

IN THE COURT OF APPEALS OF IOWA

No. 3-1160 / 13-1642
Filed December 18, 2013

**IN THE INTEREST OF G.N., S.N., and B.B.,
Minor Children,**

R.N., Father,
Appellant,

H.B., Mother,
Appellant.

Appeal from the Iowa District Court for Muscatine County, Gary D. Strausser, District Associate Judge.

A mother and father separately appeal the order terminating their parental rights. **AFFIRMED.**

Gregory A. Johnston, Muscatine, for appellant-father.

Esther J. Dean, Muscatine, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Alan Ostergren, County Attorney, and Kevin McKeever and Korie L. Shippee, Assistant County Attorneys, for appellee.

Timothy K. Wink of Schweitzer & Wink Law Firm, Columbus Junction, attorney and guardian ad litem for minor children.

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

DANILSON, C.J.

The mother of B.B.,¹ G.N., and S.N. appeals from the termination of her parental rights. The father of G.N. and S.N. separately appeals the termination of his parental rights. Upon our de novo review, because we find clear and convincing evidence supports the termination of both parents' parental rights and that termination is in the children's best interests, we affirm.

I. Background Facts and Proceedings.

B.B. was born April 9, 2007, G.N. was born, June 3, 2009; and S.N. was born August 10, 2010.

G.N. and S.N.'s father was incarcerated from September 2011, following a violation of his parole, until his release in May 2013. This was his fourth time being imprisoned.² He was offered visitation with his children by the department of corrections, but he did not see them during his incarceration. His only contact with the children was cards he sent periodically. The father did have one visit with his children following his release from prison, after the termination proceedings had begun, but the children did not recognize him. The father did not contribute to the children financially while he was in prison.

The mother has been provided services by the Iowa Department of Human Services (DHS) intermittently since January 2007. Services were provided from September 2010 until June 2011 after S.N. tested positive for THC

¹ The parental rights of B.B.'s father were also terminated. He does not appeal.

² At the time of his most recent imprisonment, the father was on parole for delivery of methamphetamine. According to the district court order terminating his parental rights, the violation of parole in question was, at least in part, due to his arrest for operating while intoxicated.

at birth. All three children were removed from the mother's care on March 13, 2012. The children were removed due to the mother's ongoing mental health issues that made her unable to parent the children independently. She had been hospitalized in early March 2012 due to anxiety and depression. The mother left the children with their maternal grandmother who was suffering from Alzheimer's and was unable to care for the children.

The children were adjudicated in need of assistance pursuant to Iowa Code sections 232.2(6)(c)(2) and (n) (2011) on May 7, 2012. The court ordered the mother to complete a psychological evaluation and comply with all recommendations regarding her mental health. The court also ordered her to complete a substance abuse evaluation and comply with recommended treatment, as well as comply with requests from DHS for random drug testing.

At an uncontested review hearing on August 2, 2012, the mother reported she had relapsed by using marijuana. Although the mother had received a large lump sum for back benefits from social security disability, she did not use the funds to obtain housing. Also, although she had been attending all of her visits, she was not attending all of the parenting sessions.

The State filed a petition to terminate the mother's parental rights regarding all three children on December 13, 2012. The hearing began on the petition on February 7, 2013, but took several days and was not completed until May 30, 2013. The court entered separate orders on October 2, 2013, terminating the parental rights of the mother and father. The mother's parental rights were terminated pursuant to section 232.116(1)(k) and (l) regarding all

three children and also pursuant to section 232.116(1)(h) for G.N. and S.N. The father's parental rights were terminated pursuant to section 232.116(1)(e). Both parents separately 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.*

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. Father's Appeal.

1. Grounds for Termination.

Iowa Code section 232.116(1)(e) provides that termination may be ordered when there is clear and convincing evidence the children have been adjudicated a child in need of assistance, have been removed from the physical custody of the parent for a period of at least six consecutive months, and “the parents have not maintained significant and meaningful contact with the child[ren] during the previous six consecutive months and have made no reasonable efforts to resume care of the child[ren] despite being given the opportunity to do so.”

