IN THE COURT OF APPEALS OF IOWA

No. 0-993 / 10-1577
Filed February 23, 2011

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

K.L.H., Father,
Appellant,

K.L.H., Mother,
Appellant.

Appeal from the Iowa District Court for Butler County, Peter B. Newell, District Associate Judge.

A father and mother appeal separately from the order terminating their parental rights. **AFFIRMED.**

Michael H. Bandy of Bandy Law Office, Waterloo, for appellant father.

Kevin D. Engels of Correll, Sheerer Benson, Engles, Galles & Demro, P.L.C., Cedar Falls, for appellant mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Greg Lievens, County Attorney, and Martin M. Petersen, Assistant County Attorney, for appellee State.

Heather Prendergast, Waterloo, for minor child.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

MANSFIELD, P.J.

Kourtney and Kenny separately appeal from a juvenile court order terminating their parental rights to their son, K.H. (born April 2009), under Iowa Code sections 232.116(1)(h) and (i) (2009). In August 2009, when K.H. was four months old, he suffered a spiral fracture to his femur. The medical evidence indicates this fracture was inflicted intentionally on K.H. by another person. The evidence points circumstantially toward Kenny, who has consistently declined to testify regarding the incident or even discuss it in therapy. Kourtney has not offered any explanation for the incident and, to put it simply, stands by Kenny. Both parents challenge the sufficiency of the evidence for termination and whether termination was in the best interests of the child. Upon our de novo review, we affirm.

I. Background Facts and Proceedings.

On August 24, 2009, K.H., who was only four months old, was taken to the emergency room and found to have a mid-shaft, spiral-type femur fracture of his left leg. Based on the type of injury, the treating orthopedic surgeon, Dr. Michael Crane, determined the injury was likely caused in a non-accidental manner. The Iowa Department of Human Services (DHS) became involved and subsequently entered into a safety plan with Kourtney and Kenny, whereby K.H. was voluntarily placed into the care of Kourtney's mother and step-father.

Following removal, DHS expressed concern that neither parent had provided an explanation as to how K.H. was injured. On November 5, 2009, the parents stipulated to K.H. being adjudicated a child in need of assistance (CINA) under Iowa Code section 232.2(6)(c)(2). The parents also agreed that evidence

regarding the nature and circumstances surrounding the injury to K.H would be presented at the next disposition hearing scheduled for December 3, 2009.

At the disposition hearing, Dr. Crane testified that a spiral fracture to the femur is "a very uncommon fracture." Dr. Crane opined that since K.H. was not walking, it would have been "very, very, very difficult for [K.H.] to cause this type of injur[y] on [his] own," and the most likely cause of the injury would have been "someone hanging onto [the child's] lower extremity and twisting the leg either out or in." Dr. Crane further testified that whoever was providing care for the child at the time of the injury would have known the child had been injured because the leg would have "crack[ed] like a stick," and the child "would start crying and be difficult to console." Dr. Crane also testified that he observed Kourtney being "overly lovee-dovee" with K.H., and in his experience this was typically "indicative of an over-reaction to [a parent's] feeling poorly about what happened."

Kourtney testified that on the day K.H. was injured, the family had just returned from swimming at a pond with some friends. Upon returning home, K.H. was brought into the house while still in his car-seat. Kourtney then went into the basement to get ready to take a shower, leaving Kenny to care for K.H. Kourtney testified that while she was downstairs, she heard K.H. let out a loud scream that "wasn't normal." When she came upstairs, Kenny handed K.H. to her and said, "I don't know what's wrong." Kourtney proceeded to attempt to comfort K.H., but K.H. continued to cry whenever he was moved. Kourtney then gave K.H. back to Kenny and took a quick shower. While Kourtney showered, Kenny noticed a color difference in K.H.'s legs. Accordingly, when Kourtney finished showering,

they took K.H. to the hospital. After describing these circumstances, Kourtney denied knowing how K.H. was injured:

> Q. How do you believe that your son was injured? A. I honestly don't know. I wish I did.
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> . . . .
>
> Q. Has anyone else offered you any explanation as to how they think it happened? A. We've tried to think of any way that it could have happened, but we don't—We don't know. Nobody—Nobody can figure—can figure it out; how it happened.
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> We've all done—We've all thought about it, but nobody knows. We don't know.

