

IN THE COURT OF APPEALS OF IOWA

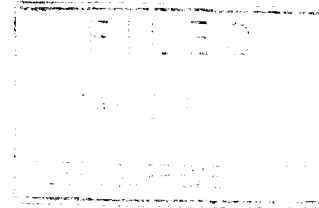
No. 9-295 / 99-0044

Filed May 26, 1999

**IN THE INTEREST OF M.G., A.T., J.T., R.T.,
D.C., and Y.C., Minor Children,**

M.G., Mother,
Appellant,

R.C., Father of D.C. and Y.C.,
Appellant.



Appeal from the Iowa District Court for Louisa County, Mark Kruse, District
Associate Judge.

A mother appeals the termination of her parental rights to her six children and
the father of two of those children also appeals his termination of parental rights.

AFFIRMED.

Kent W. Lewis, Burlington, for appellant-mother.

Timothy K. Wink of Schweitzer & Wink, Columbus Junction, for appellant-
father.

Thomas J. Miller, Attorney General, Debora Hewitt Neumeyer, Assistant
Attorney General, and David Matthews, County Attorney, for appellee-State.

Roger A. Huddle, Wapello, guardian ad litem for minor children.

Considered by Huitink, P.J., and Streit and Zimmer, JJ. Sackett, C.J., takes no
part.

HUITINK, P.J.

Maricela and Ray appeal the termination of their parental rights. She claims the court erred in: (1) finding clear and convincing evidence that her parental rights should be terminated; (2) considering the preferences of the older children regarding placement choice; and (3) failing to take into account that the termination would cut off the children from their racial identity. He contends claims he was denied due process because: (1) the State did not give him timely notice of the juvenile proceedings; (2) the court denied his motion for a continuance; and (3) a guardian ad litem was appointed too late to consider relative placement. Ray also claims he was not offered services, the State failed to prove the children could not be returned to him, and termination would cause the children to lose their cultural identity. We affirm the termination of both parent's rights.

Factual setting: Maricela is the mother of Michael, born in 1988, Ashley, born in 1990, Juan, born in 1991, Robert, born in 1992, Desiree, born in 1995, and Yvette, born in 1996. Ray is the father of Desiree and Yvette. Maricela has one older child, not in her custody, who is not part of this children in need of assistance (CINA) case and gave birth to her eighth child during the pendency of this action. Maricela has not been married to any of the fathers of her eight children.

On September 26, 1996, there was a founded child abuse report against Maricela because Yvette had amphetamines present in her system at birth. Ray has been in prison on federal drug and firearm convictions since before Yvette was born.

On October 3, 1996, there was another founded abuse report for lack of supervision because Michael, Ashley, and Juan came home after school and Maricela was not at home. On November 19, Michael, Ashley, and Juan again arrived home after school and their mother was not home. The next day the juvenile court entered a removal order finding the children to be at imminent risk of denial of critical care and placing them in the custody of the Department of Human Services (DHS) for placement in foster family care.

CINA proceedings: On November 21, 1996, the State filed a Petition alleging all six children to be in need of assistance under Iowa Code section 232.2(6)(b) and citing section 232.2(6)(o) concerning Yvette. After a hearing in December, the juvenile court continued the children in the custody of the DHS for placement in shelter or family foster care. The court ordered DHS to monitor visitation between Maricela and the children. It ordered Maricela to obtain an alcohol and drug abuse evaluation, a psychological evaluation, and to participate in homemaker services and/or any other services deemed appropriate.

The doctor who conducted the psychological evaluation of Maricela recommended parenting skills training and substance abuse treatment. After a review hearing in February 1997, the court continued the children in foster care placement and ordered Maricela to continue with homemaker services, begin individual counseling, and complete out-patient drug abuse treatment. After a review hearing in May 1997, the court continued the children in foster care placement and ordered

Maricela to continue to receive homemaker services, individual counseling, and outpatient drug abuse treatment.

