

**IN THE COURT OF APPEALS OF IOWA**

No. 2-001 / 11-1748  
Filed February 1, 2012

**IN THE INTEREST OF K.R. and R.B.,  
Minor Children,**

**STATE OF IOWA,**  
Appellant,

**C.R., Father of K.R.,**  
Appellant.

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Appeal from the Iowa District Court for Woodbury County, Brian L. Michaelson, Associate Juvenile Judge.

The Department of Human Services appeals the portion of a dispositional order that reunified the child with her mother. The father of the child appeals that order, as well as prior rulings. **AFFIRMED.**

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Patrick Jennings, County Attorney, and Dewey P. Sloan, Assistant County Attorney, for appellant State.

David A. Dawson of Law Office of David A. Dawson, Sioux City, for appellant father of K.R.

Francis J. Cleary, Sioux City, for appellee mother.

Douglas L. Roehrich of Roehrich Law Office, L.L.C., Sioux City, for appellee father of R.B.

Joseph Kertels and Michelle Hynes of Juvenile Law Center, Sioux City, attorneys and guardians ad litem for minor children.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

**VAITHESWARAN, P.J.**

The juvenile court ordered the removal of two children from their parents, adjudicated them in need of assistance, and entered a dispositional order reunifying one of the children with her mother. The Department of Human Services appeals the reunification portion of the dispositional order. The father of this child appeals that order, as well as prior rulings.

***I. Background Facts and Proceedings***

The mother has two children, born in 2004 and 2010. Neither the older child nor the older child's father is involved in this appeal.

The younger child, K.R., was fathered by Cory. When K.R. was an infant, the department received a complaint that Cory sexually abused the mother's older child. Following an investigation, the department issued a founded child abuse report against Cory. The department also cited the mother for denial of critical care. The State petitioned to have the children removed from the parents' custody.

The juvenile court agreed that Cory sexually abused the older child. The court ordered both the mother's children removed, entered a no-contact order between Cory and K.R., and adjudicated both children in need of assistance.

K.R. was placed with one of Cory's sisters and was later transferred to the care of another sister, where she remained through the dispositional hearing. Cory's family members, including the sister with whom K.R. was ultimately placed, refused to accept the finding that Cory sexually abused the mother's older child, but agreed to abide by the no-contact order.

At the dispositional hearing, the State and the children's guardian ad litem argued that K.R. should remain with Cory's sister. The children's mother countered that the children should be reunified with her. She noted that she had complied with all the department's prerequisites for reunification except the requirement that she acknowledge Cory's abuse of her older child. While she did not believe Cory sexually abused that child, she validated the child's belief that someone sexually abused her and committed to keeping that child, as well as K.R., away from Cory.

The juvenile court agreed with the department that the older child needed to remain out of the mother's home, but disagreed on K.R.'s continued placement with Cory's sister. The court reasoned as follows:

The court agrees with [the mother's] argument that if [K.R.] cannot be placed with her due to her disbelief of [the older child's] sexual abuse by Cory, then why did the Department choose to place [K.R.] with Cory's relatives in light of their disbelief of the sexual abuse? If, indeed, it is the Department's concurrent plan to move [K.R.] to another placement in the event of an unsuccessful reunification of [K.R.] with her mother, then common sense tells this court [K.R.] needs to be moved now, rather than later. The question becomes—where? Should [K.R.] be moved into a foster home or should she be returned to the care of the mother? [The mother] has exhibited good parenting skills in her interactions with [K.R.] and with the exception of her refusal to honestly validate [the older child's] sexual abuse by Cory, she has complied with all other reunification services which were recommended to her by the department and appears willing to comply with various safeguards to protect [the older child] and [K.R.]

The juvenile court concluded that K.R. should be reunified with her mother.

## ***II. Department's Appeal***

On appeal, the department contends K.R. should have been kept in its "custody for purposes of relative care placement." The department specifically

objects to reunification with the mother on the ground that the mother “failed to protect the [older child] from extensive sexual predation that took place over a long period of time in her home.”

