

**IN THE COURT OF APPEALS OF IOWA**

No. 0-996 / 10-1858  
Filed February 9, 2011

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

**Z.I.H., Father,  
Appellant,**

**L.R.S., Mother,  
Appellant.**

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Appeal from the Iowa District Court for Ringgold County, Monty W. Franklin, District Associate Judge.

A mother and father appeal from the order terminating their parental rights. **AFFIRMED AS TO MOTHER; REVERSED AS TO FATHER.**

Carol A. Clark of Clark Law Office, Lamoni, for appellant-father.

Kristian M. Lehmkuhl, Osceola, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Clinton L. Spurrier, County Attorney, for appellee.

Loretta Harvey, Creston, attorney and guardian ad litem for minor child.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

**SACKETT, C.J.**

A mother and father appeal from the juvenile court order terminating their parental rights to their child. The mother contends the court should have either given her an additional six months to regain custody or established permanency through a guardianship instead of termination. The father contends there was not clear and convincing evidence supporting termination. We affirm the termination of the mother's parental rights, but reverse the termination of the father's parental rights.

**I. Background.**

The child, born in March of 2007, was removed from her mother's care in August of 2009, following allegations of physical abuse by her mother's paramour, and placed in her father's custody. The father was living with his parents, who actually provided most of the care for the child. The court required mental health and substance abuse evaluations of both parents and the mother's paramour. The father was diagnosed as bipolar and treated that condition with medication. The mother exercised visitation. Both parents participated in services to some degree. In November of 2009 the mother gave birth to a child, whose father was the mother's paramour. That child is the subject of a separate child-in-need-of-assistance proceeding because of domestic abuse in the home and the mother's drug use. After that child's birth, the mother tested positive for drug use.

In February of 2010, the mother and her paramour married. Shortly thereafter, they both were arrested following an incident of domestic abuse. The

mother participated in substance abuse treatment, but continued to use methamphetamine, increasing from weekly to daily use. By the time of the termination hearing in September, the mother was pregnant with a third child, but apparently had stopped using methamphetamine about two weeks before the hearing. Her husband was not compliant with services. Neither had been employed during these proceedings.

The father was cooperative with services, but did not show an ability to care for the child. During the summer of 2010, he spent forty-five days in jail for probation violations. The child was removed from his care and placed in the custody of the paternal grandparents, in whose home she had resided since her removal from the mother's care. After his release from jail, the father lived with his brother. He was unemployed throughout these proceedings.

In August of 2010, the State petitioned to terminate both parents' parental rights, alleging the father consented to termination, see Iowa Code section 232.116(1)(a) (2009), the mother had not maintained significant and meaningful contact with the child, see section 232.116(1)(e), the child could not be returned to the mother's custody, see section 232.116(1)(h), and the mother has a chronic substance abuse problem that prevents return of the child to her custody, see section 232.116(1)(l). Following a hearing, at which the father presented no evidence, the court terminated the mother's parental rights under section 232.116(1)(h) and (l), and the father's parental rights under section 232.116(1)(h). It continued the child's placement with the paternal grandparents, who want to adopt the child. The court found the child's placement in the

grandparents' home provided the immediate and long-term stability, structure, nurture, and permanency that served the child's emotional, physical, and other needs.

## **II. Scope and Standards of Review.**

Our review of termination-of-parental-rights proceedings is de novo. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). We review the facts and the law and adjudicate rights anew. *In re H.G.*, 601 N.W.2d 84, 85 (Iowa 1999). We give weight to the juvenile court's factual findings but are not bound by them. *In re E.H., III*, 578 N.W.2d 243, 248 (Iowa 1998).

The parent-child relationship is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511, 519 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15, 35 (1972). When the juvenile court terminates a parent's rights, we affirm if clear and convincing evidence supports the termination under the cited statutory provision. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). The State has the burden of proving the allegations by clear and convincing evidence. "Clear and convincing evidence" is evidence leaving "no serious or substantial doubt about the correctness of the conclusion drawn from it." *In re D.D.*, 653 N.W.2d 359, 361 (Iowa 2002) (quoting *Raim v. Stancel*, 339 N.W.2d 621, 624 (Iowa Ct. App. 1983)). If the juvenile court terminates parental rights on multiple statutory grounds, we may affirm if any ground is supported by clear and convincing evidence. See *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995).

### III. Analysis.

**Father.** The father contends termination was not supported by clear and convincing evidence. He makes no argument and cites no published authority in support of his contention.

Although the State pled grounds for termination of the father's parental rights under section 232.116(1)(a), voluntary consent, the court terminated the father's parental rights under section 232.116(1)(h), a ground not pled as to the father. That section requires proof, among other things, that the child has been removed from a parent's physical custody for at least six months and that the child cannot be returned to the parent's custody at the time of the termination. There is clear and convincing evidence the child could not be returned to the father's custody at the time of the termination, but the child had only been out of the father's physical custody from July 16 to September 17, 2010, a period of just two months. We conclude the statutory ground for termination cited by the juvenile court is not supported by clear and convincing evidence and was not pled by the State as a ground for termination.

