

IN THE COURT OF APPEALS OF IOWA

No. 7-391 / 07-0675
Filed June 27, 2007

**IN THE INTEREST OF S.J.T. and J.W.T.,
Minor Children,**

**J.J.T., Father,
Appellant,**

**D.D.M., Mother,
Appellant.**

Appeal from the Iowa District Court for Polk County, Carol S. Egly, Judge.

A mother and father each appeal from the termination of their parental rights to two children. **AFFIRMED ON BOTH APPEALS.**

Aaron H. Ginkens of Ginkens Law Firm, P.L.C., West Des Moines, for appellant-father.

J. Michael Mayer, Des Moines, for appellant-mother.

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

Kathryn Miller , Des Moines, guardian ad litem for minor child.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Dawn and James, the parents of James (J.W.) and Skyler, appeal from the juvenile court order terminating their parental rights. Dawn contends clear and convincing evidence does not support termination and termination is not in the children's best interest. James contends termination was not proper given the closeness of the parent-child bond and because of his imprisonment. He further contends termination is not in the children's best interest. We affirm on both appeals.

Background. Dawn and James got together in about 1997. During their seven years together, their relationship was marked by domestic violence, criminal activity, and substance abuse. Dawn is schizophrenic and is inconsistent in taking her medication.

J.W. was born in 1998 and Skyler in 2001. In August of 2004 Dawn voluntarily placed the children with James, who was living with his parents. From August of 2004 until their removal in January of 2006, the boys were cared for by many of their father's friends and relatives. They were removed from James's care following his arrest for felony child endangerment for striking J.W. in the head. After brief placements in foster care, the boys were placed with a great aunt and her husband, where they remained during the pendency of the juvenile court proceedings. This relative placement is not available as a long-term placement.

The children's removal and finding they were in need of assistance was based on physical abuse, neglect, and failure to supervise, and their parents' substance abuse and mother's mental health issues. The family received or was

offered numerous services, including substance abuse evaluation and treatment, mental health referrals, child welfare mediation, supervised and semi-supervised visitation, therapy for the children, in-home services, and domestic violence education.

In February of 2007, the State petitioned to terminate both parents' rights under Iowa Code sections 232.116(1)(d) and (f) (2007), and James's parental rights also under section 232.116(1)(e). Following a hearing the court terminated both parents' rights on the statutory grounds pled. Both parents appeal.

Our review is de novo. Iowa R. App. P. 6.4; *In re D.G.*, 704 N.W.2d 454, 456 (Iowa Ct. App. 2005). The State must prove the statutory grounds for termination by clear and convincing evidence. *In re L.E.H.*, 696 N.W.2d 617, 618 (Iowa Ct. App. 2005). If the juvenile court terminates a parent's rights on more than one statutory ground, we will affirm if at least one ground has been proved by clear and convincing evidence. *In re A.J.*, 553 N.W.2d 909, 911 (Iowa Ct. App. 1996).

The Mother. Dawn contends the court erred in finding clear and convincing evidence to support termination under sections 232.116(1)(d) and (f) instead of returning the children to her care. She argues her life has stabilized, she has kept up visitation when able, there is a strong and loving parent-child bond, and she is ready willing and able to regain custody now. She further argues that, "given additional time, there is no question this mother could regain custody of these two children."

Under section 232.116(1)(f)(4) termination is appropriate if the child cannot be returned to the parent's custody at the time of the termination hearing

as provided in section 232.102. A child cannot be returned to a parent's custody if the child (1) cannot be protected from physical abuse or (2) the child cannot be protected from some harm that would justify the child's adjudication as a child in need of assistance. See Iowa Code § 232.102(5). The threat of probable harm will justify termination of parental rights, and the perceived harm need not be the one that supported the child's removal from the home. See *In re M.M.*, 482 N.W.2d 812, 814 (Iowa 1992). The boys had been out of Dawn's care for more than twenty months at the time of the termination hearing. She had struggled with mental health issues, illegal activities, substance abuse, and violent domestic relationships. For most of that period she was unemployed and lacked stable housing. During supervised visitation, Dawn was not able to control both boys consistently. Skyler, in particular, exhibits aggressive behavior such as hitting, spitting, kicking, and biting others. Although Dawn has made positive changes in her life, mostly in the months just before the termination hearing, we find clear and convincing evidence the children could not be returned to her care at the time of the termination hearing. We affirm the termination of her parental rights under section 232.116(1)(f).

Dawn also contends termination is not in the children's best interest. She argues termination is more harmful to them than maintaining "the present legal relationship." When we consider the children's best interests, we look to their long-range as well as immediate best interests. *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997). "[A] child's safety and his or her need for a permanent home [are] the defining elements in a child's best interests." *In re J.E.*, 723 N.W.2d 793, 802 (Iowa 2006) (Cady, J. concurring specially). "[B]eyond the [time] parameters of

chapter 232, patience with parents can soon translate into intolerable hardship for their children.” *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987). J.W. and Skyler have waited too long already for a safe, permanent home Dawn cannot provide. We affirm the termination of her parental rights.

The Father. James does not challenge any of the statutory grounds for termination cited by the court. Rather, James contends termination was not proper (1) because of the closeness of the parent-child relationship, (2) because of his imprisonment, and (3) because it was not in the best interest of the children. The first two issues relate to the provisions of Iowa Code section 232.116(3). The factors in section 232.116(3) are permissive, not mandatory. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). “It is in the court’s discretion, based upon the unique circumstances of each case and the best interests of the child, whether to apply the factors in section 232.116(3).” *In re A.J.*, 553 N.W.2d 909, 916 (Iowa Ct. App. 1996).

The juvenile court described the bond between James and the children as “present.” We acknowledge James’s attempt to maintain some contact with his children while he was incarcerated. From our review of the circumstances before us, however, we do not find the parent-child relationship sufficient to justify exercising the discretion not to terminate James’s parental rights. See Iowa Code § 232.116(3)(a); *In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998) (noting even a strong bond “is not an overriding consideration, but merely a factor to consider”).

Concerning James’s incarceration as a factor for exercising discretion not to terminate his parental rights, we have held the term “institution” in section

232.116(3)(e) “was not intended to refer to penal institutions.” *In re J.V.*, 464 N.W.2d 887, 890 (Iowa Ct. App. 1990). His claim to the contrary is without merit.

James has a history of substance abuse and violence. Although he has made some progress, he still is not in a position to care for his children. Their safety and need for a permanent home, which James cannot provide, are of paramount importance in our consideration of whether termination of James’s parental rights serves their interest. See *J.E.*, 723 N.W.2d at 802 (Cady, J., concurring specially). We affirm the termination of James’s parental rights.

AFFIRMED ON BOTH APPEALS.