

IN THE COURT OF APPEALS OF IOWA

No. 2-186 / 12-0133
Filed April 11, 2012

**IN THE INTEREST OF A.B. and S.B. Jr.,
Minor Children,**

**S.B. Sr., Father,
Appellant.**

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

A father appeals from the order terminating his parental rights.

REVERSED AND REMANDED.

Kate Strickler of KE Law, L.L.C., Des Moines, for appellant father.

Donna Beary, Des Moines, for mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, John P. Sarcone, County Attorney, and Stephanie Brown,
Assistant County Attorney, for appellee State.

John Jellineck, Des Moines, for minor children.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

A father appeals from the order terminating his parental rights. He claims: (1) the juvenile court violated his due process rights when it ordered him to provide a fingernail drug test after the termination trial and then relied upon those results in the termination order; (2) the State did not prove the grounds for termination; and (3) termination was not in the children's best interests. Upon our de novo review, we reverse and remand.

I. Background Facts and Proceedings.

S.B. is the father and N.G. is the mother of S.B. Jr., born in 2004, and A.B., born in 2007. S.B. and N.G. are not married and have a history of domestic violence. They are no longer in a relationship. Both the mother and the father have children from prior relationships. S.B. Jr. and A.B. initially lived with the mother and their younger half-brother, D.G.

The children first came to the attention of the Iowa Department of Human Services (Department) in late 2010, after it was reported that the mother was not properly caring for D.G.'s special needs. It was also reported the mother was using illegal substances, the mother's housing situation was unstable, and truancy was an issue for S.B. Jr. The Department began offering the mother services.

In early March 2011, the mother placed the children in the father's care. However, the children were removed from his care about two weeks later and placed in foster homes after the father was arrested for possession of cocaine and methamphetamine. The father was subsequently released from jail, conditioned upon obtaining a substance abuse evaluation and complying

therewith. After the removal, the children and the mother¹ provided hair samples for hair stat drug testing, and all tested positive for methamphetamine. The children were later adjudicated children in need of assistance (CINA).

The father reported he too had provided hair for a hair stat test at that time, but the testing facility found no record or documentation he had done so. Thereafter, the father shaved his head and could not provide hair samples. He offered use of his body hair, but the sample was not sufficient for testing. The father then submitted to a urine test in early April. Though he denied using illegal substances, his urine test was positive for methamphetamine.

In late April 2011, the father was sentenced to thirty days in jail following his guilty plea to possession of carrying concealed weapons and two counts of possession of controlled substances stemming from a January 2011 arrest. He began serving his sentence in late April and was released in May. In relation to his March charges for possession of cocaine and methamphetamine, the father provided his February 2011 substance abuse evaluation. In the evaluation, his counselor reported he had scored a low probability of having a substance dependence disorder, though the counselor noted the test was based upon the father's self-reported information. The counselor recommended he participate in the "level 0.5—drug/alcohol awareness education program," and the father completed the program. His charges were reduced to one count of possession of drug paraphernalia, to which he pleaded guilty and was fined.

¹ At some point thereafter, the mother stopped participating in services, and her parental rights were later terminated. The termination of her parental rights is not at issue in this appeal.

After his release from jail in May, the father became very involved in services, participating in all services offered to him by the Department. He completed anger management classes. He provided clean samples for all random urine tests requested. He obtained full-time employment; he was not late to work and only missed two days due to court. He rented an apartment, and all his bills were paid up to date. He had regular visitation with the children and was appropriate during the visits. He provided the foster parents with clothing, coats, school supplies, and diapers for the children. He began going with A.B. to therapy. He did not miss any family team meetings or court hearings. The father completed The Incredible Years and The Parenting Way parenting classes. He spoke with his parent partner and his Incredible Years teacher regularly. He kept in contact with S.B. Jr.'s school and the children's daycare provider. He underwent a mental health evaluation. He completed the recommended drug and alcohol awareness program.

Nevertheless, the Department had concerns about the father's insight and honesty. The Department's caseworker believed the father was dishonest to the Department and his substance abuse counselor when he denied using illegal substances, given his previous arrests and convictions for drug-related offenses and his positive for methamphetamine urine test in April. The caseworker was also concerned the father continued to shave his head and could not provide a hair sample for a hair stat drug test.

On August 15, 2011, the father underwent a second substance abuse evaluation with a different counselor. That counselor also found the father did

not have a substance abuse problem and did not recommend substance abuse counseling. The second counselor reported:

[The father] appeared open during the assessment. He appeared willing to share information and receive feedback. [The father] appears to be motivated to continue making low risk decisions. He reports that he has worked hard on his goals. He appears to present in the action stage of change.

