

IN THE COURT OF APPEALS OF IOWA

No. 1-790 / 11-1326
Filed November 9, 2011

**IN THE INTEREST OF M.L.,
Minor Child,**

**J.R.L., Father,
Appellant,**

**J.L., Mother,
Appellant.**

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge.

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

Francis P. Hurley of Phil Watson, P.C., Des Moines, for appellant father.

Joey T. Hoover of Kragnes & Associates, P.C., Des Moines, for appellant mother.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appellee State.

Katherine Miller, Des Moines, guardian ad litem for minor child.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

A father and mother appeal separately from the order terminating their parental rights to their one-year-old daughter, M.L. Both parents argue the State failed to prove the grounds for termination by clear and convincing evidence and termination is not in the child's best interests. The parents' parental rights were previously terminated to M.L.'s older sibling due to physical abuse. The older sibling, as an infant, suffered several fractured bones occurring in more than one incident and were determined to be non-accidental, without the parents' providing a reasonable explanation for the injuries. Although M.L. suffered no abuse, she was removed from the parents' custody within a few weeks after birth. According to the juvenile court, the parents "only superficially" completed therapeutic services during these proceedings. Because we observe no change in the parents' inconsistent statements or their credibility, we agree the safety concerns in the parents' home remain nearly exactly as they existed at the time their parental rights were terminated to the child's older sibling. We affirm termination of the father's and mother's parental rights and conclude termination is in the best interests of the child.

I. Background Facts and Proceedings.

The father¹ and mother² are married and have two children: R.L., born in December 2008, and M.L., born in August 2010. The family first came to the attention of the Iowa Department of Human Services (DHS) in March 2009, when

¹ The father has two older children from a prior relationship. The children live with their mother, and the father exercises visitation with them "whenever [he] want[s], sometimes two weekends in a row, sometimes every other weekend."

² The mother has three older children from a prior relationship. The children live with their father, and the mother does not exercise visitation with them.

R.L. was removed from the parents' care at three months old. The removal occurred as a result of the parents taking R.L. to the doctor for an injury to his leg. Medical care providers discovered the child had suffered at least four injuries, including a spiral leg fracture in his femur and four broken ribs at three stages of healing.³ It was determined R.L.'s injuries were non-accidental. DHS and the juvenile court learned the injuries R.L. sustained occurred while the child was in the parents' care.

The circumstances were questionable particularly toward the father, as he had been caring for the child while the mother was in the shower on the evening the last injury, the broken femur, occurred. During an interview following the incident, the mother told police R.L. had been fussy all evening. Later, while the mother was taking a shower, she heard R.L. start to scream "unusually loud." She also stated the father "frequently gets frustrated with the child and irritated by the fussiness of the child" and "has a problem with the child's crying."

The father offered varying accounts of how the femur injured occurred. First, he suggested R.L.'s leg might have gotten caught in the springs of a baby seat. After hearing the initial reports from medical care providers as to what could have caused the injury, the father changed his story and suggested the injury occurred when he was trying to get up from the futon couch and R.L.'s leg got caught. Alternatively, both parents maintained they had "no idea" how the leg injury happened. In addition, the parents offered no explanation for the rib fractures, and in fact, denied that the fractures occurred.

³ The amount of healing to the rib fractures indicated they occurred at different times. The most acute fracture had occurred more than two weeks prior to the femur fracture.

In January 2010, the father was found guilty, by way of an *Alford* plea, to child endangerment with respect to R.L.'s fractured femur. The father was placed on probation. Even after the father was found guilty of child endangerment, the parents continued to deny knowing how the child's injuries were caused. It was clear the parents "continued with their relationship and commitment to each other" throughout the CINA proceedings.

The mother was defensive of the father "until the very end"—at the termination hearing. The father showed up for the hearing, but left before it began. The mother was upset the father "had left [her] at the courthouse to face [the hearing] alone," and thereafter testified that she believed the father had caused R.L.'s injuries. She further stated she "would not permit" the father to be around the child, as she did not believe it would be safe for R.L. to be with her if the father was there. The court did not accept the mother's testimony as credible or consistent, and continued to have protective concerns. The court noted that R.L. was removed because "the explanations given by the parents for the injury were not considered by medical care providers, or DHS (CPA workers and others) to be a plausible explanation for the type of fracture the child sustained."

