

IN THE COURT OF APPEALS OF IOWA

No. 3-919 / 13-1089
Filed October 23, 2013

**IN THE INTEREST OF A.V. and L.D.,
Minor Children,**

M.D., Father,
Appellant,

E.V., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Constance Cohen,
Associate Juvenile Judge.

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

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father.

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for appellant-mother.

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County Attorney, John Sarcone, County Attorney, and Andrea S. Vitzthum,
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Considered by Potterfield, P.J., and Mullins and Bower, JJ.

MULLINS, J.

A mother and father separately appeal from a juvenile court order terminating their respective parental rights to their children, A.V. and L.D. They each contend the State failed to prove the grounds for termination by clear and convincing evidence. They each also contend termination is not in the children's best interests. The father advocates the children be placed in the paternal grandmother's custody and the provisions of Iowa Code section 232.116(3) (2013) be applied to avoid termination of his parental rights.

Finding the requirements for terminating parental rights set out in section 232.116 have been met, we affirm the termination of both the mother's and the father's parental rights.

I. BACKGROUND FACTS AND PROCEEDINGS.

A.V.H., born in 2010, and L.D., born in 2009, first came to the attention of the juvenile court in July 2012 after it was learned the mother's boyfriend was selling marijuana and heroin out of the family home. The mother and her boyfriend admitted using marijuana and heroin on a daily basis. As a result, the children were removed from the home and placed with the maternal grandfather. The State filed a child in need of assistance (CINA) petition.

The State could not initially locate the father, who was living in Florida and had not seen the mother in a year. Although the father was not present at the removal hearing, he was represented by counsel. The State served the father notice by certified mail on July 24, 2012. Thereafter, the father returned to Iowa to have contact with the children and participate in services.

Both the mother and the father were present at the September 6, 2012 adjudicatory hearing. On September 6, 2012, the juvenile court entered an order adjudicating the children to be CINA. The court found the mother and the father were participating in services and continued the children's placement with the maternal grandfather.

The mother participated in the services offered to her and initially made great improvements. By October 2012, she was no longer using heroin and had finished Suboxone treatment.¹ In a January 8, 2013 order, the juvenile court found the mother had "demonstrated a recovery lifestyle and shown insight into the problems that resulted in removal" and returned the children to her home for a trial placement. In the same order, the court found that although the father was participating in services, he had unresolved addiction, domestic violence, and mental health issues. The court found it was therefore necessary to continue placement of the children outside his home.

The children were again removed from the mother's care and placed with the maternal grandfather in March 2013 after the mother and her boyfriend failed to participate in multiple drug screens. The boyfriend tested positive for methamphetamine at one drug screen. Observations by both the Department of Human Services (DHS) worker and the daycare provider raised concerns that the mother was abusing drugs.

The mother failed to attend the March 2013 review hearing or have contact with the children. Meanwhile, the father was inconsistent in visiting the

¹ Suboxone, which contains a synthetic opiod, helps suppress opiate cravings and is used to treat opiate addiction.

children and participating in services, making him an unsuitable option for placement. At the juvenile court's direction, the State filed a petition to terminate both parents' rights on May 3, 2013.

The mother used methamphetamine intravenously on a daily basis until June 3, 2013. But approximately two weeks before the June 19, 2013 termination hearing, she ended her relationship with her boyfriend and made a new attempt at sobriety. At the time of the hearing, the mother was in an intensive outpatient treatment program while waiting for a bed in an inpatient treatment program.

By the time of the termination hearing, the father had only visited the children thirteen times. He claimed his work schedule prevented him from seeing the children more often. As a result of his lack of contact with the children, their bond to him is not strong. The father failed to engage adequately in services, leaving his issues with domestic violence and substance abuse unaddressed.

The juvenile court terminated both the mother's and the father's parental rights in a July 15, 2013 order. It found the State proved by clear and convincing evidence that the grounds for termination under sections 232.116(1)(h) and (l) existed with respect to the mother. Although the court found the State failed to prove the grounds for termination under section 232.116(1)(l) with respect to the father, it found termination of his parental rights was supported under sections 232.116(1)(e) and (h). The court also found termination was in the children's best interest and none of the exceptions to terminating parental rights outweighed termination.

II. STANDARD OF REVIEW.

We review termination of parental rights de novo. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). We give weight to the juvenile court's fact-findings, although they are not binding. *Id.* This is especially true with regard to witness credibility. *Id.*

III. ANALYSIS.

Iowa courts follow a three-step analysis in considering whether to terminate parental rights. See *In re P.L.*, 778 N.W.2d 37, 39 (Iowa 2010). We must first determine whether clear and convincing evidence supports the statutory grounds for termination. *Id.* We then consider whether termination is in the child's best interest under section 232.116(2). *Id.* Finally, we determine whether to apply one of the statutory exceptions to termination set forth in section 232.116(3). *Id.*

Both the mother and the father separately contend the State failed to meet its burden under the first two steps of the analysis. The father alone argues his rights should not be terminated because a statutory exception could apply. We address their arguments in turn.

A. Statutory Grounds for Termination.

Both the mother and the father argue the State failed to prove the grounds for termination by clear and convincing evidence. Although both parents' rights were terminated on two grounds, we need only find evidence supports terminating on one ground in order to affirm. See *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995).

The juvenile court terminated the mother's parental rights pursuant to Iowa Code sections 232.116(1)(h) and (l). The court may terminate a parent's rights under section 232.116(1)(h) where the court finds:

- (1) The child is three years of age or younger.
- (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
- (3) The child has been removed from the physical custody of the child's parents for at least six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.
- (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

There is no dispute the first two elements have been proved. The mother also conceded at the termination hearing that she was not in a position to have the children returned to her.