This was certainly one of the bases of the children’s removal, but our child welfare statute does not allow the department to simply rest on those removal grounds to support continued out-of-home placement. See Iowa Code § 232.102(7), (10) (2011). The department is obligated to make reasonable efforts to resolve those grounds and move towards reunification of parent with child. See *id.*

At the time of the dispositional hearing, a department employee conceded the department’s goal was still reunification and conceded the mother had taken steps to alleviate concerns that the children would be at risk in her home. A department employee further conceded the mother voluntarily underwent individual therapy at her own expense. The department’s case manager also acknowledged that Cory left the mother’s home the weekend after the department’s first team meeting with the family.

Notwithstanding these concessions, the department insists that the mother “will likely reunite with Cory.” The record created at the dispositional hearing does not support this assertion. The department furnished no evidence of personal contact between the couple after Cory moved out of the mother’s home.<sup>1</sup> And, K.R.’s mother testified there had been no such contact. She stated

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<sup>1</sup> A child protection worker saw the couple at a soccer field in the spring of 2011, and Cory’s mother testified at the adjudicatory hearing in May 2011 that they might be living together. In this time frame, neither the juvenile court nor the department had articulated any requirement that the couple separate.

that, after the adjudicatory hearing in May 2011, her involvement with Cory was limited to “[m]aybe a phone call or two—to talk about necessities for [K.R.], because he still provided stuff for [her].” She said she did not plan to get back together with him and never told the department she would like to get back with him. She expressed a willingness to abide by a no-contact order with Cory, should one be ordered, stating, “If that’s what I need to do to prove that I am not going to be with him, I will definitely do it.” Without evidence that the mother had ongoing personal contact with Cory, the department could not prove that K.R. would be at imminent risk of harm if she were returned to her care.

The department’s real objection was to the mother’s refusal to acknowledge Cory as the perpetrator of the abuse. But, as the juvenile court noted, the department saw fit to place K.R. with Cory’s family members for seven months, notwithstanding their consistent refusal to acknowledge him as the perpetrator. Indeed, a department employee went so far as to state that she had no concerns about the child’s current placement with Cory’s sister.

Notably, the department designated the sister a supervisor of visits between the mother and K.R., allowed those daily visits to take place in the home of Cory’s sister, and found no concerns arising from those visits. While a department employee testified that the agency might change the child’s placement should reunification efforts fail, she expressed no intent to immediately do so. An employee also acknowledged that the mother was sincerely undergoing therapy and was not simply paying lip service to the department’s expectations concerning protection of the children. This record

provides evidentiary support for the juvenile court's findings concerning K.R.'s placement.

The department also seeks reversal of the dispositional order based on the mother's alcohol use, which it describes as "to an excess." The department asserts her usage "will impair her decision-making about Cory and thereby endanger any young girl in her care." The problem with this argument is that, at the dispositional hearing, the department discounted the mother's alcohol use as a basis for continued removal. A department employee conceded that the mother was successfully discharged from substance abuse treatment. When asked whether substance abuse was still an issue in the case, she responded, "I would question her drinking after leaving substance abuse treatment, but, I guess, as long as there's no ongoing police contacts, no, substances aren't going to be an issue. No." The department furnished no evidence of "ongoing police contacts" based on the mother's alcohol use.

On our de novo review of the record created at and before the dispositional hearing, we conclude the juvenile court acted appropriately in returning K.R. to the mother's care. In reaching this conclusion, we take particular note of a provision in the dispositional order requiring the mother to have no contact with Cory. The court defined "no contact" broadly to mean "no contact of any kind, direct or indirect, including but not limited to, personal contact, contact by letter, mail, telephone, fax, e-mail, or through another person." The court further stated that "[a]ny attempt at contact shall also be a violation." This no-contact order, together with the order requiring Cory to have

no contact with K.R., if followed, essentially affords K.R. the same measure of protection she had in her placement with Cory's sister.

### ***III. Father's Appeal***

The father raises the following issues on appeal: (1) "the juvenile court erred in admitting the report of [the older child's] therapist at the adjudication and failing to strike said report and her subsequent statements to [the department]"; (2) "the juvenile court erred in adjudicating [K.R.] a child in need of assistance and sustaining her removal"; (3) "the juvenile court erred in issuing the no contact order and denying visitation between Cory and [K.R.]"; (4) "the juvenile court erred in consolidating and refusing to bifurcate [K.R.'s] and [the older child's] CINA proceedings"; (5) "the juvenile court erred in considering the maternal grandmother's polygraph results in the adjudication order and erred in considering Cory's decision not to take a polygraph because such testing is unreliable and not admissible evidence"; (6) "the juvenile court erred in failing to find [the department] has not made reasonable efforts to reunify [K.R.] with Cory"; (7) "the juvenile court erred in finding there is no known services that could be provided to a sex abuse perpetrator who denies the abuse and erred in assuming Cory's 'guilt' of sex abuse"; and (8) "the juvenile court erred in permitting the county attorney to remain as counsel for [the department] and the State while he continued to assert an independent position."

