FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-461 / 92-883

IN THE INTEREST OF J.H., A Minor Child,

R.H., Sr., Father,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Associate Juvenile Judge.

The father appeals a juvenile court order terminating his parental rights. **AFFIRMED.**

Mark D. Reed of Douglas V. Coonrad, P.C., Hudson, for appellant.

Bonnie J. Campbell, Attorney General; John M. Parmeter, Special Assistant Attorney General; Judy Sheirbon, Assistant Attorney General; and Daniel Block, Assistant County Attorney, for appellee State.

Sharon Briner, Waterloo, attorney and guardian ad litem for J.H., appellate counsel for J.H.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

HABHAB, J.

FACTS

Laura Smith[1] and Rick Hall[2] are common law wife and husband. They are the biological parents of John Hall,[3] born August 28, 1985. Laura has three other children, but Rick is the biological father only to John. The Department of Human Services (DHS) has been involved with this family concerning improper physical care, lack of medical care, lack of supervision, and sexual abuse since 1979. The DHS has placed Laura's three other children outside of her home for significant periods of time, and John has been outside of the home for most of his life.

John is a special needs child. Early on he experienced developmental delays in speech which were thought to be caused by the effects of his mother's alcohol ingestion. He was first labeled mentally retarded. However, after severe behavioral problems in school, he was then diagnosed with a behavior disorder. A clinical psychologist found John's behavior to be highly indicative of attention deficit hyperactivity disorder (ADHD).

Since December 1986, Rick has been incarcerated for sexually abusing John's mentally retarded half-sister. He

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1. This is not the mother's given name; her initials are L.S.

2. This is not the father's given name; his initials are R.H.

3. This is not the child's given name; his initials are J.H.

is expected to be released from prison sometime in 1993. Laura has been diagnosed as schizophrenic and disorganized. She also has a history of alcohol and marijuana use.

On August 12, 1986, the State filed a petition claiming John was a child in need of assistance (CINA). Due to an inability to locate John's father, the State obtained an order for substitute service. The State completed service by publication.

On September 15, 1986, the juvenile court declared John to be a CINA. On November 17, 1986, the juvenile court ordered the DHS to place John outside the home. On review of this dispositional order, the juvenile court provided for a permanency plan hearing. At the hearing, the court found grounds for termination pursuant to Iowa Code section 232.116(1)(c), but the court also found that termination would not be in John's best interest. The court continued long-term foster care pursuant to Iowa Code section 232.104(2)(b)(4).

Thereafter, the State filed a petition for termination of parental rights pursuant to Iowa Code sections 232.116(1)(c), 232.116(1)(d), 232.116(1)(e), 232.116(1)(i) and 232.116(1)(j)(1). Prior to both the initial hearing and the evidentiary hearing, Rick's attorney filed an application to transport the father to the hearing. The juvenile court denied both applications and appointed Rick's attorney to also serve as his guardian ad litem.

The court stated Rick's attorney/guardian ad litem could adequately represent Rick's interests. It then granted the application filed by the attorney/guardian ad litem to exceed the court-appointed fee guidelines schedule so that the attorney/guardian ad litem could visit Rick in prison.

At an evidentiary hearing in December 1991, the parties stipulated the elements of Iowa Code section 232.116(1)(e) were satisfied by clear and convincing evidence. The parties agreed the sole issue was whether or not the termination was in John's best interest. This inquiry focused upon John's adoptability.

Laura's attorney cross-examined a DHS caseworker regarding John's adoptability. The caseworker testified John's former foster parents were interested in adopting him. John lived with this family for almost a year and made significant progress developmentally while in their care. Specifically, John's diagnosis was changed from mental retardation to a behavior disorder during this period. The DHS removed John from this home pending an investigation of a disciplinary incident. Thereafter, the foster parents began seeing a family therapist to learn alternative methods of discipline.

Rick claimed John's behavioral problems made it unlikely he would be adopted. Rick also emphasized he had maintained contact with John and he would not be in prison forever. The State declined to present oral testimony and

requested additional time to investigate John's adoptability.

The court ruled from the bench that clear and convincing evidence existed for termination pursuant to Iowa Code section 232.116(1)(e). It then continued the matter for a further hearing in ninety days so the DHS could seek an adoption placement for John.

On April 2, 1992 the DHS caseworker filed a report indicating the former foster parents were still interested in adopting John. The report stated the foster parents were very involved in reuniting John with their family and continued to attend training beyond the minimal expectations of foster parents. It also stated visitations between the foster parents and John were initiated and were going well.

At the final hearing in May 1992, Laura indicated she supported adoption by the former foster parents and was willing to stipulate to the termination of her parental rights pursuant to Iowa Code sections 232.116(1)(a) and 232.116(1)(e). She specifically resisted Rick's request for a stay until he got out of prison and stipulated the proposed adoption by the foster parents was in John's best interest. Subsequently, the court terminated the parental rights of Rick and Laura pursuant to Iowa Code sections 232.116(1)(a) and 232.116(1)(e). It placed custody and guardianship of John with the DHS for purposes of adoption. The father appeals. We affirm.

SCOPE OF REVIEW

Appellate review of termination proceedings is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984), cert. denied sub nom. J.G. v. Tauke, 469 U.S. 1222, 105 S. Ct. 1212, 84 L. Ed. 2d 353 (1985). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those determinations. Id. at 491-92.

