IN THE COURT OF APPEALS OF IOWA

No. 1-952 / 11-1651
Filed February 1, 2012

IN THE INTEREST OF J.D.B.,
Minor Child,

M.B., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Rachel E. Seymour, District Associate Judge.

A mother appeals the termination of parental rights to her child. **AFFIRMED.**

Laura J. Lockwood of Pargulski, Hauser & Clarke, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, John P. Sarcone, County Attorney, and Cory McClure, Assistant County Attorney, for appellee.

Jamie Deremiah, Urbandale, for father.

Nicole Nolan of Youth Law Center, Des Moines, attorney and guardian ad litem for minor child.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

TABOR, J.

A mother appeals the termination of parental rights to her now three-year-old son. She argues a Wisconsin adjudication that her son was a Child in Need of Protection or Services (CHIPS) under that state's abuse laws did not satisfy the elements of Iowa Code sections 232.116(1)(d) or (h) (2011). She also contends that because Wisconsin did not provide her an attorney for the child protection hearings, she was not afforded reasonable services to promote reunification with her son. Finally, she asserts termination of her parental rights was not in the child's best interests.

We find that the State offered clear and convincing evidence to satisfy section 232.116(1)(d) and that termination was in the child's best interests.

I. Background Facts and Procedures

This appeal marks the culmination of three states' involvement in the care and protection of J.D.B. When he was just four months old, the child came to the attention of the Iowa Department of Human Service (IDHS). On February 25, 2009, the IDHS received a report that when J.D.B.'s parents, Josh and Melissa, were living in a Des Moines homeless shelter, the couple began to fight while Josh was holding the baby. Josh said he tripped and fell, and J.D.B. hit his head on the bed. The family refused agency services offered while in Iowa. Josh moved to Arkansas to find work in March 2009, and upon his employment with Tyson Foods, Inc., Melissa and J.D.B. joined him in May of the same year.

While living in Arkansas, the parents' care of J.D.B. generated multiple referrals to the Arkansas Department of Human Services (ADHS). Although

ADHS deemed some reports to be unsubstantiated, two investigations yielded "true findings" of child abuse. One report featured Josh's statements that upon the family's arrival in Arkansas, they were homeless and living out of a car. Josh said because they did not have heat, he gave J.D.B. Benadryl to make him sleep the entire evening. A follow-up investigation was unable to substantiate the claims in the referral, but further discovery revealed J.D.B. was suffering from a severe yeast infection on his penis. Neither parent could afford medical care for their son, despite their insurance through Tyson. Based on its investigation, the ADHS reached "true findings" of medical neglect. Josh and Melissa admit that because they both worked nights at Tyson, J.D.B. would lay unsupervised in his crib all day while they slept. This situation constituted the "true findings" of inadequate supervision. The Arkansas caseworker noted in a report, "[J.D.B.] is 10 months old and cannot crawl, cannot sit up, and doesn't have much control keeping his head upright when being held. [J.D.B.] appears to have a flat affect."

While in Arkansas, Melissa tried to commit suicide, resulting in her hospitalization. During Melissa's hospital stay, J.D.B.'s babysitter quit. Josh told a coworker that he left J.D.B. home unsupervised in the family's bathtub. Additional reports include Josh mentioning he would not mind if he died because he owned a life insurance policy, and the same would be true of J.D.B. and Melissa because he would then receive their life insurance money. He also offered to sell J.D.B. to his supervisor for $20,000. Josh and Melissa dismiss Josh's comments as "dark humor."

After Melissa's attempted suicide, J.D.B. would often stay with his babysitter twenty-four hours a day from Monday through Saturday. His babysitter noted Josh's refusal to take J.D.B. to the doctor because of their financial constraints, and occasions in which Josh would drop J.D.B. off with the babysitter for a week with only two jars of baby food and two bottles of milk. When questioned about how he retained childcare during Melissa's hospital stay, Josh recalled seeing flyers advertising daycare, but failed to conduct a background check and was unable to name any of the babysitters. In one ADHS report, the worker assessed that the couple did not have the capacity to protect their child, and that J.D.B. was suffering from developmental delays as a result of inadequate care.