The court did not terminate the father's parental rights on the statutory ground pled, that the father voluntarily and intelligently consents to the termination of his parental rights and the parent-child relationship and for good cause desires the termination. See Iowa Code § 232.116(1)(a). The State argues the father consented to termination, as evidenced by the statement of his attorney at the termination hearing. The father did not sign a written consent to termination and did not testify at the termination hearing. Neither of the State's

witnesses testified that the father had indicated his consent to termination of his parental rights. His attorney made the following statement to the court in closing argument at the termination hearing:

Your Honor, my client, [the father], wants what is in the best interest of [the child]. He wants her to be safe, protected, wants the stability that she's had in her life to continue. He wants the care and the providing for her to continue as has been provided by his parents . . . , and he leaves it up to the Court as to the course of termination as for the best way for that to continue.

The court found:

Although he has not formally consented to the termination of his parental rights, through his attorney he did indicate at the termination hearing that he wanted the child to continue to receive the stability and care being provided by to the child by his parents, acknowledging that he could not provide that stability and care himself.

“Statements, arguments, questions and comments” by lawyers “are not evidence.” Iowa Civil Jury Instruction 100.4 (2010). Even after this finding, the court did not terminate the father’s parental rights based on voluntary consent. From our review of the record, we find no evidence the father voluntarily consented to termination.

Neither the statutory ground pled nor the ground cited by the juvenile court are established by clear and convincing evidence. Accordingly, we reverse the termination of the father’s parental rights.

***Mother.*** The mother contends the court abused its discretion in not continuing permanency for an additional six months because her continuing participation in substance abuse treatment could allow return of the child to her custody.

Two weeks before the termination hearing, the mother entered a residential substance abuse treatment program at a facility that allows mothers to have their children with them. The caseworker testified the mother's progress would be evaluated after thirty days to determine if she could have a child with her, but there was no guarantee such placement would be recommended. She also testified the mother's youngest child likely would be placed with her first because of that child's greater need to be with the mother to regain and build a parent-child bond. She did not see any realistic prospect of being able to place the child at issue in this appeal with the mother in the "next month or two."

The mother testified her response to treatment this time was different because "I really want to change this time." She noted she was learning about triggers to her use. She said her response to stress in the past was "just getting high" so it was easier to deal with the stress. When questioned about what she was learning in treatment as more appropriate ways to deal with stress, she said "staying clean." When asked for another example, the mother could not think of anything else because "I haven't really got to that subject yet." The mother also testified to her commitment to remaining with her husband. At the time of the termination, there was a no-contact order preventing the husband from having contact with the child. The order was to remain in effect until the husband was compliant with services such as attending a batterer's education program.

At the time of the termination, the child had been out of the mother's custody for over a year—twice the statutory time provided for reunification. See Iowa Code § 232.116(1)(h)(3) (six months). "Once the limitation period lapses,

termination proceedings must be viewed with a sense of urgency.” *In re C.B.*, 611 N.W.2d 489, 495 (Iowa 2000). In order to defer permanency for an additional six months, the juvenile court would have to “enumerate the specific factors, conditions, or expected behavioral changes which comprise the basis for the determination that the need for removal . . . will no longer exist at the end of the additional six-month period.” Iowa Code § 232.104(2)(b). “Where the parent has been unable to rise above the addiction and experience sustained sobriety in a noncustodial setting, . . . there is little hope of success in parenting.” *In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998). From our review of the record, including the mother’s past inability to avoid using illegal drugs, even when pregnant and in substance abuse treatment and facing termination of her parental rights, we conclude the juvenile court did not abuse its discretion in refusing to give the mother an additional six months to achieve reunification with the child. *See id.* (“Thus, in considering the impact of a drug addiction, we must consider the treatment history of the parent to gauge the likelihood the parent will be in a position to parent the child in the foreseeable future.”).

The mother contends the court erred in terminating her parental rights when guardianship would have provided permanency for the child and the child was in the custody of relatives.

Before ordering permanency through a guardianship, the court must find termination is not in the child’s best interests. Iowa Code § 232.104(2)(d)(1), 232.104(3). “The legislature has categorically determined ‘the needs of a child are promoted by termination of parental rights’ if the grounds for termination of



parental rights exist.” *In re M.W.*, 458 N.W.2d 847, 850 (Iowa 1990). Thus, we determine whether the evidence is sufficient to terminate the mother’s parental rights on any ground for termination pled by the State and within section 232.116. Clearly, the child could not be returned to the mother’s care at the time of the termination. See Iowa Code § 232.116(1)(h). Since “the answer is in the affirmative, termination of parental rights was the proper alternative for the juvenile court to decree rather than a permanency order.” See *In re L.M.F.*, 490 N.W.2d 66, 68 (Iowa Ct. App. 1992).

Although a guardianship may provide some permanency, it does not necessarily provide stability for the child. So long as a parent’s rights remain intact, the parent can challenge the guardianship and seek return of the child to the parent’s custody. See Iowa Code § 232.104 (providing the parent may seek to modify a permanency order). Termination and adoption are the preferred solution when a parent is unable to regain custody within the time frames of chapter 232. *In re C.K.*, 558 N.W.2d 170, 174 (Iowa 1997) (“An appropriate determination to terminate a parent-child relationship is not to be countermanded by the ability and willingness of a family relative to take the child.”). We affirm the juvenile court’s decision not to establish permanency through a guardianship in the grandparents.

**AFFIRMED AS TO MOTHER; REVERSED AS TO FATHER.**