

IN THE COURT OF APPEALS OF IOWA

No. 3-489 / 13-0308
Filed May 30, 2013

**IN THE INTEREST OF J.W. JR.,
Minor Child,**

T.C., Mother,
Appellant,

J.W. SR., Father,
Appellant.

Appeal from the Iowa District Court for Polk County, Rachael E. Seymour,
District Associate Judge.

A mother and a father appeal the termination of their parental rights.

AFFIRMED ON BOTH APPEALS.

Patrick W. O'Bryan, Des Moines, for appellant-mother.

Joey T. Hoover of Hoover Law Firm, P.L.L.C., Winterset, for appellant-
father.

Thomas J. Miller, Attorney General, and Charles K. Phillips, Assistant
Attorney General, for appellee.

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guardian ad litem for minor child.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

A mother and a father appeal separately from a juvenile court order terminating their respective parental rights to their child, J.W., under Iowa Code section 232.116(1)(d) and (h) (2011). The mother asserts clear and convincing evidence does not support terminating her parental rights. The father argues (1) the juvenile court erred in finding clear and convincing evidence supports terminating his rights under either section 232.116(1)(d) or section 232.116(1)(h), (2) terminating his parental rights is not in the child's best interest, (3) a statutory exception to termination based on the closeness of the parent-child relationship precludes termination, and (4) he should be granted additional time to work toward reunification. We affirm on both appeals.

I. Background Facts & Proceedings

J.W. was born in April 2011. J.W.'s mother has three other children—J.W.'s older half-siblings—who were removed from her care but were not the subject of the underlying termination proceedings and are not at issue in the present appeal. The mother has a long, troubled history with the Department of Human Services (DHS) including at least thirteen founded child protective assessments, many for the physical abuse of her children. J.W.'s father has a long history of substance abuse and involvement in violent behavior, including being shot on two occasions.

On the day J.W. was born, the State requested an order temporarily removing J.W. from the mother's care. At the time J.W.'s half-siblings had already been removed from the mother's care because of extensive, founded

child abuse reports. The juvenile court granted temporary removal. In a subsequent removal hearing, neither the mother nor the father contested continued removal. The court took judicial notice of the child-in-need-of-assistance cases involving J.W.'s half-siblings, which included reports that the mother physically abused the children and the father tested positive for cocaine despite denying any use.

In May 2011, the State filed a child-in-need-of-assistance petition alleging that the mother physically abused J.W.'s half-siblings and failed to meet their mental health and emotional needs. The petition also alleged the father's unresolved substance abuse issues prevented him from providing adequate supervision. During the adjudication proceedings, J.W.'s guardian ad litem (GAL) expressed concern about the mother's minimization of the issues involving the older half-siblings. The court adjudicated J.W. as a child in need of assistance, and ordered both the mother and the father to participate in services designed to reunify them with J.W. The court confirmed J.W.'s out-of-home placement and status as a child in need of assistance.

In July 2011, the juvenile court held an uncontested dispositional hearing. Both parents stipulated that J.W. continued to be a child in need of assistance. The mother's social history entered at the dispositional hearing revealed the older half-siblings had suffered extensive physical abuse at the hands of the mother and had been removed from her care on three different occasions.

In October 2011, the juvenile court held a joint dispositional hearing for J.W. combined with a dispositional and modification hearing for the older half-

siblings. At some point prior to the dispositional hearing, the older half-siblings had been returned to the mother's care. The court found the mother failed to meet the older children's mental health needs, continued to provide improper supervision, and failed to participate in individual therapy. The court also found J.W.'s father had violated a juvenile no contact order involving the older children. The court granted the GAL's motion to modify placement and placed the older children back into foster care.

In March 2012, the GAL filed a petition to terminate the mother's and the father's parental rights to J.W. As J.W.'s older half-siblings expressed a desire to return to the mother's care, the GAL withdrew from representing the older half-siblings.

The juvenile court held termination of parental rights proceedings on five days spanning from June 2012 through October 2012. The mother, the father, the State, DHS, and all the service providers initially resisted the GAL's petition to terminate parental rights. Four service providers, each of whom met with the father a regular basis, noted no concerns about the father's ability to meet J.W.'s needs. All the service providers believed the father was a positive role model to the mother and the children. None of the providers believed the father to be under the influence of drugs at any time. The father testified under oath that he was not using any illegal drugs. The mother testified that she did not believe the father was using drugs.

The GAL presented evidence that the father had missed seventeen drug tests over the course of this case, several of his hair stat tests indicated cocaine

use, and one hair stat test indicated heroin use. The GAL also presented expert testimony discrediting theories that the father's race and hairstyle led to increased false-positive hair stat test results.