Because of their concern that the state of Arkansas would remove J.D.B. from their custody, the couple asked Josh's father, Daniel, to take J.D.B. to live with him and his wife in Wisconsin. Upon assuming care of J.D.B., Daniel noticed his grandson had severe bruising on his buttocks as well as diaper rash, and he informed the Wisconsin Department of Human Services (WDHS) of J.D.B.'s condition. J.D.B. remained with Daniel and his wife, Leslie, from late August until October, when Josh informed Daniel of his intent to retrieve J.D.B. When Daniel refused to relinquish care of J.D.B., Josh told an ADHS worker that if his dad did not cooperate, he would "probably get shot," and that "he knows me well enough to know that I will do it," stating "forty acres is a lot of land to lose a body on."

On October 2, 2009, Josh traveled to Wisconsin to remove J.D.B. from Daniel's care, but was apprehended by authorities before being able to do so. A handgun was found in his vehicle. He admitted threatening his father, but said he was not serious. After an October 5, 2009 hearing, the Polk County, Wisconsin court issued an order for temporary physical custody, finding Josh and Melissa neglected J.D.B., that WDHS made reasonable efforts to prevent removal of J.D.B. from the parents' care, and that it would be contrary to J.D.B.'s health, safety, and welfare to return him to his parents. The court ordered J.D.B. be placed in foster care, and that all parental contact with J.D.B. would be supervised by WDHS.

Over the next three months, J.D.B. remained in a foster home in Wisconsin. Josh and Melissa moved back to Iowa, and would periodically visit their son when in Wisconsin for court dates. Social workers noted J.D.B. preferred the company of his foster dad over his biological parents, and that he appeared to have no connection with Josh or Melissa. The Polk County, Wisconsin Human Services Department filed a motion to transfer jurisdiction of the case to Iowa, but Iowa declined to accept jurisdiction. On December 2, 2009, the Wisconsin court held a trial, in which J.D.B. was adjudicated as a Child in Need of Protection or Services (CHIPS)[1] under Wisconsin Statute section 48.13(3) (2009) due to his parents' admission that J.D.B. was the victim of abuse.

[1] A Child in Need of Protection or Services is Wisconsin's equivalent to Iowa's Child in Need of Assistance.

On January 27, 2010, the Wisconsin court granted legal custody to Melissa's brother and his wife, Martin and Tammy Prine. The Prines, who live in Des Moines, were granted custody until Josh and Melissa met the conditions set out by the court. Wisconsin retained jurisdiction over the matter, and the IDHS agreed to provide "courtesy supervision." Wisconsin contracted with LifeWorks in Des Moines to provide additional supervision for Josh and Melissa to visit J.D.B., as well as services to improve the couple's parenting skills.

The Prines offered J.D.B. a safe and healthy living arrangement. Josh and Mellissa periodically visited their son, but those sessions decreased over time. Visits would occur at the Prines' residence as well as at LifeWorks, because the parents' home was not suitable for J.D.B. Despite being aware that the visits were supervised, Josh would make inappropriate comments, such as calling J.D.B. a "little prick," telling J.D.B. not to throw his "nut rag" at him, and berating Melissa. Melissa also struggled to enforce boundaries for J.D.B. and became defensive when a worker would offer her advice.

The Wisconsin court judge explained the conditions Josh and Melissa had to satisfy to regain custody of J.D.B., which the Iowa juvenile court summarized as:

> Providing a safe and suitable home; cooperate with mental health providers including following all recommendations and show proof of compliance for 6 months; demonstrate an understanding of child's physical, psychological, and emotional needs by showing a pattern of appropriate and nurturing supervision; comply with family support workers . . . ; demonstrate an understanding of child's medical needs and attend medical appointments; and not interfere with the child's placement.