Upon advice from his attorney, Kenny declined to testify regarding how K.H. received his injury.

Following the disposition hearing, the juvenile court entered a written order continuing placement with the maternal grandparents. The court further ordered:

> [The parents] shall provide any information they have to the Department of Human Services to explain how the injury to [K.H.] occurred so that services can be provided and/or arranged to address the issues which led to this significant, non-accidental injury.

Over the next several months, both parents participated in some services and made improvements in their lives. Kenny maintained employment while Kourtney obtained her high school diploma. They also acquired their own home that was noted as being appropriate, and participated in daily visits with K.H., which were also noted as being appropriate. Despite their participation in services, Kourtney and Kenny continued not to provide DHS with any explanation as to how K.H. was injured. Given that circumstance, DHS maintained that unsupervised visits and reunification could not occur. Supervised visitation did continue to occur on a daily basis.

In April 2010, the mother gave birth to a second child. Kourtney and Kenny have participated in voluntary services with DHS for this child, and DHS has not expressed any concerns for the child's care or safety.[1]

By June 2010, K.H. had been out of Kourtney and Kenny's care for approximately eight months, and the case seemed to be at a standstill. The juvenile court directed the State to file a petition to terminate parental rights. The petition came on for a hearing on September 16, 2010.

At the hearing, Kourtney again testified she did not know how K.H. was injured. During cross-examination the following exchange occurred:

> Q. And I assume you recognize that this type of injury had to be done by another human being? A. That is what Dr. Crane said.
>
> Q. Did you not believe Dr. Crane? A. I would like to think that it could have been caused in any other way. I don't see how—Well, I don't see how anybody could do that to an infant.
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> . . . .
>
> Q. Okay. So, have you talked to Kenny about the fact this happened because a human being did this to your child? A. We have talked about this case on numerous occasions. We have talked about it a lot, yes.
>
> Q. And as you sit here today, it's still your testimony that you didn't do this to [K.H.]? A. No, I didn't do this.
>
> Q. So, how do you believe it happened? A. I honestly don't know.

As before, Kenny refused to testify or provide any information as to how K.H. sustained the broken leg.

A DHS supervisor, Cassie McAllister, testified that the agency had never received any information from the parents that would allow it to reach a conclusion as to what happened. As McAllister put it, the parents "don't seem to be really excited about not knowing what happened to their son . . . . We cannot

[1] Any issues relating to the other child are not before this court.

fix something that we don't know how it became broken, so we've not been able to make any progress." McAllister explained that if DHS understood what had happened, it could then provide appropriate services to the case—e.g., anger management.

A DHS caseworker, Melisa Lammers, also testified at the termination hearing. She expressed the view that the parents had not complied with the prior court order requiring them to explain how K.H.'s injury had occurred. She also referred to another incident in the records: Kenny's stepmother reported that while Kenny's sister was supervising a visit, Kenny had become upset with his three-year-old niece, grabbed her, left a mark, and made her cry. As Lammers stated, that was a "red flag," if Kenny "was getting angry enough with a three-year-old niece during a supervised visit with his own child." Also, Kenny had only attended a few sessions with a counselor but had declined to keep attending because, as Kenny explained, he could not discuss the injury. Lammers also testified that Kourtney and Kenny were pleasant on a personal level but had stopped attending mental health services and seemed not to have any passion or commitment to getting their son back. Lammers added that Kourtney had a "blind devotion" to Kenny.

The report of the Court Appointed Special Advocate (CASA) was also received into evidence. The report described recent interactions with the family. Kourtney had "again expressed that she does not know how [K.H.] broke his leg and thinks maybe their dog could have jumped on [K.H.] to cause his injury, but could not confirm that she saw this action had taken place." The CASA volunteer stated she was "concerned that neither Kenny nor Kourtney are able to verbalize

what truly happened to cause a spiral legal fracture to their four month old son; and their ability to ensure the future safety of their son." She recommended that K.H. continue in the custody of DHS for permanent placement with the maternal grandparents.

