

**IN THE COURT OF APPEALS OF IOWA**

No. 0-656 / 10-1200  
Filed September 22, 2010

**IN THE INTEREST OF L.N.,  
Minor Child,**

**K.A.V., Mother,  
Appellant.**

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

A mother appeals the district court's order terminating her parental rights.

**REVERSED.**

Bryan Webber of Taylor Law Offices, Des Moines, for appellant mother.

Felicia Rocha, Des Moines, for father.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Kevin J. Brownell, Assistant County Attorney, for appellee State.

Kimberly Ayotte of Youth Law Center, Des Moines, for minor child.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

**VAITHESWARAN, P.J.**

A mother appeals the termination of her parental rights to her child, born in 2009. She contends: (1) the State failed to prove the grounds for termination cited by the juvenile court, (2) termination was not in the child's best interests, and (3) termination was detrimental to the child based on the parent-child relationship.

The Iowa Supreme Court recently articulated the framework for our analysis as follows:

[T]he proper analysis under section 232 is first for the court to determine if a ground for termination exists under section 232.116(1). If a ground exists, the court may terminate a parent's parental rights. Iowa Code § 232.116(1). In considering whether to terminate, "the court shall give primary consideration to the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional condition and needs of the child." *Id.* § 232.116(2). Any findings in this regard should be contained in the judge's decision. Finally, before terminating a parent's parental rights, the court must consider if any of the exceptions contained in section 232.116(3) allow the court not to terminate. *Id.* § 232.116(3)

*In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010). We begin and end with the first question: whether a ground for termination exists.

Following a termination hearing that took place over two days, the juvenile court terminated the mother's parental rights pursuant to Iowa Code section 232.116(1)(d) (2009) (requiring proof of several elements, including proof the child was abused or neglected and the circumstances leading to the adjudication still exist despite the offer or receipt of services) and section 232.116(1)(h) (requiring proof of several elements including proof the child cannot be returned to the parent's custody). We cannot find clear and convincing evidence to

support either of these grounds. See *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000) (stating that appellate courts review termination proceedings de novo and that the grounds for termination under section 232.116 must be established by clear and convincing evidence).

The child was removed from the mother's home in July 2009 based on the mother's use of marijuana, as well as her explosive temper. The mother underwent outpatient substance abuse treatment for several months. She also participated in parenting classes, domestic violence classes, couples counseling, and individual and group therapy. She was successfully discharged from the outpatient treatment program in November 2009 with a notation that she had "[m]inimal relapse potential with some vulnerability" and "fair to good coping skills." A counselor from the treatment center testified that the mother "consistently attended treatment groups," was "able to address the severity of her addiction," and was "able to accept the consequences of her substance use."

Following her discharge, the mother continued to attend couples counseling and individual therapy sessions. The mother also attended substance abuse and relationship counseling. Initially, she attended as a "significant other" of the child's father. Later, she asked to attend as a client. She participated with one substance abuse counselor for two months. When the mother's work schedule changed, she switched to another counselor.

The mother also engaged in in-home services and supervised visitation with her child. A service provider noted an improved home environment and increased organization. He also commented on the close bond between mother and child. Based on these favorable comments, the Department of Human

Services was poised to recommend unsupervised visitation and eventual reunification of the family.

The department's goal changed following an incident on Christmas Eve in 2009. The department had agreed to let the mother spend Christmas with her child, as long as the visit was supervised by the child's grandfather in his home. On Christmas Eve, the grandfather's wife said she would be unable to accommodate mother and child in their home, given the arrival of last-minute guests. Accordingly, the grandfather booked a room at the hotel where he worked. The family spent Christmas Eve together, then went to the hotel room to sleep. During the night, the grandfather was called away to perform work around the hotel, leaving the mother unsupervised with her child. When the department learned of this fact, it recommended termination of the mother's parental rights.

At the termination hearing, the grandfather blamed himself for the change in plans, stating, "I actually probably persuaded them to go the way the way we did, and I—I'm sorry." The mother also acknowledged "[i]t was probably not the best decision in retrospect." She noted, however, that the child "wasn't unsupervised," as her dad was with them "most of the time except for at night" because he "kept getting called off to work because he works there, and they knew he was on the location."

After this incident, the mother continued to participate in in-home services and supervised visits with the child, continued to undergo individual therapy and couples counseling, and continued to attend after-care sessions for substance abuse treatment and relationship building. The mother made so much progress in couples counseling that the counselor discontinued those sessions in January

2010. The mother also cooperated with an order to obtain psychological testing and underwent that testing when it was ultimately scheduled by the department.

The mother testified she had not used marijuana since June 30, 2009, the date she entered outpatient treatment. This date preceded the child's removal from her custody. Although the State presented evidence of four missed drug tests between August and October 2009 and a missed drug test on Christmas Eve 2009, ten drug tests between July 30, 2009, and February 18, 2010, were negative for the presence of specified drugs, including marijuana.