With respect to the first issue, the admission of a therapist's report relating to the older child, the father concedes there was no objection to the report at the time it was introduced, but argues that we should examine the admission under an ineffective-assistance-of-counsel rubric.

“Termination of parental rights cases are civil proceedings. As no Sixth Amendment protections are implicated, there is no constitutional right to effective assistance of counsel.” *In re T.P.*, 757 N.W.2d 267, 274 (Iowa Ct. App. 2008). Nonetheless, “due process requires counsel appointed under a statutory directive to provide effective assistance.” *In re J.P.B.*, 419 N.W.2d 387, 390 (Iowa 1988). The court generally applies the same test for ineffectiveness as has been applied in the criminal context: deficiency in counsel’s performance and actual prejudice. *Id.* at 392.<sup>2</sup>

Cory had appointed counsel and was therefore entitled to effective assistance. He received effective assistance. Specifically, his claim fails on the prejudice prong, as the substance of the therapist’s report, which summarized the older child’s disclosures of sexual abuse by Cory, was contained in department documents, which were clearly admissible under Iowa Code section 232.96(6).

As for the second and third issues raised by the father, the juvenile court made detailed fact findings concerning Cory’s sexual abuse of the older child and, on our de novo review, we find evidentiary support for those findings. The same findings also support the issuance of a no-contact order between Cory and K.R.

We turn to Cory’s challenge to the consolidation of the older child’s case with K.R.’s case. Both children were removed and adjudicated in need of

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<sup>2</sup> The Iowa Supreme Court has, however, cautioned against “mechanically applying criminal law standards to a civil juvenile proceeding where the resolution turns not on guilt or innocence, but on the best interest of the child.” *J.P.B.*, 419 N.W.2d at 390.

assistance based on the same evidence, and, accordingly, the court did not abuse its discretion in declining to bifurcate the proceedings.

This brings us to the fifth issue, the court's reference to polygraph tests. In its removal/adjudicatory orders, the juvenile court did indeed refer to the maternal grandmother's submission to a polygraph test and Cory's refusal to submit to a polygraph test. We agree with the father that polygraph test results are generally inadmissible. *In re S.J.M.*, 539 N.W.2d 496, 499 (Iowa Ct. App. 1995). For that reason, we decline to consider those references. However, on our de novo review, we find independent evidence to support the juvenile court's determination that the maternal grandmother was more credible than Cory. In light of this independent evidence, we decline to reverse the removal/adjudicatory order based on references to polygraph tests.

The sixth and seventh issues relate to the department's obligation to make reasonable efforts towards reunification. See *In re C.B.*, 611 N.W.2d 489, 493 (Iowa 2000). Initially, the department afforded Cory supervised visitation with K.R. The department curtailed those visits only after the juvenile court found that Cory abused K.R.'s older half-sibling and only after the court entered a no-contact order. The care coordinator who supervised visits between Cory and K.R. testified there were no other services she was prepared or trained to provide following the entry of this order.

Cory's circumstances are not unlike those of a father in *In re C.H.*, 652 N.W.2d 144, 147 (Iowa 2002). There, as here, the father sought services that did not require him to admit the commission of sexual abuse. *C.H.*, 652 N.W.2d at 147. The court stated,

In making reasonable efforts to provide services, the State need not search for unavailable services. This is especially so when a parent, as in the present case, presents the awesome challenge of getting treatment for a deficit the parent claims he does not have.

*Id.* The court noted that the parent sought “alternate services when there was no evidence to suggest the services were available.” *Id.* at 148. Under these circumstances, the court concluded that the State made reasonable efforts to provide services. *Id.*

We likewise conclude the department complied with its reasonable efforts mandate notwithstanding its inability to provide treatment services that did not require an admission of guilt.

The father’s final challenge is to the county attorney’s role in the case. This issue was not preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”).

We affirm the dispositional order and all prior rulings issued by the juvenile court, as they relate to K.R.

**AFFIRMED.**