

IN THE COURT OF APPEALS OF IOWA

No. 8-1068 / 08-1823
Filed March 11, 2009

**IN THE INTEREST OF
A.S., O.S., Q.S., S.S., and D.S.,
Minor Children,**

**J.M.S., Mother,
Appellant,**

**O.O., Father of A.S.,
Appellant,**

**D.S. Minor Child,
Appellant,**

**D.S., Father,
Appellant.**

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

A mother, two fathers, and a child appeal separately from a juvenile court order terminating parental rights to four children and continuing placement of one child. **AFFIRMED ON ALL APPEALS.**

Jessica J. Bromley of Jeff Carter Law Offices, P.C., Des Moines, for appellant-mother.

D. William Thomas of Thomas & Diehl, Indianola, for appellant-father of A.S.

Jon Garner of Hartung & Schroeder, Des Moines, for appellant-father.

Michelle R. Saveraid, Des Moines, guardian ad litem for minor child D.S.

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

M. Kathryne Miller, Des Moines, guardian ad litem for minor children.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

June is the mother of eleven-year-old Damian, nine-year-old Savannah, six-year-old Quinten, four-year-old Oliver, and two-year-old Adem. David is the father of the four older children and Omer is the father of the youngest child. June, David, Omer, and Damian (by way of his guardian ad litem) separately appeal from an October 28, 2008 juvenile court order terminating parental rights to the four younger children and continuing placement of Damian for three months before determining whether the need for his removal would no longer exist and he could then be placed in David's custody. We affirm on all appeals.

The children were removed from the legal and physical custody of their parents on July 19, 2007, and have thereafter remained in the legal and physical custody of others. The removal was preceded by a November 2005 confirmed report of physical abuse of Savannah by June and denial of critical care of the four older children (Adem had not yet been born) by June and David; a November 2006 founded report of denial of critical care of all five children by June and David; a March 7, 2007 founded report of denial of critical care of Quinten and Adem by June; and a July 9, 2007 founded report of denial of critical care of all five children by June and David.

Concerns leading to the July 19, 2007 ex parte removal included ongoing neglect, domestic violence, medical neglect, and inadequate food, shelter, and clothing. The removal was confirmed and continued following a July 27, 2007 hearing. The juvenile court found that continued placement outside the home was necessary because of the volatility of the parents' relationship, the parents'

instability, housing instability, and the parents' inability to provide for the children's basic needs. Following removal, all of the children except Adem were initially placed with certain relatives, placements that lasted for only short periods of time. The children were adjudicated children in need of assistance (CINA) on August 16, 2007, pursuant to Iowa Code sections 232.2(6)(c)(2), (g), and (n) (2007). Following a dispositional hearing and order on September 19, 2007, Damian has been in the legal and physical custody of a maternal aunt, Quinten and Oliver have been in the legal and physical custody of maternal grandparents, and Savannah and Adem have been in the legal custody of the Iowa Department of Human Services (DHS) and the physical custody of a foster parent couple with whom they have been placed.

On July 17, 2008, the State filed a petition seeking termination of all parents' parental rights to the five children. Following a combined permanency/termination of parental rights hearing held on two days in mid-August and one day in mid-September, the juvenile court filed detailed findings of fact, conclusions of law, and a resulting order on October 28, 2008. The court terminated parental rights to Savannah, Quinten, and Oliver pursuant to Iowa Code section 232.116(1)(f). It terminated parental rights to Adem pursuant to Iowa Code section 232.116(1)(h). The court continued Damian's placement until a January 21, 2009 hearing to allow David additional time "to change his circumstances and demonstrate that he can assume custody of Damian." The court denied June's request for additional time to demonstrate that the need for Damian's removal from her home would no longer exist, finding she had been

unable to support a finding it was reasonably likely her circumstances would change so as to allow that to occur before the January 2009 hearing. June, David, Omer, and Damian's guardian ad litem appeal.

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).

Appellate review of a permanency hearing is de novo. Weight should be given to the juvenile court's findings of fact, but we are not bound by them. The best interests of the child control the court's decision. There is a rebuttable presumption that the child's best interests are served by parental custody.

