

IN THE COURT OF APPEALS OF IOWA

No. 1-407 / 11-0556

Filed June 15, 2011

**IN THE INTEREST OF N.H.-B.,
Minor Child,**

C.H., Mother,
Appellant,

L.B., Father,
Appellant.

Appeal from the Iowa District Court for Polk County, Constance Cohen,
Associate Juvenile Judge.

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

Nathaniel A. Tagtow of Pargulski, Hauser & Clarke, P.L.C., Des Moines,
for appellant mother.

Ross A. Gibson, Urbandale, for appellant father.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney
General, John P. Sarcone, County Attorney, and Andrea Vitzthum, Assistant
County Attorney, for appellee State.

Jon Jellineck, Des Moines, for minor child.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

A mother and father appeal separately from the order terminating their parental rights. Each parent argues the State failed to prove the grounds for termination, termination was not in the child's best interests, and the parent-child relationship and placement of the child with a relative should apply to avert termination. Upon our de novo review, we affirm termination of the father's parental rights. We reverse the juvenile court's order terminating the mother's parental rights and remand the case for further proceedings to make an effort to reunite the child with the mother.

I. Background Facts and Proceedings.

C.H. is the mother and L.B. is the father of N.H.-B., born in January 2007. The parents are not married, and their relationship ended after the mother learned she was pregnant. The child primarily lived with the mother, and the father had visits with the child on some weekdays and every other weekend. Both parents have a history of substance abuse.

The mother came to the attention of the Iowa Department of Human Services (Department) in November 2009 after it was reported she had stolen and abused prescription medications while caring for the child. At that time, the father was working and living in Kentucky and would visit the child when he returned to Iowa. The mother admitted she and the father had used marijuana and prescription drugs together before the child's birth. She reported she suffered chronic vaginal pain after the child was born. From January 2007 to November 2009, the mother had approximately thirty visits to medical professionals seeking treatment of her pain, and she received prescriptions for

hydrocodone, percocet, oxycodone, and vicodin, among others. The mother admitted she had snorted her pain medications to help her combat her pain faster. She further admitted she sometimes took more doses of medication than prescribed to reduce her pain.

After the Department became involved, the mother continued to minimize her use and abuse of prescription medications. The mother in November 2009 and February 2010 tested positive for methadone although she was not prescribed that medication. The mother rationalized her acquisition and use of the drug because of her extreme pain. The mother was also admitted to two different treatment facilities in the early stages of the case, but her stays in each facility were short lived.

In January 2010, the child was removed from the mother's care because the mother continued to minimize of her abuse of methadone. The child was then placed in his maternal grandparents' care, with both parents receiving visitation with the child. Services were offered to the parents, including urinalysis testing; substance abuse evaluations and treatment; family contact; family safety, risk, and permanency services; and family team meetings.

In May 2010, the child was adjudicated a child in need of assistance (CINA). The father progressed to semi-supervised visits, but his visits went back to supervised after he failed to return the child home as scheduled. On May 14, the father tested positive for hydrocodone and methadone. The father began working out of town and did not have any visits with the child thereafter into July. He also missed several drug screens.

The mother began making some progress. In May she admitted she had a problem with prescription medication, including an eight-year history of abusing prescription drugs, and she began seeing a therapist. In June 2010, the mother moved forward to semi-supervised visitation with the child. She began therapy for the child due to the child's anxiety. She began working two new jobs. From March 2010 to December 2010, the mother provided twenty-two samples for urinalysis that were negative for illegal substances and prescription drugs.

Nevertheless, concerns remained regarding the mother's progress. From February 16 to June 22, the mother missed four visits with the child. At some point, the mother's use of alcohol also became a concern. In July 2010, the mother requested a visit be changed from morning to afternoon because she planned to go out the night before and get "trashed" for her birthday.

A permanency hearing was held August 10, 2010, in which the Department recommended the parents be given an additional six months for reunification. The court agreed to give the parents an additional three months, stating:

Given the slow progress since the last hearing, [the child] should not have to wait six more months for permanency decisions. [The mother] is still struggling with her addiction and is not making decisions that demonstrate that providing [the child] a safe, stable environment is a priority. She is missing visits. Although she is making progress in treatment, and provides clean drug screens, she continues to consume alcohol and does not understand that this behavior is a problem. [The father] completed treatment and appears at minimal risk for future problems, according to his therapist. There was, however, a concerning screen that was positive for methadone, and [the father] frequently misses drug screens and contact due to his working out of town. He needs to provide financial support for [the child].

Thereafter, the father decided to stop working so he could spend more time with the child, moving back full-time to Carlisle with his aunt, uncle, and grandfather. His visits with the child again progressed to semi-supervised. However, he missed eight drug screens and nineteen visits with the child from August 2010 to January 2011 due to transportation issues or simply not showing up. On December 4, 2010, the father tested positive for hydrocodone, methadone, and hydromorphone.

