

**IN THE COURT OF APPEALS OF IOWA**

No. 2-756 / 12-1238  
Filed September 6, 2012

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

**B.M., Mother,**  
Appellant.

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Appeal from the Iowa District Court for Scott County, Christine Dalton,  
District Associate Judge.

A mother appeals the order terminating her parental rights. **AFFIRMED.**

Jack E. Dusthimer, Davenport, for appellant mother.

Thomas J. Miller, Attorney General, Katherine S. Miller-Todd, Assistant  
Attorney General, and Julie A. Walton, Trial Counsel, Assistant County Attorney,  
for appellee State.

Patricia Zamora of Zamora, Taylor, Woods, and Frederick, Davenport, for  
appellee father.

Joel Walker, Davenport, attorney and guardian ad litem for minor child.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

**POTTERFIELD, J.**

B.M. appeals the termination of her parental rights, asserting the State presented no clear and convincing evidence that it is in her son, K.M.'s best interest to terminate his relationship with B.M. She also contends the court erred in terminating her rights as she made real and steady progress in improving her parenting skills. B.M. also contests the admissibility of hearsay testimony during the termination proceedings. Finally, she appeals the denial of her request for substitute counsel who could best represent her. We affirm, finding clear and convincing evidence exists that K.M. cannot be returned to B.M.'s custody at this time and termination is in his best interests, real and steady efforts were not made by B.M., and no error was made in the admission of hearsay evidence. We decline to review the substitution of counsel issue.

**I. Statement of Facts**

K.M. was born in May of 2010. His father was not actively involved in his life and voluntarily consented to termination of his parental rights. K.M.'s mother, B.M. has previously successfully raised two children to adulthood.

B.M. and K.M. first came to the attention of the Department of Human Services (DHS) in May of 2010, shortly after the birth of K.M., when medical professionals at the hospital became concerned by B.M.'s behavior and questioned her ability to care for K.M. Her interactions with hospital staff were combative, oppositional, and over-reactive about K.M.'s health. Police were called to the hospital after B.M. made death threats to the nurses and called an ambulance from a local Walgreens for eight-day-old K.M. after he appeared

lethargic and had a broken blood vessel in his eye. The hospital admitted the child for “impaired parenting skills.”

After this report, B.M. met with a DHS worker. She stated the hospital staff did not know how to do their job, that her child had abnormal problems with gas, colic, and an eye infection, and that she did not have any mental health diagnosis. B.M. was observed to provide an adequate home, attire, and other provisions for K.M. at the time. She signed releases for communication with several individuals including the hospital, a doctor, and her adult child, and agreed to a remedial services referral. At this appointment she reported diagnoses of post-traumatic stress disorder and depression, and that she was once on medication but had ceased receiving it due to a lack of doctor’s appointments. B.M. continued to appear to interact with K.M. appropriately through subsequent appointments, though her anxiety regarding his health and welfare continued.

Another report regarding B.M. was made to DHS after she fired K.M.’s physician, continued to visit the emergency room with K.M., and displayed erratic and verbally out of control behavior. Initially DHS workers decided not to pursue child-in-need-of-assistance proceedings (CINA), because, notwithstanding her outbursts, B.M. appeared to adequately provide for K.M.

In August 2010, B.M. was evicted from her apartment. She withheld rent after her landlord used wasp spray, which she believed was poisonous. B.M. then moved with K.M. to a local motel room where the space was tight between the baby, a large dog, and their belongings—some of which B.M. believed were still covered in poisonous wasp spray. In November 2010, B.M. met with DHS

staff at the motel and reported involvement in some services, though she was not receiving psychiatric treatment at the time. At this time, she agreed to work on stabilizing and effectively managing her mental health. Also in November of 2010, police were called to a home that was caring for K.M. temporarily while B.M. had oral surgery. The surgery was delayed, and the home would not release K.M. into B.M.'s custody.

