

IN THE COURT OF APPEALS OF IOWA

No. 7-516 / 07-0907

Filed July 25, 2007

**IN THE INTEREST OF M.A. and K.A.,
Minor Children,**

**O.G., Mother,
Appellant.**

Appeal from the Iowa District Court for Appanoose County, William S. Owens, Associate Juvenile Judge.

A mother appeals from a juvenile court order terminating her parental rights to two children. **AFFIRMED.**

Kevin S. Maughan, Albia, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Robert Bozwell, County Attorney, for appellee.

James Underwood, Centerville, for father.

Joseph Goedken, Centerville, guardian ad litem for minor child.

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

MILLER, J.

Oralia is the mother of Mikayla (at some places in the record referred to as “Micayla”) and Kalob (“the children”), who were four and three years of age respectively at the time of a termination of parental rights hearing. In a May 2007 order the juvenile court terminated Oralia’s parental rights to Mikayla and Kalob pursuant to Iowa Code sections 232.116(1)(f) (2007) and 232.116(1)(h) respectively. Oralia appeals.¹

We review termination proceedings de novo. Although we are not bound by them, we give weight to the trial court’s findings of fact, especially when considering credibility of witnesses. The primary interest in termination proceedings is the best interests of the child. To support the termination of parental rights, the State must establish the grounds for termination under Iowa Code section 232.116 by clear and convincing evidence.

In re C.B., 611 N.W.2d 489, 492 (Iowa 2000) (citations omitted).

Oralia claims there is not clear and convincing evidence that the children could not be returned to her custody as provided in section 232.102. Her claim implicates the fourth element of each of the two provisions relied on by the juvenile court, an element requiring the State to prove that as of the time of the termination hearing the children could not be returned to her custody. See Iowa Code §§ 232.116(1)(f), (h). This element is proved when the evidence shows the child cannot be returned to the parent without remaining a child in need of assistance. *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 that supported the child’s initial removal from the home. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992).

¹ The juvenile court order also terminated the parental rights of the children’s father, and he has not appealed.

The family came to the attention of the Iowa Department of Human Services (DHS) in October 2004. Concerns were raised by reports that the children's father was using and manufacturing illegal drugs in the family's home. He and Oralia admitted recently using drugs. Mikayla tested positive for methamphetamine and marijuana exposure, Kalob tested positive for methamphetamine exposure, and their parents tested positive for marijuana.

The children's father participated in a substance abuse assessment in late 2004, with a resulting recommendation of extended outpatient treatment. Over the next two years he began treatment on several occasions, but each time shortly and unsuccessfully ended treatment. He failed or refused to cooperate with ordered services. He was observed to be under the influence of drugs in December 2005, and refused to be tested. He tested positive for methamphetamine in June 2006.

Oralia, twenty-six years of age at the time of the termination hearing, used and abused alcohol beginning at age twelve and is an acknowledged alcoholic. She also has a lengthy history of illegal drug use. Oralia participated in a substance abuse assessment in late 2004, with a resulting recommendation of outpatient substance abuse counseling. She began substance abuse treatment in March 2005, but tested positive for drug use and failed to keep appointments. In early June 2005 the children were voluntarily placed in foster care, where they remained until returned to Oralia in mid-August. In July 2005 Oralia tested positive for use of Darvocet, a prescription drug for which she did not have a prescription.

The children's father was to have only supervised visitations with them, because of his untreated substance abuse. In December 2005 Oralia allowed the children unsupervised visitation with him, during which the father was under the influence of drugs. The children were removed from Oralia's physical care and have thereafter remained in foster care or custody of a relative.

Oralia completed substance abuse treatment in early 2006, but tested positive for drug usage in early July 2006. She again underwent a substance abuse evaluation, but failed or refused to participate in recommended treatment.

At the time of the termination of parental rights hearing Oralia had unresolved substance abuse issues and had been diagnosed as suffering from major depressive disorder. She was unemployed, and depended on others for housing and food. We conclude that the children could not be returned to Oralia's custody without being subject to the threat of imminent harm in the form of abuse or neglect that would cause them to remain children in need of assistance.

Oralia claims there is not clear and convincing evidence that termination of her parental rights is in the children's best interest. She cites Iowa Code sections 232.116(3)(a) and (c). These respectively provide the court need not terminate the parent-child relationship if the court finds that: (a) a relative has legal custody of the child, or (c) there is clear and convincing evidence that termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.

The record shows the children were placed in the legal custody of a paternal aunt and uncle in January 2007. It also shows that Oralia has been nurturing to the children and as a result they are bonded to her.

The provisions of section 232.116(3) are permissive, not mandatory. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). It is within the sound discretion of the juvenile court, based on the unique circumstances before it and the best interests of the children, whether to apply it. *Id.* “A child’s safety and the need for a permanent home are now the primary concerns when determining a child’s best interests.” *In re J.E.*, 723 N.W.2d 793, 801 (Iowa 2006) (Cady, J., concurring specially) (citing *In re K.M.*, 653 N.W.2d 602, 608 (Iowa 2002)). When the statutory grounds for termination of parental rights exist, the needs of the children are generally promoted by termination. *In re L.M.F.*, 490 N.W.2d 66, 68 (Iowa 1992).

The children were placed with their paternal aunt and uncle as part of concurrent planning, after a petition for termination of parental rights had been filed. The aunt and uncle wish to and intend to adopt the children if parental rights are terminated.

Although a strong parent-child bond is a special circumstance which mitigates against termination of parental rights, it is not an overriding consideration but merely a factor to consider. *In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998). The children have been removed from their parents twice, first by voluntary placement in foster care in mid-2005 and later pursuant to court order since December 2005. As noted by a service provider and found by the juvenile court, the children need “a safe, stable, drug-free home environment.”

We agree with the juvenile court's conclusion that "the children cannot now, or in the reasonably foreseeable future, be returned to the custody of [Oralia]."

We conclude that under the circumstances involved in this case termination of Oralia's parental rights is in the best interests of the children, so they may acquire the safety, security, and permanence they need and deserve, and that therefore the cited provisions of section 232.116(3) should not be applied.

AFFIRMED.