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AUG 25 1981

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF SANDY CARLENE)
AZBILL and SARAH ANN AZBILL, Juveniles,)
STATE OF IOWA,)
Appellee,)
vs.)
JO ANN AZBILL,)
Appellant.)

Filed August 25, 1981

1-176
3-64750 & 3-64751

Appeal from Marshall District Court - Carl D. Baker, Magistrate.

Appellant-mother appeals from an order terminating her parental rights to her two minor daughters pursuant to section 600A, The Code. AFFIRMED.

William H. Gilliam of Rapp & Gilliam, Waterloo, Iowa, for appellant.

Thomas Miller, Attorney General of Iowa, and Francis Hoyt, Jr., Assistant Attorney General, for appellee.

Lorenz Fett of Pattie, Hinshaw and King, Marshalltown, Iowa, guardian ad litem.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Appellant-mother appeals from an order terminating her parental rights to her two minor daughters pursuant to section 600A, The Code. She alleges error in the termination proceedings because of an improperly executed release of custody, lack of jurisdiction by the court due to defective notice, and insufficient evidence to support termination of her parental rights. We affirm the trial court.

JoAnn and Dennis Azbill had known each other approximately three and one-half years and JoAnn was eight and a half months pregnant when they were married April 26, 1976. JoAnn was 17 and Dennis 18. Their first daughter, Sandy, was born May 24, 1976; Sarah was born September 19, 1977. The record is replete with information concerning the emotionally starved background of these two young parents which was reflected in a stormy and chaotic marriage relationship, resulting in dissolution on April 4, 1978. The social service divisions of three Iowa counties and one Texas county have been continuously involved with these parents and their problems since before their marriage, and a broad range of services has been offered to them, including vocational rehabilitation, homemaker aides, public nursing, and counseling. Sandy was declared to be a child in need of assistance August 24, 1976, and a recommendation for similar status was made for Sarah, but the record does not reflect whether such action was ever officially taken. JoAnn has periodically and voluntarily placed both children in foster care; to date, Sandy has lived in six foster homes and Sarah three. Both are currently in a foster home together. Since the birth of the children, JoAnn has been responsible for their care for only three months, from March to June of 1979, and during that period homemaker aides came five days a week to assist her. JoAnn herself was placed in foster care at the age of three, and since that time has been in and out of a variety of institutions. In recent years, she has voluntarily committed herself to several mental health facilities for short periods of evaluation.

In 1979 JoAnn was living in Marshall County. A child abuse report against Sandy was made and substantiated, and JoAnn again placed the children in foster care. She then admitted herself to the mental health unit of Marshalltown Area Community Hospital from June 8 to June 18, where she had some conversations with a social worker there about permanently releasing custody of her children. On June 22, she went to the office of her Marshall County social worker, Olive Norem, where, after a great deal of discussion and explanation, she executed a release of custody for both Sandy and Sarah. Later that same day, apparently feeling despondent, she went to Independence and admitted herself to the Mental Health Institute there.

We note initially that our review of this case is *de novo* and we look for clear and convincing evidence in support of termination. Klobnoek v. Abbott, 303 N.W.2d 149, 150 (Iowa 1981). Three grounds were alleged in the petition for termination: that Dennis Azbill had abandoned the children, that JoAnn had signed a release of custody pursuant to section 600A.4, The Code, 1977, and that both parents substantially, continuously, and repeatedly refused or neglected to comply with the duties imposed by the parent-child relationship. Dennis does not appeal the termination of his parental rights.

I. JoAnn alleges that the releases of custody she signed should have been revoked because of her mental instability at the time of signing and also because the ninety-six hour revocation period for releases should have been tolled during her stay in the Mental Health Institute. On appeal she also attacks the release itself, claiming it was incompletely and defectively executed. This latter ground was not urged upon the trial court. Error in the execution of the releases, if any, has not been preserved.

Section 600A.4, The Code, provides for the method by which a release of custody shall be executed. It also provides that the person executing the release may revoke it within ninety-six hours or for good cause. JoAnn attempted to have the June 22 releases revoked in September on the same grounds she now raises on appeal. The trial court, after a hearing which JoAnn did not attend, filed its ruling on her motion September 18, 1979. In denying revocation, the court, relying on her treating physician's report, specifically found that JoAnn, in her June hospitalization in Marshalltown, was determined to have a passive/aggressive personality, no delusional thinking or psychosis, and no serious mental impairment. Following this institutional stay, JoAnn signed the releases on June 22. The psychological evaluation conducted during her subsequent stay at Independence indicated she had an upper-average range of intellectual functioning, that she was emotionally neglected, dependent, and inadequate, that she had an inadequate personality with depressive and unstable features, but no gross evidence of psychosis or organicity. When discharged, she was advised to get psychotherapy locally, but she indicated she did not need help at that time. Based on these reports and on the careful examination of Olive Norem as to the explanation she gave to JoAnn, the amount of time spent in so doing, JoAnn's state of mind and understanding of what she was doing, and the total conditions surrounding the signing of the custody releases, as well as the fact that both hospitalizations were voluntarily undertaken by JoAnn, and her lack of interest in the hearing as demonstrated by her non-attendance, the court found no basis for revoking the releases. Reviewing this hearing and order, we find the

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trial court was correct in denying revocation of the custody releases. Even assuming, arguendo, that the ninety-six hour revocation period could be tolled if a person were mentally incompetent, the medical evidence and Olive Norem's testimony make clear that JoAnn was competent. She is not emotionally healthy, it is true, but her dependent and inadequate feelings do not rise to the level of incompetency necessary for us to decide the issue of the tolling of the time period in this case. No other grounds, such as fraud, coercion, or misrepresentation as provided by statute, were urged as good cause to revoke the releases, and we find no basis for reversal here.

