

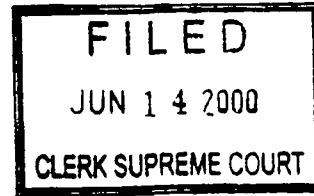
IN THE COURT OF APPEALS OF IOWA

No. 0-195 / 99-1267
Filed June 14, 2000

IN THE INTEREST OF

D.S., MINOR CHILD

K.S., MOTHER,
Appellant.



Appeal from the Juvenile District Court for Des Moines County, Mark Kruse Judge.

Mother appeals the termination of her parental rights to her son.

AFFIRMED.

Ronald D. Ellerhoff, Burlington, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Mona Clarkson, Assistant County Attorney for appellee-State

Peggy Ell, Burlington, guardian ad litem for minor child.

Considered by Sackett and Vogel, J.J., and Honsell, S.J.*

Senior judge assigned by order pursuant to Iowa Code Section 602.9206 (1999).

000235

HONSELL, S.J.

The child, D.S., was born on March 28, 1997. At the time of his birth a drug screen showed positive for cocaine. K.S. is his mother. In addition to also testing positive for cocaine at about the time that D.S. was born, she admitted using other drugs. Pursuant to court order K.S. was admitted to the psychiatric unit at Keokuk Area Hospital on March 30, 1997. She was discharged April 7, 1997, and advised that she should follow-up as an outpatient at Riverview Center in Burlington and additionally make an appointment at the Mental Health Center for ongoing psychotherapy.

On March 31, 1997 A Child in Need of Assistance petition was filed and an ex parte order obtained placing D.S. with the Iowa Department of Human Services. Review of the ex parte order was had on April 2, 1997 and the court ordered that the child remain in the custody of DHS for continued foster home placement. This order also provided that there be no visitation by the mother with the child. On April 10, 1997 D.S. was adjudicated a Child In Need of Assistance and his custody was continued with DHS for family foster care placement with supervised visitations provided through DHS. K.S. participated in supervised visitations.

At the time of the scheduled disposition hearing on May 7, 1997, it was agreed by the parties that the hearing be continued. The court further ordered that the number of supervised visitations be doubled in the event that K.S. provided a urinalysis forty-eight hours prior to a visitation. The court also ordered that visitations cease if a urinalysis showed positive for any illegal substance. On June 2, 1997 the court again continued the dispositional hearing. It was further

ordered that: D.S. be placed in the custody of K.S. with DHS providing protective services. K.S. was ordered to continue psychiatric counseling, alcohol and substance abuse treatment, and provide urine samples to DHS upon its request and at its expense.

On July 31, 1997 K.S. was incarcerated in Henderson County, Illinois, with regard to a deceptive practices charge. On August 1st D.S. was placed in the temporary custody of DHS for foster home placement, and a hearing was scheduled for August 5th. K.S. was present at that court hearing. The court determined that D.S. should remain in the custody of DHS. K.S. was ordered to comply with any and all demands made by DHS concerning family and other types of services, and she was to have visitation with D.S. as directed by DHS. DHS accorded her unsupervised visits. On August 4th K.S. had provided DHS with a urine specimen, which tested positive for cocaine. On August 6th the court by an ex parte order stopped the visitations until DHS received confirmation that K.S. had completed a DHS approved program, the criminal charges were resolved and a hearing was had to determine that she was capable of caring for D.S.

After K.S. was released from custody in Illinois she resided for a few days at the Wapello Domestic Shelter, and then, except for an appointment with her case worker on August 20, 1997, her whereabouts were unknown until she responded to one of several attempts by DHS to locate her, a letter dated September 17. Arrangements were made for appointment on October 3, 1997. During September she missed several appointments with her social worker and failed to maintain contact with the social worker. Also, during September K.S.

was discharged from the Burlington Outpatient Level 1 drug treatment program for not completing the program to which DHS had directed her.

On September 29, 1997 K.S. was charged with the crime of forgery. On October 2nd K.S. was arrested and incarcerated in the Des Moines County jail for 4th degree theft involving tools belonging to her mother and remained in jail for four days. She was again arrested on October 20 and spent approximately five days in jail. On October 20 she filed a written plea of not guilty to the forgery charge. In that document she stated under oath that she had: "Completed high school; attended three years of college – economics and business courses; and securities and insurance training."¹ She in fact left school while in the 10th grade and later completed a GED and she took some courses at a community college. This is one example, in addition to those alluded to by the trial court, which support the determination that portions of the testimony of K.S. were not credible. On January 5, 1998 K.S. was sentenced to a five-year prison sentence on the forgery charge. The sentence was suspended and she was placed on probation. In the order the court observed that K.S. "had some difficulty performing properly while on pretrial release."² The Iowa Medical and Classification Center Reception Report³ succinctly states what transpired after the sentencing:

While on probation the inmate was arrested for driving under suspension, she left the county without permission, she used alcohol and cocaine, and she was unsuccessfully discharged from inpatient substance abuse treatment at IRTC. A revocation hearing was held and she was continued on probation with an additional condition of assignment to the Violator Program. She entered the MVP on 5/22/98 and she unsuccessfully discharge on 6/12/98.

