

IN THE COURT OF APPEALS OF IOWA

No. 2-319 / 12-0411
Filed June 13, 2012

**IN THE INTEREST OF S.K.,
Minor Child,**

Z.K., Father,
Appellant,

A.S., Mother,
Appellant.

Appeal from the Iowa District Court for Johnson County, Deborah Farmer Minot, District Associate Judge.

A mother and father separately appeal a juvenile court order terminating their parental rights to a child. **AFFIRMED ON BOTH APPEALS.**

Maurine A. Braddock of Honohan Epley, Braddock & Brenneman, Iowa City, for appellant-father.

Ellen R. Ramsey-Kacena, Cedar Rapids, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Janet M. Lyness, County Attorney, and Emily Voss, Assistant County Attorney, for appellee.

Anthony A. Haughton of Linn County Advocate, Inc., Cedar Rapids, attorney and guardian ad litem for minor child.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

MULLINS, J.

The mother and father of S.K. (born January 2010) separately appeal a juvenile court order terminating their parental rights under Iowa Code section 232.116(1)(h) (2011). Both parents argue the State failed to prove the statutory ground by clear and convincing evidence. The mother further argues that termination was not in the child's best interests, while the father argues the juvenile court erred in denying his motion to dismiss for the State and guardian ad litem's failure to answer discovery. We affirm.

I. Background Facts and Proceedings.

Both the mother and the father have significant criminal histories and prior involvement with the Iowa Department of Human Services (DHS). On March 12, 2007, another one of the mother's children, K.J., was removed from her care after marijuana was found in her home. The mother admitted that she had used cocaine recently and had smoked marijuana in the presence of the child. Upon removal, a hair stat test on K.J. was positive for cocaine, cocaine metabolite, and marijuana. The mother was charged with child endangerment and possession of marijuana. She was eventually granted a deferred judgment and was placed on probation for two years. In addition, a child protective assessment was determined to be founded for presence of illegal drugs in a child's body and denial of critical care: failure to provide proper supervision. The mother was placed on the child abuse registry. As a result of this incident, K.J. was adjudicated a child in need of assistance (CINA) in March 2007 under Iowa Code sections 232.2(6)(c)(2) and (n). The mother was provided numerous services

including a substance abuse evaluation and outpatient treatment. The mother was able to make adequate progress, and K.J. was returned to her custody. The CINA case was dismissed on May 7, 2008.

On July 17, 2008, police removed two-year-old K.J. from the mother's care again after he was found wandering outside in the 400 block of Van Buren Street in Iowa City wearing only a diaper. This was the second day in a row police had been called because K.J. was in the street unsupervised. The police removed K.J. from parental care. DHS subsequently instituted another child protective assessment. The assessment revealed that although the mother had her own apartment, she often stayed with the father at his Van Buren Street apartment. The mother stated that on July 16, she fed K.J. lunch and they fell asleep afterwards. When she woke up, she discovered K.J. was gone. She stated she was frantic and looked everywhere for him before one of the father's roommates called the police. By that time, the police had already found K.J. DHS was called, but after completing a safety plan, K.J. was allowed to return to the mother's care. The very next day, the father was watching K.J. He stated that he took a shower, but when he got out, K.J. was gone. The father did not call the police right away, and when the police came to the house, they noted he smelled of marijuana. Upon removal of the child, the mother tested positive for marijuana and cocaine. The child protective assessment was determined to be founded on the mother and the father for denial of critical care: failure to provide proper supervision. K.J. was stipulated to being a CINA under Iowa Code sections 232.2(6)(b) and (c)(2) in October 2008. The mother was again provided

services, and K.J. was transitioned back to her care. On June 9, 2010, this CINA case was also dismissed.

On October 16, 2008, the father was arrested and charged with possession with intent to deliver cocaine and failure to affix a drug tax stamp after eighteen individually packaged bags of cocaine totaling over 7 grams were found on his person. The father admitted to police that he intended to sell the drugs so he could party for free. Since the father is not a citizen of the United States, he was at risk of deportation if convicted of a drug offense. The prosecutor eventually allowed the father to plead guilty to the drug tax stamp violation in order to avoid the detrimental effects with immigration. On July 2, 2010, the father received a deferred judgment, and was placed on probation for two years.

