

IN THE COURT OF APPEALS OF IOWA

No. 3-731 / 13-0892
Filed August 7, 2013

**IN THE INTEREST OF J.J. and J.J.,
Minor Children,**

J.J., Mother,
Appellant.

Appeal from the Iowa District Court for Clayton County, Alan Allbee,
Associate Juvenile Judge.

A mother appeals from the order terminating her parental rights.

AFFIRMED.

Nicholas E. Hay of Jacobson, Bristol, Garrett & Swartz, Waukon, for
appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, Alan Heavens, County Attorney, and Natalia Blaskovich,
Assistant County Attorney, for appellee.

Kimberly S. Lange of Kimberly S. Lange Law Office, Edgewood, attorney
and guardian ad litem for minor child.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

DANISON, J.

A mother appeals the termination of her parental rights to her children, JJ1¹ and JJ2.² The juvenile court terminated the mother's rights after a lengthy involvement with the Iowa Department of Human Services (DHS), which had resulted in the removal of the children from her custody three separate times. Although the mother has recently made commendable changes in her life, we agree with the juvenile court that the children cannot be returned to her care at this time. We affirm.

I. Background Facts and Proceedings.

JJ2 was born in April 2011 and was two years old at the time of the termination hearing. His sister, JJ1, was six years old at the time of the hearing.

JJ2 was born drug-affected and tested positive for methamphetamine. DHS then had JJ1 tested; she also tested positive for methamphetamine present in her body. At that time DHS removed both children from their parents'³ custody due to the mother's use of methamphetamine and her exposure of the children to the drug.

On May 13, 2011, the children were returned to their mother's care. The three entered the Heart of Iowa, a residential substance abuse and parenting program.

On May 26, 2011, the children were adjudicated to be children in need of assistance (CINA) under Iowa Code section 232.2(6)(c)(2)(n), and (o) (2011).

¹ The parental rights of the child's father have been terminated. He does not appeal.

² The parental rights of both the legal father and the putative biological father have been terminated. Neither appeals.

³ No father was present in either of the children's lives by the time of the first removal.

The court found that the mother suffered from co-occurring disorders including substance abuse, anxiety, and depressive disorders. The court also noted that JJ1 had been diagnosed with attention deficit hyperactivity disorder and oppositional defiant disorder. JJ2 was suffering from seizures and breathing difficulties, which required continued medical intervention.

On July 14, 2011, the removal order was vacated and the mother retained custody of both children. Her custodial rights were conditioned upon her continued participation in and successful completion of the treatment and courses offered by the Heart of Iowa. The mother did successfully complete the program. However, her peers did not vote her and the children into the after-care program provided by the facility. They cited her parenting problems as the reason they did not want her to participate. During her time at Heart of Iowa, the mother was caught shoplifting a bathing suit. She was also cited by Heart of Iowa for failure to follow the facility's rules regarding the storage of medication.

Upon leaving the Heart of Iowa, the family transitioned into a similar program at Hightower in Clinton, Iowa. En route to the program, the mother purportedly shoplifted from a gas station. While at Hightower the mother continued to have parenting problems and once slapped JJ1 across the face. Because no mark remained twenty-four hours later, a not founded child abuse report was made. She also violated the program rules by using alcohol and was arrested, in the presence of the children, for another shoplifting incident. As a result, she was discharged from Hightower on September 20, 2011, without successfully completing the program.

The children were removed from their mother's custody a second time on October 18, 2011. The findings of fact from the temporary removal order stated:

The Hightower facility made no referrals to any other substance abuse agency because the staff felt the children's mother "not ready for a change in her behaviors at this time." At that time, the [Iowa] Department [of Human Services] evaluated the children and concluded the children were in immediate danger of harm because of their mother's unsuccessful discharge from residential substance abuse treatment.

The children were returned to their mother's custody on December 5, 2011. The removal order was vacated ten days later.⁴

The children were removed from their mother's custody the third and final time on March 15, 2012. The children were removed after DHS received a report that the mother had relapsed and was again using methamphetamine. The mother admitted using the drug on March 14, 2012, as well as several times the prior week. She had also become physically aggressive toward her romantic partner, had not taken her psychotropic medication, and had failed to attend her substance abuse and medical health treatment. The children were present for