The court further observed:

There has been no meaningful accountability by either parent as to any of the child's injuries. It is difficult to make progress on issues of abuse if parents themselves don't take the responsibility to get to the bottom of the cause (they are in the position to know best). The risk of harm to the child remains when parents maintain that the child has suffered the injuries by accident with no plausible description of accidents. R.L. is particularly at risk since he has had a number of injuries over a period of time, the first few months of his life.

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So, the issue of the child's safety is stuck also. There has been no accountability, no reasonable explanation, and no significant changes to indicate that the dynamics amongst the adults surrounding the child have changed in a way that would lead a reasonable person to believe that the child would be safer today if he returned home than he was at the time of removal. No one can or will explain the broken ribs. . . . Therefore, the same concern for the safety of the child, if returned to the parents' care or either of the parents' care, exists today as when the child was adjudicated in need of assistance.

The father and mother's parental rights to R.L. were terminated in March 2010 following a contested hearing, and his case was closed. R.L. was adopted by his foster family.

The family came to the attention of DHS again following the birth of M.L. in August 2010. M.L. was born one month prematurely. She was healthy, aside from some respiratory issues that were "normal for a premature baby," but required her to remain in the hospital for an extra week. At the hospital following the birth, a caseworker asked the mother about the parents' older child, R.L. The mother stated that she voluntarily terminated parental rights to R.L. "because she could not care for him and that he is going to be adopted." The mother also stated R.L. "has fragile bone disease and that is why he suffered broken bones." The mother told another caseworker that R.L.'s broken ribs were possibly caused by her sister's boyfriend. The mother had stopped seeing her therapist and was still residing with the father. She reported that nothing had changed in their relationship and that things were going "very well" between them.

Two days after the M.L.'s release from the hospital, the court signed an order removing the child from the parents' care. The removal was based on remaining concerns about the parents' continued relationship and commitment to

each other, lack of insight on how R.L. was injured, and excuses as to how R.L.'s injuries occurred. When caseworkers told the mother the child was being removed, the mother responded that "she figured," and agreed to bring M.L. to the DHS with her things. M.L. was placed in a pre-adoptive family foster home with the same family who had adopted R.L. M.L. was adjudicated CINA in September 2010.

The parents engaged and cooperated in services, including mental health assessments, individual therapy, parenting classes, and family safety, risk, and permanency programs. The father was also participating in a fatherhood initiative program. He had previously completed an anger management class during R.L.'s CINA case. The mother had completed a domestic violence class during that time as well. The parents had a family safety plan.

The parents had a stable home and employment. There were no reports of domestic violence, or drug or alcohol use. Supervised visitation took place in the family home, and the parents were "very appropriate and loving during the visits." Caseworkers observed that there were not many parenting concerns for the family, but rather, for the "use of physical violence on their child." Both the mother and father maintained that "no matter what anybody says," the injuries to R.L. were an accident.

The mother suggested that maybe her sister and her boyfriend had caused the broken ribs. As time went on, the parents stated the "only reasonable explanation" for the broken ribs was that they occurred during a time that R.L. was cared for by the mother's sister and her boyfriend. However, the parents did not discuss this possibility with the mother's sister, or otherwise try to get to the

bottom of what had happened. Further, at a family team meeting in February 2011, it came to light that the mother had been claiming to her therapist that she did not know about the broken ribs, and that she did not think they occurred because she did not have an opportunity to speak with the medical care providers about the injuries.

The State filed a petition to terminate parental rights in March 2011. A termination hearing took place in April 2011. The State, guardian ad litem, and caseworkers unanimously recommended termination of the father's and mother's parental rights. In August 2011, the juvenile court entered its order terminating the father and mother's parental rights pursuant to Iowa Code sections 232.116(1)(d), (g), and (h) (2009). The parents now appeal.

