

IN THE COURT OF APPEALS OF IOWA

No. 0-757 / 10-1342
Filed November 10, 2010

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

**A.T.B., Mother,
Appellant.**

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

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

Marc A. Elcock of Elcock Law Firm, P.L.C., Des Moines, for appellant.

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

Karl Wolle, Des Moines, attorney and guardian ad litem for minor children.

Considered by Doyle, P.J., and Mansfield, J., and Miller, S.J.*

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

MILLER, S.J.

Al.B. is the mother of A.R. Jr. and Aa.B. (“the children”) who were three years and one month of age and one year and eight months of age respectively at the time of an April 2010 termination of parental rights hearing. Al.B. appeals from a July 10, 2010 juvenile court order terminating her parental rights to the children. (The order also terminated the parental rights of the children’s father, A.R. Sr., and he has not appealed.) We affirm.

Al.B. became pregnant with her first child, who is not involved in this case, when she was thirteen years of age and gave birth to that child in 2004 when she was fourteen. Al.B. recognized she was not capable of caring for this child, and the child is in the custody and care of his maternal grandmother in another state.

Al.B. gave birth to A.R. Jr. and Aa.B., fathered by A.R. Sr., in March 2007 and July 2008 respectively. A.R. Sr. lives in another state, has provided no support for the children, and apparently has no relationship with them.

Al.B. married the children’s step-father, J.M., in December 2008, when A.R. Jr. was twenty-one months of age and Aa.B. was six months of age. At the time of the April 2010 termination hearing, Al.B. was eight months pregnant.

On the evening/night of April 30-May 1, 2009, police officers were dispatched to the residence of Al.B. and J.M. and the children because of a domestic altercation between Al.B. and J.M. J.M. was allegedly drunk and throwing objects around their apartment, in which the children were present. Al.B. agreed that she and the two children would leave the residence for the evening.

In the early morning hours of May 1, 2009, the police were called back to the same apartment complex regarding a neighborhood dispute in which Al.B. and J.M. were allegedly harassing a woman with whom they had formerly resided and whom they had allegedly harassed a few days earlier. The police observed Al.B. drive into the parking lot, with J.M. as a passenger. Upon questioning, Al.B. said she had driven J.M. to a store to get cigarettes so he would not drive while intoxicated. Al.B. apparently offered no explanation as to why she had, contrary to her agreement earlier in the evening, kept the children at the apartment with a drunken J.M.

The two-year-old and ten-month-old children were found sleeping on a mattress on the floor in a locked apartment with no one else present. The police arrested Al.B. and J.M. for child endangerment.¹ The children were taken into protective custody and placed in a crisis nursery.

On May 4, 2009, the juvenile court ordered the children removed from the custody of their parents and placed the temporary legal custody of the children with the Iowa Department of Human Services (DHS), in whose legal custody the children have thereafter remained. On May 6, 2009, the children were placed with a foster family. Child in need of assistance (CINA) petitions were filed, and the children's removal was consented to and confirmed. In an uncontested proceeding the children were adjudicated CINA on June 3, 2009, pursuant to Iowa Code section 232.2(6)(c)(2) (2009) (child has suffered or is imminently likely to suffer harmful effects as a result of parent's failure to properly supervise child).

¹ Al.B. and J.M. pled guilty to and were convicted of child endangerment in July 2009.

On June 12, 2009 the children were placed in the care of a second foster family, as their first foster family was moving. They have thereafter remained in the care of that second foster family. A June 30, 2009 dispositional order, subsequent review orders, and a permanency order, have confirmed the children's adjudication as CINA and continued their custody in the DHS.

On March 23, 2010, the State filed a petition seeking termination of the parental rights of the children's parents. Following a day-long combined permanency and termination hearing the juvenile court entered lengthy and detailed findings of fact, conclusions of law, and an order terminating parental rights. The court terminated Al.B.'s parental rights pursuant to Iowa Code sections 232.116(1)(d) (child adjudicated CINA for abuse or neglect, circumstance continues to exist despite offer or receipt of services) and (h) (child three or younger, adjudicated CINA, removed from parents six of last twelve months, cannot be returned at present time). Al.B. 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).

Al.B. claims the juvenile court erred in finding the State proved by clear and convincing evidence the section 232.116(1)(d) and (h) grounds for termination of parental rights. Her arguments focus on the second element of the first of those two provisions, whether the circumstance that led to the CINA

adjudication continues to exist, and the fourth element of the second of those two provisions, whether the children could not be returned to her custody at the time of the termination hearing without remaining CINAs.

In her arguments Al.B. focuses entirely on evidence favorable to her position. However, a great deal of evidence supports the findings and conclusions of the juvenile court contrary to her arguments and the court's decision to terminate her parental rights. For the following reasons, on our de novo review we agree with the judgment of the juvenile court.

Al.B. and J.M. have a history of domestic violence, alcohol abuse, and the related neglect that led to the intervention of the DHS and the juvenile court in this case. Goals from the outset of the case involved Al.B. providing a safe and stable home for the children free from domestic violence, and ensuring adequate supervision of the children. Behavioral expectations included Al.B. demonstrating the ability to provide adequate supervision of the children and Al.B. demonstrating the ability to provide a safe and stable home environment for the children. This second expectation included housing stability as well as adequate income and/or employment. Family Risk, Safety, and Permanency Services (FRSP Services) began in mid-May 2009.

