

IN THE COURT OF APPEALS OF IOWA

No. 3-239 / 13-0100

Filed April 10, 2013

**IN THE INTEREST OF K.P., A.P.,
and C.O.,
Minor Children,**

R.P., Mother,
Appellant,

B.P., Father of K.P. and A.P.,
Appellant.

Appeal from the Iowa District Court for Tama County, Angie Wilson,
Judge.

The mother of K.P., A.P., and C.O. appeals the termination of her parental rights. The father of K.P. and A.P. also appeals the termination of his parental rights. **AFFIRMED.**

Debra M. Skelton, Walford, for appellant-mother.

Ryan P. Tang of Law Office of Ryan P. Tang, P.C., Cedar Rapids, for
appellant-father.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, and Brian D. Heeren, County Attorney, for appellee.

Mark D. Fisher and Patricia Meier of Nidey, Wenzel, Erdahl, Tindal &
Fisher, P.L.C. , Cedar Rapids, for father of C.O.

Jennifer Meyer of Jennifer Meyer Law, P.C., Marshalltown, attorney and
guardian ad litem for minor children.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

The mother and father of K.P. and A.P. appeal separately from the order terminating their parental rights. The mother also appeals termination of her rights as to C.O.¹ The father's life has been marred by drug abuse and criminal convictions and he has shown little interest in the children. The mother has been unable to give priority to her children and focus on their needs. We affirm on both appeals because grounds for termination exist and termination is in the children's best interest.

I. Background Facts and Proceedings.

Brandon and Rebecca are the parents of K.P., born in 2008, and A.P., born in 2011. Rebecca is also the mother of C.O., born in 2004. C.O., K.P., and A.P. most recently came to the attention of the Department of Human Services (DHS) in February 2011² after allegations the parents were using methamphetamine in the presence of the children and a report of an incident of domestic violence. A DHS assessment resulted in multiple concerns, including a "chaotic" household, poor hygiene, and lice infestation. C.O. had missed at least

¹ The father of C.O. did not appeal, although his parental rights were also terminated.

² In April 2007, DHS completed a child abuse assessment of the Proctor home in response to concerns of lack of supervision of C.O., then three years old, who had been found outside the home naked on one occasion and fell three feet out of a window on another occasion. In both cases a neighbor returned C.O., and the parents did not appear to know of his absence or exhibit concern. The DHS worker found the home dirty, medication was left out in the presence of children, dirty ashtrays were within reach of the children, dog feces was scattered throughout the home, and the children were behind on immunizations and development. At that time Rebecca admitted to past use of marijuana and methamphetamine and admitted that Brandon used illegal drugs in the presence of the children.

thirty-five days of school, and Rebecca was very depressed. However, DHS did not confirm the allegations of drug use or the incident of domestic violence.

The State filed child in need of assistance (CINA) petitions for C.O. and K.P. on March 23, 2011. The attached affidavit listed the following concerns: problems observed in the 2011 child abuse assessment, the 2007 supervision concerns, and Brandon's twenty criminal convictions. Rebecca and Brandon signed a voluntary service agreement, but each failed to follow through. Rebecca failed to address her mental health, and Brandon did not cooperate with drug testing.

Without permission from DHS, the parents moved to Texas and left K.P. and C.O. in Iowa with Rebecca's sister. A third child, A.P., was born in Texas on May 5, 2011. The hospital reported concerns regarding the parents' lack of contact and bonding with A.P., who was born with meconium aspiration syndrome. Rebecca and Brandon did not appear troubled by A.P.'s health concerns. Rebecca told the hospital she had no means to care for her children. A petition alleging A.P. to be a CINA was filed on May 18, 2011.

Rebecca's sister took C.O. and K.P. to Texas around May 15, 2011. The children were removed from Rebecca and Brandon by Child Protective Services in McAllen, Texas. Iowa Department of Human Services workers traveled to Texas on May 19 and flew all three children back to Iowa. All three children were placed with paternal grandparents. On July 6, 2011, Brandon and Rebecca stipulated that the children were in need of assistance pursuant to Iowa Code section 232.2(6)(c)(2) (2011).