The day after the permanency hearing, the mother was asked to provide a sample for urinalysis. Although the drug screen was negative for illegal substances and prescription drugs, the screen tested positive for alcohol, showing an alcohol level of .061 at 12:30 p.m. Thereafter, the mother's progress stagnated. In September, the mother reported drinking two vodka orange juices to cope with her pain. She also went to her dentist twice for tooth extractions and was prescribed hydrocodone at each of her appointments. The mother admitted she was not forthcoming with her substance abuse history or dependence on narcotics. In October, the mother reported she had taken two hydrocodone to cope with her vaginal pain, rather than as prescribed for her tooth pain, and she missed a drug screen on October 13, 2010. From October 22 to December 29, she missed ten visits with the child, one to stay home with her puppy.

In November, the maternal grandparents reported the mother had passed out while caring for the child on her own. The grandmother reported that when the mother awakened, she could smell a strong odor of alcohol coming from the mother and the mother was staggering. The grandmother also reported the mother drank two drinks on Thanksgiving Day, and the mother had drunk before

coming to the child's birthday party. There were also allegations that the mother had stolen two pills from the grandparents' home. During a family team meeting, the mother became confrontational with the service provider and threatened to punch the service provider in the face. The Department determined the mother's visits needed to be scaled back to fully supervised status due to the mother's "continued use of substances." On November 15, 2010, the State filed its petition to terminate the parents' parental rights.

In December, the mother reported she fell down her parents' stairs. She was prescribed oxycodone and muscle relaxers. Although she stated she had informed her doctor of her substance abuse history, the doctor, when called for verification by the Department's worker, denied the mother had reported her substance abuse history. The mother stated she did take the muscle relaxers but she flushed the oxycodone down the toilet.

Hearing on the petition was held on January 24, 25, and 31 and February 24, 2011. The mother testified and admitted she had a prescription drug problem in the past, but denied she was currently abusing drugs. She explained she did not stay with the treatment programs initially because they did not feel like a good fit to her, but she had been seeing a therapist regularly since May 2010 whom she liked. The mother testified she saw no problem with her drinking alcohol, but she had not drunk since Thanksgiving. The mother denied stealing medicine from her parents and admitted she had self-reported that she had used her dental prescription to self-medicate. She testified as to the strained relationship between her and the child's maternal grandparents, blaming the grandparents for a lot of the issues in the case. The mother acknowledged the

child had anxiety, but testified the child understood that when she missed visits she would make the visit up later.

The mother's therapist testified she believed the mother had gained insight into her substance abuse and the child could be returned to her care. She testified she had no concerns about the mother's ability to safely parent the child. The therapist testified she was not concerned the mother might be substituting alcohol for prescription drugs. The therapist testified the mother had made a lot of progress, but still had a ways to go. The therapist acknowledged that most of her information was given by the mother's self-reports.

The father testified that his friend accidentally gave him methadone in May 2010 and explained that was why he tested positive for it that month. He testified there was no reason his test was positive in December, denying he had used the substances. He testified he lived with his relatives, there was room for the child, and the child could be returned to his care.

The Department's caseworker testified and disagreed with the mother's therapist's opinions. The caseworker testified the mother continued to lack insight into her alcohol use. She acknowledged she had no concerns about the mother's ability to parent the child when sober and free from substances. However, the worker testified the parents had made minimal progress in the case. The caseworker testified the child was in need of permanency and recommended termination of the parents' parental rights.

The maternal grandmother testified that in her opinion, termination of the parents' parental rights was in the child's best interests. She testified she did not believe the mother suffered from chronic pain. She believed the mother had

stolen pills from her home, and she had changed from use of pills to alcohol. She acknowledged the mother loved the child, and the child loved the mother, but both parents were more focused on themselves than the child. The grandmother testified she really had not seen changes in the parents' behavior since they learned of the pregnancy.

On March 24, 2011, the juvenile court entered its order terminating the parents' parental rights pursuant to Iowa Code sections 232.116(1)(h) and (l) (2009). The court found termination of the parent's parental rights was in the child's best interests and no compelling reasons to maintain the parent/child relationship existed. The court further found no exceptions applied to militate against termination of the parents parental rights.

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). The State must prove grounds for termination by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). In considering whether to terminate, our primary considerations are the children's safety; the physical, mental, and emotional condition and needs of the children; and the placement that best provides for the long-term nurturing and growth of the children. Iowa Code § 232.116(2); *P.L.*, 778 N.W.2d at 37.

III. Discussion.

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 mother contends there is insufficient evidence to show the child cannot be returned to her care at the present time. Upon our de novo review, we find the State has met its burden.

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.*

Upon our review, we agree with the juvenile court's conclusion that the father has not demonstrated an ability to meet the child's needs for permanency, safety, or well-being as a parent on a consistent basis. Although he progressed to semi-supervised visits, he tested positive for prescription medications in May and December 2010 with no acceptance of his actions. He continued to miss visits and drug screens throughout the case. Under the circumstances presented, we find the State has proved by clear and convincing evidence the child could not be safely returned to the father's care at the time of the hearing.

