IN THE COURT OF APPEALS OF IOWA

No. 3-1027 / 13-1335
Filed November 20, 2013

IN THE INTEREST OF A.A. and B.A.,
Minor Children,

A.A., Father,
Appellant,

D.K., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge.

A mother and father separately appeal the termination of their parental rights to their children. **AFFIRMED.**

Nicholas A. Bailey of Bailey Law Firm, P.L.L.C., Mitchellville, for appellant-father.

Justin T. Rogers of Rogers Law Firm, P.L.L.C., Des Moines, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appellee.

Michelle Saveraid of Youth Law Center, Des Moines, attorney and guardian ad litem for minor children.

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

DANILSON, J.

A mother and father separately appeal the termination of parental rights to their children. Both parents claim the State failed to prove by a preponderance of the evidence that the children could not be returned to their care at the time of the termination hearing. *See* Iowa Code § 232.116(1)(f)(4) (2013). Because the father had not seen the children for almost eight months prior to the termination hearing, and the mother had several unresolved issues precluding the children's return, we affirm.

I. Background Facts and Proceedings.

Before the initiation of this termination action, the father appealed from a permanency order placing guardianship of the parties' two minor children with the maternal grandmother and limiting his visitation rights. We adopt our previous recitation of the facts:

> The father and mother have two children together—A.A. (born August 1999) and B.A. (born July 2008). The father and mother have an unstable relationship and a significant history of substance abuse. In particular, the father has a longstanding history of abusing crack cocaine. Shortly after A.A.'s birth, the father served over eight years in prison for a robbery he committed after a five-day cocaine binge. The father's substantial criminal history did not end upon his release from prison. After his release, the father was convicted of theft on three separate occasions from 2010 through 2011.
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> This case first came to the State's attention in July 2011 when the [Iowa] Department of Human Services (DHS) investigated reports that the father and mother were abusing crack cocaine in front of the children. The mother admitted to using crack cocaine and marijuana and provided a positive drug screen. The father delayed providing a drug screen and tested negative for the presence of any drugs. The parents consented to removal. A.A. was placed with the maternal grandmother and B.A. was placed with the paternal aunt.

In August 2011, the juvenile court held an uncontested removal hearing and confirmed removal. The same month, the juvenile court held an uncontested adjudication hearing and adjudicated both children as children in need of assistance (CINA). In October 2011, the juvenile court held a dispositional hearing, confirmed the children as children in need of assistance, and ordered the parents to engage in services to work toward reunification and sobriety.

In January 2012, the paternal aunt informed the court she was no longer able to care for B.A. B.A. was then placed with the maternal grandmother where the child remained for the rest of the proceedings.

In April 2012, the juvenile court held a review hearing. The juvenile court found the parents were not cooperating with drug screens or treatment. From November 2011 through April 2012, the parents did not submit to drug testing with DHS. During that time there were significant problems with supervised visitation, including the parents frequently arriving late and leaving early. During that same time frame, the father did submit to drug testing through Living Recovery. Living Recovery offers recovery support services and substance abuse treatment. An analysis of the father's urine tested positive for cocaine on February 14, March 20, March 27, and April 3, 2012. In April 2012, the father's hair stat test results were positive for the presence of cocaine.

In May 2012, service providers reported that they believed the father may have been injecting cocaine in the parking lot prior to a visit. The father arrived at the visit with bandage wrapped around his inner arm. He then requested a first-aid kit to stop the bleeding from a needle mark and provided inconsistent stories about the injury. The service providers reported a difference in the father's behavior throughout this visit. On May 2, May 14, and May 31, 2012, the father's sweat patch indicated high levels of cocaine metabolites consistent with recent use. During the same time, the father provided urine samples to Living Recovery that tested negative for cocaine. DHS reported that drug testing at Living Recovery is generally scheduled in advance, allows for a person to provide an unsupervised urine sample, does not test for urine temperature, and does not send the urine specimen to the lab for further testing. Although the father reported relapsing throughout this case, including significant drug use during a trip to Las Vegas, he denied any drug use after March 2012.[1]

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[1] The juvenile court questioned the reliability of the positive sweat patch results, and did not rely on the results in making its subsequent decision.

