IN THE COURT OF APPEALS OF IOWA

No. 1999-525 (9-782) / 99-1207
Filed February 9, 2000

IN THE INTEREST OF K.G. and A.W.,
Minor Children,

D.G., Father,
Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Karla J. Fultz, Associate Juvenile Judge.

Father appeals the termination of his parental rights with respect to his daughter. **AFFIRMED.**

Tiffany Koenig, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, and John Anderson, Assistant County Attorney, for appellee-State.

Amy Peters, Des Moines, guardian ad litem for minor child.

Considered by Sackett, C.J., Vogel and Hecht, JJ.

HECHT, J.

Dennis G., father of Kimberly G., appeals from the termination of his parental rights. He contends the juvenile court erred in finding clear and convincing evidence he did not maintain significant and meaningful contact with his daughter, she could not be returned to his custody, he had not utilized services, and termination was in his daughter's best interests. Dennis also contends he was denied effective assistance of counsel. We affirm.

I. Factual Background and Proceedings. The State filed a child in need of assistance (CINA) petition with respect to Kimberly on April 9, 1998.[1] The petition was based on the discovery Kimberly had been exposed to pornography and dressed and posed in a sexual manner while residing with her mother. Her mother, Ali W.[2], allowed the perpetrators to have continued contact with her after the alleged abuse. Kimberly was not living with Dennis at the time the abuse occurred and Dennis was not the perpetrator of the abuse. Kimberly was adjudicated CINA on April 17, 1998, and placed in her maternal grandmother's custody.

Pursuant to the juvenile court's order, the parents were instructed to provide one urinalysis and complete a psychosocial parenting evaluation before beginning visitation with Kimberly. Dennis was also ordered to complete an Employee and Family Resource (EFR) evaluation. The Department of Human Services (DHS) reminded Dennis several times of his obligations but he never complied with the request for urinalysis. He completed the EFR evaluation but did not provide the documentation of its completion to the court until the date of the termination

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[1] Kimberly's sister Adrianna W. was also adjudicated in this order. The rights of her parents were also terminated. However, she has a different father than Kimberly and her interests are not at issue in this appeal.

[2] Ali W. consented to the termination of her parental rights pursuant to Iowa Code section 232.116(1)(a) (1997). She is not a party to this appeal.

hearing. He began the psychosocial evaluation but did not complete all required sessions. As a consequence, Dennis was not allowed visitation with Kimberly.

The Stated filed a petition to terminate parental rights on April 20, 1999. A hearing was held in the matter on June 21, 1999. The juvenile court entered an order terminating Dennis's parental rights on July 12, 1999. Dennis appeals.

II. Standard of Review. We review proceedings to terminate a parent-child relationship de novo. Iowa R. App. P. 4; *In re J.D.B.*, 584 N.W.2d 577, 580 (Iowa App. 1998). We review the facts as well as the law and adjudicate the parents' rights anew. *In re M.N.W.*, 577 N.W.2d 874, 875 (Iowa App. 1998). Although we are not bound by them, we give weight to the trial court's findings of fact, especially when considering the credibility of witnesses. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998). We also apply a de novo review in claims of ineffective assistance of counsel. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995).

III. Termination of Parental Rights. Our primary concern is the best interests of the child. *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa App. 1997).

> We look to the child's long range, as well as immediate, interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent possible harm to a child.

R.K.B., 572 N.W.2d at 601 (quoting *In re C.M.W.*, 503 N.W.2d 874, 875 (Iowa App. 1993)).

A. Clear and Convincing Evidence. Dennis contends the juvenile court erred when it found clear and convincing evidence to terminate his parental rights under

Iowa Code sections 232.116 (1)(d), (e), and (h) (1997).[3] We affirm the district court's ruling if we find grounds to terminate parental rights under one or more of the statutory sections relied upon in that court's ruling. *In re A.J.*, 553 N.W.2d 909, 911 (Iowa App. 1996).

Section 232.116(1)(d) permits the court to terminate the parent-child relationship if the court finds the following:

> (1) the child has been adjudicated a child in need of assistance pursuant to section 232.96;
> (2) the child has been removed from the physical custody of the child's parents for a period of at least six consecutive months; and
> (3) there is clear and convincing evidence that the parents have not maintained significant and meaningful contact with the child during the previous six consecutive months and have made no reasonable efforts to resume care of the child despite being given the opportunity to do so.

Iowa Code § 232.116(1)(d). Dennis does not dispute the proof of the first two factors under this section, but contends the State did not prove the last element by clear and convincing evidence. Section 232.116(1)(d)(3) defines "significant and meaningful contacts" as:

> [A]n affirmative assumption by the parents of the duties encompassed by the role of being a parent. This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parents establish and maintain a place of importance in the child's life.

Iowa Code § 232.116(1)(d)(3). The evidence of Dennis's failure to establish such meaningful contacts with Kimberly is clear and convincing in this case.

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[3] The State concedes in its brief the elements required by section 232.116(1)(h) are not proved in this case.

Although child support payments are deducted from his paycheck, Dennis has failed to maintain his place in Kimberly's life as a parent. The record reflects Dennis had no contact with his daughter for the two years prior to the termination hearing. Although DHS has scheduled visits with Kimberly, Dennis has failed to appear for them. He has not phoned Kimberly or sent letters to her. He does not know where she attends school or which grade she is in, and does not know whether she requires special medical or education attention.

Dennis underwent a psychosocial evaluation during the summer of 1998. The resulting report indicated Dennis was under a high degree (top fifteen percent of all parents) of parental stress. The evaluator opined Dennis's probability of dysfunctional behavior was high and recommended a parenting class. Dennis has refused to attend parenting classes despite multiple contacts from DHS. He attempts to excuse this by claiming he was unable to find reliable transportation from his home near Guthrie Center to Des Moines for the classes. This explanation is of dubious merit because he testified at the termination hearing he is able to borrow a car from his parents on other occasions.

