IN THE COURT OF APPEALS OF IOWA

No. 3-494 / 93-484

FILED
NOV 29 1993
CLERK SUPREME COURT

IN THE INTEREST OF A.S., A.G., JR. and E.G., Minor Children.

P.S., Mother,

Appellant.

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Appeal from the Iowa District Court for Scott County, John G. Mullen and James A. Weaver, District Associate Judges.

The natural mother of three minor children appeals a judgment of the district court terminating her parental rights. **AFFIRMED.**

Pamela R. Serres-Smith, pro se, for appellant mother.

Bonnie J. Campbell, Attorney General; John M. Parmeter, Special Assistant Attorney General; Kathrine S. Miller-Todd, Assistant Attorney General; and Henry Filseth, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

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DONIELSON, P.J.

Pamela S. is the mother of three minor children: Ashley, born in 1986, Allen Jr., born in 1988, and Eric, born in 1990. Allen Sr. is the father of Allen and Eric. The parental rights of Allen Sr. were terminated and the district court's judgment was affirmed by the court of appeals pursuant to an opinion filed on June 29, 1993.

On August 16, 1989, a physical abuse report was founded with Pamela as the perpetrator and Ashley as the victim. Ashley had numerous bruises over her face and legs. Although family services were offered at that time, Pamela refused them. On July 14, 1990, Pamela took Ashley to the doctor, who discovered Ashley had her jaw broken in two places. Pamela initially stated Ashley had tripped on a rug and fallen on the floor, but ultimately admitted Allen Sr. had been drunk and struck Ashley several times. Pamela stated she tried to stop Allen Sr. Pamela admitted soon after the incident she allowed Ashley to go with Allen Sr. on a fishing trip. Pamela also admitted she did not seek medical help for Ashley until two days later, even though Ashley had been bleeding heavily from the mouth that day.

Family Preservation Services began counseling on July 17, 1990, to focus Pamela on the need to develop and expand parenting skills. The social workers found Pamela was overwhelmed by the responsibility of caring for three children. They found Pamela had difficulty in nurturing her children, especially Eric, and was quite punitive with

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Ashley. Ashley was ultimately placed in a protective day care. At this time, Allen Sr. was convicted of a charge unrelated to the child abuse charges and was sent to jail. Allen Sr. was eventually found guilty of assault with intent to inflict serious injury regarding the beating of Ashley.

On September 24, 1990, Ashley was adjudicated to be a child in need of assistance pursuant to Iowa Code sections 232.2(6)(b) and 232.2(6)(c)(2) (1989). A protective order was issued preventing Allen Sr. from having any contact with Ashley.

Lutheran Social Services began interviewing Pamela and Allen Sr. regarding their alcohol and substance abuse. Both strongly resisted any suggestions they had a severe problem with drugs or alcohol and stated they really did not need to be in treatment. The social investigation report noted Allen Sr. and Pamela had lived together off and on since 1986. The report stated Allen Sr. became violent when he has been drinking. Pamela stated to the social workers she believed Allen Sr. was a wonderful man and she wanted to marry him.

In December 1990, Lutheran services reported that Ashley began to exhibit severe behavioral problems. Specifically, Ashley appeared to masturbate frequently and would not stop when told to do so. Ashley additionally pulled a boy on top of her and put her hands down his pants. Allen Jr. spent a lot of time in his crib and was

often observed to have a blank, almost autistic stare. Lutheran also reported Pamela did not keep adequate milk supplies for the children and refused any free food or clothing.

Allen Sr. was released from jail on December 31, 1990. Although he was ordered to have no contact with Ashley, social workers reported Allen Sr. was seen at Pamela's home on numerous occasions. On January 18, 1991, Allen Jr. and Eric were adjudicated children in need of assistance pursuant to section 232.2(6)(b). The children were subsequently removed from the home and placed in foster care. Pamela consequently became increasingly hostile to social services. Pamela also threatened physically to remove her children from the foster homes and harassed the foster parents by placing crank telephone calls. The children had to be moved several times for their own safety.

