

**IN THE COURT OF APPEALS OF IOWA**

No. 7-006 / 06-2049  
Filed January 31, 2007

**IN THE INTEREST OF A.H., Z.H., AND L.H.,  
Minor children,**

**M.M.H., Mother,  
Appellant.**

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Appeal from the Iowa District Court for Dubuque County, Thomas J. Straka, Associate Juvenile Judge.

A mother appeals from the order terminating the parental rights to her three children. **AFFIRMED.**

Nicholas J. Klenske of Reynolds & Kenline, L.L.P., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Fred H. McCaw, County Attorney, and Jean Becker, Assistant County Attorney, for appellee.

Emilie Roth-Richardson of the Roth Law Office, Dubuque, for minor child.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

**BAKER, J.**

Madeline is the mother of Aisha, who was born in 1996, Zoe, who was born in 2000, and Lakera, who was born in 2005. The family first came to the attention of the Iowa Department of Human Services (DHS) in November of 2005 when they were removed due to protective concerns.<sup>1</sup> The basis for their removal involved allegations Madeline was using crack cocaine in the presence of the children, failing to supervise them, and failing to take her mental health medications. Following a January 4, 2006 hearing, the children were adjudicated to be in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(c)(2) and (n) (2006).

On October 25, 2006, the State filed a petition seeking to terminate Madeline's parental right to the three children. Following a hearing, the court granted the State's request and terminated Madeline's parental rights under sections 232.116(1)(h) and (f). Madeline appeals from this order.

We review termination orders de novo. *In re R.F.*, 471 N.W.2d 821, 824 (Iowa 1991). Our primary concern in termination proceedings is the best interests of the children. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000).

Madeline first contends the court committed error when it denied her request to allow ten-year old Aisha to testify at trial with regard to her apparent desire to return to her mother's care.<sup>2</sup> In denying this request, the court first

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<sup>1</sup> The children were actually first removed by Florida authorities in 2002 due to Madeline's substance abuse and lack of supervision.

<sup>2</sup> Iowa Code section 232.116(3)(b) provides that the court need not terminate parental rights if the child is over ten and objects to the termination. *See In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993) ("The factors in section 232.116(3) have been interpreted as permissive, not mandatory."). It is in the court's discretion, based upon the unique

noted that Aisha's guardian ad litem advised against such in-person testimony. It further reasoned that this evidence could be presented to the court by means other than the child's testimony and that her testimony would be unduly traumatic due to her current behavioral problems. On appeal, Madeline admits that other witnesses did in fact testify as to Aisha's wish to return to her mother. Upon consideration of these factors, we conclude the court's decision was reasonable under the circumstances, and we do not find it cause to upset this termination order. It is also questionable whether this issue has been preserved. There was no offer of proof or other means by which this court can determine the nature of the testimony sought to be introduced. See *In re S.D.*, 671 N.W.2d 522, 529 (Iowa Ct. App. 2003).

We next address Madeline's claim the State failed to meet its statutory burden to prove the children were removed from her care for the required period of time. Iowa Code sections 232.116(1)(h) and (f), upon which Madeline's rights were terminated, require that the children have been removed from the "physical custody" of their parents for either the last twelve or six months, depending on the ages of the children. Here, during part of that time frame the children were in the custody of their maternal grandmother. Also, during approximately two of those months, Madeline lived with them. Madeline now urges that during those two months she had "physical custody" of the children such that the children were not uninterruptedly removed for the statutory period of time. We reject this contention. In *In re J.O.*, 675 N.W.2d 28, 30 (Iowa Ct. App. 2004), our court

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circumstances of each case and the best interests of the child, whether to apply the factors in section 232.116(3). See *In re J.V.*, 464 N.W.2d at 890."

addressed an identical question and held “[n]o amount of contact with the child rises to the level of physical or legal custody without a judicial determination and an order returning the child to the parent.”

Madeline next asserts the State failed to meet “its burden of proving the children cannot be returned to [her] custody in accordance with Iowa Code section 232.102.” We again find questionable whether she has preserved this contention for our review. She did not claim at the termination hearing that the children could be returned to her care immediately; indeed she admitted that they could not, and she requested that the court grant her more time to prove her ability to care for them. Regardless, upon our de novo review, we conclude the children could not be returned to her care at the time of the termination hearing. The halfway house, in which she was residing at that time, by its rules, would not allow children to live with her.

We conclude Madeline has failed to preserve for appellate review her next contentions. She maintains the juvenile court should have deferred termination because the children were in the custody of a relative. See Iowa Code § 232.116(3). There is no indication this issue was raised or addressed below. Likewise we find no indication in the termination order that she ever argued the DHS “violated a court order” by “function[ally] closing . . . the case over one month prior to the termination hearing.”

Finally, we conclude clear and convincing evidence supports the court’s decision to terminate Madeline’s parental rights to her three children. The mother’s history is a tale of repeated drug use, failed attempts at treatment, and

unaddressed mental issues.<sup>3</sup> After their initial removal, both Zoe and Aisha tested positive for exposure to cocaine. Up until the time she finally entered inpatient treatment, Madeline repeatedly tested positive for drugs despite her continued denials of use. These children would clearly be at risk of abuse or neglect if returned to Madeline's care. See *In re K.F.*, 437 N.W.2d 559, 560 (Iowa 1989) (recognizing we gain insight into the child's prospects by reviewing evidence of the parent's past performance—for it may be indicative of the parent's future capabilities). Furthermore, all three are doing well in the care of their aunt and uncle and cannot wait for their mother to resolve her own problems. *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987) ("The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems."). We therefore affirm the termination order.

**AFFIRMED.**

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<sup>3</sup> Madeline has been diagnosed with bipolar disorder.