

IN THE COURT OF APPEALS OF IOWA

No. 1-244 / 11-0285
Filed April 27, 2011

**IN THE INTEREST OF K.E.M.,
Minor Child,**

**R.J.B., Mother,
Appellant,**

**S.M., Father,
Appellant.**

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

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

Jared C. Harmon, Des Moines, for appellant mother.

William E. Sales III, Des Moines, for appellant father.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, John P. Sarcone, County Attorney, and Christina Gonzales,
Assistant County Attorney, for appellee State.

Kayla Stratton, Des Moines, for minor child.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

A father and mother appeal separately from the order terminating their parental rights. Upon our de novo review, we affirm on both appeals.

I. Background Facts and Proceedings.

R.B. is the mother and S.M. is the father of K.M., born in July 2008. The parents are unmarried and have a history of the father inflicting domestic violence on the mother.

In October 2008, the Iowa Department of Human Services (Department) confirmed a report of child abuse by the father against the child for failure to provide proper supervision. Thereafter, the mother agreed to participate in Department-eligible services and to abide by the no-contact order in place between the parties. Less than a month later, the father was charged with child endangerment and domestic abuse assault after the father grabbed the child's arm or shoulder, pulling the child away from the mother while the child was breastfeeding. The father then locked the mother in the closet without the child. The father's abuse of the child was reported to the Department, and the Department determined the report to be founded. The father ultimately pled guilty to the criminal charges, and he was placed on probation for two years. Despite the father's actions, the mother later cancelled the no-contact order in December 2008.

In March 2009, another report of domestic violence between the parents was reported to the Department. The mother advised the assessment worker that the father had pushed her down on the bed on top of the child and then bit the mother on her back. The worker observed bite marks, scratches, and bruises

upon the mother's body. The day after the incident, police officers came to the mother's apartment looking for the father. Although she told the officers the father was not there, the officers found the father hiding under clothes in her closet. The mother stated the father had picked her locks and would enter her apartment anytime he wanted. When the mother was asked if she would be willing to get a no-contact order, she responded negatively, stating she wanted the child to be able to see the father. As a result of the incident, the Department confirmed the parents had denied the child critical care and requested a child in need of assistance (CINA) petition be filed. The father was arrested for violating his probation and was placed in jail.

On April 16, 2009, the State filed its petition asserting the child to be a CINA based upon the numerous domestic violence incidents between the parents and the mother's allowance of the father back into her home. The court thereafter adjudicated the child CINA. The court's order noted that the mother had "been informed of [the] possible consequences of disobeying [the no-contact] order."

The juvenile court entered its dispositional order in May 2009. The court directed the parents to complete psychological evaluations. The court further instructed the father to participate in the assault and anger management programs at the Polk County jail, where he was incarcerated.

While the father was in jail, the mother made progress toward reunification. The mother began participating in services. She enrolled the child in protective daycare, and she began attending therapy. She began dating someone new, and she moved to a new apartment. However, she did not have a

psychological evaluation completed, nor did she participate in any domestic violence classes as recommended. The mother expressed inconsistent statements about the future of her relationship with the father. She stated she wanted to be able to continue seeing the father; another time she stated she no longer wanted him in her life. She stated she was in love with another man, but she continued to write letters to the father while he was in jail.

The father remained in jail until July 2009. In September, after he was released, he began having supervised visits with the child. He also set an appointment for a psychological evaluation, but did not complete it.

In October 2009, the mother reported that when she returned home one evening, the father was in her apartment waiting for her. She stated she called police from a neighbor's home, but the father was not arrested because his mail was being sent to her apartment. Because the father's mail was being sent to the address and his clothes were seen in the mother's apartment, the Department's worker believed the father may be living with the mother. The worker also noted several inconsistencies in the mother's reports about her relationship with the father. The mother denied the father lived with her or that they were in a relationship. The Department again recommended that the mother regularly participate in therapy and domestic violence counseling.

On November 17, 2009, a family team meeting was scheduled for the parents and service providers. Neither parent showed up to the meeting. On November 22, the service provider went to the mother's apartment to make contact. The service provider again stressed that the mother needed to follow through on its recommendations, including getting a psychological evaluation.

The service provider then did a walk-through of the mother's apartment and found the father hiding in the mother's bedroom underneath a pile of clothes in the closet. The parents denied he had been staying there, and the service provider challenged the denial, noting multiple clothing items and personal effects in the apartment that indicated he had been staying there. The service provider reported the discovery to the Department, and a new safety plan was put in place. The State then filed a motion to modify the dispositional order to have the child placed in foster care. On November 24, the juvenile court granted the State's motion, and the child was removed from the mother's care.

