

IN THE COURT OF APPEALS OF IOWA

No. 2-1040 / 12-1737
Filed December 12, 2012

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

E.H., Father,
Appellant,

S.Z., Mother,
Appellant.

Appeal from the Iowa District Court for Dubuque County, Thomas J. Straka, Associate Juvenile Judge.

A mother and father appeal the termination of their parental rights.

AFFIRMED ON BOTH APPEALS.

Dustin Baker of Baker Law, Dubuque, for appellant-father.

MaryBeth A. Fleming of MaryBeth Fleming Law Office, P.C., Dubuque, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Ralph Potter, County Attorney, and Jean A. Becker, Assistant County Attorney, for appellee.

Mary Kelley of Public Defender's Office, Dubuque, attorney and guardian ad litem for minor child.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

MULLINS, J.

A mother and father appeal the termination of their parental rights under Iowa Code section 232.116(1)(h) (2011). The mother argues the State failed to present clear and convincing evidence of grounds for termination, and asserts termination is not in the child's best interests. The father concedes grounds for termination, but contends termination is not in the child's best interests, and requests additional time for reunification. We affirm on both appeals.

I. Background Facts and Proceedings

N.H. was born in January 2012 at thirty-six weeks gestation with multiple, significant congenital abnormalities, including serious heart defects and a rare chromosomal disorder. University of Iowa Hospitals and Clinics (UIHC) staff diagnosed N.H. with global hypoxic-ischemic encephalopathy—brain damage resulting from a lack of oxygen. N.H.'s condition required the use of an oximeter to monitor oxygen saturation levels. As a result of N.H.'s complex medical condition and young gestational age, UIHC admitted N.H. to the neonatal intensive care unit. UIHC staff opined N.H. has an eighty percent increased risk for developing seizures. N.H. is also at risk for developmental issues with cognition, motor skills, and behavior.

N.H.'s neonatologist informed the parents that their ability to meet N.H.'s complex medical needs was dependent on their ability to assess their child's health status accurately and recognize when medical attention is needed. UIHC documented concerns about the parents' ability to meet N.H.'s special medical needs. UIHC nursing staff noted the mother had significant difficulty learning

discharge procedures, and reported a lack of reliability in performing tasks such as taking the child's temperature, changing diapers, and burping the child after feedings. Nursing staff reported concerns about the father's cognitive functioning in addition to anger management issues.

The mother's general cognitive ability is within the borderline of intellectual functioning, scoring in the fourth percentile on the Wechsler Adult Intelligence Scale relative to the general population. A 2009 psychological report indicates the mother has severe abandonment issues and was diagnosed with attachment disorder of early childhood, dysthymia, and evolving personality disorder with mixed depression, dependent, avoidant, and undersocialized procedures. The mother has three other children. The mother's parental rights to her two oldest children were terminated, although the mother could not verbalize the circumstances leading to termination. The mother maintains a part-time job and lives with the father and their two-year-old son in a one-bedroom apartment.

The father is currently unemployed, but occasionally works at West Dubuque Tap. He reported that he completed his education to the eleventh grade and is unable to read or write. UIHC staff recorded concerns about the father's temper when confronted about providing care to N.H. and about his heavy smoking habits in light of the child's fragile heart condition.

On February 10, 2012, a hospital social worker met with the parents to discuss concerns about the parents' ability to care for N.H. independently. The social worker informed the parents that she had contacted the Department of Human Services (DHS), and UIHC did not plan to discharge the child to the

parents' care. At that time, the parents returned to Dubuque and were not present at the time of the child's discharge on February 21, 2012.

On February 14, 2012, the juvenile court entered an ex parte temporary removal order placing custody with DHS for the purposes of family foster care placement. The juvenile court held an uncontested removal hearing on February 24, 2012, and entered an order continuing custody with DHS for foster care placement.

On March 20, 2012, the parents had a family team meeting with several service providers. When the team talked to the father about concerns, the father became physically angry, rolled up a planner, and began smacking it against the table near the child's head. The father then left the meeting to smoke a cigarette. Upon his return to the meeting room twenty minutes later, the father did not rejoin the group and refused to participate any further.

On March 30, 2012, the juvenile court held an uncontested adjudication hearing. Pursuant to an agreement, the court adjudicated N.H. a child in need of assistance under Iowa Code section 232.2(6)(b) and (n).

