

IN THE COURT OF APPEALS OF IOWA

No. 3-038 / 12-2080
Filed February 27, 2013

**IN THE INTEREST OF C.P.,
Minor Child,**

A.P., Mother,
Appellant.

Appeal from the Iowa District Court for Linn County, Susan Flaherty,
Associate Juvenile Judge.

A mother appeals from a juvenile court order terminating her parental
rights to a child. **AFFIRMED.**

Amy R. Dollash, Assistant Public Defender, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Amy Licht, Assistant Attorney
General, Jerry Vander Sanden, County Attorney, and Lance J. Hereen, Assistant
County Attorney, for appellee.

Julie Trachta, Cedar Rapids, attorney and guardian ad litem for minor
child.

Considered by Eisenhauer, C.J., Bower, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MILLER, S.J.

Amy is the mother, and Tim the putative father, of C.P., who was born in December 2011 and was ten months of age at the time of an October 2012 termination of parental rights hearing. Amy appeals from a November 2, 2012 juvenile court order terminating her parental rights to C.P. (The order also terminated the parental rights of Tim, and he has not appealed.) We affirm.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS.

This appeal involves only Amy's parental rights to C.P. However, parts of the record concerning a child-in-need-of-assistance (CINA) proceeding involving two other children of Amy's were placed in evidence and made a part of the record in this case, and certain facts in that case are highly relevant to the facts and issues in this case. We therefore first summarize those facts.

Amy is the mother, and Michael the father, of a son born in March 2004. Amy is the mother, and Eric the father, of a daughter born in September 2007. Both children tested positive for marijuana at their births leading to founded child abuse reports with Amy as the person responsible. Following the daughter's birth the two children were adjudicated CINA. Amy participated in recommended services and the CINA proceeding was eventually dismissed in 2009.

Zyriah is the father, and Nicole the mother, of K.S., born in September 2008. Zyriah and Nicole separated in November 2009, with K.S. residing primarily with Nicole. Amy soon thereafter began a relationship with Zyriah. By agreement between Zyriah and Nicole, in February 2010 K.S. began residing with Zyriah. By this time Zyriah was spending substantial time, including

overnights, at Amy's house. K.S. usually accompanied him when he stayed at Amy's.

K.S., then about seventeen months of age, began attending daycare during the first week of March 2010. She was a happy and playful child. On Sunday evening, March 7, 2010, Zyriah began attending Sunday evening financial education programs at a church, leaving K.S. in Amy's care during those programs. On March 8 K.S. arrived at daycare with an injury to her eye and bruises on her forehead and cheek. It appeared that makeup had been placed over her injuries. Later that day K.S. developed a fever. Zyriah took K.S. to a physician the next day, and she was diagnosed as having conjunctivitis and a viral infection. She did not return to daycare that week. On March 12 Zyriah returned K.S. to the physician. She was diagnosed as having an ear infection, and an antibiotic was prescribed.

On Sunday, March 14, Zyriah again attended the evening program, leaving K.S. in Amy's care. On the next morning daycare staff again noted injuries to K.S.'s eye and face. K.S. was withdrawn, no longer playful, and would cry when anyone attempted to clean her face.

Zyriah and K.S. spent the weekend of Saturday and Sunday, March 20 and 21, at Amy's home. K.S. was sleepy, fussy, would not eat, and was lethargic. Zyriah attended his Sunday evening program. After bathing K.S. and putting her to bed, Amy shortly returned to K.S.'s bedroom and saw her having a seizure. K.S. was taken to the hospital, where she was found to have facial bruising and to be unresponsive, with fixed and dilated pupils and retinal

hemorrhaging in both eyes. K.S. was airlifted to the University of Iowa Hospitals and Clinics.

K.S. was found to have a subdural hematoma, and underwent surgery and follow-up medical treatment. She remained in a coma and died on March 28, 2010.

On March 22, 2010, following a child abuse assessment concerning K.S., the Iowa Department of Human Services (DHS) reported to the juvenile court that K.S. had suffered a critical head injury while Amy was her caretaker. The DHS sought and secured an order removing Amy's two children from her custody. Her son was placed with his maternal grandfather. Her daughter was placed with the daughter's father. The two children were adjudicated CINA in August 2010.

In a March 2011 permanency order the juvenile court changed the permanency goal for Amy's two children from reunification with Amy to placement with relatives. The son was placed in the custody and guardianship of his maternal grandfather and the daughter was placed in the custody of her father, each under the protective supervision of the DHS. In a September 2011 permanency review order the court continued those placements.

