

IN THE COURT OF APPEALS OF IOWA

No. 17-1398
Filed November 22, 2017

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

A.O., Mother,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Charles D. Fagan, District Associate Judge.

A mother appeals the termination of her parental rights. **AFFIRMED.**

Vanessa E. Strazdas of Strazdas Law, Council Bluffs, for appellant mother.

Thomas J. Miller, Attorney General, and John McCormally, Assistant Attorney General, for appellee State.

Roberta J. P. Megel of the State Public Defender's Office, Council Bluffs, guardian ad litem for minor child.

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

DOYLE, Judge.

E.M. was born in August 2015. Almost two years later, the juvenile court terminated his mother’s parental rights under Iowa Code section 232.116(1)(h) and (l) (2017).¹ The mother now appeals, challenging both grounds for termination found by the juvenile court. Insofar as our review requires statutory construction, our review is for correction of errors at law. See *In re C.F.-H.*, 889 N.W.2d 201, 203 (Iowa 2016). Otherwise, our review is de novo. See *In re M.W.*, 876 N.W.2d 212, 219 (Iowa 2016).

I. Discussion.

Before the court may terminate parental rights, it must find clear and convincing evidence supporting one of the grounds for termination listed under section 232.116(1).² See *id.* “On appeal, we may affirm the . . . order on any ground that we find supported by clear and convincing evidence.” *In re D.W.*, 791 N.W.2d 703, 707 (Iowa 2010). After reviewing the record in this case de novo, we conclude grounds for termination exist under section 232.116(1)(h).

Paragraph (h) of section 232.116(1) requires the State to prove each of the following four elements:

- (1) The child is three years of age or younger.
- (2) The child has been adjudicated a child in need of assistance [(CINA)] 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,

¹ The child’s father passed away unexpectedly after the juvenile court case was initiated.

² Appellate review of a chapter 232 termination-of-parental-rights order generally involves a three-step analysis. See *M.W.*, 876 N.W.2d at 219; see also § 232.116(1)-(3). However, we need not address any step not disputed on appeal. See *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010) (“Because the father does not dispute the existence of the grounds . . . , we do not have to discuss this step.”). Accordingly, we do not discuss the steps under subsections (2)—best-interest determination—and (3)—exceptions to termination. See *id.*

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.

It is undisputed that the child was under three years old at the time of the termination-of-parental-rights hearing and adjudicated a CINA as required, satisfying subparagraphs (1) and (2) of section 232.116(1)(h). It is the third and fourth elements of paragraph (h) the mother challenges on appeal.

A. Iowa Code Section 232.116(1)(h)(4).

Beginning with subparagraph (4) of section 232.116(1)(h), we find the record abundantly evidences the child could not be returned the mother's care at the time of the termination-of-parental-rights hearing. The record shows the mother has a history of illegal drug use, alcohol abuse, and domestic violence, and she has been involved with the Iowa Department of Human Services (DHS) equivalent in several other states concerning her four other children—none of whom are presently in her care.³ With respect to E.M., the record shows the child was removed from his parents' care in January 2016, after it was reported to the DHS that the parents were using methamphetamine while the child was in their care.

Services were offered to the family, and the child was placed back in the parents' care in September 2016 after they made significant progress, staying drug free, among other things. However, the father passed away in January 2017. The mother appeared to be holding herself together thereafter; on February 24, 2017,

³ None of these children are at issue in the present case.

the DHS social work case manager reported the mother had “been able to maintain appropriate care of [the child] and established [a] plan for moving forward,” including maintaining positive supports and remaining “free from mind-altering substances.” Ultimately, the mother was not able to maintain her sobriety.

By March 2017, there were reports the mother was drinking to intoxication while caring for the child. On March 6, 2017, the service provider went to the mother’s home, but the mother was not there. The service provider located the mother at another address and found the mother intoxicated, “evidenced by uncoordinated movements and slurred speech.” The home was cluttered, dirty, and foul-smelling, and the child was observed eating a doughnut of undetermined age off the floor. The mother admitted she had been “intoxicated for the past three days.” The mother then agreed to place the child with his paternal grandparents as part of a new safety plan. While waiting for the paternal grandfather to arrive to pick up the child, the service provider reported the following occurred:

[The mother] had a water bottle sitting out and asked if [the child] wanted a drink. [The child] made a face as if he had a lemon. This worker questioned [the mother] about what was in the water bottle. She stated that it was water and [the child] does not like water. Then a second time [the child] was given the bottle, this worker took the lid off the bottle to verify it was water and it appeared to be straight alcohol. This worker notified . . . DHS and then contacted poison control. Poison control stated that [the child] needed to be seen. This worker contacted [the] DHS worker as every time this workers phone went off [the mother] would escalate. DHS notified the police department for the safety of [the child] and this worker. When the police arrived, [the mother] blew a .385 alcohol level and complained of a stomach ache and was taken to the hospital and later jail. [The child] was transported to the hospital by his paternal grandfather.

The next day a permanency-review hearing was held, and thereafter the court entered its order formally placing the child in the care of the DHS for placement in

relative, foster, or other suitable care, where he has since remained. The court also directed the mother to obtain a new substance abuse evaluation.

The mother's downward spiral continued. Her visits with the child grew "sporadic," and she went "weeks at times without visits." She had begun "frequenting a home with known methamphetamine presence." She missed numerous drug screens. She had very little communication with the DHS case worker and the service provider. At times, she called the service provider while intoxicated. The mother still had not obtained a substance-abuse evaluation by the time of the permanency-review hearing held at the end of May 2017. DHS recommended the permanency goal be changed from reunification to termination of parental rights due to the mother's "inability to demonstrate positive movement in this case, failure to complete consistent visitation, lack of stable housing, and lack of progress towards substance abuse treatment." The court agreed and directed the State to file a termination-of-parental-rights petition, which the State filed on June 19, 2017.

