

IN THE COURT OF APPEALS OF IOWA

No. 2-1133 / 12-1095
Filed January 9, 2013

**IN THE INTEREST OF M.M.L.L.-W. and
T.K.L.P.-W.,
Minor Children,**

**M.W., Mother,
Appellant,**

**N.R.P., Father of T.K.L.P.-W.,
Appellant.**

Appeal from the Iowa District Court for Pottawattamie County, Gary K. Anderson, District Associate Judge.

The mother of two children and the father of T.K.L.P.-W. each appeal from the termination of their parental rights. **AFFIRMED ON BOTH APPEALS.**

Te'ya T. O'Bannon, Council Bluffs, for appellant-mother.

Roberta J. Megel, State Public Defender Office, Council Bluffs, for appellant-father of T.K.L.P.-W.

Brian Rhoten, Council Bluffs, for father of M.M.L.L.-W.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, and Eric Strovers, County Attorney, for appellee-State.

Phil Caniglia, Council Bluffs, attorney and guardian ad litem for minor children.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

The mother of two children and the father of T.K.L.P.-W. appeal from the termination of their parental rights. We affirm on both appeals because statutory grounds for termination exist, termination will allow the children permanency and stability, and no factor precludes termination.

I. Background Facts and Proceedings.

Marie is the mother of two children, M.M.L.L.-W., born in August 2009, and T.K.L.P.-W., born in February 2008. Nicholas is the father of T.K.L.P.-W. He has been in prison since February 2011 as a result of major probation violations while at a residential correctional facility (RCF). He has not seen or communicated with T.K.L.P.-W. since going to prison.

Marie and her children began voluntarily participating in services with the Department of Human Services (DHS) in June 2010 due to positive drug screens given by Marie and the father of M.M.L.L.-W.¹ during a child protective assessment. Anne Matthai, DHS social work case manager for family, worked with Marie and Nicholas beginning in June 2010. Those services were designed to assist Marie with maintaining her sobriety, improving her parenting skills, and obtaining housing. At the time, Nicholas was residing in either a RCF or a county jail. Nicholas was aware of the child's involvement with services and he worked with Boys Town family consultant Lacy Dube from August 2010 to January 2011. He was also able to exercise some visitation with T.K.L.P.-W., supervised by Nicholas's grandparents.

¹ The father of M.M.L.L.-W. is not involved in this appeal, though his parental rights were also terminated.

The children were removed from their mother's care in May 2011 due to Marie's continued methamphetamine usage, as well as drug use and allegations of physical and sexual abuse by M.M.L.L.-W.'s father. The children both tested positive with "extremely high levels of methamphetamine in their hair follicles," which led to Marie and M.M.L.L.-W.'s father being charged with two counts of felony child endangerment. Marie received a deferred judgment and probation on those charges. However, her probation was later revoked and she was sent to a RCF.

The children were adjudicated children in need of assistance (CINA) on May 25, 2011. A petition for termination of parental rights was filed on February 24, 2012. At the time the petition was filed, Marie was in a RCF.

By the time of the termination hearing on May 23, 2012, Marie was in jail having tested positive for THC (a marijuana metabolite) eight days earlier. She acknowledged she had failed to appear for drug testing in September through November 2011 because she was using methamphetamine, and that only during her incarceration had she maintained sobriety. Social work case manager Anne Matthai testified Marie had a pattern that

when Marie is under guidance or supervision of a—of the district court or a force that is more powerful than DHS, she tends to comply with the—what she's supposed to do, but once [she] is released, she resorts back to her normal—or her usual behaviors of drug use and make herself unavailable.

Marie was twenty-one years old at the time of the hearing and stated she started using methamphetamine at age seventeen. She testified she was completing drug treatment, had a job, had located an apartment, and would be

released from the RCF in about a month if permitted to return to the facility after her incarceration in the county jail. Marie testified she had not smoked marijuana and did not know why she tested positive for THC. She also stated that if the children could not be with her, the best place for them was with her sister Barb.

Nicholas was in prison at the time of the termination hearing. He testified he had not been aware of the termination proceedings and wished to be given an opportunity to parent after he was to be released in September 2012. He stated he did talk with his grandmother, who told him about her visits with T.K.L.P.-W. and had given him pictures. He stated he did not make sufficient money in prison to call or mail letters or provide support to his child.

