IN THE COURT OF APPEALS OF IOWA

No. 0-683 / 00-0220
Filed January 24, 2001

IN THE INTEREST OF

B.N., C.N. and A.N.,
Minor Children,

V.N., Father,
Appellant,

D.N., Mother,
Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Dubuque County, Jane Mylrea, Juvenile Court Judge.

Father and mother appeal the termination of their parental rights to their three children. **AFFIRMED.**

Monica L. Ackley, Dubuque, for appellant-father.

Jennifer A. Clemens-Conlon of Reynolds & Kenline, L.L.P., Dubuque, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Jean Becker, Assistant County Attorney, for appellee-State.

Patricia M. Reisen of Kintzinger Law Firm, P.L.C., Dubuque, guardian ad litem for minor children.

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

VOGEL, J.

Father and mother appeal the termination of their parental rights to their three children.[1] We find the parties failed to preserve error as to the issues of proper service and whether consent to termination was voluntarily and intelligently given. The trial court found, and we agree, the termination is in the best interests of the children. We further find the father failed to show prejudice on his ineffective assistance of counsel claim. We affirm.

Background facts. Deborah and Victor are the natural parents of three children, Byron, born in 1988, Andrew, born in 1989, and Christopher, born in 1990. The children were removed from the home in March of 1999 and adjudicated to be children in need of assistance on March 31, 1999, pursuant to Iowa Code section 232.2(6)(b) and (c)(2). A petition for termination of parental rights was filed on December 28, 1999 with an order setting hearing for January 13, 2000. The only evidence presented to the trial court was the Release of Custody and Consent to Termination of Parental Rights forms, signed by Deborah and Victor. The trial court ordered the termination on January 14, 2000. Both parents now appeal.

Scope of review. We review proceedings to terminate parental rights de novo. *In re Dameron,* 306 N.W.2d 743, 745 (Iowa 1981). We review the facts as well as the law and adjudicate parents' rights anew. *Id.* We give weight to the findings of the juvenile court, particularly with respect to the credibility of witnesses, but are not bound by them. *In re L.L.,* 459 N.W.2d 489, 493 (Iowa

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[1] The Guardian Ad Litem failed to file her brief in a timely manner, as prescribed by Iowa Rule of Appellate Procedure 13(b) and, therefore, it was not considered in this decision.

1990); *In re R.R.K.*, 544 N.W.2d 274, 275 (Iowa App. 1995); Iowa R. App. P. 14(f)(7).

Our primary concern in a termination proceeding is the best interests of the child. *R.R.K.*, 544 N.W.2d at 275. Those best interests are determined by looking at the child's long-range as well as immediate interests. We consider what the future likely holds for the child if that child is returned to his or her parents. Insight for that determination may be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of future care that the parent is capable of providing. *L.L.*, 459 N.W.2d at 493; *Dameron*, 306 N.W.2d at 745.

Proper service prior to termination hearing. Both parents appeal, claiming the trial court erred in its finding that the service of notice was proper. Victor signed an acceptance of service on January 10, 2000, and Deborah signed an acceptance of service on January 12, 2000. The termination hearing was held on January 13, 2000. Iowa Code section 232.112(3) requires notice of a parental termination hearing which is personally served be made at least seven days before the hearing and service by certified mail be sent not less than fourteen days before the hearing. The manner of service utilized is not clear on this record. However, the two acceptances of service signed by each parent state each "accepts notice herein, and submits and consents to the jurisdiction of this Court." Although neither parent was present for the hearing, attorneys for both appeared and participated in the hearing. Neither objected to the service of

process at or prior to the hearing[2]. Furthermore, by the attorneys' active participation in the hearing, even acknowledging their respective client's voluntary and intelligent consent to the termination, both implicitly waived additional time.[3]. Generally, a client is bound by the acts of the client's attorney acting within the scope of the latter's authority. *State v. LaMar,* 224 N.W.2d 252, 254 (Iowa 1974). Neither parent claims that his or her attorney did not have authority to waive additional time and proceed to hearing. Absent such a claim, the waivers stand and the parents' claims are without merit. Having raised this issue now for the first time on appeal, it is waived. *See In re T.J.O.,* 527 N.W.2d 417, 420 (Iowa App. 1994).

Consent to termination of parental rights. Both Victor and Deborah claim the releases terminating their parental rights were not executed voluntarily or intelligently. Although both concede this issue was not raised before the juvenile court, they contend on appeal we should review the releases under the strictures and safeguards of Iowa Code section 600A.4. However, both parties failed to raise this issue before the trial court. Matters not raised in the trial court, including constitutional questions, cannot be asserted for the first time on appeal. *In re C.D.,* 508 N.W.2d 97, 100 (Iowa App. 1993).

Best interests of the children. Both parties maintain that, despite the voluntarily executed releases, the court was still obligated to determine that such a decision was in the best interests of the children. Victor and Deborah claim the

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[2] On appeal, Deborah concedes her claim on this issue was waived

[3] On appeal, Deborah concedes her claim on this issue was waived

trial court failed to meet this requirement, however Deborah concedes this issue was not preserved for review and Victor fails to indicate how the issue was preserved. Our review of the record indicates the trial court, in its brief ruling, found it is in the best interests of the children to remain in the environment they are currently in. This finding is supported by the agreement of the guardian ad litem, stating the boys have improved in their current foster home and adoption with this family would be a positive outcome. Additionally, the release forms executed by the parents stipulated the termination was in the best interests of the children and is prima facie evidence of the proof of the allegations in the petition. Further, at the hearing, Deborah's attorney specifically stated Deborah felt this step was in the best interests of the boys. Therefore, we find the trial court properly found termination to be in the best interests of the children.

Ineffective assistance of counsel. Finally, Victor contends his attorney provided ineffective assistance of counsel based on two grounds: she failed to object to a lack of reunification services and she failed to properly counsel him prior to his execution of the release form. As there is no procedural equivalent to postconviction relief for termination of parental rights proceedings, claims of ineffective assistance of counsel must be raised on direct appeal. *In re J.P.B.*, 419 N.W.2d 387, 390 (Iowa 1988). Although the Sixth Amendment to the United State Constitution, guaranteeing an accused the right to counsel, does not apply to juvenile cases, due process requires counsel appointed under a statutory directive to render effective assistance. *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986). We will apply the same test for effective assistance of counsel as set forth in *Strickland v. Washington*, 466 U.S. 668, 687-98, 104 S. Ct. 2052, 2064-

70, 80 L. Ed. 2d 674, 693-700 (1984), whether counsel's performance was deficient and that actual prejudice resulted. *Id.* at 580. It is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *In re D.P.*, 465 N.W.2d 313, 316 (Iowa App. 1990) (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). Therefore, we may affirm the trial court's decision because of a failure to prove prejudice without deciding whether there was a failure of a duty. *Id.*At the time of trial, Victor was serving a prison term for his conviction for child endangerment stemming from his abusive actions toward his sons. On December 31, Victor wrote to the court, requesting a change of counsel, increased communication with his children and a continuance of the termination hearing. The trial court denied the requests "due to lack of specificity and merit." Victor cannot demonstrate prejudice in his counsel's representation, when subsequent to the December 31 letter, he signed a release of custody and consent to termination of parental rights, fully acknowledging his act to be both voluntary and intelligent, and in the best interests of his children. Likewise, Victor has not effectively shown any lack of advice from his attorney prior to his execution of the parental release form would have produced a reasonable probability the proceeding would have rendered a different outcome. Therefore, we cannot find Victor was prejudiced by the alleged ineffective assistance of counsel.

Accordingly, we affirm the decision of the trial court.

AFFIRMED.