

IN THE COURT OF APPEALS OF IOWA

No. 7-353 / 07-0593

Filed June 13, 2007

**IN THE INTEREST OF D.M.,
Minor Child,**

**D.L.G., Father,
Appellant,**

**D.A.M., Mother,
Appellant.**

Appeal from the Iowa District Court for Polk County, Joe E. Smith, District Associate Judge.

A mother and a father each appeal from a juvenile court order terminating their parental rights. **AFFIRMED ON BOTH APPEALS.**

Andrea Flanagan of Sporer & Ilic, P.C., Des Moines, for appellant-father.

Jared Harmon, Des Moines, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Christine Gonzales, Assistant County Attorney, for appellee.

Cory Gourley of Gourley & Rehkamper, P.L.C., Des Moines, guardian ad litem for minor child.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.

Denise is the mother, and Daniel the father, of ten-year-old Danielle. Denise and Daniel each appeal from a March 2007 juvenile court order terminating their parental rights to Danielle. We affirm on both appeals.

Danielle and her fourteen-year-old and sixteen-year-old brothers¹ were removed from the custody of their parents and placed in the temporary legal custody of the Iowa Department of Human Services (DHS) in November 2005. Daniel was in jail. Denise had for some time left the children in the care of Denise's mother, who abused alcohol and did not supervise the children, leading to frequent and continuing calls to local police.

The State filed a child in need of assistance (CINA) petition. In late November 2005 the juvenile court confirmed the temporary removal of the children and placed their custody with their paternal grandmother, subject to supervision by the DHS. In January 2006 the court adjudicated the children CINAs pursuant to Iowa Code sections 232.2(6)(b), (c)(2), and (n) (2005), noting Denise's unresolved substance abuse issues. It placed custody of the children with their paternal grandmother. This status was continued in a March 2006 dispositional order, which again noted Denise's unresolved substance abuse issues.

In a May 2006 review order the juvenile court ordered Danielle and her brothers removed from their paternal grandmother and placed in the custody of the DHS for foster care placement. This change in status was precipitated by the grandmother being unable or unwilling to supervise and control the children, and

¹ Parental rights to the two brothers are not at issue in these appeals.

allowing Denise and Daniel to have unapproved, unsupervised visitations with them. Danielle has thereafter remained in DHS custody and foster home placement.

In its May 2006 order, the juvenile court noted Denise's unresolved substance abuse and housing issues and the "non-involvement with court ordered services" of Danielle's parents. In a July 2006 review order, it noted the "parents' unresolved substance abuse & housing issues & non-involvement of services."

The juvenile court scheduled a permanency hearing for early November 2006. Following that hearing, the court ordered proceedings instituted to terminate parental rights, noting "mother's unresolved substance abuse issues & parents' unavailability." The State filed a termination petition in December 2006. Following a March 2007 hearing, the court terminated each parent's parental rights to Danielle pursuant to Iowa Code sections 232.116(1)(e), (f), and (l) (2007). Daniel and Denise both appeal.

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).

Daniel claims the juvenile court erred in terminating his parental rights, arguing the State failed to prove each of the three statutory grounds for termination relied on by the court. "When the juvenile court terminates parental rights on more than one statutory ground, we need only find grounds to terminate

under one of the sections cited by the juvenile court to affirm.” *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). We choose to focus on section 232.116(1)(f).

Section 232.116(1)(f) requires proof that the child (1) is four years of age or older; (2) has been adjudicated a CINA; (3) has been removed from the physical custody of the child’s parents twelve of the last eighteen months, or for the last twelve months and any trial period at home has been less than thirty days; and (4) at the present time cannot be returned to the custody of its parents as provided in section 232.102. The State clearly proved the first three of the four essential elements, and only the fourth is at issue in Daniel’s appeal, as his claim of error is that: “The State failed to prove by clear and convincing evidence that [Danielle] could not be returned to her father.” This element is proved when the evidence shows the child cannot be returned to the parents without remaining a CINA. *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 the child’s initial removal from the home. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992).

