

IN THE COURT OF APPEALS OF IOWA

No. 7-118 / 07-0031
Filed February 28, 2007

**IN THE INTEREST OF M.R.H. and J.H.,
Minor Children,**

**D.J.H., Mother,
Appellant.**

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

A mother appeals from the termination of her parental rights to two
children. **AFFIRMED.**

Charles Hallberg of Hallberg, Jacobsen, Johnson & Viner, P.L.C., Cedar
Rapids, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, Harold L. Denton, County Attorney, and Troy M. Powell,
Assistant County Attorney, for appellee.

Patrick O'Connell of Lynch Dallas, P.C., Cedar Rapids, for father.

Melody Butz of Butz Law Office, Cedar Rapids, attorney and guardian ad
litem for minor children.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Danita, the mother of Mariah, born in 2000, and Jayshon, born in 2002, appeals from the juvenile court order terminating her parental rights.¹ We affirm.

Background

The Department of Human Services became involved in August of 2004 when it was contacted by police, who were executing a search warrant at Danita's home in response to multiple complaints of drug sales from the home. Tests revealed the children had been exposed to high levels of cocaine. The children were placed with their father, but later were placed with their maternal aunt. Danita was provided with numerous services, including supervised visitation, substance abuse treatment, parenting and early childhood development training, a mental health evaluation, individual counseling, and domestic violence counseling.

Termination Proceedings

In August of 2006, the State petitioned to terminate the parents' rights. Following a contested hearing in November, the court terminated both parents' rights under Iowa Code sections 232.116(1)(f) (2005) (Mariah) and (h) (Jayshon).

The court's findings concerning Danita include:

She had physical custody of the children in August 2004, when they both tested for high levels of cocaine in their hair stat tests. Since that time the mother has continued to deny any knowledge of drug activity at that residence or in any proximity to her children. The mother has continuously failed to appreciate her responsibility in protecting her children from the risks imposed by her association with others. This is evident by her lack of cooperation and honesty

¹ The court also terminated the father's parental rights, but he did not appeal.

with the Department of Human Services regarding her continued associations with males that had a record of illegal drug usage or being physically abusive. In spite of ongoing directives from service providers, the mother has defiantly maintained that she has a right to associate with whomever she chooses to regardless of long-term safety implications. The mother has maintained this practice for 26 of the 27 months of juvenile court involvement. The mother currently claims that she is free of relationships, but based upon her history of defiance and dishonesty with regard to this matter, the court cannot find that she has resolved this issue and must conclude that the children cannot be returned to their mother's care at this time without being at risk of being children in need of assistance pursuant to Iowa Code section 232.2(6)(c)(2). This is also evident by the mother's inability to progress beyond supervised visitation throughout this entire process

. . . .

The court finds that the case for termination of parental rights is clearly in these children's best interests. The children were removed from their mother's care when Mariah was three years old and Jayshon was one year and eleven months after it was found that they had high levels of cocaine in their systems. Their mother denies responsibility for that occurrence and has maintained associations that could continue the risk to the safety of these children. The mother's defiant attitude has continued throughout these proceedings in spite of numerous services provided to her and in spite of confrontation and redirection from service providers. . . . The need for permanency in the children's lives is paramount. They have waited more than 2 years for their father and mother to resolve significant impediments to their ability to parent. Any significant progress has either been short-lived or gained shortly before trial and has not withstood any reasonable test of time to determine its integrity. The court finds that the children have waited long enough and that they deserve and need stability, safety, and permanency.

Analysis

The mother raises four claims on appeal.

1. The State failed to present any evidence of their being a risk of "imminent danger" in returning the children to their mother, [Danita] at the time of trial. There was no evidence presented that the children would be "children in need of assistance" under 232.2(6) if returned to her care at the time of trial.

This appears to be a challenge to the evidence to satisfy sections 232.116(1)(f)(4) and 232.116(1)(h)(4), both of which require that there be clear and convincing evidence the child cannot be returned to the custody of the child's parents as provided in section 232.102 "at the present time." This is proved when the evidence shows the child cannot be returned to the parents because the child remains in need of assistance as defined by section 232.2(6). *In re R.R.K.*, 544 N.W.2d 274, 277 (Iowa Ct. App. 1995). The threat of probable harm will justify termination of parental rights, and the perceived harm need not be the one necessitating the child's initial removal from the home. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992). None of the code sections pled by the State or cited by the court require proof of "imminent danger." Compare Iowa Code §§ 232.116(1)(i) and (n). The juvenile court's determination the children could not be returned to Danita's care at the time of the termination hearing is supported by clear and convincing evidence.

2. The State did not establish by clear and convincing evidence that the children would be children in need of assistance under Iowa Code section 232.2(6) as all the State's witnesses had no knowledge of the mother's circumstances after August 2006, when the State decided to file for termination of parental rights.

When we consider what the future might hold for a child, we can gain insight from case records and a parent's past performance. *In re A.J.*, 553 N.W.2d 909, 913 (Iowa Ct. App. 1996). The case records and report to the court, along with Danita's past performance provide clear and convincing evidence the children would be at risk if returned to her care. She has repeatedly chosen to associate with men who are abusive or abuse drugs or both. She has lied to service providers and the court about her relationships. She did not protect an

older daughter from abuse. The goal of our statutory scheme is to prevent probable harm to the child; our statutes do not require delay until after the harm has happened. *In re L.L.*, 459 N.W.2d 489, 494 (Iowa 1990). This claim is without merit.

3. The State did not allege grounds in its petition for termination of parental rights under 232.116(1)(f) regarding Mariah.

The State amended the petition to allege termination was proper under section 232.116(1)(f). The court properly cited this section as a ground for termination.

4. The juvenile court did not consider the best interests of the children in terminating parental rights, and did not make a specific finding regarding why any exception under Iowa Code section 232.116(1)(h)(3) did not apply. The children were in the care of a relative, the paternal aunt, [Janice]. The children could have been returned home to mother with a 6 month extension, and the testimony established the DHS discontinued services substantially after August of 2006.

Although the children were in their father's care at times after their removal from Danita's care, there was no trial period in Danita's home and their father is in prison now. The children had been out of Danita's home for more than two years at the time of the termination. The time requirements of section 232.116(1)(h)(3) have been met.

Although the children are in their paternal aunt's care, their placement with a relative does not prevent termination. See *In re C.K.*, 558 N.W.2d 170, 174 (Iowa 1997); *R.R.K.*, 544 N.W.2d at 275. The provisions of section 232.116(3) are discretionary, not mandatory. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). The court found termination of Danita's parental rights is in the children's interest. Considering the children's "safety and the need for a

permanent home,” we find termination proper. See *In re J.E.*, 723 N.W.2d 793, 801 (Iowa 2006) (Cady, J., concurring specially).

AFFIRMED.