The Department's caseworker was also concerned by the father's relationship with S.G., the mother of another of his biological children.² In May 2011, the father was charged with domestic abuse assault, following an incident with S.G., and a no-contact order was issued. On August 18, 2011, the charge was changed to disorderly conduct, to which the father pleaded guilty and was fined. The same day, S.G. requested the no-contact order be cancelled, and the order was cancelled.

Around the same time, the father was approved for semi-supervised visitation with the children. The first visit was held on August 21, 2011, and the father was transported to the visit by S.G. S.G. left after she dropped the father off; however, the caseworker saw S.G. and was surprised and very upset by the situation. She believed S.G. and the father were continuing their relationship, based upon statements made by S.G. and the father, and, due to their history, found a relationship between them to be a safety concern. The caseworker allowed the father to finish his visit, but she determined the visits should return to fully supervised because of safety.

² The father's parental rights to this child were terminated in January 2011. The father did not participate in that case at all.

A permanency hearing was held September 1, 2011. The father requested additional time to obtain custody. The children's guardian ad litem recommended he be given additional time. The State recommended his rights be terminated. The juvenile court noted the father was "complying with reunification services and benefitting from them," but it instructed the State to institute proceedings to terminate the parents' parental rights. The court set a date for a permanency/termination of parental rights beginning on October 25.

The permanency/termination hearing was held over three days. The father testified he was complying with services and was focused upon bettering himself and his situation for the children. He denied using illegal substances, and he testified the drugs in his possession for which he had previously been arrested were not his. He also denied he shaved his head to avoid the hair stat test, testifying he was balding and did not have much hair. He explained he tried to give body hair samples, but to no avail. He noted he had never missed a random urine test, all of which had tested clean since April. He testified he had attended some of A.B.'s therapy sessions, and he acknowledged that A.B.'s therapist reported A.B. had been recalling incidents of violence that had taken place in the home. The father was working with the therapist to address questions A.B. had. The father testified he had a close bond with the children and they could be returned to his care that day. He denied having a relationship with S.G.

S.G. testified she and the father no longer had a relationship. She testified that although he sometimes bought diapers and clothes for their child, they did not have much contact with each other. She testified that she let the

father use her car, and she had transported the father to his semi-supervised visit, but had no intention of staying.

The Department's caseworker testified she and other case professionals continued to have concerns about the father's honesty. She recommended the father's parental rights be terminated, despite the close bond between the father and the children. She testified she believed the father and S.G. continued to have a relationship, stating the father had said they had a relationship, but later said they did not, and S.G. had told her they were going to marry after the case was closed. She acknowledged that S.G. did not stay for the semi-supervised visit, but testified she had concerns because A.B.'s therapist had reported A.B. was afraid of S.G. and had some traumatic memories. The caseworker also acknowledged she was aware S.G. had been providing the father transportation and she had not told the father S.G. could not transport him. She also testified she did not believe the father had been honest concerning his substance abuse and had not addressed his problems.

A.B.'s therapist testified A.B. had begun to express fears about being left alone. A.B. shared with the therapist memories about arguments between the mother and father and memories about people in their home smoking with a pipe and passing around cigarettes. The therapist testified A.B.'s foster mother reported A.B.'s behavior was improving. She also testified that the father had been present for three of A.B.'s sessions and was very appropriate and open to suggestions during the sessions. She testified that permanency was important for any child A.B.'s age.

At the end of evidence, the father's attorney requested additional visitation with the children on behalf of the father. The following exchange occurred:

THE COURT: [T]he court would expect that [the father's] visits can be transitioned into semi-supervised if the child's therapist agrees and [the father] can get himself there alone or with an approved person

. . . .

[THE STATE]: Your Honor, . . . [w]e've requested, and it's been ordered in the past, for a hair test. And [the father] hasn't been able to provide one since his hair is not long enough. [The Department's case worker] informs me they can do a nail test, so I would just ask that be substituted instead.

THE COURT: Okay.

[THE FATHER'S COUNSEL]: And if I could respond, Your Honor?

[The father] calls every day for his number, for his urine tests; and he has not missed any of his urine tests. He goes every time that his number is called, and all of his tests have come back clean. I believe there was one that came back not clean,

THE COURT: Okay. Well, this is a service that's being offered. I think it's a reasonable effort.

