

IN THE COURT OF APPEALS OF IOWA

No. 8-193 / 08-0142

Filed April 9, 2008

IN THE INTEREST OF R.S., JR., and M.F.
Minor Children,

H.B.-F., Mother,
Appellant,

R.M.S., SR., Father,
Appellant.

Appeal from the Iowa District Court for Polk County, Louise Jacobs,
District Associate Judge.

A mother and father appeal from a juvenile court order terminating their
parental rights. **AFFIRMED.**

Karen A. Taylor of Taylor Law Offices, Des Moines, for mother.

Christopher Kragnes of Kragnes & Associates, P.C., Des Moines, for
father

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

Nancy Trotter, Des Moines, guardian ad litem for minor children.

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

SACKETT, C.J.

Heather and Roger appeal a January 16, 2008 order terminating their parental rights to their two biological children, Micahla, born in February of 2004, and Roger, born in June of 2005. Kevin, who was married to Heather at the time of the children's birth, did not appear at the termination hearing and he is not a party to this appeal.¹

I. SCOPE OF REVIEW.

We review termination proceedings de novo. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993). Although we are not bound by them, we give weight to the trial court's findings of fact, especially when considering credibility of witnesses. Iowa R. App. P. 6.14(f)(7); *In re M.M.S.*, 502 N.W.2d 4, 5 (Iowa 1993). 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. See Iowa Code § 232.116 (2007). "Clear and convincing evidence" means there are no serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence. See *Raim v. Stancel*, 339 N.W.2d 621, 624 (Iowa Ct. App. 1983).

II. BACKGROUND AND PROCEEDINGS.

The children were removed from the custody of Heather and Roger under a temporary order in September of 2006. The children came to the attention of the Department of Human Services when Roger's stepmother called indicating she was concerned about Roger's depression and Heather's use of controlled substances. The children were found to be children in need of assistance on

¹ The juvenile court found that he was personally served and his service should be on file.

November 14, 2006, under Iowa Code section 232.2(6)(c)(2)(n) (2007). The juvenile court made the following specific findings of fact: “mother unresolved S.A. issues; father is also reported to be a drug user.” The juvenile court further found the children should remain in or be placed in out-of-home placement due to “mother’s unresolved S.A. issues.” The juvenile court ordered the custody of the children would be retained by or placed with the Department of Human Services for purposes of family foster care.

On October 16, 2007, the State filed a petition to terminate the parents’ rights to the two children. The State contended that the rights of Heather, Roger, and Kevin should be terminated under sections 232.116(1)(d), (g), and (h). The State contended the rights of Heather and Roger should be terminated under section 232.116(1)(l).

The matter came on for hearing and the juvenile court, after hearing the evidence, made a number of factual findings. The court found Kevin’s parental rights should be terminated under sections 232.116(1)(b), (d), and (e) (2007). No appeal has been taken from this finding.

The juvenile court found the parental rights of Kevin, Roger, and Heather should be terminated under section 232.116(1)(d). The court found the children had been physically abused and/or neglected or were imminently like to be abused and/or neglected as result of the acts or omissions of one or both parents. The juvenile court also found the parents’ ability to provide the children with necessities was significantly impaired by substance abuse issues. The juvenile court noted the children demonstrated hoarding of food after their removal from Roger and Heather’s home and placement in foster care. The

juvenile court found both Heather and Roger admitted that Roger prior to removal relapsed on cocaine and Heather had cocaine in her system. The juvenile court found Roger and Heather were offered and received services to correct the circumstances that led to adjudication and despite that, the circumstances that led to adjudication continue to exist because the parents deny concerns about their use of drugs and their mental health issues. The juvenile court further noted Roger and Heather have provided a number of negative drug screens but failed to answer every request for tests. The court found it is likely Roger will relapse into drug use and found no improvement in the area of domestic abuse.

The juvenile court also terminated Heather's parental rights under section 232.116(1)(g). The juvenile court found that Heather's parental rights were terminated to another child in April of 2003² and that there is clear and convincing evidence that she continues to lack the ability or willingness to respond to services that would correct the situation that led to the prior termination, and as long as she remains in denial there is reason for concern and little hope for improvement. The juvenile court also found an additional period of rehabilitation will not correct the situation.

