

IN THE COURT OF APPEALS OF IOWA

No. 1-408 / 11-0559
Filed June 15, 2011

**IN THE INTEREST OF S.F.O. and A.L.O.,
Minor Children,**

**H.M.N., Mother,
Appellant.**

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

A mother appeals from the order terminating her parental rights.

AFFIRMED.

Cathleen Siebrecht of Siebrecht Law Firm, Des Moines, for appellant
mother.

Nathaniel Tagtow, Des Moines, for father.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant
Attorney General, John P. Sarcone, County Attorney, and Andrea Vitzthum,
Assistant County Attorney, for appellee State.

John Jellineck, Des Moines, for minor children.

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

DANILSON, J.

A mother appeals the termination of her parental rights to her children, three-year-old S.F.O. and one-year-old A.L.O.¹ She contends the State failed to prove the grounds for termination by clear and convincing evidence and that her parental rights should not be terminated because the children were placed in the custody of the maternal grandmother. Considering the mother's longstanding history of substance abuse and failure to address her addiction, we conclude there is clear and convincing evidence the child cannot be returned to her care at this time. We further agree termination is in the child's best interests, despite their placement with a relative. We affirm termination of the mother's parental rights.

I. Background Facts and Proceedings.

This family came to the attention of the Iowa Department of Human Services in November 2009, when the mother tested positive for methamphetamine and admitted to actively using marijuana. On December 7, 2009, the mother consented to the children's removal and placement with the maternal grandmother. At the time, S.F.O. was two-years-old, and A.L.O. was four-months-old. The children were adjudicated in need of assistance (CINA) following an uncontested hearing on January 12, 2010.

Initially, the mother appeared to be making good progress. She missed some drug screens, but those she did provide were clean. She attended some parenting classes. Following a disposition hearing on February 12, 2010, the

¹ The State also sought to terminate the parental rights of the father of S.F.O. and A.L.O., but the father died during the pendency of the termination proceedings.

juvenile court predicted the mother would soon be reunified with her children in the home of the maternal grandmother. The mother had not yet completed a substance abuse evaluation or mental health evaluation as ordered, but agreed to in the near future.

Unfortunately, the mother's efforts deteriorated. As of a May 11, 2010 review hearing, the mother had relapsed to using methamphetamine. She did not want to enter inpatient treatment, however, because she wanted to be available to help the maternal grandmother with the children. She agreed she needed a mental health evaluation, which she had still not received. The mother was also on the verge of losing Early Access services due to her lack of contact with the program.

The mother relapsed again on May 23, 2010. She tested positive for methamphetamine and avoided many drug screens. However, the court acknowledged the children "were very bonded to their parents and there was a secure concurrent plan with their grandmother." Following a June 7, 2010 permanency hearing, the court "reluctantly" agreed to give the mother additional time to "demonstrate compliance with treatment and recovery recommendations."

The mother again showed substantial progress during June, July, and August 2010, including completing inpatient substance abuse treatment, but then relapsed by using methamphetamine. Following a November 16, 2010 review hearing, the court transferred sole custody of the children to the father, who had shown significant progress by that time.

Placement of the children with the father was short-lived. S.F.O. tested positive for opiates and methamphetamine at a very high level while in his care.

On January 3, 2011, an emergency removal order was granted by the court transferring custody of the children back to the maternal grandmother. The children have remained in the care of the maternal grandmother since that time. The mother was allowed contact with the children only under DHS supervision.

On January 11, 2011, the State filed its petition to terminate parental rights of the mother and father. The father died in February 2011. The mother was pregnant with another child by the father and was due in May 2011. The mother admitted to ongoing use of marijuana, despite being aware of her pregnancy. The mother was also not forthcoming about her involvement in treatment and lied to providers and the maternal grandmother about her attendance. A week before the termination hearing, the mother entered the House of Mercy. She admitted at the termination hearing on March 14, 2011, that she last used “probably a couple of days” ago.

Following a hearing on March 14, 2011, the juvenile court entered its order terminating the mother’s parental rights pursuant to Iowa Code sections 232.116(1)(h) and (l) (2011).² The mother now appeals.

II. Standard of Review.

We review termination proceedings de novo. *In re Z.H.*, 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). Although we are not bound by them, we give weight to the district court’s findings of fact, especially when considering the credibility of witnesses. Iowa R. App. P. 6.904(3)(g); *In re M.M.S.*, 502 N.W.2d 4, 5 (Iowa 1993). The parent-child relationship is constitutionally protected.

² The court also terminated the parental rights of any unknown putative father pursuant to section 232.116(1)(h).

Quilloin v. Walcott, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511, 519 (1978). The State has the burden of proving the grounds for termination by clear and convincing evidence. *In re P.L.*, 778 N.W.2d 33, 34, 39 (Iowa 2010); *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). If a statutory ground for termination exists, termination is in the child's best interests, and no factor weighing against termination exists, we will affirm. *P.L.*, 778 N.W.2d at 39.

III. Clear and Convincing Evidence.

The mother contends clear and convincing evidence does not support termination under Iowa Code sections 232.116(1)(h) or (l), alleging she “was residing at a residential treatment facility and engaged in all appropriate services there where she could be reunited with her children if not immediately, then within a reasonable time.”

