

IN THE COURT OF APPEALS OF IOWA

No. 1-482 / 11-0576
Filed July 13, 2011

**IN THE INTEREST OF A.B.,
Minor Child,**

**M.S.A., Mother,
Appellant.**

Appeal from the Iowa District Court for Clinton County, Phillip J. Tabor,
District Associate Judge.

A mother appeals from the order terminating her parental rights.

AFFIRMED.

J. David Zimmerman, Clinton, for appellant mother.

Neill A. Kroeger, LeClaire, for father.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
County Attorney, Mike Wolf, County Attorney, and Cheryl J. Newport, Assistant
County Attorney, for appellee State.

Lucy Valainis, Davenport, for minor child.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes
no part.

DOYLE, J.

A mother appeals from the order terminating her parental rights to her child, who suffered non-accidental abusive head trauma while in her care. She claims the juvenile court erred in (1) finding the child could not be returned home at the time of the termination hearing and (2) failing to consider placement with the maternal grandparents in lieu of termination. We review these claims de novo. See *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010).

I. Background Facts and Proceedings.

The mother gave birth to a healthy baby boy in November 2009. All was well at the baby's two-week well-child exam in the beginning of December. But towards the end of that month, the baby began vomiting frequently. The mother and father took him to the doctor several times throughout January 2010. He was diagnosed with reflux and possible colic. At an appointment on January 20, the child's doctor gave the parents two different formulas to try and asked them to return in one week.

The parents did not take the child back to the doctor as scheduled. On February 6, the mother's parents visited the family at their home. They noticed the child's head was alarmingly large. The grandfather told the parents, "You guys need to get him to the doctor's office. Something is not right." Yet nothing was done about the baby's condition until February 8.

On that day, the mother's friend came to pick her up for work around 1:00 p.m. The friend noticed the child's head looked "enormous" and thought it felt heavy when she held him. The mother told her the doctor had said the child would "grow into his head." Medical records show, however, that the child was

born with a normal head circumference. The friend observed that when the baby was lying in the bassinet, his eyes were not tracking and were fixed to the left. She also thought he had raspy breathing.

The father picked the mother up at work around 7:00 p.m. The mother noticed the child's left eye twitched a couple of times, but she stated she "did not think anything of it." The parents returned home and fed the child. They laid him on his belly on the couch in the living room and ate dinner in the kitchen. Fifteen minutes later, they finished eating and checked on the baby. They noticed his entire left side was shaking. His eyes were staring towards the left. The mother called her father around 8:00 p.m. He told her to take the child to a nearby hospital right away, but the parents did not arrive there until 9:20 p.m.

Once there, the child was found to have suffered bilateral retinal hemorrhages, large chronic subdural hematomas, and brain atrophy due to increased intracranial pressure from the subdural hematomas. The child's physicians suspected these injuries had occurred two to four weeks earlier and were intentionally inflicted.

The parents were interviewed by the police while the child was in the hospital. Both the mother and father denied harming the child or witnessing the other abuse the child. But they stated they were the child's only caretakers during the time when his injuries likely occurred. The incident was reported to the Iowa Department of Human Services, and a founded report of physical abuse against both parents resulted. A later addendum to the report additionally found the parents failed to provide adequate health care and proper supervision for the child due to their delay in seeking medical treatment.

The child was removed from his parents' care and placed in foster care where he has since remained. He was adjudicated as a child in need of assistance (CINA) in July 2010 pursuant to Iowa Code sections 232.2(6)(b), (c)(1), (c)(2), and (e) (2009). The parents were arrested on child endangerment charges soon thereafter. Their relationship, which was abusive at times, ended around the same time.

Both the father and mother tested positive for marijuana at the beginning of the CINA proceedings. The mother's cell phone records showed they were actively seeking drugs during the time when their child was sick, including the day he began experiencing seizures. The mother completed an outpatient substance abuse treatment program and participated in a psychological evaluation. She acknowledged having a "quick, hot temper," along with irritability and aggressiveness. The mother participated in therapy sessions focusing in part on anger management. She also regularly attended supervised visitations with the child and participated in his doctor and rehabilitation appointments. The maternal grandparents, who were interested in having the child placed with them, attended those appointments as well.

The service providers observed that the mother interacted appropriately with the child but was at times unaware of his needs. For example, she often continued to play with the child when it was apparent he needed to nap. She also questioned some of the treatments recommended by the child's medical providers, including his continuing need for rehabilitative therapy and use of an eye patch and arm brace. Those services were instituted because the child exhibited developmental delays and vision problems from the head trauma.

A major stumbling block in reunification with the parents was their refusal to acknowledge how the child was injured. At the permanency hearing in November 2010, the parents invoked their Fifth Amendment right to remain silent as to anything that occurred before the Department's involvement due to the pending criminal charges. The mother nevertheless implied the child was born with or developed a brain disorder naturally despite abundant medical evidence to the contrary. When asked, "What is your understanding of the child's medical diagnosis?" the mother responded,

As far as I know, Iowa City has diagnosed him with hydrocephalus.

Q. What is hydrocephalus? A. Hydrocephalus is water around the brain. And as far as I've looked up information about hydrocephalus personally, any person at any time in their life can develop hydrocephalus.

Following that hearing, the State filed a petition to terminate parental rights. A hearing on the petition was held in February 2011. The mother testified for the first time there that the father injured the child. Following the hearing, the juvenile court entered an order terminating the mother's rights to the child under Iowa Code sections 232.116(1)(d), (h), and (i) (2011). The mother appeals.