In December 2010, those working with B.M. from DHS recommended K.M. be adjudicated a CINA. This was based in large part on B.M.'s continued inability to find more appropriate housing, refusal to sign psychiatric records releases, as well as some continued erratic behavior, refusal of contact with DHS workers, unwillingness to participate in mental health services, and allegations of incompetency regarding doctors and K.M. It was also noted by workers that B.M. had taken out a number of restraining orders against ex-boyfriends. K.M. was adjudicated a CINA in March of 2011. The court noted how difficult B.M. was to work with, describing her as "suspicious, paranoid, defensive, angry, and hostile."

Just before the adjudicatory hearing, B.M. moved with K.M. into more stable housing. DHS was concerned about B.M.'s choice in living arrangements, however, due to its proximity to K.M.'s biological father and B.M.'s willingness to allow unlimited visitation in spite of her allegations the biological father was alcoholic and abusive.

In April 2011, B.M. began participation in a psychological profile evaluation. She did not complete the evaluation but began therapy. A June 2011 psychological report indicated she demonstrated a great deal of performance anxiety and concern about minor details, was somewhat impulsive,

and very preoccupied with an intense need for happiness. The doctor also noted a “strong suggestion, however, that [B.M.] may have serious mental health problems. Clearly she is suspected of being evasive and manipulative.” From the end of June until August 2011 B.M. did not allow contact from DHS. In August 2011, B.M. again believed her landlord was poisoning her, this time through fumes from a remodeling project. B.M. and K.M. went to the hospital for treatment and no problem was found. Around that time an anonymous call was made to DHS that B.M. was threatening suicide and to kill B.M.’s father in K.M.’s presence. B.M. was also observed with marks suggesting she was in a new intimate relationship, which concerned DHS workers in light of her past relationships.

In September B.M. was once again evicted from her apartment for nonpayment of rent and moved into a hotel. She also fought with workers regarding meeting times. A removal hearing was held, and K.M. was removed from B.M.’s care on September 16, 2011. The removal order noted B.M.’s housing instability, refusal to work with DHS, and living situation.

After the removal, B.M. was initially resistant to DHS’s efforts to have her sign releases and schedule visits at particular times. During her visits with K.M., B.M. exhibited normal parenting abilities but would comment on bumps, bruises, digestive difficulties, and other issues with her son. At an October hearing, B.M. was concerned with the foster parent’s failure to provide K.M. with allergy medication. B.M. began to take pictures during visitation of K.M.’s hives and injuries.

In October, B.M. was able to obtain a new apartment under her boyfriend's name. During this time, an incident occurred in K.M.'s foster home in which K.M. drank Lysol and was sent to the hospital. This upset B.M. and she took more photos of K.M. during the visits and questioned the safety of the DHS's car seat in which K.M. was transported. K.M. was then transferred to a different foster home. B.M. began taking medication for anxiety during this time.

In November, during one visit, B.M. threw a baby gate that was not working properly after she was told she would not have K.M. during Thanksgiving. Towards the end of November, B.M. began seeing a psychiatrist and was provided with more comprehensive mental health medication. She also continued her relationship with a man who was still married, lived with another woman, and was charged with domestic abuse.

In December, B.M. agreed to sign the remaining releases so long as she received a copy of the releases. Apparently B.M. thought the releases she signed for Court Appointed Special Advocate (CASA) were sufficient to cover what the DHS needed. Visitation through the end of December 2011 continued without incident, though at one point B.M. started crying because she thought her psychologist had been doing a psychiatric evaluation but he was not. B.M. spent one visitation day taking K.M. to a doctor's appointment where he was given a flu shot and antibiotics for an ear infection. Approximately a week later, B.M. became very angry when K.M.'s fever did not appear to be resolving. She accused the foster care system of neglecting her son's medical needs and stated she wanted K.M. to see a doctor that day. Ultimately, B.M. called a police officer

to make a report regarding what she perceived as K.M.'s history of abuse in foster families.