If you choose to take advantage of it, you know, it's an opportunity for you to demonstrate that you have absolutely nothing to hide. We all know that urine screens can be adulterated. So I urge you to comply with that request. If you're doing your homework, turn it in.

THE FATHER: Okay.

THE COURT: Okay. Then we'll be in recess until November 28

At the continued hearing on November 28, the father's counsel reported that "[a]t the end of the [last hearing] . . . , we decided—or we all agreed that [the father] could have semi-supervised visits if he passed a fingernail test." The father went to get the fingernail test done a week before the November 28 hearing, but was told by the drug testing service they did not perform fingernail testing. The Department's caseworker stated she was "very concerned that [the father] didn't go to provide that test as soon as it was requested" on November 1. She further stated the "nail test[]" was approved by my director. I called back the

[drug testing service], and they said that they will call me and let me know if he can provide this nail test.” The father’s counsel responded that the father was “perfectly willing to do the fingernail test And he would be happy to start dropping UAs again” The court considered the matter submitted, but left the record open for two weeks for the father to “submit a fingernail test and for us to get the results of that.”

The father submitted to the fingernail test on November 29, 2011. The nail tested positive for methamphetamine.

On January 10, 2012, the juvenile court entered its order terminating the father’s parental rights pursuant to Iowa Code section 232.116(1) paragraphs (d), (g), (h), and (i) (2011). The court concluded the father had provided false representations to his substance abuse counselors and failed to tell his second counselor he had tested positive for methamphetamine in April 2011. Additionally, the court found:

[M]ore disturbing, [the father] provided a drug screen positive for methamphetamine in December 2011, as per the fingernail analysis. Clearly, [the father] suffers from a severe and chronic substance abuse problem that places himself and others in danger as evidenced by his prior acts. His fervent denial of drug use in the face of clear evidence to the contrary indicates that he is not ready to begin the changes necessary to provide a safe and stable drug-free environment for young children. Given his denial, his prognosis is poor. There is no reason to believe that he will be able to resolve his unadmitted addiction in a reasonable amount of time given these young children’s need for permanent home.

The court found termination was in the children’s best interests, concluding that “[a]lthough there is a bond with the children, because of his deceit and inability to admit that he needs more help visits are still professionally supervised and cannot progress beyond that restriction without risk of harm to the children.”

The father now appeals.

II. Scope and Standards of Review.

We review the juvenile court's decision to terminate parental rights de novo. See *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). We give weight to the juvenile court's findings of fact, but are not bound by them. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). The State must prove grounds for termination by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006).

Even when the State satisfies the statutory grounds for termination under section 232.116(1), our decision to terminate parental rights must reflect the children's best interests. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). The best-interest determination focuses on the children's safety; their physical, mental, and emotional condition and needs; and the placement that best provides for their long-term nurturing and growth. Iowa Code § 232.116(2); see also *P.L.*, 778 N.W.2d at 40 (holding "there is no all-encompassing best interest standard to override the express terms" of the statute). In addition, termination is not mandatory when we find "clear and convincing evidence that termination would be detrimental to the child at the time due to the closeness of the parent-child relationship." Iowa Code § 232.116(3)(c).

III. Discussion.

A. Fingernail Drug Test.

On appeal, the father contends juvenile court violated his due process rights when it ordered him to provide a fingernail drug test after the termination trial and then relied upon those results in the termination order. The State argues the father failed to preserve any error on this issue. We agree.

Issues must be presented to and ruled upon by the district court in order to preserve error for appeal. See *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003); *In re R.J.*, 495 N.W.2d 114, 117 (Iowa Ct. App. 1992). Here, the father never voiced an objection or complaint about the alleged errors or improprieties. In fact, he admitted he agreed to the test. Consequently, we conclude the father failed to preserve the alleged errors for appeal.

B. Grounds for Termination.

The father argues the State failed to prove by clear and convincing evidence paragraphs (d), (g), (h), and (l) of section 232.116(1) as grounds for terminating his parental rights. We agree.

Paragraph (d) requires proving:

(1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.

(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.*

(Emphasis added.) Termination is appropriate under paragraph (g) where:

(1) The child has been adjudicated a child in need of assistance pursuant to section 232.96.

(2) The court has terminated parental rights pursuant to section 232.117 with respect to another child who is a member of the same family or a court of competent jurisdiction in another state has entered an order involuntarily terminating parental rights with respect to another child who is a member of the same family.

(3) *There is clear and convincing evidence that the parent continues to lack the ability or willingness to respond to services which would correct the situation.*

(4) There is clear and convincing evidence that an additional period of rehabilitation would not correct the situation.