II. Standard of Review.

We conduct a de novo review of termination of parental rights proceedings. *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). Although we are not bound by the juvenile court's findings of fact, we do give them weight, especially in assessing the credibility of witnesses. *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010). An order terminating parental rights will be upheld if there is clear and convincing evidence of grounds for termination under section 232.116. *Id.* Evidence is considered "clear and convincing" when there are no "serious or substantial doubts as to the correctness or conclusions of law drawn from the evidence." *Id.*

III. Analysis.

Iowa Code chapter 232 termination of parental rights follows a three-step analysis. See *P.L.*, 778 N.W.2d at 39. The court must initially determine whether

a ground for termination under section 232.116(1) is established. *Id.* If a ground for termination is established, the court must next apply the best-interest framework set out in section 232.116(2) to decide if the grounds for termination should result in a termination of parental rights. *Id.* If the statutory best-interest framework supports termination of parental rights, the court must finally consider if any statutory exceptions or factors set out in section 232.116(3) weigh against termination of parental rights. *Id.*

A. Grounds for Termination.

1. *Clear and convincing evidence.* We need only find termination proper under one ground to affirm. *In re A.J.*, 553 N.W.2d 909, 911 (Iowa Ct. App. 1996). In order to terminate under section 232.116(1)(d), the State was required to prove by clear and convincing evidence the following:

(1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.

(2) Subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

Neither parent disputes that the first element was proved. Indeed, M.L. was adjudicated CINA after the court previously adjudicated R.L. to be a CINA after finding he was physically abused as the result of the acts of one or both parents. See Iowa Code § 232.116(d)(1).

Rather, the father and mother argue the circumstances that led to the adjudication do not continue to exist. See Iowa Code § 232.116(d)(2). As the

father alleges, “The circumstances which led to M.L.’s adjudication have nothing to do with M.L. The circumstances were that M.L.’s older sibling suffered severe injuries.” The mother further contends that “the termination rested on the father’s or mother’s refusal to say, ‘I caused the injuries to R.L. intentionally.’”⁴ They point out that they “regularly participated in a variety of services, including therapy and parenting classes.” They allege the only ongoing concern was that “no one had taken responsibility for the injuries” to R.L. Therefore, the parents argue they were in an “impossible situation”—they could not reunify with M.L. because “they could not explain in a manner that satisfies the State or the Court about injuries that happened to another child.”

The father and mother essentially argue that the absence of their “confession” is the only fact to support termination of their parental rights. We disagree. Unfortunately, the barrier keeping the parents’ from reunification with M.L. is not nearly that simple. The record is clear that M.L. would not be safe in the parents’ care, even assuming the parents had said that they “caused the injuries to R.L. intentionally.” The fact remains that the parents have “no insight in what happened so that it’s not going to happen again.” Without that insight, the services provided to, and received by, the parents cannot ensure that an abused child (R.L.), or any other child under the supervision of the parents (M.L.), would be safe.

⁴ We find the parents’ reliance on *In re C.H.*, 652 N.W.2d 144, 149 (Iowa 2002) (finding parents cannot be compelled to make admissions that may be in violation of their Fifth Amendment rights), and comparison to *In re K.H.*, No. 10-1577 (Iowa Ct. App. Feb. 23, 2011) (interpreting *In re C.H.*), to be inapplicable in this case. Here, the father was found guilty of child endangerment for R.L.’s leg injury in January 2010. There are no other pending charges against the parents. The facts in *C.H.* and *K.H.* are distinguishable, as there are no Fifth Amendment concerns in this case.

The father had no less than three stories for how the femur injury to R.L. occurred. The circumstances surrounding the incident made all the father's explanations seem unlikely. At the termination hearing for M.L., he maintained that the leg injury was a "horrible accident," and he did not explain the broken ribs. The father testified that he had never experienced anger at his children. He further stated he was never irritated by R.L.'s crying or fussiness, but the mother's testimony specifically refuted his statement. He testified that he and the mother had "a basic safety plan."