The guardian ad litem recommended termination of parental rights. She stated that she did not believe K.H. could be returned home "in light of a lack of an explanation."

The record indicated the maternal grandparents were ready and willing to proceed with adoption.

On September 23, 2010, the juvenile court filed an order terminating Kourtney's and Kenny's parental rights under Iowa Code sections 232.116(1)(h) and (i). The juvenile court found:

> The parents have continued to argue that they can't provide an explanation as to what happened, but the child's father has refused to answer questions about the circumstances surrounding what happened to this child. It is not that they *cannot* provide an explanation, but that they *will not* provide an explanation.
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> . . . .
>
> The parents' attorneys argue that it is possible that the parents simply do not know what happened and are unwilling to provide false testimony to the Department of Human Services or "play ball" in order to obtain the return of their child. The Court believes that the more likely explanation is that the parents are fully aware of how this child was injured and are unwilling to provide an explanation. This explains their lack of interest in seeking out answers as to who might have caused their child to be injured.
>
> If the parents were not responsible for this severe injury to their child, one would expect them to be diligent in trying to determine how this injury occurred. The Department has not seen any effort on the parents' part to either discuss this matter or seek out answers as to how this injury could have occurred.
>
> The evidence strongly indicates that Kenny is the individual responsible for this injury. The parents are aware that this is what the Department of Human Services believes and yet the parents continue to maintain a silence about the events surrounding the

> injury to this child. The parents are also aware and the Court has made clear to the parents that if there was some admission of responsibility for the injuries to this child, services could be provided and the parents would not be in any way precluded from being reunified with their child.
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> . . . .
>
> [W]ithout an explanation as to how this non-accidental injury occurred to this Child, and without an effort on the parents' part to provide an explanation, the Child cannot be returned to the parents' care.

Kourtney and Kenny appeal.

II. Standard of Review.

We review termination of parental rights de novo. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). We give weight to the factual determinations of the juvenile court, but are not bound by them. *Id*.

III. Analysis.

A. Grounds for Termination.

Kourtney and Kenny both contend insufficient evidence exists to support termination of their parental rights under sections 232.116(h) and (i). 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. *In re D.W.*, 791 N.W.2d 703, 707 (Iowa 2010). We find termination to be appropriate under section 232.116(1)(h), which requires all of the following to have occurred:

> (1) The child is three years of age or younger.
> (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 six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.

> (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

Kourtney and Kenny challenge only the fourth element, arguing the State failed to prove by clear and convincing evidence that K.H. cannot be returned to their care.

Upon our de novo review, we agree that K.H. cannot be returned to Kourtney's or Kenny's care without the threat of further abuse or neglect. Iowa Code § 232.2(6)(b). Yet we do not entirely adopt the reasoning of the juvenile court.

Rather, we begin with the proposition that clear and convincing evidence exists that Kenny was responsible for the injury to K.H.[2] Kourtney testified that she left K.H. with Kenny and shortly thereafter heard K.H. let out a cry that "wasn't normal." When she returned upstairs to investigate the crying, Kenny handed her K.H. and stated, "I don't know what's wrong." This strong circumstantial evidence pointing to Kenny as the culpable party can be as probative as direct evidence. *See* Iowa R. App. P. 6.904(3)(*p*); *see also State v. Sayles*, 662 N.W.2d 1, 4 (Iowa 2003) (finding evidence sufficient to identify perpetrator of infant's injuries when defendant was exclusive caregiver before onset of symptoms). Kenny has subsequently refused to divulge any information regarding how the injury may have occurred. While Kenny has a Fifth Amendment right not to testify, in a civil case the court may draw an adverse

[2] As the juvenile court stated, and we agree, "The evidence strongly indicates that Kenny is the individual responsible for this injury."

inference from his failure to testify. *Craig Foster Ford, Inc. v. Iowa Dep't of Transp*., 562 N.W.2d 618, 623–24 (Iowa 1997).