On the final day of the termination proceedings, just minutes before the juvenile court adjourned, the State received the father's substance abuse evaluation. The father admitted to using cocaine approximately ninety-six times over the past year and eight times in the past month. In light of the new evidence, the State retracted its initial position and supported the GAL's termination petition. The court found the recommendation from, and credibility of, the service providers was seriously compromised by evidence of the father's ongoing drug use. The court also found the father was clearly untruthful during his testimony and the mother was not a credible witness. The court ordered termination of both the mother's and the father's parental rights under section 232.116(1)(d) and (h).

The mother and the father appeal, separately.

II. Standard of Review

We review termination of parental rights *de novo*. *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011). We give non-binding deference to the juvenile court's factual findings, especially when determining witness credibility. *Id.* On review, the children's best interest is of our utmost concern. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000).

III. Analysis

Iowa courts follow a well-established three-step analysis in considering whether to terminate parental rights. See *In re P.L.*, 778 N.W.2d 37, 39 (Iowa 2010). First, the court determines whether clear and convincing evidence supports one of the enumerated statutory grounds for termination in section 232.116(1). If the evidence supports one statutory ground, the court may order termination. See Iowa Code § 232.116(1). Second, the court considers whether termination is in the child's best interest by applying factors set forth in section 232.116(2). *Id.* § 232.116(2). Third, if one statutory ground for termination is proven and termination is in the child's best interest, the court considers whether to apply a statutory exception to termination to save the parent-child relationship. *Id.* § 232.116(3). We will address the mother's and the father's arguments, respectively, within the context of this three-step analysis. See *P.L.*, 778 N.W.2d at 39. We will then turn to the question of whether the father should be granted additional time to work toward reunification.

A. Statutory Grounds

The mother asserts that the juvenile court erred in finding that there was clear and convincing evidence to terminate the mother's parental rights. When a juvenile court terminates parental rights on more than one statutory ground, we need only find one ground proper to affirm. *In re D.W.*, 791 N.W.2d 703, 707 (Iowa 2010). The juvenile court terminated the mother's parental rights under section 232.116(1)(d) and (h). While the mother cites to section 232.116(1)(d) to

support her assertion of error, she failed to cite to section 232.116(1)(h).¹ Although we could find the issue waived, we determine it is expedient to address section 232.116(1)(h) together with the father's argument. See Iowa R. App. P. 6.903(2)(g).

To terminate parental rights under section 232.116(1)(h), the court must find clear and convincing evidence that (1) the child is three years old or younger, (2) has been adjudicated a child in need of assistance, (3) has been removed from the parent's physical care for the requisite period of time (at least six months), and (4) cannot be returned to the parent's custody at the time of termination. See Iowa Code § 232.116(1)(h). It is undisputed that J.W. is younger than three years old, had been adjudicated a child in need of assistance, and had been removed from the parent's physical care for well beyond the requisite time. See *id.* § 232.116(1)(h)(1)–(3). Thus, we consider whether there was clear and convincing evidence J.W. could not be returned to the parent's care. See *id.* § 232.116(1)(h)(4).

The mother, in essence, argues that there was not clear and convincing evidence to prove the child could not be returned to her care because she removed the father from the home upon learning of his drug use. The father

¹ The entirety of the mother's three-sentence argument is as follows:

As shown by the record, none of the service providers testified that they believed that the father was actually using illegal substances. When the mother found out he had positive tests proving that he was using illegal substances, she immediately asked, and he agreed, to remove himself from the home and seek the necessary treatment for those substances. Thus the court's concerns are misplaced, and overlooked the strong bond between the mother and her baby.

In support of her assertions, the mother cites to Iowa Code section 232.116(d) [sic]; *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000); and *In re P.L.*, 778 N.W.2d 37, 39 (Iowa 2010).

tested positive for the use of cocaine and heroin throughout the underlying child-in-need-of-assistance proceedings. Despite these positive drug tests, the father denied any drug use and the mother denied any knowledge of his drug use. The DHS worker and service providers testified they did not observe the father to be under the influence of any drug and theorized his race and hairstyle lead to false-positive drug test results—a theory rejected by the GAL’s expert witness. Just before closing the record on the fifth day of the termination proceedings, the State learned that the father had admitted to using cocaine or crack cocaine approximately ninety-six times over the past year. The juvenile court found the mother and the father were not credible witnesses. We defer to the juvenile court’s credibility finding as to the mother and the father.

Beyond our concerns of illegal drug use, the mother has demonstrated an especially troubling parenting style that led to at least thirteen founded child protective assessments for abusing her children. We can glean insight into a parent’s ability to care for a child based on the parent’s past performances. See *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). Despite providing years of services to the mother, the mother demonstrates a clear lack of insight into how to supervise and care for her children properly. This lack of insight is particularly worrisome in light of J.W.’s young age and inability to self-protect relative to the child’s older half-siblings. We find clear and convincing evidence supports the juvenile court’s finding that J.W. could not be returned to the mother’s care at the time of the termination proceedings without the imminent likelihood of suffering adjudicatory harm. As we find clear and convincing evidence supports grounds

for terminating the mother's parental rights under section 232.116(1)(h), we need not consider whether termination would also be proper under section 232.116(1)(d). See *D.W.*, 791 N.W.2d at 707.