Josh and Melissa also signed a notice warning them that if they did not meet the conditions in a timely manner, their parental rights could be terminated.

The couple completed a parenting course and enrolled in college classes. Both found jobs. But many conditions of reunification remained unfulfilled by the date of termination.

The couple did not establish a suitable home for J.D.B. Two visits to the trailer where the couple had been staying showed an unsafe living environment. The first visit took place in October 2009; the investigator reported the home "had bad odor, feces in the carpet, dirty dishes that had been there a long time, mold coming through the outside of the trailer, dog hair, and the smoke was awful." Because Josh and Melissa told IDHS the home was ready for J.D.B, a worker conducted a second visit on November 3, 2010. The trailer was cluttered and unkempt. The worker found a strong smell of cigarette smoke, a cause for concern due to J.D.B.'s asthma. The worker reported she saw a litter box on the floor in a location very accessible to a child, piles of dirty laundry throughout, a punch hole in the wall of the bathroom, and the floor had weak spots in the entry way to J.D.B.'s room. The room lacked any child-appropriate furnishings, such as a crib, and an electrical socket was popped out from the wall.

Mental health evaluations were an additional condition of reunification. The parents did not obtain the evaluations until late November 2010, blaming the delay on WDHS's refusal to pay for the services, and an inability to locate a proper facility to conduct the evaluation.

On July 7, 2010, WDHS requested the Wisconsin court revise the dispositional order to transfer the case to Iowa. The WDHS caseworker noted Josh and Melissa currently lived in Iowa and never had resided in Polk County, Wisconsin. Since January 27, 2010, J.D.B. had lived with his aunt and uncle in Des Moines. The worker believed the parents should have case management on a local level for better supervision and coordination, stating "[t]his agency is not able to adequately case manage the case from this distance. Josh, Melissa, and [J.D.B.] all deserve more than WI is able to provide."

On August 9, 2010, the Wisconsin court ordered that jurisdiction be transferred to Iowa. The Polk County, Iowa, juvenile court accepted the case on September 20, 2010, and on September 29, 2010, began a permanency hearing. On November 4, 2010, the county attorney filed a petition to terminate the parental rights of Josh and Melissa. A combined permanency and termination hearing occurred over four days: November 24, 2010; December 17, 2010; January 3, 2011; and January 12, 2011. The juvenile court terminated the parental rights of Josh and Melissa on October 5, 2011.[2] In its order, the court noted both parents failed to show any more insight during the termination proceeding than they had at the removal stage as to why they could not adequately care for J.D.B.

II. Standard of Review

We review decisions to terminate parental rights de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010) (citations omitted). While we accord weight to the juvenile court's factual findings, especially those regarding the credibility of

[2] The father does not appeal.

witnesses, we are not bound by them. *In re C.A.V.*, 787 N.W.2d 96, 99 (Iowa Ct. App. 2010). We will uphold an order to terminate if the grounds under Iowa Code section 232.116 are supported by clear and convincing evidence. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). "Clear and convincing" means there are no "'serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence.'" *Id.* (quoting section 232.116). Our paramount concern is the best interest of the child. *C.A.V.*, 787 N.W.2d at 99.

III. Analysis

We follow the three-step process set forth in *P.L.* when reviewing a court's decision to terminate parental rights:

> First, the court must determine if the evidence proves one of the enumerated grounds for termination in section 232.116(1). If a ground is proven, the court may order the termination. Next, the court must consider whether to terminate by applying the factors in section 232.116(2). Finally, if the factors require termination, the court must then determine an exception under section 232.116(3) exists.

P.L., 778 N.W.2d at 40 (citations omitted). We address each step in turn.