In re N.M., 528 N.W.2d 94, 96 (Iowa 1995) (citations omitted).

June and David claim that reasonable efforts were not made to reunify the family or eliminate the need for the children's removal. They assert that neither they, their attorneys, nor the juvenile court were provided with information suggesting that Damian was somewhat depressed and unhappy in his placement with his aunt and that she might not be a permanent placement for him, or information about an allegation Savannah had been physically abused in her foster home. They complain that neither they nor their attorneys were notified of or invited to attend a professional staffing held on July 19 or 22, 2008, during which these matters were among various matters that were discussed by DHS personnel and service providers.

Damian has been placed with his maternal aunt since mid-August 2007. He is somewhat unhappy and depressed because of his separation from his parents and siblings. However he could not be placed in foster care with Savannah and Adem because of conflict between himself and Savannah and because the foster parents were unable to take an additional child. He could not be placed with his grandparents, who have Quinten and Oliver, because of their inability or unwillingness to take an additional child. June and David were both aware long before the permanency/termination hearing that Damian has been somewhat depressed and unhappy and that his aunt may not be an appropriate permanent placement for him. Despite this knowledge they have not sought any different or additional services for either Damian or themselves. They did not in the juvenile court, and do not on appeal, suggest what different or additional services might have been or should have been provided. Any failure of the DHS or service providers to inform them of what they were well aware does not constitute a failure to make reasonable efforts.

Savannah was originally placed with relatives, but the placement did not work out. She was later placed in a foster home with Adem, but when the foster home felt it could not care for Savannah because of behaviors of hers that they felt endangered their own child, Savannah and Adem were moved to another foster home in very early November 2007. Shortly thereafter, and apparently at or immediately following a visit by June, Savannah claimed she had been abused in the foster home by being required to sleep on the floor, being pushed, and

having her teeth brushed too hard. She has made no further or additional claims of abuse.

Savannah's claim of abuse was investigated. The investigation revealed that not long after being placed in the foster home Savannah had a tantrum, grabbed a bed and was shaking it, and as discipline was required to sleep on blankets on the floor one time. Her claims of having been pushed and having her teeth brushed too hard were apparently felt to be insignificant.

June became aware of Savannah's claim at least several months before the permanency/termination hearing. David's attorney became aware of the claim sometime between July 14, 2008, and the mid-August beginning of the hearing. Neither June nor David requested any different or additional services for Savannah or themselves, either before the hearing or in the one month between the first two days of the hearing and the day on which the hearing was concluded. They did not in the juvenile court, and do not on appeal, suggest what different or additional services might have been or should have been provided.

For almost two years before the permanency/termination hearing, June, David, and the children were offered a plethora of services as noted in various exhibits including the DHS termination report, and as listed in the juvenile court's ruling. The juvenile court has been and is fully aware of Damian's situation and the concerns about his placements. Savannah's claims, to the extent they are or may be true, hardly rise to the level of physical abuse as apparently asserted by June and David. We conclude that any failure by the DHS or service providers to

more fully discuss these matters with June and David, and any failure to include June and David and their attorneys in the July 2008 professional staff meeting, do not constitute a failure to provide reasonable efforts.

June claims the juvenile court erred in not granting her additional time for reunification with the children, and separately claims the court erred in not granting her additional time for reunification with Damian. David claims the juvenile court erred in not granting him additional time for reunification with Savannah, Quinten, and Oliver.

June and David's marriage and time together with the children had been plagued by domestic violence by each parent, at times in the presence of the children, and abuse and neglect of the children. June suffers from mental health issues and anger management problems and engages in impulsive, at times harsh, and inappropriate physical discipline of the children. Until late in the CINA and termination proceedings she has been largely non-compliant with offered and available services, believing that her parenting has been appropriate and that she does not need to make any changes. David suffers from depression, which he acknowledges, and from anger management problems, which he does not readily acknowledge. Until shortly before the permanency/termination hearing he has lacked stability in employment and housing. He quite frankly and honestly acknowledges that until shortly before the hearing he hoped the children would be returned to June and he had done nothing toward having them placed with him.

