

IN THE COURT OF APPEALS OF IOWA

No. 1-473 / 10-1740
Filed July 13, 2011

**IN THE INTEREST OF L.H.,
Minor Child,**

B.H., Father,
Appellant,

L.B., Mother,
Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor,
Judge.

A mother appeals from a juvenile court order terminating her parental
rights to a child. **AFFIRMED.**

Cheryl Fullenkamp, Davenport, for appellant mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, and Michael J. Walton, County Attorney, for appellee.

Patricia Zamora of Zamora, Taylor & Frederick, Davenport, for father.

Jack E. Dusthimer, Davenport, attorney and guardian ad litem for minor
child.

Considered by Vogel, P.J., Vaitheswaran, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

L.B. is the mother of L.H., who was nineteen months of age at the time of a termination of parental rights hearing. L.B. appeals from a juvenile court order terminating her parental rights to L.H.¹ We affirm.

L.B. has a lengthy history of using illegal drugs. She has eight children older than L.H., none of whom are in her custody, largely as a result of her drug use. L.B. was unsuccessfully discharged from substance abuse treatment in February 2009. She used crack cocaine while pregnant with L.H., who was born in March 2009.

L.H. was initially removed from L.B. in July 2009, when he was four months of age, because of concerns that L.B. was using crack cocaine. L.H. was returned to her in September 2009 when she entered an inpatient substance abuse treatment program, which she successfully completed in December 2009. L.H. was again removed from L.B. in February 2010 when she relapsed and used crack cocaine. L.H.'s hair stat test at that time was positive for a high level of cocaine metabolites. In April 2010, following a dispositional review/permanency hearing, the court continued for two months, subject to stated conditions, the permanency hearing and a hearing on a request by L.H.'s guardian ad litem for waiver of reasonable efforts. The conditions included an order that L.B. "enroll and attend an in-patient or residential type substance abuse program." L.B. and B.H. appealed. This court affirmed. See *In re L.H.*, No. 10-0710 (Iowa Ct. App. July 14, 2010).

¹ The order also terminated the parental rights of L.H.'s father, B.H. B.H. filed a notice of appeal, but his appeal was dismissed by order of our supreme court.

In April 2010 L.B. was discussing with the Iowa Department of Human Services (DHS) the possibility of re-entering an outpatient substance abuse treatment program, but had taken no steps to do so.

Between the April 2010 hearing and the October 2010 termination hearing, L.B. did not maintain consistent contact with the DHS, refused to meet with DHS staff, and failed to show up for scheduled appointments. She did attend a scheduled substance abuse evaluation in late May 2010, and a drug test taken that day was positive for cocaine use. L.B. appeared for a substance abuse intake in early June 2010, but thereafter appeared for only two group sessions and has not further participated in any outpatient substance abuse treatment program. She has refused to participate in the court-ordered inpatient program.

L.B. has a history of being the victim of domestic violence. In June 2010 she was the victim of physical abuse by B.H., but thereafter continued to maintain a relationship with him. L.B. has failed or refused to participate in recommended domestic violence counseling.

L.B. does not have stable housing. She has failed to appear for random drug testing scheduled by the DHS. L.B. has failed to consistently visit L.H. From the April 2010 hearing to about the filing of the termination petition three months later she cancelled or failed to appear on all but three occasions out of about twenty-five scheduled visits.

Following the termination hearing the juvenile court ordered L.B.'s parental rights terminated pursuant to Iowa Code sections 232.116(1)(c), (d), (g), (h), and (k) (2009). L.B. appeals.

Our review of a termination of parental rights proceeding is de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). We are not bound by the juvenile court's findings of fact, but we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 6.904(3)(g); *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). Grounds for termination of parental rights must be proved by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). "Clear and convincing evidence" means there are no serious or substantial doubts as to the correctness of the conclusions drawn from the evidence. *Raim v. Stancel*, 339 N.W.2d 621, 624 (Iowa Ct. App. 1983).

L.B. first contends the evidence was insufficient to terminate her parental rights on any one or more of the five statutory grounds relied on by the juvenile court. The State notes that L.B. has not addressed any of these specific code provisions, and asserts she has therefore waived her contention. Although the State appears to be correct, we choose to address one of the grounds relied on by the court.

