

IN THE COURT OF APPEALS OF IOWA

No. 0-482 / 10-0595
Filed September 9, 2010

**IN THE INTEREST OF A.B., A.B., and I.B.,
Minor Children,**

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

**J.J.W., Father,
Appellant.**

Appeal from the Iowa District Court for Polk County, Carol S. Egly, District Associate Judge.

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

Christine Bisignano, Windsor Heights, for appellant-mother.

Victoria L. Meade, West Des Moines, for appellant-father.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, John P. Sarcone, County Attorney, and Kevin Brownell, Assistant County Attorney, for appellee.

Nancy Pietz, Des Moines, for father of A.B.

Mark Elcock, Indianola, for father of I.B.

Yvonne Naanep, Des Moines, attorney and guardian ad litem for minor children.

Considered by Potterfield, P.J., Tabor, J., and Miller, S.J.*

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

MILLER, S.J.

M.B. is the mother of As.B., Ah.B., and I.B., (“the children”) who were six, four, and three years of age respectively at the time of a February 2010 termination of parental rights hearing. J.W. is Ah.B.’s father. M.B. and J.W. separately appeal from a March 31, 2010 juvenile court order terminating M.B.’s parental rights to the children and J.W.’s parental rights to Ah.B. (The order also terminated the parental rights of I.B.’s father, referred to some places in the record as I.N. and at other places as D.I.N., who has not appealed, and continued for hearing at a later date the issue of the parental rights of As.B.’s father, W.H.) We affirm on both appeals.

The children were, with the consent of M.B., removed from her physical custody and placed in the temporary legal custody of their maternal grandmother on June 12, 2009. The children were removed because M.B. had been using methamphetamine. At the time of removal J.W. had a prior conviction for domestic assault, and harassment charges were pending against both M.B. and J.W.

On June 15, 2009, the State filed petitions alleging the children to be children in need of assistance (CINA). J.W. did not attend a June 19, 2009 temporary removal hearing and pretrial conference. The juvenile court ordered M.B. to participate in substance abuse evaluation and treatment and to attend family drug court. It continued the children in the temporary legal custody of their maternal grandmother, subject to the supervision of the Iowa Department of Human Services (DHS).

Following a July 21, 2009 hearing the juvenile court adjudicated the children to be CINA pursuant to Iowa Code sections 232.2(6)(c)(2) (child who is imminently likely to suffer harmful effects as a result of failure of parent to exercise reasonable degree of care in supervising child) and (n) (child whose parent's mental condition or drug or alcohol abuse results in child not receiving adequate care) (2009). Neither M.B. nor J.W. attended that hearing. The court found, among other things, that M.B. had been "untruthful regarding substance use."

On August 3, 2009, the juvenile court ordered I.B., who was about to reach his third birthday, placed in the temporary legal custody of the DHS for foster care placement. This action was precipitated by I.B.'s sexually acting out toward his sister Ah.B., who was about to reach her fourth birthday. I.B. has thereafter remained in the legal custody of the DHS, placed in the same foster family home.

A disposition hearing was held on August 24, 2009. J.W. was by then incarcerated and did not attend. The juvenile court confirmed the children's adjudication as CINA, and continued in effect its prior orders.

On December 30, 2009, the State filed its petition seeking termination of parental rights. On the same date the court temporarily modified its disposition order by placing As.B. and Ah.B. in the custody of the DHS for foster care. The change occurred as a result of the maternal grandmother failing to get the older daughter, As.B., to school on a regular basis, and not getting Ah.B. to daycare to improve her delayed development. As.B. had already incurred fourteen

unexcused absences and seven tardy days in that school year. M.B., who had regular, frequent, and continuing contact with the two girls was unwilling to accept any responsibility for As.B.'s absences and tardiness and the fact that Ah.B. had not been enrolled in daycare. As.B. and Ah.B. have thereafter remained in the custody of the DHS, placed in the same foster family home as I.B.

A combined permanency and termination of parental rights hearing was held on February 4, 11, and 12, 2010. The juvenile court subsequently terminated M.B.'s parental rights to all three children pursuant to Iowa Code section 232.116(1)(d) (child adjudicated CINA for abuse or neglect, circumstance that led to adjudication continues to exist despite offer or receipt of services to correct circumstance) and also terminated her parental rights to I.B. pursuant to section 232.116(1)(h) (child three or younger, adjudicated CINA, removed from parents' physical custody at least six of last twelve months, cannot be returned at present time). The court terminated J.W.'s parental rights to Ah.B. pursuant to Iowa Code sections 232.116(1)(b) (abandonment, and desertion), (d), and (e) (child adjudicated CINA, child removed from physical custody of parents at least six consecutive months, parent has not maintained significant and meaningful contact with child during previous six months and has made no reasonable efforts to resume care of child despite being given opportunity to do so). M.B. and J.W. separately 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).