The parents then openly resumed their relationship, and they began having supervised visitation together with the child. On December 14, 2009, the mother reported she had again left the father after he had pushed her up against a wall and strangled her. She stated he destroyed her apartment and all her family heirlooms. Police were called, and a warrant was issued for the father's arrest for attempted murder. She also stated she obtained a restraining order against the father. The mother told the service provider she believed the father had left the state because he did not want to go to jail. The mother then requested the child be returned to her, as the father was no longer a threat. The service provider again stressed to the mother the importance of fulfilling the court's expectations, including resuming therapy and obtaining a psychological evaluation. The service provider spoke to the father via phone, and he denied harming the mother and her belongings.

Thereafter, the mother reported she had begun attending domestic violence classes, but then stated that the classes had been cancelled for a

number of weeks. The service provider talked to the class provider and verified the classes had not been cancelled for a number of weeks. When confronted, the mother stated her advocate told her the classes were cancelled, but could not recall the advocate's name. The mother also told the service provider that complying with the court's expectations were difficult for her because she was working two jobs. When pressed on where she was working, the mother was evasive. The mother stated the father had tried to kill her on multiple occasions; once chasing her down the hallway with a butcher knife. She stated he had broken into her old apartment as well as her new apartment. She told the worker she did not turn the father in because she was afraid of him.

In January 2010, the mother reported the father had returned to the Des Moines area. She continued to give inconsistent reports of her relationship with him. In February, she told the service provider she had had a conference call with the father and his attorney concerning the father's requirement that he complete the batterer's education program. The next week the mother said she had not spoken to the father in over a month.

The father contacted the service provider and requested visits with the child in January 2010. The service provider advised him to contact the Department, but he refused. A warrant remained out for the father's arrest. The father later contacted the Department in April 2010 and advised he was eight hundred miles away and he was not interested in services.

On April 5, 2010, the mother completed a psychological evaluation, but did not provide a copy of the evaluation to the Department until June 2010, despite numerous requests. The psychologist diagnosed the mother with an adjustment

disorder with depressed mood and recommended she continue individual therapy.

The mother continued to have supervised visits with the child. She was consistently ten to fifteen minutes late for the visits, sometimes even later. The mother again requested the child be returned to her care, stating she had done everything the Department had asked of her. The service provider requested information regarding the mother's progress with individual therapy. The mother did not want to have her therapist disclose anything about their conversations. She also mentioned the father had showed up at her apartment again.

Following a permanency hearing in June 2010, the juvenile court entered its order extending permanency for three months. The court's order directed the mother to demonstrate "insight on putting her child first as [a] priority" and "insight into domestic abuse issues." The order also instructed that the mother should cooperate with the Department and "be honest [with] providers." The court's order noted the mother had "made some progress for which she is commended and is encouraged to give her very best efforts."

In July 2010, the service provider noticed the mother had been rubbing her stomach and resting her hand on it, and the service provider asked the mother if she was pregnant. The mother denied that she was pregnant, but stated she was having problems with her blood sugar and needed to have it checked. At her next visit, the service provider followed up with the mother about her blood sugar issues. The mother stated she had kidney stones and the medicine she was on made her very sleepy. Seven days later, the mother informed the service provider and the Department she was three months

pregnant with twins. Initially refusing to identify the father, the mother later stated there was a possibility that S.M. was the father of her unborn babies, “but it was not what [the Department] thought.” The mother said she had had sexual relations with the father three times. When the service provider restated the Department’s concerns that the child was not safe in the mother’s care, as she had continued to be around the father and had not followed any of the safety plans put into place, the mother asked the service provider if she knew “what it is like to be raped over and over again.” The service provider asked if that was what had happened to cause her to be pregnant again, but the mother responded she was not going to get the father into more trouble. She then denied the father had raped her recently, but stated he had done so several times in the past. The mother later told the court-appointed special advocate (CASA) that she was with the father consensually in April 2010, when she became pregnant, but that he had raped her in the past. When the CASA asked if she had reported it to her therapist, the mother responded that she had not told her therapist because the therapist might report it to the Department.

On September 10, 2010, the State filed its petition to terminate the parents’ parental rights. Hearing on the petition was held on October 25 and 29, and December 2, 2010. The father appeared the first day of the hearing, and he was arrested on his outstanding warrant for domestic assault charge enhanced. The mother testified she was willing to not be around the father, she would follow the safety plan, and the child could be immediately returned to her care. The mother denied the father had ever raped her, but stated she had had sex with him when she did not want to have sexual relations. The father testified he had

resumed visits with the child after he was released from jail. He also testified he understood why the State thought his rights should be terminated, but he believed the child should remain with the mother.

