

IN THE COURT OF APPEALS OF IOWA

No. 0-449 / 10-0746

Filed June 30, 2010

**IN THE INTEREST OF S.F. and A.F.,
Minor Children,**

**T.G.F., Father,
Appellant.**

Appeal from the Iowa District Court for Clinton County, Phillip Tabor,
District Associate Judge.

A father appeals from the order terminating his parental rights.

AFFIRMED.

Mary Wolfe, Clinton, for appellant father.

Lucy Valainis, Davenport, for mother.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant
Attorney General, Mike Wolf, County Attorney, and Cheryl Newport, Assistant
County Attorney, for appellee State.

Thomas Lonergan, Clinton, for minor children.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J.,
takes no part.

DANILSON, J.

Toby¹ appeals from the termination of his parental rights to A.F. and S.F. pursuant to Iowa Code section 232.116(1)(d),² (i),³ and (l)⁴ (2009). He contends the statutory grounds have not been met under any of those provisions. Upon our de novo review we find clear and convincing evidence to support termination pursuant to section 232.116(1)(l) and we therefore affirm.

I. Background Facts and Proceedings.

A.F. was born in November 2005 and S.F. in October 2006 to Toby and Audra,⁵ parents who were never married. These two children have been involved with the Iowa Department of Human Services (DHS) throughout their lives. Since her birth A.F. has tested positive for cocaine on three occasions and has experienced five removals and out-of-home placements, and S.F. has tested positive for cocaine on two occasions and has experienced four removals and

¹ The father's name appears in the record spelled both as "Toby" and "Tobey." We have used the spelling used in the father's exhibits.

² Iowa Code section 232.116(1)(d) authorizes termination of parental rights if (1) the court has previously adjudicated the child a child in need of assistance (CINA) after a 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 sibling CINA and (2) subsequent to CINA 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."

³ Section 232.116(1)(i) authorizes termination if (1) the child meets the definition of CINA, (2) there is clear and convincing evidence that the abuse or neglect posed a significant risk to the life of the child or constituted imminent danger to child, and (3) there is clear and convincing evidence that services would not correct the conditions which led to abuse or neglect within a reasonable period of time.

⁴ Section 232.116(1)(l) authorizes termination if (1) child has been adjudicated CINA and custody has been transferred, (2) the parent has severe, chronic substance abuse problem, and presents a danger to self or others as evidenced by prior acts, and (3) there is clear and convincing evidence that the parent's prognosis indicates that the child will not be able to be returned to the custody of the child within a reasonable period of time.

⁵The mother has not appealed the termination of her parental rights.

out-of-home placements. At the termination hearing in April 2010, their play therapist testified:

They don't trust easily. They are fearful of new situations. They have increased anxiety. They have symptoms of post-traumatic stress disorder, and they're afraid a lot. They're afraid that they will be removed again from [their foster parents]. They don't know where they'll go. They don't know what will happen to them. This has become the norm for these kids.

As background, A.F. tested positive for opiates and cocaine at birth, resulting in a founded abuse report against Audra. A.F. was voluntarily placed with her maternal grandmother and then placed in foster care from February through April 2006. DHS services were closed in December 2006 because Audra had followed through with substance abuse treatment and participated in services. Toby was only minimally involved, if at all.

In December 2007, another child abuse report against Audra was founded for denial of critical care and failure to provide proper supervision. Both children tested positive for cocaine. The girls were voluntarily placed with their grandmother.

On January 18, 2008, an abuse report that Toby had used cocaine in the children's presence was "not confirmed" because "[t]here was not a preponderance of evidence to support that [the children] were placed at risk for injury or death due to being exposed to cocaine by their father." DHS unsuccessfully attempted to locate Toby during the assessment of this report. It was recommended that if Toby chose to be involved with his daughters, he cooperate with services and juvenile court recommendations and he would be

expected to follow the same expectations as Audra. The child protective worker recommended a substance abuse evaluation and random drug tests for Toby.

A CINA petition was filed in February 2008 after Audra was arrested for child endangerment and the children tested positive for cocaine and other illegal drugs. A.F. and S.F. were placed in foster care. Audra entered a short-term treatment program, but was unsuccessfully discharged in March. On April 1, 2008, Audra pled guilty to child endangerment. On April 2, the girls were adjudicated CINA. That same day, Audra entered treatment at a halfway house. The father's name was listed as one upon whom the orders of adjudication and disposition were served.