On December 15, 1997, Maricela entered into a contract of expectations with DHS, clearly enumerating what was expected of her because of her lack of commitment in working toward reunification with her children in the previous twelve months. The contract listed nine expectations Maricela would have to achieve in six months. The court ordered her to continue with homemaker services, individual counseling, aftercare services through New Horizons, and to submit to drug screens when requested by DHS.

On June 15, 1998, a review hearing was held. DHS submitted a report on Maricela's progress on the expectations in the contract. The report noted:

1. Maricela continued to remain alcohol and drug free.
2. Maricela attended only 28 of 52 Narcotics Anonymous meetings and never reported obtaining a sponsor.
3. Maricela had good attendance at her individual counseling sessions and had made some progress according to her therapist.
4. Maricela still did not have a place for the children to live.
5. Maricela had attended 19 out of 25 of the visitations with the children. She canceled some visitations because she was sick, the weather was bad, or she didn't have a car. Maricela continued to be unable to supervise the children properly and keep them safe. The visits had been increased from two hours to four hours but that proved to be too long for Maricela, so they were shortened to two hours again.
6. Maricela provided her phone number and address to the DHS as requested.
7. Maricela continued to make poor decisions by becoming pregnant while her other children were in foster care. She fails to consider the best interests of her children in decisions she makes.

8. Maricela did not have a job and had failed to inform DHS when she quit her previous job.
9. Maricela continued to allow Ashley to assist her in caring for the younger children.

In June 1999 the State filed an application for a permanency hearing, which was set for August 10, 1998. On August 14, 1998, the State filed a petition to terminate Maricela's and Ray's parental rights. The court appointed a guardian ad litem for Ray, since he still was incarcerated in federal prison in Illinois, and set the termination hearing for October 5, 1998.

On September 15, Ray's guardian ad litem filed a request for a continuance., arguing he was new on the case, it was difficult to communicate with Ray because of his incarceration, and he needed time to prepare for the hearing. The guardian ad litem for the children filed a resistance about a week later. On September 28, the court denied the continuance and stated it had no jurisdiction to order Ray transported to the termination hearing because Ray was in federal custody and in another state. The court directed Ray's guardian ad litem to arrange for Ray to participate by telephone.

After a hearing and consideration of additional written closing arguments, the court terminated Maricela's parental rights pursuant to sections 232.116(1)(c), (e), and (g). It also terminated Ray's rights pursuant to sections 232.116(1)(c) and (g).

Appellate claims: Both Maricela and Ray appeal. Maricela contends the court erred in (1) finding clear and convincing evidence that her parental rights should be terminated, (2) considering the preferences of the older children regarding placement

choice, and (3) failing to take into account that the termination would cut off the children from their biological ties and racial identity. Ray contends he was denied due process because (1) the State did not give him timely notice of the juvenile proceedings, (2) the court denied his motion for continuance, and (3) a guardian ad litem was appointed too late to consider relative placement. He also urges, among other things, he was not offered services, the State failed to prove the children could not be returned to a parent, and that by termination, the children will lose their cultural identity.

Discussion: Scope of review. We review proceedings to terminate parental rights de novo -- we review the facts as well as the law and adjudicate parents' rights anew. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). We give weight to the findings of the juvenile court, particularly with respect to the credibility of witnesses, but are not bound by them. *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990); *In re R.R.K.*, 544 N.W.2d 274, 275 (Iowa App. 1995); Iowa R. App. P. 14(f)(7).

Maricela. She first claims DHS ignored the substantive progress she made in completing the requirements placed on her, focusing instead on statistical failures in attending visitation and Narcotics Anonymous meetings. She asserts she achieved and maintained sobriety, obtained employment and housing, and sought assistance in caring for her children. She complains DHS never considered a trial period, placing any of the children in her care. Nor did DHS allow Ray's family to participate in visitation or in caring for his two children. She contrasts her circumstances with those

in *In re H.L.B.R.*, where the mother had not made significant progress in changing her life and providing a safe home for her children. Maricela asserts she has made significant progress, as noted by her counselor, Dan Di Cerbo, yet DHS ignored her accomplishments and proceeded directly to termination.