Additionally, the record indicates that neither parent has adequately addressed that prior abuse. "A parent's failure to address his or her role in the abuse may hurt the parents' chances of regaining custody and care of their children." *In re C.H.*, 652 N.W.2d 144, 150 (Iowa 2002). Although the parents have participated in other services and made improvements to their lives, the underlying concern regarding physical abuse has not been addressed and thus K.H. cannot be returned to Kourtney and Kenny's care. Kenny's counseling sessions, for example, were few and unproductive because Kenny declined to discuss the incident. Given the serious physical abuse of K.H. in August 2009 and the parents' failure to address that abuse, clear and convincing evidence exists that K.H. cannot presently be returned to their care.

B. *In re C.H.*

The juvenile court's termination order did not discuss the supreme court's decision in *C.H*., 652 N.W.2d 144. That was understandable, since neither parent has ever argued, here nor in the juvenile court, that termination of parental rights would violate a right against self-incrimination. No party mentioned the *C.H*. decision below. *See In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003) ("Even issues implicating constitutional rights must be presented and ruled upon by the district court in order to preserve error for appeal.").

Nonetheless, even if a Fifth Amendment argument had been properly raised, we believe our present disposition of the case is consistent with *C.H*. and does not violate Kenny's right against self-incrimination. In *C.H*., the supreme

court indicated that a parent involved in a termination case may not be penalized for "noncompliance with a court order impinging on his right against self-incrimination." *C.H.*, 652 N.W.2d at 150. But it also held that exercise of that right "*may* indeed have consequences." *Id*. (emphasis in original). For example, "sexual offender treatment where the offender refuses to take responsibility for the abuse may constitute ineffective therapy." *Id*. (citing *In re H.R.K.*, 433 N.W.2d 46, 50 (Iowa Ct. App. 1988)).

We believe our resolution of this case adheres to these guideposts. Nothing in *C.H*. prevents a court from drawing an adverse inference based on a parent's refusal to testify. Like the juvenile court in *C.H.*, when we consider the entirety of the record, we find that the underlying act of abuse *did* occur. *Id*. at 151. Nor does *C.H*. prevent a court from reaching conclusions about the sufficiency of treatment, even when the insufficiency results from a parent's refusal to discuss or acknowledge the underlying events. *Id*. at 150. Here the record indicates that while the parents have received some services, they have not received services such as anger management that would address this serious incident of physical abuse.

C.H., in our view, *does* prohibit us from relying on Kenny's bare refusal to comply with judicial and DHS directives that he explain what happened as a ground for terminating parental rights. In our decision, we are not doing so. Our ruling is not based on this fact, but on the fact that Kenny and Kourtney have not participated in services tailored to the serious abuse that occurred. As the supreme court reiterated in *C.H*., "The best interests of [the child] are our paramount concern." *Id*. at 151. Thus, when a parent fails "to complete any form

of treatment, we cannot conclude [he] has fixed his problems and is now fit as a parent." *Id*.

Our dissenting colleague has another view, quoting the DHS supervisor's testimony that the parents have "basically been cooperative with the services that have been offered" and arguing that the only cited noncompliance with the case permanency plan involves the parents' failure to "explain how the injury occurred." We see things differently for two reasons.

First, the testimony of the DHS witnesses makes it clear that the parents' cooperation was superficial and did not address the concerns that had led to the child's removal. After McAllister (the supervisor) took the stand, Lammers (the caseworker) testified. Lammers pointed out that Kourtney simply stopped attending mental health services, while Kenny "shared with [his counselor] that he can't really talk about the injury and didn't really see how the therapy could go any further one way or another." Lammers also noted that Kourtney had not attended a parenting class despite promising she would do so and had recently canceled appointments with her. Moreover, McAllister did not testify that the parents had received services adequate to address the risk to the child. As she explained twice in her testimony, "The services provided were based on an incomplete needs assessment."