A family team meeting was held on June 11, 2009. Al.B. agreed to contact the Young Women's Resource Center and to attend a Young Moms Group. However, she did not contact the center until mid-July, and as of September 2009 was not attending classes, claiming they conflicted with family violence center sessions. Al.B. agreed to contact the Visiting Nurses Services

and participate in a Parent Education Project. However, she did not access those services until July 30, 2009. Nevertheless, according to the family educator involved in that program Al.B. did reasonably well with interactions (visitations with the children) and safety issues until the program ended because of budget cuts. Al.B. agreed to continue to work with FSRP Services and address the behavioral goals and objectives identified in May.

As of the June 30, 2009 dispositional hearing, the history of domestic violence indicated that services to address that problem were needed. It was recommended that Al.B. contact the Children and Families of Iowa Family Violence Center to gain an understanding of family violence and how it negatively affects children.

As of a July 14, 2009 family team meeting it was reported that Al.B. had made little progress toward previously established goals.

By August 2009 Al.B. and J.M. were participating in some recommended services, and their interactions with the children were moved from supervised to semi-supervised. However, in August and September Al.B. and J.M. at times failed to bring food or diapers for visits and in mid-August failed to appear for a scheduled visit. It appears that as of late August both were employed in some manner.

Concerns had surfaced regarding A.R. Jr.'s attachment to Al.B. Al.B. (and J.M.) were referred to a child guidance program for an attachment/bonding assessment shortly after the June 30, 2009 disposition hearing. They attended the assessment sessions and the evaluation was completed as of September 28,

2009. By late 2009 Al.B. (and J.M.) had attended two “didactic therapy” sessions, sessions involving modeling positive behavior and how to better interact with the children, but the instructing clinical social worker could not yet report that they were making significant progress and indicated that further sessions were needed. On January 8, 2010, Al.B. and J.M. missed scheduled sessions with the instructor, in late January Al.B. stated she would not attend further sessions, and Al.B. and J.M. did not attend any further sessions.

On October 27, 2009, permanency was established granting Al.B. and J.M. an additional six months to demonstrate an ability to care for the children. They had since August showed some progress, including consistently attending and actively engaging in the attachment assessment, interacting with the children, and beginning to demonstrate some ability to meet the children’s supervision needs during short-term, semi-supervised visitations. However, further progress was needed.

On October 10, 2009, Al.B. had once again been cited by the police for harassment. She did not report this fact to the DHS or service providers. The citation led to a probation violation proceeding related to her child endangerment conviction. The harassment charge and probation violation proceeding were eventually dismissed after Al.B. attended and participated in a victim/offender reconciliation program.

In November 2009, several behavioral concerns were demonstrated, concerns that indicated a lack of insight about age appropriate supervision among other things. During the third week of November Al.B. had gone to

Indiana to deal with a pending criminal charge. She was jailed in Indiana for failing to appear for the hearing, which had been scheduled for the previous week. Al.B. had not contacted the DHS or any service provider to indicate that she would be gone from the state. The children were brought to where they were to have visitation with Al.B. and J.M., apparently their apartment. Recognizing the location and the presence of the individual who supervised the visitations as indicating a visitation was to occur, the children anticipated and looked forward to the visitation. They were greatly disappointed when it did not occur. When Al.B. was asked, after her return to Iowa, why she had not provided information that she would be gone from Iowa and had not provided information that she had been incarcerated and unable to attend scheduled visitations, Al.B. claimed that the events were a “non-issue,” asserting that the scheduled visitations should have been unsupervised. In the opinions of the DHS and service providers, Al.B.’s failures and attitude demonstrated a lack of protective capacity. Interactions between Al.B. and children reverted from semi-supervised to supervised. They have thereafter remained fully supervised.

It appears that as of their return to Iowa from Indiana in November 2009 neither Al.B. nor J.M. retained their previous employment.

At a December 16, 2009 family team meeting, Al.B. was asked if she was pregnant, and responded that she did not know. She was about four months pregnant, and was well aware of that fact. This was one of many times that Al.B. lied to the DHS and service providers or failed to disclose to them information that was unfavorable to her but should have been disclosed.

At the December family team meeting the DHS social worker indicated a belief that the services previously recommended were not causing necessary behavioral changes in Al.B. and recommended further assistance. Specifically, he recommended parenting classes concerning age-appropriate expectations of children. Al.B. refused to participate, despite being informed that such a refusal might affect reunification efforts. Al.B. declined an offer of a holiday visit with the children in the foster family home.

At the December 2009 family team meeting concerns were also expressed regarding Al.B.'s failure to disclose the October criminal charge against her and her failure to notify the DHS or service workers of her intent to be gone to Indiana and of her incarceration in Indiana in November. Al.B. took no responsibility for those actions or failures to act, made several attempts to coerce team members, and eventually left the meeting.