On appeal, the mother argues the children have not been removed from her custody for six consecutive months, noting a trial period of more than thirty days occurred from January to March 2013. However, the children were out of the mother's custody from July 2012 through the termination hearing on June 15, 2013; even subtracting the two-month trial placement, the children have been out of the mother's custody for more than six months during the eleven months leading up to the termination hearing. Because the children have been out of the mother's custody for six or more months during a twelve-month period, the State proved the ground for termination under section 232.116(1)(h).²

² The mother also asks for more time. We address this argument in our best-interest analysis.

The father's parental rights were terminated under sections 232.116(1)(e) and (h). The court may terminate a parent's rights under section 232.116(1)(e) where the court finds the child has been adjudicated a CINA, the child has been removed from the parent's physical custody for at least six months, and there is "clear and convincing evidence that the parents have not maintained significant and meaningful contact with the child during the previous six consecutive months and have made no reasonable efforts to resume care of the child despite being given the opportunity to do so."

The father's main argument is that the children were not removed from his care because they were in their mother's care at the time of removal.³ He claims he was never made a party to the action, he did not consent to the removal, and that he was not contacted about the removal until after the fact.

The record shows that a temporary removal order was entered on July 13, 2012. The juvenile court appointed an attorney to represent the father's interests at the July 23, 2012 removal hearing. The State sent notice of the proceedings to the father by certified mail on July 24, 2012. On August 3, 2013, the State filed a return of service, attaching the card that certified the father had received notice. Thereafter, the father moved back to Iowa and attended the adjudicatory hearing.

³ In his issue statement, the father states the juvenile court erred in terminating his parental rights pursuant to Iowa Code sections 232.116(1)(e) and (h). However, his brief only addresses the deficiency in proof to terminate under section 232.116(1)(h). Form 5, found in Iowa Rule of Appellate Procedure 6.1401, states general conclusions, such as "the trial court's ruling is not supported by law or the facts," are not acceptable. However, we will address the one contested element that is the same under both sections—the removal—as a challenge to the proof of that element under section 232.116(1)(e).

We find the children were removed from the father's custody. In its September 6, 2012 adjudicatory order, October 16, 2012 dispositional order, and March 22, 2013 dispositional order, the juvenile court found the children's placement outside the home was necessary because continued placement in or return to the home would be contrary to the children's welfare. On January 8, 2013, the court modified the dispositional order to return the children to the mother's custody, but specifically found: "Placement of the children outside of the home of [the father] continues to be necessary because of unresolved addiction, domestic violence, and mental health issues." The father did not appeal any of these orders. The court's orders clearly show the children were also removed from the father's custody from September 2, 2012 through the June 19, 2013 termination hearing, satisfying the six-month removal requirement of section 232.116(1)(e)(2). The grounds for termination have been proved.

B. Best Interests.

Both the mother and the father contend termination is not in the children's best interest. In making the best-interest determination, 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 condition and needs of the child." *P.L.*, 778 N.W.2d at 39 (Iowa 2010) (quoting Iowa Code § 232.116(2)).

The mother argues termination is not in the children's best interest given her strong bond with the children. She claims she has shown a strong commitment to reunification by "substantially complying" with all of the DHS

requirements. She asks that the court grant her more time to address her substance abuse issues through inpatient treatment and to get back on her feet.

We find termination is in the children's best interest. While the mother has a bond with the children, she failed to be involved in their lives in the months leading up to termination, choosing a lifestyle of substance abuse over her relationship with them. In spite of the mother's renewed commitment to sobriety on the eve of the termination hearing, we view her prognosis for recovery with caution. The record shows the mother has a nine-year history of substance abuse, which includes marijuana, cocaine, heroin, and methamphetamine use. The longest period of sobriety she has attained lasted approximately two years before she relapsed. The mother succeeded in her attempt at recovery early on in the CINA case, but relapsed within months. In light of her history, the time that would be needed to show the mother is able to maintain sobriety would be lengthy. See *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997) (holding we look to the parents' past performance as an indicator of the future quality of care a parent is capable of providing). The children simply do not have that kind of time. See *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987) (noting the importance of the passage of time and finding "patience with parents can soon translate into intolerable hardship for the children"). The statutory time for termination has passed, and the children should not be forced to wait longer. See *In re C.B.*, 611 N.W.2d 489, 495 (Iowa 2000) ("Once the limitation period lapses, termination proceedings must be viewed with a sense of urgency.").

We find termination of the father's parental rights is also in the children's best interests. Like the mother, the father initially showed promise. However, he failed to follow through with the case plan, and his contact with the children, as the juvenile court found, "has been disappointing to say the least." The father saw the children only thirteen times in eleven months. Although he blames his work schedule and what he alleges to be unreasonableness on the part of the DHS, the record belies his claims. The father had eleven months to demonstrate his commitment to his children. The father's failure to follow through with the case plan recommendations, visit the children, or pay for the children's support shows he failed to prioritize the children in his life. The children require permanency and should not be forced to wait longer for the father to show an interest in parenting them when the statutory grounds for termination have been established. See *C.K.*, 558 N.W.2d at 175.

C. Statutory Exceptions.

Finally, the father contends termination should be avoided under one of the exceptions set forth in section 232.116(3). Specifically, he argues the children should be placed with the paternal grandmother in Florida. Under section 232.116(3)(a), the court need not terminate parental rights a relative has legal custody of the child.

The children were not in the paternal grandmother's legal custody at the time of termination. Accordingly, the provisions of section 232.116(3)(a) cannot be applied.

AFFIRMED ON BOTH APPEALS.