⁴ In finding the children were no longer in imminent risk of harm the court stated:
Since the time of the last review of the matter . . . the child[ren]'s mother completed her substance abuse evaluation at Northeast Iowa Behavioral Health and was diagnosed with cannabis dependence (in remission), alcohol dependence (in remission), methamphetamine dependence (in remission) and cocaine abuse (in remission). It was recommended that she attend Level 2.1 intensive outpatient treatment that she began on November 28, 2011. It was also recommended that she receive a mental health assessment. She completed that assessment and weekly individual outpatient mental health treatment was recommended. Dr. Gil monitors her psychotropic medication. She had a clean drug test. She has obtained appropriate housing in Waukon, that has been approved by [DHS]. . . . Family safety, risk and permanency services are being provided by LSI. . . . Child care has been arranged. The children are no longer in imminent risk of harm if returned to their mother's care conditioned upon her active participation in services as arranged.

the physical altercations between their mother and her partner. They were also present in the apartment when the mother used methamphetamine as proven by a hairstat test which showed that the children were exposed to high enough levels of the drug over the previous three months that they had actually metabolized the drug.

Following the children's removal, the mother was arrested on burglary charges for stealing money and property out of various vehicles in Waukon. She was also charged with identity theft for taking an ID out of her counsel's purse. She intended to use the ID to obtain pseudoephedrine, an ingredient used in the manufacturing of methamphetamine.

On April 26, 2012, the district court transferred custody of the children to DHS for placement in family foster care. The modification order addressed the changed circumstances:

Since the time of the last review hearing, the children's mother has relapsed with regard to the use of illegal drugs. A child protective assessment was completed in April 2012 founded against the children's mother for denial of critical care for lack of proper supervision and an illegal drug present in the children as a result of the actions of the children's mother. The children's mother has had a new substance abuse assessment and is participating in intensive outpatient treatment. She has her medication managed by her psychiatrist. The problems addressed in the permanency plan . . . have not been solved within the deadline given. That the children's parent's compliance with the case plan is indicative of her lack of progress toward alleviating or mitigating the cause necessitating foster care placement.

Following the order, the mother entered another inpatient substance abuse treatment program but was discharged unsuccessfully shortly thereafter for

smoking on premises. The mother then moved to Dubuque where she initially stayed in a homeless shelter.

While the mother was living in Dubuque, DHS had a difficult time arranging services for her and scheduling visitations. As a result, multiple visits with the children were missed. This was especially difficult on JJ1, who exhibited concern for her mother's welfare and began having behavioral problems. Once in July and once in September, 2012, the mother tested positive for THC, indicating she had used marijuana. The July test also showed that the mother had used methamphetamine. While in Dubuque, the mother did obtain employment at Taco John's. However, she was terminated when she missed three consecutive days. The mother was absent because she was unconscious for multiple days after taking two hundred prescription pills in a suicide attempt.

A review hearing was held on October 11, 2012, in which the court identified continuing problems:

On September 17, 2012, the children's mother was convicted in Allamakee County of criminal charges resulting in her incarceration at the West Union Residential Facility for maximum benefits not to exceed one year. She was previously convicted of other criminal acts in Clinton County and given a suspended sentence of 180 days of which she has already served 20 days. Due to failure to make payments on that judgment and new criminal charges, the remaining suspended sentence in Clinton County will have to be served prior to her entering the West Union facility. Additionally, the children's mother is today being arrested on warrants outstanding in Clayton County. Visitation and participation in FSRP services has not been consistent. Reunification of the children with their mother will not likely be possible due to her extended incarceration.

Following a permanency hearing, the court directed the county attorney to file a termination petition on January 17, 2013. The court noted that the mother had

received a suspended sentence but was still on probation and was placed in a residential correctional facility. She expected to leave the facility within thirty to sixty days if she could find a home. She had obtained full-time employment at Greene Company in Monona, Iowa, but had no savings and was still unable to regain her license. She had been subjected to random, monthly drug tests for three months and was reported to be clean. The court expressed continued concerns:

The placement of the children in family foster care continues to be necessary because the children's mother is incarcerated, without suitable housing, and has not demonstrated the mental stability and sobriety outside a structured setting. Proceedings for termination of parental rights should be commenced because the children's mother has had long-standing substance abuse issues that have not been resolved with prior treatment requiring multiple placements of the children in foster care.

When the State filed the petition for termination, Iowa Code section 232.116(1)(f) (2013) did not apply to JJ1 because she had not yet been removed from the home for twelve months and it was not included in the original petition. Rather, termination was sought pursuant to section 232.116(1)(j) for both children and also sought pursuant to 232.116(1)(h) regarding JJ2.

At the termination hearing on May 22, 2013, the State moved to amend the petition to include section 232.116(1)(f) in regards to JJ1. The mother objected and asked for a continuance. The juvenile court denied the request for continuance because "the evidence regarding whether the child could return home would be no different than under the circumstances originally pled."

