IN THE COURT OF APPEALS OF IOWA

No. 1999-233 (9-457) / 99-0422
Filed November 10, 1999

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CLERK SUPREME COURT

IN THE INTEREST OF M.F.,
Minor Child,

J.F., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, District Associate Judge.

Mother appeals from a review and permanency order that transferred sole custody of the child from her to the father. She contends her trial counsel was ineffective for failing to know Iowa Code section 232.104(2)(d)(2) transferred sole custody and not merely physical custody. **AFFIRMED.**

Catherine K. Levine, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Chris Odell, Assistant Attorney General, Diane M. Stahle, Special Assistant Attorney General, and Cory McClure, Assistant County Attorney, for appellee-State.

Charles Fuson of the Youth Law Center, Des Moines, guardian ad litem for minor child.

Heard by Sackett, C.J., and Zimmer and Miller, J.J.

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MILLER, J.

A mother appeals the juvenile court review and permanency order which placed a child with the child's father pursuant to section 232.104(2)(d)(2) of the Code of Iowa. She claims her trial attorney did not know that section 232.104(2)(d)(2) provided for the transfer of sole custody, not merely physical custody, and thus rendered ineffective assistance of counsel in violation of her right to due process of law by stipulating to that placement. We affirm.

M.F., born March 7, 1984, is the son of J.F., mother, and S.F., father. There were two other children of the marriage, a son, C.F., who is now an adult, and a daughter, A.F. J.F. and S.F.'s marriage was dissolved in 1990. The court ordered joint legal custody of the three children, and placed their physical custody with their mother, J.F.

M.F. has been diagnosed with major depressive disorder and post traumatic stress disorder. According to the therapist and other experts, M.F.'s psychological problems stem at least in part from the constant, bitter conflict between his parents that has persisted since M.F. can remember. In July 1997 M.F. attempted suicide by overdose and was subsequently hospitalized. In October 1997 his sister, A.F., committed suicide. The state filed its Child In Need of Assistance (CINA) petition on October 22, 1997, alleging M.F. was a child in need of assistance as defined in section 232.2(6)(f) of the Code of Iowa in that he was in need of treatment to cure or alleviate serious mental illness or disorder, or emotional damage, and his parents were

unwilling or unable to provide such treatment. On November 26, 1997 the court entered a shelter care order pursuant to section 232.20 of the Code and M.F. was placed in the care of Mr. and Mrs. R. On that same day the court entered an order that there be no visitation between M.F. and J.F.

M.F. remained at the home of the R.s until suicidal ideations resulted in his placement at Iowa Lutheran Hospital, then at the Healthway Crisis Stabilization Unit, and ultimately at Orchard Place Kenyon House, where he arrived March 10, 1998 and stayed throughout subsequent proceedings.

M.F. was adjudicated a child in need of assistance on December 17, 1997, upon the stipulation of all parties except J.F. J.F. declined to testify and stipulated that her son did not receive his aftercare treatment as recommended by his psychiatrist. An order that there be no contact between J.F. and M.F. was modified at that time to allow visitation upon the agreement of M.F.'s therapist, guardian ad litem and custodians, that such visitation was in his best interest. After J.F.'s family pressured M.F. to visit, the court entered an order on December 24, 1997 that there be no contact between M.F. and J.F., and none between M.F. and members of J.F.'s family, until further order of the court.

Dispositional hearings were held on February 12 and March 18, 1998. M.F. was placed in the temporary custody of the Iowa Department of Human Services (DHS) for placement in a PMIC facility. In a March 18, 1998 CINA dispositional order, the court continued M.F. in the custody of DHS, for appropriate placement; and

ordered that there be no contact between M.F. and his parents or M.F. and the R.s for the next thirty days. On March 30, 1998 M.F. ran from Kenyon House, stole a purse and car from the R.s, and drove to Lincoln, Nebraska. M.F. called his father, S.F. and brother, C.F., from there, and they picked him up and returned him to Iowa where he was placed in a juvenile detention facility and a delinquency petition filed. He was subsequently returned to Kenyon House.

After a review hearing on May 8, 1998 the court found in its May 21, 1998 review order that placement outside the home continued to be necessary. Although the mother resisted, the court also ordered both parents to obtain a psychosocial evaluation. At this time the court also adopted the Case Permanency Plan. On November 23, 1998 yet another review hearing took place. As a result the court ordered on December 10, 1998 that results of J.F.'s psychosocial evaluation be made available to the parties and continued the review hearing until January 4, 1999, to be held with the permanency hearing.

