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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-594 / 01-0615
Filed November 16, 2001

IN THE INTEREST OF K.B. and I.B., Minor Children,

L.B., Mother,
Appellant,

T.B., Sr., Father,
Appellant.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla, District Associate Judge.

The mother and father of two minor children appeal a juvenile court order terminating their parental rights. **AFFIRMED.**

Lucy E. Harrington, Cedar Rapids, for appellant mother.

John J. Bishop, Cedar Rapids, for appellant father.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Leslie C. Ayers, Legal Intern, and Rebecca Belcher, Assistant County Attorney, for appellee State.

Jean C. Lawrence of White, Stone, Aasgaard & Lawrence, P.L.C., Marion, guardian ad litem for minor children.

Heard by Vogel, P.J., and Miller and Eisenhauer, JJ.

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VOGEL, P.J.

A mother and father appeal the termination of their parental rights to two minor children. We affirm.

Background Facts and Proceedings. Laura and Tommie are the parents of Katie, born September 12, 1995 and Isaiah, born February 1, 1997. In late May 1998, Laura smoked crack cocaine in a hotel bathroom while her children slept in the adjoining room. Later that day Laura decided to enter an inpatient substance abuse program and, as Tommie was incarcerated, she placed Katie and Isaiah with a friend. Laura had a long history of substance abuse, and this was her ninth attempt at substance abuse treatment.

The friend could not continue her care of the children, and they were placed in voluntary foster care on June 5, 1998. Katie and Isaiah were adjudicated as children in need of assistance on June 25, 1998 as to Laura, and on August 14, 1998 as to Tommie. The adjudications were based on a finding that the parents' imprisonment or drug abuse resulted in the children not receiving adequate care, pursuant to Iowa Code section 232.2(6)(n). On August 14 the children were placed in the custody of the Iowa Department of Human Services for the purpose of foster family care. At this time Katie was nearly three years old and Isaiah was approximately one and one-half years old.

Laura successfully completed the inpatient program and complied with after-care recommendations. On October 5, 1998, the children were returned to Laura's custody under protective supervision of the Department. In nearly all respects Laura performed quite well for a five-month period. Then, on March 4,

1999 the children were once again removed from Laura's care, after she self-reported drug use. Laura indicated she had used crack cocaine during the weekend of February 26, while the children stayed with a daycare provider. In a dispositional modification order on April 15, 1999, custody of the children was returned to the Department for placement in foster family care. Katie was over three and one-half years old, and Isaiah was just over two years old

Laura's progress continued to ebb and flow, and Katie and Isaiah resided in foster family care from the March 4 removal until the date of termination. By October 1999 Laura had achieved four months of sobriety, and had care of the children for four overnight visits per week. She then relapsed and the overnights were terminated. By the time of Tommie's release from prison in January 2000, Laura had again progressed to four overnights per week, and the Department was prepared to recommend that the children be returned to her custody. However, soon after reuniting with Tommie, Laura's compliance deteriorated, she admitted to substance use, refused to drop requested samples for drug screening (U.A.s), lost her housing, and was arrested for shoplifting. Tommie and Laura had a history of domestic violence, and there were also reports Tommie was using drugs and involved in illegal activities. By February 2000 visitation was once again supervised.

A meeting on February 16 outlined Departmental expectations for reunification. Both parents began to make progress, and the Department again considered returning the children to their care. However, U.A.s provided by Tommie and a pregnant Laura just prior to a July 2000 review hearing each

tested positive for cocaine. Both parents denied usage, claimed the test results were false positives, and refused to provide future samples. On July 31, 2000, the State filed a petition for termination. At the time of filing Katie and Isaiah had been in foster family care for twenty of the preceding twenty-five months.

The hearing on the termination petition was scheduled for September 13, 2000. However, because Tommie and Laura had been compliant with the case plan, the State recommended they be given additional time to work toward reunification. The juvenile court continued the termination hearing until February 8, 2001.[1]

On October 15, 2000 Laura gave birth to a third child, Alyiah. Although Laura continued to deny she had used drugs since a time prior to July 2000, Alyiah tested positive for cocaine in her system. Tommie indicated he knew the baby would test positive. On October 20, 2000, the district court directed that Alyiah be removed from her parents' care, and Alyiah was adjudicated as a child in need of assistance on January 19, 2001.