Second, the ultimate question we have to answer is whether K.H. can be safely returned to his parents' custody at the present time, not whether the parents complied with the dispositional order except for the portion thereof requiring them to explain how the injury occurred. We must review the record de novo to determine if clear and convincing evidence exists that K.H. cannot be

returned to Kenny and Kourtney. We have done so and believe it does. In our review, we are not limited to the specific factual grounds for termination cited by the juvenile court, especially when the parents never raised *C.H*. or gave that court the opportunity to consider the possibility that its orders, as they were framed, might impinge upon Kenny's right against self-incrimination.

C. Best Interests of the Child.

Although statutory grounds for termination exist, termination must still serve the best interests of the child. *In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010). In determining whether termination is in the child's best interests, we "'give primary consideration to the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional condition and needs of the child.'" *Id*. (quoting Iowa Code § 232.116(2)).

Unaddressed concerns of physical abuse are a clear threat to a child's safety. Even if the record did not include clear and convincing evidence that Kenny was responsible for K.H.'s spiral fracture, we would be troubled by the parents' lack of interest in finding out how their infant was seriously injured as a means to ensure that no similar harm came to him in the future. In addition, K.H. was removed from his parents care when he was only four months old, and has now been out of his parents' care for over a year. K.H. is developing well with the maternal grandparents, who are a preadoptive placement. Based upon the statutory factors, we find termination is in K.H.'s best interests.

D. Significance of the Parental Bond.

Kourtney and Kenny also claim the exception to termination under section 232.116(3)(c) is met because "K.H. is bonded with both parents and would suffer irreparable harm if termination is allowed to stand." In analyzing this exception, "our consideration must center on whether the child will be disadvantaged by termination, and whether the disadvantage overcomes [the parent's] inability to provide for [the child's] developing needs." *D.W.*, 791 N.W.2d at 709. Although there is a bond between K.H. and his parents, we do not believe the disadvantage of termination overcomes the parents' inability to provide for K.H.'s safety.

For the foregoing reasons, we affirm the juvenile court order terminating parental rights to K.H.

AFFIRMED.

Tabor, J., concurs; Danilson, J., dissents.

DANILSON, J. (dissenting)

I respectfully dissent. Contrary to the majority, I believe the termination of the parental rights of Kenny and Kourtney impinges upon their rights against self-incrimination. "The State may not penalize [a parent] for noncompliance with a court order impinging on his right against self-incrimination." *C.H.*, 652 N.W.2d at 150.

In *C.H.*, our supreme court found that the father had not adequately complied with the case permanency plan. *See id.* at 149–51. The court stated:

> The State made continuous attempts to see that [the father] was able to satisfy the plan's requirements. DHS provided [the father] with treatment and other services to overcome his problems. The department gave him generous time to develop needed parenting skills and comply with all of the requirements of the case permanency plan. Yet he has failed to show little, if any, improvement. Given [the father's] past performance, we are not convinced additional time or alternative services will change his conduct.

Id. at 150–51.

Unlike the facts in *C.H.*, both parents in this proceeding have been cooperative with the Department of Human Services and have substantially completed court-ordered treatment and services. In short, the evidence may be depicted by the testimony of Cassie McAllister, the Department supervisor assigned to the case. During the examination of Ms. McAllister she was asked about the Department's expectations of the parents:

> Q. And with the exception of failing to provide a viable explanation for how the injury to the child occurred, have the parents failed to meet any of those expectations? A. No. They have basically been cooperative with the services that have been offered.

Later, Ms. McAllister was asked whether Kenny and Kourtney had lived up to the Department's requirements:

> Q. And would you agree with me that, since the time of the injury, that Kourtney and Kenny have done everything that the department asked, has done everything that the department has asked them to participate in, to help insure the safety of not only [K.H.], but also [C.H.]? A. I think they have cooperated in all the services that have been offered.

Although Ms. McAllister and other State's witnesses asked that the parent's parental rights be terminated, the only significant shortfall cited was the parents' inability or refusal to explain the cause of K.H.'s injury.

Here, clear and convincing evidence does not exist that either Kenny or Kourtney failed to comply with the case permanency plan except the portion of the court's order that required that "they explain how the injury occurred." Accordingly, the termination of the parent's parental rights penalizes them for exercising their privilege against self-incrimination. *Id*. at 150. I would reverse the order terminating their parental rights.