> In June 2012, the State petitioned to terminate parental rights. In July 2012, the father's sweat patch again tested positive for cocaine.
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> In August 2012, the juvenile court held a joint permanency hearing and termination of parental rights proceeding. At that time the father was living at the local YMCA. Although he had been unemployed throughout much of this case, the father had recently secured employment washing dishes at a restaurant. He had not secured future housing and admitted he needed a higher level of drug treatment than he was receiving. The father requested custody of both children and believed it was in the children's best interest to return to his care. At the conclusion of the first day of testimony, the court continued the matter until October 2012. Then, due to a scheduling conflict, the court ordered another continuance until November 2012. Following the conclusion of the joint permanency hearing and termination of parental rights proceeding, the juvenile court found clear and convincing evidence of statutory grounds for termination under Iowa Code section 232.116(1)(f) and (h) (2011). But the juvenile court did not terminate parental rights. Rather, the juvenile court granted guardianship to the children's maternal grandmother, changed the permanency goal to reunifying B.A. with the mother, extended the termination proceedings to allow the mother to work toward reunification, and allowed the father to have visitation at the grandmother's discretion. The mother did not appeal the juvenile court's decision.

In re A.A. and B.A., No13-0028, 2013 WL 1225078, at *1–2 (Iowa Ct. App. March 27, 2013). We affirmed the juvenile court. *Id*. at *3.

As stated in the facts above, following the first termination hearing in November 2012, the court issued a ruling on the termination petition and permanency plan. In it, the juvenile court also stated that "further reasonable efforts [toward unification] do not need to be provided to the [f]ather," because his "inability and unwillingness to fully cooperate with services" and "his admitted inability to be a custodial option . . . despite the CINA cases being open for more than a year" made it "very clear" he could not provide permanency for the

children. Following the ruling, the father did not have any visits with either child. He only had contact with DHS one time**.**

Regarding the mother, following the court's ruling, which changed the permanency goal to reunify, the mother failed to follow through with the requirements imposed by the court. She did not consistently attend visits, lost the apartment she was living in at the time of the November hearing, did not submit to a hair stat test, and provided only one urine sample for analysis,[2] which came back positive for cocaine. Although she reported to DHS she had obtained a job, she was unable to provide the name of her employer.

In August 2013, the court terminated both parent's parental rights to both children pursuant to Iowa Code sections 232.116(1)(d) and (f). Both mother and father appeal.

II. Standard of Review.

Our review of termination decisions is de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). We give weight to the juvenile court's findings, especially assessing witness credibility, although we are not bound by them. *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 "clear and convincing" when there are no "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *Id*.

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[2] The sample for urine analysis was provided by the mother on January 16, 2013.

III. Discussion.

Iowa Code chapter 232 termination of parental rights follows a three-step analysis. *P.L.*, 778 N.W.2d at 39. The court must first determine whether a ground for termination under section 232.116(1) has been established. *Id*. If a ground for termination has been established, the court must apply the best-interest framework set out in section 232.116(2) to decide if the grounds for termination should result in termination of parental rights. *Id.* Finally, if the statutory best-interest framework supports termination of parental rights, the court must consider if any of the statutory exceptions set out in section 232.116(3) weigh against the termination of parental rights. *Id*.

A. Grounds for Termination.

When the juvenile court terminates parental rights on more than one statutory ground, we may affirm the order on any ground we find supported by the record. *D.W.*, 791 N.W.2d at 707. Iowa Code section 232.116(1)(f) provides that termination may be ordered when there is clear and convincing evidence the children are four years of age or older, have each been adjudicated a child in need of assistance, have been removed from the physical custody of the parents for at least twelve of the last eighteen months, and cannot be returned to the parents' custody at the time of the termination hearing.

In this case, each parent claims there was not clear and convincing evidence that their parental rights should be terminated under section 232.116(1)(f). They do not dispute that the children, at the time of the termination hearing, were four years of age or older, had each been adjudicated

a child in need of assistance, or had been removed from their custody for at least twelve of the last eighteen months. They dispute the court's determination that the children could not be returned to their care at the time of the hearing. *See* Iowa Code § 232.116(1)(f)(4).

Regarding the father, we note, as did the juvenile court in its termination order, he admitted at the August 2013 termination hearing that he was not able to assume physical custody of the children. He had not seen the children since his last visit in December 2012. We agree with the court that there is clear and convincing evidence A.A. and B.A. could not be returned to their father's custody at the time of the termination hearing.