The mother's testimony throughout the past several years has been inconsistent and anything but credible. At R.L.'s termination hearing in early 2010, after months of defending the father, the mother admitted that she believed the father *had* caused R.L.'s injuries. At that time, the mother stated she "would not permit" the father to be around the child, as she did not believe it would be safe for R.L. to with her if the father was there. Despite this testimony, the mother and father did not separate, even when the mother was pregnant with M.L. Indeed, the parents were together six months later, when M.L. was born in August 2010. And at that time, the mother told caseworkers their relationship was going "very well."

At the hospital following M.L.'s birth, the mother made false statements regarding R.L. She told caseworkers she had voluntarily terminated parental rights to R.L. "because she could not care for him" and he was "going to be adopted." The mother also stated R.L. had "fragile bone disease and that [was] why he suffered broken bones." These statements are entirely inconsistent with

the information repeatedly provided to the mother by medical providers and caseworkers in the year prior to M.L.'s birth.

The parents also continued to deny that R.L. had broken ribs. As late as a month before the termination hearing, the mother denied any knowledge regarding R.L.'s rib injuries. Indeed, throughout the proceedings, both parents exhibited a lackadaisical attitude toward finding out what happened to R.L. to cause his injuries.

This case is troublesome because the parents, in many aspects, are able to offer a stable home for the child. They are employed, have a home, and do not use drugs or alcohol. There is no evidence of domestic violence. Caseworkers testified the parents exhibit good parenting skills. They are loving and affectionate toward the child. They have regularly participated in services offered to them.

Yet, we conclude the grounds for termination pursuant to section 232.116(1)(d) have been proved. The bottom line is that M.L.'s older sibling suffered severe physical abuse by the time he was three months old and while he was in the parents' care. Nothing has changed in this family since that physical abuse occurred. See *C.H.*, 652 N.W.2d at 150 ("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."). Accordingly, M.L. was removed shortly after being released from the hospital due to concerns that she was also at risk of suffering physical abuse. And by the time of the termination hearing, the circumstances that led to M.L.'s adjudication continued to exist. See *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006) (observing that the best predictor of the future

is to look to “the parents’ past performance because it may indicate the quality of care the parent is capable of providing”); see also *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993).

For the number of reasons set forth above, the parents have been unable to verbalize or acknowledge what occurred, and accordingly, an adequate safety plan has not been developed to address each stage of the process that occurs when a parent becomes so angry or upset that they physically injure a child. See *In re S.R.*, 600 N.W.2d 63, 65 (Iowa Ct. App. 1999) (“The requirement that a parent acknowledge and recognize abuse is essential for any meaningful change to occur. Without this acknowledgment, the services provided were not likely to be effective.”); see also *In re H.R.K.*, 433 N.W.2d 46, 50 (Iowa Ct. App. 1988).

As one caseworker testified,

There’s just absolutely no way we can ensure any type of safety if the child was returned home. I think it puts her at risks of being physically harmed, due to the parents’ past, and due to them not addressing those issues that led them to be physically abusive to their newborn before.

The guardian ad litem summarized the proceedings at the termination hearing:

My recollection is that what this Court told the father and mother at the beginning of this case was that they had the opportunity to have a different outcome in this case. Obviously, the prior situation could not be ignored by anyone, but they were told that they did have an opportunity to have a different outcome depending upon what happened and what took place in this case.

When we’re talking about red flags, I think someone suggested that maybe there were none of the classic indicators of abuse. Boy, and I see some when I look through State’s Exhibit 10, which was the baby was fussy and then the baby started screaming. The father frequently gets frustrated with the baby and irritated by the fussiness of the baby. And then this story about falling backwards, we now see that happened the following morning. Those are classic indicators of child abuse.

I think the mother has moments when she realizes that, when she accepts that. I don't know what to make of her testimony, other than to say that it seems to be that she says what she says that's either most convenient or helpful to her at the time when she's saying it. . . . I think she said the first of the year [2010] is when she decided that she thought the father was probably responsible for the injuries. . . .

As indicated by the State, our statutes are . . . preventative and not just remedial. And certainly we cannot compel them to say what did or did not happen. I think instead what we have to do is look at the evidence as a whole—the police report, State's Exhibit 10, which was taken at the time of the mother's testimony in February 2010, about her conclusions that she had reached then, and the entire history of this situation to know what happened. They can't be compelled to [say what happened]. They have never done so. But . . . R.L. suffered significant physical abuse that resulted in the termination of his parental rights within five or six months.