The father argues he has made an effort to resume care of his children, thus meeting the affirmative duty imposed by Iowa Code section 232.116(1)(e). We acknowledge the father did request a continuance for additional time to establish a home for the children and took some parenting classes while incarcerated. He also sent some cards to the children on their birthdays and holidays. However, the father went the entire time of his incarceration without seeing his children due to his inability to arrange transportation of the children. Unfortunately, at his first visit after his release, his children did not recognize him. The father did not offer any evidence at the proceedings he had provided financial support for his children while he was incarcerated, and the juvenile court determined it could “reasonably infer” he had not done so. In light of the father’s lifestyle leading to incarceration, we cannot say the father maintained “significant and meaningful” contact with his children. See Iowa Code § 232.116(1)(e)(3)

("[S]ignificant and meaningful contact' includes but is not limited to the affirmative assumption by the parents of the duties encompassed by the role of being a parent. This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parents establish and maintain a place of importance in the child's life.") Furthermore, the father cannot use his incarceration as an excuse for his lack of relationship with his children. See *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993) (The father "cannot use his incarceration as a justification for his lack of relationship with the child[ren]. This is especially true when the incarceration results from a lifestyle that is chosen in preference to, and at the expense of, a relationship with [the children].").

The father also argues DHS did not make reasonable efforts to reunite him with his children. The State contends this error was not preserved as the father did not raise this argument until the termination proceedings. We agree and decline to decide the merits of the argument.³ See *In re C.H.*, 652 N.W.2d 144, 147–48 (Iowa 2002) ("Even if [the father] asked for alternative treatment, he did not make his request in an appropriate proceeding or at the appropriate time.

³ We acknowledge the father also requested an extension of six months to allow some additional time to be in a position to assume custody of G.N. and S.N. However, this issue was not identified as an issue on appeal in the father's petition. Rather, it appears to be part of the father's argument that the State did not make reasonable efforts to reunite the children with their father. The request for a six month extension was denied by the juvenile court. We agree with the reasons stated by the juvenile court in denying the extension. The father's lifestyle and imprisonment clearly handicapped his ability to take timely steps to be a father to his two children. Our supreme court has stated, "[t]he 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 609, 613 (Iowa 1987).

In general, if a parent fails to request other services at the proper time, the parent waives the issue and may not later challenge it at the termination proceeding. . . . If a parent has a complaint regarding services, the parent must make such challenge at the removal, when the case permanency plan is entered, or at later review hearings. Moreover, voicing complaints regarding the adequacy of services to a social worker is not sufficient. A parent must inform the juvenile court of such challenge.” (citations omitted); *see also In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa Ct. App. 1994) (“While the State had the obligation to make the efforts, the parents have a responsibility to demand services prior to the termination hearing.”).

There is clear and convincing evidence the father did not maintain “significant and meaningful contact” with the children. Thus, the grounds for termination pursuant to section 232.116(1)(e) have been met.

2. Best Interests 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 interest 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 juvenile court’s determination that termination of the father’s parental rights is in the best interest of the children. In reaching its conclusion, the court stated:

[The father] was also placed in the [department of corrections] in 2002 and was paroled in 2006. He testified that between 2006 and 2011 he slipped and went into treatment, then did good for about two years, slipped and went to treatment, did good a while and slipped again. The reasonable inference is that when [the father] testified he slipped he meant he used drugs and/or alcohol.

....

[S.N.] was approximately 13 months old when his father was incarcerated. [G.N.] was 2 years old when his father was incarcerated. Thus, [the father] has been incarcerated for more than half of [S.N.'s] life. They did not recognize their father during the one visit they have had with their father since 2011. [The father] is a stranger to them due to lack of contact. . . . He offered no explanation as to why he has not routinely written letters to the children. He knew if he violated his parole he could be placed in the [department of corrections]. With this knowledge, he relapsed and was arrested for operating while intoxicated leading to the revocation of his parole.

....

In considering whether to terminate parental rights the Court shall give primary consideration to the children's safety, to the best placement for furthering the long term nurturing and growth of the children, and to the physical, mental, and emotional condition and needs of the children. All these are best met by termination of parental rights. There is no bond between the children and their father. [The father's] actions led to his incarceration and deterioration of that bond. [His] history demonstrates that he will return to the use of drugs and or alcohol.

It is in the children's best interest to terminate the father's parental rights pursuant to section 232.116(2).

3. 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. *In re D.S.*, 806 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 factors in the section to save the parent-child relationship. *Id.* at 475.

The father did not argue any of the exceptions or factors against termination apply in this case. Upon our de novo, we conclude no exception or factor in section 232.116(3) applies to make termination unnecessary.