Shortly after Alyiah's removal Tommie broke off contact with the Department. Tommie had not provided U.A.s since July and there was a warrant for his arrest in Johnson County, Iowa. According to Laura, Tommie was in Chicago, wanted on forgery charges and facing a possible twenty-five-year prison sentence. Tommie did not appear for the termination hearing on February 8, 2001.

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[1] We question the appropriateness of continuing the termination hearing for nearly five months. Given the length of time the children had been in family foster care, we presume a juvenile court would proceed on the merits or dismiss the petition.

In contrast, Laura made good and steady progress after Alyiah's birth. While she was arrested for forgery in November, a charge which remained unresolved at the time of the termination hearing, it appears the underlying incident occurred prior to Tommie's departure. Laura also consistently provided samples that tested negative for drugs, sought substance abuse treatment, and cooperated with the Department. By the time the termination hearing was held on February 8, 2001, the Department was recommending Alyiah be returned to Laura's care.

At the termination hearing it was conceded that Laura was a caring and nurturing mother who was bonded with Katie and Isaiah and was generally able to care for their needs, and that she had made good progress in the four months since Alyiah's birth. The Department nevertheless recommended the children not be returned to her care as, from and after the children's initial placement in voluntary foster care, Laura had been unable to maintain sobriety for more than four or five months. The protective home care director recommended a minimum six to twelve month period of sobriety before returning the children to Laura's care, and both the director and the protective worker testified Laura's history of relapses raised concerns she would be unable to successfully maintain sobriety for any length of time.

All of the State's witnesses concluded that the children's ages of 5 and 4, and the fact they had spent approximately twenty-seven of the preceding thirty-two months in foster care, indicated a need for permanency in the children's lives. Laura's emotional stability and her ability to successfully separate herself

from Tommie were also concerns. The State's witnesses further testified that Tommie's history of domestic violence, criminal record, substance abuse problem and lack of parenting skills raised serious concerns about whether he was either a safe or appropriate caretaker for the children. The juvenile court terminated Laura and Tommie's parental rights under Iowa Code sections 232.116(1)(e), (g) and (k) (2001). Both parents appeal.

Scope of Review. A termination of parental rights is subject to de novo review. *In re S.J.*, 620 N.W.2d 522, 524 (Iowa Ct. App. 2000). The grounds for termination must be proven by clear and convincing evidence. *In re E.K.*, 568 N.W.2d 829, 830 (Iowa Ct. App.1997). Our primary concern is the best interest of the children. *In re M.N.W.*, 577 N.W.2d 874, 875 (Iowa Ct. App.1998).

Return of Custody. Under Iowa Code section 232.116(1)(e), the court can terminate parental rights if all the following factors are met:

> (1) The child is four years of age or older.
> (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
> (3) The child has been removed from the physical custody of the child's parents for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.
> (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

Iowa Code § 232.116(1)(e) (2001). There is no dispute the first three elements all existed, as to both Katie and Isaiah, at the time of the termination hearing. The only dispute is whether the State presented clear and convincing evidence that the children could not be returned to the custody of their parents at that time.

A return was appropriate unless it would have subjected the children to physical abuse, or a harm that would justify their adjudication as children in need of assistance. Iowa Code § 232.102(5) (2001). Since there is no allegation of physical abuse in this case, we must determine if there is sufficient proof a ground for adjudication exists. *See In re A.B.*, 554 N.W.2d 291, 294 (Iowa Ct. App. 1996). Of the numerous grounds, which are found in Iowa Code section 232.2(6), the two relied upon by the juvenile court are also the only grounds with any application to this case: where a child "is imminently likely to suffer harmful effects as a result of . . . [t]he failure of the child's parent . . . to exercise a reasonable degree of care in supervising the child," Iowa Code § 232.6(c)(2) (2001), and where the "parent's . . . drug or alcohol abuse results in the child not receiving adequate care." Iowa Code § 232.6(n) (2001).

There is no evidence that Tommie has taken any substantive steps towards addressing his drug abuse, ongoing criminal activities or domestic abuse issues, and nearly all the evidence admitted at the termination hearing indicated Tommie would not be an appropriate or adequate care giver for the children. We therefore concur with the trial court's assessment that Tommie's drug usage would result in a lack of adequate care and likely result in harm due to an absence of proper supervision. We also agree that, despite Laura's progress towards reunification, she too was unable to provide Katie and Isaiah reasonable and adequate supervision and care at the time of the termination hearing. Key to this determination was Laura's inability to maintain sustained sobriety.

