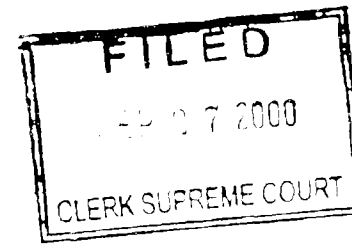
IN THE COURT OF APPEALS OF IOWA

No. 0-294 / 00-0120
Filed September 27, 2000

IN THE INTEREST OF

B.B. and A.B. MINOR CHILDREN



L.H., MOTHER,

Appellant.

Appeal from the Iowa Juvenile Court for Sioux County, Brian L. Michaelson, judge.

Mother appeals the termination of her parental rights to her daughters.

AFFIRMED.

James H. Pickner, Hawarden, for appellant.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney General, and Mark Schouten, County Attorney for appellee-State

Patricia Vogel, Orange City, guardian ad litem for the minor children.

Considered by Vogel, P.J., and Hecht, J., and Honsell, S.J.*

Senior judge assigned by order pursuant to Iowa Code Section 602.9206 (1999).

HONSELL, S.J.

L.H. was arrested and incarcerated on September 30, 1997 concerning a controlled substance charge. Following her arrest and incarceration, L.H. voluntarily placed her children, B.B. who was born on April 5, 1990, and A.B. who was born on May 24, 1996, in foster care.

On November 14, 1997 a CINA petition was filed. The premise for filing the petition was Iowa code section 232.6(n), which states: "Child in need of assistance" means an unmarried child whose parent's or guardian's mental capacity or condition, imprisonment, or drug or alcohol abuse results in the child not receiving adequate care. Because she was still incarcerated L.H. was not present at the adjudicatory hearing held on December 8, 1997, but was represented by court appointed counsel at the hearing. L.H's attorney on her behalf, together with all the other interested parties stipulated that B.B. and A.B were children in need of assistance as contemplated by Iowa code section 232.6(n). The most significant fact giving rise to the resulting adjudication was L.H.'s incarceration. All parties agreed the children remain in foster care pending the disposition hearing. The adjudication order also provided so long as L.H. remained in the county jail there would be no parent-child visitation, however, there could be continued contact by letter, and as soon as she was released from jail supervised visitations were to commence.

Prior to the disposition hearing on March 30, 1998 L.H. pled guilty to a class D felony crime involving a controlled substance. She received a five-year suspended sentence and was placed on probation. One of the terms of

probation was that she successfully complete inpatient treatment and a program provided at a halfway house. In the disposition order the court stated:

> "The Court, while accepting the terms and conditions of the proposed case plan, did personally address [L.H.] and advised her that in the event she failed to comply with the terms of the case plan, that the Court would be directing the State of Iowa to initiate termination of parental rights proceedings."

The court in its factual determinations in part found L.H. "did not have a stable life as she was growing up, and this has continued into her own adult life with her own family," the children have thrived in their foster care home, and L.H.'s first face-to-face visitation had taken place on March 8, 1998. The court ordered the parties to comply with the terms of the case permanency plan, the children remain in foster care, and L.H. comply with the recommendations set forth in her psychological evaluation.

By the time of the dispositional review hearing on September 28, 1998, L.H. had completed chemical dependency treatment, parenting classes, domestic abuse education classes and successfully graduated from the halfway house program. Prior to the dispositional review hearing arrangements had been made for L.H. to have extended visitations with the children. The court subsequently entered an order indicating the case plan contemplated the return of the children to L.H. in January of 1999. Foster home placement was continued until the next hearing scheduled for January 18, 1999.

The January 18 hearing was continued to March 1, 1999, because L.H.'s attorney was in trial at the time of the scheduled hearing. Commencing in November of 1998, L.H. had overnight visitations with the children. The visitations became every other weekend visits by the children. While being

described as active and bright, the children do act out and are in need of supervision, structure and guidance. B.B. has received counseling. The plan to place the children with L.H. on a full-time basis during January was put on hold when B.B.'s school counselor and B.B.'s therapist indicated B.B. was expressing fear of the placement. After the March 1, 1999 hearing the court continued the foster home placement indicating the placement might take place at the end of the school year. The court further ordered L.H. have unsupervised visitations with the children every weekend until the end of the school year. The next hearing was scheduled for June 21, 1999.