On June 1, 2008, Audra was discharged from the treatment program after reaching maximum benefits. DHS worker, Tina Fuller, reported at a July 9, 2008 family team meeting that she was optimistic about Audra's progress, but reminded the mother that "this was her last chance." Audra had visits with the girls, first supervised and then unsupervised.

The children were moved from foster care and placed with their maternal grandmother on August 8, 2008. The motion to modify the prior dispositional order noted that "father is not participating in the case plan and is not represented." The "cc" list on the order modifying disposition notes next to the father's name "no address; not sent."

Audra continued to cooperate with DHS and test negative for drugs. On November 5, 2008, the children were returned to Audra's care with DHS supervision.

From July 2008 through February 2009, Audra apparently allowed Toby overnight visits with the girls without the knowledge or approval of DHS.

On February 2, 2009, the children were again removed from Audra's care after Audra tested positive for cocaine. The children were again placed in the care of their grandmother.

On February 20, 2009, Toby contacted DHS and requested that he be included in the DHS case. He stated he had been hopeful Audra would be able to stop her drug usage so she could continue to parent the girls, but that did not now seem possible. Toby at that time was involved in anger management. DHS conducted a criminal background check, which revealed several prior OWI, domestic abuse assault, consumption/intoxication, and disorderly conduct charges and convictions. Toby had twice been ordered to complete substance abuse treatment in 1992 and 2004.

DHS requested that Toby complete a substance abuse evaluation and abstain from alcohol use around his children. He began to have supervised visits with A.F. and S.F. at the end of February 2009, which "rather quickly" progressed to unsupervised visits with random drop-ins, to unsupervised visits with drop-ins, and then to overnights. Toby was living with his paramour and her two children.

Family care coordinator, Linda Huling, noted on April 11, 2009, that she "[r]eviewed with Toby case plan expectations," which included that Toby "will be able to maintain a home environment that is consistently clean and drug free" for his children; "meet with his provider on a consistent basis"; "submit to random drug testing"; "seek out appropriate counseling for domestic violence"; and "maintain stable, safe, and drug free environment." Huling noted that Toby

“needs to participate in an appropriate domestic violence or anger management program and follow all recommendations.” On April 26, 2009, Huling discussed with Toby “the effects of alcohol use on his children and personal relationships.”

Huling’s May 12, 2009 progress report indicates “Toby completed substance abuse treatment at New Directions. Toby attends individual counseling sessions with Dan Fullerton to address anger issues.”

On May 17, 2009, Huling discussed with Toby that she received information that he had been involved in an altercation in a local bar. They also discussed the impact of alcohol use on his children. On May 22, 2009, Toby telephoned Huling and was very emotional. She asked him if he had been drinking and he stated he had been. Huling noted, “Toby continues to deny he has an addiction to alcohol and is unable to recognize the impact alcohol abuse has on his family.” On May 24, she again reviewed with Toby the “effects of alcohol use on his children and personal relationships.”

The children were returned to Audra’s home in June 2009. Huling noted Audra was remaining sober and actively participating in substance abuse services.

Alcohol use and its effects continued to be discussed by Huling with Toby in June and July. Huling’s July 14, 2009 progress report states that a worker dropped by Audra’s home on July 7 and Toby was present at the home and was drinking alcohol. The report continues:

On June 9, 2009, a court hearing was held which specifically addressed Toby’s use of alcohol. It was agreed by the TEAM that this Family Care Coordinator would transport the children to Toby’s home every other weekend for visits to ensure he was not under the influence of alcohol.

Huling recommended that Toby complete a substance abuse evaluation and follow any treatment recommendations. DHS social worker Tina Fuller's July 22, 2009 report also indicates "Toby needs to be evaluated for substance abuse issues." Discussions with Toby about the effects of alcohol use were again noted in Huling's August 2009 progress report.

A review and permanency hearing was held August 6, 2009, and the children were ordered to remain in Audra's care, with the matter of permanency continued for six months.