(Emphasis added.) Termination is also appropriate under paragraph (h) where:

- (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.

(Emphasis added.) Finally, termination is appropriate under paragraph (l) where:

- (1) The child has been adjudicated a child in need of assistance pursuant to section 232.96 and custody has been transferred from the child's parents for placement pursuant to section 232.102.
- (2) *The parent has a severe, chronic substance abuse problem, and presents a danger to self or others as evidenced by prior acts.*
- (3) There is clear and convincing evidence that the parent's prognosis indicates that the child will not be able to be returned to the custody of the parent within a reasonable period of time considering the child's age and need for a permanent home.

(Emphasis added.)

In this case, the juvenile court concluded: "Were it not for the denial of drug use in the face of credible evidence to the contrary, reunification would be achievable." However, it appears the only evidence the court relied upon in reaching its conclusion was the positive result of the father's fingernail drug test. We too are bothered by the results of the fingernail test, but for different reasons. Upon our review, we find no evidence in the record as to the reliability or the accuracy of this type of test. Nor do we find any information as to how such test results are to be interpreted. Our review of Iowa cases finds only one noted use

of such a test, and in that case, a fingernail and a hair stat test were provided to prove a false positive on another type of drug test. See *In re H.F.*, No. 07-1519, 2007 WL 3085873 n.3 at *2 (Iowa Ct. App. Oct. 24, 2007). The Department's caseworker even stated the drug testing agency was unsure if it could perform such a test. Presumably the fingernail sample was clipped from the open edge, which would be the oldest part of the nail. There is no information in the record indicating the rate of growth for fingernails. So, we have no way of knowing, based upon this record, whether the fingernail test indicates current drug usage, usage in the last week, last month, or from several months ago. For all we know, the positive test merely confirms the April test results.

From this one positive test result, the court concluded the father was a severe and chronic substance-abuse user who presented a danger to himself and his children. Further, from the positive test result, the court concluded the father had been dishonest in failing to admit his substance abuse problems and the father had failed to address his problems. Because of the positive test and the failure to admit and address his problems, the court determined the father had a poor prognosis towards rehabilitation and the children could not be returned to his care in the foreseeable future. Although we recognize that a parent who has such a problem clearly presents a danger to the parent's children, see *State v. Petithory*, 702 N.W.2d 854, 858 (Iowa 2005) (citing *In re J.K.*, 495 N.W.2d 108, 113 (Iowa 1993)), we do not find that to be the case here under the record presented.

There is no dispute the father participated in every service recommended by the Department. He provided clean samples for all random urinalysis tests

requested. He had regular visitation with his children; he was appropriate with them in his visits, and both he and the children were happy and excited to see one another. He not only found employment, his employer provided a “character reference” letter on his behalf. The letter explained the employer planned on bringing the father on full-time from the temporary staffing agency, stating “this could and will have only happened if his job performance were meeting, if not exceeding, our expectations, which they are.” The letter reported the father had, “in no way, shape, or form . . . done anything to make us think anything less of him. He always has a smile on his face and has never displayed a negative attitude.” The father’s Incredible Years instructor advised that during the class, the father was “very diligent in completing his home assignments and keeping continual contact” with him “above and beyond what is required.” He further stated he was “extremely impressed with [the father’s] motivation, diligence, willingness to engage and he has been only [one] of two parents in the past four years that [he had] had in [his] groups that brought in and [showed him] tools he created from our topics. The father’s second substance abuse counselor found the father to appear open during the evaluation, and ultimately concluded the father did not have a substance abuse problem. The father’s significant progress in this case indicates he had not been abusing substances and is supported by his negative urine screens and the conclusion by his substance abuse counselor. Without more information about the fingernail test, we refuse to speculate as to what it demonstrates, and in light of all of the other evidence, we cannot rely upon it to justify termination of the father’s parental rights.

Here, we do not find the State proved there was clear and convincing evidence the father continued to lack the ability or willingness to respond to services that would correct the situation, causing the ground asserted under Iowa Code section 232.116(1)(d) to fail. Likewise, we find the State failed to prove there was clear and convincing evidence the father continued to lack the ability or willingness to respond to services that would correct the situation and thus did not prove all of the elements of section 232.116(1)(g). We also find the State failed to prove there was clear and convincing evidence the father had a severe, chronic substance abuse problem and presented a danger to himself or others as evidenced by prior acts, ruling out the ground asserted under 232.116(1)(f). Finally we find the State failed to prove the ground under section 232.116(1)(h), as neither of the children were three years or younger at the time of the termination. For these reasons, we conclude the State failed to prove by clear and convincing evidence the grounds upon which the juvenile court terminated the father's parental rights.

