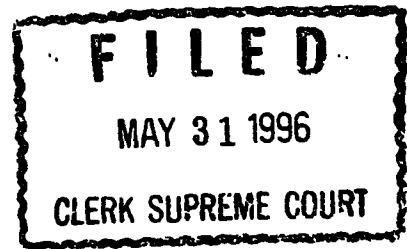


IN THE COURT OF APPEALS OF IOWA

No. 6-212 / 95-1411



IN THE INTEREST OF N.N. AND S.N., Minor Children,

M.N., Father,

Appellant.

Appeal from the Iowa District Court for Jasper County, John P. Crouch, District
Associate Judge.

Father appeals the district court's order terminating his parental rights to his
minor children. **AFFIRMED.**

Erik A. Luthens of Luthens Law Offices, P.C., Colfax, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, and John C. Heinicke, Assistant County Attorney, for appellee State.

Gilbert R. Caldwell III of Caldwell, Caldwell & Caldwell, Newton, guardian ad
litem for minor children

Considered by Habhab, P.J., and Cady and Streit, JJ. Vogel, J., takes no part.

STREIT, J.

M.N. and L.N. are the parents of N.N., born June 26, 1989, and S.N., born April 24, 1991. On February 1, 1994, the State filed a child in need of assistance (CINA) petition alleging Nathan and Stephanie were in need of assistance. L.N. had left the children with a baby-sitter and failed to return, and M.N. was incarcerated for third offense OWI and driving while barred. The district court issued a no-contact order against the parents as well as a temporary removal order. The children were placed with Mark's sister, Sheron, and her husband, Mike. On February 11, 1994, the court adjudicated both children to be in need of assistance. A dispositional order on March 4, 1994, continued placement with Sheron and Mike.

On July 17, 1995, the court entered an order terminating the rights of both parents to the children. The court concluded the State failed to prove the father abandoned the children, but had shown the children could not safely be returned to either parent. The court found the father had minimally complied with most requirements of the case permanency plan, but had not solved his substance abuse problem and did not exhibit a change in attitude. The court noted he had tested positive for drugs twice in a six-month span. The court therefore concluded the father's parental rights should be terminated under section 232.116(1)(e) and (k) (chronic substance abuse). The court ordered the guardianship and custody of the children should be transferred to Mike and Sheron. M.N. appeals.

I. Standard of Review.

Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1984) *cert. denied sub nom. J.G. v. Tauke*, 469 U.S. 1222 (1985). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those determinations. *Id.* at 491-92.

The primary concern in termination proceedings is the best interest of the child. Iowa R. App. P. 14(f)(15); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

We look to the child's long-range, as well as immediate, interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App. 1988) (citing *Dameron*, 306 N.W.2d at 745)

II. Statutory Grounds for Termination.

M.N.'s parental rights were terminated pursuant to Iowa Code sections 232.116(1)(e) and 232.116(1)(k) (1991). Iowa Code section 232.116(1)(e) permits the juvenile court to terminate the parent-child relationship if the court finds all of the following have occurred:

- (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 custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 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 section 232.116(1)(k) permits termination where the court finds all of the following have occurred:

(1) The child has been adjudicated a child in need of assistance pursuant to section 232.96 and custody has been transferred from the child's parents for placement pursuant to section 232.102.

(2) The parent has a severe, chronic substance abuse problem, and presents a danger to self or others as evidenced by prior acts.

(3) There is clear and convincing evidence that the parent's prognosis indicates that the child will not be able to be returned to the custody of the parent within a reasonable period of time considering the child's age and need for a permanent home.

M.N. contends the court erred in ruling the State proved his parental rights should be terminated under any of the statutory grounds. M.N. claims termination was not proper because he was employed, was participating in aftercare, and had exercised visitation with the children. He also notes the DHS social worker admitted he had complied with most of the requirements of the case permanency plan. He also maintains the State did not prove he has a chronic substance abuse problem. He points out he was discharged from the Capstone treatment program and had participated in aftercare. We find termination under both grounds appropriate.

With respect to section 232.116(1)(e), the issue is whether subsection (1)(e)(4) was met. The requirement of Iowa Code section 232.116(1)(e)(4) is met “when the child cannot be returned to the parental home because the definitional grounds of a child in need of assistance . . . are met.” *In re A.M.S.*, 419 N.W.2d 723, 725 (Iowa 1988). M.N.’s involvement with illegal drugs dates back to 1975 and continued into late 1994, five months before the termination hearing, when he again tested positive for drugs – methamphetamine. In 1992 M.N. was arrested for OWI while driving with his children. Testimony revealed M.N. threatened his children so they would not discuss certain topics with case workers. Testimony made references to drug usage in M.N.’s home, storing needles in the children’s play room, directly subjecting N.N. to drugs by blowing smoke into his mouth, and physical violence toward the children. Both children have told case workers about violence in the home. Evidence of M.N.’s past performance may be indicative of the quality of future care he is capable of providing. See *In re Dameron*, 306 N.W.2d at 745. We find clear and convincing evidence exists that the children cannot be returned to M.N. as set forth in Iowa Code section 232.102.