In its termination order the court noted that the mother had successfully completed the residential correctional program in West Union and was

discharged on April 5, 2013. During her stay she was written up several times for various infractions, including having contact with a former boyfriend, a known methamphetamine manufacturer and user, in violation of her probation. However, she did successfully complete substance abuse treatment while in the facility. She had maintained her job with Greene Company since December 2012 and worked twenty to fifty hours per week. She had proven to be a capable employee. She had obtained a one-bedroom apartment in Monona and had a bed for each child. The mother did testify that she continues to smoke cigarettes despite a strict prohibition against exposing JJ2 to second hand smoke or clothing that had been smoked in. She also did not have a driver's license due to unpaid fines and costs from her criminal cases; these totaled thousands of dollars. She testified she was able to depend on family, friends, co-workers, and the local transit system for transportation. She had plans for daycare, medical insurance, quality clothing, and planned to sign up for food stamps if the children were returned to her. DHS had recently modified her visitation with her children so that it was now monitored, rather than supervised, and had been increased from two hours to six hours in duration. In the six weeks following her incarceration, there was no evidence of relapse. The mother was reportedly attending two to three Narcotics Anonymous (NA) meetings each week. She reported she was in a new romantic relationship with one of the lay leaders of her local NA chapter who is also a recovering methamphetamine addict. The State indicated concern that NA policies do not support romantic relationships between members for the first year of involvement with the group.

Ultimately, the court commended the mother for the positive changes she had recently made in her life, but noted that it “must gauge how likely her sobriety and stability is to continue in the long-term” since “[t]he children have already been removed from their mother’s care and custody three times.” The court also referenced the mother’s past history:

Repeated attempts at substance abuse treatment in the past have resulted in significant relapse. She has maintained sobriety for a substantial recent period, however, the vast majority of that time has been while she was incarcerated. . . . Past history would indicate that if any stressors or negative associations interfere, a negative outcome is likely. . . . Her current stability outside a correctional setting has been shown only for 45 days, all long after the termination petition was filed and reunification deadlines past.

For those reasons the court determined the children could not be returned to their mother at that time. Her parental rights to JJ1 were then terminated pursuant to Iowa Code sections 232.116(1)(f). Her parental rights to JJ2 were terminated pursuant to Iowa Code section 223.116(1)(h). The mother appeals.

II. Standard of Review.

Our review of termination decisions is *de novo*. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). We give weight to the juvenile court’s findings, especially assessing witness credibility, although we are not bound by them. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). 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 “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. *P.L.*, 778 N.W.2d at 39. The court must first determine whether a ground for termination under section 232.116(1) has been established. *Id.* If a ground for termination has been established, the court must apply the best-interest framework set out in section 232.116(2) to decide if the ground for termination should result in termination of parental rights. *Id.* Finally, if the statutory best-interest framework supports termination of parental rights, the court must consider if any of the statutory exceptions set out in section 232.116(3) weigh against the termination of parental rights. *Id.*

A. Grounds for Termination.

The mother's parental rights to JJ1 were terminated pursuant to Iowa Code section 232.116(1)(f). That section provides that termination may be ordered when there is clear and convincing evidence the child is four years of age or older, has been adjudicated a child in need of assistance, has been removed from the physical custody of the parent for at least twelve of the last eighteen months, and cannot be returned to the parent's custody at the time of the termination hearing.

The mother's parental rights to JJ2 were terminated pursuant to Iowa Code section 232.116(1)(h). That section provides that termination may be ordered when there is clear and convincing evidence the child is three years of age or younger, has been adjudicated a child in need of assistance, has been removed from the physical custody of the parent for at least six of the last twelve

months, and cannot be returned to the parent's custody at the time of the termination hearing.

1. Insufficient Notice of Amendment.

In this case, the mother argues that her constitutional due process rights were violated when the juvenile court allowed the termination petition to be amended to include section 232.116(1)(f) as a ground for termination regarding JJ1 at the start of the hearing. The State argues this alleged error was not preserved for appeal, but we choose to decide the merits of the mother's argument. In *In re D.E.D.*, the court held that a father's due process rights were violated when the State was allowed to amend a termination petition during trial to allege a new ground for termination because he had no notice prior to the hearing of the ground under which termination was decreed. 476 N.W.2d 737, 739–40 (Iowa Ct. App. 1991) *overruled on other grounds by In re P.L.*, 778 N.W.2d 33, 38–39 (Iowa 2010). The facts are dissimilar to the present case. In *In re D.E.D.*, the State's amendment included completely new and different elements than the father had received notice of prior to trial. *D.E.D.*, 476 N.W.2d at 739 (comparing Iowa Code section 232.116(1)(b) and section 232.116(1)(g) (1989)). However, in the present case, the new element in dispute was whether the child could be returned to the mother's custody at the time of the termination hearing.⁵ The mother was already provided notice of this requirement in regards to JJ2, and the evidence needed to show that JJ1 could