The present case was started on October 26, 2010, when S.K. was about ten months old. On that day, officers conducted a probation home check on the father because he had tested positive for cocaine the previous week. When the officers arrived, the father was standing outside the building. A search of the father revealed a small bag of white powder which was identified as K2. When the officers entered the home, the mother was found in the basement with two other females. The officers noted a strong odor of freshly sprayed air freshener. Under the couch where the mother was sitting, the officers discovered a still warm marijuana pipe, which she admitted was hers. Marijuana and a large amount of cash were also found in the mother's purse. While searching upstairs, the officers found cocaine in a dresser next to the crib where S.K. was sleeping.

In the apartment, the officers discovered a total of 50.5 grams of marijuana, 6.8 grams of cocaine, 1.8 grams of K2, drug paraphernalia, and a large amount of cash. Both parents admitted to dealing drugs. The officers removed the children from the home, and contacted DHS. DHS completed another child protective assessment and determined it was founded on both parents for denial of critical care: failure to provide proper supervision. As a result of this incident, both parents were arrested and charged with possession with intent to deliver marijuana, possession with intent to deliver cocaine, maintaining a drug house, and child endangerment without injury.

On October 29, 2010, the State filed a petition alleging K.J. and S.K. to be CINA. Shortly thereafter, K.J. was placed with his biological father. By the agreement of the parties, the juvenile court granted concurrent jurisdiction with the district court so K.J.'s father could proceed with an application to modify custody. The mother later consented to modify primary physical care of K.J. to his father, which the district court approved. K.J. is not at issue in this appeal.

By January 2011, the mother and the father had stipulated, in writing, to S.K. being adjudicated CINA. On January 6, 2011, the juvenile court found S.K. to be a CINA under Iowa Code sections 232.2(6)(c)(2) and (n) (2011). After adjudication, S.K. was placed with his paternal grandmother, where he has remained.

Over the next several months, the parents participated in several services. Both parents participated in substance abuse evaluations, successfully completed substance abuse treatment, and provided clean drug tests. Both

obtained and maintained employment, and both participated in visitation. However, because their criminal charges were not resolved, DHS was unwilling to expand visitation. On June 22, 2011, the State filed a petition seeking termination of the parental rights of the mother and the father to S.K.

On June 30, 2011, the mother reached a plea agreement with the State. The State dismissed the remaining charges upon the mother pleading guilty to possession of marijuana with intent to deliver, a Class "D" felony, and child endangerment, an aggravated misdemeanor. The mother received a five-year suspended sentence, with three years of probation, and placement on the Intermediate Sanctions Continuum on the possession charge as well as a concurrent two-year suspended sentence on the child endangerment charge.

On September 22, 2011, the father also reached a plea agreement with the State. The State dismissed the remaining charges upon the father pleading guilty to possession of cocaine with intent to deliver, a Class "C" felony, and child endangerment, an aggravated misdemeanor. The father received a ten-year suspended sentence, with three years of probation, and placement on the Intermediate Sanctions Continuum on the possession charge as well as a concurrent two-year suspended sentence on the child endangerment charge. The father also stipulated that he violated the terms of his probation, and had his deferred judgment revoked. The father received a separate five-year suspended sentence and was order to serve a concurrent three-year term of probation.

On September 12, 13, 19, and October 24, 2011, hearings were held on the State's termination petition. On November 1, 2011, the juvenile court denied

the State's petition for termination in an extremely detailed and well-written opinion. The juvenile court determined that the State showed clear and convincing evidence proving termination was appropriate for the mother under Iowa Code section 232.116(1)(h), and the father under sections 232.116(1)(h) and (l). However, the juvenile court nonetheless concluded that it was not in S.K.'s best interests to terminate the parental rights of both parents at this time.

