

IN THE COURT OF APPEALS OF IOWA

No. 17-1684
Filed December 20, 2017

**IN THE INTEREST OF H.B. and L.G.,
Minor Children,**

**B.M., Mother,
Appellant.**

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge.

A mother appeals the termination of her parental rights to two children.

REVERSED.

Emily K. DeRonde of DeRonde Law Firm, P.L.L.C., Johnston, for appellant mother.

Thomas J. Miller, Attorney General, and Anagha Dixit, Assistant Attorney General, for appellee State.

Charles E. Isaacson of Charles Isaacson Law, P.C., Des Moines, guardian ad litem for minor children.

Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ.

VAITHESWARAN, Presiding Judge.

A serially abused mother with a history of substance abuse and mental illness appeals the termination of her parental rights to two children, born in 2012 and 2014. She challenges the ground for termination cited by the juvenile court and raises several other issues. We find her challenge to the termination ground dispositive.

I. Background Facts and Proceedings

The children were removed from the mother's care in 2015 after she left them with relatives and failed to provide the relatives with medical releases. The State petitioned to have the children adjudicated in need of assistance under several statutory grounds. The juvenile court granted the petition but dismissed one of the statutory grounds—Iowa Code section 232.2(6)(b) (2017)--"pursuant to oral motion of the State." Section 232.2(6)(b) defines a child in need of assistance as a child "[w]hose parent, guardian, other custodian, or other member of the household in which the child resides has physically abused or neglected the child, or is imminently likely to abuse or neglect the child."

The mother cooperated with reunification services and, in time, the juvenile court ordered the children returned to her care. The children remained with her for seven months. During that time, the mother's cooperation waned and she failed to appear at review hearings. The juvenile court ordered the children transferred to the department's custody.

The State petitioned to terminate the mother's parental rights. Notwithstanding its prior dismissal of the section 232.2(6)(b) ground for adjudication, the State alleged "the Court has previously adjudicated the children

to be [children] in Need of Assistance within the meaning of Section 232.2(6)(b).” The State sought termination of the mother’s parental rights pursuant to section 232.116(1)(d) and several other statutory provisions. The other provisions required removal of the children for a specified period of time. In light of the seven-month reunification of the children with their mother, the time frame in those provisions was not satisfied.

At the termination hearing, it became apparent that section 232.116(1)(d) was the only pled termination ground on which the State could rely. To prove “physical abuse or neglect,” the State pointed to the mother’s decision to leave the children with relatives and her failure to provide medical releases. The State also cited evidence of a 2005 order terminating the mother’s parental rights to an older child. This order was partially grounded on physical abuse or neglect of the child under section 232.2(6)(b) and termination under section 232.116(1)(d).

The juvenile court terminated the mother’s parental rights pursuant to section 232.116(1)(d). This appeal followed.

II. Section 232.116(1)(d)

Section 232.116(1)(d) states termination is warranted if:

d. The court finds that both of the following have occurred:

(1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.

(2) Subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

On our de novo review, we find clear and convincing evidence to support section 232.116(1)(d)(2). The same is not true of section 232.116(1)(d)(1).

Section 232.116(1)(d)(1) requires a finding of physical or sexual abuse or neglect. These are “terms of art in this context”:

Within chapter 232, “physical abuse or neglect” and “abuse or neglect” mean “any nonaccidental physical injury suffered by a child as the result of the acts or omissions of the child’s parent, guardian, or custodian or other person legally responsible for the child. [Iowa Code] § 232.2(42) ‘[P]hysical injury to the child is a prerequisite’ to finding *past* physical abuse or neglect. See *In re B.B.*, 440 N.W.2d 594, 597 (Iowa 1989) (observing the definition of neglect under chapter 232 requires a finding of physical injury).

In re J.S., 846 N.W.2d 36, 41 (Iowa 2014); see also *In re T.S.*, No. 14-1517, 2015 WL 791698, at *9 (Iowa Ct. App. Feb. 25, 2015), *amended by In re T.S.*, 868 N.W.2d 425, 436 (Iowa Ct. App. 2015).

As noted, the State dismissed the “physical or sexual abuse or neglect” ground for adjudication. The State did not attempt to retract this dismissal in the face of evidence that the mother took a hammer to a vehicle windshield while the children were in it, causing shards of glass to land around them, and in the face of a guardian ad litem’s report documenting physical abuse of one of the children. Nor was there a court finding of physical injury to these children. As a result, there was no basis to conclude “[t]he court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents.” Iowa Code § 232.116(1)(d)(1); see also *In re M.W.*, 876 N.W.2d 212, 220 (Iowa 2016) (“The court of appeals concluded that the record contained no evidence that either of the children suffered a ‘nonaccidental physical injury’ that would support

the termination of parental rights pursuant to these code sections. We agree and affirm the court of appeals in this regard.”); *T.S.*, 868 N.W.2d at 436 (“The juvenile court made no finding that there was a physical injury to K.G., nor is there any evidence in the record of a physical injury. As such, although the CINA adjudication was appropriate under the “imminently likely” clause of 232.2(6)(b), the facts do not support the juvenile court’s termination of Leanne’s parental rights to K.G. under paragraph (d), and we reverse the order to that extent.”)

The only remaining part of section 232.116(1)(d)(1) on which the State could rely is the second clause, which allows for termination when “the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.” The 2005 termination order contained the following finding: “On November 23, 2004, the State filed a petition to adjudicate [the child] a child in need of assistance pursuant to 232.2(6)(b), (c)(2) and (n), in Case No. JV 219704” and the child was adjudicated to be a child in need of assistance as defined in Iowa Code Section 232.2(6)(b), (c)(2), and (n) based on the mother’s inability “to care for and provide a safe home for [the child] due to her own serious issues and need for residential placement.” Although this language technically satisfies the second clause of section 232.116(1)(d)(1), the order and language predated our appellate courts’ interpretation of “past physical abuse or neglect” to require a non-accidental physical injury. See *J.S.*, 846 N.W.2d at 41. In light of this recent interpretation, we decline to find the 2005 termination order sufficient to prove section 232.116(1)(d)(1).

We conclude the State failed to satisfy its burden of proving termination under section 232.116(1)(d). We reverse the order terminating the mother's parental rights to two of her children.

REVERSED.