Huling's October 12, 2009 progress report notes that Toby's whereabouts were unknown and that he was "reportedly homeless and staying with friends." However, an October 27, 2009 report to the court by social worker Rachael VanBuer indicates that Toby "continues to have weekend visits with his daughters." This report noted Audra's apparent relapse and that her ability to continue to provide a healthy environment for the children was in question. With regard to Toby, VanBuer wrote:

DHS case plan recommends that Toby complete a psychological evaluation to determine his competency to parent his children fulltime if it were to become necessary. To DHS knowledge, Toby has not completed the requested evaluation. Due to his criminal history and concern over his alcohol use, Toby would need to do this before he would be considered as a full-time placement option.

On November 3, 2009, just before the permanency hearing, Audra admitted to DHS that she had used cocaine the week before. The children were removed from her care. During the hearing on November 3, Toby asked that the girls be placed in his care. Toby was ordered to complete a psychological

evaluation and a substance abuse evaluation and follow through with all recommendations before he would be considered for placement.

A November 6, 2009 psychological report prepared by evaluator, John W. Keraus, found that Toby met the criteria for bipolar II disorder with hypomania and major depression, panic and anxiety disorders, and alcohol dependency in partial remission. Keraus noted the symptoms of his psychiatric disorders were “reduced recently with effective medication interventions.” He recommended that Toby continue with his medications and proceed to his scheduled alcohol and substance abuse evaluation and “follow through with any recommendations for interventions, support, and structure to deal with and alter his risk given the past history of alcohol dependence and related legal difficulties.”

On November 9, 2009, David L. Sievers wrote to VanBuer following Toby’s drug and alcohol evaluation. Based on Toby’s report that he had not “had a problem with alcohol for over eleven months,” and that his anxiety and depression were “greatly reduced since seeing Tina Budreau, Bridgeview ARNP, and receiving medication for his symptoms,” Sievers concluded: “Given Toby’s responses and recent history of not abusing alcohol, my recommendation is that he continue individual therapy with Dan Fullerton until Dan feels it is no longer needed.”

On November 10, Toby informed DHS he had completed the evaluations, which recommended that Toby continue counseling. He reported he was continuing in counseling with Dan Fullerton and that he had resumed anger management counseling.

On December 7, 2009, a petition for termination of parental rights was filed. In a December 8, 2009 affidavit, VanBuer stated in part:

DHS does have concern with Toby's criminal record, particularly his lengthy history of alcohol abuse. There is also concern with Toby's history with DHS. There are four reports regarding Toby, and although none have been confirmed, he has shown a pattern of avoiding contact and participation with DHS for extended periods of time. DHS has recently increased Toby's visitation . . . and will be randomly checking to see how he handles the increased responsibility. If this visitation continues without concern, and Toby continues to cooperate with the case plan, DHS would consider Toby a permanent placement option for his children. His paramour . . . will also need to participate in services if Toby plans to continue to reside with her.

DHS was ordered to file Termination of Parental Rights request per a court ordered dated November 3, 2009. It should be noted that [Toby] has been having increased visitation with his children since the last hearing. He has been consistent in parenting the children DHS recognizes the long pattern of concern and risk the children have been exposed to at the hands of both parents as well as the need for permanency

Huling's December 14, 2009 progress report indicates that the children were placed with Toby for an extended home visit and that she had "observed no alcohol use by Toby or safety risks to the children."

On January 14, 2010, the State moved to continue the hearing on termination of parental rights. The State noted Toby was cooperating with services and DHS "desires to provide the father an additional four months to demonstrate his compliance and consistency with the case plan." The motion was granted and the termination hearing was scheduled for May 4, 2010.

On February 10, 2010, the court ordered the children's placement transferred from foster care to Toby after several months of increasing unsupervised overnight visitation.

On February 24, 2010, Toby and his paramour were arrested for public intoxication.⁶ The children were again placed with relative foster parents.⁷ Toby completed another drug and alcohol evaluation with David Sievers on March 10 and was diagnosed with alcohol dependence. He was admitted to a co-occurring group⁸ beginning on March 15, 2010. A March 24 review hearing upheld the children's relative placement.