In this regard, the juvenile court stated:

The main concerns at this time are whether [the mother] can maintain sobriety and stability and whether she can develop the same level of insight and discipline regarding her friends and male companions. At this point, there are both troubling and hopeful signs. [The mother] is still at high risk to enter into another relationship that would be unhealthy for her and the children; she needs a lot of assistance in this area of her life, as well as professional counseling to help her work through some of the trauma she has experienced. The Court firmly believes that children should be permanently removed from their parents only when there appears to be little hope of reunification and lasting change. This is not the case with [the mother] right now. For these reasons, it is not in [S.K.'s] best interest to terminate [the mother's] parental rights at this time.

The Court is not so optimistic when it comes to [the father]. Although there is no doubt that [the father] is a loving father with good parenting skills, there are many serious barriers that [the father] needs to breach to be a suitable custodial parent. There is no reason to believe he can accomplish this in the reasonably foreseeable future. His choice to so quickly jump into a live-in relationship with a woman who had lost custody of her own child raises concerns about whether he is willing or able to make safe decisions about [S.K.]. Then there is the issue of addiction which, as discussed above, he is neither acknowledging nor addressing, and which poses a clear and present danger to any child in his care. Next is the issue of his criminal cases. Having resolved them and been granted probation, they are now on appeal and, therefore, not resolved. [The father's] immigration status is also a factor. The risk of deportation has been a primary issue since before [S.K.] was born. It was a prominent issue in his first criminal case, which took nearly two years to resolve. He has had an immigration attorney working diligently on his behalf since 2008. It

was thoroughly discussed during this trial on September 12, 13, and 19. Despite all this, [the father] has simply refused to deal with the possibility that he can be removed or deported. In June 2010, [the father] told DCS: "After realizing all the punishments and all the consequences, such as deportation and losing the rights to visit my son, I don't ever want to go back to it again." Just four months later he was again arrested for dealing cocaine. His decision to use and deal drugs while on probation, while he was seeking a waiver in his immigration case, after seeing the impact of a removal and juvenile court involvement on [the mother] and [K.J.], and while the termination trial was pending, raises grave doubts about his judgment and suitability as a parent. He argues that any parent can suddenly become unavailable due to accident or illness. This is true. But if [the father] becomes unavailable to [S.K.] due to imprisonment or deportation, it will not be because he was struck by tragedy, but because he engaged in criminal behavior with disregard for his own future or the future of his son.

Nevertheless, the Court declines to enter a termination order regarding [the father] at this time. The child in need of assistance case will remain open. DHS will continue to work with [the mother] toward the goal of reunification. [The father] is capable of supporting [S.K.] financially and should do so. He is still young and he is intelligent. He had the benefit of a good childhood and he has strong family support. In addition, his relationship with [S.K.] should be continued because, by all reports, it is good for [S.K.]. If [the mother] is able to regain custody of [S.K.] and if [the father] is able to deal with the many issues that confront him, there is hope that he can become a safe and suitable non-custodial parent at some point in the future.

Accordingly, the juvenile court changed the permanency goal to reunification with the mother, and granted an additional six months to work towards reunification.

On November 28, 2011, a family team meeting was held. The mother arrived to the meeting a little late, and was observed driving someone's car. When she exited the vehicle, someone in the backseat moved to the front and drove the car away. When confronted about her license being suspended, and that driving was a violation of her probation, the mother admitted that she knew she should not be driving, but stated she was in a hurry. During the meeting, the

mother was also confronted about her recently becoming engaged to a man residing in a local halfway house for sexual exploitation of a minor and failure to register on the sex offender registry. The mother denied the relationship.

On December 1, 2011, the mother's probation officer arranged a meeting between herself, the mother, the sex offender, and DHS. At this meeting, the mother admitted that she and the sex offender were engaged, and had been in a relationship for three months. This new admission showed that the mother's relationship predated her testimony to the juvenile court at the termination hearing where she testified to only considering but then rejecting the thought of a relationship with the sex offender.

