

IN THE COURT OF APPEALS OF IOWA

No. 3-809 / 13-1046
Filed September 18, 2013

**IN THE INTEREST OF Q.S. and D.S.,
Minor Children,**

H.S., Mother,
Appellant.

Appeal from the Iowa District Court for Jackson County, Phillip J. Tabor,
District Associate Judge.

A mother appeals from the juvenile court's order terminating her parental
rights to two children. **AFFIRMED.**

Stuart G. Hoover and Leslie Blair of Blair & Fitzsimmons, P.C., Dubuque,
for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, Chris Raker, County Attorney, and Sara Davenport, Assistant
County Attorney, for appellee.

Bradley Boffeli of Kurt Law Office, P.C., Dubuque, attorney and guardian
ad litem for minor children.

Considered by Potterfield, P.J., Mullins, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MILLER, S.J.

Heather is the mother of Q.S., who was born in August 2007, and D.S., who was born in December 2009. Q.S. and D.S. have different fathers. Heather appeals from a June 24, 2013 juvenile court order terminating her parental rights to Q.S. and D.S. (“the children”). The order also terminated the fathers’ respective parental rights, and neither has appealed. We affirm.

The children came to the attention of the Iowa Department of Human Services (DHS) in March 2012 when Heather and both children tested positive for methamphetamine. In mid-March the juvenile court issued an ex parte order removing the children from Heather’s physical custody and placing them in the temporary custody of the DHS for placement in family foster care.

The State filed a child in need of assistance (CINA) petition. In April 2012 the juvenile court adjudicated the children to be in need of assistance pursuant to Iowa Code sections 232.2(6)(b), (c)(2), (n), and (o) (2011). It continued the children in DHS’s temporary custody for continued placement in family foster care.

In a June 12, 2012 dispositional order the juvenile court confirmed the children to be in need of assistance and placed them in the custody of the DHS for continued placement in family foster care. At all times following the children’s mid-March 2012 removal they have remained in the custody of the DHS, placed in the same foster family home.

On April 3, 2013 the State filed a petition seeking termination of parental rights. Following a contested hearing the juvenile court entered its order

terminating parental rights. Its order terminated Heather's rights to Q.S. pursuant to Iowa Code section 232.116(1)(f) (2013) (child four or older, adjudicated CINA, removed last twelve consecutive months, cannot be returned at present time). The order terminated Heather's parental rights to D.S. pursuant to section 232.116(1)(h) (child three or younger, adjudicated CINA, removed last six consecutive months, cannot be returned at present time). Heather appeals.

We review termination proceedings de novo. Although we are not bound by them, we give weight to the trial court's findings of fact, especially when considering credibility of witnesses. The primary interest in termination proceedings is the best interests of the child. To support the termination of parental rights, the State must establish the grounds for termination under Iowa Code section 232.116 by clear and convincing evidence.

In re C.B., 611 N.W.2d 489, 492 (Iowa 2000) (citations omitted).

Heather claims the juvenile court erred in finding clear and convincing evidence supporting termination of her parental rights. She argues she had exercised visitation with the children throughout the case, the visits went well, she had progressed from supervised visitation to unsupervised visitation, and the State has thus failed to prove by clear and convincing evidence that the children could not be returned to her.

The first three of the four elements of each of the statutory provisions relied on by the juvenile court were not subject to reasonable dispute and were proved by clear and convincing evidence. Heather's argument goes only to the fourth element of each provision. This element is proved when clear and convincing evidence shows the child cannot at the time of the termination hearing be returned to the parent without remaining a CINA. Iowa Code § 232.116(1)(f),

(h); *In re R.R.K.*, 544 N.W.2d 274, 277 (Iowa Ct. App. 1995). The threat of probable harm will justify termination of parental rights, and the perceived harm need not be the one that supported removal from the home. *In re M.M.*, 482 N.W.2d 812, 814 (Iowa 1992).

Heather has a lengthy and serious history of using illegal drugs. She successfully completed substance abuse treatment in 2008, but then relapsed and used from 2008 or 2009 until 2012. It is apparent the children have been exposed to drugs on more than one occasion. Q.S. has tested positive for cocaine on two occasions and for methamphetamine once. D.S. has tested positive for cocaine once and for methamphetamine once.

Heather began outpatient treatment for substance abuse after the children were removed. She thereafter tested positive for methamphetamine in May, in June, and in July of 2012, and was discharged “unsuccessfully” from treatment, but insists she did not use after March 2012.

Heather again began outpatient substance abuse treatment in August 2012, and “successfully” completed the program in March 2013. She has not tested positive since. Heather was to obtain a relapse prevention sponsor and attend AA or NA meetings. She initially, but very infrequently, attended such meetings, but shortly stopped doing so as she “didn’t like it.” She has never obtained a sponsor. Heather continued to associate with persons who are acknowledged “triggers” to her drug use, including her mother and a brother, but testified at the termination hearing that she had very recently stopped associating with her mother and brother.