2. *The Mother.*

Here, as late as December, the mother obtained prescription drugs without disclosing her history of substance abuse to her doctor, and despite her past abuse of the medication, the mother sees no problem with her behavior. Although the mother's drug screens have been clean of prescription and illegal substances, it is clear the mother continues to make poor choices concerning her abuse of prescription medication. Her therapist acknowledged although she had made a lot of progress, the mother still had a ways to go. Additionally, after being given additional time for reunification, the mother missed numerous visits with the child, despite the child's known anxiety. She also passed out while caring for him. Under the circumstances presented, 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. Best Interests and Iowa Code section 232.116(3).

If a statutory ground for termination is determined to exist, the court may terminate a parent's parental rights. *P.L.*, 788 N.W.2d at 37. In considering whether to terminate, the court must then apply the best-interest framework established in section 232.116(2). *Id.* The legislature highlighted as primary considerations: 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 children. *Id.*

Furthermore, 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 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).

1. The Father.

Taking the above mentioned factors into account, we agree with the juvenile court that termination of the father's parental rights is in the child's best interests. While we do not doubt his love for the child and the child's for him,

[i]t is well-settled law that we cannot deprive a child of permanency after the State has proved a ground for termination under section 232.116(1) by hoping someday a parent will learn to be a parent and be able to provide a stable home for the child.

Id. at 41. Children are not equipped with pause buttons. "The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987). "At some point, the rights and needs of the child rise above the rights and needs of the parents." *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997), *overruled on other grounds by P.L.*, 778 N.W.2d at 39-40.

We recognize and commend the progress the father has made in attempting to address his long-standing issues with substance abuse. However, the record reveals that the child cannot be returned to the father's care at this time, and the child should not be forced to wait for permanency.

We have repeatedly followed the principle that the statutory time line must be followed and children should not be forced to wait for their parent to grow up. We have also indicated that a good prediction of the future conduct of a parent is to look at the past conduct. Thus, in considering the impact of [an] 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. Where the parent has been unable to rise above the addiction and experience sustained sobriety in a noncustodial setting, and establish the essential support system to maintain sobriety, there is little hope of success in parenting.

In re N.F., 579 N.W.2d 338, 341 (Iowa Ct. App. 1998) (citations omitted).

The father has not made changes to show he is going to be sober and be a safe parent to the child, again testing positive for substances in December 2010. We cannot maintain a relationship where there exists only a possibility that the father will become a responsible parent sometime in the unknown future. Given the father's overall lack of progress and minimal involvement during the case, we agree with the juvenile court that termination of the father's parental rights was in the child's best interests. Under the facts of this case, we do not find the father and child's bond or the child's placement with the maternal grandparents are a sufficient reasons to refuse to terminate the father's parental rights. Accordingly, we affirm the termination of the father's parental rights.

2. The Mother.

Nevertheless, we disagree with the juvenile court that termination of the mother's parental rights is in the child's best interests. It is true the mother has made some bad decisions during the pendency of the case. Her failure to advise her doctor of her past history of prescription drug use is a major concern; yet, she has not tested positive for illegal substances or prescriptions drugs since February 2010, not considering her missed drug screen in October 2010. However, since that missed drug screen, she has had clean drug screens. Although there is evidence that she has used alcohol during the case, except for one instance that the mother disputes, there is no evidence she has abused alcohol such that she cannot or will not be able to properly parent the child in the foreseeable future. The mother's therapist testified she did not believe alcohol was a problem for the mother and she believed the mother could safely parent the child. The mother is employed and hardworking.

Here, there is significant testimony concerning the mother's and the child's strong bond and relationship. Additionally, the child is in the maternal grandparents' care, and the grandmother has expressed she will continue the relationship between the mother and child provided the mother continues her sobriety. The child looks forward to visits with the mother.

Considering the safety and "the physical, mental, and emotional condition and needs" of the child, we conclude the mother is the "best placement for furthering the long-term nurturing and growth" of the child. See *P.L.*, 778 N.W.2d at 37. We agree that sections 232.116(3)(a) and (c) are applicable in this case, as the child is in the custody of his grandparents and there is clear and convincing evidence termination of the mother's parental rights would be detrimental to the child due to the closeness of the parent-child relationship.

IV. Conclusion.

Upon our review, we affirm the juvenile court's termination of the father's parental rights. However, we find the mother's parental rights to the child should not be terminated considering the child's best interests, the closeness of the relationship between the mother and child, and the placement of the child with a relative. Accordingly, 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 the child with the mother.

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

Danilson, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I agree with the majority's decision not to terminate the mother's parental rights. That said, I do not find it in the child's interest to terminate the father's parental rights, which appear, to terminate the father's support obligation. The mother and or the State should not be required to assume the child's total support. I recognize the father is not now employed, but he is looking for employment. The child and the father are bonded. Therefore I would reverse on both the father's and the mother's appeals.