After this incident, all further meetings between K.M. and B.M. were held at the local Family Resources center. During one visit, B.M. noticed a cockroach crawling in a pile of wooden blocks K.M. was playing with. This caused B.M. to curse and use sanitizing spray on the carpet and toys. In a subsequent visit, K.M. plugged in the vacuum cleaner and unplugged it again, and B.M. did not seem to notice. B.M. also accompanied K.M. at a doctor's appointment, where she became upset about a DHS worker not informing her immediately about a rash on K.M. and his treatment for it at an urgent care facility. During this time, B.M. was engaged in bi-weekly therapy sessions, weekly ongoing mental evaluations, and psychological medication management. A letter from B.M.'s psychologist to the CASA dated January 11, 2012, stated B.M. attended her appointments on a regular basis; that she began prior to K.M.'s foster placement; that her learning disabilities in part can cause her to misunderstand, become frustrated, and upset. However, though her stress levels increased by K.M.'s placement in foster care, she continued to make progress. The psychologist found her long-term prognosis to be positive and her level of functioning at that time to be an improvement since beginning sessions.

The court noted in its permanency order,

There is no doubt in the court's mind that [B.M.] loves her son. Unfortunately her apparent mental health disorders stand in the way of her regaining custody at this time. She simply refuses to comply with the court ordered services. She obsesses over her child's physical wellbeing. . . As she has refused to complete a parenting assessment, the Court does not have an objective evaluation of her skill level. Subjective evidence from observations

made by staff point to [B.M.] having good parenting skills and knowledge; interrupted by explosions and excessive anxiety.

Around the time of the permanency hearing, B.M. began to attend regularly at a group therapy class, and parenting class, and changed to more frequent sessions with her therapist to manage her borderline personality disorder and depression. She continued these services through the termination of parental rights hearing in April.

Between the permanency and termination hearings, DHS workers grew concerned with B.M. giving K.M. either Tylenol or ibuprofen at every visit. DHS workers were concerned with her obsession with her son's illnesses, whether cutting teeth or a cold, and worried that she may become obsessed with a subject and forget K.M. is with her. Further, ongoing concerns existed at the termination hearing with B.M.'s relationship with a man who is in other relationships and was previously charged with domestic abuse. K.M.'s third foster family since removal expressed willingness to adopt and appeared to provide an adequate home.

In its decision, the juvenile court noted,

[B.M.]'s illness is an insurmountable barrier. . . . She attended her therapy appointments, she attended visitation, she demonstrates good parenting skills as to physical safety and childhood development. However, her preoccupation with perceived illnesses/injuries causes harm to her child. Her paranoid and combative response to service providers makes it virtually impossible to effect change and at times has raised concerns that she ignores her child's needs when angrily fixated on an issue.

The juvenile court concluded grounds existed for the termination of B.M.'s parental rights under Iowa Code sections 232.116(1)(d), 232.116(1)(h), and 232.116(1)(i) (2011). B.M. appeals.



## II. Standard of Review

We review actions for the termination of parental rights de novo. *In re D.S.*, 806 N.W.2d 458, 465 (Iowa Ct. App. 2011). While we are not bound by the juvenile court's fact-findings, we do give them weight, especially when assessing witness credibility. *Id.* In termination cases, our primary concern is the best interests of the children. *In re A.S.*, 743 N.W.2d 865, 867 (Iowa Ct. App. 2007). "We only need to find grounds to terminate parental rights under one of the sections cited by the district court in order to affirm its ruling." *In re R.K.*, 649 N.W.2d 18, 19 (Iowa Ct. App. 2002). We address the evidence supporting the statutory grounds for termination, although it is not clear whether B.M. challenges the sufficiency of the evidence on any issue except the best interests of her son.

### A. Statutory Grounds for Termination

We will uphold a termination order if clear and convincing evidence supports the grounds for termination under section 232.116(1). *D.S.*, 806 N.W.2d at 465. Evidence is "clear and convincing" where there are "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *Id.* The juvenile court found termination of B.M.'s parental rights was proper under section 232.116(1)(d), (h), and (i). Iowa Code section 232.116(1)(h) provides termination is appropriate where:

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.

