

IN THE COURT OF APPEALS OF IOWA

No. 2-216 / 12-0163
Filed March 28, 2012

**IN THE INTEREST OF A.H. and T.H.,
Minor Children,**

**M.Z., Mother,
Appellant.**

Appeal from the Iowa District Court for Polk County, Colin Witt, District Associate Judge.

A mother appeals from the order terminating her parental rights.

AFFIRMED.

Nathaniel A. Tagtow of Pargulski, Hauser & Clarke, P.L.C., Des Moines, for appellant mother.

Victoria Meade, West Des Moines, for father.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, John P. Sarcone, County Attorney, and Faye Ann Jenkins and Corey McClure, Assistant County Attorneys for appellee State.

John Jellineck, Des Moines, for minor children.

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

DOYLE, J.

A mother appeals from the order terminating her parental rights to two of her children. She claims (1) the State failed to prove the grounds for termination by clear and convincing evidence; (2) termination was not in the children's best interests; (3) the juvenile court erred in quashing her subpoena directed to the children; and (4) termination was not necessary because the factors set forth in Iowa Code section 232.116(3)(a)-(c) (2011) applied. We affirm.

I. Background Facts and Proceedings.

This family has a lengthy history with the Iowa Department of Human Services (Department). The mother has a history of substance abuse, mental health issues, and relationships with sex offenders. Her two children at issue here, A.H. born in 1999 and T.H. born in 1997, came to the attention of the Department in 2006 after it was reported the mother's ex-husband had sexually abused them. The child abuse reports were determined to be founded, and the mother was offered services. The children remained in her care.¹

The children again came to the attention of the Department in 2010, after it was reported the mother was abusing substances and living with another sex offender. Her hair stat drug test was positive for methamphetamine, and the mother was uncooperative with the Department. The children were removed from her care and later adjudicated children in need of assistance (CINA). The

¹ There were also founded child abuse reports in 2007 concerning these two children after the Department determined the children's father failed to provide them proper supervision. The father's parental rights were ultimately terminated and are not at issue in this appeal.

children were ultimately placed in the care of parental relatives, where they have since remained.

The mother was again offered services, but she minimally participated. She completed a substance abuse evaluation, which recommended she receive inpatient treatment. Therapy services were arranged for her to begin to address her substance abuse issues. Although the mother entered a few substance abuse treatment programs during the case, she left before completion of the programs or was discharged for failing to follow through.

In July 2011, the mother was charged with forgery. She pled guilty and was sentenced to two years in prison, with the sentence suspended, and she was placed on probation. The mother was to return to an inpatient treatment facility, but she instead moved to another town and did not tell her probation officer, in violation of her probation agreement. Due to transportation and travel distance issues as a result of her move, the mother's visitation with the children was decreased. She attempted to keep in contact with the children through phone calls and text messages; A.H. would sometimes engage in conversation with the mother, but T.H. almost always refused. The mother's last supervised visit with A.H. occurred on September 2, 2011. T.H.'s last visit with the mother was sometime before that date, because he did not want to see his mother.

On September 5, 2011, the mother was to enter and complete a program at the Women's Correctional Facility as part of her probation. The mother failed to report to the facility, and a warrant was issued for her arrest. In an effort to avoid being arrested on her outstanding warrant, the mother contacted the Department's caseworker minimally, claiming she only had the ability to text

message. The mother requested phone contact with the children, but the caseworker advised the mother she was only willing to grant the mother actual in-person visitation, which the mother did not accept. The mother had no further contact with the service provider or the children after her last visit.

In December 2011, the State filed a petition to terminate the mother's parental rights, and a hearing date was set. Prior to the termination hearing, the mother served the children's attorney with a subpoena to compel the children's appearance at the hearing. At the January 2012 hearing, the children appeared pursuant to the subpoena. The mother did not attend. The State, the children's guardian ad litem (GAL), and the children's foster mother advised the juvenile court the children did not want to testify and testifying was not in their best interests. The State and the GAL requested the mother's subpoenas be quashed.

The mother's counsel stated he did not know of the mother's whereabouts, but had recently talked with her on the phone. He stated she did not want her parental rights terminated and she wanted the children to testify as to whether they wanted her parental rights terminated. The mother's counsel agreed to first examine the Department's caseworker to determine if the children had discussed the issue with her, and the children were then excused to sit outside the courtroom.

The Department's caseworker testified the children knew what was going on in the proceeding and they were conflicted by it. She testified the children wanted to remain with their paternal relatives, but she did not know if the children would actually declare they wanted their mother's parental rights terminated.

She testified T.H. believed his father may return for him at some point, but was beginning to come to terms with his father's lack of participation. She did not make any statement about T.H.'s beliefs concerning the mother, but she acknowledged T.H.'s bond with the mother was weaker than A.H.'s bond with the mother. She testified T.H. was ultimately okay with the termination of his parents' parental rights, explaining: "He wants to stay where he's at. He sees himself having a future, and I don't think he wants that to change by any means." The caseworker testified A.H. was a people pleaser, and she believed having to testify would be very hard for her and A.H. would not want to hurt her mother.

The Department's caseworker also testified termination was in the children's best interests, as opposed to a long-term guardianship with the paternal relatives, explaining the children needed permanency and needed to know, "from this point on, they can live their lives, they can continue to progress, and make decisions for themselves." She did not believe reunification with the mother was possible in the future, given the mother's failure to complete substance abuse treatment. The caseworker reported that despite the offer of services to the mother, "the only the thing she's done is visit her kids, and that ended in September."