N.H.'s severe heart condition continued to deprive his body of oxygen and eventually required surgery. On April 25, 2012, N.H. had a routine check-up at UIHC prior to the heart surgery. N.H.'s oxygen saturation levels were very low and required observation overnight. The parents refused to stay, indicating that DHS should have to stay because they have custody of the child. The nurse reported that when she attempted to place a bracelet on the mother, the mother pulled her arm away and stated, "I am not staying with [N.H.]"

On June 29, 2012, the juvenile court held a dispositional review hearing. The father acknowledged he had been “less than cooperative in the past” but indicated he was now ready to commit himself to having N.H. returned and would now fully cooperate with services and a mental health evaluation. The juvenile court ordered continued custody of N.H. with DHS.

From July 3 through July 9, 2012, N.H. was at UIHC for heart surgery. The parents left the hospital on July 5, 2012, indicating they ran out of money for food and needed to return to Dubuque. Although the father told staff he would return, neither parent was present to receive N.H.’s discharge instructions. N.H. will require another heart surgery in approximately two years.

As a result of the father’s aggressive behavior toward care providers and the parents’ frequently missed hospital stays, DHS reduced visits from three times to two times per week. Visits were supervised and lasted two hours. Despite repeated requests to provide DHS with a copy of her work schedule, the mother failed to do so, and routinely left visits early to go to work. After DHS reduced visitation, the mother continued to leave visits early. The father continued to exhibit aggressive, agitated behavior and missed an entire week of visits to volunteer at the local “Catfish Festival.” Both parents continued to miss medical appointments. As a result, DHS reduced visits to once a week for two hours at a time. When the parents were present for visitation, the DHS worker found the parents interacted appropriately with the child.

Prior to the termination hearing, DHS found a new foster home placement for N.H. with a family in Waterloo. The mother is a registered nurse and cares for

two other children with special needs. The family is willing to adopt N.H. pending the outcome of these proceedings.

On August 8, 2012, the State filed a petition to terminate the mother's and the father's parental rights. On August 30, 2012, the juvenile court held contested termination proceedings. The juvenile court found that the set of personality traits presented in this case "does not bode well for a medically fragile child whose life depends on parents who are able to put the needs of a child above their own. [The parents] have demonstrated they are simply unwilling or unable to do so." The court further found that,

Neither parent has demonstrated a willingness or desire to put the needs of the child ahead of their own. At the time of the termination hearing, the parents' interactions occurred only one time per week for two hours and the parents did not even make that minimal interaction a priority. Neither parent has put forth any effort to understand and meet the child's extensive medical needs.

On September 8, 2012, the juvenile court ordered termination of parental rights under section 232.116(1)(h). Both the mother and the father appeal.

II. Standard of Review

We review proceedings to terminate parental rights *de novo*. *In re A.B.*, 815 N.W.2d 764, 773 (Iowa 2012). Our review gives non-binding deference to the juvenile court's findings of fact. *Id.* If there is clear and convincing evidence of statutory grounds for termination pursuant to Iowa Code section 232.116, we will uphold the termination of parental rights. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). "Evidence is 'clear and convincing' when there are no 'serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence.'" *Id.* (internal citations omitted).

III. Analysis

A. Statutory grounds

The mother contends the State failed to present clear and convincing evidence to support termination under Iowa Code section 232.116(1)(h). The father does not contest the statutory grounds for termination. To terminate parental rights under section 232.116(1)(h), the State must present clear and convincing evidence the child is under the age of three, has been adjudicated a child in need of assistance, has been removed from the parent's care for at least the last six consecutive months, and cannot be returned to the parent's custody at the time of the termination hearing.

At issue is whether the State demonstrated that the juvenile court could not, at the time of the termination hearing, order the return of N.H. to the parents' custody pursuant to section 232.102. See Iowa Code § 232.116(1)(h) (setting forth the statutory grounds for termination). The State satisfies this element if it presents clear and convincing evidence the child has suffered or is imminently likely to suffer an adjudicatory harm upon return to parental care. See *id.* §§ 232.116(1)(h), .102(5)(a)(2), and .2(6)(c); *In re A.M.S.*, 419 N.W.2d 723, 725 (Iowa 1988). For the State to meet its burden, it is sufficient for the State to show the child is imminently likely to suffer an adjudicatory harm; it need not show the circumstances leading to the original adjudication continue to exist at the time of termination. *A.M.S.*, 419 N.W.2d at 725.