A review hearing was held on January 19, 2010. In the opinion of the DHS social worker, since October 2009 several behaviors of Al.B. indicated a diminished rather than increased protective capacity. The DHS recommended that a petition to terminate parental rights be filed.

In January 2010 Al.B. indicated she was willing to participate in the parenting class that had been recommended in December. She enrolled in the class, began attending in late January, but was removed from the class for absences and lack of commitment.

On March 10, 2010, Al.B. contacted the DHS social worker, indicating she was at a family violence shelter seeking placement due to an incident with J.M.

She indicated that due to her pregnancy she did not want to expose herself to the stress and discord that existed in their relationship. She stated a belief that J.M. was “bi-polar,” that he suffered from anxiety attacks, and that she needed police protection. She stated that she was ending their relationship. However, as of March 16, 2010, she moved back to the residence she shared with J.M. In the opinion of the DHS and service providers her actions demonstrated a lack of insight concerning the family violence that was one of the factors leading to DHS involvement and the children’s removal some ten months earlier.

Because Al.B. decided to return to what she had shortly before claimed was a dangerous environment, and because she had no explanation as to how she intended to ensure the children’s safety, the DHS case worker indicated that visits would need to occur at locations other than Al.B.’s and J.M.’s apartment. Al.B. disagreed. The social worker scheduled a meeting of Al.B., J.M., the FSRP service worker, and himself, for March 19. Al.B. refused to attend. She also refused to attend a subsequently-scheduled meeting with the FSRP worker’s supervisor, and declined to attend visitations scheduled in late March.

The juvenile court’s extensive and detailed findings of fact include the following:

Unfortunately, [Al.B.] was never able to be successfully fully engaged in the services offered so that the children could be safely returned to her custody. This judge on several occasions early on believed that reunification would happen within a short period of time. Just as it seemed that such an order would be entered, events would intervene and it was not safe to return the children. A level of trust was never established with her social worker and the mother would not be forthcoming about problems—then the problems would be discovered and reunification would be delayed in order to address the situation that actually existed.

In its findings the court also stated that it was adopting the rationale of the social worker as to why the children could not be returned to the custody of their mother. The court stated that the social worker

noted that . . . [A.I.B.] had been unable to demonstrate an ability to properly supervise the children over any substantial length of time and that the family violence issues had not been dealt with.

We agree with these findings of the juvenile court and its conclusion that the State proved the challenged elements of both sections 232.116(1)(d) and (h).

A.I.B. claims that termination of her parental rights is not in the best interests of the children. She argues both generally that termination is not in the best interests of the children and that termination should not occur because it would be detrimental to the children due to the closeness of the parent-child relationship.

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)).

Concerns at the outset of DHS involvement in this case included domestic violence and lack of adequate supervision. During the case, additional concerns arose regarding attachment between A.I.B. and A.R. Jr., instability in and

uncertainty of the family's housing, and Al.B.'s lack of and instability in employment.

The family violence issues remain unresolved. Al.B. has at times been unemployed, sometimes losing employment, and at other times being unable to work. Her housing has repeatedly been at risk, and remained at risk shortly before the termination hearing. Didactic therapy was felt necessary to foster positive interaction between Al.B. and the children, but after attending sessions for a time Al.B. refused to participate further. The same is true regarding parenting classes. Throughout the CINA proceeding Al.B. has often been untruthful with the DHS and service providers, and has failed or refused to cooperate reasonably and fully with necessary and required services. She has not developed a reasonable degree of insight into the unsafe and detrimental effects on the children of domestic violence, criminal activity, and lack of adequate supervision.

We find, as the juvenile court did, that the best interest of the children will be served by termination of Al.B.'s parental rights. The children are in need of safety, stability, and permanency. Al.B. is not able to provide safety and stability for them, either at the present time or within the reasonably foreseeable future. At the time of the termination hearing the children had been placed in a pre-adoptive foster home for ten months, with foster parents to whom they are bonded and who are willing and able to provide permanency for them. We find that termination of Al.B.'s rights best assures the children's safety, best furthers

their long-term nurturing and growth, and best provides for their 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. Al.B. claims that because of 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 a child due to the closeness of the parent-child relationship) the juvenile court erred in finding that termination of her parental rights was proper.

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 this issue, the juvenile court found that a good bond existed between Al.B. and the children, although A.R. Jr.'s bond with her was lower than his bond with J.M. It further found that a good and stable bond existed between the children and their foster parents, in whose care they had been for ten months, who had met all of their daily needs, and who had been present for them with Al.B. had elected not to be.

We recognize that termination of Al.B.'s parental rights will not be without some trauma to the children. However, upon our de novo review, *see In re P.L.*,

778 N.W.2d at 40, we agree with the juvenile court. We recognize that the children have a good bond with their mother. But they also have a good and stable bond with their foster parents. We conclude, as the juvenile court did, that in the short term the children will sustain some detrimental effect from termination of Al.B.'s parental rights. However, given their ages and their integration into a foster family willing to adopt them, we agree with the juvenile court that the section 232.116(3)(c) exception should not preclude the otherwise appropriate termination of parental rights in this case.

AFFIRMED.