[B]etween whenever the decision was made in early 2010 until the birth of M.L., I don't think we have any indication that M.L. would not be at great risk of physical abuse if she continued to live in that home. The mother said as much in February [2010], that she did not believe it would be safe for R.L. to be with her if the father was living with her; and by the time M.L. was born, he was.

This child is as equally vulnerable and unable to protect herself as her older sibling. See *In re I.L.G.R.*, 433 N.W.2d 681, 689 (Iowa 1988) (observing that the State has a "duty to assure that every child within its borders receives proper care and treatment," and that the State must act to prevent harm rather than delay until actual harm has occurred). The mother testified at the last termination hearing that the older sibling would not be safe if she continued her relationship with the father. The mother stayed with the father and later recanted this testimony. However, we find the mother's testimony to be significant, especially considered in light of this family's history with DHS involvement, including the multiple stories told by the parents as to how the injuries occurred; the differing testimony by the parents in regard to the father's irritation and anger

at the older sibling's fussiness and crying; and the fact that the parents have remained together despite the mother's reports of separation. As the juvenile court observed:

More than two years has passed since R.L. was removed. The evidence is clear and convincing that R.L. suffered multiple non-accidental injuries as a result of more than one event. Clear and convincing evidence supports a conclusion that a parent caused at least one of the injuries. Both parents have only superficially engaged in therapeutic services, and have really only done so in this second case. Neither is even close in therapy to the point where they could put to use real understandings and genuine plan against the risk that what happened to R.L. could happen to M.L.

The parents have been given every opportunity to recognize the risks involved with their past behavior and accept their responsibility for their outcomes in this case. The circumstances in the parents' home have remained nearly exactly as they were at the time their parental rights were terminated to the child's older sibling, due to their physical abuse of that child. It is clear the parents are not a safe placement option for this child, and the child cannot be returned to their care. We find clear and convincing evidence that grounds for termination exist under section 232.116(1)(d).

B. Factors in Termination.

Even if a statutory ground for termination is met, a decision to terminate must still be in the best interests of a child after a review of section 232.116(2). *P.L.*, 778 N.W.2d at 37. In determining best interests, this court's primary considerations are "the child's safety, the best placement for furthering the long-term nurturing and growth of the child, and the physical, mental, and emotional condition and needs of the child." *Id.* Taking these factors into account, we

conclude the child's best interests require termination of the father's and mother's parental rights.

Both parents argue termination of parental rights is not in the best interests of the child. We disagree. The parents have had over a year to address their issues in this case alone. The child has been out of the parents' home for all but three days of her life. The juvenile court considered evidence from the caseworkers and the guardian ad litem that the child's interests are best served by termination of the father and mother's parental rights. The child is not safe in their care, and the parents are not able to provide for her long-term nurturing and growth. In addition, the child is bonded to her foster family, and is thriving in that placement. The foster parents adopted the child's older sibling and are willing to adopt her as well. It would be a detriment to the child's physical, mental, and emotional conditions to maintain these parent-child relationships.

C. Exceptions or Factors against Termination.

Finally, we give consideration to whether any exception or factor in section 232.116(3) applies to make termination unnecessary, including the presence of evidence that "a relative has legal custody of the child," or that "the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship." See Iowa Code § 232.116(3)(a), (c). The factors weighing against termination in section 232.116(3) are permissive, not mandatory. See *P.L.*, 778 N.W.2d at 38; *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). The court has discretion, based on the unique circumstances of each case and the best interests of the child, whether to apply the factors in this section to save

the parent-child relationship. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). Under these circumstances, we do not find that any factors in section 232.116(3) are applicable to maintain a relationship between the child and the parents.

IV. Conclusion.

There is clear and convincing evidence that grounds for termination exist under section 232.116(1), termination of parental rights is in the child's best interests pursuant to 232.116(2), and no consequential factor weighing against termination in section 232.116(3) requires a different conclusion. We affirm termination of the father's and mother's parental rights.

AFFIRMED.