

**IN THE COURT OF APPEALS OF IOWA**

No. 0-480 / 10-0864  
Filed July 28, 2010

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

**H.L.E., Mother,  
Appellant.**

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Appeal from the Iowa District Court for Polk County, Constance Cohen,  
Juvenile Judge.

A mother appeals from a juvenile court order terminating her parental  
rights to a child. **AFFIRMED.**

Marla McCoid, Bondurant, for appellant.

Thomas J. Miller, Attorney General, Janet Hoffman, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Andrea Vitzthum, Assistant  
County Attorney, for appellee.

Amanda Demichelis of Demichelis Law Firm, Chariton, for father.

Michelle Saveraid, Youth Law Center, Des Moines, attorney and guardian  
ad litem for minor child.

Considered by Vogel, P.J., Vaitheswaran, J, and Miller, S.J.\*

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

**MILLER, S.J.**

H.E. is the mother, and N.E. the father, of S.E., who was twenty months of age at the time of an April 2010 termination of parental rights hearing. H.E. appeals from a May 2010 juvenile court order terminating her parental rights to S.E.<sup>1</sup> We affirm.

H.E. and N.E. have never been married, but had agreed to an arrangement whereby S.E. spent time with each of them. N.E. provided somewhat the majority of S.E.'s care. As of August 2009, when S.E. was thirteen months of age, H.E. and N.E. were living separately. In mid-August the State sought and secured an ex parte order from the juvenile court removing S.E. from H.E.'s physical and legal custody and placing S.E. in the temporary legal custody of the Iowa Department of Human Services (DHS) "or in the temporary legal custody of [N.E.] under DHS supervision." The removal was occasioned by H.E.'s use of methamphetamine, the presence of methamphetamine and methamphetamine paraphernalia in H.E.'s home, and H.E. associating with methamphetamine users. On the same day the State filed a child in need of assistance (CINA) petition concerning S.E.

Following an uncontested removal hearing, the juvenile court confirmed and continued S.E.'s removal from H.E. and placed S.E.'s temporary legal custody in N.E. The court ordered services, including drug screens, substance abuse evaluation and recommended treatment, and various reunification services. Following an uncontested adjudication hearing, the court adjudicated

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<sup>1</sup> The State sought termination of only H.E.'s parental rights.

S.E. a CINA pursuant to Iowa Code section 232.2(6)(c)(2) (2009) (child who has suffered or is imminently likely to suffer harmful effects as result of failure of parent to exercise reasonable degree of care in supervising child) and section 232.2(6)(n) (child whose parent's drug abuse results in child not receiving adequate care). S.E. apparently was doing well in N.E.'s care and the court continued S.E.'s legal custody in N.E.

In an early November dispositional order, following an uncontested hearing, the juvenile court continued S.E.'s legal custody in N.E., noting that S.E. was doing well in N.E.'s care. The court held an uncontested disposition review hearing in early January 2010. In an order resulting from the hearing the court found that N.E. was meeting S.E.'s needs, continued S.E.'s custody in N.E., and authorized S.E.'s parents to litigate custody and visitation in the district court.<sup>2</sup>

In mid-February the juvenile court held an uncontested permanency hearing. In an order resulting from that hearing the court confirmed the previous grant of jurisdiction to the district court to determine custody and visitation, but also changed the permanency goal from returning S.E. to S.E.'s parents' homes to transferring sole custody of S.E. to N.E.

The juvenile court scheduled a combined permanency review and termination of parental rights hearing for early April 2010. Following a hearing the court ordered H.E.'s parental rights terminated. In doing so it found, among other things, that the State had proved by clear and convincing evidence the grounds for termination pursuant to Iowa Code section 232.116(1)(h) (child three

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<sup>2</sup> H.E. has not taken any action to invoke the jurisdiction of the district court.

or younger, adjudicated CINA, removed from parents at least six of last twelve months, cannot be returned to parent at present time) and section 232.116(1)(l) (child adjudicated CINA and custody transferred from parents; 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). The order also placed S.E. in the custody of N.E. H.E. appeals.

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).

H.E. first claims the juvenile court "erred in terminating H.E.'s parental rights pursuant to Iowa Code § 232.116(1)(h) and (l)." She argues the State failed to prove the elements of these provisions by clear and convincing evidence. When the trial court terminates on more than one statutory ground, we may affirm if we find grounds to terminate under any one of the grounds relied on by the court. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). We choose to focus on section 232.116(1)(h).

The first three elements of section 232.116(1)(h) were clearly proved, and H.E.'s argument goes to the fourth element. That element is proved when the evidence shows the child cannot be returned to the parent 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 removal from the home. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992).

H.E. had first used methamphetamine some four years before the termination hearing. By her own admissions, she had regularly used methamphetamine during the six months immediately preceding S.E.'s removal, using an average of two to three times per week.<sup>3</sup> Although H.E. had moved from the home of her boyfriend, a drug user, she was still involved in a relationship with him and he was staying with her as his home was in foreclosure.

In August 2009 H.E. moved to Ames to attend Iowa State University. As of the September 2009 adjudicatory hearing she had not engaged in services. As of the November dispositional hearing she had not engaged in services other than attending three NA meetings and had not been consistent in attending visitations with S.E. H.E. had provided some drug screens that were negative, but others were "dilute" and she failed to attend and cooperate on yet other occasions.

