IN THE COURT OF APPEALS OF IOWA

No. 0-369 / 00-264
Filed June 28, 2000

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CLERK SUPREME COURT

IN THE INTEREST OF
B.H. and D.R., Minor Children,

D.H., Mother,
Appellant.

Appeal from the Iowa District Court for Buchanan County, Daniel L. Block, Associate Juvenile Judge.

Mother appeals from juvenile court order terminating her parental rights. **AFFIRMED.**

Kathryn J. Mahoney, Cedar Falls, for appellant.

Thomas J. Miller, Attorney General, Tabitha Gardner, Assistant Attorney General, and Allan W. Vander Hart, County Attorney, for appellee-State.

Linnea Nicol, Assistant Public Defender, Waterloo, guardian ad litem for minor children.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

STREIT, J.

Debra appeals the termination of her parental rights, claiming she did not receive adequate services, her trial counsel was ineffective for failing to object to the services provided, and the trial court erred in terminating her parental rights because she had substantially complied with the case permanency plan. We affirm, finding no merit to her claims.

I. Background Facts & Proceedings.

Debra is the mother of Brooklyn, born July 24, 1996, and Dakota, born November 15, 1998. The children have two different fathers. The Iowa Department of Human Services first became involved with Brooklyn in May of 1998 when she was brought to the hospital for bruises on her face and numerous bite marks on her body. The child received the injuries while staying with Debra's new boyfriend and Dakota's eventual father, Thomas. A founded child abuse report was filed against Thomas, and he was instructed not to have unsupervised contact with the child. In October of 1998 Brooklyn was again at the hospital after staying with Thomas, but this time with bruises on her face and a spiral fracture of her arm. The treating physician told Debra the injuries were not consistent with any type of accidental injury. Upon further examination, the physician discovered a two-month-old fracture of the child's leg. Debra stated the child broke her leg in a fall while with Thomas. She also reported the child had suffered bruising on six other occasions. Brooklyn told a nurse and the investigator the injuries occurred at the hands of Thomas. A founded report of child abuse was filed against Thomas for the abuse and Debra for denial of

[redacted] to expose her child to abuse. Throughout the hospital visits and subsequent investigations Debra maintained Thomas did not abuse her daughter.

Brooklyn was removed from the home, and the court ordered Thomas to have no contact with either Debra or Brooklyn. Two weeks later, Debra gave birth to Dakota. Despite the court's no-contact order, Thomas was present for the birth. A little over a week later, Brooklyn was adjudicated a child in need of assistance (CINA). During the entire month of December Debra and Thomas summarily ignored the court's no-contact order. She often stayed with him, and they were seen together around town. They admitted to violating the order over ninety-five times. In January of 1999 Dakota was adjudicated a child in need of assistance based on Debra's refusal to abide by the no-contact order. Under the case permanency plan Debra was to obtain counseling for her dependency issues, have no contact with Thomas, participate in supervised visitation, and partake in individual therapy and family-centered services.

In March Dakota was hospitalized with a viral infection. Debra did not assist in the care of her son, did not visit the hospital with any regularity, and refused to nurse her son back to health upon his return from the hospital. Thus, he was removed and place with his sister in foster care. Debra continued to have contact with Thomas. In April the court found Debra and Thomas in contempt for willfully violating the no-contact order. In late May Debra stopped attending her individual therapy, stating she was tired of talking about her relationship with Thomas. She also began to dodge those assigned to assist her

in family-centered counseling. A few weeks later it was learned Debra was again pregnant with Thomas's child. Debra subsequently lost the baby.

In November of 1999, after Debra completely refused to participate in any counseling for six months, the court terminated Debra's parental rights to Brooklyn and Dakota pursuant to Iowa Code sections 232.116(1)(c), (d), (g), and (h) (1999). Debra appeals, claiming she did not receive reasonable services, her trial counsel was ineffective for failing to object to the services provided, and the trial court erred in terminating her parental rights because she had substantially complied with the case permanency plan. The parental rights of Thomas and Brooklyn's father were also terminated and have not been appealed.

II. Error Preservation.

Debra first claims she did not receive adequate services. While the State bears the obligation to offer reasonable services, Debra has the responsibility to challenge or object to the services provided at the removal or review hearing. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994). It is too late to challenge the adequacy of services at the termination hearing. *See id.* Debra never objected to the services offered nor requested additional services she thought necessary for her successful reunification with the children. The issue of adequate services, therefore, has not been preserved for appellate review. *See In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa App. 1994).

III. Standard of Review.

Appellate review of proceedings to terminate a parent-child relationship is de novo; thus, "it is our duty to review the facts as well as the law and adjudicate

[redacted] propositions properly preserved and [redacted] us." *In re O'Neal*, 3[redacted] N.W.2d 414, 422 (Iowa 1981). We accord weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses whom the court heard and observed firsthand, but we are not bound by those findings. *Long v. Long*, 255 N.W.2d 140, 143 (Iowa 1977).

IV. Ineffective Assistance of Counsel.

Perhaps recognizing her problem with error preservation, Debra next claims her counsel was ineffective for failing to object to those services provided.

"The test for ineffective assistance of counsel in termination cases is generally the same as in criminal proceedings." *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992). Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)). The burden is on the mother to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. An ineffective assistance of counsel claim may be disposed of if she fails to prove either prong. *See State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm the termination based on her failure to prove prejudice without deciding whether her counsel failed to perform an essential duty. *See State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996). The test for prejudice is whether counsel's failure worked to Debra's actual and substantial disadvantage to the extent a reasonable probability exists that but for the trial attorney's

[redacted] the result would have been different. *See State v. Johnson*, 534 N.W.2d 118, 128 (Iowa App. 1995). A reasonable probability is one sufficient to undermine confidence in the outcome. *See State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996).

Debra cannot carry her burden of proving prejudice by a preponderance of the evidence. Debra was provided ample opportunity to address her codependency issues. She was offered individual therapy and family-centered counseling. These services were specifically designed to address her troubled relationship with Thomas. She refused to take advantage of these services, stating all the discussion of Thomas made her want to see him all the more. Debra expressed no desire to end her relationship with Thomas. Despite a court order and the risk of losing her two children, Debra continued to see the man responsible for breaking bones in her child's body. Any additional services would likely be just as futile as the ones already ordered. Her claim must fail.

V. Compliance with the Case Permanency Plan.

Debra finally claims the trial court erred in terminating her parental rights because she substantially complied with the case plan directives. First and foremost, Debra did not comply with the case plan directives. She ignored the directive to avoid contact with Thomas, failed to provide her children with a safe environment by continuing to be with Thomas, and refused to participate in individual or family-centered counseling. The only directive she marginally complied with was visitation. To her credit, she not only participated in visitation but also was an appropriate parent during visitation. Second, Debra fails to

articulate how her alleged compliance undermines any of the specific grounds cited for termination. Nevertheless, we find clear and convincing evidence supports the termination. The juvenile court is affirmed.

AFFIRMED.