

IN THE COURT OF APPEALS OF IOWA

No. 9-825 / 09-1347
Filed October 21, 2009

**IN THE INTEREST OF M.S. Jr.,
Minor Child,**

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

Appeal from the Iowa District Court for Linn County, Susan Flaherty,
Associate Juvenile Judge.

A mother appeals from the order terminating her parental rights.

AFFIRMED.

John Broz, Oakdale, for appellant mother.

John Bishop, Cedar Rapids, for father.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney
General, Harold Denton, County Attorney, and Rebecca Belcher, Assistant
County Attorney, for appellee State.

Robert Davison, Cedar Rapids, for minor child.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

DOYLE, J.

Susan is the mother and Michael is the father of six-year-old M.S. Susan appeals from an August 2009 order terminating her parental rights to this child.¹ We affirm.

I. Background Facts and Proceedings.

This family first came to the attention of the Child Protective Services Unit of the Iowa Department of Human Services (DHS) in December 2006 due to concerns about domestic violence between the parents. The allegations prompting the investigation were not confirmed, but the child protective assessment noted, “This family is at high risk for domestic violence if the arguments are not discontinued between Susan and Michael.”

A short time after that assessment was completed, Susan was arrested for assaulting Michael, allegedly stabbing him with a knife. Their child was left in Michael’s care while Susan was in jail. A child protection worker visited the family’s home and discovered it was in a deplorable condition, with “clothing and garbage covering the floor.” The worker also learned Michael was on probation for a criminal charge and had provided a positive drug test for methamphetamine in January 2007. Susan and Michael voluntarily placed M.S. in the care of his maternal aunt in March 2007. Susan also agreed to place her two older children from a different relationship outside the family home.

All three children were adjudicated children in need of assistance (CINA) in July 2007 pursuant to Iowa Code section 232.2(6)(c)(2) (2007). The juvenile

¹ The juvenile court also terminated Michael’s parental rights to M.S. He has not appealed.

court's subsequent dispositional order confirmed the children were CINA and ordered their custody to be placed with DHS for continued placement outside the home. The court ordered Susan to obtain substance abuse and psychological evaluations, participate in substance abuse treatment and mental health counseling, and provide samples for drug testing.

Initially, Susan was not compliant with these directives. She abused illegal and legal drugs throughout these proceedings, testing positive at various times for cocaine, opiates, and multiple prescription drugs that she was not prescribed. She struggled to maintain employment and stable housing, experiencing several periods of homelessness during this case. Susan also continued her troubled relationship with Michael despite ongoing reports of domestic violence. She was arrested in the fall of 2007 after she and Michael "were caught fighting on a street corner" and was in and out of jail. Her criminal history includes convictions for assault, theft, forgery, and disorderly conduct. Workers involved with the family reported Susan was making minimal progress towards reunification with M.S. in the first months of this case.

By the end of March 2008, however, a report prepared by the family's case manager indicated Susan had "shown great improvement." She found an apartment, became employed, and completed substance abuse treatment. Susan's visits with M.S. and his half-sisters were going well, and she was consistently attending parent-skills training. The case manager accordingly recommended that Susan's weekly visits with her two oldest children become semi-supervised. The case manager remained concerned, however, by Susan's drug tests in March, which were positive for benzodiazepines and methadone.

Susan denied any illegal usage and attributed those results to medications she had been prescribed.

The case manager's concerns were unfortunately justified. In early April 2008, police searched Susan and Michael's apartment and discovered a number of different prescription drugs, including Ritalin and methadone, which were prescribed to other individuals. During that same time period, a child protection worker investigated a report that Susan's oldest daughter was selling marijuana for her mother. Susan's second oldest child had also reported on several different occasions that her mother had sold some of her attention-deficit disorder medication. Neither of those reports was confirmed, though the worker noted, "I have strong suspicions that something is going on."

From that point forward, Susan's participation in the services offered to her by DHS became sporadic. She stopped providing samples for drug testing, lost her housing and employment, canceled a number of scheduled visits with her children, and stopped attending parent-skills sessions. Her rocky relationship with Michael continued, with several separations and reconciliations.

The State filed a petition to terminate parental rights to M.S., and a hearing was scheduled for late October 2008. Susan filed a motion to continue because she had abdominal surgery in early October and was taking "narcotic pain killers," which she alleged might affect her thinking capacity. The motion was granted, and the hearing was continued to the end of November. Susan filed another motion to continue the day before that hearing, asserting "she subsequently developed a skin infection near the site of the surgery and was hospitalized at Mercy Hospital in Cedar Rapids from November 14, 2008 through

November 20, 2008 for that condition.” That motion to continue was also granted. The case manager later learned that Mercy Hospital had no record of Susan being admitted to the hospital in November 2008.