We agree with the juvenile court's findings that it is unlikely June will be able to meet the children's needs within the foreseeable future, and that there is no reasonable likelihood that David could meet the needs of the younger children, or the needs of multiple children, within the foreseeable future. Upon our de novo review we agree with the court's denial of additional time with respect to the parental rights and children in question.

Damian's guardian ad litem claims the juvenile court's order with respect to Damian violates Iowa Code sections 232.104(1)(a)(1) and 232.104(2). She argues that section 232.104(2) does not authorize an order "delaying the permanency finding," but acknowledges that it does authorize an order "grant[ing] a six-month extension for a parent."

Section 232.104(1)(a)(1), applicable to the facts in this case, requires a permanency hearing within twelve months of the children's removal. No one suggests that the hearing in this case was untimely.

Section 232.104(2) allows the juvenile court, as one option following a permanency hearing, to:

Enter an order pursuant to section 232.102 to continue placement of the child for an additional six months at which time the court shall hold a hearing to consider modification of its permanency order. An order entered under this paragraph shall enumerate the specific factors, conditions, or expected behavioral changes which comprise the basis for the determination that the need for removal of the child from the child's home will no longer exist at the end of the additional six-month period.

Iowa Code § 232.104(2)(b).

The guardian ad litem argues that while the juvenile court's language appears to attempt to meet the requirements of section 232.104(2)(b), it does not

grant additional time to June and defers the decision as to whether to terminate her parental rights, and its findings regarding permanency for Damian are inconsistent. She further claims that if the court's order is a permanency order its provisions for an additional period of services to David is not supported by the evidence or the law.

Until shortly before the commencement of the permanency/termination hearing David had done little to address his problems and cure his parental deficiencies. He readily acknowledged his failures were a result of his hope and belief that June would become able to have the children returned to her. When it appeared that a return to June might not happen, David took meaningful steps to place himself in a position to be reunified with at least some of the children. He recognized and articulated his part in and responsibility for the failures that had resulted in harm to and removal of the children. David began therapy to address his depression. He not only secured or maintained one job, but also secured a second job. He acquired a stable residence with a cousin, and began saving money to be able to acquire housing that would be adequate for himself and a child or children.

We readily acknowledge that the language used by the juvenile court is somewhat ambiguous and does not *expressly* establish permanency for Damian by "continuing placement of [Damian] for an additional six months." However, we believe the *effect* of the order is to continue his placement as authorized by section 232.104(2)(b). We also believe that the language allowing such a continued placement "for an additional six months" has as its purpose the setting

of an outer time limit on the period within which the contemplated additional hearing must be held, and does not prohibit the hearing from being held at a somewhat earlier time if the court finds such to be appropriate. We conclude the juvenile court substantially complied with the time limitation of the statute by scheduling the further hearing for a time five months after commencement of the permanency/termination hearing, four months after conclusion of the hearing, and three months after the court's resulting order.

The juvenile court found that if David had started to address issues surrounding his depression he could expand his abilities sufficiently to care for Damian within the foreseeable future. David had recently acknowledged he suffered from depression and had started therapy to deal with his depression. The court found that David could provide a safe and secure home that would meet Damian's daily needs if motivated to do so and if he also worked consistently, provided a suitable home, and nurtured Damian's emotional needs. The record indicates David is motivated, is working consistently, is taking the steps necessary to provide a suitable home, and recognizes Damian's emotional needs and is making progress toward being able to meet them. We conclude the court's order substantially complies with the statute's requirement that it "enumerate the specific factors, conditions, or expected behavioral changes" that support the court's implicit determination that the need for Damian's removal from David will no longer exist at the time of the additional hearing.

Damian is almost twelve years of age. Despite the sad history in this case he longs for a placement with his mother or father and a renewed relationship

with them. If at the time of the scheduled further hearing it is possible to place Damian with David, termination of June's parental rights to Damian may be unnecessary. We find no error in the juvenile court's decision to delay until that hearing its decision concerning June's parental rights to Damian.