The primary concern in termination proceedings is the best interest of the child. Iowa R. App. P. 14(f)(15); In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

> We look to the child's long-range, as well as immediate, interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App. 1988) (citing Dameron, 306 N.W.2d at 745); see also In re A.C., 415 N.W.2d 609, 613 (Iowa 1987), cert. denied, 485 U.S. 1008, 108 S. Ct. 1474, 99 L. Ed. 2d 702 (1988).

ANALYSIS

I. Iowa Code section 232.116(1)(e).

Rick argues it was not in the child's best interest for the juvenile court to terminate his parental rights pursuant to Iowa Code section 232.116(1)(e). We disagree.

Under Iowa Code section 232.116(1)(e), the court may order the termination of parental rights if it finds all of the following have occurred:

> (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 custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 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.

Iowa Code § 232.116(1)(e) (1991).

At the evidentiary hearing, the parties stipulated the elements of section 232.116(1)(e) were satisfied by clear and convincing evidence. The court then ruled clear and convincing evidence existed for termination pursuant to Iowa Code section 232.116(1)(e). It merely continued the matter until the DHS could secure an adoption placement for John.

We find the State proved the elements of section 232.116(1)(e) by clear and convincing evidence. We further find it is in the child's best interest to terminate Rick's parental rights. We affirm the juvenile court's termination of Rick's parental rights.

II. Ineffective Assistance of Counsel.

Rick further argues he was denied effective assistance of counsel. He rests his ineffective assistance claim on

the following actions and inactions of his trial counsel: (1) trial counsel failed to move to dismiss the termination petition on grounds of defective notice in the underlying CINA proceeding; (2) trial counsel allowed Rick to stipulate to grounds for termination; (3) trial counsel failed to properly preserve a record by not affording Rick an opportunity to give testimony by deposition after denial of repeated requests to be personally present at the proceedings; (4) trial counsel failed to object to the juvenile court's sua sponte continuation of the hearing after finding clear and convincing evidence to terminate parental rights and after finding insufficient evidence that the child was adoptable. We do not find Rick's contentions of ineffective assistance of counsel to be persuasive.

Established principles govern our review of appellant's sixth amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant

circumstances." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." Id. at 131-32.

In proving the first prong of this test, the appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show 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, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984).

> [S]crutiny of the CHINA counsel's performance must "be highly deferential," [citation omitted] and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [party] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" [citation omitted]

In re D.W., 385 N.W.2d 570, 580 (Iowa 1986) (citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 694-95).

We find trial counsel did not breach an essential duty in failing to move to dismiss. The record establishes that Rick was given notice of the CINA proceeding by publication

after the petitioner followed the necessary procedures to obtain a court order which dispensed with the requirement of personal service.[4] We find Rick was properly given notice of the underlying CINA proceedings. Therefore, trial counsel, by professional standards, acted reasonably, as required by Strickland, in not moving to dismiss based on lack of notice of the CINA proceedings.

We further find Rick's trial counsel cannot be found to be ineffective for advising his client to enter into a stipulation stating the grounds for termination pursuant to Iowa Code section 232.116(1)(e) existed. Trial counsel consulted with his incarcerated client and explained the elements of this section. Rick's affidavit from February 1992 does not indicate Rick disagreed with this stipulation. At the termination hearing, the parties agreed the main issue was whether or not termination was in the child's best interests due to the question of his adoptability, not whether the criteria for termination existed. Trial counsel did not breach an essential duty by allowing his client to enter into the stipulation when all of the grounds for termination clearly existed.

We find trial counsel did not breach an essential duty in not affording Rick an opportunity to give testimony in

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4. We note that the insufficient notice issue was raised for the first time on appeal. Ordinarily, we would not address this issue for the first time. We elect to do so in this instance mindful of the scarcity of evidence in the record concerning the claims of the father as to this subject.

the form of a deposition. Trial counsel made two requests to the court for Rick to be transported to the proceedings, but the court denied both requests. The court indicated the attorney/guardian ad litem could represent Rick's interests and authorized additional fees for the attorney/guardian ad litem to visit his client in prison. Furthermore, at the May 1992 termination hearing, Rick's attorney submitted an affidavit stating Rick's wishes regarding John. We find Rick clearly stated his wishes. He was represented by counsel. We fail to find anything in the record that reveals Rick would have given testimony by deposition that he did not present in his affidavit. We further believe that Rick fully revealed his position to his attorney and that his desires were reduced to writing in the form of the affidavit. Accordingly, trial counsel did not breach an essential duty in not affording Rick an opportunity to give testimony in the form of a deposition.

We find trial counsel did not breach an essential duty in failing to object to the court's continuance of the termination hearing. After ruling clear and convincing evidence existed for termination pursuant to Iowa Code section 232.116(1)(e), the court merely continued the hearing to allow the DHS to secure an adoption placement for John. We believe the court was acting within its discretion in continuing the hearing. Trial counsel did not breach an essential duty in failing to object to the continuance.

After reviewing the record, we conclude trial counsel's performance was not deficient. Because we find Rick's trial counsel did not fail to perform any essential duties, technically, we do not need to address the second prong of prejudice. Nevertheless, we hold Rick has failed to show prejudice resulted. We are unable to find to a reasonable probability that, but for the alleged errors committed by his trial counsel, the court would have denied termination of his parental rights.

CONCLUSION

We find the requirements of Iowa Code section 232.116(1)(e) have been met and the parental rights of Rick should be terminated. We hold it is in John's best interest to terminate the parental rights of his father so the foster family can adopt him. We are unable to conclude Rick was denied effective assistance of counsel. Further, we determine any other issues the appellant may have raised were not properly preserved for our review or are without merit. We affirm the juvenile court.

Costs of this appeal are taxed to the appellant.

AFFIRMED.