M.B. makes two rather closely-related claims of juvenile court error, and we choose to address them simultaneously. She first claims she “should be afforded an additional six months to demonstrate further progress and compliance,” and cites Iowa Code section 232.104(2)(b). That statute provides that after a permanency hearing the court may, among other things, continue placement of a child an additional six months and then consider permanency. M.B. somewhat relatedly claims the court erred in terminating her parental rights pursuant to sections 232.116(1)(b), (d), (e), and (h)¹ “in that permanency should have been continued pursuant to Iowa Code Section 232.116(1)(3)(a)² because extenuating circumstances exist . . . and that termination of parental rights was not in the best interests of the children.”

As to M.B. and her parental rights, the juvenile court made lengthy, detailed, and comprehensive findings of fact and drew conclusions from those facts, and the court made detailed conclusions of law applying relevant law to the facts and conclusions derived from the facts found. Upon our de novo review we find it unnecessary to review or restate those facts and conclusions in detail, as we fully agree with those supporting the court’s ultimate determination. We will instead summarize the essential facts.

¹ The court did not terminate her parental rights pursuant to either section 232.116(1)(b) or (e).

² No such statute exists. We assume, from M.B.’s later citation of a case involving section 232.116(3), that it is the provision she intends.

The children were removed from M.B. in June 2009 because of her use of methamphetamine and resulting failure to provide reasonable supervision and care. M.B. has a history of engaging in relationships with males such as J.W. and D.I.N. who engage in domestic violence, drug use, and other criminal activity. It appears that D.I.N. sexually abused Ah.B. and I.B. Approximately six months after the CINA case began, and shortly before the termination petitions were filed, M.B. began a relationship with a male who used marijuana, had a history of domestic violence, and had recently been found to have engaged in child abuse. M.B.'s most recent paramour is suspected of having sexually abused Ah.B.

Throughout the juvenile court proceedings M.B. has been dishonest with the DHS, service providers, and the court. She initially and at times denied using methamphetamine more than once, but later at times acknowledged having used during the year before the children were removed. M.B. initially denied any lengthy use of illegal drugs, but later admitted having used them from age thirteen or fourteen to the time of the June 2009 incident that led to removal of the children.³ She denied using alcohol during the CINA case, despite a service provider having observed her attempting to hide a bottle of liquor in her home some five months into the CINA case. M.B. denied committing disorderly conduct and interference with official acts, claiming to be a victim in the incident

³ M.B. was twenty-three years of age at the time of the termination hearing.

leading to such charges against her,⁴ but later pled guilty to and was convicted of those charges. M.B. denied having begun the relationship referred to in the preceding paragraph, despite strong evidence refuting her denial.

M.B. has to a large extent failed or refused to acknowledge, and has failed to reasonably deal with and work toward resolution of, her issues and problems that have required DHS and juvenile court involvement. These issues include domestic violence, both as a victim and as a perpetrator; a history of drug abuse; mental health problems;⁵ and serial relationships with males who engage in domestic violence, child abuse, drug use, and other criminal activity.

Section 232.104(2)(b) allows the juvenile court, following a permanency hearing,⁶ to “continue placement of the child for an additional six months.”

However, in order to do so the court must find and enumerate

the specific factors, conditions, or expected behavioral changes which comprise the basis for the determination that the need for removal of the child from the child’s home will no longer exist at the end of the additional six-month period.

The juvenile court found, among other things, that: “[a]fter six months of services this judge cannot see that more months of services will change anything.” It found that M.B.’s pattern of lying was “so pervasive that it is not possible for this judge to find that she has made any progress with services,” and that her lying was “a barrier and demonstrates that continued services will be unable to resolve the problems.” The court also found:

⁴ The charge arose out of an incident that occurred in mid-October 2009, some four months after the CINA case began and only two days after M.B. was discharged, at her request, from a substance abuse treatment program.

⁵ M.B. suffers from depression and anxiety.

⁶ The February 2010 hearing was a combined permanency and termination hearing.