The juvenile court next terminated under section 232.116(1)(h) finding the children are three years old or younger, have been found to be child in need of assistance, have been removed from the custody of their parents and have been out of the home for at least six months, including the last six consecutive months.

² Heather had two other children. One child lives with the child's father. Heather's parental rights to the second child were terminated and there is some reference this happened because the child's father was abusive.

The juvenile court found there is clear and convincing evidence the children cannot be returned home at this time.

The juvenile court also terminated under section 232.116(1)(f). The juvenile court found clear and convincing evidence Roger has a severe, chronic substance abuse problem and is a present danger to himself and others. The juvenile court found Heather tested positive for cocaine but denies its use and lives with Roger, whom she acknowledged relapsed on cocaine, yet she remains in denial. The juvenile court found the elements of severe chronic substance abuse problems or prognosis had not been proved as to Heather. The juvenile court also found clear and convincing evidence indicates that Roger's prognosis indicates the children will not be able to be returned to the custody of their parents within a reasonable time.

The juvenile court also found clear and convincing evidence that to return the children to their parents' custody would subject them to adjudicatory harm as defined in section 232.2(6).

III. HEATHER'S CLAIMS.

Heather contends that the State failed to prove by clear and convincing evidence that circumstances that existed prior to the children being found in need of assistance continue despite the offer or receipt of services. She argues she has demonstrated she does not have substance abuse issues and that she found an appropriate place to live and completed most of the other requirements the Department of Human Services made. She argues that while her home may not be up to the standards of the foster home where the children now live, there is no

evidence the issues giving rise to the children being found in need of assistance continue to exist.

Heather argues the requirements of section 232.116(1)(g) were not proved as the State did not offer evidence to prove she continues to lack the ability to respond to services that would correct the situation. She argues she participated in offered services including in home therapy and the reason behind the termination of their parental rights to her other children are different and not indicative that the children cannot be returned home.

Heather next contends that the State failed to prove the elements of section 232.116(l)(h) as she has no unresolved substance abuse issues, she has maintained appropriate housing for the children, her therapist believes she is working diligently in therapy, and there is no evidence mental health issues will impede her ability to parent her children.

Heather also contends that termination is not in the children's best interest as the children are bonded with her and there is no evidence anything inappropriate occurred during visits, as the in-home worker testified she merely supervised the visits and if there were deficiencies it was the worker's job to correct them.

The State contends Heather's parental rights were correctly terminated under sections 232.116(d), (g), and (h). The State argues Heather continues to suffer from depression and needs more therapy, she has not dealt with domestic violence issues even though she had these issues in two relationships, she has substance abuse issues and tested positive for cocaine at the beginning of the case yet continues to deny she used drugs, and has failed to provide all drug

screens or participate in substance abuse treatment or support groups. The State also argues that termination of parental rights is in the children's best interest.

IV. ROGER'S CLAIMS.

Roger contends the juvenile court erred in finding the State had met its burden to show termination under section 116(1)(d) as he no longer has a drug problem. He contends he should not be terminated under section 232.116(1)(h) because the children can be returned home. He contends he should not be terminated under section 232.116(1)(l) because, while he has a history of substance abuse, much of it happened in his youth, his latest relapse was precipitated by the death of his father, and he has substantially complied with drug testing.

He also contends there is not clear and convincing evidence to terminate under section 232.102(12)(b) because reasonable efforts to reunite the family were not made.

The State's response is that the State proved by clear and convincing evidence that Roger's parental rights should be terminated under sections 232.116(1)(d), (h), and (l) as the children cannot be returned to his care and he continues to have substance abuse and mental health issues. The State also argues that reasonable efforts for reunification were made.

V. ANALYSIS.

The children were found to be children in need of assistance because their parents had substance abuse issues. The couple has limited financial resources. Roger, who was released from prison after five years, is twenty-eight years old

and has fathered five children. He was employed at the time of the termination hearing but does not have transportation and is seeking employment closer to home. Heather, who is thirty-one years of age, has had some employment but does not have a steady job. Both Roger and Heather have made serious efforts to do what was expected of them to have their children returned. Both successfully completed parenting classes, had completed psychosocial testing by April of 2007, scheduled appointments for mental health and substance abuse issues, and consulted therapists. They took parenting tests that showed Heather had good parenting skills. Roger's scores on the tests were not as high as Heather's.³ They participated in scheduled visitations.