N.H. has a complex medical condition, placing the child in a delicate state of life. While the child's prognosis is unclear, among the child's other

developmental delays, it is questionable whether the child will ever develop the motor skills necessary to walk. N.H. is also at significant risk for seizures and will require another heart surgery around the age of three. Although the child no longer requires consistent use of an oximeter, N.H. continues to require constant vigilance and attention. To meet the child's complex medical needs, the mother must possess the ability to assess the child's medical status and evaluate the need to seek medical attention. UIHC staff reported, "Even if daily professional nursing assistance was provided, current test results raise serious reservations about [the mother's] capacity to reliably monitor, assess, use judgment, and take appropriate action in the context of complex or critical care needs." Upon our de novo review, we find the mother is unable to meet the needs of N.H.'s fragile medical condition. Accordingly, we find the State presented clear and convincing evidence of grounds for termination under section 232.116(1)(h).

B. Best Interests

Both the mother and the father argue termination is not in the child's best interests. If the State establishes grounds for termination, the court must determine whether termination is in the child's best interests pursuant to section 232.116(2). *In re P.L.*, 778 N.W.2d 33, 37 (Iowa 2010). To make this determination, our primary considerations are "the child's safety, the best placement for furthering the long-term nurturing growth of the child, and the physical, mental, and emotional condition and needs of the child." *Id.*

"Insight for the determination of the child's long-range best interests can be gleaned from 'evidence of the parent's past performance for that performance

may be indicative of the quality of the future care that parent is capable of providing.” *A.B.*, 815 N.W.2d at 778 (internal citations omitted). We give weight to the juvenile court’s finding that the parents’ history of being unable to provide adequate care for previous children is a clear indication that the parents “are simply unprepared for meeting the needs of a child with complex medical conditions.” Throughout the course of this case, the parents have consistently missed doctor’s appointments and interactions with the child. The parents displayed an inability to navigate financial and transportation issues to be present at critical times during the child’s medical care, including a failure to be present to receive important discharge instructions after each of the child’s hospitalizations.

The father’s frequent aggressive and hostile behavior when confronted or prompted to provide care is particularly concerning. The father’s preliminary mental health evaluation indicates the father is bipolar and has an antisocial personality with sadistic personality traits. On one occasion, the father became so agitated that he walked out of a family team meeting. On another occasion, he asked the child’s service provider and physical therapist to leave his home, prematurely ending a visit with his child; and said he would not allow the physical therapist to return. Even during the termination hearing—when his parental rights were at stake—the father interrupted the hearing and asked to be excused. Although he returned to the courtroom a few minutes later, the juvenile court found he “remained agitated for the rest of the hearing, sitting with his arms crossed in front of him or with his head buried in his hands.”

“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.” *P.L.*, 778 N.W.2d at 41. The child has a foster care placement capable of meeting complex medical needs and willing to adopt. Upon our de novo review, we find the mother’s intellectual and emotional functioning inhibit the ability to provide adequate care given the child’s fragile physical, mental, and emotional needs. The father’s inability and unwillingness to cooperate with care providers in an appropriate, non-hostile manner does not facilitate the type of long-term, nurturing growth a child with special needs will require. Placing the child in the custody of her parents would present an imminent risk of adjudicatory harm. For the aforementioned reasons, we find terminating parental rights is in the child’s best interests.

C. Preservation of Error

On appeal, the father requests an extension to pursue reunification pursuant to Iowa Code section 232.104. An issue not presented to and decided upon by the juvenile court may not be raised for the first time on appeal. *In re C.S.*, 776 N.W.2d 297, 299 (Iowa Ct. App. 2009). The father did not request additional time to pursue reunification at the termination proceeding, nor did the juvenile court rule on such a request. We find this issue was not properly preserved for appellate review.

IV. Conclusion

We find the State proved grounds for termination by clear and convincing evidence, and termination is in the child's best interests. The father request for additional time was not preserved. We affirm on both appeals.

AFFIRMED ON BOTH APPEALS.