In its August 2010 combined adjudication and disposition order concerning Amy's two children, the juvenile court made detailed and lengthy findings of fact concerning the circumstances surrounding K.S.'s injuries and death. It thereafter concluded, in part, as follows:

The evidence available does not allow the Court to determine with complete certainty who inflicted these injuries upon [K.S.] or what the specific circumstances were. However, the evidence presented clearly convinces this Court that the injuries

which led to [K.S.'s] death were inflicted injuries, not injuries that resulted from normal toddler activity. Further, the Court finds that the evidence clearly and convincingly establishes that the injuries were perpetrated by Amy and/or Zyriah, who were caretakers for [K.S.]. Additionally, the evidence is clear and convincing that both Amy and Zyriah neglected to address the child's critical need for medical care, by failing to seek appropriate medical care for [K.S.] for the injuries she received and then ignoring the need for a medical evaluation of the changes in her behavior, the significant bruises and the increasing lethargy preceding her coma and eventual death.

[K.S.] died as a result of injuries that can only reasonably be the result of the actions of Amy [] and/or her significant other, Zyriah []. Amy maintains a relationship with Zyriah at the present time. Amy has not been truthful with the Department of Human Services, regarding her relationship with Zyriah or regarding the source of [K.S.'s] injuries. Her lack of honesty makes it unsafe at this point to rely on her to comply with the protective service plan that could be developed to provide for [Amy's two children's] safety in her care.

In July 2011 the State filed a trial information charging Amy and Zyriah with murder in the first degree, a class "A" felony, and child endangerment resulting in death, a class "B" felony with a special sentencing provision requiring confinement for no more than fifty years.

C.P., the child in interest in this proceeding, was removed from Amy's custody by juvenile court order on January 3, 2012, shortly after his birth. The order placed him in the custody of the DHS, and authorized relative placement. C.P. has thereafter at all times been placed in the care of his maternal grandmother. Following a combined adjudication and dispositional hearing C.P. was adjudicated a CINA in April 2012. Amy appealed. Our court of appeals affirmed the adjudication. *In re C.P.*, No. 12-0809 (Iowa Ct. App. June 27, 2012). In September 2012 the State filed a petition seeking termination of the parental rights of C.P.'s parents. Following a hearing the court ordered Amy's parental

rights terminated pursuant to Iowa Code sections 232.116(1)(d) (2011) (child of same family previously adjudicated CINA for abuse by parent, circumstance continues to exist despite offer or receipt of services), and (h) (child three or younger, adjudicated CINA, removed from parents' custody at least six of last twelve months, cannot be returned at present time). Amy appeals. She asserts the juvenile court erred in (1) finding the State proved the statutory grounds for termination, and (2) finding termination to be in C.P.'s best interest.

II. SCOPE AND STANDARDS OF REVIEW.

Our review of a termination of parental rights proceeding is de novo. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010), as is our review of CINA cases, *In re D.D.*, 653 N.W.2d 359, 361 (Iowa 2002). We are not bound by the juvenile court's findings of fact, but we give them weight, especially when considering credibility of witnesses. Iowa R. App. P. 6.904(3)(g); *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). Grounds for termination of parental rights must be proved by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). "Clear and convincing evidence' means there are no serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *C.B.*, 611 N.W.2d at 492.

III. STATUTORY GROUNDS FOR TERMINATION.

Amy asserts the State did not prove either of the two statutory grounds upon which the juvenile court terminated her parental rights. Although the court relied on two separate statutory provisions to terminate her rights, we need find grounds under only one of those provisions in order to affirm the juvenile court if

otherwise appropriate. *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995). We choose to focus on section 232.116(1)(h).

Amy stipulates that the first three elements of section 232.116(1)(h) were proved, but challenges the finding that C.P. could not be returned to her custody at the time of the termination hearing, the fourth element of that provision. That element is proved when the evidence shows the child cannot at the time of the termination hearing be returned to the parent without remaining a CINA. Iowa Code § 232.116(1)(h)(4); *R.R.K.*, 544 N.W.2d at 277. The threat of probable harm will justify termination of parental rights, and the perceived harm need not be the one that supported the child's removal from the home. *In re M.M.*, 482 N.W.2d 812, 814 (Iowa 1992).

In the CINA case involving Amy's two other children the juvenile court found by clear and convincing evidence that K.S.'s injuries had been inflicted upon her, the injuries were caused by Amy or Zyriah or both, and Amy and Zyriah were responsible for K.S.'s death. The DHS believed the case plan should include Amy participating in a mental health evaluation and counseling to address circumstances leading to K.S.'s death. However, because of the ongoing criminal investigation that plan did not require those services. Although such services were recommended, Amy chose not to receive them.

