IN THE COURT OF APPEALS OF IOWA

No. 1-646 / 11-0707
Filed September 21, 2011

IN THE INTEREST OF J.D.,
Minor Child,

J.D., Father,
Appellant,

J.D., Minor Child,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Susan Larson Christensen, District Associate Judge.

A father and guardian ad litem appeal from the juvenile court order terminating the father's parental rights to his child but not the mother's rights. **AFFIRMED.**

Chad Douglas Primmer of Chad Douglas Primmer, P.C., Council Bluffs, for appellant-father.

Marti D. Nerenstone, Council Bluffs, attorney and guardian ad litem for appellant minor child.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Matthew Wilber, County Attorney, and Eric Strovers, Assistant County Attorney, for appellee.

Robert Megal, Council Bluffs, for mother.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

TABOR, J.

This termination-of-parental-rights appeal involves a one-year-old child with developmental disabilities. When he was four weeks old, J.D. suffered serious brain damage from being shaken while in the care of his parents. Upon the State's petition, the juvenile court terminated the parental rights of the father, Johnathan, but declined to terminate the rights of the mother, Pammie.

Johnathan appeals, alleging the State produced insufficient evidence and that termination of the rights of only one parent was not in J.D.'s best interests. The guardian ad litem (GAL) for the child also appeals, asserting the juvenile court erred in not finding sufficient evidence to terminate Pammie's parental rights. In the alternative, the GAL agrees with Johnathan that it was not in J.D.'s best interests to terminate the rights of only one parent, reasoning that the father could provide child support for J.D. The State joins the arguments of the GAL.

Following our de novo review of the record, we reach the same conclusions as the juvenile court. The State offered clear and convincing evidence supporting the termination of Johnathan's parental rights under Iowa Code section 232.116(1)(h) (2009).[1] The record lacked clear and convincing proof that Pammie's rights should be terminated.

Finally, we disagree with both Johnathan and the GAL that terminating the rights of just one parent is counter to J.D.'s best interests. While "terminating the rights of a parent who is obligated to pay child support may place a greater

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[1] The court also found sufficient evidence under sections 232.116(1)(d) and (i), but we need only affirm on one statutory ground. *See In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999).

financial burden on the remaining parent or the State . . . if the alternative is that the child's safety, nurturing and growth, or physical, mental, and emotional condition and needs will suffer, the legislature has directed us to proceed with termination, provided the statutory prerequisites of section 232.116(1) have been met and nothing in section 232.116(3) would lead to a contrary result." *See In re H.S.*, 2011 WL 3862644, 11, ___ N.W.2d ___ ___(Iowa 2011).

I. Background Facts and Proceedings

When Pammie came home from work on December 22, 2009, she noticed her infant son looked pale, felt clammy, and was acting fussy. The baby's father, Jonathan—who had been caring for J.D. during the day on December 21 and 22—reported to Pammie that the baby was not interested in taking his bottle. Pammie noticed the baby's arm trembled and his eye "blinked with it." Both Pammie and Johnathan called their mothers for advice, but did not take the baby to the hospital that night.

When the baby's arm continued to "twitch" the morning of December 23, 2009, the parents drove him to the doctor's office. Once there, the baby suffered a seizure in the arms of the nurse. Medical professionals rushed the baby to an Omaha hospital where doctors discovered that "a significant portion of his brain [had] been permanently injured." Neurosurgeons estimated that the damage reached seventy percent of the baby's left hemisphere and thirty to forty percent of his right hemisphere. Dr. Suzanne Haney testified that J.D. sustained multiple injuries likely from one traumatic shaking incident.

The juvenile court removed the baby from the care of his parents and placed him with his paternal grandmother where he has been since January 2010. On February 10, 2010, the court adjudicated J.D. as a child in need of assistance (CINA). On January 5, 2011, the State filed petitions to terminate the rights of both the mother and the father. The juvenile court heard evidence over four days: March 1, March 15, March 25, and March 28, 2011.

At the time of the termination hearing, J.D. was fourteen months old and about five months behind in his cognitive development. He took several anti-seizure medications. An early childhood specialist with the Area Education Association (AEA) testified that the child's prognosis for the future was "very difficult to predict."

While the Department of Human Services (DHS) workers did not know who caused J.D.'s injuries, his only caregivers at the time of the injuries were Johnathan and Pammie. Pammie denied hurting J.D., but admitted at the termination hearing that she went through a long period of denial: "I did not want to accept that [J.D.] was shaken." She also testified that after J.D.'s removal she repeatedly asked Johnathan to move out of the house where she was paying the rent. Pammie's therapist testified he did not have concerns that her mental health would hinder her ability to care for J.D.

Pamela Jones, the family safety, risk, and permanency (FRSP) service provider, testified that Pammie was "very intelligent" and "a very optimistic person," but was not naïve as to the challenges J.D. faced because of his disabilities. Jones told the court that Pammie had internalized much of the

information provided and had matured during the time J.D. was out of her care. The FSRP provider believed Pammie shared a strong bond with her son and posed no threat to his safety. The service provider did not share the State's view that Pammie's parental rights should be terminated.

