

IN THE COURT OF APPEALS OF IOWA

No. 3-884 / 13-1189
Filed October 2, 2013

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

J.M., Mother,
Appellant,

S.M., Father,
Appellant.

Appeal from the Iowa District Court for Iowa County, Russell G. Keast,
District Associate Judge.

A mother and father separately challenge the termination of their parental
rights to their son. **AFFRIMED.**

Erek P. Sittig of Neuzil, Sanderson & Sigafoose, P.C., Iowa City, for
appellant-mother.

Kelly D. Steele, Cedar Rapids, for appellant-father.

Thomas J. Miller, Attorney General, Janet Hoffman, Assistant Attorney
General, Tim McMeen, County Attorney, for appellee.

Deborah Skelton, Walford, attorney and guardian ad litem for minor child.

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

TABOR, J.

M.M. was born prematurely in October 2011, weighing just over three pounds. The doctors have diagnosed him with intrauterine growth retardation, fetal alcohol syndrome, atrial septal and ventricular septal defects, failure to thrive, as well as cognitive and physical development delays. His parents both have a long history of substance abuse and struggle to grasp the complexity of their son's health problems. The juvenile court ordered the termination of their parental rights, and both parents filed appeals. The mother and father allege the same three bases for reversal: (1) the juvenile court wrongly admitted certain exhibits at the termination hearing; (2) the statutory grounds for termination were not supported by clear and convincing evidence; and (3) termination is not in M.M.'s best interests.

In our de novo review¹ we conclude the juvenile court properly considered the State's exhibits, the parents did not preserve error on their claim M.M. could be presently placed back in their care, and severing parental ties so that M.M. may be adopted was in his best interests.

I. Facts and Procedural History

The mother, Jessica, has been interacting with the Department of Human Services (DHS) for almost a decade. The DHS opened child in need of assistance (CINA) cases for her son J.H. in 2004 and her daughter S.H. in 2006.²

¹ We review termination decisions de novo, giving weight to the juvenile court's factual findings, especially as to the credibility of witnesses. *In re A.B.*, 815 N.W.2d 764, 773 (Iowa 2012).

² The father of J.H. and S.H. is not involved in the current case.

The juvenile court ordered these children removed from their parents' care because of substance abuse and domestic violence in the home. The DHS provided services to the family for nearly three years, but Jessica did not make progress in managing either her addiction or violence issues. The court placed her son and daughter in the permanent care of their maternal grandparents.

M.M.'s father, Scott, also has had prior involvement with the DHS. Scott and Jessica's daughter, L.M., was born in September 2008 with low birth weight and tested positive for the presence of marijuana; she was also diagnosed with fetal alcohol syndrome. L.M. was removed from her parents' care shortly after her birth. The parents did not obtain substance abuse evaluations and rarely visited their daughter. Scott and Jessica consented to the termination of their parental rights to L.M., who was adopted by her maternal grandparents in September 2010.

In October 2011, Jessica gave birth to M.M., the child at issue in this case. M.M. weighed 3.14 pounds and suffered from congenital heart defects. Doctors also diagnosed M.M. with a chromosomal abnormality associated with delayed cognitive development, speech delay, mental retardation, and physical delays. M.M. also showed signs of fetal alcohol syndrome and failure to thrive.

M.M. had to undergo heart surgery on February 13, 2012. Both parents visited the hospital on February 15. The hospital staff reported the smell of alcoholic beverages in the child's room and witnessed an incident where Jessica yelled at Scott, using profanity. The staff had to tell Jessica to keep her voice

down. After that disruption the parents visited their infant son only sporadically during his time in the hospital.

On April 13, 2012, the State filed a petition alleging M.M. to be a CINA. According to the petition Scott and Jessica were living with M.M. in a garage in North English, and were drinking heavily and using marijuana in the child's presence. In May 2012, Jessica arrived for a pretrial conference at the courthouse intoxicated and was placed under arrest; she was later convicted of public intoxication. M.M. was removed from his parents' care in June 2012 after police responded to a report of domestic violence at their residence and found Jessica too intoxicated to care for M.M.; Scott had already fled the scene. That same month Jessica was hospitalized on a substance abuse commitment order. After her release she did not complete the outpatient treatment recommended.