A case plan developed as a result of C.P.'s adjudication as a CINA included a mental health evaluation and counseling services for Amy. Amy did eventually undergo a mental health evaluation, and briefly attended some counseling sessions. She shortly, however, stopped attending counseling and

has declined to sign releases that would allow the DHS, service providers, and the juvenile court to acquire information concerning her mental health status in order to determine whether it might be possible to return C.P. to her custody.¹ The DHS social worker assigned to Amy and C.P., as well as the family support worker assigned by a service provider, continue to have serious concerns regarding Amy's mental health and need for counseling. Their concerns are based on their view that Amy demonstrates a complete lack of emotional reaction to K.S.'s abuse and death and the removal of her three children, and that Amy has been dishonest with the DHS and service providers.

We recognize, as the juvenile court did, that Amy has been faithful in visiting C.P., she demonstrates a knowledge of how to care for C.P. and her other two children during visitations, and she interacts appropriately with the children and has a bond with them. However, perhaps because of the pending criminal charges, Amy continues to refuse to participate in the recommended services that would allow the DHS and court to determine whether it is likely that C.P. could be placed in her custody without remaining a CINA. We therefore agree with the court that Amy's lack of progress in recommended services, together with her perceived lack of truthfulness, constitute a significant barrier to reunification with C.P. We agree with the court's finding that at the time of the termination hearing there existed "no reasonable likelihood that [C.P.] will be returned to his mother's custody anytime within the foreseeable future." We

¹ We note that C.P. has in fact spent all but the first few days of his life in the custody of the DHS, placed with his maternal grandmother.

conclude the State proved by clear and convincing evidence the fourth element of section 232.116(1)(h).

IV. BEST INTEREST.

We apply the best-interest framework of Iowa Code section 232.116(2) to determine whether a proven statutory ground for termination should result in termination of a parent's parental rights. *P.L.*, 778 N.W.2d at 39. We give primary consideration to the child's safety, the best placement for furthering the child's long-term nurturing and growth, and to the child's physical, mental, and emotional condition and needs. Iowa Code § 232.116(2).

Amy asserts the juvenile court erred in finding that termination was in C.P.'s best interest under the section 232.116(2) criteria. She argues in part that his relationship with his half siblings, Amy's two other children, may be stunted or ended.

Although as of the termination hearing C.P. had been removed from Amy's custody his entire ten-month life, he has had frequent, at times daily, contact with her. He has a good, strong bond with her. However, he has lived with his maternal grandmother all of his life and she has been his primary caretaker throughout that time. His bond with her is probably even stronger than his bond with Amy. C.P. is adoptable and his grandmother is committed to adopting him if Amy's parental rights are terminated. His grandmother is also committed to maintaining a relationship between C.P. and Amy in the event she adopts him. C.P.'s grandmother has seen to it that C.P. has continued to have

contact and a relationship with his half siblings, and wishes to maintain those relationships in the future.

At the time of the termination hearing the very serious criminal charges had been pending against Amy for almost fifteen months. Trial had previously been scheduled on two or more occasions, each time continued at Amy's request or with her acquiescence, and was scheduled for January 2013, some three months in the future. Even if the serious charges (and any lesser-included charges) were resolved in Amy's favor, it would be some time thereafter before her participation in services could help determine whether C.P. could be "returned" to her custody. As shown by the evidence, C.P. needs permanency now, not at some indefinite time in the future.

We agree with the juvenile court that termination of Amy's parental rights is in C.P.'s best interest under the framework established by section 232.116(2).

V. STATUTORY EXCEPTIONS.

Amy asserts that termination of her parental rights is improper as it would be detrimental to C.P. due to the closeness of her parent-child relationship with him. See Iowa Code § 232.116(3)(c). We must therefore consider whether this statutory exception should serve to preclude an otherwise appropriate termination of her parental rights. See *P.L.*, 778 N.W.2d at 39.

The provisions of section 232.116(3) are permissive, not mandatory. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). The court uses its best judgment in applying the factors contained in that statute. *P.L.*, 778 N.W.2d at 40. "A child's safety and the need for a permanent home are now the primary

concerns when determining a child's best interests." *J.E.*, 723 N.W.2d at 801 (Cady, J., concurring specially). When the statutory grounds for termination of parental rights exists, the needs of a child are generally promoted by termination. *In re L.M.F.*, 490 N.W.2d 66, 68 (Iowa 1992).

Termination of parental rights has been found appropriate when the child is likely to be adopted by grandparents. *In re D.K.K.*, 500 N.W.2d 54, 57 (Iowa 1993). As previously noted, C.P.'s bond with his maternal grandmother is in all likelihood even stronger than his bond with Amy, his grandmother is committed to adopting him, and his grandmother intends to maintain his relationship with Amy and with his half siblings. We conclude, as the juvenile court did, that the section 232.116(3)(c) exception should not preclude the otherwise appropriate termination of parental rights in this case.

VI. CONCLUSION AND DISPOSITION.

We agree with and affirm the juvenile court's order terminating Amy's parental rights to C.P.

AFFIRMED.