

IN THE COURT OF APPEALS OF IOWA

No. 1999-432 (9-685) / 98-1487

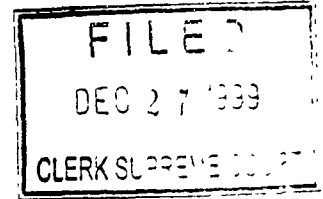
Filed December 27, 1999

IN THE INTEREST OF

N.V., Minor Child,

T.P., Mother,

Appellant.



Appeal from the Iowa District Court for Pottawattamie County, Kathleen Kilnoski, District Associate Judge.

Mother appeals the termination of her parental rights. **AFFIRMED.**

David A. Poore, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Martha A. Heinicke, Assistant County Attorney, for appellee.

Roberta Megal, Public Defender for Juveniles, guardian ad litem for child.

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

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ZIMMER, J.

Tonya P. appeals the termination of her parental rights to her daughter, Nicole. Tonya argues service of the termination petition was inadequate under due process standards. She also contends she was not offered adequate services prior to termination and termination was not in Nicole's best interests. We affirm.

Nicole was born in April of 1987. She exhibits severe behavioral problems. Six founded abuse reports involving Nicole or her siblings have named the parents, Tonya or Ronald, as the perpetrators. Nicole was adjudicated a child in need of assistance (CINA) in August of 1993, after she was the subject of a founded abuse report implicating her father, Ronald, and after she tried to choke her infant brother. Nicole was returned to her parents for a brief time. She was removed again from the home in January of 1994, after her father indicated he might harm her in an effort to control her severe behaviors. Nicole has been in foster care since that time.

The term 'chaotic' appears frequently in descriptions of Tonya's household. Supervised visits with her parents caused Nicole increased anxiety. Nicole had severe temper tantrums and tried to harm small children. One of her brothers also exhibited similar behavioral problems. Conditions in the home worsened as Tonya's and Ronald's relationship deteriorated and Tonya's health problems grew. Termination was first recommended in July of 1995. Tonya had not consistently attended therapy or been able to implement parenting skills. Tonya and Ronald had physical altercations in 1996 and the two eventually separated. Tonya also admitted she was abusing alcohol at that time.

Both before and after Nicole's removal in 1994, Tonya and Ronald expressed ambivalence about having Nicole in the home. After her removal, Nicole rarely mentioned returning home and asked about adoption. Nicole's behavior improved in the more structured environment she received in foster care. Between May and November of 1995, Tonya had only nine visits with Nicole. She kept only three of eleven scheduled visits between December 1995 and March 1996. Between January 1996 and November 1996, the parents made no requests to see Nicole. Visitation between Nicole and Tonya was cut off in May of 1997 because Tonya failed to follow up on scheduled visitation. At a review hearing in December of 1997, it was noted Tonya did not maintain a fixed address. Around this time, Tonya had a relapse in her health problems. After recovering, she moved in with a new boyfriend, who physically abused her. Tonya was offered numerous services, but failed to utilize them.

On January 17, 1998, the State filed a petition to terminate parental rights. Tonya was served by leaving a copy of the petition with a person alleged to live at her current residence. Tonya filed a pre-answer motion to dismiss, arguing the petition failed to state sufficient facts which would indicate the parent-child relationship should be terminated. The motion did not challenge the sufficiency of service. The court denied Tonya's motion to dismiss but ordered the State to file an amended petition. The juvenile court also ruled service of this amended petition could be by ordinary mail and set the termination hearing for May 7, 1998. The parents filed answers to the amended petition.

~~At the~~ termination hearing in May, Tonya's attorney made an oral motion to dismiss, ~~complaining~~ service failed to comply with Iowa Code section 232.112(3). The court overruled the motion. Neither parent appeared at the termination hearing and the juvenile court denied a motion for a continuance. The court terminated Tonya's parental rights to Nicole pursuant to Iowa Code section 232.116(1)(e) (1997). Tonya appeals, contesting the adequacy of service of the amended petition and the reasonableness of the services offered to her prior to termination. Tonya also asserts it is not in Nicole's best interests to terminate parental rights.