The social workers' report stated that at the time of the children's removal, they were poorly fed and clothed. They were covered with feces and urine and had food smeared all over their bodies. Although social services devised a case permanency plan, neither Pamela nor Allen Sr. were extremely interested in meeting its criteria for return of the children.

In March 1992, social services reported Pamela had moved to Illinois to live with a man who had numerous convictions for sexual abuse and indecent exposure. Pamela

became increasingly hostile to the social workers and virtually refused all treatment and social services. She began yelling profanities and threatened the social workers with lawsuits.

Visitation between Pamela and the children was significantly curtailed in February 1992, after the children were observed exhibiting behavioral problems after the visits. In August 1992, Lutheran terminated services based on Pamela's complete lack of effort. Bethany Home began services in August 1992 and terminated them in November 1992, stating to the court Pamela was a poor candidate for rehabilitation. Bethany Home recommended the parents' parental rights be terminated.

On November 12, 1992, the Department of Human Services canceled all future visits by Pamela based on the department's concern for the children's safety. The district court issued a protective order on November 18, 1992. A hearing was held on January 4, 1993 on the petition to terminate Pamela's parental rights. On March 8, 1993, the district court terminated Pamela's parental rights pursuant to sections 232.116(c), (e), and (g). Pamela has appealed.

Pamela argues the district court erred in finding there was clear and convincing evidence that grounds existed for terminating her parental rights. Pamela argues that while her skills needed work, the State should have afforded her more services and more time to comply with the case

permanency plan. Pamela argues she applied for and obtained public housing assistance so that the children would have a nicer home. Pamela further alleges the State did not use its best efforts to reunite her with her children. Pamela claims the social workers did nothing to help her correct the problems which led to the initial findings the children were in need of assistance. Pamela lastly contends her trial counsel was ineffective for failing to call various witnesses on her behalf. Pamela maintains her trial counsel should have called Ashley as a witness, as well as Allen Sr.

Our review of termination proceedings is de novo. In re C.L.H., 500 N.W.2d 449, 451 (Iowa App. 1993). 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. In re W.G., 349 N.W.2d 487, 491-92 (Iowa 1984) cert. denied sub nom. J.G. v. Tauke, 469 U.S. 1222 (1985)

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.

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In re R.M., 431 N.W.2d 196, 199 (Iowa App. 1988) (citing Dameron, 306 N.W.2d at 745).

Termination of parental rights should be a last resort. In re S.O., 483 N.W.2d 602, 604 (Iowa 1992). However, children should not be forced endlessly to suffer "the parentless limbo of foster care." In re M.Z., 481 N.W.2d 532, 536 (Iowa App. 1991); Long v. Long, 255 N.W.2d 140, 146 (Iowa 1977). Our law demands a full measure of patience with parents who seek to remedy their lack of parenting skills. In re A.C., 415 N.W.2d 609, 613 (Iowa 1987), cert. denied, 485 U.S. 1008 (1988). A parent's failure to comply with the case permanency plan is not an independent ground to terminate parental rights. In re J.L.P., 449 N.W.2d 349, 352 (Iowa 1989). That failure, however, "can be considered evidence of the parent's attitude toward recognizing and correcting the problems which resulted in the loss of custody." Id. "Termination must occur if twelve to eighteen months have elapsed since the child was removed from the home and the parents still cannot take care of the child." In re C.L.H., 500 N.W.2d at 453 (Iowa App. 1993); In re T.D.C., 336 N.W.2d 738, 744 (Iowa 1983).

I. Appellant first argues the evidence supporting termination under Iowa Code sections 232.116(1)(e), (g), and 232.117 (1991) was not clear and convincing. We disagree. The evidence is undisputed that at the time of the termination hearing Ashley and Allen were at least four

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years old and Eric was no more than three years old. Ashley was adjudicated CINA in September 1990. Allen and Eric were adjudicated CINA in January 1991. All three children were removed from appellant's home and care in February 1991. By the time of the initial termination hearing in October 1992, the children had been in foster care for more than twenty months.