The court adjudicated M.M. as a CINA on July 13, 2012. The court approved a case permanency plan requiring Jessica to participate in substance abuse treatment and Scott to obtain a substance abuse evaluation and follow through with its recommendations. The order also required the parents to stay engaged in their son's medical care. The DHS also made supervised visitation available to the parents.

Jessica failed to visit her son for ten weeks. Scott claimed not to know where she could be found. After September 25, 2012, the parents exercised regular visitation, even progressing to semi-supervised sessions with M.M. The parents missed many of M.M.'s appointments with health professionals during

the late summer and fall of 2012, though their attendance improved from November 2012 until March 2013.

Both Scott and Jessica obtained substance abuse evaluations from MECCA in the fall of 2012. But the juvenile court was skeptical of the recommendations because MECCA relied solely on the information provided by the parents. The DHS case worker learned that Jessica “greatly minimized” her history of substance abuse. When the clinical manager urged Jessica to return for a follow-up interview, she failed to do so. The parents also failed to comply with court ordered substance abuse testing.

Both parents have criminal histories, largely linked to their substance abuse problems. They have failed to follow DHS recommendations to seek couple’s counseling. And they have not maintained steady employment nor had their own housing during M.M.’s CINA case.

The State filed a petition to terminate parental rights on January 18, 2013. The petition alleged termination was proper under Iowa Code sections 232.116(1)(e), (g), (h) and (l) (2013). The juvenile court held a hearing on April 12, 2013. Both the mother and father testified at the hearing. The child’s guardian ad litem (GAL) advocated for termination. The court issued its order on July 12, 2013, terminating the parental rights of both parents by relying on Iowa Code section 232.116(1)(h).

II. Analysis

A. Did the Juvenile Court Err in Admitting State's Exhibits Documenting CINA Cases Involving Other Children of These Parents?

Attorneys for both Jessica and Scott objected at the termination hearing when the State offered exhibits including DHS records for their other children, criminal sentencing orders, and incident reports. The parents' attorneys raised hearsay, foundation, and relevancy grounds. The court admitted the exhibits "subject to the objections made on the record."

The parents now argue the court should not have admitted documents related to children other than M.M. or documents containing "hearsay within hearsay" or lacking foundational evidence to prove their accuracy or authenticity. The State counters that the court properly admitted all of the exhibits as they are "highly relevant" as examples of the parents' past performance.

In discussing adjudicatory hearings in CINA cases, the juvenile code provides for the application of the rules of evidence from civil cases—with certain exceptions. Iowa Code § 232.96(3). The legislature drafted an exception allowing admission of DHS and police reports relating to a child in a juvenile proceeding, notwithstanding hearsay objections. Iowa Code § 232.96(6);³ see also *In re E.J.R.*, 400 N.W.2d 531, 533 (Iowa 1987) (holding evidence admissible

³ That statute provides: "A report, study, record, or other writing . . . made by the department of human services, . . . , 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, The circumstances of the making of the report, study, record or other writing . . . including the maker's lack of personal knowledge, may be proved to affect its weight."

under section 232.96(6) to be admissible in termination-of-parental-rights proceedings). Overall, juvenile hearings may be conducted in a more informal manner than other court proceedings. See *In re A.S.*, 743 N.W.2d 865, 868 (Iowa Ct. App. 2007); see also Iowa Code §§ 232.99(2) (directing juvenile court to admit “all relevant and material evidence” at dispositional hearings); 232.104(1)(c) (stating permanency hearings to be similarly conducted).

We conclude the juvenile court properly admitted the State’s exhibits. The DHS documents showing Jessica and Scott’s parental rights were terminated in regard to their older daughter L.M. were admissible under section 232.96(6) and relevant to prove an element of section 232.116(1)(g) (requiring proof parental rights were terminated with respect to another member of the same family). The CINA files and child abuse assessments involving Jessica’s older children, J.H. and S.H., were also admissible to show the mother’s past performance. See *In re C.M.*, 526 N.W.2d 562, 565 (Iowa Ct. App. 1994) (upholding admission of evidence concerning a mother’s prior termination of her parental rights to another daughter). In deciding termination cases, the court “necessarily looks at past performance ‘for that performance may be indicative of the quality of future care that the parent is capable of providing.’” *Id.* Section 232.96(6) allows admission of records “relating to a child in a proceeding under this division” of the juvenile code; it does not specify the records are limited to the same child being considered in the current proceedings.