Brandon remained in Texas. Rebecca moved back to Iowa to live with the paternal grandparents and her children for a few months beginning in June 2011. However, she failed to take responsibility for the children and was no longer welcome at that home by the dispositional hearing on August 24, 2011. There were ongoing concerns of lice in Rebecca's new Iowa home, and C.O. had educational delays and masturbated almost daily.³ Although C.O. had been diagnosed with ADHD, he was not medicated because Rebecca and Brandon allowed their Title XIX to lapse. K.P. had delayed speech and exhibited detachment from her surroundings. A.P. was generally doing well, though she did not have a bond with Rebecca, as she had never been in her mother's care.

Both parents were ordered to submit to drug testing at the August 24, 2011 dispositional hearing. Rebecca's test was negative, but Brandon's hair stat test was very high for amphetamine and methamphetamine. He denied using methamphetamine. Rebecca first reported that she was going to leave Brandon, but she moved back to Texas with Brandon after the hearing. She wanted the children moved to foster care in Texas.

Rebecca and Brandon only saw the children three times between August 24, 2011, and November 30, 2011. When Brandon visited the children, he exhibited little interest in them. At a family team meeting on November 18, Brandon denied using methamphetamine, but emphasized that use was legal in

³ Connie, paternal step-grandmother, testified that C.O.'s episodes of masturbation were more frequent after his visits with his mother. She also believed C.O. had been exposed to pornography by Brandon. On one occasion Connie found C.O. and K.P. engaging in oral sex. C.O.'s biological father David is on the sex offender registry.

Mexico. He was directed to complete a substance abuse evaluation and follow treatment recommendations.

At the November 30, 2011 review hearing, neither parent had complied with the case plan. Neither had been drug tested. Rebecca had not completed a mental health evaluation as ordered, nor was she receiving treatment. The parents were living in Texas. Due to a total lack of progress, the guardian ad litem for the children filed petitions for termination as to K.P. and A.P.

Rebecca moved back to Iowa in December 2011. Her visits with the children improved, but were not consistent. She alternated between expressing plans to reunite with Brandon and professing a commitment to end the relationship and focus on her children. However, she completed her mental health evaluation and was working on setting up treatment and parenting classes. Rebecca was given a three-month extension to work toward reunification.

Between December 28, 2011, and February 29, 2012, Rebecca attended five of the nine scheduled visits with her children. Rebecca repeatedly asked the DHS worker why she could not maintain a relationship with Brandon. The worker explained that the children were not considered safe with Brandon and that staying in a relationship with him could result in termination of her rights.

In March 2012, Rebecca got an apartment. She missed her first scheduled visit with the children, but had three other visits that month. Her interactions with the children had improved, but after visits in her home, she returned the children to the paternal grandparents with head lice and hand, foot,

and mouth disease. On one of the visit dates, Rebecca saw Brandon. She denied that the children also saw him at that time.

Rebecca had been claiming she ended her relationship with Brandon, and understood he was noncompliant with DHS and court requests. However, at a family team meeting on March 29, 2012, she explained that she had been with Brandon for nine years and she could not walk away from the relationship. At that meeting, she admitted that if the children were returned to her care, she planned to move to Texas and live with Brandon. Domestic violence counseling was recommended at the meeting, but Rebecca claimed the services were unnecessary.

A termination petition was ordered as to C.O. on April 25, 2012. The district court noted Rebecca continued to exhibit three primary impediments to reunification, including her “inability to understand Brandon could not be a part of her life if she wanted the children with her . . . struggle to consistently deal with her mental health . . . [and] struggles with financial stability and caring for all three children.”

At the review hearing in June 2012, the court found Rebecca was making considerable effort to comply with the court’s directives and had made substantial progress. The court cancelled the scheduled termination hearing and provided another extension to afford Rebecca an opportunity to make continued progress. She was afforded substantial visitation, including overnight visits. A review hearing was set for August 29, 2012. Rebecca was directed not to have face-to-face or phone contact with Brandon during visits.