Over eight months into DHS and court involvement there have been no behavior changes by [M.B.] that could support a finding that she can be honest. There is no basis for finding that whatever efforts would continue to try to reunite the children with [M.B.], that she is willing to change the behaviors that have put her children at risk. The only findings that can be made are that she will go to extraordinary efforts to conceal her own conduct and to influence family members to take responsibility for her children.

. . . .
[T]his court cannot make findings that within a reasonable time—even up to six months[—]that it is likely the children could be safely returned to the custody of [M.B.]. At every turn [M.B.'s] dishonesty or failure to be forthcoming has been a barrier to progress.

We agree with the substance of these findings, and conclude that given the history of this case the evidence presented at the permanency/termination hearing will not support a determination that the need for removal of the children from M.B. would no longer exist at the end of an additional six-month period.

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 primary concern in a termination of parental rights proceeding is the best interest of the child. Iowa R. App. P. 6.904(3)(o); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981); *In re R.R.K.*, 544 N.W.2d 274, 275 (Iowa Ct. App. 1995).

In considering whether to terminate a parent's rights pursuant to section 232.116(1), our courts shall give primary consideration to the children's safety, to the best placement for furthering their long-term nurturing and growth, and to their physical, mental, and emotional condition and needs. Iowa Code § 232.116(2). M.B.'s ability to provide for the children's needs is adversely affected by her dishonesty and related failure or refusal to recognize and deal with her

drug abuse, history of bad relationships and domestic abuse, and mental health issues. I.B. had been in foster care, with one family, for six months and was doing well. Although As.B. and Ah.B. had been in the home of the same foster family for only one and one-half months, they also were doing well. Their placement in foster care had relieved all three of the abuse they had suffered before removal from M.B. and the neglect and instability they had been subjected to until their respective placements in foster care.

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. We have carefully reviewed those factors, find that none apply, and conclude that the facts the foster family may not adopt the children, there exists a possibility the children may be separated, and relatives may be interested in adopting them should not prevent the otherwise appropriate termination of M.B.'s parental rights.

J.W. first claims the juvenile court erred in terminating his parental rights to Ah.B., asserting that "reasonable efforts were not provided by the State pursuant to Iowa Code Section 232.99(3)." The State questions whether J.W. has preserved error on this claim.

"The State must make reasonable efforts to provide services to a parent before termination proceedings may be instituted." *In re C.H.*, 652 N.W.2d 144, 147 (Iowa 2002) (citations omitted). However, a parent who feels that services are inadequate or inappropriate must object early in the process in order that changes may be made. *C.B.*, 611 N.W.2d at 493-94. While the State has an

obligation to make reasonable efforts toward reunification, a parent has an equal obligation to demand other, different, or additional services before a permanency or termination hearing, and if the parent does not do so the issue has not been preserved for appellate review. *In re A.A.G.*, 708 N.W.2d 85, 91 (Iowa Ct. App. 2005); *In re S.R.*, 600 N.W.2d 63, 65 (Iowa Ct. App. 1999). J.W. makes no claim that he at any time requested any services that were not provided, and upon our review of the record we have not found any such request. We conclude this issue is not preserved for our review, and we do not further address it.

J.W. also claims the juvenile court erred in terminating his parental rights pursuant to Iowa Code sections 232.116(1)(b), (d), and (e) “in that permanency should have been continued pursuant to Iowa Code Section 232.116(1)(3)(a) [sic] because extenuating circumstances exist . . . and that termination of parental rights was not in the best interest of the child.” J.W. makes the same argument regarding Ah.B. that M.B. makes concerning the children, that the foster family may not adopt Ah.B., there exists a possibility the children may be separated, and relatives may be interested in adopting Ah.B.

Ah.B. does recognize J.W. as her father. There is, however, no substantial bond between them. At the time of the termination hearing J.W. had not seen Ah.B. in about a year, had only communicated with her occasionally by telephone in the few months following his arrest in mid-summer of 2009, and had had no communication with her in the previous two months. J.W.’s most recent incarceration was not scheduled to end until some three months after the hearing. J.W. readily acknowledged he would then be on parole for some period

of time and it would be some six months after his release on parole before he could assume Ah.B.'s care and provide for her.

We conclude that termination of J.W.'s parental rights is in Ah.B.'s best interest under the factors set forth in section 232.116(2). We find that none of the factors set forth in section 232.116(3) apply, and conclude the facts the foster family may not adopt Ah.B., there exists a possibility the children may be separated, and relatives may be interested in adopting Ah.B., should not prevent the otherwise appropriate termination of J.W.'s parental rights.

AFFIRMED ON BOTH APPEALS.