I. Scope of Review. We review proceedings to terminate a parent-child relationship de novo. *In re M.N.W.*, 577 N.W.2d 874, 875 (Iowa App. 1998).

II. Service of the Amended Petition. Tonya contends the service of the amended petition must be in accordance with Iowa Code section 232.112(3)¹. The juvenile court's order permitted service of the amended petition by ordinary mail.

¹Section 232.112(3) reads:

3: Notice under this section shall be served personally or shall be sent by restricted certified mail, whichever is determined by the court to be the most effective means of notification. Such notice shall be made according to the rules of civil procedure relating to an original notice where not inconsistent with the provisions of this section. Notice by personal delivery shall be served not less than seven days prior to the hearing on termination of parental rights. Notice by restricted certified mail shall be sent not less than fourteen days prior to the hearing on termination of parental rights. A notice by restricted certified mail which is refused by the necessary party given notice shall be sufficient notice to the party under this section.

Tonya's contentions are obviated by the fact she filed an answer to the amended petition without first objecting to its service. In fact, she did not raise the issue until the termination hearing. Iowa Rule of Civil Procedure 88 requires sufficiency of service to be challenged by pre-answer motion. Iowa R. Civ. P. 88(a). Failure to do so results in waiver of the issue. See Iowa R. Civ. P. 88(d); *In re Marriage of Zahnd*, 567 N.W.2d 684, 686 (Iowa App. 1997) (interpreting former rule 104, now rule 88, and finding failure to challenge personal jurisdiction before filing answer results in waiver of the issue); see also *In re Marriage of Glade*, 501 N.W.2d 563, 566 (Iowa App. 1993) (finding motion to dismiss untimely when filed after answer).

Tonya correctly points out the rules of civil procedure do not automatically apply to juvenile proceedings. See *In re A.G.*, 558 N.W.2d 400, 402 (Iowa 1997) (citation omitted) (finding rule 75 regarding intervention applies to juvenile proceedings). In determining whether a particular rule of civil procedure applies in a juvenile case, the Iowa Supreme Court has looked at two factors: whether strict application of the rule would be inconsistent with the informality of juvenile proceedings, see *In re A.R.*, 316 N.W.2d 887, 889 (Iowa 1982) (citing *In re Hewitt*, 272 N.W.2d 852, 859 (Iowa 1978)), and whether the juvenile justice code contains procedures for certain matters. See *In re J.R.*, 315 N.W.2d 750, 751-752 (Iowa 1982) (holding rule 75 regarding intervention applied to juvenile court proceedings because intervention should be permitted and the juvenile code made no provision therefor). The Iowa Supreme Court has considered issues waived in juvenile proceedings by the

~~failure to timely file~~ motions under other rules of civil procedure. *See In re A.M.H.*, 516 N.W.2d 867, 872 (Iowa 1994) (applying rule 179(b) in CINA proceeding).

We determine rule 88 applies. We do not find the requirement that a party make a motion to dismiss before filing an answer unduly formalizes juvenile proceedings or creates a trap for the unwary. While the proceedings must remain informal, the notion that a parent may make a motion to dismiss at any time during the termination process creates the potential for waste of judicial and other resources. Furthermore, the juvenile code does not set out procedures for the timing of motions or answers in termination cases. Tonya's attorney first objected to the sufficiency of service at the termination hearing, long after an answer had been filed. We apply rule 88 and determine this oral motion came too late to preserve the issue.

Furthermore, the record discloses termination came as no surprise to Tonya. A social worker testified that both parents knew of the termination petition and the May 1998 hearing date. The CINA proceeding was ongoing and termination had been mentioned several times since Nicole's removal. Also, notice to an attorney is notice to the client. *See In re R.E.*, 462 N.W.2d 723, 726 (Iowa App. 1990) (due process satisfied and mother received sufficient notice of termination proceeding where attorney had notice); *see generally* Iowa R. Civ. P. 106 (permitting all pleadings subsequent to original notice to be served upon attorney). Tonya's attorney has represented her since some time in 1996. Her attorney was served with notice of the termination hearing and, therefore, Tonya is deemed to have notice of it as well.