Lori Jensen, who supervised visits between Roger and Heather and the children, testified that visits at the parents' apartment went well and the parents' interaction with the children was fine. There were other visits in Roger's stepmother's⁴ house and Heather's mother's house that did not go so well because apparently there are a number of relatives around including the parents and grandparents and an occasional aunt or uncle or family friend. Jensen supervised nearly all the visits and never sought to remove the children during the visits. She was critical of Heather whom she found very, very dramatic about changing diapers, always needing help, always calling to Roger for help. Jensen related Roger and Heather and some of their relatives smoked cigarettes sometimes where the children were present despite the fact they have been told not to do so. Jensen related a situation where Micahla reported her foster father

³ Jensen's observation was that Roger was the better parent.

⁴ There were also two of Roger's older children ages six and three who were under the guardianship of the stepmother. The children had lived since birth with Roger's stepmother and with Roger's father until his death.

touched her inappropriately and police were called. It is not clear what the final resolution of this issue was. Jensen testified she did not believe Heather responded properly to the report and apparently as a result there was some decrease in the parents' visitation.

Jensen was of the opinion that the children's parental rights should be terminated because: "The children have been out of their home since September 2006. They're in a pre-adoptive home and they're thriving. . . . They are very happy in the foster home. They're very bonded."

Zach Pach testified she represented the State and worked for Behavioral Health Resources and is a licensed master social worker. She had been seeing Heather every two weeks since August working on Heather's depression. Pach was asked:

Q. Have you had discussions with regards to the issues of substance abuse the mother has? A. Yes. She had remained clean since that one time that she tested positive.

Pach related Heather shows up for appointments and is taking medication, which leads her to the conclusion that Heather wants her children back. She said Heather is able to recognize she has made mistakes and is not a perfect parent and that she has made progress since August.

Jeffery Kramer, a licensed therapy counselor, testified that he had seen Roger a couple of times since April of 2007. His initial diagnosis included schizo-affective disorder, bipolar type, generalized anxiety disorder, as well as a rule-out diagnosis of post-traumatic stress disorder and possible polysubstance dependence. He felt Roger needed ongoing therapy and he referred Roger to a

nurse practitioner. Roger's last scheduled appointment with her was on the 19th of the month of trial.

Kramer found Roger to be a hyper individual who gets edgy and frustrated and easily snaps at people. Kramer had no idea how Roger was doing as he had not seen him for some time. He testified there was not a way to predict when there would be stability. Kramer had little to say about Roger's substance abuse issues as he and Roger had not discussed that very much.

Roger's stepmother testified that she made the original call to the Department of Human Services because Roger, who had an earlier substance abuse problem, "fell off the wagon" and went into a deep depression at the time of his father's death in July. She said she recognized he needed help. She further testified in her opinion Roger had exceeded everything that was expected for him and in the prior six months he had become trustworthy and responsible. She further testified she saw nothing in the parents' visits with the children that caused her concern other than seeing the children cling to their parents when visits were over. She said if she felt that Roger still had the problem that caused her to make the original call she would not be testifying as a witness for him. In her opinion the children would most definitely be safe in Roger and Heather's care. She had no concerns about Heather's ability to care for the children and has seen improvement. She related she was at ten or twelve visits where Jensen supervised and she did not observe much interaction between Jensen and the parents and the children.

Clearly Roger and Heather have made substantial progress. They argue that their failure to follow some of the State's requirements including attendance

at all therapy sessions and drug tests was the result of lack of money or transportation. They have no car but at times were given bus tokens. Apparently they were required to pay for the drug testing but we have not found a reference in the record to the cost of the tests.⁵ We understand that the Department of Human Services generally considers missed drug tests to be evidence of continued abuse. We recognize the monetary problems parents such as Roger and Heather living at or below the poverty level have. There is no evidence of current drug use by either parent and we consider this together with the parents' poverty and lack of transportation in assessing what weight if any we give to evidence of missed drug tests.