The only question is whether the evidence is clear and convincing the children could not be returned to appellant's care. We believe it is. Appellant has a substance abuse problem and has refused to complete treatment. She maintains a relationship with a man who is domineering and a potential danger to the children. Her attitude toward agencies offering her services has been uncooperative and antagonistic. She does not have and has not developed the ability to deal with directing and disciplining her children appropriately nor providing for their physical, emotional, and psychological needs adequately. The children would be at risk if returned to her custody. Termination of her parental rights was appropriate and promotes the long-term best interest of the children.

II. Appellant next asserts the services offered under Iowa Code section 232.116(1)(c)(2) were inadequate and reasonable efforts to reunite the family were not made. We disagree. The record reveals a long list of agencies which worked with appellant and services which were offered to

her. She argues she has psychological problems which prevented her from being able to work with the agencies or to benefit from the services. She asserts these problems were not identified or addressed in any of the case permanency plans until after the petition for termination was filed.

Iowa Code section 232.116(1)(c)(2) requires that a parent be offered or receive "services to correct the circumstance which led to the adjudication" and that the problem continue "despite the offer or receipt of services." Id. The circumstances which led to the children being adjudicated CINA were abuse and neglect. Appellant was offered and received services targeting the abuse and neglect. She was offered or received services on family preservation, domestic violence, parenting, substance abuse, and homemaking. During visitation with her children, caseworkers instructed and encouraged appellant in appropriate discipline, care, and nurture of her children. We find the evidence clear and convincing the requirements of Iowa Code section 232.116(1)(c) have been met and termination of appellant's parental rights was necessary and appropriate. We also find the efforts of the state to reunite this family were reasonable.

III. Appellant also asserts she was denied effective assistance of counsel in the termination proceedings. We apply the same test for ineffective assistance of counsel in termination proceedings as in criminal trials. In re

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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, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Id. at 131. The burden is on the appellant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 131-32 (citation omitted); In re J.P.B., 419 N.W.2d 387, 392 (Iowa 1988).

The first prong requires an affirmative factual basis be set forth demonstrating the alleged inadequacy of representation. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). When addressing the second prong, prejudice, we require the appellant to show counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The test to determine whether specified errors of counsel have resulted in prejudice to this degree is the appellant must show there is reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984).

In the present case, appellant alleges counsel should have called or deposed certain witnesses. Appellant asserts the testimony of these witnesses would have negated claims appellant failed to protect Ashley from sexual abuse and allowed Allen Sr. to be in the home in violation of a court order. While we believe counsel's choice of witnesses falls within the wide bounds of professional competence, even if we assume counsel failed in an essential duty, appellant has failed to show prejudice. We find substantial clear and convincing evidence in the record to support terminating appellant's parental rights without any consideration of the alleged sexual abuse of Ashley or Allen Sr.'s alleged visit to the home. Appellant physically abused and neglected Ashley. Appellant neglected Allen and Eric. The neglect alone would place the children at risk if returned to appellant's care. We find no reasonable probability the result would have been different if counsel had called the witnesses cited by appellant.

IV. Appellant finally argues the district court should have ordered transcripts of all prior proceedings so her appellate counsel could determine whether to assert ineffective assistance of counsel in the termination proceeding or in the earlier proceedings. The court

ordered a transcript of the termination proceeding for appellate counsel, but declined to order transcripts of all prior proceedings or to order an additional copy for appellant's own use. The court was correct in its ruling. We have repeatedly held that ordinarily, matters not raised in the district court, including constitutional questions, cannot effectively be asserted for the first time on appeal. In re Robbins, 230 N.W.2d 489, 494 (Iowa 1975); Long v. Long, 255 N.W.2d at 144; see also Schnabel v. Display Service, Inc., 219 N.W.2d 546, 548 (Iowa 1974).

Appellant asserts counsel at the termination proceeding may have been ineffective in not introducing the prior transcripts into evidence. We cannot agree. As we stated above, we do not find counsel's actions at the termination proceeding fall outside the bounds of professional competence. Nor can we agree that introducing the earlier transcripts in the termination proceeding might have changed the outcome. The voluminous evidence in the record is clear and convincing that termination of appellant's parental rights to Ashley, Allen Jr., and Eric was necessary and proper.

Costs of this appeal are assessed to appellant.

AFFIRMED.