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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-109 / 91-1778

IN THE INTEREST OF T.C., N.C. and C.C., Minor Children,

J.C., Father,

Appellant.

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Appeal from the Iowa District Court for Linn County, Jane F. Spande, District Associate Judge.

The father of three children appeals the termination of his parental rights. The mother does not appeal. **AFFIRMED.**

Jeffrey P. Taylor of Klinger, Robinson, McCuskey & Ford, Cedar Rapids, for appellant.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, and Charles K. Phillips, Assistant Attorney General, for appellee State.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

I.

J.C. is the father and W.C. is the mother of three children. The three children in question are: T.C., a boy born October 30, 1981; N.C., a boy born November 24, 1982; and C.C., a girl born February 12, 1984. Although the parents were separated during the pendency of these proceedings, the marriage had not been dissolved.

On September 8, 1987, the children were adjudicated children in need of assistance (CINA) pursuant to Iowa Code section 232.2(6)(c)(2). At the time of the adjudication, J.C. and W.C. were separated and the children were in the physical care and control of W.C.

W.C. and her attorney were present at the CINA proceedings. The children likewise were present along with their attorney and guardian ad litem, Patrick Grady. J.C. did not appear nor did anyone appear for him even though he had been timely served with an original notice of the proceedings on August 26, 1987.

The record reveals the children's guardian ad litem and attorney, their mother and her attorney stipulated that the children are CINA. The court entered its order in accordance with that stipulation, finding in effect the children to be CINA. That adjudication was upon a further finding that the children had suffered or were imminently likely to suffer harmful effects as a result of the parents' failure to exercise a reasonable degree of care in

their supervision within the meaning of section 232.2(6)(c)(2).

In January of 1988, four months after that adjudication as children in need of assistance, J.C. was convicted of delivery of a controlled substance. Three months later, on April 15, 1988, he was sentenced to serve thirty years in prison as a result of that conviction. Since that time he has been continuously confined in prison.

On April 19, 1991, the State filed a petition seeking to terminate the parental rights of W.C. and J.C. On April 23, 1991, J.C. filed an application for appointment of counsel and financial statement. The district court appointed counsel to represent J.C.

The hearing on the termination petition was scheduled for July 17, 1991. On July 12, 1991, J.C. filed a motion for continuance in order to obtain the reports and testimony of two psychologists. On July 17, 1991, the court denied the motion for continuance. The court allowed the record to remain open so J.C. could present the testimony of the two psychologists.

During the hearing, the court took judicial notice of the previous court files in the CINA actions filed on behalf of the children. J.C.'s counsel objected to the testimony regarding the adoptability of the children. Counsel argued the testimony was hearsay and did not fall within an exception. Counsel also objected to questioning

during cross-examination by the State regarding J.C.'s juvenile court record.

After the hearing, the court ordered the termination of both parents' rights. The court ordered the termination of W.C.'s parental rights pursuant to sections 232.116(1)(b) and 232.116(1)(e) of the Iowa Code. The court ordered the termination of J.C.'s parental rights pursuant to Iowa Code section 232.116(1)(e).

In reaching its decision, the court entered extensive findings of fact, noting among other things that J.C. is currently incarcerated for delivery of a controlled substance (second offense) resulting in death. His thirty-year sentence is subject to a mandatory minimum term of ten years. His earliest parole date is March 1993. The court found the children were all present during J.C.'s drug usage. The court further found the children vividly recalled J.C.'s drug usage and its effect upon them. It further found it was not in the best interest of the children to elect for long-term foster care in lieu of termination of parental rights.

W.C. has neither resisted nor appealed the termination of parental rights. J.C. appeals. We affirm.

II.

Appellate review of termination proceedings is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984), cert. denied, 469 U.S. 1222, 105 S. Ct. 1212, 84 L. Ed. 2d 353

(1985). The primary concern in termination proceedings is the best interest of the child. Iowa R. App. P. 14(f)(15).

III.

J.C. claims he was denied his right to due process during the CINA adjudicatory hearing, and, therefore, the termination of parental rights should be reversed. We disagree.

The record is clear and J.C. does not dispute that he was timely and properly served with an original notice as to the CINA proceedings. He complains that he was in the county jail at the time of service. Yet there is some evidence that there was a short period of time after service of notice that he was out of jail.[1] He then had the opportunity to secure counsel or request appointment of counsel if he so desired. We find nothing in the record that prevented J.C. from securing independent counsel or from asking the court to appoint one for him for it is apparent he was an indigent. Factually it appears that he was held in jail on a pretrial bond status and not under a sentence.