While we recognize that the law requires a “full measure of patience with troubled parents who attempt to remedy a lack of parenting skills,” Iowa has built this patience into the statutory scheme of chapter 232. *In the Interest of A.C.*, 415 N.W.2d 609, 613-14 (Iowa 1987). It provides this patience by prescribing certain steps to protect the rights of natural parents in termination proceedings. *In the Interest of I.L.G.R.*, 433 N.W.2d 681, 689 (Iowa 1988). However,

[t]here are a number of stern realities faced by a juvenile judge in any case of this kind. Among the most important is the relentless passage of precious time. The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems. Neither will childhood await the wanderings of judicial process.

In the Interest of A.C., 415 N.W.2d at 613. For this reason, plans which exceed the twelve-month period during which a parent tries to achieve adequate parenting skills are viewed with a sense of urgency. *In re D.A.*, 506 N.W.2d 478, 479 (Iowa App. 1993). The children had been out of Maricela’s care for nearly two years at the time of the termination hearing.

Maricela agreed with and did not complain about the case permanency plan requirements or the expectations in the contract until the termination hearing. The State offered numerous services, including homemaker services, substance abuse

evaluation, out-patient treatment, psychological evaluation, individual counseling, parent skill development, visitations, and family therapy. While the State has the obligation to make reasonable efforts, the parents have a responsibility to demand services prior to the termination hearing. *In re C.D.*, 508 N.W.2d 97, 101 (Iowa App. 1993). Challenges to the plan for reunification should come when the plan was entered. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994). It is too late to challenge the service plan at the termination hearing. *See In re C.D.*, 508 N.W.2d at 101.

Maricela next claims the court erred in considering the preferences expressed by the older children without finding they had sufficient capacity to express a reasonable preference. She cites *In re J.R.*, 478 N.W.2d 409, 413-14 (Iowa App. 1991) as authority the court must make a determination of the capacity of the child to express a preference when factoring in the child's preference in deciding to terminate a parent's rights.¹ The court makes only passing references to Michael in its ruling.

¹ The opinion in *In re J.R.* cites the following language of Iowa Code section 232.116(2)(b):

In considering whether to terminate the rights of a parent under this section, the court shall give primary consideration to the physical, mental and emotional needs of the child. Such consideration may include any of the following:

b. For a child who has been placed in foster family care by a court or has been voluntarily placed in foster family care by a parent or by another person, whether the child has become integrated into the foster family to the extent that the child's familial identity is with the foster family, and whether the family is able and willing to permanently integrate the child into the foster family. In considering integration into a foster family, the court shall review the following:

(1) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining that environment and continuity for the child.

(2) The reasonable preference of the child, if the court determines that the child has sufficient capacity to express a reasonable preference.

When setting forth the factors it considered when terminating Maricela's parental rights, the court discusses factors for three pages. Near the end of the discussion, the court states:

In looking at the needs of the children, the statements by the mother that "my kids turned on me when they were taken away," and that her children were different and not the same kids, show recognition that they have grown apart. The children have been out of home for almost two years. The performance of the school age children in school activities has improved. *The older children show a real interest in getting on with their lives.* It goes without saying that continuation in the current circumstances of open-ended foster care is detrimental to the future of the children. (Emphasis added).

This reference is far different in context from the situation in *In re J.R.* where the trial court contemplated the emotional harm which would result if the child were removed from the foster home. Here, this oblique reference is only one of a large number of factors considered by the court, including the number of children, the mother's past failures, the alleged abuse of the children, the problems during visitation, and the services provided. This does not appear to be a situation in which the court placed any weight on Michael's alleged preference to remain with his foster parents. Even if that were the case, removing that factor from our de novo review would not change the weight of the evidence supporting termination of Maricela's parental rights.