The following day, DHS submitted a letter to the juvenile court alleging a relapse in behavior by the mother. The letter further alleged that the father knew of the relationship, but did nothing. The juvenile court suspended all visits between the parents and S.K. pending further hearings.

On December 6, 2011, the guardian ad litem for S.K. filed a petition seeking termination of the mother and the father's parental rights. Two days later, the father filed an "application for order requiring shortened discovery," requesting the juvenile court require the parties respond to discovery at least five days before the termination trial. Along with the motion, the father filed a notice stating he served upon the county attorney and guardian ad litem nine interrogatories and a request for admissions. The request for admissions sought for the county attorney and guardian ad litem to admit that they did not have any

witnesses or tangible evidence showing the father knew of the mother's relationship with the sex offender.

On December 12, 2011, the juvenile court denied the father's motion for shorter discovery deadlines stating: "The Court does not authorize formal discovery in light of the already lengthy record developed and the limited times before the Court."

On January 10, 2012, the mother admitted that she violated the terms of her probation. However, the district court did not revoke her probation; instead, found her in contempt of court. The mother was sentenced to twenty days in jail with credit for sixteen days already served. Due to her incarceration, the mother lost her employment.

On February 14, 2012, a hearing was held on the second petition to terminate parental rights. At the outset of the hearing, the father, orally and in writing, moved to dismiss the proceedings as a sanction for the county attorney and guardian ad litem's failure to object or respond to his interrogatories and request for admissions. The juvenile court denied the motion.

On February 23, 2012, the juvenile court terminated both parents' parental rights under Iowa Code section 232.116(1)(h). The mother and the father separately appeal.

Standard of Review.

We review proceedings to terminate parental rights de novo.¹ *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011). We give weight to the juvenile court's factual findings, especially when considering the credibility of witnesses, but we are not bound by them. *Id.*

III. Statutory Grounds.

Both parents assert the State failed to prove the statutory ground. The only element the parents challenge is whether the State proved by clear and convincing evidence that S.K. cannot presently be returned to their care. See Iowa Code § 232.116(1)(h)(4). In addressing this issue, the juvenile court stated:

The Court finds that the evidence is compelling that [S.K.] cannot be returned home without continuing to be a child in need of assistance.

The evidence of [the mother's] past poor performance over a period of several years, coupled with the concerns that developed almost immediately after the first termination trial about her relationship with a man convicted twice of sex offenses against minors, her calculated and deliberate lies, and her utter disregard for [S.K.'s] future and well-being, is overwhelming. It establishes, beyond any doubt, that if [S.K.] were returned to the custody of [the mother] today, he would be in imminent danger. Specifically, he would be at high risk from exposure to adults who engage in drug abuse and criminal behavior; he would be at high risk of receiving inadequate supervision; and he would be at risk for physical, medical, and emotional neglect as well as sexual abuse. In the judgment of the Court, only 24-hour-per-day supervision and/or surveillance of [the mother] would ensure his safety. In many ways, [the mother's] situation has deteriorated over the past four months. She lost a full-time job with benefits after she violated her probation. Her current job through a temp agency is less than full time; therefore, her financial status is less secure. This could put

¹ We only consider the record that was considered by the trial court. *In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005). Accordingly, we dispose of the pending Motion to Strike by striking so much of the guardian ad litem's response to mother's petition on appeal as alleges facts that are not in the record on appeal. *Id.*

her housing at risk. Further, since she has already found to be in contempt of court for probation violations, future violations may be treated more harshly. She still faces a lengthy prison sentence or placement in a community correctional facility. The services she is participating in are identical to the services she has had for years. . . .