Brandon had no contact with DHS. He was believed to be in Texas, but received traffic violations in Iowa on June 30 and July 7 for driving while suspended. He was arrested on July 10, 2012, and was charged with conspiracy to manufacture, deliver and or possess with the intent to deliver methamphetamine, possession of precursors, and a drug tax stamp violation. He refused a drug test.

Rebecca visited Brandon in jail and claimed he was innocent. However, recorded jailhouse telephone calls suggest that both Rebecca and Brandon were involved in manufacturing methamphetamine.

Rebecca's visitation was scaled back. Rebecca told DHS worker Kerry Grimm that she had made a mistake in visiting Brandon and that she would not allow him to interfere with her reunification with her children. Ms. Grimm advised her to stay away from Brandon and to stop talking to him.

During a family team meeting on August 20, 2012, Rebecca agreed to attend mental health treatment two or three times per month. However, she was very inconsistent, usually attending only one appointment per month.

In late September 2012, Rebecca told DHS that she was not in contact with Brandon and that she was not in a relationship with him. She reported that she had a new apartment because the landlord refused to address maintenance issues in her last apartment. DHS later learned that Rebecca was evicted for non-payment, and she engaged in 119 telephone conversations with Brandon between September 7 and November 17.

Jail recordings of the calls demonstrate Rebecca's mental instability. Rebecca and Brandon repeatedly discussed preventing DHS from learning about various things, consistent with their dishonesty throughout the proceedings. On September 29, Rebecca was having visitation with the children and talking to Brandon on a recorded call. The recording memorializes her yelling at C.O. repeatedly.

In the recordings Rebecca says she "needs" Brandon, and that she loves him more than the children. DHS social worker Kerry Grimm testified in the termination hearing that the recordings were consistent with Rebecca's actions throughout the proceedings. She further testified that DHS could not guarantee the safety of the children as long as Brandon used drugs and Rebecca failed to protect them from the danger his lifestyle presented. Finally, she testified that Rebecca was repeatedly warned that if she continued to choose Brandon over the children's safety, she would risk termination.

At the termination hearing on September 26, 2012,⁴ DHS workers Allonda Pierce and Karen Werner testified that they believed the children could be safely returned to Rebecca; however, that testimony was based on the mistaken belief that Rebecca had not been in contact with Brandon. When asked if their recommendations would change if Rebecca reunited with Brandon, Pierce testified that she would tell Rebecca she needed to choose between her husband and her children, and that she could not have both. Werner testified that if

⁴ The first day of trial was September 26, 2012, when Brandon was still incarcerated. The second day of trial was rescheduled and did not take place until November 21, 2012.

Brandon were in Rebecca's life, she would have safety concerns. Karen Wielert, the family's safety and permanency support worker also testified that she would have "strong concerns" if the relationship between Rebecca and Brandon were to continue.

Almost two months later, on the second day of trial, Brandon had been released from jail. Rebecca testified that he began living with her two days before the hearing. She explained that he was not a bad father or husband, and she saw no reason why he could not live with her and the children because he was no longer using drugs.

The juvenile court terminated the father's parental rights pursuant to Iowa Code section 232.116(1)(b) (abandonment), (d) (court has previously adjudicated the child a CINA and parent offered services, but circumstance continues despite services), (e) (parent has not maintained significant and meaningful contact with the child), (f) (child age four or older has been adjudicated CINA and out of parent's custody for last six consecutive months and cannot be returned at present), and (h) (child three or younger who has been adjudicated CINA has been out of parent's custody for last six consecutive months and cannot be returned at present). Brandon appeals, contesting statutory authority for termination under subsections (d) and (h) only. He further asserts a claim that termination is not in the children's best interest because of a strong bond with their mother.

The juvenile court terminated the mother's parental rights pursuant to Iowa Code section 232.116(1)(d), (f), and (h). She appeals, disputing the

determination that the circumstances leading to the CINA adjudication continued to exist at the time of the termination hearing. The mother also disputes that the State established by clear and convincing evidence that the children could not be safely returned to her custody. Finally, she asserts that termination is not in the children's best interests because of the closeness of the parent-child relationship.