VI. REASONABLE EFFORTS.

We first address Roger's challenge that the State failed to make reasonable efforts to reunite the family. Iowa Code section 232.102(10)(a) defines reasonable efforts as the efforts made to preserve and unify a family prior to the out-of-home placement of a child in foster care or to eliminate the need for removal of the child or make it possible for the child to safely return to the family's home. If returning the child to the family's home is not appropriate or not possible, reasonable efforts shall include the efforts made in a timely manner to finalize a permanency plan for the child. *Id.* A child's health and safety shall be the paramount concern in making reasonable efforts.

The State is required to "make every reasonable effort to return the child to the child's home as quickly as possible consistent with the best interests of the child." Iowa Code § 232.102(7); see also *In re M.B.*, 553 N.W.2d 343, 345 (Iowa

⁵ Generally five tests were scheduled for every month.

Ct. App. 1996). The reasonableness of the efforts is dependent on the unique circumstances of each case. *In re S.J.*, 620 N.W.2d 522, 524-25 (Iowa Ct. App. 2000); *In re E.K.*, 568 N.W.2d 829, 831 (Iowa Ct. App. 1997).

The children were found to be in need of assistance because of their parents' drug use. Roger and Heather were given access to substance abuse counseling to address the problem of addiction as well as other services. Reasonable efforts were made.

VII. GROUNDS FOR TERMINATION.

The focal issue in addressing all grounds for termination found by the juvenile court is whether the State has shown by clear and convincing evidence that the children cannot be returned to Roger and Heather's home. Can Roger and Heather perform as adequate parents?

We agree with Heather the fact the foster parents may be better parents is not relevant to a decision whether or not to terminate parental rights. However, considering whether to terminate, the court may consider a child's integration in a foster home and whether the foster family is able and willing to integrate the child in the foster family permanently. See Iowa Code § 232.116(2)(b).

Roger and Heather to their credit have made serious efforts to reclaim their children despite some stumbling blocks. Though homeless at the time of the children's removal, they now have a two-bedroom apartment determined by the Department of Human Services to be clean, safe, and cared for. They have their name in for a three-bedroom apartment. Roger has employment. Heather has had employment but was not employed at the time of the hearing.

The children were found to be in need of assistance because of Roger's stepmother's report, the admitted use of cocaine by Roger and the test showing Heather positive for cocaine.⁶ Roger has a long and troublesome history of substance abuse. He has had a series of treatments and relapses. He also suffers from emotional problems that may be tied to his drug use. Roger has not complied with all the drug screens and his work hours and lack of funds could be valid excuses for his failure to submit to all the required tests. Yet his failure to complete all drug testing, together with his history and lack of evidence that he is involved in or regularly attends a support group, created a heightened suspicion he may have continued to use illegal substances, at least on occasion.

Though Heather initially testified positive for cocaine, she denies any drug use. She claims she tested positive because of her exposure to Roger. There is no evidence to either support or disprove her theory. The juvenile court made references to problems of domestic abuse, but we find no evidence of any current problems in this area. We are unsure if substance abuse played a part in the termination of Heather's other child. Heather has a significant number of negative drug tests and no positive test save the first test.

We may affirm if we find clear and convincing evidence to support any of the termination grounds cited by the district court. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999).

⁶ Heather has continually denied using cocaine. We find no scientific evidence to guide us in determining whether the positive test was the result of her use or for her exposure to Roger, who was using cocaine.

The children were found to be in need of assistance because of mental health and substance abuse issues that put their children at risk. Neither party at the time of the termination hearing were continuing in substance abuse treatment or substance abuse after care. The juvenile court found among other things that the children could not be returned home because of the parents' drug or alcohol abuse and mental health issues which would result in the children not receiving adequate care. This is a difficult case. The parents have made progress on a number of issues. However giving the required deference to the factual findings of the juvenile court we agree there is clear and convincing evidence supporting termination of Roger's parental rights under 232.116(1)(l) and Heathers' parental rights under 232.(1)(g). We affirm on these grounds. We also agree from our review of the evidence that there is no showing that termination of parental rights is not in the children's best interests.

AFFIRMED.