

IN THE COURT OF APPEALS OF IOWA

No. 8-966 / 08-1730
Filed January 22, 2009

IN THE INTEREST OF E.H., Minor Child,

S.O., Mother,
Appellant,

K.H., Father,
Appellant.

Appeal from the Iowa District Court for Polk County, Karla J. Fultz,
Associate Juvenile Judge.

A mother and father appeal separately from a juvenile court order
terminating their parental rights to their child. **AFFIRMED ON BOTH APPEALS.**

Jesse A. Macro Jr. of Gaudineer, Comito & George, L.L.P., West Des
Moines, for appellant mother.

Victoria L. Meade, West Des Moines, for appellant father.

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

Nicole Garbis-Nolan, Des Moines, guardian ad litem for minor child.

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

MILLER, J.

Samantha is the mother and Kenneth is the father of two-year-old Elizabeth. They appeal separately from an October 2008 order terminating their parental rights to Elizabeth. We affirm on both appeals.

Elizabeth was removed from Samantha and Kenneth's care in December 2007 after both of her parents provided drug screens that tested positive for methamphetamine and marijuana. She was placed in the temporary legal custody of her paternal aunt and uncle under the supervision of the Iowa Department of Human Services (DHS). She has thereafter remained in their custody and care. Elizabeth was adjudicated a child in need of assistance (CINA) in January 2008 pursuant to Iowa Code sections 232.2(6)(c)(2) and (n) (2007).

Samantha began using marijuana when she was twelve years old, eventually progressing to methamphetamine by the time she was eighteen or nineteen years old. She entered inpatient treatment at the House of Mercy in January 2008 after Elizabeth was removed from her care. Although Samantha "showed periodic gains of insight and improvements in exhibiting recovery-based behavior, [she] did not make sustained commitments to change" while she was at the House of Mercy. Samantha voluntarily discharged herself from that program in June 2008 against the advice of professionals. Her potential for relapse at that time was reported as being "high due to [her] impulsivity in discharging, continued dishonesty and recovery environment."

Upon leaving the House of Mercy, Samantha began living with her aunt and uncle who are both recovering addicts. She successfully completed an

outpatient treatment program at MECCA in July 2008 and has participated in their aftercare program since that time. She has consistently provided negative drug screens throughout the juvenile court proceedings.

Like Samantha, Kenneth began using illegal drugs at a very young age. He reported using marijuana on a daily basis and methamphetamine occasionally. Kenneth also struggles with mental health issues, which include “symptoms of chronic complicated post traumatic disorder.” He additionally suffers from “‘severe’ Tourette’s disorder, a learning disability, and mild mental retardation” and needs assistance with daily living. Kenneth continued to use marijuana after Elizabeth was removed from his care until April 2008 when he began participating in substance abuse treatment. Although he successfully completed MECCA’s outpatient treatment program in May 2008 and provided negative drug screens thereafter, his prognosis for continued sobriety was “guarded.”

Samantha identified Kenneth as a potential “trigger” for continued drug use. Her service providers consequently recommended that she end her relationship with him. However, she continued to have almost daily contact with him, which she was not honest about. Kenneth gave Samantha a diamond engagement ring and diamond earrings in July 2008 even though he was “unable to buy Elizabeth a meal during one of her visits because he had no money.” Samantha and Kenneth’s DHS case manager reported they often appeared to be “more focused on each other and having a relationship than meeting the needs of Elizabeth.”

The State filed a petition to terminate parental rights in July 2008. Following a hearing, the juvenile court entered an order terminating Samantha and Kenneth's parental rights pursuant to Iowa Code sections 232.116(1)(d), (e), (h), and (i). The court denied Samantha's request for an additional six months to demonstrate that her child could be safely returned to her care. Samantha and Kenneth 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).

Samantha initially claims the juvenile court erred in finding there was clear and convincing to support termination of her parental rights under section 232.116(1)(h).¹ Her claim implicates only the fourth element of that section. This element is proved when the evidence shows the children cannot be returned to the parent without remaining CINA. *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 children's removal from the home. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992).

Samantha testified at the termination hearing that she was not yet ready or able to care for Elizabeth. There is clear and convincing evidence present in

¹ Because we conclude termination of Samantha's parental rights was proper under section 232.116(1)(h), we need not and do not address her claims regarding sections 232.116(1)(d), (e), and (i). See *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999) ("When the juvenile court terminates parental rights on more than one statutory ground, we need only find grounds to terminate under one of the sections cited by the juvenile court to affirm.").

the record to support her honest assertion. Samantha's visits with Elizabeth did not progress beyond weekly supervised visits due to the service providers' concerns regarding her parenting ability. She occasionally had difficulty interacting with Elizabeth during the visits and became overwhelmed when Elizabeth acted out. Samantha indicated at one point during the juvenile court proceedings that she was not "ready for increases in her visitation and wants to wait so she does not get overwhelmed."