III. Termination under Section 232.116(1)(e). Tonya contends the State did not make reasonable efforts to reunite her with her child and termination was not in Nicole's best interests.

A. Reasonable Efforts. This issue was not properly preserved. The reasonableness of reunification efforts is not the focus of termination hearings. *In re B.K.K.*, 500 N.W.2d 54, 57 (Iowa 1993). A challenge to services should be made when the case plan is entered, not when the termination is sought. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997) (citation omitted). No evidence appears in the record that the parents challenged the services at the appropriate times.

B. Nicole's Best Interests. Iowa Code section 232.116(1)(e) permits termination when all of the following are present:

- (1) The child is four years of age or older.
- (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
- (3) The child has been removed from the physical custody of the child's parents for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.
- (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

Tonya contends only the fourth subsection is at issue on appeal, however, she does not herself ever assert the children could be returned to her safely. Instead she argues that termination was not in the best interests of Nicole who should not be separated from her siblings.

We have held siblings should be kept together when possible. See *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa App. 1994) (citation omitted) (finding it was not in child's best interests to establish relationship with sibling whom the child did not know). We find this sibling principle inapplicable here. Nicole has one older brother and two younger brothers. She has been separated from her siblings for five years and has no significant relationship with her younger brothers who were very little when she was removed. The older brother has severe mental health problems, has been institutionalized, and does not live with Tonya. The record does not demonstrate regular sibling visitation since some time in 1995. Nicole does not ask to see her brothers. We give little weight to the sibling preference in this case.

We find clear and convincing evidence Nicole cannot be returned to Tonya. We are sympathetic to Tonya's health problems. However, from the outset of this case, both parents have exhibited a lack of interest in this child and appear unable to control their children. They indicated early on that they could not control Nicole and feared they might abuse her in their attempts to control her. At least six founded abuse reports concerning Nicole or her siblings named the parents as perpetrators. Tonya does not appear capable of providing Nicole with the structured environment she needs. Tonya had a volatile relationship with Ronald and for two years prior to the termination hearing, she did not have a permanent residence and was involved in a relationship that included drugs and domestic abuse. Nicole expresses fear and distrust of her parents, particularly her father, and had ambivalent feelings about the

~~termination.~~ We find clear and convincing evidence Nicole could not be protected from harm if she is returned to Tonya.

AFFIRMED.

Miller, J., concurs; Sackett, C.J., specially concurs.

SACKETT C.J. (specially concurs)

I concur specially. I agree with the majority (1) that there is clear and convincing evidence supporting the termination and (2) that reasonable efforts were made to preserve this biological family.

While I also agree with the majority's decision to reject Tonya's claim her due process rights were violated, I do so for different reasons. Even if the service on Tonya were not sufficient to protect these rights, she subjected herself to the jurisdiction of the court in the termination case in filing a motion in limine prior to challenging the state's compliance with the directive of Iowa Code section 232.112(3) that provides for service of notice of the filing of a termination petition.

I cannot, however, agree with the majority's holding that Iowa Rule of Civil Procedure 88 applies to termination of parental rights cases. Nor do I find this holding necessarily compatible with the requirement to afford parents due process rights. For as the Iowa court said in *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994), "A parent's interest in maintaining family integrity is best protected by the Due Process Clause." citing *Alsager v. District Court of Polk County*, 406 F.Supp. 10, 22 (S.D. Iowa 1975), *aff'd in part*, 545 F.2d 1137 (8th Cir.1976).

Rule 88 clearly refers to pleadings provided for under the Rules of Civil Procedure. There are not provisions for similar pleading in Iowa Code Section 232 which for the most part contains its own procedures that are focused on providing due process protections. To attempt to apply Iowa R. Civ. P. 88 to Iowa Code section

232 ~~will create~~ confusion and may in some instances be contrary to the due process rights ~~that section~~ 232 seeks to protect.