the trial court, including constitutional questions, cannot be effectively asserted the first time on appeal. Furthermore the constitutionality of a statute may not be considered as a basis for reversal where the question was not raised in the lower court. (Citation). Since plaintiff's contention in this respect was not urged in the trial court it presents nothing for review in this court.

Long v. Long, 255 N.W.2d 140, 144 (Iowa 1977) (quoting *Wolfs v. Challacombe*, 218 N.W.2d 564, 570 (Iowa 1974).

We also note we lack subject matter jurisdiction to decide the issue, a matter this court may raise on its own motion. *Uchtorff v. Dahlin*, 363 N.W.2d 264, 267 (Iowa 1985). The juvenile court ordered the requirement of reasonable efforts be waived, pursuant to Iowa Code section 232.102(12) (1999), in the CINA dispositional order of May 5, 1999. A CINA dispositional order is an appealable final order. *In re A.W.*, 464 N.W.2d 475, 477 (Iowa App. 1990) (citing *In re Long*, 313 N.W.2d 473, 477 (Iowa 1981). The issues decided therein were not appealed within thirty days. *See* Iowa R. App. P. 5. We therefore are without subject-matter jurisdiction in this appeal of the termination of Lisa's parental rights to consider those issues decided by the final unappealed CINA dispositional order. Iowa R. App. P. 5; *Greene v. Iowa Dist. Ct.*, 312 N.W.2d 915, 919 (Iowa 1981) (holding an untimely filed appeal deprives appellate court of subject matter jurisdiction).

For the reasons noted above, Lisa has also not preserved her claim the State did not provide reasonable services prior to termination of her parental rights. *See In re H.L.B.R.*, 567 N.W.2d 675, 679 (Iowa App. 1997) ("There is a requirement that reasonable services be offered to preserve the family unit."). The State's obligation to make reasonable efforts toward reunification in this case ended with the unappealed CINA dispositional order. We further note that the State did provide Lisa with visitation, but it was exercised sporadically. In any event, the order waiving reasonable efforts to reunite the family was correct. Lisa was provided with a "myriad of services" prior to the termination of her parental rights to Alecia, but was unable to respond to them. Elizabeth was born within three weeks of the order terminating Lisa's parental rights to Alecia. The court

correctly found additional services, offered such a short period of time after a previous termination, would not correct the situation.

Lisa next argues the State did not prove by clear and convincing evidence all of the elements of each subsection of 232.116(1) relied on by the court in terminating her parental rights. Specifically, Lisa contends subsections 232.116(1)(f)(3), (f)(4), and (g)(3) of the Iowa Code were not proven because the DHS "had not arranged the necessary services to cure the alleged defects in [Lisa's] parenting" skills prior to the termination hearing. The district court in the CINA dispositional order found clear and convincing evidence the offer or receipt of additional services would not be likely within a reasonable period of time to correct the conditions which led to Elizabeth's removal. We agree, and have also agreed with the district court's determination "reasonable efforts" should be waived. As noted above, these determinations are no longer appealable. Therefore, Lisa's argument as to why the specified subsections of 232.116(1)(f) and (g) were not proven must fail.

Her claim must fail on the merits as well. Iowa Code § 232.116(1)(f) does not require the state provide any services, but instead only requires the juvenile court find by clear and convincing evidence the "parent continues to lack the ability . . . to respond to services" and "an additional period of rehabilitation would not correct the situation." Iowa Code §§ 232.116(1)(f)(3) and (4). We find ample support for the juvenile court's finding the requirements of section 232.116(1)(f) were proved by clear and convincing evidence. All the social workers and mental health professionals who worked with Lisa agree she does not have the parenting skills necessary to care for a child. Lisa is in denial of her mental

illness, claiming it has been cured by God. When parenting her second child, Alecia, Lisa felt she was a good and capable parent and had no areas of concern. She and Darrell claimed to know exactly what the baby was thinking and feeling. They did not answer the baby's cries when they did not believe she should be hungry or need to be changed. The State then went out of its way to help Lisa and Darrell learn parenting skills, but because of their mental limitations the services were unsuccessful. A psychosocial evaluation conducted in March 1999 documents that the assessments made during proceedings to terminate Lisa's parental rights to Alecia remained true, and therefore there was no reasonable probability Lisa would be able to handle the responsibilities of raising Elizabeth.

Mental disability, standing alone, is not a sufficient reason for the termination of the parent-child relationship. *In re K.F.*, 437 N.W.2d 559, 560 (Iowa 1989); *In re T.T.*, 541 N.W.2d 552, 556 (Iowa App. 1995). Nevertheless, it is a proper factor to consider and, when it contributes to a person's inability to parent, may be determinative on the issue of whether termination is required in the child's best interest. *In re K.F.*, 437 N.W.2d at 560; *In re T.T.*, 541 N.W.2d at 556. We believe a previous statement by our supreme court has particular applicability here:

> What is of controlling importance is her total inability to mother the children. It seems inescapable to us that the mother has no realistic chance to become adequately equipped to care for these children during the years remaining in their childhood. Her mental illness, though cruelly unfair from her point of view, continues a threat to those around her.

In re A.C., 415 N.W.2d 609, 614 (Iowa 1987). The juvenile court did not err in determining the section 232.116(1)(f) grounds for terminating her parental rights had been proved.

When the juvenile court terminates parental rights on more than one statutory ground, 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). Having found termination appropriate under section 232.116(1)(f), we need not reach Lisa's argument the juvenile court erred in terminating her parental rights pursuant to Iowa Code section 232.116(1)(g).

Lisa vaguely argues termination is not in Elizabeth's best interest because 1) Lisa "had significant and meaningful contact with [Elizabeth] and was clearly bonded to her," and 2) Elizabeth will be placed for adoption.

Once the court concludes that all of the criteria for termination of parental rights have been satisfied, the court must still make a determination as to whether termination would be in the child's best interest. *See* Iowa Code §§ 232.116(2), (3) (1999); *In re T.R.*, 483 N.W.2d 334, 337 (Iowa App. 1992). Lisa does not direct our attention to any evidence supporting her claim she and Elizabeth were "clearly bonded." Elizabeth has never been under Lisa's unsupervised control. Our review of the record indicates visitation was exercised by Lisa only sporadically. There simply has been no opportunity for mother and daughter to bond.

We find termination of Lisa's parental rights is in Elizabeth's best interest. To continue to keep Elizabeth in temporary or long-term foster care is not in her best interest, especially, as in this case, when she is adoptable. *In re T.T.*, 541

N.W.2d at 557. Children should not suffer the "endless limbo" of foster care. *Id.* The court must be cognizant of the "relentless passage of time" for children waiting in foster care for parents to gain sufficient skills. *Id.*

AFFIRMED.