No evidence was presented on behalf of the mother that conflicted with the caseworker's testimony and reports. The juvenile court took the motion to quash under advisement. The court then advised it would appoint the children a separate attorney and proceed with their testimony at another time if it determined they were required by law to testify; otherwise it would rule upon the State's termination petition.

On January 10, 2012, the juvenile court entered its order finding the children were not required to testify under the facts of the case and terminating the mother's parental rights under Iowa Code section 232.116(1) paragraphs (e) and (f) (2011). The mother now appeals. We review the termination decision de novo. See *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010).

II. Discussion.

A. Grounds for Termination.

We need only find termination proper under one ground to affirm. *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995). Termination is appropriate under section 232.116(1)(f) where:

- (1) The child is four years of age or older.
- (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 twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.
- (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

Here, the mother does not dispute the State proved the first three elements under this section. Instead, she contends the State failed to prove the children could not be returned to her care. We disagree.

Here, the children had been removed from their mother's care since October 2010. The mother did not complete substance abuse treatment. She gained no insight into how her relationships with sex offenders hurt her children. She put herself before her children by choosing to "lay low" to avoid being arrested and have no contact with her children. Under the circumstances

presented, it is clear the children could not be safely returned to the mother's care at the time of the hearing. We therefore agree the State proved by clear and convincing evidence that grounds for termination of the mother's parental rights exist under section 232.116(1)(f).

B. Best Interests.

If a statutory ground for termination is determined to exist, the court may terminate a parent's parental rights. *P.L.*, 788 N.W.2d at 37. In considering whether to terminate, the court must then apply the best-interest framework established in section 232.116(2). *Id.* The legislature highlighted as primary considerations: the children's safety, the best placement for furthering the long-term nurturing and growth of the children, and the physical, mental, and emotional condition and needs of the children. *Id.*; see also Iowa Code § 232.116(2).

Taking these factors into account, we agree with the juvenile court that the child's best interests require termination of the mother's parental rights.

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 record reveals the children cannot be returned to the mother's care at this time, and the children should not be forced to wait for permanency. Children are not equipped with pause buttons. "The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987). "At some point, the

rights and needs of the child rise above the rights and needs of the parents.” *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 39–40. The children should not be forced to endlessly suffer the parentless limbo of foster care. *In re J.P.*, 499 N.W.2d 334, 339 (Iowa Ct. App. 1993).

The children are in need of protection and permanency. By all accounts, the children are bonded with their paternal relatives and doing very well in their home. The children expressly stated they wanted to remain with their relatives, and the relatives wish to adopt them. Given the mother’s minimal participation in the case and her failure to address serious concerns regarding her ability to safely parent the children, we agree with the juvenile court that termination of the mother’s parental rights was in the children’s best interests.

C. Motion to Quash.

The court has wide discretion in ruling on a motion to quash. See *Morris v. Morris*, 383 N.W.2d 527, 529 (Iowa 1986). An abuse of discretion occurs when the trial court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. See *In re Estate of Rutter*, 633 N.W.2d 740, 745 (Iowa 2001). A ground or reason is untenable when it is not supported by substantial evidence or is based on an erroneous application of the law. *Id.*

The juvenile court found the mother’s subpoena to compel the children’s testimony should be quashed, explaining:

It is clear on this record that the children did not want to testify. The court’s observations of the children’s demeanor and mannerisms in the courtroom for the brief time they were physically in the

courtroom matches up with these representations as well. It is clear that . . . [A.H.] . . . was likely to experience mental and emotional anguish and possibly an enduring trauma if forced to testify.

These children are not being called as fact witnesses to testify about a particular event in controversy. These children are twelve and fourteen years old with long-standing up and down relationships with their biological mother. . . . The mother wants to keep doing what she is doing in living her life as an outlaw and still be able to pull the strings on these children's emotions and minds. The undersigned is not going to allow this to occur.

Upon our review, we find no abuse of discretion in quashing the subpoena. The juvenile court's reasoning is sound and supported by substantial evidence. See *Rutter*, 633 N.W.2d at 745. We therefore affirm upon this issue.

D. Section 232.116(3) Factors.

Finally, we consider the mother's argument that the enumerated factors in section 232.116(3)(a)-(c) should serve to preclude termination of her parental rights. Even though a court may find termination appropriate under Iowa Code section 232.116(2), a court need not terminate the relationship between parent and child if any of the enumerated circumstances contained in section 232.116(3) exist. *P.L.*, 778 N.W.2d at 37. Section 232.116(3)(a) states termination is not necessary if the court finds a relative has legal custody of the child. Section 232.116(3)(b) provides termination need not occur if "the child is over ten years of age and objects to the termination." Or, if 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," termination is not necessary pursuant to section 232.116(3)(c). However, section 232.116(3) has been interpreted to be permissive, not mandatory. *P.L.*, 778 N.W.2d at 39. The juvenile court has discretion, based on the unique circumstances of each case

and the best interests of the children, whether to apply the factor to save the parent-child relationship. *Id.* at 39-40.

The juvenile court declined to invoke section 232.116(3), though the children were in the custody of their paternal relatives. We agree with the court's decision and find no abuse of discretion. The children have been out of the mother's care for over a year. There is no evidence in the record to support the mother's assertions that the children object to termination of her parental rights. Nor is there clear and convincing evidence she and children have a very close relationship, and as a result, termination of her rights would be detrimental to them. At the time of the termination hearing, the mother had not had contact with her children for three months. Considering the children's long-term and immediate best interests, we agree with the juvenile court that termination will provide these children with the safety, security, and permanency they deserve. See *P.L.*, 778 N.W.2d at 41. We accordingly affirm the juvenile court order terminating the mother's parental rights to A.H. and T.H.

AFFIRMED.