

IN THE COURT OF APPEALS OF IOWA

No. 3-881 / 13-1086
Filed September 18, 2013

**IN THE INTEREST OF G.E., C.E., and J.E.,
Minor Children,**

K.E., Mother,
Appellant,

J.E., Father,
Appellant.

Appeal from the Iowa District Court for Polk County, Terry L. Wilson,
District Associate Judge.

A mother and father appeal separately from the order terminating their
parental rights. **AFFIRMED ON BOTH APPEALS.**

Nancy A.S. Trotter, Des Moines, for appellant mother.

Jared C. Harmon, Des Moines, for appellant father.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant
Attorney General, John P. Sarcone, County Attorney, and Kevin Brownell,
Assistant County Attorney, for appellee State.

Charles Fuson of the Youth Law Center, Des Moines, for minor children.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

EISENHAUER, C.J.

A mother and father appeal separately from the order terminating their parental rights to their¹ three children, contending clear and convincing evidence does not support either statutory ground for termination. The mother also contends the court failed to consider the statutory exception to termination based on a strong parent-child bond. The father also contends termination is not in the best interests of the children and the court should have considered a guardianship. We affirm on both appeals.

Background Facts and Proceedings. The mother and father have a history of domestic violence, substance abuse, and criminal activity. Two prior child-in-need-of-assistance (CINA) cases were closed, and the children were returned to the mother's care after the mother successfully completed substance abuse treatment and other case plan requirements demonstrating her ability to parent the children safely. She relapsed again in December 2011.

The children—ages five, six, and eight—were removed again in April 2012 and adjudicated CINA in May under Iowa Code section 232.2(6)(b), (c)(2), and (n) (2011). Throughout this case, they have been in the care of a family friend. The mother was arrested on drug-related charges in July, her probation was revoked in September, and she remained in jail until December. Upon her release, she entered inpatient substance abuse treatment, which she successfully completed. She entered the women's correctional facility in Des

¹ The mother has two older children, born in 1997 and 2000, who not the subjects of this appeal. The appellant father is not the father of the older children. At the time of the termination hearing, the oldest child was in the same home as the three children involved in this appeal. The other child was living with his father.

Moines in January 2013, successfully completed programming there, and was released on probation in April. By the time of the termination hearing in June, the mother had employment and housing. Except for when she was in jail, the mother participated in supervised visitation.

The father was in jail seven times between the children's removal in April 2012 and the termination hearing in June 2013. At the time of the termination hearing, he had just begun serving a two-year sentence for possession of a controlled substance, second offense. When not in jail, he participated in supervised visitation, although not as regularly as the mother. He entered inpatient substance abuse treatment in March 2013, but left after two days.²

Following a permanency hearing in April 2013, the court directed the county attorney to file petitions to terminate both parents' rights. The petitions alleged termination was proper under section 232.116(1)(d) and (f) (2013). The petitions came on for contested hearing in June.

The mother testified she was drug-free and leading a sober lifestyle, was employed, had ended her relationship with the father, and believed the children could be returned to her care. The father testified by phone from prison and asked the court to establish a guardianship instead of terminating his parental rights so he could pursue reunification after serving his prison sentence. Both parents testified they had strong bonds with the children.

The court found the parents' response to services "has been insufficient to warrant return of the children to either parent's custody." It further found

² The father asserts in his petition on appeal that he "completed in-patient treatment."

returning the children to their home at that time would subject them to harm warranting adjudication as children in need of assistance. The court noted the parent-child bond “is described as strong” as was the bond between the children and their caretaker. It found termination served the children’s best interests. The court terminated the parental rights of the mother and father under section 232.116(1)(d) and (f). The mother and father each appeal.

Scope and Standards of Review. We review terminations de novo. *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011). We examine both the facts and law and adjudicate anew those issues properly preserved and presented. *In re L.G.*, 532 N.W.2d 478, 480-81 (Iowa Ct. App. 1995). We accord considerable weight to the findings of the juvenile court, especially concerning the credibility of witnesses, but are not bound by them. *Id.* at 481. Our main concern lies with the children’s welfare and best interests. *See id.*

Merits.

Mother. Statutory Grounds. The mother contends clear and convincing evidence does not support either statutory ground for termination. When parental rights are terminated on more than one statutory ground, we only need to find the evidence supports termination on one of the grounds to affirm. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). We choose to focus on section 232.116(1)(f). The first three elements of section 232.116(1)(f) are not in dispute. The mother argues the children could have been returned to her at the time of the termination hearing because she was employed, had a house, had ended her relationship with the father, and had overcome her long-term substance abuse problem. *See* Iowa Code § 232.116(1)(f)(4). She also argues she participated in

services and worked to maintain a relationship with the children, even while in jail. See *id.* § 232.116(1)(d).