But even if we assume any of the challenged exhibits were not admissible under section 232.96(6), we find no reversible error. *A.S.*, 743 N.W.2d at 869.

Our review is de novo, and we arrive at the same result as did the juvenile court, without resort to the objectionable exhibits. *In re Adkins*, 298 N.W.2d 273, 278 (Iowa 1980).

B. Did the Parents Preserve Error on Their Claim the State's Proof Was Inadequate?

The juvenile court terminated the parents' rights under section 232.116(1)(h), which requires clear and convincing evidence of the following elements: (1) the child is three years old or younger, (2) has been adjudicated a child in need of assistance, (3) has been removed from the parents' physical care for the requisite period of time (at least six months), and (4) cannot be returned to the parent's custody at the time of termination. The parents concede the State proved the first three elements by clear and convincing evidence. See Iowa Code § 232.116(1)(h)(1)-(3). They contest the fourth element, arguing the court "focused on all the bad things that Scott and Jessica had done in the past" and failed to credit the progress they have made in the instant case. See *id.* § 232.116(1)(h)(4). The parents argue the juvenile court should have decided M.M. could be returned to their care at the present time.

The State contends the parents did not preserve error on this claim because during the termination hearing they did not assert they could presently provide care for M.M, but instead asked for additional time. At the hearing the mother's attorney told the court: "it would be in [M.M.'s] best interests to give his parents some more time. He obviously has a bond with them and I think he

deserves to have a life with them if that can be—if that can happen.” The father’s attorney’s echoed those sentiments:

I agree the parents would like the opportunity to keep working. The visits have expanded. They’ve become semi-supervised. Obviously, this case isn’t on a fast track. It’s been moving along slow, but progress has been made. It’s not maybe as quick as the State might want it to be done. But that would be our request too, is to allow the parent’s more time.

Termination cases are not immune from “the general rule that appellate arguments must first be raised in the trial court.” *In re A.B.*, 815 N.W.2d 764, 773 (Iowa 2012). The parents did not ask the juvenile court to return M.M. to their custody at the time of the hearing. See Iowa Code § 232.116(1)(h)(4). Accordingly, we cannot consider their new argument on appeal.

C. Was Termination in M.M.’s Best Interests?

Finally, the parents contend termination was not in their son’s best interests, citing Iowa Code sections 232.116(2) and (3). In their view, the juvenile court gave too much weight to their past indiscretions and did not recognize the progress they have made since the fall of 2012.

In evaluating what is in a child’s best interests; we give primary consideration to his safety, to the best placement for furthering his long-term nurturing and growth, and to his physical, mental, and emotional condition and needs. See *In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010) (citing Iowa Code § 232.116(2)). A juvenile court may also deny the State’s petition if there is clear and convincing evidence termination would be detrimental to the child due to the closeness of the parent-child relationship. Iowa Code § 232.116(3)(c).

In M.M.'s case, attending to his long-term medical needs looms large in the best-interest determination. The GAL eloquently explained why Jessica and Scott were not the best placement for M.M.:

I believe the parents love [M.M.] very much and I think they care about him but I don't believe that they grasp the severity of their addictions to alcohol. I don't think that they even begin to understand the enormity of the impact their drinking has had on [M.M.].

And so I feel that as long as they're unable to comprehend just how severe his medical conditions are or as long as they're in denial about how severe his medical conditions are—[M.M.] would remain at risk if he were placed with them. He would remain at risk of serious permanent harm.

While the record shows M.M. has a bond with his parents, especially with Scott, it does not show the kind of close parent-child relationship, where termination would be detrimental to the child. See *P.L.*, 778 N.W.2d at 41.

The juvenile court recognized the child's demanding medical needs could not be addressed by his parents. "Scott and Jessica have chosen a path of minimal participation and understanding of [M.M.'s] overwhelming medical regimen. There has been no indication by the parents that they are capable or desirous of meeting those nurturing requirements." The court noted despite his special needs, M.M. was a bright and cheerful child, who was thriving in foster care and was adoptable. Given these observations, we agree termination was in the child's best interests.

AFFIRMED.