It is the January 5, 1999 order which resulted from the January 4th hearing that is at issue in this appeal. At the January 4 hearing, with J.F. and her attorney present, the parties presented the court with a stipulation of facts and recommendations for a proposed order. In relevant part, and summarized, the stipulation included the following:

> (1) Pursuant to Iowa Code section 232.104(2)(c)(2), M.F.'s custody should be transferred to his father, S.F., upon M.F.'s discharge

from Orchard Place, with such discharge anticipated to be in the next month.

(2) Reasonable efforts had been made and offered in order to reunite M.F. with J.F., those efforts had been unsuccessful, and the reasons for removal continued to exist;

(3) Termination of J.F.'s parental rights to M.F. would not be in M.F.'s best interests, because of M.F.'s age, bond with J.F., and anticipated placement with his father.

(4) Therapy should continue to be provided to M.F. from Orchard Place with no change in therapists.

(5) Visitation between J.F. and M.F. should be at the discretion of those therapists;

(6) The juvenile court should grant concurrent jurisdiction to the district court for a determination of M.F.'s custody.

At the January 4, 1999 hearing the court received in evidence and considered a Case Permanency Plan prepared by DHS and a quarterly report from Orchard Place Kenyon House. In comments made on the record and in an order filed January 5, 1999 the court made findings and an order consistent with the parties' stipulation and request for such an order, ordered that its jurisdiction continue, and scheduled a June 11, 1999 review hearing.

On January 20, 1999 J.F. filed a motion under Iowa R. Civ. P. 179(b), requesting that the court modify the order of January 5 to provide that physical care of M.F., rather than sole custody, be placed with his father. The trial court denied this motion on February 15, 1999, finding that the parties agreed to a transfer of custody pursuant to Iowa Code section 232.104(2)(d)(2)[1] as part of the permanency order. J.F. appeals.

Because there is no procedural equivalent to post conviction relief for proceedings to terminate parental rights, direct appeal is the only way for a parent to raise an ineffective assistance counsel claim in a termination case. *In re J.P.B.*, 419 N.W.2d 387, 390 (Iowa 1988). We have concluded the same principle applies in a CINA case. *In re A.D.L.*, 497 N.W.2d 178, 181 (Iowa App. 1992). Accordingly, we properly address J.F.'s claims of ineffective assistance.

J.F.'s rights to counsel in CINA proceedings is granted by section 232.89 of the Code of Iowa. Because these proceedings are civil, not criminal, no Sixth Amendment constitutional protections are implicated. *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986). Nevertheless, due process requires counsel appointed under a statutory directive to provide effective assistance. *In re J.P.B.* 419 N.W.2d 387, 390

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[1]At the Permanency Hearing on January 4, 1999, the assistant county attorney misspoke and stated that the transfer of custody to which the parties were stipulating was pursuant to the provisions of Iowa Code section 232.104(2)(c)(2). No such provision exists. The trial court found in its February 15, 1999 ruling on J.F.'s rule 179(b) motion that the assistant county attorney misspoke, but that his subsequent comments clearly indicated that the stipulation was for a transfer of custody to S.F. pursuant to section 232.104(2)(d)(2) of the Code. There is no dispute over the fact that the intended reference was to section 232.104(2)(d)(2).

(Iowa 1988). We review constitutional challenges de novo. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). We apply the same standard adopted for counsel appointed in a criminal proceeding. *In re D.W.*, 384 N.W.2d at 579; *In re D.P.*, 465 N.W.2d 313, 316 (Iowa App. 1990).

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) requires a party claiming ineffective assistance of counsel to show (1) that counsel's performance was deficient, and (2) that actual prejudice resulted. Unless both showings are made, the claim must fail. *In re D.W.*, 385 N.W.2d 570, 580 (Iowa 1986) (citations omitted). Our scrutiny of the CINA counsel's performance must be highly deferential, and we must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Section 232.104(2) of the Code requires that

> ...
> 2. After a permanency hea ing the court shall do one of the following:
> ...
> d. Enter an order ... to do one of the following:
> ...
> (2) Transfer sole custody of the child from one parent to another parent.

J.F.'s only claim of ineffective assistance of counsel is that her trial counsel's performance was deficient because he failed to understand the meaning and import of section 232.104(2)(d)(2), that is, he did not know that it provided for sole custody and not for physical custody only. In support of this claim she relies entirely on the

fact that her attorney filed the Iowa R. Civ. P. 179(b) motion on January 20, 1999, and the content of that motion.

