

IN THE COURT OF APPEALS OF IOWA

No. 7-247 / 07-0387
Filed April 25, 2007

**IN THE INTEREST OF S.J.,
Minor Child,**

**K.K.E., Mother,
Appellant.**

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

A mother appeals from the order terminating her parental rights.

AFFIRMED.

Steven W. Guiter of Johnston, Hicks, Guiter & Griffith, Knoxville, for
appellant mother.

W.J., Des Moines, father, pro se.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant
Attorney General, Terry Rachels, County Attorney, and Melissa Clarke, Assistant
County Attorney, for appellee State.

Terri A. Beukelman, Pella, attorney and guardian ad litem for minor child.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Khrista appeals from the order terminating her parental rights to Shelby, arguing there were insufficient grounds for termination and the termination was not in Shelby's best interests. We affirm.

I. Background Facts and Proceedings

Shelby was five months old when she was removed on July 16, 2004. She was removed because police discovered an active methamphetamine lab in the family home. On September 8, 2004, Shelby was adjudicated a child in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(c) (child is likely to suffer harm due to parent's failure to exercise care in supervising child) and (n) (parent's drug or alcohol abuse results in child not receiving adequate care) (2003). Shelby remained in foster care until she was placed with her maternal grandfather in September 2004.

Because of her involvement with the meth lab, Khrista was incarcerated until December 2005. She was then transferred to a work release center in Des Moines. In April 2006 a drug screen revealed a controlled substance in her system. Five months later she was arrested for check forgery. She was eventually convicted for felony forgery and sentenced to five years' imprisonment. She will be eligible for parole in May, 2007.

On October 4, 2006, the attorney and guardian ad litem for the child petitioned the court for the termination of parental rights pursuant to Iowa Code section 232.111. The State subsequently joined in this petition. After a full

hearing, the court terminated Khrista's¹ parental rights on February 14, 2007, pursuant to section 232.116(1)(h).

II. Standard of Review

We review terminations of parental rights de novo. Iowa R. App. P. 6.4. Although we are not bound by them, we give weight to the district court's findings of fact, especially when considering the credibility of witnesses. See *In re J.V.*, 464 N.W.2d 887, 888 (Iowa Ct. App. 1990).

III. Analysis

Under section 232.116(1)(h), a parent's rights may be terminated if the court finds by clear and convincing evidence (1) the child is three or younger, (2) the child has been adjudicated in need of assistance, (3) the child has been removed from the home for six of the last twelve months, and (4) the child cannot be returned home. There are no disputes concerning Shelby's adjudication, age, or length of out-of-home placement. On appeal, Khrista contends the court erred in finding that Shelby could not be returned to her care.² We reject this argument because it is clear that at the present time the child cannot be returned to her custody because Khrista is incarcerated. See *In re J.S.*, 470 N.W.2d 48, 51 (Iowa Ct. App. 1991) (rejecting father's claim that his child could be returned to his care because father was currently incarcerated). Also, during the brief period between incarcerations, Khrista did not progress past supervised visitations or establish a strong bond with Shelby. For example, Khrista often brought her

¹ The father's parental rights were also terminated, but he is not a party to this appeal.

² We do not address Khrista's argument that she maintained significant and meaningful contact with Shelby because that is an element indicating grounds for termination under a different section of the Iowa Code.

boyfriend to visitations and would talk with him most of the time. If her boyfriend did not come to the visitation, she would call and talk with him on the phone. Based on our de novo review of the record, we find clear and convincing evidence to support termination under section 232.116(1)(h).

Proof of a statutory ground for termination is not dispositive. We must also determine whether it is in the child's best interests to terminate parental rights. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). Khrista contends termination is not in Shelby's best interests because Iowa Code section 232.116(3) provides that a court need not terminate the relationship between a parent and child if the court finds that a relative has legal custody of the child.

Section 232.116(3)(a) provides, in relevant part:

3. The court need not terminate the relationship between the parent and child if the court finds any of the following:
 - a. A relative has legal custody of the child.

This code section does not contain mandatory language. In interpreting section 232.116(3)(e), another subsection of section 232.116(3), our court has held:

[I]t is self-evident in the words "[t]he court *need not terminate* the relationship" that the legislature did not intend this to be a mandatory provision. Unlike the words "shall not terminate" which would impose a duty, or "must not terminate," which would state a requirement, the words "need not terminate" clearly are permissive.

See *J.V.*, 464 N.W.2d at 890 (internal citations omitted). The application of section 232.116(3) is within the sound discretion of the court, based on the circumstances of the case before it and the best interests of the child. *Id.* Based upon our review of the evidence, we find the juvenile court was correct in determining termination was in Shelby's best interests.

Khrista has been incarcerated for the overwhelming majority of Shelby's life. She had the opportunity to be released and begin the process of parenting, but instead chose to engage in further criminal acts. *In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa Ct. App. 1994) (noting that an incarcerated parent must take responsibility for the action that caused the incarceration). Based on her prior behaviors, there is a strong possibility she may never be able to provide for Shelby's basic needs. See *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006) (noting a parent's past performance is indicative of the quality of care the parent will provide in the future). On the other hand, Shelby has thrived under the care of her maternal grandfather and step-grandmother. They have provided a loving and stable environment and are willing to adopt her. For all practical purposes, this temporary home is the only home she has ever known. Shelby deserves to grow in a permanent environment; she should not be forced to endlessly await the maturity of her natural parent. *In re T.D.C.*, 336 N.W.2d 738, 744 (Iowa 1983); see also *J.E.*, 723 N.W.2d at 801 (Cady, J., concurring) ("A child's safety and the need for a permanent home are now the primary concerns when determining a child's best interests.").

We affirm the decision to terminate Khrista's parental rights.

AFFIRMED.