IN THE COURT OF APPEALS OF IOWA

No. 0-197 / 10-0202
Filed May 12, 2010

IN THE INTEREST OF N.F.,
Minor Child,

C.L.F., Father,
Appellant,

S.M.B., Mother,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Daniel L. Block, Associate Juvenile Judge.

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

Delmer D. Werner, Cedar Rapids, for appellant-father.

Christina M. Shriver, Hudson, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Steven Halbach, Assistant County Attorney, for appellee.

Melissa Anderson-Seeber, Waterloo, attorney and guardian ad litem for minor child.

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

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

C.F. is the father and S.B. is the mother of N.F., who was fifteen months of age at the time of a November 2009 termination of parental rights hearing. They separately appeal from a January 2010 order terminating their parental rights to N.F. We affirm on both appeals.

In August 2008 a child abuse assessment was initiated as a result of a report that C.F. had driven an automobile while intoxicated with one-month-old N.F. lying unrestrained on the front seat, and that C.F. had then "flung" the child out the window to C.F.'s adult daughter. The investigation resulted in a "founded" report of denial of critical care-failure to provide proper supervision, with C.F. and S.B. as the perpetrators and N.F. as the victim.[1] As a result of the incident C.F. was arrested and charged with child endangerment.

S.B. agreed to a safety plan and secured an order that C.F. have no contact with her. She soon had the order rescinded and took N.F. to see C.F., in violation of the agreed-to safety plan. N.F. was removed from S.B. in early September 2008 and placed in the legal custody of the Iowa Department of Human Services (DHS). He has thereafter remained in the legal custody of the DHS, placed with a relative, C.F.'s adult daughter.[2]

N.F. was adjudicated a child in need of assistance (CINA) in October 2008. A dispositional order was entered in December 2008. As a result of a

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[1] There were two earlier "founded" reports of physical abuse by C.F., one resulting from C.F.'s abuse of a daughter of S.B., and the other resulting of C.F.'s abuse of another daughter of S.B. S.B. has three daughters, sixteen, twelve, and five years of age and all live with relatives as a result of their fear of, and perhaps dislike of, C.F.

[2] This daughter was involved in reporting to the police C.F.'s driving while intoxicated with N.F. unrestrained.

February 2009 permanency hearing, the juvenile court deferred permanency for ninety days to allow the parents additional time to comply with services. In May 2009 the court deferred permanency an additional ninety days.

In August 2009 the State filed a petition seeking termination of parental rights. Following a hearing the juvenile court terminated each parent's parental rights pursuant to Iowa Code section 232.116(1)(h) (2009) (child three or younger, adjudicated CINA, removed from parents at least six of last twelve months, cannot be returned at present time). The court also terminated C.F.'s parental rights pursuant to section 232.116(1)(*l*) (child adjudicated CINA and custody transferred for placement; parent has severe, chronic, substance abuse problem and presents danger to self or others; parent's prognosis indicates child cannot be returned to parent within reasonable period of time). C.F. and S.B. 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).

C.F. initially claims the juvenile court erred in terminating his parental rights pursuant to section 232.116(1)(h) because the State did not prove N.F. "could not be returned to . . . S.B." Assuming, without so deciding, that the State did not prove N.F. could not be returned to S.B.'s custody, such would constitute no failure to prove the section 232.116(1)(h) grounds for termination of C.F.'s

parental rights. *See generally In re N.M.*, 491 N.W.2d 153, 155-56 (Iowa 1992) (holding that various provisions of section 232.116(1), including the predecessor of current section 232.116(1)(h), allow termination of the parental rights of one parent even though children remain in the custody of another parent whose rights are not terminated).

Although not stated as an issue on appeal, C.F. argues that by the time the termination order was entered he was home and capable of having N.F.'s custody placed with him. However, as shown by the record made at the termination hearing, at the time of the termination hearing C.F. had been incarcerated for over six months and would not be released for almost two more months. C.F. thus asserts "facts" beyond those presented at trial and a part of the record. We will not consider them on appeal, *Rasmussen v. Yates*, 522 N.W.2d 844, 846 (Iowa Ct. App. 1994), as we limit our review to the record made in the termination hearing, *In re M.M.*, 483 N.W.2d 812, 815 (Iowa 1992). N.F. clearly could not be returned to C.F. at the time of the termination hearing.

Although also not stated as an issue, C.F. appears to argue that he should have been given an extension of a few months before the court considered terminating his parental rights. We find nothing in the record indicating that such a request or argument was made to the juvenile court.[3] We conclude error has not been preserved on this argument and do not further address it.