The hearing on the State’s petition to terminate parental rights finally occurred in January 2009. Susan did not attend. Following the hearing, the juvenile court entered an order terminating Susan’s rights to her child pursuant to Iowa Code sections 232.116(1)(f) and (l). Susan appeals.

II. Scope and Standards of Review.

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).

III. Discussion.

Susan first claims the juvenile court erred in finding there was clear and convincing evidence to support termination of her parental rights under section 232.116(1)(f).² As the first three elements of section 232.116(1)(f) are clearly met, her claim implicates only the fourth element of that section. This element is proved when the evidence shows the child 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

² Because we conclude termination of Susan’s parental rights was proper under section 232.116(1)(f), we need not and do not address her claim regarding section 232.116(1)(l). 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 perceived harm need not be the one that supported the child's removal from the home. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992).

Susan argues the juvenile court's finding that M.S. could not be returned to her care "ignores the progress that [she] made and [her] recent displacement by the flood of June 2008 and the medical problems she was repeatedly hospitalized for in late 2008." We believe Susan's argument exaggerates the evidence present in the record.

Our de novo review reveals that Susan's overall progress in this case was minimal. Although she had made some improvement in areas of concern by March 2008—a full year after DHS became involved with the family—that improvement was short-lived. After police discovered prescription drugs that did not belong to either Susan or Michael in their apartment, Susan began to regress. She did not provide any samples for drug testing from March 2008 through October 2008. The one sample she did provide in late October was positive for morphine and opiates, as was a sample she provided in early November.³ Susan's visits with M.S. did not progress beyond weekly supervised visits due to the service providers' concerns regarding her continued drug use and her sporadic attendance at visits, which caused considerable anxiety for her child.

We do not believe Susan's lack of progress throughout the life of this case can be excused by the flood that occurred in June 2008 or by her one

³ Susan's brief asserts those positive drug screens "may have been the result of [her] recent hospitalization" in early October 2008. Her discharge summary from the hospital indicates she was prescribed hydromorphone for pain. However, there is no evidence beyond that record indicating her positive drug screens were attributable to medicine she was prescribed in the hospital.

documented hospitalization in early October 2008. Susan's case manager testified,

In my opinion, due to the flood and the continued hearings, I believe that [the parents] have been given additional time, and during that additional time neither parent has shown consistency that would indicate that maybe in a few months that [the child] could be returned.

As our court has often stated, 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). "Children simply cannot wait for responsible parenting. Parenting cannot be turned off and on like a spigot. It must be constant, responsible, and reliable." *In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990).

Our primary concern is the child's best interests. "In this connection, we look to the child's long-range as well as immediate interests. Hence we necessarily consider what the future likely holds for the child if returned to his or her parents." *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). Although Susan made some improvement in areas of concern at certain points in this case, her progress as a whole was minimal. See *id.* (stating evidence of a parent's past performance may be indicative of the quality of the future care that parent is capable of providing). We therefore agree with the juvenile court that although Susan and her son "have a bond, it is unlikely that [the child] could be returned to [her] care anytime in the reasonably near future without continuing to be at imminent risk of harm."

We deny Susan's related claim that the juvenile court ignored her "progress on the case plan, the bond between [her] and [M.S.], and the fact that [M.S.] was with a relative." Under section 232.116(3), which Susan cites in

support of this claim, the juvenile court need not terminate the parental relationship if a relative has legal custody of the child or if, based on the closeness of the parent-child bond, termination would be harmful to the child. Section 232.116(3) has been interpreted to be 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 upon the unique circumstances before it and the best interests of the child, whether to apply this section.” *Id.*

This child has been out of his mother’s legal custody and care for more than two years. He is doing very well. He needs and deserves permanency, which his aunt is committed to providing as evidenced by her stated desire to adopt him. 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.”). “Long-term foster care is not preferred to termination of parental rights.” *In re R.L.*, 541 N.W.2d 900, 903 (Iowa Ct. App. 1995). “A child should not be forced to endlessly suffer the parentless limbo of foster care.” *Id.* In light of the foregoing, we do not believe the juvenile court abused its discretion in terminating Susan’s parental rights even though the child was placed with a relative and bonded with Susan.

IV. Conclusion.

The juvenile court did not err in finding clear and convincing evidence supported termination of Susan’s parental rights, which we find, like the juvenile court, is in the child’s best interests.

AFFIRMED.