

**IN THE COURT OF APPEALS OF IOWA**

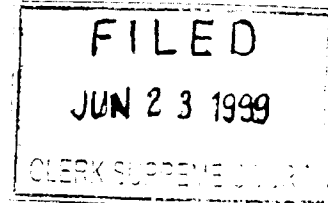
No. 9-374 / 98-984

Filed June 23, 1999

**IN THE INTEREST OF  
K.L. and T.L., Minor Children,**

**J.L., Mother,**

Appellant.



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Appeal from the Iowa District Court for Marion County, Terry L. Wilson,  
District Associate Judge.

A mother appeals the termination of her parental rights. **AFFIRMED.**

Christy L. Diehl, Indianola, for appellant.

Thomas J. Miller, Attorney General, and Kathrine S. Miller-Todd, Assistant  
Attorney General, for appellee-State.

Julie Fisher of Pothoven & Stravers, Oskaloosa, guardian ad litem for minor  
children.

Considered by Huitink, P.J., Mahan, J., and Schlegel, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

**SCHLEGEL, S.J.**

A mother, Jennifer, appeals the termination of her parental rights to her two children. She contends her court-appointed attorney for the CINA case was ineffective in failing to request that her children be placed with her mother and her court-appointed attorney for the termination was ineffective in failing to call a number of witnesses Jennifer had requested be called. We affirm.

Jennifer is the mother of Teryn, born in December 1995, and Kaylenea, born in December 1996. In February 1997 the Department of Human Services received a child abuse report claiming Jennifer was only feeding Kaylenea sugar water. Another claim was Jennifer would shake Kaylenea when she cried. Jennifer stipulated at the temporary removal hearing she had not fed Kaylenea properly or given her proper medication, she and the children had no residence of their own, and the children lacked proper supervision. The court placed both children in foster care. Two weeks later the court adjudicated the children in need of assistance under Iowa Code section 232.2(6)(c)(2) (1995) and continued their placement in foster care.

In March 1998 the State filed a petition to terminate Jennifer's parental rights to both children under section 232.116(1)(g). The court granted the petition in April 1998, finding Jennifer had failed to keep any steady employment or housing, she had made little progress in learning parenting skills, and she was living with her brother who had been convicted of indecent contact with a child.

Jennifer appeals, claiming her court-appointed attorneys were ineffective in at least two respects. She first argues her counsel in the initial CINA proceeding in Appanoose County was ineffective in failing to request the children be placed with Jennifer's mother so she could have had the opportunity to visit them more frequently. The State responds Jennifer failed to preserve error on this issue because she did not appeal the initial CINA proceeding nor raise any claim counsel was ineffective until this appeal. Jennifer contends her attorney advised her nothing could be done about the adjudication, so she did not know she had the right to appeal.

In order to prevail on a claim of ineffective assistance of counsel, Jennifer must prove counsel's performance was deficient and she suffered actual prejudice. *In re J.P.B.*, 419 N.W.2d 387 390-92 (Iowa 1988) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). We presume counsel acted competently. *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992). The court-ordered social survey DHS conducted reveals the Department *did* consider whether the children could be placed with the maternal grandmother but recommended against such placement. Jennifer cannot show prejudice from her attorney not requesting placement of the children with her mother. Jennifer also contends her attorney should not have encouraged her to stipulate to certain facts at the temporary removal hearing. She offers no authority to suggest this was a failure in an essential duty or any proof she was prejudiced by the stipulation. We find Jennifer has not demonstrated she suffered prejudice from counsel's performance.

Jennifer next argues her court-appointed counsel for the termination proceeding in Marion County was ineffective in failing to call several witnesses she had requested be called. She sets forth in her brief the substance of the testimony those witnesses would have offered if called. In summary she claims, “Had the above-listed witnesses been called to testify on behalf of J.L, *parts* of what was said by witnesses for the State *could* have been refuted.” (Emphasis added).

The test for effective assistance of counsel in CINA proceedings is generally the same as in criminal proceedings. *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986). Jennifer must show her counsel in the termination proceeding had a duty to call the witnesses Jennifer wanted to be called and that she was prejudiced as a result. An attorney's decision regarding strategy or tactics does not ordinarily provide an adequate basis for a claim of ineffective assistance of counsel. *State v. Wilkens*, 346 N.W.2d 16, 19 (Iowa 1984); *State v. Foell*, 512 N.W.2d 809, 814 (Iowa App. 1993). The decision whether or not to call a witness falls under the rubric of trial tactics or strategy and we are reluctant to second-guess trial counsel in such areas. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). Jennifer does not claim the court would have found her witnesses more credible than the State's witnesses. She does not argue the court could not still have found the children could not be safely returned to her care. She does not claim any of the witnesses would have testified (1) she had obtained and maintained suitable housing and employment; (2) she lived at times in her mother's home with her brother who has been convicted of indecent contact with

a child; (3) she has a dependent personality and suffers from depression; or (4) she missed many appointments for her counseling. Assuming the witnesses would have testified as Jennifer claims, we find no prejudice because clear and convincing evidence would still remain which would support termination. Since the outcome of the case would not be different, Jennifer suffered no prejudice. She has failed to prove either prong of the *Strickland* test.

**AFFIRMED.**

**No. 98-984. [9-374] IN RE K.L. and T.L.**

Appeal from the Iowa District Court for Marion County, Terry L. Wilson, District Associate Judge. **AFFIRMED.** Considered by Huitink, P.J., Mahan, J., and Schlegel, S.J. Opinion by Schlegel, S.J. (5 pages \$2.00)

Jennifer is the mother of Teryn, born in December 1995, and Kaylenea, born in December 1996. In February 1997 the Department of Human Services received a child abuse report. Jennifer stipulated at the temporary removal hearing she had not fed Kaylenea properly or given her proper medication, she and the children had no residence of their own, and the children lacked proper supervision. In March 1998 the State filed a petition to terminate Jennifer's parental rights to both children under section 232.116(1)(g). The court granted the petition in April 1998, finding Jennifer had failed to keep any steady employment or housing, she had made little progress in learning parenting skills, and she was living with her brother who had been convicted of indecent contact with a child. Jennifer appeals, claiming her court-appointed attorneys were ineffective. She first argues her counsel in the initial CINA proceeding in Appanoose County was ineffective in failing to request the children be placed with Jennifer's mother. The court-ordered social survey DHS conducted reveals the Department *did* consider whether the children could be placed with the maternal grandmother but recommended against such placement. Jennifer cannot show prejudice. Jennifer next argues her court-appointed counsel for the termination proceeding in Marion County was ineffective in failing to call several witnesses she had requested be called. The decision whether or not to call a witness falls under the rubric of trial tactics or strategy and we are reluctant to second-guess trial counsel in such areas. Jennifer does not claim the court would have found her witnesses more credible than the State's witnesses. She does not argue the court could not still have found the children could not be safely returned to her care. Assuming the witnesses would have testified as Jennifer claims, we find no prejudice because clear and convincing evidence would still remain which would support termination.