Next, Maricela claims the court erred in failing to consider the effect of termination on the children's biological ties and racial identity. The four older children are Hispanic. The record does not contain evidence any prospective adoptive

In re J.R., 478 N.W.2d at 413-14.

parents are Hispanic or of any other racial and cultural heritage. The cases cited, *In re L.L.*, 459 N.W.2d 489, 496-97 (Iowa 1990) and *In re Marriage of Mikelson*, 299 N.W.2d 670, 674 (Iowa 1980), provide little support for Maricela's claim in this case. In *In re L.L.*, the court stated racial identity is only one of many factors which may be considered. In this case, there is no evidence to consider. In *Mikelson*, evidence was presented concerning the problems of trans-racial adoptions in the setting of a white family adopting a black child. In this case, no such evidence was presented.

Finally, Maricela claims the court erred in terminating Ray's parental rights by denying him due process. We discuss this claim under Ray's claims.

Ray. In February 1996 Ray was incarcerated and has remained so throughout these proceedings. DHS became involved with these children after Yvette was born drug-affected in August 1996. The children were removed from Maricela's care and custody, not Ray's. He claims he received no notice of the CINA proceedings and did not discover the children had been removed from the home until March 1997. There is no indication DHS or the court knew Ray was the father of Desiree and Yvette at the time of the initial removal or CINA adjudication. The case permanency plans dated December 13, 1996, February 24, 1997, and May 7, 1997 do not mention Ray. The first mention of Ray occurs in the December 8, 1997 case permanency plan where he is listed as a perpetrator of child abuse on Robert. Although Ray complains he received no notice of the CINA proceedings he offers no evidence DHS knew he was the father of Desiree and Yvette and entitled to notice. There also is no evidence in

the record Ray had any legal custodial rights to Desiree and Yvette since they were born out of wedlock. *See, e.g.*, Iowa Code § 600B.40. Ray did not raise any notice issue when he discovered the removal and CINA adjudication. He did not raise notice when he wrote to DHS a year later.

Ray also claims he wrote to DHS concerning his daughters and also wrote letters to them, but he and his family were not allowed to have contact with the girls. The first letter in the record is dated February 17, 1998—almost sixteen months after the children were removed from the home and nearly a year after Ray claims he knew about the removal. Ray claims DHS did not allow his family to be involved with his daughters and did not consider relative placement, yet he did not contact DHS or seek to have relative placement considered until a year after he became aware of the CINA proceedings. Iowa Code section 232.102 gives preference to placement with relatives. In this case, however, the children had been in foster placement for at least sixteen months before Ray asked DHS to consider placing his daughters in his mother's home. The possible stress and trauma from disrupting the children's lives by changing placement could outweigh any preference for placement with relatives. In addition, placing Desiree with her paternal grandmother would have separated her from her siblings, which is not preferred.

Ray claims he was not given notice of the termination hearing in sufficient time to prepare adequately. *In re Hewitt*, 272 N.W.2d 852, 855 (Iowa 1978); *In re Myer*, 204 N.W.2d 625, 626 (Iowa 1973). On July 3, 1998 the court set a permanency

hearing for August 10, 1998. A note affixed to the order states previous attempts to serve notice on Ray at the Linn County Courthouse have been unsuccessful. On August 14, 1998 DHS petitioned to terminate the parental rights of all parents of these six children. That same day the court appointed a guardian ad litem for Ray and set the termination hearing for October 5, 1998. His guardian ad litem did not request a continuance until more than a month had elapsed since his appointment and only about three weeks remained before the hearing. In its order denying the continuance, the court provided Ray the opportunity to participate in the hearing by telephone. When an incarcerated parent receives notice of the hearing, is represented by counsel at the hearing, and has the opportunity to present testimony, even if only by deposition, we have not found a violation of the parent's due process rights. *In re J.F.*, 470 N.W.2d 48, 51 (Iowa App. 1991).