On April 14, 2010, VanBaur submitted a Termination Report outlining the family's involvement with DHS since 2005, the children's adjustment issues and post traumatic stress disorder, and their need for stability. She also notes Toby's delayed involvement in the children's lives and involvement with services. She writes,

Toby has demonstrated with his most recent arrest that he still is not in control of his alcohol use and that he is not able to put the needs of his children above his use of alcohol, which poses an ongoing risk of harm to the children. Toby has a long documented history of alcohol abuse, violence, and related legal troubles that has gone on throughout this case and well before. Toby has completed substance abuse treatment at least twice and has recently resumed treatment for alcohol dependence. He has also completed anger management programming. Despite Toby's demonstrated ability to follow through with treatment programs, he has not shown that he can internalize the services enough to make the long-term changes in his life that would be necessary to provide a healthy home for his children. . . . Toby denies that he had any fault in his most recent arrest, despite police documentation to the contrary.

The termination hearing was held on April 20, 2010. Hillary Davis, the children's play therapist, testified the children need stability and that following the

⁶ Toby's paramour had previously been convicted of OWI and public intoxication.

⁷ The children's grandmother died in December 2009. When she was alive, she lived for a time with the children's aunt and uncle. Consequently, A.F. and S.F. had lived with their aunt and uncle much of their lives, who are now their foster parents.

⁸ This apparently involves both substance abuse and psychological treatment.

February 24, 2010 removal from Toby's home, the children were reporting being afraid of Toby's paramour.

VanBuer testified her concerns about Toby were his lack of cooperation with the case when the girls were in various placements for the first year, his follow-through with recommendations when he finally did get involved in February 2009 did not occur until November 2009, and his being arrested in February 2010 for public intoxication following a long known history of alcohol abuse. She testified that while Toby was not told by caseworkers he could never drink, he was told not to drink around the children, and "he was very aware that getting into any trouble related to alcohol use would be an issue." She further emphasized the length of time these children had been involved in services and their need for stability. She stated she could not recommend either parent have any more time to prove themselves.

Huling testified that each time she picked the children up to transport them (whether to an appointment or visit with a parent) they needed to be reassured that they were going to return to their foster home. They were very anxious that they were going to be moved yet again. She too testified that they are in need of stability.

Toby acknowledged he had little involvement with his children's lives until February 2010. He also acknowledged that he had been through substance abuse treatment in the past, was told he had an alcohol problem, and that he should not drink. However, he stated that DHS did not tell him he could not drink, just that he should not drink around the children. He testified the children did not appear to be traumatized. Toby testified he was receiving both mental

health and alcohol abuse treatment; he was willing to cooperate with DHS; and he had done everything he had been asked to do by DHS.

On cross-examination, Toby again acknowledged that he had many prior alcohol related charges and convictions; he had been through alcohol treatment three times and been told to abstain from alcohol; and that he and his paramour went out drinking every weekend when the children were staying overnight with their grandparents, despite knowing that could jeopardize his children being in his care. Toby also testified he was aware of the CINA proceedings and chose not to participate early on in the case. He also acknowledged he made an agreement with Audra to see the children without DHS approval.

On April 21, 2010, the district court entered its order terminating parental rights. The court found that “at the beginning of the case the father had abandoned these children and took no interest in their welfare” despite being “aware they were living with a parent who had a chronic, severe substance abuse problem.” The court also found that Toby knew of the CINA case, did not participate in the case, but had visits with the children without DHS’s knowledge.

The court FINDS that once the father became involved in the case, while he made some efforts to have visitation, he did not follow through with the necessary requirements of the case plan until after the Petition for Termination was filed and that the opportunity to have the children live with him failed as the result of his severe and chronic substance abuse issues. The Court also FINDS from the history of the father’s chronic substance abuse that the future for his rehabilitation is grim.

The court further found that the children could not be returned to Toby’s care presently because the “father is still unable to handle the responsibility and needs of these children.” The court concluded that termination was in the

children's best interests as it would best further their long-term nurturing and growth.

Toby now appeals.

II. Scope and Standard of Review.

We review termination proceedings de novo. *In re Z.H.*, 740 N.W.2d 648, 650 (Iowa Ct. App. 2007). Although we are not bound by them, we give weight to the district court's findings of fact, especially when considering the credibility of witnesses. Iowa R. App. P. 6.904(3)(g); *In re M.M.S.*, 502 N.W.2d 4, 5 (Iowa 1993). The State has the burden of proving the grounds for termination by clear and convincing evidence. *In re P.L.*, 778 N.W.2d 33, 34, 39 (Iowa 2010); *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006).