On April 26, 1999 a hearing was held concerning a previously filed motion to modify the then existing court orders. L.H. was present at the hearing with counsel. The evidence reflected that on April 13, 1999 after her probation officer requested a urine sample, L.H. told her substance abuse counselor she had snorted one line of methamphetamine while at work. Additionally L.H. was supposed to be attending group substance abuse counseling sessions on a weekly basis, and since August of 1998, she had attended only six sessions. During the March 1, 1999 hearing, L.H. testified she was fulfilling her probationary requirements, when in fact she had pled guilty during December of 1998 to two simple misdemeanor theft charges, and she was at this time charged with theft in the fourth degree and theft in the fifth degree. The court was aware of these new facts and modified the existing orders by changing the visitations to supervised visits and mandating L.H. comply with all terms of her probation, involve herself in a community support program through AA and/or NA by attending at least one meeting a week, provide a drug free environment for the

children, participate in a parenting skill development program and provide urine samples as requested by her probation officer.

On May 24,1999 L.H. was aggressive toward staff members at the residential treatment facility when she was asked to provide a urine specimen. On June 3 she failed to appear for an appointment at a substance abuse facility, and on June 11 canceled an appointment at the substance abuse facility. On June 13 she consumed alcohol knowing it was a violation of probation. On July 7 her probation was revoked and she was placed in the violators program. On July 15 L.H. was convicted of theft in the fourth degree. She entered the violators program on that day. On July 22 a warrant was issued for her arrest concerning a charge of theft in the fifth degree and on July 30 a warrant was issued with regard to a charge of theft in the fifth degree.

On July 19, 1999 L.H.'s attorney moved for a continuance of the scheduled review hearing, which had been rescheduled once because of the pending revocation hearing, stating L.H. was incarcerated in Violator's Program at the Newton Correctional Facility. The motion was granted and hearing was scheduled for October 25, 1999.

On September 14, 1999 L.H. was discharged from the violators program, having completed the program with only one minor infraction, and placed in residential treatment.

On September 27, 1999 a petition for the termination of the parental child relationship was filed. The hearing was held on October 25 and 26, 1999. L.H. remained in the residential treatment facility at the time of the October hearing. Since entry she had knowingly committed several major violations of its rules.

The director of the program opined that L.H. was in danger of being dropped from the program and if that happened she would be returned to prison. L.H. elected to have no in-person contact with the children while in the violators program or the residential treatment facility reasoning she didn't want to expose them to that environment. She maintains contact by telephone and letter.

The court in the termination order succinctly summarizes a portion of the relevant evidence as follows:

> A myriad of reunification services have been provided since Court intervention. These services have included several psychosocial evaluations; supervised visitations; several treatment programs for [L.H.], including the Synergy Center, the Jackson Street Manor, the Gordon Recovery Center, the Northwest Iowa Alcoholism and Drug Treatment Unit, the Violator's Program, and residential treatment care; the Parent Survival Program; individual counseling for both children; Family Centered Services; and counseling for [L.H.] with the children's therapist. Until recently [L.H.] had declined the Department's offer to provide her with individual therapy to address family of origin issues. [B.B.] has been involved in therapy since late 1997, whereas [A.B.] has been involved in therapy since May 1999. They continue to have weekly counseling sessions with (their therapist). [B.B.] and [A.B.] are difficult children to parent as they are both demanding and require one-to-one attention. [B.B.'s] behaviors have been improving, although she has a hard time controlling her behaviors, as evidenced by her disobedience of simple and direct rules. [A.B.'s] behaviors have been improving, although he still struggles with any kind of transition and expresses this by physically lashing out at people, with [B.B] being his favorite target. Both children require structure and consistency. [A.B.] has been questioning where he fits into the foster family structure. He has asked his foster father whether or not he is his "dad" and has stated to his foster mother that he wishes he had a "real mom." [B.B.] sees herself as "different" from other children since she does not have a permanent family like other children do. The children's therapist testified to his opinion that [L.H.'s] statements that she would "do anything" for the children are incongruent with her behaviors. According to the therapist, when the children hear [L.H.'s] expressed desire to be reunited with them but then see [L.H.'s] behaviors, which contradict her expressed desire, this creates conflict for the children as to what to believe, and this causes the children to develop insecurity.