II. Discussion.

A. Statutory Grounds.

The mother makes a general argument that the juvenile court erred in finding there was clear and convincing evidence the child could not be returned to her care at the time of the termination hearing. Her argument implicates the fourth element of section 232.116(1)(h). See *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995) (stating we need only find termination proper under one

ground to affirm). This element is proved when the evidence shows the child cannot be returned to the parent without remaining a CINA. *Id.* at 277.

We recognize the mother substantially complied with the case plan throughout most of these proceedings. She attended every supervised visitation but one. She went to the child's rehabilitative and doctors' appointments and participated in them. She completed substance abuse treatment and attended weekly therapy sessions. She was employed at the time of the termination hearing and had stable housing. The Department nevertheless recommended termination of the mother's parental rights due to the following concerns.

First, and foremost, was the mother's initial refusal to acknowledge the child was physically abused. "It is essential in meeting a child's needs that parents recognize and acknowledge abuse. Meaningful change cannot occur without this recognition." *In re L.B.*, 530 N.W.2d 465, 468 (Iowa Ct. App. 1995) (citation omitted); *see also In re C.H.*, 652 N.W.2d 144, 150 (Iowa 2002) ("A parent's failure to address his or her role in the abuse may hurt the parents' chances of regaining custody and care of their children."). The mother and father were the child's only caretakers during the timeframe when he was injured. Yet neither knew how his non-accidental head trauma occurred. In fact, the mother at first maintained the child's brain damage something he was born with, informing doctors and detectives that his head had always been big, though medical records did not support that assertion.

The mother changed her story at the termination hearing, testifying for the first time that the father had injured the child. But she did not elaborate on that statement due to her pending child endangerment charge. More importantly, the

mother did not explain her delay in seeking medical treatment for the child. Photographs of the child show his head was visibly enlarged by January 24, 2010. The maternal grandparents were alarmed by the size of the child's head when they saw him on February 6 and urged the parents to take him to the doctor. Two days later, a friend of the mother was likewise shocked by the baby's appearance. She said his head was very large and felt heavy. She also observed his eyes were fixed to the left, and he was exhibiting raspy breathing. The mother dismissed these concerns and went to work with her friend. Even after the mother witnessed the baby having a seizure that night, it took her close to two hours to bring him to the nearby hospital.

A physician involved with the case opined that all of these delays caused greater injury to the child:

[I]t is clear that this child seized at home at least for an hour if not longer in a persistent manner, which means he was in status epilepticus but he wasn't taken to the hospital for urgent medical care. As I stated above, status epilepticus is very harmful on brain tissue because when the child is in constant seizure he is not going to be able to deliver adequate oxygen to the brain tissue. Since the brain tissue and nerve cells are highly dependent on oxygen, prolonged seizures may cause nerve cell death, which is irreversible. Thus, this status epilepticus was an indication of significant medical neglect and the child, based on scientific knowledge of status epilepticus dynamics and outcome, experienced serious injury and further injury to his brain cells.

Another concern was the discovery of a bag of marijuana in the mother's apartment about one month before the termination hearing, shortly after the mother was successfully discharged from substance abuse treatment. See *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992) (stating the threat of probable harm will justify termination of parental rights, and the perceived harm need not be the one

that supported the children's removal from the home). The service provider was in the mother's home when she noticed the mother's cat playing with a bag of marijuana. The mother denied knowing where the marijuana came from, though she lived by herself. At the termination hearing, the mother stated:

I have not a clue. It was found on the side of the couch that [the service provider] was sitting on. For all I know, for all the reports that have come out, all of the lies in the reports, the lies that I have heard today from everybody's testimonies, I wouldn't be surprised if it was planted in my apartment, to be quite frank and honest.

She refused to provide a urine sample for a drug screen after the marijuana was discovered because she did not trust the Department.

A final concern was the mother's minimization of the child's health problems. Throughout the case, she questioned the child's need for rehabilitative therapy. She was resistant to doctors' recommendations that the child wear an eye patch and arm brace. She did not stop smoking when informed the child had breathing issues and could not be exposed to first, second, or third-hand smoke.

Given all of the foregoing, we find there is clear and convincing evidence the child could not be returned to the mother's home without remaining CINA. *R.R.K.*, 544 N.W.2d at 277. We turn next to the mother's claim that the juvenile court erred in failing to consider placement with the maternal grandparents in lieu of termination.

B. Relative Placement.

The mother seeks to avoid termination of her parental rights by arguing the child should have been placed with her parents instead of with a foster family. In support of this argument, she cites Iowa Code section 232.116(3)(a), which

states termination is not necessary if the court finds a relative has legal custody of the child. This section has no applicability here, as the maternal grandparents did not have legal custody of the child. In any event, section 232.116(3)(a) is “permissive, not mandatory.” See *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. “It is within the sound discretion of the juvenile court based upon the unique circumstances before it and the best interests of the child, whether to apply this section.” *Id.*

The child, who was fifteen months old at the time of the termination hearing, has been placed with the same foster family since his removal from the parents when he was only three months old. By all accounts, including the mother’s, the child is bonded with his foster parents and their three other children. He is doing very well, and the foster parents have expressed interest in adopting him. Termination will provide the child with the safety, security, and permanency he deserves. See *P.L.*, 778 N.W.2d at 41.

We accordingly affirm the juvenile court order terminating the parental rights of the mother.

AFFIRMED.