¹ Petitioner's exhibit 48.

² Petitioner's exhibit 11.

³ Guardian Ad Litem's exhibit 6

While in the program she failed to follow her behavioral contract, she was dishonest, she received two disciplinary reports for unsatisfactory work, and she was not present for court on one occasion. Her probation for the present offense was revoked and she was sentenced to five years in prison. She was received at IMCC as a probation violator from Des Moines County on 8/13/98.

K.S. completed a substance abuse evaluation on November 20, 1997.

Pursuant to the recommendation K.S. entered a treatment program. She failed to honor appointments on November 17 and 20, and December 6 and 10, 1997. From January 28 until February 12, 1998 she attended three partial classes out of twelve. She was discharged from the program on February 12. Having failed to complete two outpatient programs within a year's period of time, it was recommended that K.S. participate in an inpatient treatment program. On March 6th she tested positive for cocaine use. K.S. commenced inpatient treatment on April 7, 1998, and was discharged April 22 having failed to successfully complete the program.

On December 16, 1997 a court order was filed in this case. Pursuant to the agreement of the parties K.S. would have supervised visitation with D.S. at least two hours a week. The visitation was conditioned upon K.S. obtaining an alcohol/substance abuse evaluation alluded to in the preceding paragraph, and complying with the recommendations made as a result of the evaluation. She was to abide by all requests made by DHS and comply with random urinalysis testing.⁴ By March of 1998 she had cancelled six visitations. She did participate in five visitations. In those that she did participate in she usually arrived late or left early.

⁴ Petitioner's exhibit 10.

Beginning in April of 1997 K.S. was offered services not only for her own personal health, but also in the areas of personal development and homemaker skills. These services were ultimately terminated because K.S. was not available at time of appointments and on one occasion she was incarcerated. Although there was an ongoing attempt to provide these services, they were stopped in December 1997 conditioned upon K.S. establishing a residence for a period of at least two months.

The scope of review in termination cases is *de novo*. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1994). The grounds for termination must be proven by clear and convincing evidence. *In re E.K.*, 568 N.W.2d 829, 830 (Iowa App. 1997). Our primary concern is the best interests of the child. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa App. 1996).

The State has the burden to prove the grounds for termination by clear and convincing evidence. See *In re T.A.L.*, 505 N.W.2d 480 (Iowa 1993). A parent has the right to due process and a fair trial when the State seeks to terminate parental rights. *In re R.B.*, 493 N.W.2d 897 (Iowa App. 1992); see also *Alsager v. Iowa District Court of Polk County*, 406 F. Supp. 10, 22 (S.D. Iowa 1975). A parent's right to have custody of his or her child should be terminated only with the utilization of the required constitutional safeguards. See *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045 (1923); *In re T.R.*, 460 N.W.2d 873, 875 (Iowa App. 1990). The parent-child relationship is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511, 519 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S.

Ct. 1526, 1542, 32 L. Ed. 2d 15, 35 (1972). *In re H.L.B.R.*, 567 N.W.2d 675, 677 (Iowa App. 1997).

Termination of parental rights requires that we scrutinize rather closely the procedure employed by the State in the termination proceedings to ensure due process requirements have been met. Generally, the fundamental requirement of due process is an opportunity to be heard. *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S. Ct. 1011, 1020, 25 L. Ed. 2d 287, 299 (1970); *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972). *In re S.R.*, 548 N.W.2d 176, 177-78 (Iowa App. 1996).

Matters not raised in the trial court, including constitutional questions, cannot be raised for the first time on appeal. *In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993).

We find that the Appellant has failed to preserve this issue for appeal. However even if the issue was preserved, the record shows that the termination passed constitutional muster.

I. Termination proceedings. K.S. also contends the State did not engage in reasonable efforts to reunite her with her son. Reasonable services must be provided to attempt to reunite a family before the State can terminate parental rights. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994). While the State has an obligation to make reasonable efforts, it is a parent's responsibility to demand services if they are not offered prior to the termination hearing. *In re H.L.B.R.*, 567 N.W.2d 675, 679 (Iowa App. 1997).

There is no evidence to show K.S. requested additional services prior to the termination hearing. Therefore, we need not address this issue on appeal. In any event, as the record reflects, reasonable efforts were made, however K.S. did not appropriately respond to them.

Our primary concern in a termination proceeding is the best interests of the child. *In re R.R.K.*, 544 N.W.2d 274, 275 (Iowa App. 1995). Those best interests are determined by looking at the child's long-range as well as immediate interests. We consider what the future likely holds for the child if that child is returned to his or her parents. Insight for that determination may be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care that the parent is capable of providing. *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981); *In re T.T.*, 541 N.W.2d 552, 555 (Iowa App. 1995). Case history records are entitled to much probative force when a parent's record is being examined. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993).

As alluded to above, the evidence presented at trial clearly reflects that K.S. has not been able to appropriately cope with her substance abuse problem or with her legal problems. Given the circumstances clearly shown in the record, both the immediate and long-range best interests of D.S. will be best served by affirming the decision of the juvenile court.

We affirm the decision of the juvenile court removing D.S. from his mother's care and terminating K.S.'s parental rights.

AFFIRMED.