

IN THE COURT OF APPEALS OF IOWA

No. 0-827 / 10-1522
Filed December 8, 2010

**IN THE INTEREST OF K.C., K.C., and E.C.,
Minor Children,**

N.J.C., Father,
Appellant,

A.C., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Louise Jacobs,
District Associate Judge.

A father and mother appeal separately from the order terminating their
parental rights. **AFFIRMED ON FATHER'S APPEAL; REVERSED AND
REMANDED ON MOTHER'S APPEAL.**

Patrick O'Bryan, Des Moines, for appellant father.

Nancy Pietz, Des Moines, for appellant mother.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, John P. Sarcone, County Attorney, and Annette Taylor, Assistant
County Attorney, for appellee State.

Michelle Saveraid of the Youth Law Center, Des Moines, for minor
children.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

A father and mother appeal separately from the termination of their parental rights to their three children. The father contends the district court erred in terminating his parental rights despite a strong parent-child bond. The mother contends the State failed to prove the grounds for termination by clear and convincing evidence; termination is not in the children's best interest; and the court erred in failing to grant her additional time for reunification and in terminating her parental rights despite a strong parent-child bond and the children's placement with a relative. We review these claims de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). Given the father's history of chronic and severe substance abuse problems, current incarceration, and two convictions for child endangerment placing the children at risk of harm, we affirm termination of his parental rights. In regard to the mother, we find there is insufficient evidence to justify the termination of her parental rights to the children under the facts and circumstances of this case. We reverse the court's order terminating the mother's parental rights and remand the case for further proceedings to make an effort to reunite these children with the mother.

I. Background Facts and Proceedings.

The father and mother began their relationship in 2005. Their first child was born in October 2006, when the father was sixteen years old and the mother was eighteen years old. They married in 2007. They had two more children, born in November 2007 and August 2009. At the time of the termination hearing, the father was twenty-one, and the mother was twenty-three.

The family came to the attention of the Iowa Department of Human Services in November 2008, after the police found the father and the two older children in a vehicle with marijuana and a loaded BB gun within reach of the children. The father was charged with child endangerment, and the family was offered informal services to assist in meeting parenting responsibilities. In September 2009, the family again came to the attention of DHS, when the two older children (nearly two and three years of age) were discovered playing outside the family home in the mid-morning without adult supervision. The youngest child was one month old at the time. A concerned neighbor called the police, and officers arrived at the family home and awakened the parents who were sleeping inside the home.¹ Both parents were charged with child endangerment. The mother received a deferred judgment. The children were removed from the home and were adjudicated in need of assistance (CINA). The children have been in the custody of their paternal aunt since removal.

The father was on probation for the initial child endangerment charge when the second charges were filed. His probation was revoked, and he was sentenced to up to ten years in prison on the new charges. He has been in prison since March 2010, and expects to be released in March 2014. The father has a lengthy history of substance abuse. He began using illegal drugs at age eleven or twelve, and has gone at most six months without using drugs since that time. He completed substance abuse treatment programs on two occasions, but

¹ The mother was recovering from a cesarean delivery and was taking prescription painkillers at the time. It appears both parents were resting after being up at night with the newborn, but neither intended to fall asleep. The mother admitted she was aware that her painkillers made her groggy.

relapsed shortly thereafter. He last used cocaine in June 2009, and marijuana two days before going to prison in 2010.

The mother does not use drugs or alcohol. Her drug screens and hair stats throughout these proceedings have been negative. She cooperated with caseworkers and participated in all recommended services, including individual and family therapy, visitation, and protective daycare. She takes medications as prescribed for her depression. By the time of termination, caseworkers indicated the mother's mental health was no longer a concern. The mother is employed and has a home that is appropriate for the children.

The mother has had five supervised visits a week with the children. Several caseworkers reported that visitation went very well, and there were no concerns as to the mother's ability to parent the children. In March 2010, child psychiatrist Dr. Martin Fialkov recommended the mother's visitation be increased to semi-supervised and unsupervised as soon as possible. In early June 2010, social worker Dustin Daugherty recommended the same. However, the record indicates that from at least December 2009 to the time of the termination hearing, visitation had not increased.