B. Mother's Appeal.

1. 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)(k) provides that termination may be ordered when there is clear and convincing evidence the children have been adjudicated a child in need of assistance and custody has been transferred from the children's parent, the parent has a chronic mental illness and has been repeatedly institutionalized for mental illness and presents a danger to self or others as evidenced by prior acts, and the parent's prognosis indicated that the children will not be able to be returned to the custody of the parent within a reasonable period of time considering the children's ages and need for a permanent home.⁴

⁴ Our supreme court has not yet been called upon to define the term "repeatedly institutionalized" as used in Iowa Code section 232.116(1)(k). However, we note that our legislature has defined the term "repeatedly" for purposes of the crime of stalking to mean "on two or more occasions." Iowa Code section 708.11(1)(d); see also *The American Heritage Dictionary* 1048 (2nd college ed. 1985) (defining repeatedly as "said, done, or occurring again and again.") For these reasons, we conclude the term "repeatedly institutionalized" as used in Iowa Code section 232.116(1)(k) means institutionalized on two or more occasions.

The mother disputes both that she presents a danger to herself or others and that her prognosis indicates the children cannot be returned to her within a reasonable period of time.

We believe clear and convincing evidence exists that the mother is a danger to herself or others. The reason for the involvement of DHS with the family again in March 2012 was due to the mother's mental health issues. She left the children with their maternal grandmother, who was suffering from Alzheimer's and unable to meet their needs, while the mother was hospitalized for suicidal ideation. The mother reported feeling overwhelmed. She was diagnosed with major depressive disorder and general anxiety disorder, and her profile suggests she has difficulty functioning in the world and keeping up with daily tasks. This has been a long-term issue for the mother. She was first hospitalized for depression around 2002. She also reported she had tried overdosing on pills around 2000. As the juvenile court stated:

The credible evidence is that [the mother] suffers from depression. During visitation she often brought her family to assist her at visits. She quit attending visitation for a period of time last fall and reported she would consent to termination of parental rights. She has not meaningfully addressed her depression. When her depression is severe she can be a danger to herself and others as evidenced by her thoughts of suicide or having a death wish in the past. She can be a danger to her young children who are unable to self-protect and would rely upon their mother to meet their needs. She testified she did not participate in some services because she forgot due to her depression. Her prognosis is poor.

We also believe clear and convincing evidence exists that the children cannot be returned to the mother within a reasonable period of time. The mother has had long-term issues with her mental health and she has not made

consistent attempts to improve it. She has consistently missed appointments with two different therapists. She testified at the termination hearing that “there’s no point to [therapy]” because she did not feel it was helpful to her. There has also been ongoing concern throughout the case that the mother is self-medicating for her mental health issues since there have been times she finished prescriptions sooner than expected. Although the mother requested a six month extension to allow her more time to address her mental health treatment, there was no indication the extra time would be beneficial.

There is clear and convincing evidence the mother presents a danger to herself or others and her prognosis indicates the children cannot be returned to her within a reasonable period of time. The grounds for termination pursuant to section 232.116(1)(k) have been met.

2. Best Interests of the Child.

The mother argues termination of her parental rights was not in the best interests of the children. However, considering the children’s safety, the best placement for furthering the long-term nurturing and growth of the children, and the physical, mental, and emotional conditions and needs of the children, we believe it is. See Iowa Code § 232.116(2).

DHS has been involved with this family in the past for allegations involving violence and for the mother’s drug abuse. She has ongoing substance abuse issues and fails to recognize the impact these issues have on her parenting. She also has ongoing mental health issues. The mother often brought other family members to assist her in visits because she was overwhelmed when caring for

the children by herself. There has been no evidence the mother is able to parent the children independently. Thus, it is in their best interests to terminate the mother's parental rights.

3. Exceptions or Factors against Termination.

The mother does not argue any specific exception or factors from section 232.116(3) apply in this case. Upon our de novo, we conclude no exception or factor in section 232.116(3) applies to make termination unnecessary.

IV. Conclusion.

Regarding the father of G.N. and S.N., there is clear and convincing evidence that grounds for termination exist under section 232.116(1)(e), termination of 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 the father's parental rights to each child.

Regarding the mother of B.B., G.N., and S.N., there is clear and convincing evidence that grounds for termination exist under section 232.116(1)(k), termination of 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 the mother's parental rights to each child.

AFFIRMED.