We may affirm the termination if facts support the termination of the mother's parental rights under either of the sections cited by the juvenile court. See *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.”). We choose to focus our analysis on the merits of challenged ground section 232.116(1)(h). Termination is appropriate under that section where there is clear and convincing evidence of the following:

- (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.

Iowa Code § 232.116(1)(h). There is no dispute the first three elements have been proved. Our inquiry focuses on whether there is clear and convincing evidence the children cannot be safely returned to the mother's custody. *Id.*

We conclude the State proved the children could not be returned to the mother's care at the time of termination, or anytime in the reasonably near future. The mother has a long history of drug use and addiction. She has used methamphetamine and marijuana for approximately eight years, with her longest period of sobriety being approximately one month. She used illegal drugs and alcohol during her pregnancies.

Because of the mother's drug use, the children were removed from her care in December 2009. During these proceedings, the mother relapsed four times. She admitted that she last used several days before the termination hearing on March 14, 2011.

To her credit, the mother did complete inpatient substance abuse treatment, but unfortunately she subsequently relapsed. Aside from the inpatient treatment, the mother was not active in her participation in services to address her substance abuse issues, and she was dishonest with DHS about the services she did access. The mother's recent admission to House of Mercy occurred just one week before the termination hearing, after she was offered services for many months prior.

The juvenile court aptly noted the mother's recent attempt to address her substance abuse was "too little, too late," and "[o]verall, the mother is in no better

place than she was when the case began in terms of resolving addiction and mental health problems.” As the court observed:

[The mother] is a severe and chronic substance abuser who presents a danger to herself and others as evidenced by prior acts. Given her prognosis, the children will not be able to be returned to her custody within a reasonable period of time, especially considering their ages and need for a permanent home.

The mother is now residing at the House of Mercy. Because she did not enter this program until one week before trial, her decision appears to be more motivated by the termination of parental rights litigation than anything else. It is, simply put, too little, too late. When considering the context of the past 14 months plus of opportunity to resolve her addiction, it is far too early to say that this time the treatment will work. It is far too early to say that this time the mother will remain in treatment, given her history of leaving other programs against medical advice. It is far too early to conclude that this time the mother is honestly committed to her recovery. The Court must rely on a person’s past behaviors, not current assertions, to determine the likelihood of success. Unfortunately, the mother’s history, despite being given extensions of time within which to resolve her problems, suggests no other conclusion than she lacks the commitment to sobriety and keeping herself and others safe.

We agree with the juvenile court’s findings that the mother has not addressed her addiction and has not demonstrated an ability to maintain sobriety for any sustained period of time. It is clear the children cannot be returned to the mother’s care at the present time. See *In re M.Z.*, 481 N.W.2d 532, 536 (Iowa Ct. App. 1991) (“Termination should occur if the statutory period has elapsed and the parent is still unable to care for the child.”).

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 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. 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) (internal citation omitted).

Under these facts, we conclude the mother has not put herself in a position to safely and effectively care for the children. The State has presented clear and convincing evidence to support termination of the mother's parental rights pursuant to section 232.116(1)(h).

IV. Relative Custody.

The mother contends her parental rights should not be terminated because the maternal grandmother has custody of the children. Iowa Code section 232.116(3) lists factors that can militate against termination, including a situation where “[a] relative has legal custody of the child[ren].” Iowa Code § 232.116(3)(a). The factors weighing against termination in section 232.116(3) are permissive, not mandatory. See *P.L.*, 778 N.W.2d at 38; *J.L.W.*, 570 N.W.2d at 781. The court has discretion, based on the unique circumstances of each case and the best interests of the child, whether to apply the factors in 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 acknowledged the children's placement with the maternal grandmother. The court determined, however, that establishing a guardianship was not in the best interests of the children under the circumstances of this case. As the court observed:

Although the permanency plan is for the children to remain in the custody of a relative, termination of parental rights is in the children's best interest and would be less detrimental than the harm

that would be caused to them by continuing the parent/child relationship.

.....

Given the amount of time these children have been out of the mother's care, their ages and desperate need for permanency and predictability in the wake of just having lost their father, it is in their best interest to stabilize them and place them in a family that can meet their needs now and in the future. Their grandmother has made this commitment.

We agree. The maternal grandmother has shown her commitment to the children and wishes to adopt them. Guardianship is not a legally preferable alternative to termination of parental rights and adoption. *In re L.M.F.*, 490 N.W.2d 66, 67-68 (Iowa Ct. App. 1992). We cannot maintain a relationship where there exists only a possibility the mother will become a responsible parent sometime in the unknown future. *See id.* at 68 ("A child should not be forced to endlessly suffer parentless limbo."). We are also concerned with the mother's continued use of marijuana during her current pregnancy. Without termination, the children, as well as the guardian, may remain subject to the mother's irresponsible decisions and dangerous lifestyle. Under these facts, termination is in the children's best interests, see Iowa Code section 232.116(2), and no factor weighing against termination in section 232.116(3) requires a different conclusion. We therefore affirm.

AFFIRMED.