H.E. did not attend the January 2010 dispositional review hearing, had not engaged in services other than two substance abuse evaluations, and had missed one-half of scheduled visits with S.E. H.E. disagreed with the assessments resulting from the substance abuse evaluations, and failed or refused to participate in required outpatient substance abuse counseling. H.E. did not attend the February permanency hearing and had continued to miss

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<sup>3</sup> An "Initial Assessment/Social History" introduced in evidence at the early November 2009 disposition hearing indicates that H.E. had informed the DHS social worker that H.E. had been using two to three times per week for almost a year before S.E.'s removal.

scheduled visits with S.E. The State filed its petition to terminate H.E.'s parental rights.

At the termination hearing H.E. asserted that if tested for drugs that day the test "would be clean." A test was scheduled for later the same day, with the result to be made part of the record. H.E. failed to submit to the scheduled test.

H.E. has a history of regularly using methamphetamine over an extended period of time. Until the termination hearing she had failed or refused to acknowledge her addiction, recognize that her substance abuse placed S.E. in danger of harm, or engage in required treatment. We find that the evidence clearly and convincingly demonstrates that S.E. could not be returned to H.E. at the time of the termination hearing without being a CINA as the result of imminent risk of neglect or lack of adequate care, and that the State thus proved the fourth element of section 232.116(1)(h). We conclude the State proved the grounds for termination pursuant to section 232.116(1)(h).

H.E. claims the juvenile court erred in finding that termination of her parental rights satisfied the requirements of Iowa Code section 232.116(2). Even if a statutory ground for termination is met, a decision to terminate must still be in the best interest of a child. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). The best interest test involves use of the framework established in section 232.116(2). *In re P.L.*, 778 N.W.2d 33, 37 (Iowa 2010). "The primary considerations are 'the child's safety,' 'the best placement for furthering the long-term nurturing and growth of the child,' and 'the physical, mental, and emotional condition and needs of the child.'" *Id.* (quoting section 232.116(2)).

H.E.'s ability to provide for S.E.'s needs is detrimentally affected by H.E.'s long-standing and untreated substance abuse. We have long recognized that parents with a chronic and unresolved substance abuse problem present a danger to their children. See, e.g., *State v. Pethithory*, 702 N.W.2d 854, 858-59 (Iowa 2005). N.E. provided somewhat the majority of S.E.'s care before S.E.'s removal, has provided all or almost all of S.E.'s care since removal, and a strong bond clearly exists between them. N.E. has available the support and assistance of relatives in caring for and providing for S.E. Although S.E. recognizes H.E. as S.E.'s mother and some bond exists between them, the bond that existed has been weakened by H.E.'s absence from S.E.'s life and has been harmed by H.E. failing to attend scheduled and anticipated visitations. S.E. is thriving in N.E.'s care.

We find, as the juvenile court did, that termination of H.E.'s parental rights and S.E.'s resulting placement in the sole custody of N.E. best assures S.E.'s safety, best furthers S.E.'s long-term nurturing and growth, and best provides for S.E.'s physical, mental, and emotional condition and needs.

We conclude that termination is appropriate under the factors set forth in section 232.116(2). Section 232.116(3) nevertheless provides that termination need not occur if any of the factors listed in that provision apply. H.E. claims the juvenile court erred in finding that termination of her parental rights was proper in light of section 232.116(3)(a) (providing that the court need not terminate if it finds that a relative has custody of the child) and section 232.116(3)(c) (providing that the court need not terminate if there is clear and convincing evidence that

termination would be detrimental to the child due to the closeness of the parent-child relationship).

The provisions of section 232.116(3) are permissive, not mandatory. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997), *overruled on other grounds by In re P.L.*, 778 N.W.2d at 40. It is within the sound discretion of the juvenile court, based on the unique circumstances before it and the best interests of the child, whether to apply section 232.116(3) to avoid otherwise appropriate termination of parental rights. *Id.*

In addressing these issues, the juvenile court found that a bond and mutual affection existed between S.E. and H.E., and that H.E. engaged in age-appropriate parenting of S.E. It further found that those facts did not outweigh the disruption H.E. would continue to visit upon S.E. if H.E. retained parental rights. In so finding, the court found an absence of any reason to believe H.E. would treat her addiction because she did not admit to having one; found it unlikely that H.E. would change her pattern of disappointing S.E. by failing to visit when expected; and found no reason to believe H.E. would ever follow through to obtain a concurrent jurisdiction order that might have allowed the juvenile court case to close without protective concerns. The court also found that H.E. had made no progress toward resolving the threat of maltreatment that H.E.'s methamphetamine addiction posed to S.E., and had done essentially nothing to demonstrate a willingness to change and establish a stability that would afford S.E. needed permanency and safety.



Upon our de novo review, see *In re T.L.*, 778 N.W.2d at 40, we agree with these findings and conclusions of the juvenile court. We conclude, as the juvenile court did, that N.E.'s legal custody of S.E. should not preclude the otherwise appropriate termination of H.E.'s parental rights. We further conclude that the record does not contain clear and convincing evidence that termination of H.E.'s parental rights would be detrimental to S.E. because of the closeness of a parent-child relationship between them.

**AFFIRMED.**