The service provider testified that the mother's visits with the child were appropriate and there were no concerns about the mother's treatment of the child. The service provider explained her recommendation that the mother's parental rights be terminated was a tough choice. She continued to be concerned with the mother's interactions with the father, the mother's ability to make safe choices for the child around the men in the mother's life, and the mother's ability to put the child first. The service provider testified that the mother had stated her last contact with the father was in April 2010. However, the mother's doctor indicated the mother was only eighteen weeks along in her pregnancy at a September 2010 appointment, which would indicate the twins were conceived around the end of May or beginning of June; much later than the date the mother stated she was last with the father. She testified there were new reports that the mother had been with the father in early November 2010, and the two had fought and the father had threatened the mother.

The Department's worker testified that neither parent had "gained any insight [into] domestic violence, [was] willing to follow a safety plan, [or was] willing to put [the child's] best interest at had first. And [the parents] continue to obviously want to meet their own needs prior to [the child's]" The worker testified that the mother tended "to tell different people different things and different versions of the truth than what's really happened, and that has hindered the ability to get [the mother] the . . . services . . . she needs" She further

testified that the child should not have to “wait anymore for those parents to get [it] together and to gain the insight that’s needed to keep him safe. He deserves permanency.”

Both the Department’s worker and the service provider acknowledged the mother and child shared a bond. The service provider testified it would be difficult for the child if the mother’s parental rights were terminated. The Department’s worker also testified the child shared a bond with the foster parents, the child was doing well in their care, and the family wished to adopt the child.

After hearing testimony and receiving evidentiary depositions, the court entered its order terminating the parents’ parental rights. The court terminated the parents’ parental rights pursuant to Iowa Code sections 232.116(1)(d) and (h) (2009). The court also terminated the father’s parental rights pursuant to section 232.116(1)(b) and (e).

The parents now appeal separately.

II. Scope and Standards of Review.

We review the juvenile court’s decision to terminate parental rights de novo. See *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). We are not bound by the juvenile court’s factual findings, but we give weight to them, especially those that involve witness credibility. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). The State must prove grounds for termination by clear and convincing evidence. *Id.* In considering whether to terminate, our primary considerations are the child’s safety; their physical, mental, and emotional condition and needs; and the

placement that best provides for the long-term nurturing and growth of the child.
Iowa Code § 232.116(2); *P.L.*, 778 N.W.2d at 37.

III. Discussion.

On appeal, both parents contend the State failed to prove by clear and convincing evidence the grounds the juvenile court found in terminating the parents' parental rights. Additionally, the mother argues the court erred in failing to consider the statutory factors under section 232.116(3) to determine if the factors under that section were applicable to preserve the mother's parental rights. Upon our *de novo* review, we disagree.

A. Grounds for Termination.

We need only find termination proper under one ground to affirm. *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995). Termination is appropriate under section 232.116(1)(h) where there is clear and convincing evidence:

- (1) The child is three years of age or younger.
- (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
- (3) The child has been removed from the physical custody of the child's parents for at least six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.
- (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

There is no dispute the first three elements of this section have been proved. However, the parents each contend there is insufficient evidence to show the child cannot be returned to the mother's care at the present time. Upon our *de novo* review, we find the State has met its burden as to both parents.

While the law requires a “full measure of patience with troubled parents who attempt to remedy a lack of parenting skills,” this patience has been built into the statutory scheme of chapter 232. *In re C.B.*, 611 N.W.2d 489, 494 (Iowa 2000). The legislature incorporated a six-month limitation for children adjudicated a CINA aged three and younger. Iowa Code § 232.116(1)(h)(3). Our supreme court has stated that “the legislature, in cases meeting the conditions of [the Iowa Code], has made a categorical determination that the needs of a child are promoted by termination of parental rights.” *In re M.W.*, 458 N.W.2d 847, 850 (Iowa 1990) (discussing Iowa Code § 232.116(1)(e)). The public policy of the state having been legislatively set, we are obligated to heed the statutory time periods for reunification.

1. *The Father.*

Here, the father did not participate in services throughout much of these proceedings. He had very minimal visitation with the child. The father has not established in any way that he can refrain from violence. He continued his violent relationship with the mother despite all recommendations and orders that he stay away. During the last domestic violence incident he tried to strangle the mother. There is no evidence in the record that the child could have been returned to his care at time of the termination hearing. The father makes no argument on appeal that the child could be returned to his care at the time of the termination hearing.¹ Accordingly, we find the State has proved by clear and

¹ Although the father argues the child could have been returned to the mother’s care at the time of the termination hearing, he lacks standing to assert such an argument. See *In re D.G.*, 704 N.W.2d 454, 460 (Iowa Ct. App. 2005) (stating that one parent cannot assert facts or legal positions pertaining to the other parent as the court

convincing evidence the child could not be safely returned to the father's care at the time of the hearing.