Johnathan testified that after serving two tours of duty in Iraq as a member of the Marine Corps, he suffered from post-traumatic stress disorder (PTSD). He described his PTSD symptoms as including anxiety, dizziness, blackouts, and loss of memory. He testified that he had no recollection of hurting J.D. Johnathan told Dr. Rosanna Thurman he could have potentially harmed J.D. due to his PTSD symptoms. Dr. Thurman reported that Johnathan's records from the Veterans Administration did not support his account of suffering a traumatic brain injury during his military service. Dr. Thurman opined that Johnathan was not being entirely truthful and was possibly capable of harming his son and then covering that up. She did not recommend J.D. be returned to Johnathan's care.

On the question of who shook J.D., the juvenile court determined clear and convincing evidence pointed to Johnathan as "the perpetrator of [J.D.'s] life-threatening injuries." In reaching this determination, the court took judicial notice of the criminal proceeding in which Johnathan received a deferred judgment for neglect or abandonment of a child. The court also considered

> 1. "the evidence presented regarding John being [J.D.'s] primary caretaker while Pammie was at work,"
> 2. his "failure to address his mental health needs and admitted diagnosis of PTSD which at times results in him not remembering what he did,"
> 3. "statements that he made to Dr. Thurman that he could have potentially harmed [J.D.]," and

> 4. "the parent's statements that no one else was in charge of [J.D.] during the period of time he was injured."

Based on these considerations, the court found clear and convincing evidence to terminate the father's rights under Iowa Code sections 232.116(1)(d), (h), and (i). The court determined "it would be in [J.D.'s] best interest to terminate John's parental rights as they exist over him because of the probability that John may hurt [J.D.] again."

The juvenile court took a different view of the petition to terminate Pammie's parental rights. The court listed the reasons supporting the State's recommendation against Pammie, including her use of a medicine dropper and a "sippie" cup to hydrate J.D. rather than a bottle, and returning him from visitation on one occasion with a wet diaper. The court noted that "silly" as it may seem, a substantial amount of testimony was devoted to these topics. The juvenile court found that the State's complaints were trivial compared to the mother's positive actions to regain custody of her son. The juvenile court wrote in glowing terms concerning Pammie's efforts:

> She took initiative rarely seen in juvenile court—she actively pursued even more services and programs than were suggested in an effort to improve her parenting. The court has never seen a parent embrace court-ordered services more than Pammie, and it appears to be genuine.

The juvenile court concluded Pammie was a "capable person to act as guardian of [J.D.]" The court ordered J.D. to remain in family foster care until the DHS could quickly transition him to unsupervised visits and a trial home visit with his mother.

The father, the GAL, and the State all appeal from the April 29, 2011 termination order.

II. Scope and Standard of Review

We exercise de novo review of juvenile court termination orders. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). De novo review places the ultimate responsibility to assess the entire record on this court. *See Jensen v. Jensen*, 261 Iowa 38, 42, 152 N.W.2d 829, 832 (1967). The juvenile court's factual findings do not bind our decision, but deserve deference, especially in assessing the credibility of witnesses. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010).

Our court will uphold an order terminating parental rights if there is clear and convincing evidence of grounds for termination under Iowa Code section 232.116. *Id.* Evidence is "clear and convincing" when there are no "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *Id.*

Even when the State satisfies the statutory grounds for termination under section 232.116(1), our decision to terminate parental rights must reflect the child's best interests. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). The best-interest determination focuses on the child's safety; his or her physical, mental, and emotional condition and needs; and the placement that best provides for his or her long-term nurturing and growth. Iowa Code § 232.116(2); *see P.L.*, 778 N.W.2d at 40 (holding "there is no all-encompassing best-interest standard to override the express terms" of the statute).

III. Discussion

A. J.D. cannot be safely returned to the custody of his father.

Johnathan argues the evidence did not support termination on any of the statutory grounds alleged by the State. Specifically as to section 232.116(1)(h)(4), the father contends the State did not prove by clear and convincing evidence that J.D. could not be presently returned to his custody. On appeal, the father's attorney argues that "the State put a lot of effort into demonstrating that they could not guarantee [J.D.] would not be harmed if returned to Johnathan's care." In response, Johnathan urges that "the court can never guarantee that any child will not be harmed. To expect something from Johnathan . . . that cannot be expected of anyone is simply unreasonable."

Johnathan's argument relies on a false analogy between the impossibility of guaranteeing harm-free child rearing by any parent and the possibility that a parent who has harmed a child once is more likely to do so again. Predicting a parent's future performance from a parent's past conduct is a mainstay of our child welfare jurisprudence. *See In re T.B.*, 604 N.W.2d 660, 662 (Iowa 2000); *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993). Johnathan did not recall shaking J.D., but admitted to an evaluator that he could have done so as a result of his PTSD symptoms. Even if Johnathan did not intentionally inflict his son's severe brain injuries, his purported blackouts and memory lapses create a distinct danger for a child entrusted to his care.

