

IN THE COURT OF APPEALS OF IOWA

No. 1-1009 / 11-1461
Filed February 1, 2012

**IN THE INTEREST OF E.T.,
Minor Child,**

J.D., Father,
Appellant.

Appeal from the Iowa District Court for Linn County, Susan Flaherty,
Associate Juvenile Judge.

A father appeals the district court's ruling terminating his parental rights.

AFFIRMED.

Ellen R. Ramsey-Kacena, Cedar Rapids, for appellant father.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, Jerry Vander Sanden, County Attorney, and Kelly J. Kaufman,
Assistant County Attorney, for appellee State.

W. Eric Nelson of State Public Defender's Office, Cedar Rapids, for
appellee mother.

Brandy R. Lundy of Lundy Law Office, Cedar Rapids, attorney and
guardian ad litem for minor child.

Considered by Vogel, P.J., Eisenhauer, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, P.J.

Jamison appeals from the district court's order terminating his parental rights to his son, E.T., born 2008. On August 31, 2011, the district court ordered termination of Jamison's parental rights under Iowa Code section 232.116(1)(h) (child three or younger, adjudicated CINA, removed from parent's physical custody for at least six of last twelve months, or last six consecutive months and any trial period at home less than thirty days, clear and convincing evidence child cannot be returned to custody of parent at present time) and (l) (adjudicated CINA, parent has a severe, chronic substance abuse problem and presents danger to self and others, child cannot be returned to parent's custody within a reasonable period of time) (2011).¹ We affirm.

I. Background Facts and Proceedings

This family came to the attention of the Iowa Department of Human Services (DHS) in March 2008, when the mental health and substance abuse problems of E.T.'s mother, Nicole, rendered her unable to care for E.T.'s older half-sibling, C.T., born March 2007. C.T. was then removed from Nicole's care on March 18, 2008. E.T. was born in November 2008, and based on Nicole's past issues, as well as a pending termination hearing for C.T., DHS recommended E.T. be adjudicated a child in need of assistance (CINA). In January 2009, E.T.'s putative father, Jamison, decided that he did not want to

¹ The mother's parental rights as to E.T. were also terminated under Iowa Code section 232.116(1)(h), and (l). Her parental rights to a second child, C.T., were also terminated at this time. Her rights to two other children, one born in 2005 and one born in 2009, have also been terminated. She does not appeal.

seek custody of E.T., but did want to remain a part of E.T.'s life. At that time, Jamison was in outpatient substance abuse treatment.

On February 18, 2009, E.T. was adjudicated CINA, but custody was to remain with Nicole, with protective supervision by DHS. That same day, a hearing was also scheduled to terminate parental rights as concerning C.T., but as Nicole had made progress addressing her substance abuse and mental health issues, the district court allowed Nicole additional time to work toward reunification with C.T. On October 15, 2009, the CINA proceedings involving C.T. were dismissed. On February 18, 2010, the district court found reasonable efforts to maintain the permanency plan that had been made, and ordered both E.T. and C.T. to remain in Nicole's custody. On April 13, 2010, the district court filed a temporary removal order based on Nicole inconsistently submitting to drug testing, the children being in the care of an unapproved caretaker who had a significant history of substance abuse, and general concerns for the children's safety. On April 26, 2010, hair stat testing indicated that both C.T. and E.T. had been exposed to cocaine. On June 2, 2010, custody of C.T. and E.T. was transferred to DHS and they were placed together in foster care.

A paternity test, completed in June 2010, confirmed Jamison was E.T.'s father. On July 2, 2010, DHS prepared a home study/social history regarding Brenda, Jamison's mother. DHS recommended Brenda's home not be approved for E.T.'s placement as Brenda was allowing Jamison to be around E.T., despite a court order that prohibited Brenda from being a visitation designee for Jamison. The district court was also concerned that Brenda was not willing to keep E.T. and his half-sibling, C.T., in the same home. On July 26, 2010, Jamison filed an

application for modification, requesting that E.T. be placed with Brenda rather than continuing his placement in foster care. On September 29, 2010, a modification hearing was held, and on October 1, 2010, the district court denied Jamison's application. The district court repeated its concern that E.T. and C.T. should be able to maintain their bond as half-siblings, but that Brenda was not committed to providing a home for both children. The district court also expressed concerns regarding Brenda's ability to care for E.T. and C.T., despite her longing to continue helping Jamison. The district court informed Brenda that she could request to be a permanent placement option for E.T. when the State filed its Petition for Termination of Parental Rights.

At the time of the termination of parental rights hearing, Jamison was living at the Abbe Center, a residential treatment facility. The termination of parental rights hearing was held on February 3, 2011,² with written order filed August 31, 2011. Jamison appeals.

II. Standard of Review

We review termination of parental rights cases de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). Grounds for termination must be proved by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). Where parental rights are terminated on more than one statutory ground, we need only find grounds under one section to affirm. *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995). Our primary concern in termination of parental rights cases is the best interests of the child. *J.E.*, 723 N.W.2d at 798.