2. *The Mother.*

We agree with the juvenile court that the State proved by clear and convincing evidence the child could not be safely returned to the mother's care at the time of the hearing. By the time of the last day of the termination hearing, the child had been out of the mother's custody for over a year. Despite the fact the mother asserted the father had tried to kill her more than once, and the fact the father had injured the child during one of their conflicts, the mother continued her relationship with the father, evidencing little to no insight as to the danger the relationship posed to both her and the child. The statutory six-month period came and went with little evidence that she could parent the child safely by putting the child first and giving up her violent relationship with the father. Even after she was given three extra months for reunification, she engaged in sexual relations with the father and now is pregnant again. There was evidence presented that, during the course of the termination hearing, she had again sought out the father, which resulted in the two fighting and the father threatening her yet again.

Upon our de novo review, we agree with the juvenile court's conclusion:

[The mother] has made some steps forward, but appears to have taken as many steps backward despite the length of time services have been offered to her. Little, if any, sustained progress has been made on the issues of domestic violence. [The mother] has gained little insight or has failed to put into practice any insight she may have gained on the impact of domestic violence on [the

makes a separate adjudication as to each parent). We therefore do not consider his claim.

child] or even herself. It appears very likely that she has continued her relationship with [the father] through the CINA case and chose instead to concentrate her efforts in hiding her relationship from [the Department]. She could take any number of protective actions which would demonstrate and understanding and change which would reduce the risk of harm to [the child] if he were returned to her care. But, she has failed to demonstrate any meaningful progress on this issue.

Because the mother continued to involve herself in a relationship with the father despite his assaults against her, we find the State has proved by clear and convincing evidence the child could not be safely returned to the mother's care at the time of the hearing.

B. Iowa Code section 232.116(3).

The mother contends the court erred in determining termination of her parental rights was in the child's best interests despite the closeness of her and the child's relationship. She also argues the court failed to consider placement of the child with a relative as a reason not to terminate her rights. We disagree.²

Even though a court may find termination appropriate under section 232.116(2), a court need not terminate the relationship between the parent and child if any of the enumerated circumstances contained in section 232.116(3) exist. See *P.L.*, 778 N.W.2d at 37. Section 232.116(3)(a) provides termination is not required when a relative has legal custody of the child. Section 232.116(3)(c) provides termination is not required where it would be detrimental to the child due to the closeness of the parent-child relationship. The exceptions set forth in 232.116(3) have been interpreted as permissive, rather than mandatory. *In re*

² We note the juvenile court did not specifically address section 232.116(3) and the mother did not file a motion asking the juvenile court to address the issue. However, we elect to proceed to the merits of the issue.

J.L.W., 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). In determining whether to apply this section, we consider the child's long-term and immediate best interests. See *P.L.*, 778 N.W.2d at 37. A court has discretion, based on the unique circumstances of each case and the best interests of the child, whether to apply this section to save the parent-child relationship. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993).

The juvenile court found termination was in the best interests of the child, explaining:

The child's safety is the court's primary consideration. There are ongoing concerns about the safety of the child if returned to the care and custody of either parent. Neither has made changes to eliminate or even diminish the risk of harm to the child who will continue to be exposed to out of control parents engaged in violent behaviors if he was returned to their care. The child needs a long-term commitment from an adult who can be appropriately nurturing, supportive of his growth and development, and by a responsible adult who appropriately meets his physical, mental, and emotional needs and does not expose him to violence in the home. . . .

The parents have demonstrated they are not willing or able to provide a nurturing environment without the presence of violence. The child's best interests require that the parental rights of the child's mother and father be terminated.

Here, the child is not in the custody of a relative. Additionally, although the record shows the mother and child share a bond, under the facts and circumstances in this case, and considering the child's long-term and immediate best interests, we agree with the juvenile court that termination of the mother's parental rights is in the child's best interests. We note the child is doing well in foster care. We therefore decline to apply section 232.116(3). Accordingly, we affirm the termination of the mother's parental rights.

IV. Conclusion.

Upon our de novo review, we find there was clear and convincing evidence the child could not be safely returned to neither the father's nor the mother's care at the time of the hearing, and therefore agree with the juvenile court that the State proved the grounds for termination as to each parent under section 232.116(1)(h). Additionally, we agree with the juvenile court that termination of the mother's parental rights was in the child's best interests, and we decline to apply section 232.116(3) to save the parent-child relationship. We therefore affirm the decision of the juvenile court terminating the mother's and father's parental rights.

AFFIRMED ON BOTH APPEALS.