The mother additionally made efforts to keep the father of the child on his course toward sobriety, with mixed success. She eventually heeded the department's suggestion to separate from the father.

Finally, the mother readied her apartment for the child and made it clear that she was in a position to have the child returned to her care.

We are not convinced the State met its high burden of proving the circumstances that led to the adjudication continued to exist despite the offer and receipt of services or the child could not be returned to the mother's custody. See Iowa Code §§ 232.116(1)(d), (h). Based on our de novo review of the record created on or before the March 2010 termination hearings, we conclude the grounds for termination cited by the juvenile court do not exist.

In reaching this conclusion, we have considered the arguments in support of termination raised by the State. We find them unpersuasive.

**1. Truthfulness.** The State asserts the mother was not truthful with the department. There is no question the mother did not contact the department on Christmas Eve 2009 to obtain permission for the changed location of the

overnight visit. However, we find scant evidence to support the State's broad assertion with respect to the mother that, "so much lying had taken place during the course of the case that it was difficult to discern the truth from the various stories that were presented." Much of the evidence of lying pertained to the father of the child who, according to a service provider, had "a strong penchant for not telling the truth" about his after-care and therapy attendance and his compliance with drug testing. The service provider characterized the mother as having "a much stronger investment than [the father] in regards to accomplishing DHS expectations." The service provider's main criticism of the mother was her failure to separate from the father. On this point, the service provider stated the mother was unwilling "to make the crucial decision between maintaining her allegiance to her boyfriend or ensuring that the well being of her son and his best interests are met as it pertains to his safety." He continued, "[the mother] has, throughout this case, made the conscious decision to stand by [the father's] side, even as he continued to lie about his level of participation in treatment and failed to provide clean UA's." As noted, the mother addressed this criticism by separating from the boyfriend prior to the conclusion of the termination hearings.

**2. Mental Health.** The State contends the mother failed "to cooperate with the recommendations made about her mental health issues". The record fails to support this assertion. Less than six weeks before the first termination hearing, the mother's mental health counselor reported that the mother's "coping skills have vastly improved since I began working with her in August 2009." She continued,

While she is still prone to emotional responses to her current situation, which is realistically to be expected, she has proven to be less reactive and explosive. She seems to have applied what she has learned about healthy communication, anger management and stress reduction through counseling and classes and while she has not perfected these skills, she has improved in such a way that leads me to believe she is less volatile and unpredictable. By this I mean she does not seem likely to react to a situation in such a way that would put herself or anyone else in danger.

The counselor also noted that the mother intended to continue with counseling sessions through the same service provider despite that counselor's recent resignation.

The service provider who supervised visits similarly testified that the mother was "much more positive," and had made progress in "maintaining her anger and temper." At the first termination hearing, he stated he regretted having recommended termination of her parental rights, given her significant progress. He said he based the recommendation on the mother's association with her boyfriend. While he equivocated at the second termination, he confirmed on cross-examination that he had been against the termination of the mother's parental rights.

The mother also underwent a psychological evaluation, which the State concedes was not scheduled until shortly before the first termination hearing. The evaluator noted that the mother was "willing to participate in the intake process" and was "motivated and excited to start therapy."

**3. Domestic Violence.** The State contends the mother had not resolved domestic violence issues, as reflected by her friendship and cohabitation with a male that she and her boyfriend knew. The record reveals the domestic violence issues of concern were precipitated by the mother. As noted, the mother made

significant strides in addressing the anger that led to the domestic violence. As for the mother's friendship and cohabitation with the male, the record reflects that the mother and her boyfriend allowed him to stay with them in their apartment. The department furnished no evidence that this male was anything more than a friend of the couple or was abusive towards the mother. Indeed, a service provider testified, "I don't think he's a direct safety concern."

**4. Alcohol Usage.** The State asserts there were proper concerns about "the mother's alcohol usage." While there is evidence the mother abused alcohol in the past, the State's evidence of recent alcohol consumption was limited to a sighting of alcohol at the apartment the mother shared with the child's father, and a reference in the mother's psychological evaluation that she reported consuming "1 wine" on January 5, 2010, and drank "1 time a month." This evidence is too speculative to support termination of the mother's parental rights, given her favorable discharge evaluation from outpatient treatment, her participation in substance-abuse counseling and individual therapy, the positive testimony of the substance-abuse counselor and her individual therapist, and the ten negative drug tests from July 30, 2009, through February 18, 2010.

We reverse the order terminating the mother's parental rights to this child based on the absence of clear and convincing evidence to support the cited grounds for termination. We find it unnecessary to reach the remaining two issues raised by the mother.

**REVERSED.**