. . . .
[The father's] situation has not substantially changed since the first termination trial. It is significant that he has not tested positive for illegal substances nor committed a material violation of his probation since September 2011. Still, his future remains just as uncertain. He is still on felony probation, facing a possible 10-year prison sentence. Even if his appeal is successful, it would only result in his plea being vacated; he would still face trial on the same charges. His immigration status remains in jeopardy. He remains in America on a work permit which is valid until July 2012, subject to renewal. ICE initiated detention and removal proceedings which, the Court was advised, are suspended only due to the pending appeal. None of these problems are going to disappear. Further, at the time of the first trial, [the father] was hoping for a permanent position at Quality Associates. That did not happen. He is now working for another temp agency. Other than [the father's] reports to providers, there was no testimony that he has ended his relationship with [his girlfriend], whom the Court previously determined posed a risk to [S.K.]. Finally, there was no testimony that his new apartment is safe or suitable for [S.K.] or that he can meet [S.K.'s] needs for food, shelter, medical care, and other basic necessities. Thus, [S.K.] cannot be returned to his father's care without continuing to be in need of assistance. Specifically, he would be at risk of his basic needs not being met; he would be at risk from exposure to adults who engage in drug abuse and criminal behavior; he would be at risk of receiving inadequate supervision; and he would be at risk for physical, medical, and emotional neglect.

We agree with the juvenile court's detailed findings and adopt them as our own. Accordingly, we find the State met its burden with regard to both parents.

IV. Best Interests.

The mother also challenges whether the State proved termination was in the best interests of S.K. In determining a child's best interests, 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.” *In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010) (quoting Iowa Code § 232.116(2)). “Insight for this determination 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.” *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

S.K. has been removed from parental care for nearly sixteen months. Despite numerous services and being granted an additional six months to work towards reunification, the mother regressed. She violated her probation and was incarcerated, lost her employment, and became engaged to a sex offender, which presents a clear safety risk to S.K. Although the law demands a full measure of patience with troubled parents, “[t]he 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). In analyzing the statutory factors, we agree with the juvenile court that termination was in S.K.’s best interests.

V. Motion to Dismiss.

The father further asserts that the juvenile court erred by denying his motion to dismiss based on the State and guardian ad litem’s failure to respond to his discovery requests.

Iowa Rule of Juvenile Procedure 8.1 prescribes the scope of discovery in juvenile proceedings as follows:

In order to provide adequate information for informed decision making and to expedite trials, minimize surprise, afford opportunity for effective cross-examination and meet the requirements of due process, discovery prior to trial and other judicial hearings should be as full and free as possible consistent with protection of persons and effectuation of the goals of the juvenile justice system.

In CINA and termination proceedings, Rule 8.3 specifies, “[a]lthough informal discovery methods are preferred, Iowa R. Civ. P. divisions V and VII, governing discovery, depositions and perpetuation of testimony, shall apply to proceedings under Iowa Code chapter 232, divisions III and IV, where not otherwise inconsistent with these rules or applicable statutes.” Consistent with this rule, “[o]ur case law had long held that juvenile proceedings should be conducted in an informal manner.” *In re A.S.*, 743 N.W.2d 865, 868 (Iowa 2007).

The guardian ad litem claims he had multiple discussions with the father’s counsel on his discovery requests prior to trial. He states he informed the father’s counsel that he had no further discovery to provide outside the information already known to the parties. Specifically, the DHS letter to the court which set forth the mother’s statement that she believed the father knew of the relationship as well as the circumstantial evidence that supported a finding that he knew of the relationship; namely, the father worked for the same company as the mother and the sex offender, the father brought the sex offender to the court’s attention during the first termination trial, the mother’s statement that she posted her engagement on Facebook to make the father jealous, and that the father had a key to the mother’s apartment and was entering the home from time

to time. Seeing that this information was already available to the father and he was able to cross-examine the mother directly concerning this information, we find the juvenile court did not abuse its discretion in its ruling.

However, even if we were to find the juvenile court abused its discretion when it permitted the State and guardian ad litem to present this evidence despite failing to respond to discovery requests, reversal is not required unless prejudice resulted. *Id.* at 869; *accord In re C.L.C.*, 798 N.W.2d 329, 341 (Iowa Ct. App. 2011). Given the substantial other evidence supporting the statutory grounds, we find the father did not suffer any prejudice from this allegedly erroneous evidence.

VI. Conclusion.

For the foregoing reasons, we affirm the juvenile court's judgment terminating the mother and the father's parental rights to S.K.

AFFIRMED.