Both children have remained in the care of Marie's sister, Barb, since May 2011 and are doing well in that placement. Barb is ready and willing to adopt them.

The juvenile court terminated Marie's parental rights pursuant to Iowa Code section 232.116(1)(b) (abandonment), (d) (court has previously adjudicated the child a CINA and parent offered services, but circumstance continues despite services), (e) (parent has not maintained significant and meaningful contact with the child), (h) (child three or younger who has been adjudicated CINA has been out of parent's custody for last six consecutive months and cannot be returned at present),² (i) (child was in imminent danger and services would not correct conditions), and (j) (parent has a severe, chronic substance abuse problem and

² We note that 232.116(1)(h) cannot support termination of rights with respect to T.K.L.P.-W. because she was no longer three years old at the time of the termination hearing.

prognosis indicates the child will not be able to return to parent in a reasonable period of time) (2011).

The court terminated Nicholas's parental rights to T.K.L.P.-W. pursuant to section 232.116(1)(b), (d), (e), (h), and (i). Both parents appeal the termination of parental rights.

II. Scope and Standard of Review.

We conduct a de novo review of termination of parental rights proceedings. *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011). Although we are not bound by the juvenile court's findings of fact, we do give them weight, especially in assessing the credibility of witnesses. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). An order terminating parental rights will be upheld if there is clear and convincing evidence of grounds for termination under section 232.116. *Id.* Evidence is considered "clear and convincing" when there are no "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *Id.*

III. Analysis.

Iowa Code chapter 232 termination of parental rights follows a three-step analysis. *In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010). The court must initially determine whether a ground for termination under section 232.116(1) is established. *Id.* If a ground for termination is established, the court must next apply the best-interest framework set out in section 232.116(2) to decide if the grounds for termination should result in a termination of parental rights. *Id.* If the statutory best-interest framework supports termination of parental rights, the

court must finally consider if any statutory exceptions or factors set out in section 232.116(3) weigh against termination of parental rights. *Id.*

When the juvenile court terminates parental rights on more than one statutory ground, we may affirm the juvenile court's order on any ground we find supported by the record. *D.W.*, 791 N.W.2d at 707.

Mother's appeal. The mother claims there is not clear and convincing evidence to support termination under any of the statutory grounds. She notes she is "currently addressing concerns regarding her drug abuse in a drug treatment program that she was due to finish in a few weeks" and she has provided negative drug screens. However, the mother never complied with the juvenile court order to undergo substance abuse treatment until the district court ordered her to reside in the RCF where she began treatment.

The mother's efforts are too little, too late. See *In re C.B.*, 611 N.W.2d 489, 495 (Iowa 2000) (stating parent's efforts "in the two or three months before termination hearing, in light of preceding eighteen months, are insufficient"). During January 2011 to May 2011, Marie seemingly disappeared and had no contact with DHS. In November 2011, a DHS worker met with Marie, who appeared very thin and had sores on her face, and Marie acknowledged that she needed help for her drug abuse but refused either hospitalization or inpatient treatment. The mother has only been able to provide negative drug screens while incarcerated except during very brief periods of sobriety.

Despite services being provided since June 2010, the circumstances that led to these children being adjudicated CINA remain. Marie has not yet

completed substance abuse treatment and remained incarcerated at the time of the hearing. Marie tested positive for marijuana just eight days prior to the hearing while residing in the RCF resulting in her incarceration at the county jail. Upon our de novo review, we find clear and convincing evidence to support termination of the mother's parental rights pursuant to Iowa Code section 232.116(1)(d) and (l).³

Marie also argues that even if grounds for termination are shown, termination is not in the children's best interest as defined in section 232.116(2), and termination of her parental rights need not occur due to the fact that a relative has custody of the children, see Iowa Code § 232.116(3)(a), and due to the closeness of the parent-child bonds. See *id.* § 232.116(3)(c).

³ Section 232.116(1) allows the juvenile court to terminate parental rights:

d. The court finds that both of the following have occurred:

(1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.

(2) Subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

.....