At some point during these proceedings, the mother's attorney and caseworkers advised the mother to cease all contact with the father or risk losing the children. (However, the juvenile court never ordered that she not have contact with the father.) It appears that even after this recommendation was given, the mother maintained some amount of contact with the father. In March 2010, caseworkers discovered that during a visit, the mother allowed the children to speak with the father on the phone for a few minutes, and thereafter

relinquished her Easter visit with the children scheduled to occur the following weekend. The mother called the father in prison on several occasions in April 2010. In May 2010, the father mailed the mother a Mother's Day card and a birthday card. It appears he also sent her several letters through her brother.

The State filed its petition to terminate parental rights in March 2010. Thereafter, the mother claimed that although she still loved the father, she no longer wanted to be with him. She filed a petition for divorce and claimed she had stopped having contact with the father. She changed her cell phone number so he could not contact her. Following a hearing taking place on June 14 and July 1, 2010, the court entered its order terminating the father's parental rights pursuant to Iowa Code section 232.116(1)(d), (h), (i), (j), and (l), and the mother's parental rights pursuant to section 232.116(1)(d), (h), and (i) (2009).

II. Parental Rights of the Father.

Because the father does not dispute the grounds for termination have been proved, we may affirm on those grounds. See Iowa R. App. P. 6.903(2)(g)(3) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."); *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999) ("When the juvenile court terminates parental rights on more than one statutory ground, we need only find grounds to terminate under one of the sections cited by the juvenile court to affirm."). However, the father contends termination would be detrimental to the children because of the strong parent-child bond he shares with the children.

The father's argument asks us to consider whether the exception under section 232.116(3)(c) applies to refute termination of his parental rights.² See Iowa Code § 232.116(3)(c) ("There is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship."). Upon our review, we find a parent child bond does exist between the father and the two older children (the youngest child was only seven months old at the time of his imprisonment). Under the facts of this case, however, we do not believe the bond here is a reason to refuse to terminate. Therefore, the exception under section 232.116(3)(c) does not apply in this case.

Termination of the father's parental rights is in the children's best interests. At the time of termination, the father was incarcerated with an anticipated release date in March 2014. The children are in need of permanency and will have next to no contact with the father for potentially four years while he is incarcerated. The father continued to use illegal substances throughout these proceedings, which included his use of marijuana two days before his imprisonment. He has been through treatment a few times, and relapsed each time. His parenting abilities are questionable, as he has failed to properly supervise the children resulting in two separate incidents of child endangerment charges against him, for which he is now imprisoned. He has chosen to associate with people who use illegal substances. We will not place the father's needs above those of the children by continuing the parent-child relationship in this case. The father has

² The State contends the father failed to preserve error on this issue. The father testified at trial in regard to the issue, and several exhibits in the record discuss his bond with the children. We therefore find the issue was properly preserved.

not made changes to show he is going to be sober and be a safe parent to the children. The father's incarceration resulted from a lifestyle chosen in preference to, and at the expense of, a relationship with the children. We cannot maintain a relationship where there exists only a possibility that the father will become a responsible parent sometime in the unknown future. We affirm termination of the father's parental rights.

III. Parental Rights of the Mother.

A. Grounds for Termination. The court terminated the mother's parental rights under Iowa Code section 232.116(1)(d) (children adjudicated CINA after finding the children to have been neglected as the result of the acts or omissions of parent; circumstances that led to adjudication continue to exist despite offer or receipt of services), section 232.116(1)(h) (children three years or younger; children adjudicated CINA; children removed for six of the last twelve months; clear and convincing evidence children cannot be returned to the custody of the parent at the present time), and section 232.116(1)(i) (children meet definition of CINA based on neglect as a result of the acts or omissions of parent; clear and convincing evidence that the neglect posed a significant risk to the life of the children or constituted imminent danger to the children; clear and convincing evidence that the offer or receipt of services would not correct the conditions that led to the neglect of the children within a reasonable period of time).