² Although the district court order stated the termination hearing was held on "February 3, 2011 and May 20, 2011," the transcript included in the record on appeal only indicates the February 3rd date.

III. Grounds for Termination

Jamison essentially concedes the grounds for termination were satisfied under Iowa Code section 232.116(1)(h) because he admitted during the termination hearing that he could not care for E.T. Jamison's testimony proceeded as follows:

Q: Do you want E.T. placed with you? A: No, ma'am.

Q: What do you think would be best for E.T.? A: To—For him to be placed with his grandmother.

Grounds for termination exist under Iowa Code section 232.116(1)(h) if:

- (1) The child is three years of age or younger.
- (2) The child has been adjudicated 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.

Although on appeal he asserts the district court "erred" by finding termination under this section, he diverts this court's attention to what is essentially an argument under Iowa Code section 232.116(3)—whether any factors would weigh against termination—and merges that argument with the assertion that termination is not in E.T.'s best interests under 232.116(2). See *P.L.*, 778 N.W.2d at 37–38 (explaining that even though termination may be appropriate under section 232.116(2), the court need not terminate a parent's rights if any of the circumstances in section 232.116(3) are met). We conclude the statutory elements are met under 232.116(1)(h), E.T.'s best interests are served by

termination under 232.116(2), and nothing in 232.116(3) would weigh against termination, such that the district court, “need not terminate.”

Jamison argues that due to his diagnosis of schizophrenia, his ability to care independently for E.T. is limited, but claims his “substantial family support” would have allowed him to maintain an active role in E.T.’s life if E.T. had been placed with Jamison’s mother. At the time of the termination hearing, Jamison was living at the Abbe Center, where he was receiving dual diagnosis treatment for mental health and substance abuse issues. While Jamison was hopeful that he would be released from the Abbe Center and move into a supervised living program at the end of February 2011, Jamison recognized that E.T. could not be returned to his custody due to his mental health issues. Moreover, Jamison never requested E.T. be placed with him, but urged that placement of E.T. be with Jamison’s mother, Brenda.

Jamison cannot overcome the statutory grounds for termination under Iowa Code section 232.116(1)(h) because his sole argument is not founded on the notion that E.T. can be returned to *his* care, but rather Jamison’s mother’s care. See *In re C.K.*, 558 N.W.2d 170, 174 (Iowa 1997) (explaining that termination of the parent-child relationship “is not to be countermanded by the ability and willingness of a family relative to take the child”). In addition, Jamison’s mental illness and substance abuse issues, which were still being treated at an inpatient facility at the time of the hearing, as well as his pending charges for sexual abuse, precluded E.T. from returning to Jamison’s care at the present time. We therefore conclude clear and convincing evidence supports

termination of Jamison's parental rights under Iowa Code section 232.116(1)(h) and affirm on this issue.

We next review whether termination was in E.T.'s best interests, and whether termination should have occurred given Brenda's role in E.T.'s life. Our supreme court has held, "[a]n appropriate determination to terminate a parent-child relationship is not to be countermanded by the ability and willingness of a family relative to take the child. The child's best interests always remain the first consideration." *C.K.*, 558 N.W.2d at 174. In seeking out the best interests of the child,

we look to the child's long-range as well as immediate interests. This requires considering what the future holds for the child if returned to the parents. When making this decision, we look at the parents' past performance because it may indicate the quality of care the parent is capable of providing in the future.

Id. at 172.

Because Jamison had such minimal involvement in E.T.'s life until the three months preceding the termination hearing, never had an unsupervised or overnight visit with E.T., and struggled with mental health issues that continued to be addressed at the time of the termination hearing, we find termination of Jamison's parental rights in E.T.'s best interests. We, like the district court, recognize that E.T. needs permanency now, and that "[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 addition, none of the reasons not to terminate under Iowa Code section 232.116(3) exist in this case. The district court noted in the termination order:

Brenda . . . has asked to be a permanent placement for E.T. and is willing to do so by way of adoption or guardianship. . . . The court has previously determined that immediate placement of E.T. with Brenda . . . , particularly if it involved separation from C.T., is not in the child's best interests. . . . It is in the children's best interests to allow the Department of Human Services to carefully assess the needs of each child as well as the children together and determine the most appropriate permanent placement. An order from this court placing custody and guardianship of E.T. with Brenda . . . would bypass that assessment process and almost certainly result in the separation of these siblings. Therefore, the court finds that none of the exceptions to termination as set out in section 232.116(3) apply to these proceedings. [Brenda] is encouraged to proceed with the process available through the Department of Human Services to assess whether permanent placement with her, by way of adoption, is in E.T.'s best interest.

We affirm the findings of the district court as there are no factors impeding termination under 232.116(3), and further note that the district court provided Brenda a procedural roadmap to seek custody or guardianship of E.T.

We therefore affirm the termination of Jamison's parental rights to E.T.

AFFIRMED.