A. Termination Was Proper Under Iowa Code section 232.116(d)

Melissa first contests the juvenile court's grounds for termination. In its order, the juvenile court terminated her parental rights based on section 232.116, subsections d and h, which read:

> *d.* The court finds that both of the following have occurred:
>
> (1) The court has previously adjudicated the child to be a child in need of assistance after finding to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents . . . .
>
> (2) Subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the

> circumstance continues to exist despite the offer or receipt of services.
>
> . . . .
>
> *h.* The court finds that all of the following have occurred:
>
> (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)(d), (h) (2009).

Melissa argues neither subsection provides a proper basis to terminate her parental rights. First, she contends the State did not satisfy the elements of paragraph d because neither the Wisconsin nor Iowa court adjudicated J.D.B. based on a finding he had been abused "as the result of the acts or omissions of one or both parents." *See* Iowa Code § 232.116(1)(d)(1) (2009). She also alleges the trial court erred in finding the parents could not identify a service that had not been provided for them, citing her continuous request for legal representation during the Wisconsin proceedings, increased Family Safety, Risk and Permanency (FSRP) services, a caseworker in Iowa to help the parents access available services in the state, and assistance in obtaining a mental health evaluation in Iowa.

With respect to paragraph h, Melissa contends the court erred in finding clear and convincing evidence of the second and fourth elements: that the child had been adjudicated a CINA under section 232.96 and that the child could not be presently returned to her care.

When the district court terminates on more than one ground, we only need to find evidence supporting one of those grounds to affirm the termination. *In re B.L.A.*, 357 N.W.2d 20, 22 (Iowa 1984). In this case, we believe that the record evidence satisfied the elements of 232.116(1)(d).

1. Previously Adjudicated

The Wisconsin court adjudicated J.D.B. as a "victim of abuse" under Wisconsin Statute section 48.13(3). The findings made by the Wisconsin court were sufficient to satisfy the language in Iowa Code section 232.116(1)(d)(1) that the previous adjudication found the child to have been physically abused or neglected "as the result of the act or omissions of one or both parents."

The WDHS petition alleged J.D.B. needed protection under section 48.13(3) for being a victim of abuse and section 48.13(10) based on his parents' inability to provide medical care. *See* Wis. Stat. § 48.13 (2009). Josh and Melissa contended the bruising occurred either while J.D.P was in the care of a babysitter in Arkansas or in the custody of his grandfather in Wisconsin. After the first day of the CHIPS hearing, Josh and Melissa stipulated that J.D.B. was in need of protective services because he suffered abuse under section 48.13(3), without specifying the perpetrator. The medical neglect allegation was dropped. Section 48.13(3) authorizes a court's jurisdiction over a child "[w]ho has been the victim of abuse, as defined in s. 48.02(1)(a) . . . , including injury that is . . . inflicted by another . . . ." Section 48.02(1)(a) defines abuse as "[p]hysical injury inflicted on a child by other than accidental means . . . ."

The State maintains that although the Wisconsin court did not specifically identify either Josh or Melissa as the person who abused J.D.B., the reference to parental "omissions" in section 232.116(1)(d)(1) is broad enough to encompass the Wisconsin court's general finding that J.D.B. was the victim of abuse.

We accept the State's position. The permanency plan developed by the WDHS noted that J.D.B. "had extensive bruising while under the care of Josh and Melissa." After adjudicating J.D.B. to be in need of protection, the Wisconsin court found that it was contrary to the child's best interests to be placed in the parents' home. The issue is not whether the Wisconsin court expressly found one of the parents caused J.D.B.'s bruises, but whether it believed their conduct was adequate to prevent the injuries. The Wisconsin court's refusal to allow the couple to regain custody of their son was not based on the court's concern that an unknown Arkansas babysitter or the grandfather may have harmed J.D.B.—such a concern would not be remedied by keeping him from his parents. By refusing to restore custody to Josh and Melissa, the Wisconsin court concluded the parents did not fulfill their responsibility to keep their child safe from harm. We believe the Wisconsin CHIPS adjudication satisfies the finding of physical abuse or neglect necessary under section 232.116(1)(d)(1).