Johnathan also failed to promptly seek medical attention for his critically injured son. In fact, he pleaded guilty to a charge of neglect. The record does

not show that the father is any more attentive to his child's needs now than he was at the time of the severe injuries. According to the FSRP worker, Johnathan did not take advantage of the services offered by the DHS. Johnathan did not regularly attend his son's doctor appointments, and did not demonstrate a readiness to handle the needs of this medically fragile child. We agree with the juvenile court that termination was proper under section 232.116(1)(h).

B. The grounds for termination of Pammie's parental rights were not supported by clear and convincing evidence.

The GAL contends the reasons advanced by the State for terminating Pammie's parental rights were not "silly," but rather reflected a pattern of "not putting J.D.'s needs first, and even putting J.D. at continued risk of not reading his cues or meeting his needs." We disagree with the GAL's view that Pammie's actions show an inability to understand J.D.'s needs.

Numerous witnesses testified that Pammie has developed a keen insight into the special needs of her son. The AEA specialist found Pammie to be receptive to information about her son and asked appropriate questions about his progress. Both Pammie's mother and Johnathan testified Pammie was a good mother and was aware of what J.D.'s care entailed. FSRP consultant Pamela Jones had been involved with the family for nine months and found that Pammie learned a lot from the services offered. The consultant testified:

> And she knows that [J.D.] is never going to be like a normal child, whatever normal is, because that's all relative. But, as she said, I thought she put it pretty well one time–[J.D.] is her norm. . . . This is her norm for her baby.

Therapist James Holt echoed Pammie's proven commitment to parenting J.D.:

> Pammie is aware that her son has a disability. And that disability is going to need to be addressed from a parental standpoint should she have him in her care. And so she has actually–she did research and actually developed ways of contacting providers in the community to help her with what she needs to have in her home and her knowledge to take care of her son and his disability.

Pammie also sought help from Terri Lippert, an adoptive mother of nine children who have suffered from shaken baby syndrome. Lippert testified that Pammie has realistic expectations for her son; "she strives to make [J.D.] do the best he can but she also seems to accept that there are some deficits with him."

Viewed in its entirety, the evidence did not show that the circumstances leading to adjudication of J.D. as a CINA still existed despite Pammie receiving services, that J.D. could not be safely returned to his mother at the present time, or that the mother's receipt of services had not corrected the conditions that led to the abuse or neglect of J.D. *See* Iowa Code §§ 232.116(1)(d), (h), (i). We agree with the juvenile court's dismissal of the petition to terminate the mother's rights.

C. Termination of the rights of just one parent is not counter to the child's best interests.

Johnathan argues it is not in J.D.'s best interest for Pammie's parental rights to stay intact while his parental rights are terminated, particularly because he "is a veteran and can provide additional government sponsored benefits to the child should something happen to the child's mother." The GAL, while arguing primarily for termination of Pammie's rights, contends in the alternative:

> J.D. has significant needs, and will continue to have them his entire life. If, in fact, he is returned to [Pammie's] custody, it is in his best interests to have the financial and emotional support available from

> [Johnathan] and his extended family. J.D. could receive child support from [Johnathan] and perhaps benefits from Johnathan's veteran status.

Neither Johnathan nor the GAL point to anything in the record that would support the contention Johnathan's status as a veteran would assure government benefits for his son should his parental rights be maintained.

Likewise, the record does not reflect that Johnathan urged the juvenile court it was in J.D.'s best interests to grant concurrent jurisdiction so custody and visitation could be established in the district court. *See In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003) (requiring parents to present issues to and receive ruling from the juvenile court before raising claim on appeal). Accordingly, we question whether this best-interest claim is preserved for our review.

Assuming the issue was properly preserved, we reject the contention that termination of parental rights must be a both-or-neither proposition to serve J.D.'s best interests. The juvenile court may terminate the rights of one custodial parent and not the other. *See In re N.M.*, 491 N.W.2d 153, 155 (Iowa 1992) (conceiving of "situations when a child in the custody of one parent would benefit from the termination of the other parent's rights" and citing as an example when one parent has abused the child); *see also In re C.W.*, 554 N.W.2d 279, 282 (Iowa Ct. App. 1996).

In this case, the juvenile court found termination of the father's rights was in J.D.'s best interest because of the probability Johnathan would hurt the child again. We agree with the juvenile court such a risk exists given the father's admission that he may have caused the child's injuries, but does not recall doing

so. We also consider that Johnathan committed an incident of domestic violence against Pammie in March 2010 in front of his six-year-old daughter from another relationship. Given these incidents and Johnathan's mental health diagnoses, we are concerned that if his rights are not terminated, Johnathan will interfere with Pammie's ability to provide effective care for J.D. Our concerns about Johnathan's instability outweigh the unsubstantiated possibility that he may be a source of financial support for the child. Moreover, our supreme court has recently explained that "the anticipated loss of child support funds in and of themselves as a result of termination should not be part of the section 232.116(2) best interests analysis." *H.S.*, ___ N.W.2d at ___.

As for emotional support for the child, the juvenile court determined Pammie would foster J.D.'s relationship with his paternal grandmother and other extended family members even if Johnathan's parental rights are terminated. We agree that J.D.'s best interests are served by severing Johnathan's parental rights, but preserving Pammie's ties to her son.

AFFIRMED.