The fact the children had yet to suffer a defined physical harm as a result of their mother's drug use does not speak to the question of whether such drug use impairs Laura's ability to use reasonable care in supervising the children. At the time of the hearing she had managed consistent sobriety for only four months, two to eight months shy of the minimum period recommended by the Department before reunification would be approved. In addition, Laura had yet to achieve financial or housing stability, had not fully addressed her own mental health issues, and had maintained contact with Tommie despite their history of domestic abuse. All were issues that impacted negatively on her ability to maintain sobriety. She also had a past history of using drugs while the children were under her supervision.

All the foregoing establishes, by clear and convincing evidence, that Katie and Isaiah could not be returned to the care of either Tommie nor Laura at the time of the termination hearing. We are not persuaded the possibility of Alyiah's return to her mother necessitates a finding that all the children were ready and able to be returned to Laura's care. The Department only contemplated, but had not yet effected, a "possible trial home placement" of Alyiah. While the Departmental worker testified they were "on track" for such a placement, she also raised concerns about Laura's pending incarceration and her relationship with Tommie and how those things would effect Alyiah's future care. We note that termination of parental rights as to Alyiah was not before the court so development of any record in that regard was incomplete. It is also relevant that, as Alyiah had been adjudicated a child in need of assistance less than a month

before the termination hearing, the Department was just beginning to make reasonable efforts toward reunification. In contrast, Laura had been given multiple opportunities to successfully achieve reunification with Katie and Isaiah, and had repeatedly failed.

Having found Laura and Tommie's parental rights were properly terminated under one of the statutory grounds relied upon by the juvenile court, we may affirm the terminations without addressing whether proper findings were made by the juvenile court under the other statutory provisions. *See In re A.J.*, 553 N.W.2d 909, 911 (Iowa Ct. App.1996).

Best Interests of the Child. Even where there is a statutory basis to terminate parental rights, the termination must still be in the best interest of the children. *In re M.S.,* 519 N.W.2d 398, 400 (Iowa 1994). In making that determination we consider both the children's long-range and intermediate interests. *In re M.N.W.*, 577 N.W.2d 874, 875 (Iowa Ct. App.1998). We use the parents' past performance to assess their ability to provide future care, giving substantial weight to case history records. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993).

Tommie's failure to make reasonable progress toward reunification, and his lack of contact with the children for substantial portions of their lives, all demonstrate that termination of his parental rights was in the children's best interest. Assessing the children's best interests in regard to continuing a relationship with Laura is not as simple. There is no dispute that, once Laura attempts to come into compliance, she does quite well for a period of time. It is

also clear that she is a caring and loving mother who, when sober, is capable of providing adequate and reasonable care for her children. However, there is also no dispute that Laura continues to relapse, and has a long history of substance abuse with only intermittent periods of sobriety.

We are not persuaded by the possibility that Laura may achieve long term sobriety, if given more time. A parent does not have an unlimited amount of time to achieve reunification with his or her child. *In re H.L.B.R.*, 567 N.W.2d 675, 677 (Iowa Ct. App. 1997). As previously noted by this court:

> We must reasonably limit the time for parents to be in a position to assume care of their children because patience with parents can soon translate into intolerable hardship for the children. A child should not be forced to endlessly suffer the parentless limbo of foster care. The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems. Children simply cannot wait for responsible parenting.

In re E.K., 568 N.W.2d 829, 831 (Iowa Ct. App. 1997) (citations omitted). Because Laura has been unable to adequately maintain sobriety, even though having over two and one-half years to achieve such a goal, the termination was in the children's best interest.

Extenuating Circumstances. Finally, Laura argues the termination was inappropriate because of the strong bond she had formed with the children, and because her likely reunification with Alyiah would result in Katie and Isaiah being separated form their sibling. The bond between Laura and her children is a mitigating factor to consider, but is not an overriding consideration. Iowa Code § 232.116(3) (2001); *see also In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998). Similarly, while siblings should be kept together whenever possible, our

primary concern remains the best interest of the children. *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994). Under the facts of this case, we find those interests to be best served by termination.

AFFIRMED.