Ray complains the state did not provide him with services designed to reunite him with his children. The initial CINA adjudication was based on neglect and abuse by Maricela. Ray offers no evidence he requested services or challenged the case permanency plan. While the State has the obligation to make reasonable efforts, the parents have a responsibility to demand services prior to the termination hearing. *In re C.D.*, 508 N.W.2d 97, 101 (Iowa App. 1993). Challenges to the plan for reunification should have come when the plan was entered. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994). It is too late to challenge the service plan at the

termination hearing. *See In re C.D.*, 508 N.W.2d at 101. This issue should have been raised earlier and we will not consider it now. *Id.*

We do not hold or suggest that termination is a necessary result of conviction of a crime and resulting imprisonment. *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993). On the other hand Ray cannot use his incarceration as a justification for his lack of relationship with the child. This is especially true when the incarceration results from a lifestyle that is chosen in preference to, and at the expense of, a relationship with a child. *See In re J.S.*, 470 N.W.2d 48, 51 (Iowa App.1991) (incarceration is no justification for father's failed responsibilities; termination ordered); *In re R.L.F.*, 437 N.W.2d 599, 601-02 (Iowa App.1989) (mere generalized interest in child whom prisoner-father has not met cannot bar termination); *In re Griffin*, 210 N.W.2d 665, 667 (Iowa 1973) (while not deciding whether it amounts to abandonment, father's pursuit of crime in preference to family life warranted termination). Ray was not available to care for his children during the pendency of this case nor at the time of the termination hearing. His apparent interest in retaining his parental rights is too little, too late.

For the reasons set forth, we affirm the termination of Maricela's and Ray's parental rights.

AFFIRMED.

No. 99-0044. [9-295] IN RE M.G.

Appeal from the Iowa District Court for Louisa County, Mark Kruse, District Associate Judge. **AFFIRMED.** Considered by Huitink, P.J., and Streit and Zimmer, JJ. Opinion by Huitink, P.J. Sackett, C.J., takes no part. (8 pages \$3.20)

Maricela is the mother of Michael, Ashley, Juan, Robert, Desiree, and Yvette. Ray is the father of Desiree and Yvette. Maricela and Ray appeal the termination of their parental rights. She claims the court erred in: (1) finding clear and convincing evidence that her parental rights should be terminated; (2) considering the preferences of the older children regarding placement choice; and (3) failing to take into account the termination

would cut off the children from their racial identity. He contends he was denied due process because: (1) the State did not give him timely notice of the juvenile proceedings; (2) the court denied his motion for a continuance; and (3) a guardian ad litem was appointed too late to consider relative placement. Ray also claims he was not offered services, the State failed to prove the children could not be returned to him, and termination would cause the children to lose their cultural identity. **OPINION HOLDS:** Challenges to the plan for reunification should come when the plan was entered. It is too late to challenge the service plan at the termination hearing. The court makes only passing references to Michael in its ruling. This does not appear to be a situation in which the court placed any weight on Michael's alleged preference to remain with his foster parents. The four older children are Hispanic. The record does not contain evidence any prospective adoptive parents are Hispanic or of any other racial and cultural heritage. In February 1996 Ray was incarcerated and has remained so throughout these proceedings. Although Ray complains he received no notice of the CINA proceedings he offers no evidence DHS knew he was the father of Desiree and Yvette and entitled to notice. Ray did not raise any notice issue when he discovered the removal and CINA adjudication. He did not raise notice when he wrote to DHS a year later. Ray claims DHS did not allow his family to be involved with his daughters and did not consider relative placement, yet he did not contact DHS or seek to have relative placement considered until a year after he became aware of the CINA proceedings. Placing Desiree with her paternal grandmother would have separated her from her siblings, which is not preferred. On August 14, 1998, DHS petitioned to terminate the parental rights of all parents of these six children. That same day the court appointed a guardian ad litem for Ray and set the termination hearing for October 5, 1998. The court provided Ray the opportunity to participate in the hearing by telephone. He received what process was due. Ray offers no evidence he requested services or challenged the case permanency plan.