Iowa Code section 232.116(1)(h) provides that the court may terminate a parent's rights to a child upon proof of the following four elements: (1) the child is three years of age or younger; (2) has been adjudicated a child in need of assistance (CINA); (3) has been removed from the physical custody of parents for six of the last twelve months, or for the last six months with any trial period at

home less than thirty days; and (4) cannot be returned to a parent at the present time. L.H. was nineteen months of age at the time of the termination hearing. He had been adjudicated a CINA in mid-September 2009, and remained so adjudicated. L.H. had been removed from his parents for eight months continuously, with no trial period at home. The first three elements are proved by clear and convincing evidence.

The fourth element is proved when the evidence shows the child cannot be returned to the parent without remaining a CINA. *In re R.R.K.*, 554 N.W.2d 274, 277 (Iowa Ct. App. 1995). The threat of probable harm will justify termination of parental rights, and the perceived harm need not be the one that supported removal from the home. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992).

L.B. does not have stable housing; continues to maintain a physically abusive relationship; and has not maintained significant contact with nineteen-month old L.H., who has been out of her care the great majority of his life, including the last eight months before the termination hearing. Most importantly, however, L.B. has a severe, chronic substance abuse problem. Although she has in the past completed a course of treatment, the problem recurs and is persistent.

As noted by the juvenile court, L.B. “has not been able to remain clean and sober for any sustained period of time over the course of [DHS] involvement,” and “[h]er only successful periods of sobriety have occurred while under strict supervision of in-patient and supervised programs.”

L.B.'s history, not only with L.H., but also with her eight older children, shows that her prognosis is poor, she will not be in a position to parent in the foreseeable future, and there is little hope she will be in a position to successfully parent L.H. A parent who has a chronic, severe substance abuse problem clearly presents a danger to their child. *State v. Petithory*, 702 N.W.2d 854, 858-59 (Iowa 2005).

We conclude clear and convincing evidence shows that L.H. cannot be returned to L.B. without remaining a CINA.

Having found grounds for termination of L.B.'s parental rights pursuant to section 232.116(1)(h), we need not address the other grounds relied on by the juvenile court. See *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999) (holding that one statutory ground will suffice to affirm termination on appeal).

Less than a month before the termination hearing, based upon a favorable home study and the consent of the parties, the juvenile court authorized placement of L.H.'s legal custody with L.B.'s cousin in California, subject to DHS supervision. L.B. contends that because L.H. was in the legal custody of a relative the court should have ordered a guardianship and not terminated her parental rights.

Our primary considerations in determining whether to terminate a parent's parental rights 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." Iowa Code § 232.116(2); *P.L.*, 778 N.W.2d at 37. However, the juvenile court need not terminate the parent-child relationship if

a relative has legal custody of a child. Iowa Code § 232.116(3)(a). Nevertheless, the provisions of section 232.116(3) are permissive, not mandatory. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). The court uses its best judgment in applying the factors contained in the statute. *P.L.*, 778 N.W.2d at 40. “A child’s safety and the need for a permanent home are now the primary concerns when determining a child’s best interests. *J.E.*, 723 N.W.2d at 801 (Cady, J., concurring specially). When the statutory grounds for termination of parental rights exist, the needs of a child are generally promoted by termination. *In re L.M.F.*, 490 N.W.2d 66, 68 (Iowa 1992).

Placement with a relative under a permanency order is not legally preferable to termination. *Id.* at 67-68. L.H. needs permanency. A guardianship, as proposed by L.B., would not assure permanency. It would continue in existence a parent-child relationship where there is little if any bond, and only a possibility that L.B. would at some indefinite time in the future be able to parent L.H. L.H. is at an adoptable age, his father’s parental rights have been terminated, and he is in the legal custody of a relative who is willing and able to adopt him. Termination of L.B.’s parental rights enables L.H. to be permanently placed in an adoptive home. We conclude that under the circumstances shown the exception set forth in section 232.116(3)(a) should not and does not preclude the otherwise appropriate termination of L.B.’s parental rights.

Upon our de novo review of the issues presented, we affirm the judgment of the juvenile court.

AFFIRMED.