IN THE COURT OF APPEALS OF IOWA

No. 7-791 / 97-1526

000277

FILED
MAR 27 1998
CLERK SUPREME COURT

IN THE INTEREST OF K.O., Minor Child,

A.S., Mother,

Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, District Associate Judge.

A mother appeals the termination of her parental rights. **REVERSED AND REMANDED.**

Susan R. Stockdale of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Romonda Belcher, Assistant County Attorney, for appellee State.

Christine Bisignano, Des Moines, for minor child.

Heard by Cady, C.J., and Sackett, and Mahan, JJ.

CADY, C.J.

The question we face in this appeal is whether the juvenile court erred by conducting a parent-child termination hearing in the absence of the mother and counsel for the mother. Under the facts of this case, we conclude the case must be reversed and remanded for a new hearing.

Angela and Michael are the parents of Keith, born October 26, 1987. Keith was adjudicated in need of assistance and removed from his parents' care in August 1995. The adjudication was based on drug use and physical abuse by the parents. Keith was placed in the custody of his paternal grandparents.

A petition to terminate the parental rights of Angela and Michael was filed in April 1997 after services by the Department of Human Services failed to reunify Keith and his parents. Angela was served with notice of the hearing and an order was entered appointing Jeffrey Lipman, attorney at law, to represent Angela. Attorney Lipman had represented Angela during the earlier child in need of assistance proceedings. The termination hearing was eventually scheduled for July 23, 1997, and a pretrial conference was set for July 8, 1997. Counsel was not appointed for Michael.

Attorney Lipman moved to withdraw as counsel for Angela at the pretrial conference based on "lack of contact" with Angela. The juvenile court deferred the motion to the date of the termination hearing.

Angela did not appear at the termination hearing on July 23. The juvenile court first considered the pending motion to withdraw. Attorney Lipman informed the juvenile court he mailed a copy of the pretrial conference order to Angela with a handwritten notation on the order for her to call him. He further indicated Angela had not contacted him, and he had no explanation for her failure to contact him. He also informed the court he had not talked to Angela for over a year and had been unable to prepare a defense to the termination.

Michael appeared at the hearing. He confirmed Angela had knowledge of the hearing but understood she was planning to attend. Michael and Angela did not live together.

The juvenile court granted the motion to withdraw and excused attorney Lipman from the hearing. It then indicated the hearing concerning Michael's parental rights would be continued in order to allow him an opportunity to obtain counsel. The State then suggested the hearing concerning Angela also be continued because its evidence against both parents was similar. The juvenile court directed the hearing to proceed against Angela. The State then presented its evidence.

During the course of the hearing, a juvenile court officer informed the juvenile court he had just talked to Angela over the telephone, and she informed him that her grandmother's vehicle was out of gas and she had no transportation to the hearing. Angela also expressed a desire to be at the hearing and indicated she had experienced

problems communicating with her attorney. The juvenile court proceeded with the evidence and subsequently entered an order terminating Angela's parental rights.

Angela appeals. She claims the decision by the juvenile court to proceed with the hearing violated her due process rights. She also claims her statutory right to counsel was violated.

Our review of proceedings to terminate a parent-child relationship is de novo. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). The issues presented for review in this case, however, do not involve findings of fact. Consequently, the State suggests we should not disturb the juvenile court decision to proceed to hearing without Angela and her attorney absent an abuse of discretion. Although our review in this appeal is limited to questions normally reviewed at law in other cases, we review most issues in juvenile proceedings de novo. *See In re E.P.*, 478 N.W.2d 402, 403 (Iowa 1991)(de novo standard of review applied to juvenile proceedings involving speeding indictment claim); *see also In re S.M.D.*, 569 N.W.2d 609, 610-11 (Iowa 1997)(interpretation of statute in juvenile proceeding reviewed on error). In this case, either standard of review leads to the same result.

Two important principles converge in this case. The first is the due process requirement of fairness and an opportunity to be heard. *See In re Marriage of Seyler*, 559 N.W.2d 7, 9 (Iowa 1997). The second is the statutory right to be represented by counsel in proceedings to terminate a parent-child relationship. *See* Iowa Code

§ 232.113(1) (1997). We must decide if these principles were violated by the decision of the juvenile court to proceed to the hearing in the absence of the mother and an attorney.

We recognize due process does not require the physical presence of a parent at a termination hearing. *See In re J.S.*, 470 N.W.2d 48, 51 (Iowa App. 1991). Instead, the requirements of due process are flexible and depend, essentially, on: (a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs of additional procedures. *Seyler*, 559 N.W.2d at 9.

Considering the important interests at stake and the strict necessity for a process compatible with sound decision-making, as well as the need in this case for a second hearing in the action against the father, we believe due process required a continuance of the termination proceedings against Angela. The juvenile court was informed Angela had failed to contact her attorney prior to the termination hearing, but the record discloses the only action taken by Attorney Lipman to meet with Angela prior to the hearing was to send her a copy of the order issued following the pretrial conference with the notation, "Angela, call Jeff Lipman." We think more was required before due process would permit a hearing to proceed in her absence.

Furthermore, the juvenile court had acquired information that Angela desired to attend the hearing but had transportation problems.

Additionally, based on the record, we cannot conclude Angela waived her right to counsel. Angela had a right to counsel, and more must be shown before this important right can be waived.

We understand the urge of the juvenile court to proceed forward in the case in the absence of Angela and her attorney. The child in interest had been out of the home for nearly two years, and his future was suspended in limbo. Angela had expressed little, if any, interest in the court proceedings prior to the termination. Yet, while these factors point to termination, they do not transpose into a waiver of the right to counsel. Instead, they only intensified the need for counsel and emphasize the need for aggressive representation. Although Angela did nothing to express an interest in the proceedings, the evidence reveals little was done to help her. Angela's failure to contact her lawyer prior to the termination hearing, without more, does not amount to a waiver of counsel. Neither does her failure to appear at the hearing, considering the relationship between the two events.

Under all the circumstances, the juvenile court erred in proceeding against Angela. A continuance would not have needlessly delayed permanency for the child since the case had been continued for the father. Angela should have had counsel to

present a defense and explain her conduct. Only then can we gain the necessary confidence in the outcome of the final decision.

We reverse the termination order entered by the juvenile court and remand for a new hearing.

REVERSED AND REMANDED.