Although Dennis completed the EFR evaluation, he failed to follow any of the recommendations made by the evaluation and made no effort to comply with the requirements of the case permanency plan. The State directed Dennis to submit to one urinalysis before exercising visitation with Kimberly. Dennis refused to comply with this directive claiming it was unreasonable because he "has done nothing wrong." Given Dennis's history of drug use and admissions of post-treatment drug use, we believe the State's requirement Dennis complete one urinalysis and obtain a substance abuse evaluation before exercising visitation was reasonable.

We conclude Dennis has failed to maintain significant and meaningful contact with his daughter. He has shown little interest in her life and no interest in being a part of her life. A parent's past performance may be indicative of the quality of care the parent is capable of providing in the future. *See In re L.L.*, 459 N.W.2d 489, 493-94 (Iowa 1990). Accordingly, we find the State proved by clear and convincing evidence the requirements of section 232.116(1)(d) and we affirm the decision of the juvenile court.

B. Best Interests of the Child. Dennis contends the State failed to prove termination of his parental rights was in the best interests of his daughter. Even if the statutory requirements for termination are met, the decision to terminate must still be in the best interests of the child. *In re C.W.*, 554 N.W.2d 279, 282 (Iowa App. 1996). Dennis has had no contact with Kimberly for the last two years and claimed in his testimony the lapse was due to his belief he was not permitted to have contact with her during the pendency of the proceedings. He resisted any efforts to regain contact and become a parent for Kimberly until the termination hearing. He has shown no interest in her life, and conceded during cross-examination "it might be better if Kimberly could be adopted," although he professed the desire to be able to write to her and see her. Kimberly is in need of a permanent, stable, and loving home and should not have to wait for her father to make an effort at reunification. We find termination is in the best interests of Kimberly and affirm the decision of the juvenile court.

IV. Ineffective Assistance of Counsel. Dennis contends he was denied effective assistance of counsel because trial counsel failed to preserve the issue of the reasonableness of services, failed to call additional witnesses at the termination

hearing, and failed to introduce certain evidence. The test for ineffective assistance of counsel in termination cases is generally the same as in criminal proceedings. *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986). In order to establish an ineffective assistance claim, it must be shown (1) counsel's performance is deficient, and (2) actual prejudice resulted. *Id.* at 580; *see also Strickland v. Washington,* 466 U.S. 668, 687-98, 104 S. Ct. 2052, 2064-70, 80 L. Ed. 2d 674, 693-700 (1984). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook,* 565 N.W.2d 611, 614 (Iowa 1997). We presume counsel's conduct falls within the range of reasonable professional competency. *D.W.*, 385 N.W.2d at 580. The burden of proving ineffectiveness is on the claimant. *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992).

Dennis first argues his counsel was ineffective by failing to preserve the issue of reasonableness of services. He claims his attorney should have challenged the reasonableness of DHS's requirement he attend parenting classes and complete one urinalysis before visitation with Kimberly. Under the circumstances of this case, we find the services requested by DHS were reasonable as a matter of law. Trial counsel had no duty to question the reasonableness of such services. An ineffectiveness claim cannot be sustained on failure to urge an issue having no merit. *State v. Neuzil,* 589 N.W.2d 708, 711 (Iowa 1999). Dennis's trial counsel was not ineffective for failing to object the reasonableness of the services.

Dennis next contends his counsel was ineffective by failing to call additional witnesses to attest to his ability to take Kimberly home on the day of the termination hearing, and to support his claim he was capable of providing appropriate parental care for her. We find no prejudice resulting from trial counsel's failure to call

additional witnesses. Dennis testified as to his ability to care for Kimberly. In view of his noncompliance with DHS's requests for urinalysis and parenting class participation, there is no reasonable likelihood additional witnesses would have affected the outcome in this case. Accordingly, we find no prejudice resulting from counsel's failure to call additional witnesses during the hearing.

Dennis also claims his counsel was ineffective for failure to offer evidence of a substance abuse evaluation. Although it is unclear in his brief and the record, we assume he makes reference to the report resulting from the EFR evaluation. In assessing whether Dennis was prejudiced by the omission of the substance abuse evaluation report, we review the record to determine whether "there is a reasonable probability, but for the counsel's unprofessional errors, the result of the proceeding would have been different" if the report had been admitted. *See State v. Hopkins,* 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997) (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)). When considering such claims, our ultimate concern is with the "fundamental fairness of the proceedings whose result is being challenged." *Strickland,* 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. We must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. The court must indulge a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984); *Sims v. State*, 295 N.W.2d 420,

423 (Iowa 1980). After carefully applying these principles, we conclude Dennis has failed to show a reasonable probability the outcome of the proceeding would have been different if the substance abuse evaluation report had been received by the district court.

Even if the substance abuse evaluation report which Dennis's counsel failed to offer documented a clean urinalysis and period of sobriety in the fall of 1998, there was clear and convincing evidence, other than the history of drug abuse, to support the district court's order terminating parental rights under Iowa Code section 232.116(1)(d). The State clearly and convincingly proved Dennis failed to maintain significant and meaningful contact with Kimberly. Accordingly, the failure to offer the substance abuse evaluation report, which we assume for purposes of our analysis to have been completely favorable to Dennis, would not have changed the outcome of these proceedings. Dennis suffered no prejudice from its exclusion from the record.

Accordingly, we affirm the order terminating Dennis's parental rights with respect to his daughter.

AFFIRMED.