⁵ The other new issues involved whether the child was over four years of age and if the child had been out of the home for twelve of the last eighteen months. Although the mother's request for a continuance was denied, the court did allow a short recess to double check the timeline to determine the length of removal.

also be returned would be the same. Because we find the mother did receive sufficient notice of the elements prior to trial to be properly prepared, her constitutional due process rights were not violated.

2. Clear and Convincing Evidence.

The mother also disputes that the State proved by clear and convincing evidence that the children could not be returned to her custody at the time of the termination hearing as required by 232.116(1)(f)(4) and 232.116(1)(h)(4). At the time of the termination hearing, the mother had been sober for seven months, had a safe and secure home, and had obtained steady employment for a period of time, but she had only maintained the stability outside the structure of a correctional facility for forty-five days. The court must consider what the future holds for the children if they are returned to their mother. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). “Insight for this determination can be gained 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.” *Id.* The children have already been removed from their mother’s custody on three separate occasions after her relapses with drugs and alcohol. Also as a result of her relapses, the children have suffered lack of proper parenting and have been subjected to exposure to and ingestion of methamphetamine. JJ1’s exposure to domestic violence has resulted in defiance and aggression toward her caregivers. JJ2’s exposure to methamphetamine in utero has resulted in continuing health concerns that require medical intervention. Furthermore, although DHS recently modified the mother’s visitation from two hours to six

hours, and from supervised to monitored, DHS has not been able to ascertain whether the mother is capable of handling, in a healthy way, the stress and frustration that can accompany full-time parenting.

We also commend the mother for the positive changes she has recently made in her life, however there remains clear and convincing evidence that the children could not be returned to her custody at the time of the termination hearing. Therefore, we agree with the juvenile court that clear and convincing evidence exists to terminate parental to JJ1 under section 232.116(1)(f) and to JJ2 under section 232.116(1)(h).

B. Best Interest of the Child.

Even if a statutory ground for termination is met, a decision to terminate must still be in the best interests of a child after a review of section 232.116(2). *P.L.*, 778 N.W.2d at 37. In determining the best interest of the child, 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 conditions and needs of the child.” See Iowa Code § 232.116(2).

We agree with the juvenile court’s finding that the termination of the mother’s parental rights would best provide for the children’s long-term nurturing and growth. Although the children do have a strong bond with and love their mother, the children also have a strong bond with their foster parents who have expressed their willingness to adopt the children if parental rights were terminated. The juvenile court reflected on the needs of the children:

The best placement for furthering the long-term nurturing and growth of the children is with the children’s foster parents because

their mother has not demonstrated the ability in the long-term to remain stable and sober outside the corrections system. The physical, mental and emotional conditions and needs of the children can best be met by their foster parents because both children require continued and substantial mental and medical treatment. The children have become integrated into the children's foster or kinship family.

The children had been with their foster parents for fourteen months at the time of the termination hearing. The foster parents have been able to provide them with stability and would like to continue doing so. We agree with the juvenile court that it is in the children's best interest to terminate the mother's parental rights.

C. Exceptions or Facts against Termination.

Finally, we consider whether any exception or factor in section 232.116(3) weighs against termination of parental rights. *P.L.*, 778 N.W.2d at 39. 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 facts in the section to save the parent-child relationship. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993).

The mother contends termination of her parental rights is not necessary because of the closeness of the parent-child relationship between the children and her. See § 232.116(3)(c). Although the children are bonded to their mother, the record does not provide any evidence that termination of her parental rights would be detrimental to the children. Furthermore, the foster parents have expressed their willingness to allow the mother continued contact with both

children so long as that contact is healthy. We conclude no exception or factor in section 232.116(3) applies to make termination unnecessary.

IV. Conclusion.

There is clear and convincing evidence the grounds for termination exist under section 232.116(1)(f) and 232.116(1)(h), termination of parental rights is in the child's best interests pursuant to section 232.116(2), and no consequential factor weighing against termination in section 232.116(3) requires a different conclusion. Accordingly, we affirm termination of the mother's parental rights.

AFFIRMED.