II. Standard of Review.

Our review of proceedings to terminate parental rights is *de novo*. *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011). We give weight to the juvenile court's findings of fact even though we are not bound by them. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). This is especially so "when considering the credibility of witnesses whom the trial court heard and observed firsthand." *In re D.P.*, 431 N.W.2d 777, 780 (Iowa 1988). An order terminating parental rights will be upheld if there is clear and convincing evidence of grounds for termination under section 232.116. *Id.* Evidence is considered "clear and convincing" when there are no "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *Id.*

III. Discussion.

Iowa Code chapter 232 termination of parental rights follows a three-step analysis. *In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010). The court must initially determine whether a ground for termination under section 232.116(1) is established. *Id.* If a ground for termination is established, the court must next apply the best-interest framework set out in section 232.116(2) to decide if the grounds for termination should result in a termination of parental rights. *Id.* If the

statutory best-interest framework supports termination of parental rights, the court must finally consider if any statutory exceptions or factors set out in section 232.116(3) weigh against termination of parental rights. *Id.*

“When the juvenile court terminates parental rights on more than one statutory ground, we need only find grounds to terminate under one of the sections cited by the juvenile court to affirm.” *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct.App.1999). Our primary concern is always the best interests of the child. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001).

A. *Father’s appeal.*

We find clear and convincing evidence to support termination of Brandon’s parental rights to K.P. and A.P., pursuant to Iowa Code section 232.116(1)(b) because the children have been abandoned or deserted as defined in the Code. Iowa Code section 232.2(1) defines “abandonment of a child” as

the relinquishment or surrender, without reference to any particular person, of the parental rights, duties, or privileges inherent in the parent-child relationship. Proof of abandonment must include both the intention to abandon and the acts by which the intention is evidenced. The term does not require that the relinquishment or surrender be over any particular period of time.

In *In re D.M.*, 516 N.W.2d 888, 891 (Iowa 1994), our supreme court stated:

We have characterized abandonment as “a giving up of parental rights and responsibilities accompanied by an intent to forego them.” Two elements are involved in this characterization. First, the giving up of parental rights and responsibilities refers to conduct. Second, the intent element refers to the accompanying state of mind.

In addition, “parental responsibilities include more than subjectively maintaining an interest in a child. The concept requires affirmative parenting to the extent it is practical and feasible in the circumstances.”

(Citations omitted.)

Brandon faces serious felony charges related to the manufacture of methamphetamine. He completed one drug test on August 24, 2011, which was positive for methamphetamine. He stopped complying with services until he was arrested on the pending charges in July 2012. He completed a substance abuse evaluation in November 2012, and testified he would go to treatment. However, Brandon has not seen his children or had any contact whatsoever with them, since November 2011. As the district court noted:

Brandon has had no contact with his children. Even when Brandon did attend visits, he showed very little interest in his children and did not actively parent them. Brandon was given every opportunity to comply with services and parent his children, but he refused. . . . Brandon has not received treatment for his own mental health issues.

Brandon has made no effort to parent even to the extent practical and feasible under the circumstances. His imprisonment was the result of a lifestyle he chose over the relationship with his children. See *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993). Parenting requires more than subjectively maintaining an interest in one's child. See *D.M.*, 516 N.W.2d at 891.

Statutory grounds for termination are established. Moreover, Brandon's substance abuse presents a safety risk to the children. Termination is in their best interest and no exceptions weigh against termination.⁵ We affirm the termination of his parental rights.

⁵ Brandon's assertion that the children have a strong bond with their mother is not relevant to termination of his rights.

B. Mother's appeal.

1. Grounds.

The court may terminate parental rights pursuant to Iowa Code section 232.116(1)(d) where both of the following have occurred:

(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.

Rebecca concedes that the elements of (1) were established in the record. We adopt the trial court's findings that the elements of (2) are also met.