June claims the juvenile court erred in terminating her parental rights under Iowa Code sections 232.116(1)(d), as the State failed to prove that the circumstances that led to the CINA adjudication continued to exist. See Iowa Code § 232.116(1)(d)(2). The State did not allege, and the court did not find, that grounds for termination under section 232.116(1)(d) were met. We will assume that June intended to challenge the court's determination that the State proved grounds for termination under sections 232.116(1)(f) and (h). As the children met the relevant age requirements, had been adjudicated CINA, and had been removed the requisite time periods, June's challenge must be to the court's determination that the children could not be returned to her at the time of the termination hearing without being subject to the threat of adjudicatory harm. See Iowa Code §§ 232.116(1)(f)(4), (h)(4). David claims the State failed to prove that his children could not be returned to him at the time of the termination hearing without being subject to adjudicatory harm. See Iowa Code § 232.116(1)(f)(4).

Until shortly before the permanency/termination hearing June had done little to address her mental health issues, anger management problems, or concerns that she had a substance abuse problem. Her home had been "foreclosed on" and she was renting by "working off the rent pretty much." In March 2008 June was hospitalized for two days. She had an alcohol

concentration of 0.154 and tested positive for cocaine. In June 2008 she was hospitalized after taking an overdose of up to twenty-five Aleve pills, an incident she does not remember. In July 2008 June spent time in jail for interference with official acts, related to the March events.

In May 2008, and perhaps at an earlier time as well, June was directed to undergo a substance abuse evaluation. She did not do so until the day before the permanency/termination hearing. We conclude, as the juvenile court did, that the State proved the section 232.116(1)(f) and (h) grounds for termination of June's parental rights to the children.

David also had done little or nothing to address his problems and parenting deficiencies until shortly before the hearing. He suffered from depression and had lacked stable employment and housing. David had made little or no effort to reunify with the children. He had recently begun to address his issues, but frankly and honestly acknowledged he was not yet in a position to have his children returned to his custody. We conclude the State proved the section 232.116(1)(f) grounds for termination of David's parental rights to Savannah, Quinten, and Oliver.

Omer claims there was insufficient evidence to support termination of his parental rights to Adem. Omer has a substantial and concerning criminal history. He was convicted of harassment in 2000, theft in 2002, and domestic abuse assault in 2004. In 2005 Omer was convicted of public intoxication, and was also convicted with assault with intent to commit sexual abuse. He is a registered sex offender.

Omer apparently has two children by another woman with whom he once lived, but appears to have no relationship with those children and provides no support for them. June informed him as early as May 2006 that he was Adem's father. Omer thereafter saw Adem on a couple of occasions but accepted no responsibility for him and established no relationship with him. State officials contacted Omer about Adem in August 2007. Omer did nothing to accept responsibility or develop a relationship. Paternity testing was ordered at about that time. Omer learned that paternity testing had been requested or ordered, but did nothing to participate in testing until served with an order in February 2008. Test results in early April showed that Omer was Adem's father.

Omer did not inform the DHS until about June 2008, when a decision had been made to file a petition for termination of parental rights, that he might want Adem placed with him. He thereafter had some visits with Adem, but missed others. At the permanency/termination hearing he for the first time suggested family members as possible placements for Adem.

We conclude that the State proved Adem could not be placed with Omer at the time of the termination hearing without being subject to the threat of neglect or abuse, and consequently proved the section 232.116(1)(h) grounds for termination of Omer's parental rights.

June claims that termination of her parental rights to Savannah, Quinten, and Oliver is not in their best interest because (1) they share a strong bond with her, and (2) there is not clear and convincing evidence they could not be immediately returned to her. She claims termination of her parental rights to

Adem is not in his best interest because (1) he has a strong bond with her, and (2) there is not clear and convincing evidence he could not be immediately returned to her. David claims termination of his parental rights is not in the best interest of his children (Savannah, Quinten, and Oliver, as his rights to Damian were not terminated).

We have above agreed with the juvenile court that the children could not be returned to June and will not discuss that issue further. However, even if the statutory requirements for termination are met, a decision to terminate must still be in the best interest of a child. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994).