It was felt that Heather had mental health issues that might cause or contribute to her substance abuse. From the beginning of the CINA case the DHS case worker requested that she attend regular mental health counseling. Heather reported she was doing so, but the DHS discovered she was attending only about one time per month.

Heather was requested to have a psychiatric evaluation in January 2013, but did so only in May 2013, after the petition to terminate her parental rights had been filed. She was diagnosed as having attention deficit/hyperactivity disorder, post-traumatic stress disorder, and symptoms of anxiety and depression. At the time of the termination hearing Heather had begun mental health treatment, but had attended only two "intake" sessions and one other session.

The DHS had requested that Heather be assessed to see if she needed medication to stabilize her mental health. Her May 2013 psychiatric evaluation also resulted in a recommendation that she be evaluated for medication. Heather reported she had been evaluated for a possible need for medication and that no medications were recommended. However, as of the termination hearing she had in fact not received such an evaluation.

When the CINA case started, the police searched Heather's home for drugs. A sex offender was present with the children. From the time of the children's removal Q.S. exhibited sexualized behavior and indications that she had been sexually abused. Q.S. named an uncle as a perpetrator of her sexual abuse. Heather refuses to believe Q.S., states that any sexual abuse must have occurred in the foster home, and states that if it is proved the uncle sexually

abused Q.S. she, Heather, will continue contact with him but try to limit Q.S.'s contact with him. Play therapy is recommended for Q.S.'s sexualized behavior and possible sexual abuse. Heather does not believe such treatment is needed.

The record does demonstrate certain facts favorable to Heather. She had always exercised allowed visitation and had progressed from supervised visitations with the children to two sessions, totaling six hours per week, of daytime unsupervised visitation. Following her third change of residence after the children's removal, Heather had been living in the same home, shared with a male acquaintance, for five months. She had secured what appears to be ongoing employment.¹ Heather had not tested positive for drug use since July 2012.

The foregoing facts in Heather's favor nevertheless pale in comparison to the overwhelming evidence that the children could not be returned to her at the time of the termination hearing, or even within a reasonable time thereafter. Concerns leading to the children's removal and subsequent continuation in foster care included Heather's lengthy and serious history of substance abuse and potential for relapse, her ongoing mental health issues, and her resulting or

¹ Heather worked in a convenience store/gas station. The testimony presented by Heather and a witness on her behalf, the owner of the home in which she lived, was, however, conflicting and inconsistent. Some of the testimony indicated she worked full-time, while other testimony indicated twenty to twenty-five hours per week. Some testimony indicated she had held the job continuously or consistently for many months, while her own testimony indicated she had at some time after starting there been without employment for up to three months as a result of an incident at work. The DHS had requested pay stubs to verify Heather's employment and income. Heather testified she had worked for cash, and still did. Although she had been reporting that over the last several months she had been working full-time, the only pay stub she produced showed fifteen hours of work.

related inability to provide proper and adequate supervision for the children. Heather's substance abuse history indicated a serious danger of relapse, but she failed or refused to obtain a sponsor and attend AA or NA meetings.

Until after the petition for termination was filed, Heather failed to regularly attend recommended mental health counseling or secure the requested psychological evaluation. Despite earlier DHS requests that she secure an evaluation to see if she needed medication for her mental health issues, and despite a similar recommendation as a result of her belated psychological evaluation, at the time of the termination hearing Heather had still not had such an evaluation.

Heather fails to acknowledge that Q.S. may well have been sexually abused while in her custody, and denies that Q.S. needs recommended therapy for her sexualized behavior and possible sexual abuse.

In summary, we conclude, as the juvenile court did, that at the time of the termination hearing the children could not be returned to Heather without being subject to such threat of abuse or neglect as would cause them to remain children in need of assistance. We thus affirm the juvenile court on this issue.

Heather also claims the juvenile court "erred in finding clear and convincing evidence that an extension for time for continue reunification efforts would be detrimental to the children." She argues that the court, having at a December 17, 2012 permanency hearing deferred a permanency hearing for ninety days, should have at the termination granted another three-month extension, thus allowing her a total of six months within which to show she is

capable of having the children returned to her. The State responds that Heather has not preserved error on this issue.

As the State points out, the termination order does not address a question of an extension and the transcript of the hearing gives no indication that an extension was requested. “Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal.” *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995), and “a [rule 1.904(2)] motion is essential to preservation of error when the trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication,” *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984). These rules apply to CINA and termination of parental rights cases. See *In re A.B.*, 815 N.W.2d 764, 773 (Iowa 2012) (citing cases). We conclude this issue has not been preserved for our review.²

We agree with the juvenile court on the first of the two issues raised on appeal and conclude the second issue was not preserved. We therefore affirm the judgment of the juvenile court.

AFFIRMED.

² We do note that Heather had the benefit of not only the ninety-day extension from the December 17, 2012 hearing to a March 18, 2013 permanency hearing and order, but also more than an additional three months, from the March 18 order to the June 24, 2013 termination hearing and order, to demonstrate an ability to have the children returned.