Regarding the mother, we also find there is clear and convincing evidence the children could not be returned to her care at the time of the termination hearing. In December 2012, the court provided the mother with "a limited time opportunity" to show the court she had met "certain expectations and behavioral changes." The court outlined several objectives for the mother to complete in order be reunified with B.A.[3] The mother was to: (1) complete a mental health evaluation and comply with any therapeutic recommendations, (2) provide one hair stat and two random urine samples for analysis, (3) have at least six hours of visits with B.A. at her apartment each week before progressing to semi-supervised and unsupervised visits, (4) participate in and complete a parenting

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[3] A.A. was thirteen at the time of the November 2012 termination hearing and had already expressed to the court that she wanted to continue to live with her maternal grandmother as her guardian. The court's ruling following the hearing indicated the intent for the maternal grandmother to have guardianship over A.A. without terminating the mother's parental rights.

class, and (5) maintain independent housing. The mother did complete a mental health evaluation but there was no evidence she had complied with any of the recommendations. She failed to attend six hours of visits with B.A. each week and so had not progressed to even semi-supervised visits. She never provided a hair stat and provided only one urine sample, in January 2013, which ultimately tested positive for cocaine. There was also no proof she ever completed a parenting class although there was evidence presented that she had attended some of the required sessions. Finally, she lost the apartment she was living in at the time of the November hearing and was now residing with her grandmother.

There is clear and convincing evidence that A.A. and B.A. cannot be returned to their parents' custody at this time and the grounds for termination, pursuant to section 232.116(1)(f), have been met.

B. Best Interest of the Child.

Even if a statutory ground for termination is met, a decision to terminate must still be in the best interests of a child after a review of section 232.116(2). *P.L.*, 778 N.W.2d at 37. In determining the best interests of the child, we give primary consideration to "the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional conditions and needs of the child." *See* Iowa Code § 232.116(2).

We agree with the district court's finding that termination of the parents' parental rights would best provide for the children's long-term nurturing and growth. The court reached this conclusion, reasoning:

> For the better part of [A.A.'s] life, and at least the past eighteen months of [B.A.'s] life, their Grandmother has provided for

> these children's physical, mental, and emotional needs. For the last two years the children have seen their parents only at supervised visits which have gradually decreased in frequency over time. [A.A.] considers her Grandmother to be the best possible caretaker and actively wishes to remain with her and for the court process to end.
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> The Grandmother is willing to adopt these children and to provide them with [the] care and stability which she has offered for least the past two years and which the parents have never been able to offer throughout that time and cannot offer today. . . . These children have waited two years, twice as long as required by Iowa law, for such a parent and still the most either of their parents can do is ask them to wait longer. . . . These children's best interests are best served by knowing that they will remain in a home that can provide for their needs permanently rather than waiting to see if parents might some day be able to do so.

The legislature has determined the interval for which patience may last; "this period must be reasonably limited because patience . . . can quickly translate into intolerable hardship for children." *In re R.J.*, 436 N.W.2d 630, 636 (Iowa 1989).

We agree with the district court that it is in the children's best interest to terminate both the mother and father's parental rights.

C. Exceptions or Factors against Termination.

Finally, we consider whether any exception or factor in section 232.116(3) weighs against termination of parental rights. *P.L.*, 778 N.W.2d at 39. The factors weighing against termination in section 232.116(3) are permissive, not mandatory. *See In re D.S.*, 816 N.W.2d 458, 474–75 (Iowa Ct. App. 2011). The court has discretion, based on the unique circumstances of each case and the best interests of the child, whether to apply the facts in the section to save the parent-child relationship. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993).

Both parents contend termination of their parental nights is not necessary because a relative, the maternal grandmother, has legal custody of the children. *See* Iowa Code § 232.116(3)(a). As the district court did, we decline to apply this exception. In the spring of 2012, the grandmother refused to continue supervising visits because she felt she was being put between the parents and the children. It is clear the grandmother feels uncomfortable in this position. Furthermore, the mother filed a motion to have B.A. placed with an aunt rather than this grandmother after the grandmother refused to allow her unauthorized visits. Application of this exception would likely create further instability in the children's lives and would do them more harm than good.

The father also contends termination of his parental rights is not necessary due to the closeness of the parent-child relationship. *See* Iowa Code § 232.116(3)(c). Neither child had had contact with their father after December 2012 through the August 2013 termination hearing, and, as the district court stated, "There is no evidence that they would benefit from re-establishing contact now."[4]

We conclude no exception or factor in section 232.116(3) applies to make termination unnecessary.

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[4] The State maintains this issue was not preserved for appeal. It is unclear whether the issue was raised by the father at the termination hearing, however, the juvenile court did not address it in the termination order. *See State v. McCright,* 569 N.W.2d 605, 607 (Iowa 1997) ("Generally, we will only review an issue raised on appeal if it was first presented to and ruled on by the district court."). Thus, the issue was not preserved.

IV. Conclusion.

There is clear and convincing evidence that grounds for termination exist under section 232.116(1)(f), termination of both parents' parental rights is in the children's best interests pursuant to section 232.116(2), and no consequential factor weighing against termination in section 232.116(3) requires a different conclusion. Accordingly, we affirm termination of both parents' parental rights.

AFFIRMED.