There is no evidence in the record that suggests these children could be safely returned to the custody of either parent at [the time of the termination hearing] [T]he issues that led to termination petitions being filed . . . are the same issues which remain Most notably are Rebecca's inability and/or unwillingness to understand why she cannot have a relationship with Brandon and have custody of her children. A close second is Rebecca's continued minimization of her mental health issues including her inability and/or unwillingness to deal with the toxicity of her relationship with Brandon. Rebecca misses at least half of her mental health appointments. [T]he phone calls between Brandon and Rebecca [demonstrate] every red flag of domestic violence in their relationship Rebecca threatens to leave, but ALWAYS comes back to the relationship.

Brandon has a problem with using methamphetamine and has for the duration of this case. Rebecca made excuses and justified the positive drug test. Brandon never complied with services including further drug testing and drug treatment. While Rebecca did not have contact with Brandon for a while, once she figured it was safe based on her conversations with her in-home provider, Rebecca resumed her relationship with Brandon in earnest. Despite verbalizing she knew she was risking her

children, Rebecca jumped head long into a relationship with Brandon upon his release from jail and cannot understand why this is a problem. Rebecca repeatedly verbalizes she will not choose Brandon over her children, but she has done just that.

We conclude statutory grounds for termination exist pursuant to Iowa Code section 232.116(1)(d).

2. *Best Interests.*

Rebecca asserts termination is not in the best interest of the children. In applying the best interests framework, 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.” Iowa Code § 232.116(2); *P.L.*, 778 N.W.2d at 40.

Because the past is an indicator of future performance, *see In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006), we have no serious doubt that these children would risk exposure to mental instability, substance abuse, and domestic violence if returned to the mother’s care. As noted by the district court, the toxicity between Brandon and Rebecca

fuels Rebecca’s depression which in turn makes it impossible for her to effectively parent her children as evidenced by C.O.’s ongoing mental health and C.O. and K.P.’s delays when they were initially placed in relative care. Those delays have been overcome by the structure, consistency, and treatment received by the children while in relative care. Rebecca has not consistently treated her own mental health needs and has now reunited with Brandon. Brandon has received no services for his substance abuse and his own mental health due to his unwillingness to cooperate with services. Returning the children to this environment would be a disaster and would undo the months of progress they have made . . . Rebecca was told repeatedly she would have to choose and she chose Brandon.

3. *Factors Against Termination.*

Iowa Code section 232.116(3) provides factors that the juvenile court may consider to avoid termination even where statutory grounds exist. The mother invokes section 232.116(3)(c) (“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.”).

The factors weighing against termination in section 232.116(3) are permissive, not mandatory. See *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). The court has discretion, based on the unique circumstances of each case and the best interests of the child, whether to apply the factors in this section to save the parent-child relationship. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). Our consideration centers on whether the children would be disadvantaged by the termination. *D.W.*, 791 N.W.2d at 709.

We do not find clear and convincing evidence in the record that termination would be detrimental to the children. Although the children were together in relative placement, Rebecca and Brandon were given eighteen months to overcome their parenting deficiencies and establish a safe environment for reunification. They failed to do so. The children have thrived with their paternal grandparents.

Even if Rebecca has a bond with the children, we find it is in the children’s best interests to terminate her parental rights. We agree with the district court that despite a bond between the children and Rebecca, the

sadness the children may feel because of the termination does not overcome the likely long-term hardship and neglect the children will

suffer if returned to the care of their parents. . . . [T]he Court simply cannot find that the parent-child relationship is so strong that it surmounts the need for termination.

It is not in their best interests to make them wait longer for permanency. See *In re A.B.*, 815 N.W.2d 764, 777 (Iowa 2012) (noting children “simply cannot wait for responsible parenting”).

Termination is in the best interests of the children and no exceptions weigh against termination. We affirm the termination of Rebecca’s parental rights.

IV. Conclusion.

Statutory grounds for termination are established for both the father and the mother. Because the children’s safety and need for a permanent home are our primary concerns, see Iowa Code § 232.116(2), we find termination of the mother’s and father’s parental rights is in the best interest of each child and no factors militate against termination. We therefore affirm.

AFFIRMED.