II. JoAnn also alleges that the court lacks jurisdiction in this matter because of a failure to give proper notice to her. It is true that notice can be so defective as to render a juvenile court without jurisdiction. In re Interest of Herron, 212 N.W.2d 474, 476 (Iowa 1973). Notice, to be proper, must satisfy the Iowa statutory test and the due process requirements of the fourteenth amendment. In re Interest of Hewitt, 272 N.W.2d 852, 855 (Iowa 1978). To do so, the petition for termination must state the facts upon which the petition is grounded so that the party served may adequately prepare for trial. Id. at 857. Hewitt makes clear that the appearance at court by a party, although not in compliance with the method prescribed by Iowa R. Civ. P. 66, is not fatal to the maintenance of a challenge to jurisdiction on statutory and due process grounds. The court is to look at the nature and substance of the appearance, not just the form. Id. at 858. The difficulty here is that appellant's brief does not clarify whether JoAnn is challenging subject matter jurisdiction or personal jurisdiction. If personal jurisdiction is the issue, the record is clear that attempts were made to serve her personally at her last known address and at Independence. Permission was then granted by the court to serve her by publication. She contacted her attorney and filed indigency papers so that he could be appointed to represent her. She petitioned the court to set aside her releases of custody, and at the hearing on revocation¹ the court in its order set the date and time for the subsequent termination hearing. Twice, at JoAnn's request, the hearing was continued, and when it was finally held in January, JoAnn was present and she testified. It is apparent that she had notice either by service or publication and, in any case, waived any objection she may have had both by failing to object before this appeal and by appearing and participating at the hearing.

¹ JoAnn did not attend this hearing because she was living in Waterloo and had failed to make transportation arrangements. She did know of the hearing, however, and did call and talk to her attorney in the morning before the hearing started, telling him she would still try to attend.

If subject matter jurisdiction is the issue, it is clear JoAnn would not waive that deficiency simply by appearing. In Interest of Hewitt, at 858. However, the kind of notice inadequacy contemplated by Hewitt is substantive and means that a party was not informed as to what matters would be raised at hearing, leaving the person with no idea of how to prepare. Clearly, this is not that kind of situation. JoAnn had been informed continually by social services as to what she needed to do if her parental rights were going to be preserved. The petition re-stated these grounds. She had voluntarily signed two releases of custody, and been informed at that time, both orally by Olive Norem and in writing by the forms she signed, that these releases could be grounds for termination. The petition re-stated the signing of the releases as a ground for termination. Under either theory of jurisdiction, personal or subject matter, there is no merit to this asserted error.

III. JoAnn also urges that there was insufficient evidence before the court to terminate her parental rights. In determining this issue, we examine the whole record to determine if the state was able to establish grounds for termination by clear and convincing evidence. In Interest of Voeltz, 271 N.W.2d 719, 722-23 (Iowa 1978). A parent's rights are considered on our review as well, but the long-range best interests of the child are paramount, and we must decide whether, despite past conduct, the parent prospectively can assume parental duties and responsibilities. Id. at 723. Children cannot await their parents' maturity, In re Leoffelholz, 162 N.W.2d 415, 425 (Iowa 1968), nor should they be made to suffer indefinitely in a parentless limbo. In Interest of Kester, 228 N.W.2d 107, 110 (Iowa 1975). The past performance of this mother must be considered to gain insight into the quality of future care likely to be given by her. In Interest of Ponx, 276 N.W.2d 425, 433 (Iowa 1979).

Sadly, this record is filled with evidence which shows clearly and convincingly that she is unable to carry out her parental responsibilities either now or, very likely, ever. JoAnn is not a bad person; rather, she is struggling with her own needs induced, perhaps, by her upbringing in the very kind of situation in which her daughters now find themselves. In discussing another parent diagnosed as an inadequate personality, the court said: "Such persons appear neither physically nor mentally deficient, but do manifest inadaptability, poor judgment, social inability, and lack of physical and emotional stability." In Interest of Adkins, 298 N.W.2d 273, 275 (Iowa 1980). The prognosis is not good, and Sandy and Sarah cannot wait.

Perhaps the most significant evidence in support of termination comes from JoAnn herself. At the termination hearing the following testimony was received:

Q: [to JoAnn]: What are your feelings today about your daughters, Sandy and Sarah?

A: I love them very much and I want what is right for them, you know. And I realize at this point that, you know, that I cannot take care of them and I may never be able to take care of them.

From the mass of evidence assembled and admitted at the hearing, JoAnn's own assessment appears to be accurate. The various county departments of social services deserve to be commended, for the record reveals they have taken every possible means for more than four years to help JoAnn to develop the love she has for her daughters into a corresponding acceptance of parental responsibilities. This she has been unable to do, and, considering the record as a whole, we are persuaded by clear and convincing evidence that the trial court's termination of JoAnn's parental rights is best for Sandy and Sarah. Finding no basis requiring reversal in any of the issues raised, we affirm.

AFFIRMED.