In summary, we find no grounds to disturb the juvenile court's termination of C.F.'s parental rights pursuant to section 232.116(1)(h). We need not and do

[3] The juvenile court had already twice extended a permanency decision, ninety days each time.

not consider whether the State also proved the grounds for termination of his parental rights pursuant to section 232.116(1)(*l*). *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999).

S.B. claims the juvenile court erred in terminating her parental rights because the State did not prove the final element of section 232.116(1)(h), that N.F. could not be returned to her custody at the time of the termination hearing. That element "is met when the child cannot be returned to the parental home because the definitional grounds of a child in need of assistance, Iowa Code § 232.2(6), exist." *In re A.M.S.*, 419 N.W.2d 723, 725 (Iowa 1988). 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 removal from the home. *M.M.*, 483 N.W.2d at 814.

S.B. has been diagnosed as having a personality disorder and an adjustment disorder. In orders filed in early December 2008, early February 2009, and early May 2009, the juvenile court ordered S.B. to participate in individual mental health counseling, follow recommendations for prescribed medication, and follow all recommendations of her mental health counselors.[4] Although S.B. was hesitant to accept offered services, she initially cooperated in early 2009. Subsequently, after late March 2009, she missed mental health counseling appointments until well after the petition for termination of parental rights was filed in August. S.B. at times stopped taking prescribed medication, and at times "self-medicated" by doubling the dosage she was supposed to be

[4] Numerous other services were ordered and offered to address the many other issues and problems of S.B., of C.F., and of the two as a couple.

taking. The evidence shows that S.B. is calm and rational when taking prescribed medication and attending mental health counseling, but becomes erratic, profane, aggressive, and confrontational when not doing so. Despite her counselor's recommendations that S.B. needs continuing counseling and medication, as of October 2009 S.B. had rejected any further mental health counseling. Although S.B. indicated she was continuing to take prescribed medication, her lack of contact with mental health personnel and her erratic and confrontational behavior caused DHS personnel and service providers to doubt that she was doing so.

C.F., forty-seven years of age, has abused alcohol since age fourteen and has numerous convictions for operating while intoxicated, public intoxication, and domestic abuse. Some of the domestic abuse convictions are alcohol-related. C.F. has experienced only about one and one-half years of sobriety in the last thirty-three years. C.F. has been diagnosed a being afflicted by mood disorder and personality disorder. S.B. and C.F.'s relationship has been plagued by his verbal abuse and at times by his physical abuse of S.B.

The services ordered for C.F. and for the couple included couples counseling. C.F. originally cooperated with services, but by about March 2009 stopped doing so. S.B. and C.F. were initially scheduled for five sessions of couples counseling. They felt they had no need for couples counseling and went merely to satisfy the DHS and the juvenile court, but stopped going after two sessions. S.B. attributes their lack of further attendance to C.F.'s arrest for probation violations and his subsequent incarceration. It appears, however, that

after attending two sessions the couple had little interest in attending, and little or no intent to attend, any further sessions.

S.B.'s three daughters live with relatives as a result of C.F.'s drinking and abuse and S.B.'s choice to tolerate the situation. N.F. was removed from S.B. and C.F. for the same reasons. S.B. initially acknowledged C.F.'s alcohol abuse and domestic abuse and acknowledged that he represented a threat to her children. She has subsequently minimized his alcohol abuse,[5] denied that physical abuse had occurred, and stated a belief that C.F.'s actions have not been a threat to N.F.'s safety. Until the termination hearing S.B. was unwilling to consider requiring C.F. to leave their home if he was drinking and a child or children were present.

In the opinion of the professionals involved in this case, neither S.B. nor C.F. understand how domestic violence can impact children's safety; if S.B. is not involved in taking prescribed medication and participating in mental health counseling she may not recognize and appropriately respond to threats to N.F.'s safety; and S.B. has up to the present time failed or refused to put her children's needs ahead of her own needs (as demonstrated by choosing to allow an abusive, intoxicated C.F. to remain in her home while placing her three daughters elsewhere).

We agree with the juvenile court that N.F. could not be returned to S.B. as provided by section 232.102 at the time of the termination hearing. *See* Iowa

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[5] As one example, she testified at the termination hearing that C.F. could not have been intoxicated on the morning he drove a vehicle with N.F. unrestrained in the front seat, because it would take more to get him drunk than the two quarts and sixteen ounces of beer or ale she reported to the police he had consumed that morning before driving.

Code § 232.2(6)(b) (imminent likelihood of physical abuse or neglect); *id*. § 232.2(6)(c)(2) (imminent likelihood of harmful effects as result of failure of parent to exercise reasonable degree of care in supervising child).

AFFIRMED ON BOTH APPEALS.