III. Discussion.

Toby contends the statutory grounds for termination have not been met. We may affirm the termination if facts support the termination of the father's parental rights under any of the sections cited by the juvenile court. *See In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). We conclude there is clear and convincing evidence to support termination under Iowa Code section 232.116(1)(f).

There is no doubt that A.F. and S.F. have been adjudicated CINA and custody has been transferred. *See* Iowa Code § 232.116(1)(f)(1). Toby concedes he has a chronic substance abuse problem. *See id.* § 232.116(1)(f). Toby disagrees, however, that his substance abuse is severe or "presents a danger to self or others as evidenced by prior acts." *See id.* § 232.116(1)(f)(2).

It appears to be Toby's contention that the children did not suffer harm due to his drinking and arrest for public intoxication on February 24, 2010, because he had arranged for a care provider while he went out drinking, and that but for the children's grandfather taking the children out of his house that night, the children would not have known about his arrest. This argument minimizes the seriousness of Toby's substance abuse problem and attempts to obfuscate his responsibility for the children and for his decision to continue drinking. See *In re N.F.*, 579 N.W.2d 338, 340-41 (Iowa Ct. App. 1998) ("When the addiction renders the parent minimally incapable of parenting, the impact of [substance abuse] is obvious."); *In re A.J.*, 553 N.W.2d 909, 914-15 (Iowa Ct. App. 1996) (affirming termination in light of extensive history of alcohol abuse and lengthy history of relapses), *overruled on other grounds by P.L.*, 778 N.W.2d at 39. Toby's arrest for public intoxication left him unavailable to parent his children—even if only temporarily. The State emphasizes Toby's extensive criminal record involving substance abuse and points out that Toby's chosen caretaker (his mother) had not been approved by DHS; that Toby has undergone numerous investigations for child abuse involving alcohol; and that in one investigation where he was alleged to have choked a woman in front of her children, he claimed he was so drunk he could not remember. Toby himself testified he continued to drink despite having been through substance abuse treatment more than once and being told he should abstain. We acknowledge that caseworkers did not forbid Toby to drink.⁹ However, Toby knew that

⁹ VanBuer testified she did not "feel like it was really my place [to tell him not to drink.] It's not illegal to drink." Huling testified similarly. We find this testimony troubling.

continuing to drink jeopardized the children being in his care. His arrest meant he was not available to parent.

Toby complains that this was his first “screw up.” This statement ignores his long absence from the children’s lives. It ignores his decision to leave them with a person he knew was an addict. It ignores his decision not to become actively involved until the termination petition was filed. Toby was clearly aware that the children had been subjected to turmoil for much of their lives. He knew he had been granted additional time to show he could parent his children. Children should not be forced to endlessly await the maturity of a natural parent. *In re C.B.*, 611 N.W.2d 489, 494-95 (Iowa 2000). At some point, the rights and needs of the children rise above the rights and needs of the parent. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App.1997). These children need and deserve permanency. *In re J.E.*, 723 N.W.2d 793, 802 (Iowa 2006) (Cady, J., concurring specially).

Toby believes the evidence does not support a finding that his “prognosis indicates that the child will not be able to be returned to the custody of the parent within a reasonable period of time.” *Id.* § 232.116(1)(3). The district court concluded his prognosis is “grim.” We consider Toby’s treatment history and conclude it is unlikely that he will be in a position to parent in the foreseeable future. See *N.F.*, 579 N.W.2d at 341 (indicating a good prediction of the future conduct of a parent is to look at the past conduct). Toby states he introduced a report from his treating substance abuse counselor indicating his prognosis is

Whether drinking is illegal seems to be immaterial where our charge is to protect children and a parent has a history of substance abuse and assault charges.

good, but fails to provide a citation to the record. If he is referring to Sievers's November 2009 evaluation, we point out that the evaluation (diagnosing Toby's alcohol dependence to be "in early remission") was based upon Toby's report that he had not "had a problem with alcohol for over eleven months." This is clearly contradicted by the record as Toby admitted to continuing to drink until February 2010. If he is referring to Siever's April 2010 letter, we find he reads too much into Sievers' conclusion that "[h]is demeanor is vastly improved as is his determination to stay clean and sober."

Upon our de novo review, we find clear and convincing evidence supports termination pursuant to Iowa Code section 232.116(1)(I). We therefore affirm.

AFFIRMED.