We will not assume that counsel's representation was deficient. Rather, representation is presumed competent and a party claiming ineffective assistance has the burden to prove by a preponderance of the evidence that counsel's performance was deficient. *See, e.g., Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). A change of mind on J.F.'s part concerning M.F.'s custody as readily explains why J.F.'s attorney filed a rule 179(b) motion as does a belief that at the time of the permanency he did not know that section 232.104(2)(d)(2) provided for sole custody. In fact, given the presumption of competent representation, it is the stronger and more reasonable explanation. J.F. has failed to prove by a preponderance of the evidence the first element of an ineffective assistance of counsel claim, that her trial attorney's performance was deficient.

As noted above, because there is no procedural equivalent to post conviction for proceedings to terminate parental rights or for CINA proceedings, direct appeal is the only way for appellants to raise an ineffective assistance of counsel claim in such proceedings. A party claiming ineffective assistance of counsel must develop an affirmative basis to demonstrate counsel's inadequate representation. *See, e.g., Sallis v. Rhoads*, 325 N.W.2d 121, 122 (Iowa 1982). This would initially appear to present an insurmountable obstacle when the facts supporting such a claim do not appear of record. However, a party claiming ineffective assistance of trial counsel

presumably knows of the claim and its details early in the appeal. Further, a party making such a claim has the right to seek limited remand to the district court during the pendency of the appeal for the purpose of a specific proceeding to obtain and present additional evidence and obtain a finding of fact concerning this issue. Iowa R. App. P. 12(g); *see, e.g., State v. White*, 337 N.W.2d 517, 520 n.2 (Iowa 1983); and *State v. Nelson*, 329 N.W.2d 643, 647 (Iowa 1983). We point this out as a procedure that was available to J.F. if her trial counsel gave her erroneous or inadequate advice concerning the meaning and effect of section 232.104(2)(d)(2), or did not know the content, meaning or effect of that provision.

Even assuming that trial counsel's performance was deficient, J.F. has not proved by a preponderance of the evidence that actual prejudice occurred. In addition to showing deficient performance, a party claiming ineffective assistance of counsel must show that the failure worked to the party's actual and substantial disadvantage. *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986). The United States Supreme Court has described prejudice in this way:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 456 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2 674, 698 (1984).

J.F. argues she was prejudiced in two ways: (1) because she did not know that the stipulation was for sole custody, she was unable to contest that at the permanency

hearing; and (2) the domestic relations court will know that juvenile court placed M.F. in the sole custody of S.F., which will be an indictment on the parenting skills of J.F. Each is implicitly founded on claims or assumptions that her attorney did not know that section 232.104(2)(d)(2) provided for sole custody; that if he had known, she would not have stipulated to M.F.'s custody being transferred to S.F.; and that if she had not so stipulated that result of the permanency hearing would have been different. For the reasons that follow, we do not agree and find J.F. has failed to prove actual prejudice.

The parties did not just stipulate that M.F.'s custody should be transferred to his father. As noted above, they also stipulated that reasonable efforts had been made and offered in order to reunite M.F. with J.F., that those efforts had been unsuccessful, and that the reasons for removal continued to exist; that termination of J.F.'s parental rights to M.F. would not be in M.F.'s best interests, for reasons stated; that therapy should continue to be provided to M.F. with no change in therapists; that visitation between J.F. and M.F. should be at the discretion of his therapists; and that the juvenile court should grant concurrent jurisdiction to the district court for a determination of M.F.'s custody. The juvenile court made findings consistent with these stipulations. J.F. does not challenge these additional stipulations or findings. She does not claim that the facts contained in them and found by the court are not accurate. Neither does she claim that her attorney in any way acted improperly in entering into these stipulations on her behalf.

Setting aside the stipulation concerning transfer of custody, the essence of the parties' other stipulations and the court's findings is that M.F. had made substantial progress, M.F. needed to continue in therapy, M.F. no longer needed to be in DHS custody or in shelter care, M.F. could not be reunited with J.F., M.F. should have contact with J.F. only when his therapists felt it to be appropriate, and that concurrent jurisdiction should be granted to the district court so that it could determine M.F.'s custody and/or physical care. These findings are fully supported by the record. Upon our de novo review, based on the undisputed facts upon which these findings are based, we conclude that at the time of the January, 1999 permanency hearing and order, M.F.'s custody should have been transferred to his father pursuant to section 232.104(2)(d)(2) of the Code. We conclude that the juvenile court's decision would have been the same even if J.F. had not joined the other parties in stipulating that M.F.'s custody should be transferred to S.F. We accordingly conclude that J.F. has failed to prove by a preponderance of the evidence that she was prejudiced by her attorney so stipulating on her behalf. Otherwise stated, we conclude that J.F. has failed to prove by a preponderance of the evidence that there is a reasonable probability that the result of the permanency proceeding would have been different absent that stipulation.

AFFIRMED.