June's claim based on a strong parent-child bond implicates Iowa Code section 232.116(3)(c). It provides that a strong parent-child relationship is a special circumstance that militates against termination. *In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998). The juvenile court did not, however, address this statute or issue, and June does not show or claim that she filed a post-ruling motion requesting the court to do so. As the issue was neither presented to nor passed upon by the juvenile court, the asserted error is not preserved for our review.¹

To the extent June's and David's claims regarding best interests are based on the general best interests of the children in question, we agree with the juvenile court and reject those claims. While the children were with June and

¹ We do note that the juvenile court found that "[t]he bond between the children and the parents is best described as broken for the three youngest children and [June and David]," and that although there was a bond between Damian and Savannah on the one hand and their parents on the other, those bonds "are largely negative bonds." We agree with the court's characterization of any bond between Damian and June and any bond between Savannah and her parents.

David they suffered neglect, abuse, and exposure to ongoing domestic violence. Neither parent is ready to have the children in question returned, now or within the reasonably foreseeable future. The four younger children have achieved some security and stability. Quinten and Oliver are doing well, and their grandparents wish to and intend to adopt them. Savannah and Adem are doing well. As noted by the juvenile court, Savannah has been given the structure, consistency, and nurture she needs, the bond between Savannah and Adem and their foster parents is growing and positive, and permanency for Savannah and Adem is adoption. We agree with the juvenile court that termination of parental rights is in the best interests of the four younger children.

June claims the juvenile court erred by terminating the children's sibling relationship. David questions whether the court properly considered the need for sibling interaction and the impact termination would have on such interaction.

The juvenile court did in fact consider sibling contact and interaction. It noted the early and unsuccessful placements with various relatives, placements which, if they became permanent, might well have fostered more sibling interaction than might occur when some of the children are placed with non-relatives. It expressly noted that "[p]lacement of all the children together was not possible." The record shows and the court noted, that Damian is placed with the maternal aunt, Quinten and Oliver are placed with maternal grandparents, and the DHS, service providers, and the foster parents have encouraged and facilitated sibling contact and interaction. Simply put, the four younger children cannot be returned to their parents, the current placements of all five children are

the best available, and none of the persons with whom the children are placed are able or willing to take on other children.

In cases involving more than one child termination of parental rights often will result in decreased sibling contact when siblings cannot all be placed together. This hard fact does not, however, mean that either the juvenile court or a reviewing appellate court has not considered the impact of termination on sibling relationships. Nor does it mean that termination therefore constitutes error. We reject these claims of juvenile court error.

Damian's guardian ad litem points out that, as found by the juvenile court, clear and convincing evidence supports termination of June's and David's parental rights to Damian. She claims a delay in permanency for Damian is not in his best interest, and that termination of parental rights is in his best interest. She argues the record demonstrates that the maternal aunt with whom he is placed is willing to provide him a permanent, stable home.

Although the elements of Iowa Code section 232.116(1)(f) were proved by clear and convincing evidence as to Damian, termination should not occur unless it is in his best interest. *In re M.S.*, 519 N.W.2d at 400. As found by the juvenile court and acknowledged by Damian's guardian ad litem, Damian's situation concerning permanency is much different than that of his siblings. Although the maternal aunt with whom he is placed has provided for him and is willing to adopt him, Damian is unhappy and depressed in her care and wishes to be reunited with his mother or father. He is older than his siblings and his attachment to his parents is stronger than that of his younger siblings, all of whom are doing well

and are happy in their current placements. Not only Damian's parents, but also the DHS and service providers, question whether the aunt is an appropriate permanent placement for Damian. We agree with the juvenile court that termination of the parental rights of Damian's parents was not in Damian's best interest at the time of the permanency/termination hearing.

For reasons stated above we believe the juvenile court's order concerning Damian substantially complied with Iowa Code section 232.104(2)(b) and did establish permanency by continuing his placement with his maternal aunt, subject to review and possible modification at a subsequent hearing contemplated by the statute and scheduled by the court.

We conclude the juvenile court's order concerning Damian is appropriate and in his best interest.

We affirm the juvenile court on all issues presented on appeal.

AFFIRMED ON ALL APPEALS.