The father contends the juvenile court erred in finding clear and convincing evidence supported terminating his parental rights under section 232.116(1)(d) and (h). As previously articulated, the grounds for termination under section 232.116(1)(h)(1), (2), and (3) are undisputed. Thus, we first address the father's argument under section 232.116(1)(h)(4) to determine whether there was clear and convincing evidence J.W. could not be returned to the father's care. See *id.* § 232.116(1)(h)(4).

Throughout the termination proceedings and the underlying child-in-need-of-assistance case, the father repeatedly denied drug use to service providers and even denied drug use in sworn statements to the court. He later admitted to using cocaine or crack cocaine approximately ninety-six times in the preceding year, and eight times in the thirty days before the last day of the termination hearing. Any suggestion that his ability to use cocaine that prolifically and to fool service providers into believing that he was able to provide care is evidence of his own denial, minimization, and dishonesty. It is proof that he has failed to comply with the requirements of the juvenile court to address the issues that required removal of J.W. from the parents' care. Although the father was apparently undergoing intensive outpatient drug treatment, we find clear and convincing evidence J.W. could not return to his care at the time of the termination order without subjecting the child to imminent adjudicatory harm.

Thus, we find clear and convincing evidence to support grounds for terminating the father's parental rights under section 232.116(1)(h) and need not reach the question of whether termination would also be proper under section 232.116(1)(d). See *D.W.*, 791 N.W.2d at 707.

B. Best Interests

The mother does not question the juvenile court's finding that terminating her parental rights was in J.W.'s best interest. Thus, this issue does not warrant appellate review. See Iowa R. App. P. 6.903(2)(g).

The father contends the juvenile court erred in finding that terminating his parental rights was in the child's best interest. To determine whether it is in the child's best interest to terminate parental rights, 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 father argues that he is a good parent, is able to meet J.W.'s needs, and there is no evidence that his drug use would lead to an adjudicatory harm. He argues the court should not hold his lack of candor about his drug use against him. The father's drug use in this case extends well beyond a lack of candor. Even while his parental rights were at stake, the father continued to use, and lie about using, cocaine or crack cocaine approximately ninety-six times over the past year. The father's deceptive behavior and long-term, substantial drug abuse raises serious questions about his ability to parent J.W. now or at any time in the

near future. The father's history of violent encounters—including being shot twice—and his deceptive behavior in hiding his ongoing drug use from service providers does not foster the type of safe, nurturing environment J.W. deserves. J.W. has essentially been in foster care since birth. J.W.'s current foster care environment is more apt to meet his immediate and long-term physical, mental, and emotional needs when compared to the father's history of violence and ongoing drug use. Accordingly, we find terminating the father's parental rights is in J.W.'s best interest. See Iowa Code § 232.116(2).

C. Statutory Exceptions

The mother asserts the juvenile court failed to consider the bond between the mother and her baby. The father also contends the parent-child relationship weighs against terminating his parental rights. Pursuant to section 232.116(3)(c), the juvenile court is not obligated to terminate parental rights when “[t]here is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.” Soon after the mother gave birth to J.W., the child was removed from her care. At the conclusion of the termination hearings, J.W. was almost two years old. At no point during the termination proceedings or the underlying child in need of assistance case did J.W. return to the mother's or the father's care. The evidence is insufficient to establish that terminating either the mother's or the father's parental rights would be detrimental to the child because of the alleged closeness of the parent-child relationship. Upon our de novo review, we find

insufficient evidence to preclude termination of parental rights under section 232.116(3)(c) as to both the mother and the father.

D. Additional Time

The father argues he should be given additional time to work toward reunification under section 232.104(2)(b).² To allow for additional time to work for reunification under section 232.104(2)(b), the court must “enumerate the specific factors, conditions, or expected behavioral changes which comprise the basis for the determination that the need for removal of the child from the child’s home will no longer exist at the end of the additional six-month period.” The father’s substantial and continued drug use did not come to light until the final minutes of the fifth and final day of the termination proceedings. At that time, he was just beginning intensive outpatient drug treatment. J.W. has already languished in parentless limbo for nearly two years at the time of this appeal. J.W. should not have to continue to languish in limbo while the father struggles to acknowledge and correct his substance abuse issues. J.W. deserves permanency now. We find no error in the juvenile court’s refusal to grant the father additional time to work toward reunification.

AFFIRMED ON BOTH APPEALS.

² The mother made no such request for additional time on appeal. Thus, that issue is not properly before this court. See Iowa R. App. P. 6.903(2)(g).