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1. According to the record, J.C. testified: "Well, I was released on my own to pre-trial release and I had missed a few appointments and they pulled--this would have to have been after September. I was in jail in September for seven days and after getting out of jail for seven days, I was to go up to the chemical dependency center . . . ."

J.C. also complains the termination proceedings must fail for at the time of the CINA hearing, he was hospitalized[2] on an involuntary[3] substance abuse commitment order. He claims, in accordance with Iowa Rule of Civil Procedure 13, that a guardian ad litem should have been appointed to represent him at that hearing. He further claims that since one was not appointed, the adjudication as to him that his children were CINA is void. Thus, he argues, one of the elements required to enable termination has not been met. Iowa Code § 232.116(1)

We note at the inception that he does not now nor has he ever by direct attack challenged the CINA adjudication. Whether he can do so in a defensive manner as he does in these termination proceedings we need not now decide; nor need we now decide whether he was entitled to a guardian ad litem under Iowa Rule of Civil Procedure 13. This is so for J.C. was present at the termination hearing along with

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2. If we understand the record, J.C. voluntarily consented to his involuntary commitment at St. Luke's Hospital in Cedar Rapids. It appears from the record and the trial court found that whatever commitment order that issued was dismissed at the request of the father's family (petitioner in the commitment proceeding) and without proceeding to hearing. The dismissal was effective on or about September 15, 1987, a date after the CINA adjudication. Dismissal of the commitment resulted from J.C.'s agreement to voluntarily undertake in-patient substance abuse treatment.

3. From our de novo review of the record, we are unable to find any provision in the record that establishes J.C. was "confined in a penitentiary, reformatory, or any state hospital for the mentally ill, or one judicially adjudged incompetent, or whose physician certifies to the court that he appears to be mentally incapable of conducting his defense." Iowa R. Civ. P. 13.

his attorney. Extensive testimony was submitted by J.C., his lay witnesses and his expert witnesses. Testimony was produced on J.C.'s part that attempted to show that his children were not children in need of assistance.

The trial court recognized J.C.'s rule 13 argument and from the evidence made its own and separate adjudication that each of the children were CINA. Indeed, J.C. admitted at the termination hearing that out-of-home placement was necessary and in the children's best interest. From our de novo review, we reach the same conclusion.

Since J.C. was present with his counsel at the termination proceedings and was afforded the opportunity to offer evidence as to whether his children were CINA, coupled with the fact that the trial judge made its separate adjudication that such need existed, we conclude that J.C.'s claim that he was denied due process is without merit. We find, as did the trial court, that clear and convincing evidence exists to grant the State's petition to terminate the parental rights of J.C. We further find that the best interest of the children requires parental termination.

IV.

We find the juvenile court did not rely on Iowa Code section 232.116(1)(b) in terminating J.C.'s parental rights. It is clear from the court's order J.C.'s parental rights were terminated pursuant to Iowa Code section

232.116(1)(e). Therefore, we need not address the issue of abandonment.

V.

J.C. claims the juvenile court abused its discretion in denying his motion for continuance filed on July 12, 1991. J.C. further asserts he was prejudiced by the denial of the motion. The motion set forth that it was impossible to adequately prepare his case for trial without knowing the results of the clinical reports which were to be prepared by Dr. Karn Pirnot and Dr. Carl S. Davis. The juvenile court allowed the record to remain open for additional evidence and the doctors filed their reports and testified at a later trial date. The juvenile court based its decision on the children's best interest. After reviewing the facts, we are unable to conclude the juvenile court abused its discretion in denying the motion for continuance.

VI.

J.C. claims the lower court improperly admitted three categories of evidence at trial which prejudiced him and are cause for a reversal. The first category of evidence J.C. objects to is the documentation associated with the prior CINA actions which the court took judicial notice of. The second category of evidence he objects to is the testimony by Jill Weigel regarding the adoptability of the

the children. The third category to which he objects is the questioning and testimony regarding J.C.'s juvenile court record.

Our review of this case is de novo. Therefore, we may consider the entire record, review the evidence we deem admissible, and adjudge the facts anew in reaching our decision. Without even considering these three categories of evidence to which J.C. objects, we find clear and convincing evidence that the parental rights of J.C. should be terminated under Iowa Code section 232.116(1)(e).

After considering all issues raised by J.C., we hold they are without merit. We find that termination of J.C.'s parental rights is in the best interest of the children. We affirm in all respects.

Costs of this appeal are assessed to the appellant.

AFFIRMED.

Sackett, J., specially concurs without opinion.