2. Receipt of Services

Additionally, Melissa argues neither Wisconsin nor Iowa provided reasonable services after the CHIPS adjudication, and therefore the State did not prove the second element of section 232.116(1)(d) by clear and convincing evidence. In particular, she contends she was denied reasonable services by not

being appointed an attorney in the Wisconsin proceedings, and by not receiving FSRP services for more than two months after J.D.B. was moved to Iowa, not being assigned a caseworker in Iowa to help access services, and not receiving assistance to obtain a mental health evaluation.

a. Appointment of Attorney

As the Wisconsin court explained to the couple during the CHIPS hearing, Wisconsin provides counsel for the termination hearing, but not during the initial CHIPS proceedings. Consequently, Josh and Melissa were not appointed an attorney to represent their interests while the case remained in Wisconsin. But once Wisconsin transferred the case to Iowa, the Iowa court appointed counsel for the parents. Melissa contends the lack of representation in Wisconsin equates to a failure by the State of Iowa to provide reasonable services. We do not find her argument persuasive.

Melissa "has the statutory right to representation by counsel under Iowa Code section 232.89 [(2009)]." *In re S.D.*, 671 N.W.2d 522, 529 (Iowa Ct. App. 2003). But this is a state-specific right; the statute has no effect on proceedings in the Wisconsin court system. Moreover, appointment of an attorney for the adjudication stage of the proceedings is not the type of service contemplated by section 232.116(1)(d)(2). The services that IDHS is required to offer before termination are those which help preserve the family unit. *See In re. H.H.*, 528 N.W.2d 675, 677 (Iowa Ct. App. 1995); *see also In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa Ct. App. 1994) (requiring reasonable services that help to eliminate need for removal be provided prior to termination). Furthermore, section

232.116(1)(d)(2) looks to the services provided *after* the adjudication to correct the circumstances that led to the finding. The parents' lack of an attorney *before* the Wisconsin adjudication does not fit that category.

b. Other Reasonable Services

Both Iowa and Wisconsin have provided ample services since the inception of this case. The juvenile court listed services provided to the family, including:

> Voluntary placement with grandparent; Child Protective Assessment services in Iowa; Child Protective Assessment services in Arkansas; Interstate Compact on Placement of Children (ICPC); Relative placement; Visitation; Family Safety, Risk and Permanency Services; Courtesy Supervision by Iowa DHS; Referral to Iowa Cares Program; Referral information housing assistance; Referral information for psychological evaluations; Referral information for individual counseling; Individual therapy; Referral to House of Mercy for Mother, Parenting classes; Marital therapy; Family Team Meetings; and Substance abuse evaluation for Mother.

Despite her contention on appeal, in her testimony at the termination hearing Melissa was unable to identify any service that was not provided to her by Wisconsin or Iowa. When pressed about the psychiatric evaluations, she mentioned only her desire for more locations to obtain an evaluation. For more than a year before undergoing their evaluations, Josh and Melissa were aware that an evaluation was required to reunify with their son. They blame their tardiness on Wisconsin's failure to provide funding or locations for such services in Iowa. But evidence shows the couple could have obtained the evaluation free of charge in Wisconsin, and workers provided them with multiple locations in Iowa.

Melissa also complains she did not have an Iowa caseworker. Under the unusual geography of this case, both the parents and the child were residing in Des Moines for the majority of the time that WDHS handled the case. WDHS made special accommodations to assure the family was receiving services to assist with reunification. In addition to Wisconsin providing a WDHS caseworker, IDHS provided "courtesy supervision" pursuant to the Interstate Compact on Placement of Children. Iowa Code § 232.158 (2009). WDHS also contracted with LifeWorks in Des Moines to provide supervised visits and parenting services. IDHS workers communicated with WDHS by quarterly reports regarding J.D.B.'s well-being. Staff at LifeWorks and WDHS exchanged phone calls and emails regarding J.D.B. Melissa received access to services for mental health and parenting skills.