The court found, and we agree, the children could not be returned to the mother's care without remaining children in need of assistance. See *id.* § 232.116(1)(f)(4); *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992) ("A child cannot be returned to a parent under section 232.102 if by doing so the child would be exposed to any harm amounting to a new child in need of assistance adjudication."). "The threat of probable harm will justify termination, and the perceived harm need not be the one that supported the child's initial removal from the home." *M.M.*, 483 N.W.2d at 814; see *In re C.M.T.*, 433 N.W.2d 55, 56 (Iowa Ct. App. 1988). The mother had recently participated in substance abuse treatment. Given her history of repeated participation in treatment followed by relapse, not enough time has passed to show the children could be returned to her care safely. Additionally, her relationship with the father includes domestic violence and, although she claims it is over now, she continued the relationship until he was arrested and sent to prison, and he posted on his Facebook page they were engaged. During the pendency of this CINA case, the mother was arrested several times on drug-related charges. At the time of the termination she was on probation, which could be revoked—as a previous probation was—if the mother continued her illegal activities. We conclude termination of the mother's parental rights is appropriate under section 232.116(1)(f) and affirm on that statutory ground.

Exceptions to Termination. The mother contends the court failed to consider the statutory factor in section 232.116(3)(c) to determine whether

termination was in the children's best interests given the strong parent-child bond. She argues "no party or evidence disputes the bond which exists between these children and their mother." The district court may deny an otherwise appropriate termination if one of the factors in section 232.116(3) applies. *In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010). The court has discretion, "based upon the unique circumstances of each case and the best interests of the child, whether to apply this section to save the parent-child relationship." *In re D.S.*, 806 N.W.2d 458, 475 (Iowa Ct. App. 2011).

The children are attached to their mother. The worker supervising visitation testified when the mother is using illegal drugs, "that bond is dramatically weakened." She further testified there were times the children did not want to talk to the mother on the phone or to visit because they were hurt by her using drugs and going to jail. The children also have a strong attachment to and trusting relationship with the family friend/foster mother and identify her as a mother figure. See Iowa Code § 232.116(2)(b). The district court did not find, and we do not find termination would be detrimental to the children based solely on the closeness of the parent-child relationship. See *id.* § 232.116(3)(c); *In re D.W.*, 791 N.W.2d 703, 709 (Iowa 2011) (stating "our consideration must center on whether the child will be disadvantaged by termination"). We affirm on this issue.

Father. Statutory Grounds. The father, who had just begun serving a two-year sentence at the time of the termination hearing, acknowledges the children could not be returned to his care at that time, but argues a guardianship "would have been a more appropriate permanency option" and "would have

allowed the father to complete his prison sentence and resume the parental role when he was released back into the community.”

Clear and convincing evidence supports termination under section 232.116(1)(f). The father has not addressed his substance abuse or domestic violence problems. It likely will be at least one year before he is released from prison. Nothing indicates the father is interested in resolving his substance abuse problem. A guardianship would only prolong the uncertainty for the children, because the father could challenge a guardianship and seek to have the children returned to his care. See Iowa Code § 232.104(2)(b) (allowing a parent to seek modification or termination of a permanency order). There is no indication the father will ever address his substance abuse problem and be able to provide a safe, stable home for his children. Considering the best-interest factors in section 232.116(2), we conclude a guardianship is not appropriate in these circumstances. See *id.* § 232.116(2); see also *In re J.E.*, 723 N.W.2d 793, 801 (Iowa 2006) (Cady, J., concurring specially) (“A child’s safety and the need for a permanent home are now the primary concerns when determining a child’s best interests.”). “It is well-settled law that we cannot deprive a child of permanency after the State has proved a ground for termination under section 232.116(1) by hoping someday a parent will learn to be a parent and be able to provide a stable home for the child.” *P.L.*, 778 N.W.2d at 41. These children should not be forced to suffer the parentless limbo of foster care or a guardianship. See *In re J.P.*, 499 N.W.2d 334, 339 (Iowa Ct. App. 1993). We conclude termination of the father’s parental rights is appropriate under section 232.116(1)(f) and affirm on that statutory ground.

Best Interests. The father contends termination is not in the best interests of the children because of the strong parent-child bond. He argues a guardianship is a better option “so that [he] may be able to resume care of the children after he has resolved his criminal issues.” As we have concluded, a guardianship is not appropriate in this case. Although there is a parent-child bond, the district court did not find, and we do not find termination would be detrimental to the children based solely on the closeness of the parent-child relationship. See Iowa Code § 232.116(3)(c); *D.W.*, 791 N.W.2d at 709. We affirm on this issue.

AFFIRMED ON BOTH APPEALS.