At the August 2017 termination-of-parental-rights hearing, the mother testified she completed a substance-abuse evaluation in July 2017 and began treatment the following week. She testified she had an alcohol problem and was "getting treatment for it," but it is clear she did not re-engage in treatment until after the termination-of-parental-rights petition was filed. The mother claimed the service provider was incorrect when she reported the child had consumed alcohol in March 2017, but the mother admitted that, at that point, she had been drinking for three days straight and "blew a .385," so she is not reliable reporter on the matter. Moreover, the mother testified she was "committed to her sobriety," but

she also maintained she missed numerous drug screens because it was during her work hours and “there’s no way [she] would be able to make it.” However, she admitted she had only been employed for “about three weeks” at the time of the hearing, so the drug screens she missed between March 2017 and July 21, 2017, could not have been due to a work conflict.

We recognize the death of the father may have contributed to the mother’s abuse of alcohol. Nevertheless, this is the kind of situation where the mother has to demonstrate she can step up and put the needs of her child first. A three-day bender helped no one and clearly endangered the child’s safety, especially considering the mother gave her toddler alcohol. Moreover, this is not the mother’s first rodeo; she has been in this situation before with respect to her other children. Yet, after E.M. was removed from her care the second time in March 2017, she did not really participate in the case until *after* the State filed the termination-of-parental-rights petition, around three months later. Having reviewed the record de novo, we agree with the juvenile court that the State proved by clear and convincing evidence that the child could not be returned to the mother’s care at the time of the termination-of-parental-rights hearing.

B. Iowa Code Section 232.116(1)(h)(3).

As to subparagraph (3) of section 232.116(1)(h), the mother argues that, “[i]mmediately prior to the termination hearing, the child had been removed from [her] care for five months and one week. This is not sufficient to meet the ‘last six consecutive months’ wording.” While this is true, the mother overlooks the statutory language immediately preceding the “for the last six consecutive months’ wording”—specifically, the legislature’s use of the word “or” before the phrase upon

which she relies. See Iowa Code § 232.116(1)(h)(3). “Or” is presumed to be disjunctive unless contrary intent appears. See *Kearney v. Ahmann*, 264 N.W.2d 768, 769 (Iowa 1978); see also *In re J.C.*, 857 N.W.2d 495, 504 (Iowa 2014); *Iowa Erosion Control, Inc. v. Sanchez*, 599 N.W.2d 711, 714 (Iowa 1999). Contrary legislative intent is not present here, meaning the language preceding and following the “or” sets out two alternative choices. See generally *Anderson v. State*, 801 N.W.2d 1, 6 (Iowa 2011) (determining legislature’s use of the disjunctive “or” necessitated conclusion that statute set forth a list of alternatives), *superseded by statute*, 2012 Iowa Acts ch. 1138, § 91 (codified at Iowa Code § 907.3 (2013)); *Iowa Erosion Control, Inc.*, 599 N.W.2d at 714 (holding “legislature’s use of the word ‘or’ in [statute] signals two distinct classes”); see also *In re A.F.*, No. 01-501, 2001 WL 1130831, at *3 (Iowa Ct. App. Sept. 26, 2001) (discussing the disjunctive “or” in the statute). The State had to prove the child has been removed from the physical custody of the child’s parents for either “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.” Iowa Code § 232.116(1)(h)(3). Notably, only one of the temporal alternatives of subparagraph (3) requires removal for a consecutive number of months. See *id.* This makes sense, because “[t]ime is a critical element” in our statutory framework. *In re C.B.*, 611 N.W.2d 489, 495 (Iowa 2000). Under chapter 232, “a parent has a definite period of time to remedy the problems which led to the removal so the child can be safely returned.” *In re J.O.*, 675 N.W.2d 28, 30 (Iowa Ct. App. 2004). In fact, “[t]he statutory time period specified in section 232.116(1)(h)(3) begins to run on the date custody is transferred and continues to run until the date of the termination hearing.” See *id.* “We have

repeatedly followed the principle that the statutory time line must be followed and a child should not be forced to wait for the parent to overcome their addiction.” *In re J.A.D.-F.*, 776 N.W.2d 879, 885 (Iowa Ct. App. 2009). Accordingly, “[w]e view cases in which the statutory period for patience with a parent has expired with urgency.” *In re J.D.B.*, 584 N.W.2d 577, 581 (Iowa Ct. App. 1998).

Here, the child was first removed from the parents’ care in January 2016, and the termination-of-parental-rights hearing was held a year-and-a-half later, well beyond the one-year timeframe for children aged three and under. See Iowa Code § 232.116(1)(h)(3). During that time, the child was returned to the parents’ physical custody in September 2016 and again removed in March 2017. Excluding the months the child was returned to the parents’ physical custody, the child had been removed for approximately thirteen of the last twenty months. We agree with the juvenile court that the State proved by clear and convincing evidence the child had been removed from the mother’s physical custody as required under subparagraph (3) of section 232.116(1)(h).

II. Conclusion.

Because the State proved all four elements of section 232.116(1)(h) by clear and convincing evidence, establishing the statutory ground for termination under that paragraph, we affirm the juvenile court’s order terminating the mother’s parental rights.

AFFIRMED.