Although Samantha consistently provided negative drug screens after Elizabeth was removed from her care, she testified that she was tempted to use illegal drugs after the first day of the termination hearing. Her relapse potential at the time of her discharge from the House of Mercy was identified as high. It is simply too soon to conclude Samantha's chronic substance abuse problems will not recur despite her recent sobriety, especially in light of her lengthy history of substance abuse and guarded prognosis for recovery. See *In re J.K.*, 495 N.W.2d 108, 113 (Iowa 1993) (finding termination of parents' rights appropriate where parents struggled with severe chronic substance abuse problems despite some attempts at treatment). We therefore conclude that although Samantha made progress in some areas of concern, the child could not be returned to her care at the time of the hearing without being subject to the threat of neglect or other harm that would cause her to remain CINA.

Our supreme court has recognized that children "should not be forced to endlessly await the maturity of a natural parent." *In re C.K.*, 558 N.W.2d 170, 175 (Iowa 1997). "Children simply cannot wait for responsible parenting. Parenting cannot be turned off and on like a spigot. It must be constant,

responsible, and reliable.” *Id.* With these principles in mind, we reject Samantha’s next claim that the district court erred in denying her request for an additional six months to demonstrate that her child could be safely returned to her care.²

A parent does not have unlimited time in which to correct her deficiencies. *In re H.L.B.R.*, 567 N.W.2d 675, 677 (Iowa Ct. App. 1997). “At some point, the rights and needs of the child rise above the rights and needs of the parent[].” *J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). “[P]lans which extend the . . . period during which parents attempt to become adequate in parenting skills should be viewed with a sense of urgency.” *In re A.C.*, 415 N.W.2d 609, 614 (Iowa 1987). “The judge considering [an extension of time] should however constantly bear in mind that, if the plan fails, all extended time must be subtracted from an already shortened life for the children in a better home.” *Id.*

Elizabeth has been in the legal custody and care of her paternal aunt and uncle for more than a year.³ She is doing very well. She needs and deserves

² Because we conclude an extension of time was not warranted in this case, we need not and do not address Samantha’s related claim that the juvenile court erred in finding it did not have the “legal ability” to order such an extension at the termination stage of the juvenile court proceedings.

³ Samantha and Kenneth both claim that the juvenile court erred in terminating their parental rights due to Elizabeth’s placement with her paternal aunt and uncle and the closeness of the parent-child relationship. See Iowa Code § 232.116(3)(a), (c). Although it appears Samantha raised section 232.116(3)(a) at the conclusion of the termination hearing, the juvenile court did not address any section 232.116(3) issues in its order terminating her parental rights. “Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal.” *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). Neither Samantha nor Kenneth filed a motion to enlarge or modify the court’s order. See *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984) (“It is well settled that a [rule 1.904(2)] motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication.”). This rule has been held to apply to termination proceedings. See *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994). Samantha and Kenneth thus did not

permanency, which her aunt and uncle are committed to providing as evidenced by their stated desire to adopt her. See *In re J.E.*, 723 N.W.2d 793, 801 (Iowa 2006) (Cady, J., concurring specially) (“A child’s safety and the need for a permanent home are now the primary concerns when determining a child’s best interests.”). In light of the foregoing, we do not believe the juvenile court abused its discretion in denying Samantha’s request for an additional six months. This is especially so considering her equivocal testimony as to when she would be ready to resume care of Elizabeth.

Samantha had been employed at a part-time minimum wage job for only one month prior to the termination hearing. She was living with her aunt and uncle who were both recovering addicts that occasionally drank alcohol. Samantha’s uncle testified that Samantha drank a beer at a social gathering, which is concerning when considering her high potential for relapse. Samantha acknowledged her weaknesses in parenting at the termination hearing, testifying that she thought she would be ready to resume care of Elizabeth “[m]aybe after I finish my parenting classes [and] get some more insight.”

Although Kenneth completed outpatient substance abuse treatment and experienced a period of sobriety during the juvenile court proceedings, he admitted to using marijuana about a week before the continued termination hearing. He testified that he relapsed because Samantha had made him mad. He also missed two aftercare meetings in the weeks before the continued termination hearing. In addition to his struggles with substance abuse, Kenneth suffers from “chronic complicated post traumatic disorder,” Tourette’s disorder, a

preserve error on their section 232.116(3) claims, and we do not address those claims any further.

learning disability, and mild mental retardation. He is not employed and subsists on social security disability payments. Kenneth needs assistance with daily living and was unable to consistently demonstrate the ability to safely parent Elizabeth during his visits with her.

While we do not doubt Samantha and Kenneth's love for Elizabeth, our primary concern is the child's best interests. Although both parents have made improvements and experienced sustained periods of sobriety during this case, we believe termination of their parental rights is necessary in order to give Elizabeth the safety, stability, and permanency that she deserves. We reject their arguments to the contrary and conclude, like the juvenile court, that termination of Samantha and Kenneth's parental rights is in Elizabeth's best interests.

AFFIRMED ON BOTH APPEALS.