Daniel is fifty years of age. He began drug use at age seventeen. He has used and abused marijuana, crack cocaine, and alcohol. Daniel had substance abuse treatment in 1998, but thereafter used drugs, by his own admission using crack cocaine as recently as six months before the termination hearing. He was ordered to submit to a substance abuse evaluation as part of the CINA proceeding, but waited a year to do so, until about the time the juvenile court ordered that a termination proceeding be instituted. Daniel was ordered to

submit to drug testing, starting in about May 2006. From then until mid-January 2007 he did so on only three of about seventy occasions on which appointments were made, despite knowing that his failure or refusal to do so prevented visitation with Danielle.

Daniel has a lengthy and serious history of criminal convictions and incarcerations. In the last twenty years he has almost three dozen convictions for theft; seven convictions for driving while barred or while his license was under suspension; two convictions for failure to appear; and convictions for domestic abuse assault, resisting arrest, operating while intoxicated, and possession of controlled substances. About sixteen of his convictions have resulted in jail sentences, and eight in prison sentences. Daniel was in jail when the CINA proceedings started. At the time of the termination hearing he was facing a contempt of court charge and a warrant for his arrest was outstanding in another county. Daniel does not believe his criminal activities and history are relevant to his ability to have Danielle placed with him. Daniel asserts he is self-employed, selling cars, and also has employment working for a truck salvaging company. He has no driver's license, as a result of his failure or refusal to pay fines and child support. Daniel has no housing of his own, relying on his mother for his place to live. He did not start substance abuse treatment until December 2006 as he does not feel he needs it. At the time of the termination hearing, some ten weeks of treatment remained. His prognosis is at best guarded, given his thirty-year history of substance abuse and relatively recent use of crack cocaine.

Daniel was released from jail in late January 2006, showed no interest in visitation with Danielle until the time a permanency hearing was scheduled, and

began seeing her with any regularity only after the juvenile court ordered termination proceedings instituted. Finally, and perhaps most importantly, Daniel acknowledged at the termination hearing that he was unable to have Danielle's care and custody at the present time and it would probably be "a few months or so" before he was able to do so.

We conclude the State proved by clear and convincing evidence that at the time of the termination hearing Danielle could not be placed in Daniel's custody without being subject to the threat of neglect or other harm that would cause her to remain a CINA. We therefore further conclude the State proved by clear and convincing evidence the grounds for termination of Daniel's parental rights to Danielle pursuant to section 232.116(1)(f).

Denise and Daniel both claim that termination of their respective parental rights to Danielle is not in her best interest.

Danielle has been removed from her parents' custody and care for sixteen months. Even before that, Denise had not for some time provided Danielle's care. Denise has a serious substance abuse problem, and has been unwilling to take steps to deal with it. She has failed to participate in necessary and required services, and has not meaningfully participated in supervised visitation. Denise was incarcerated at the time of the termination hearing.

Daniel has, with perhaps the exception of a couple of months, never had care and custody of Danielle. He spent substantial periods of time in jail in 1997, in prison in 2001, and in jail in 2004. He was in jail in 2005 when the CINA case began, and after being released in January 2006 was again jailed for theft in July 2006. At the time of the termination hearing he had a contempt of court charge

pending and an arrest warrant outstanding. He has generally not been a presence in Danielle's life in the past, and is highly unlikely to be in the future.

Danielle seldom talks about Denise. Until Daniel began visiting with Danielle after the juvenile court ordered termination proceeding instituted, Danielle did not speak of him. Danielle does not want to be with Daniel. Neither parent has at any time contacted the counselor who is providing individual therapy to Danielle. Danielle is thriving in her present foster home.

Both Danielle's individual therapist and the DHS caseworker assigned to Danielle opined that she needs stability and permanency, and that her parents will not be able to provide it. Both they and Danielle's attorney and guardian ad litem believe termination of parental rights is in Danielle's best interest and recommend it.

The juvenile court concluded, in part:

Danielle's parents let time pass while they pursued their own interests at the expense of their daughter. Danielle is entitled to know with certainty where she will spend the rest of her childhood. Her parents are unable to provide that certainty. Danielle has a bright future if the rest of her childhood can be spent in a stable and nurturing environment, an environment her parents are not in a position to provide. Certainly termination is in Danielle's best interest.

We agree, and conclude that termination, rather than long-term foster care or another planned permanent living arrangement, is in Danielle's best interest in order to provide her with the opportunity to acquire the stability, security, and permanency she needs and deserves.

AFFIRMED ON BOTH APPEALS.