The mother contends the State failed to prove each of these grounds for termination by clear and convincing evidence. The crux of this argument is that the court erred in terminating her parental rights because the circumstances that led to adjudication no longer exist, the children could be returned to her custody

at the present time, and her receipt of services would correct the conditions that led to the neglect of the children within a reasonable period of time. See Iowa Code §§ 232.116(1)(d)(2), 232.116(1)(h)(4), 232.116(1)(i)(3).

The testimony is undisputed that the mother is competent and has the appropriate parenting capacity to raise the children. She is employed, has insurance benefits through her employment, and has a home for the children. She does not use drugs or alcohol, and has stabilized her depression by prescribed medication. Caseworkers agreed the mother's relationship with the father is the only risk she presents to the children. As the district court stated:

[The mother] is reported to not use illegal drugs, and is also reported to have parenting skills with her children. She is currently employed and able to provide the children a home. The mother has the parenting skills to parent. Her expert, Dr. Martin Fialkov, testified also that she had good parenting skills and that her anxiety and/or depression would not likely interfere with her parenting. Given that the mother has the ability to parent, it is all the more disappointing that she shows little insight into the dangers to the children created and present by reason of their father using drugs and living in the home with the children as an active substance abuser.

The mother testified that she didn't see a risk and the father's drug use didn't make him a bad father. Her testimony varied a little with leading questions, but no real insight was articulated by the mother.

....

Her attorney seeks to characterize such behavior as loving her husband too much and being too loyal. Rarely has the court been presented with a case where the father's actions have actually resulted in child endangerment cases on two separate occasions (both closely related to his drug use), and the mother of the children has been unable to even articulate the dangers of such drug use.

....

Despite the concerns expressed by DHS and the service providers, the mother showed no improvement in her insight over the time period of receiving services and instead, as stated, she did her best to hide her relationship with the father thus avoiding the real issue of understanding the needs of her children. The concern

of DHS and many service providers was that as soon as the father was discharged from prison he would be residing with the mother and the children without maintaining sobriety presenting the same risks present at the time that just a few of his behaviors led to the child endangerment charges. Obviously his drug use presents other risks than just those that led to the charges.

Since the mother fails to see the risk to harm to the children, one can easily conclude that she would not protect the children from predictable harm resulting from the father's likely return to the home upon his discharge, or the possible introduction of another substance abuser into the family.

We have carefully and thoroughly reviewed the record and particularly the testimony of the mother, three caseworkers (Melissa Mee, Shauna Grewe, and Jessica O'Brien), child psychiatrist (Dr. Martin Fialkov), and social worker (Dustin Daugherty). We agree with the court that the mother has the necessary parenting ability and capacity to care for the children, but that she has not shown ideal progress in her insight as to the risks and dangers that her association with people using illegal substances places on the children. The dangers and risks to children as a result of being around drugs and drug users can hardly be understated. As a parent, it is the mother's responsibility to ensure the safety and well-being of the children. At the same time, we find ample support in the record that she will make her best effort to not allow people using illegal substances to be around the children in the future.

We cannot, under the grounds cited by the district court, terminate the mother's parental rights based upon the concern that she *might* allow the father to return to the family home upon his release from prison in 2014, and if so, that the father *might* continue to use illegal substances at that time. At present, the mother is a fully capable parent, with a home and employment. She has fully and consistently participated in all services offered to her and has had visitation

with her children five days a week since December 2009. She loves the children, and the children are bonded to her. We understand there is a chance the father could return to the family home after he is released. There is also a chance the mother could begin another relationship in the meantime.³

Our review of the record, however, convinces us the mother will not allow any contact with the father that would be inappropriate or harmful for the children. The mother understands she must make better choices with the father, or anyone else she may become involved with. The mother has developed the ability and awareness to keep the children safe. The mother became involved with the father in 2005 when they were both juveniles. The father was using illegal substances at that time, and he continued to use illegal substances throughout the relationship. They were married and had three children together. It is clear the mother's relationship with the father was a significant part of her life. It was no small task for the mother to initiate a dissolution action against the father where there was little evidence of marital discord. Although the mother made mistakes in the past by allowing the children to be around the father when he was using illegal substances, the mother has presented her commitment to protecting the children from such conduct in the future.