Because the State provided clear and convincing evidence that the parents were offered adequate services to correct the circumstances that led to the initial CHIPS adjudication, the juvenile court properly found grounds for termination under section 232.116(1)(d).

B. Termination Was in the Best Interest of J.D.B.

Section 232.116(2) governs the second step in the termination analysis. We "give primary consideration to the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional condition and needs of the child." *P.L.*, 778 at 40 (quotations omitted). We have traditionally held that parents' past performance

indicates their ability to care for their child in the future. *In re T.T.*, 541 N.W.2d 552, 556 (Iowa Ct. App. 1995).

While Josh and Melissa had custody of J.D.B., three states received six referrals reporting possible child abuse. Melissa has had ample time since the Wisconsin court adjudicated J.D.B. as a CHIPS to correct her parenting deficiencies, but has failed to do so. The juvenile court found it very troubling that at the time of termination, Melissa failed to show any insight as to why she did not have custody of her child. She believed the only reason J.D.B. was not in her care was because of Josh's death threats to his father.

Melissa notes both the Wisconsin court and a Wisconsin child protective services worker made positive comments in a report regarding the parents' progress toward reunifying with their son. But that same worker, who was later called as a witness during the termination hearing, admitted she made the statement without full information. After hearing the testimony of the parents and other caseworkers, she retracted her opinion.

Melissa did not have housing suitable for J.D.B. Her continued relationship with Josh troubled the juvenile court. Melissa stated that she did not have "any concerns about Josh as a parent." Melissa's inability to see the danger posed by Josh does not promote the best interests of J.D.B. *See In re A.S.*, 743 N.W.2d 865, 868 (Iowa Ct. App. 2007) (holding termination of father's parental rights was in child's best interest because "he is unable to place the interest of his child above his interest in continuing his relationship with [the

child's abusive mother]," and that a foster home provides child with a safe and nurturing environment).

The Prines have provided J.D.B. with a safe and loving home. He is bonded with his aunt and uncle, who have worked with him to overcome the developmental delays traceable to his early days in Arkansas. The Prines are willing to adopt him if Melissa's rights are terminated.

Clear and convincing evidence shows Melissa remains unable to address the mental, physical, and emotional needs of her child, nor is she able to provide a safe and nurturing environment for him. *See P.L.*, 788 N.W.2d at 41 ("It 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.").

C. No Additional Factors Preclude Termination

Last, we must determine whether any factors enumerated in section 232.116(3) warrant reversing the termination of Melissa's parental rights. Melissa contends termination is improper because her brother has custody of J.D.B. and because she has a close relationship with the child.

> The court need not terminate the relationship between the parent and child if the court finds . . .
>
> *a.* A relative has legal custody of the child.
>
> . . . .
>
> *c.* There is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.

Iowa Code § 232.116(3) (2009).

The fact J.D.B. is in the legal custody of his maternal aunt and uncle does not justify preserving the parent-child relationship under these circumstances. Nor does the record reveal a bond so close that terminating the mother's parental rights would be detrimental to her son.

Melissa had custody off and on during the first ten months of J.D.B.'s life. But since then, her only contact has been through sporadic supervised visits. While J.D.B. was in foster care in Wisconsin, she visited him only when she had court dates in the state. One WDHS worker observed that the child preferred the care of his Wisconsin foster family over that of his biological parents. J.D.B., who is now three years old, has lived with his aunt and uncle for two years, referring to them as "Mom" and "Dad." Despite living in the same city as her son and having no restrictions on how often she could schedule visits, Melissa saw her son only twice a week. Given these facts, we do not believe that the factors in section 232.116(3) stand in the way of termination.

Therefore, we affirm the juvenile court's order.

AFFIRMED.