C. Best Interests.

Finally, even if the grounds for termination had been met, we agree with the father that termination of his parental rights is not in the children's best interests.

The juvenile court found the father "is this case's greatest disappointment. Because he is unwilling to admit that he has a substance abuse problem," again, based upon the fingernail test's result,

he cannot begin to resolve it. . . . Although there is a bond with the children, because of his deceit and inability to admit that he needs

more help, visits are still professionally supervised and cannot progress beyond that restriction without risk of harm to the children.

When we review the facts anew, we believe two factors set this case apart from most termination appeals: the father's potential to be a successful parent for the children, evidenced by his efforts in participating in all services, family team meetings, court hearings, visitations; and the father's close relationship with the children. While time is of the essence in achieving permanency for these children, we cannot lose sight of the competing principle that "termination is an outcome of last resort." *In re B.F.*, 526 N.W.2d 352, 356 (Iowa Ct. App. 1994). The termination of parental rights is generally final and irrevocable. See *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599, 606 (1982) (stating that parents are not given second chances after parental rights have been terminated absent some type of judicial relief). "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Id.* at 753, 102 S. Ct. at 1394-95, 71 L. Ed. 2d at 606.

We believe a single fingernail test, without any information about its accuracy, reliability, or how its results are to be interpreted, cannot support termination of the father's parental rights under this record. Nevertheless, even considering the positive result of the test in our analysis, we still conclude the father should have been granted additional time for reunification with the children. We find the father's commendable efforts and his close relationship with his children simply outweigh the late positive result in this case. Rarely do

we see such efforts by a parent, and his hard work should account for something. We find the father still has much work to do, but we conclude one relapse (assuming the fingernail test result demonstrates a relapse) during the relatively short duration of this case should not trump all of father's hard work to obtain reunification with his children. Given his close relationship and his efforts toward reunification with his children, we conclude termination of the father's parental rights is not in the children's best interests and the factor set forth in Iowa Code section 232.116(3)(c) applies under the facts of this case to preclude termination of the father's parental rights. Accordingly, we reverse the juvenile court's termination of the father's parental rights and remand with instructions to grant the father six additional months towards reunification. This finding, of course, does not preclude a subsequent termination petition should events demonstrate that the children cannot be returned to the father's custody.

REVERSED AND REMANDED.

Potterfield, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

Although the majority sets forth an excellent and compelling opinion, I dissent because the issues as they relate to the fingernail drug test were simply not preserved for our review. The majority acknowledges the lack of error preservation. In spite of that, it inappropriately resurrects the fingernail test issue, critiques the test, suggests it was unreliable, and then concludes that termination was improper. This is not the role of an appellate court. See *Hanson v. Harveys Casino Hotel*, 652 N.W.2d 841, 843 (Iowa Ct. App. 2002) (recognizing the court will not undertake a partisan role and undertake a party's research and *advocacy*) (emphasis added).

The majority stated it was "bothered" by the results of the test because there was "no evidence in the record as to the reliability or accuracy of this test," no information "as to how such test results are to be interpreted," and "no information in the record indicating the rate of growth for fingernails." The majority concludes, "For all we know, the positive test merely confirms the April test results." The majority then explains that based on this one positive test result, "the court concluded the father was a severe and chronic substance-abuse user who presented a danger to himself and his children."

The record was kept open for two weeks following the termination/permanency hearing in November 2011 for the limited purpose of allowing the father to submit to the fingernail test and offer the results. At no point did he object to submitting to the fingernail test, nor to keeping the record open for the limited purpose of admitting the results. Nor did he suggest by way of argument during the hearing or later motion that he should be allowed to testify

or challenge the results of the test. Therefore, he cannot raise his challenges to the test results for the first time on appeal. *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003) (recognizing issues must be raised and ruled upon by the district court in order to preserve error for appeal).

Moreover, the majority offers, *sua sponte*, several reasons why the fingernail drug test may have been faulty. Again, the father never raised these claims below and we cannot be charged with taking on the role of advocate, crafting an argument in the father's defense. *See Hanson*, 652 N.W.2d at 843 ("Where a party's failure to comply with the appellate rules requires the court to assume a partisan role and undertake a party's research and advocacy, we will dismiss the appeal.").

In keeping with the proper function of an appellate court, I respectfully dissent, and would affirm the district court.