With respect to section 232.116(1)(k), the issues are whether subsections (1)(k)(2) and (1)(k)(3) were met. We find the State proved by clear and convincing evidence M.N. has a chronic substance abuse problem and presents a danger to his children, as required by subsection (1)(k)(2). As stated above, M.N. has a long history

of substance abuse which continued to be a problem at the time of the termination hearing. M.N. has subjected the children to many dangerous situations. He has exposed them to illegal drugs, driven with them in the car while under the influence of alcohol or drugs, acted violently towards them, and threatened them. M.N. has a substance abuse problem and presents a danger to his children.

There is also clear and convincing evidence M.N.'s children cannot be returned to his custody within a reasonable period of time considering the children's ages and need for a permanent home, as required by subsection (1)(k)(3). The children are ages six and four. Testimony revealed the children are at a critical age for bonding. They need stability, a sense of family, and a sense of safety in their lives. Both S.N. and N.N. appear to feel safe and happy living with their aunt. N.N. feels afraid his father will punish him for talking about events in the home. M.N.'s substance abuse continues to impede his ability to care for the children. According to reports, he cannot provide a nurturing, emotionally healthy environment for the children. According to M.N., he is not ready to have custody of his children and would like the process to go slowly. These children should not be forced to endlessly await the maturity of their father. *See In re T.D.C.*, 336 N.W.2d 738, 744 (Iowa 1983). Termination must occur if twelve to eighteen months have elapsed since the child was removed from the home and the parent still cannot take care of the child. *Id.* These children have already waited in placement for seventeen months. They should not be required to wait any longer for

the change in their father which is improbable. These children will not be able to return safely to M.N.'s custody in a reasonable length of time as required by subsection (1)(k)(3).

In summary, we agree with the district court's conclusion that M.N.'s parental rights should be terminated pursuant to Iowa Code sections 232.116(1)(e) and (k). Termination is in the best interests of the children.

III. Iowa Code Section 232.116(3).

M.N. argues, even if the State did prove by clear and convincing evidence the statutory grounds for termination, his parental rights should not have been terminated because the children were being placed with a relative, his sister Sheron. M.N. cites Iowa Code section 232.116(3)(a) which states, "The court need not terminate the relationship between the parent and child if the court finds . . . a relative has legal custody of the child." We reject this argument. Section 232.116(3) contains no mandatory language. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa App. 1993). It is within the sound discretion of the court, based upon the circumstances of the case before it and the best interests of the child, whether to apply section 232.116(3)(a) to save the parent-child relationship. *See id.* We find it is in the best interests of the children for M.N.'s parental rights to be terminated. As stated in part II of this opinion, M.N. has a chronic substance abuse problem and presents a danger to his children. These children "should not be made to suffer indefinitely in parentless limbo." *In re*

A.C., 415 N.W.2d 609, 613 (Iowa 1987). They deserve a get on with their lives. Iowa Code section 232.116(3) does not warrant continuing M.N.'s parental rights.

IV. Reasonable Efforts.

Reasonable efforts to reunite parent and child are required prior to termination. *In re C.L.H.*, 500 N.W.2d at 453. M.N. argues the State did not make reasonable efforts to reunite him with his children prior to the termination of his parental rights. He claims the testimony of social worker Debbie Johnson indicates she prematurely decided to move toward termination of his rights and therefore failed to make adequate efforts to reunite him and his children. We find the State, DHS, and the juvenile court all have made reasonable efforts to promote reunification between the children and M.N. *See id.*

DHS developed a case permanency plan whereby M.N. was given seven responsibilities. He was required to complete treatment at the Fort Des Moines OWI facility, attend outpatient treatment for alcohol and drug abuse, find appropriate housing and employment, attend supervised visitation at least twice a month, remain sober, and attend parenting classes

The State gave M N every opportunity to successfully complete these tasks. Services were provided at all times while the case was pending. There is no evidence Johnson interfered with these services or disregarded any progress M.N. may have made by participating in services. The only impediment to providing services to M.N.

was his incarcerations. Although M.N. minimally complied with most of the services in that he attended programs, M.N. failed to benefit from the services. As the district court noted, his mere presence was not sufficient to maintain parental rights. The district court stated M.N. did not give the wholehearted compliance and change in attitude which the children deserved. We give weight to these findings of fact. *In re W.G.*, 349 N.W.2d at 491-92. M.N.'s continuing drug abuse and inability to change his behavior show he did not benefit from the services provided. Although adequate services were provided to M.N., he failed to take advantage of the programs and failed to improve his parenting skills.

AFFIRMED.