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

(1) The child has been adjudicated a child in need of assistance pursuant to section 232.96 and custody has been transferred from the child's parents for placement pursuant to section 232.102.

(2) The parent has a severe, chronic substance abuse problem, and presents a danger to self or others as evidenced by prior acts.

(3) There is clear and convincing evidence that the parent's prognosis indicates that the child will not be able to be returned to the custody of the parent within a reasonable period of time considering the child's age and need for a permanent home.

We have thoroughly reviewed the record before us and, “giv[ing] primary consideration to the child[ren]’s safety, to the best placement for furthering the long-term nurturing and growth of the child[ren], and to the physical, mental, and emotional condition and needs of the child[ren],” *see id.* § 232.116(2), we conclude that termination of the mother’s parental rights is in the children’s best interests as it will provide them the stability and permanence they deserve.

Though we acknowledge that there is testimony the children know Marie and care for her, there is also evidence they are bonded with their aunt, who has provided them with consistent care for more than a year and who is ready and willing to adopt them. These two children should not have to wait any longer for their mother to become a responsible parent. *See In re D.W.*, 385 N.W.2d 570, 578 (Iowa 1986) (“[W]e cannot gamble with the children’s future. They must not be made to await their mother’s maturity.” (citation omitted)). We affirm the termination of the mother’s parental rights.

Father’s appeal. Nicholas claims the State has not made reasonable efforts at reunifying T.K.L.P.-W. with him. He contends he was not aware of the termination proceedings despite his attorney having sent him letters and reports concerning the termination, and despite remaining in contact with his grandmother, who received monthly visits with T.K.L.P.-W. We do not find these claims persuasive. Nicholas has been aware of T.K.L.P.-W.’s involvement with services since 2010 and was involved with a worker until he was imprisoned. He was represented by counsel, and court reports after each CINA hearing, with a letter attached, were sent to Nicholas by DHS social work case manager Anne

Matthai. Nicholas's attorney sent him all documents concerning the juvenile court proceedings. He has not contacted DHS or his child for more than a year. Our supreme court has noted that parents are required to respond to services actively and promptly, "as well as to voice any problems with services so changes or corrections in the case plan can be made." *C.B.*, 611 N.W.2d at 495. "A parent cannot wait until the eve of termination, after the statutory time periods for reunification have expired, to begin to express an interest in parenting." *Id.*; *cf. In re S.J.*, 620 N.W.2d 522 (Iowa Ct. App. 2000) (noting incarcerated father took steps to better himself and asked for visitation).

We find clear and convincing evidence to support termination of Nicholas's parental rights to T.K.L.P.-W. pursuant to Iowa Code section 232.116(1)(b) because "the child has been abandoned or deserted" as defined in the Code. Iowa Code section 232.2(1) defines "abandonment of a child" as

the relinquishment or surrender, without reference to any particular person, of the parental rights, duties, or privileges inherent in the parent-child relationship. Proof of abandonment must include both the intention to abandon and the acts by which the intention is evidenced. The term does not require that the relinquishment or surrender be over any particular period of time.

In *In re D.M.*, 516 N.W.2d 888, 891 (Iowa 1994), our supreme court stated:

We have characterized abandonment as "a giving up of parental rights and responsibilities accompanied by an intent to forego them." Two elements are involved in this characterization. First, the giving up of parental rights and responsibilities refers to conduct. Second, the intent element refers to the accompanying state of mind.

In addition, "parental responsibilities include more than subjectively maintaining an interest in a child. The concept requires affirmative parenting to the extent it is practical and feasible in the circumstances."

(Citations omitted.)

Nicholas complains he was not able to parent from prison. This circumstance was of his own making. His imprisonment was the result of a lifestyle he chose over the relationship with his child. See *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993). Moreover, Nicholas has made no effort to parent even to the extent practical and feasible under the circumstances. At the time of the termination hearing Nicholas had not seen his child for more than sixteen months. He had not written a letter or telephoned his child. He has failed to support her financially in even a limited manner. Parenting requires more than subjectively maintaining an interest in one's child. See *D.M.*, 516 N.W.2d at 891. We affirm the termination of his parental rights.

AFFIRMED ON BOTH APPEALS.