For these reasons, we find there is inadequate evidence in this record to support the termination under the statutory provisions cited by the court. It is also troubling that at least two caseworkers recommended as early as March 2010 that visitation be increased as soon as possible to semi-supervised and

³ The mother testified she had recently been on several dates with a coworker who drinks occasionally and does not use drugs.

unsupervised visits, yet visits were not increased in any way since December 2009. We find the circumstances that led to the adjudication no longer exist, and the children are able to be returned to the mother's care at the present time, or at the very least, within a reasonable time. The order terminating the mother's parental rights should be reversed, and the case remanded for increased visitation with the goal for reunification to occur as soon as possible.

B. Best Interests. The mother further argues that termination is not in the children's best interests. Even if a statutory ground for termination exists, a decision to terminate must still be in the best interests of a child after a consideration of the factors under Iowa Code section 232.116(2). *In re P.L.*, 778 N.W.2d 33, 37 (Iowa 2010). In determining best interests, this court's 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.*

Upon our review, we conclude termination of the mother's parental rights is not in children's best interests. It is clear the mother and children share a strong bond. All the caseworkers indicated a strong attachment between the mother and the children. For the majority of these proceedings, the mother has had visitation with the children three times a week supervised by a caseworker, as well as weekend visits supervised by the maternal grandmother. In total, the children see the mother five times a week. The mother is involved in the children's activities, communicates appropriately with them, and is concerned about their health. She provides diapers, pull-ups, toys, games, and clothing for the children. She prepares and feeds them meals.

The children are healthy and happy. They look forward to visits with their mother and also enjoy seeing their grandmother. The record indicates the children respond well to the mother's directions and look to her for comfort and approval. There is a high level of trust between the mother and the children. As one caseworker reported:

[The mother] has five supervised visits a week with her children. She has not missed any of her visits which has allowed her to continue to grow a strong parent/child bond. . . . [The mother] has a great support system with her side of the family. Her mother is willing to help her in every way. This has been evidenced by her allowing the mother to stay with her, supervise weekend visits and transport her and the children to appointments. . . . [The mother] interacts with her children during supervised visits. The family is always outside going on walks or playing board games. The mother has mentioned getting family photos sometime soon.

The mother sees her therapist every week. She is employed and has health insurance through her employer. Her employer testified she is reliable and hardworking, and was recently promoted. The mother is able to provide for the children. Upon consideration of the safety of the children and "the physical, mental, and emotional condition and needs" of the children, we conclude the mother is the "best placement for furthering the long-term nurturing and growth" of the children. *See id.*

C. *Section 232.116(3)*. The mother also contends the court erred in terminating her parental rights despite the evidence of several factors under section 232.116(3) that exist to refute termination in this case. In support of her contention, the mother points to the fact that a "relative has legal custody" of the

children, and “the closeness of the parent-child relationship”.⁴ See Iowa Code § 232.116(3)(a) and (c). We agree that both these exceptions are applicable in this case. The children have been in the custody of their paternal aunt since removal, and there is clear and convincing evidence termination of the mother’s parental rights would be detrimental to the children due to the closeness of the parent-child relationship.⁵

IV. Conclusion.

Under the facts of this case, we do not find a strong parent-child bond is a reason to refuse to terminate the father’s parental rights. We affirm the termination of the father’s parental rights.

Upon our review, we find there is insufficient evidence to justify the termination of the mother’s parental rights to the children. We reverse the court’s order terminating the mother’s parental rights, and remand the case for further proceedings to make an effort to reunite these children to the mother.

AFFIRMED ON FATHER’S APPEAL; REVERSED AND REMANDED ON MOTHER’S APPEAL.

⁴ The State contends error was not preserved on the issue of the parent-child bond. Much testimony concerning the parent-child bond was admitted at trial and in the various exhibits presented by the parties. We find the issue was properly preserved.

⁵ The mother also argues the court erred in failing to grant a permanency extension pursuant to section 232.104(2)(b). Because we have determined there is insufficient evidence to terminate the mother’s parental rights, we need not reach this issue.