K.M. was two years old at the time of the termination proceeding, he had been properly adjudicated a child in need of assistance in March 2011. He was continually removed from his mother's care from September 2011 until the termination hearing date in June 2012.

The district court found clear and convincing evidence that the child could not be returned to the custody of B.M. at the present time. We agree. While in recent months she has worked harder to improve her mental health and has cooperated more fully with evaluation requirements, it does not appear from the termination proceedings that she has overcome her mental health problems, which have led to insecure housing and preoccupation with health issues.

*B. Best interests of the Child*

B.M. contends there was a lack of clear and convincing evidence that it was in K.M.'s best interest to terminate the relationship as there was no medical or mental expert opinion of adjudicatory harm to the child. The best interests of the child are always at the core of our considerations. A.S., 743 N.W.2d at 867. Nothing in the record indicates B.M. will be able to continue to provide stable housing. In the two years since the State became involved with B.M. and K.M., B.M. has moved four times—twice evicted and twice in and out of hotels. Before that, K.M.'s birth father states he met B.M. in a tent by a river while she was homeless. This combined with B.M.'s continued inability, as evidenced during the termination proceeding, to keep her emotions in check in stressful situations shows B.M. cannot provide a stable environment for K.M. at this time. K.M.

cannot be returned home, the basis for his removal still exists. Therefore, we find clear and convincing evidence that termination is in K.M.'s best interests.

### *C. Real and Steady Progress*

B.M. next contends the five-month window between the removal of K.M. and the permanency hearing violated the six-month provision and did not allow her an opportunity to demonstrate real and steady progress, especially in light of her mental illness. “While we have in the past stated that mental disability, standing alone is not a sufficient reason for the termination of the parent-child relationship, it is a contributing factor to the inability to perform the duties of a parent.” *In re T.O.*, 470 N.W.2d 8, 11 (Iowa 1991). In fact, a parent’s mental capacity or condition is a secondary consideration under our termination statute. Iowa Code § 232.116(2)(a).

K.M. was removed from B.M.’s custody in September 2011 and the termination order was entered in June of 2012—a period of over nine months. While B.M. began seeing a therapist in July 2011, her efforts to complete testing and attend multiple mental health classes did not begin until January 2012. The report by B.M.’s therapist in January 2012 showed B.M. was making progress at this time, but her failure to work with the system to regain custody prior to this date does not constitute the kind of real and steady progress necessary to allow K.M. back into her care. *See id.* (finding termination unnecessary where, there was “evidence of real and steady progress by [the parent] in improving her parenting skills in order to provide a good home for her children,” which included psychiatric treatment, therapy, community college courses, several parenting courses, and a marked decrease in argumentative attitude, and acceptance of

others' suggestions). We thus find clear and convincing evidence still exists under 232.116(1)(h) for termination and that termination is in the best interests of the child..

*D. Hearsay Testimony*

B.M. challenges the evidence admitted against her at the hearings as being inadmissible under our hearsay rules. Iowa Code section 232.96 provides for admissibility of certain evidence containing hearsay statements in CINA proceedings. This evidence includes:

A report, study, record, or other writing or an audiotape or videotape recording made by the department of human services, a juvenile court officer, a peace officer or a hospital relating to a child in a proceeding under this division is admissible notwithstanding any objection to hearsay statements contained in it provided it is relevant and material and provided its probative value substantially outweighs the danger of unfair prejudice to the child's parent, guardian, or custodian. The circumstances of the making of the report, study, record or other writing or an audiotape or videotape recording, including the maker's lack of personal knowledge, may be proved to affect its weight.

Iowa Code § 232.96 (2011).

This hearsay exception applies to termination of parental rights proceedings as well. *In re N.N.*, 692 N.W.2d 51 (Iowa Ct. App. 2004). Thus, the evidence relied upon by the district court, including DHS, CASA, and hospital records was all properly admitted.

*E. Request For Counsel*

B.M. finally submits her request for substitute counsel was improperly denied. She cites no authority for this argument and thus we decline to address the issue. Iowa R. App. P. 6.903(2)(g)(3).

**AFFIRMED.**