> The long-term effect of [B.B.'s] witnessing of [L.H.'s] criminal behavior is that [B.B.] is at risk for losing her own sense of consequences and knowing what is right from wrong. [L.H.] now acknowledges that she directed [B.B.] to take the blame for [L.H.'s] shoplifting, which occurred during one of the unsupervised visitations.

Expert testimony presented during trial indicated the children need a sense of permanency in their lives and the longer they go without it, the more difficult it will be for them in the future. The children's therapist opined without permanency in their lives they will not develop a sense of self-security, security with others, self-discipline or self-control.

I. The scope of review in termination cases is de novo. *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa App. 1997). The grounds for termination must be proven by clear and convincing evidence. *In re E.K.*, 568 N.W.2d 829, 830 (Iowa App. 1997). Our primary concern is the best interests of the children. *In re T.B.*, 604 N.W.2d 660, 662 (Iowa 2000).

II. L.H. asserts she was denied due process in violation of her constitutional rights. The right of a parent to companionship, care, custody, and management of children has been recognized as far more precious than property rights and more significant and priceless than liberties which derive merely from shifting economic arrangements. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551, 558 (1972); *May v. Anderson*, 345 U.S. 528, 533, 73 S. Ct. 840, 843, 97 L. Ed. 1221, 1226 (1953); *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994). As our supreme court stated in *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982):

> The fundamental liberty of natural parents in the care, custody, and management of their child does not evaporate simply because they

> have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protection than do those resisting state intervention into ongoing family affairs. *When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.* (Emphasis added.)

Santosky v. Kramer, 455 U.S. at 753-54, 102 S. Ct. at 1394-95, 71 L. Ed. 2d at 606; *In re S.R.*, 548 N.W.2d 176, 177-78 (Iowa App. 1996).

Due process has two fundamental requirements: notice and opportunity to be heard. *Knight v. Knight*, 525 N.W.2d 841, 843 (Iowa 1994). These requirements are not, however, cast in stone, because due process is not a technical conception with fixed content unrelated to time, place and circumstances, but instead is flexible and calls for such procedural protections as the particular situation demands. *Id.* The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Silva v. Employment Appeal Bd.*, 547 N.W.2d 232, 234 (Iowa App. 1996). The central elements are notice and an opportunity to defend. *Id.* at 234-35. Procedural due process requires, at a minimum, notice and an opportunity to be heard in a proceeding that is adequate to safeguard the right for which the constitutional protection is invoked. *City of Cedar Rapids v. Municipal Fire & Police Retirement System*, 526 N.W.2d 284, 291 (Iowa 1995).

In order to make out a claim of deprivation of fourteenth amendment due process rights, a person must show: (1) deprivation of a liberty interest protected by the fourteenth amendment; and (2) the procedure used to deprive that interest was constitutionally deficient. *Board of Regents v. Roth*, 408 U.S. 564, 569-71,

92 S. Ct. 2701, 2705-06, 33 L. Ed. 2d 548, 556-57 (1972). The United States Supreme Court has stated that liberty denotes not merely freedom from bodily restraint but also freedom to marry, to establish a home and to bring up children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045 (1923). State statutes may create liberty interests which are entitled to due process. *Vitek v. Jones*, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561-62 (1980). When no right or justifiable expectation is created a state can act without providing due process. *See, e.g., Meachum v. Fano*, 427 U.S. 215, 228, 96 S. Ct. 2532, 2540, 49 L. Ed. 2d 451, 461 (1976). In *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977), the court declined to decide whether a liberty interest exists in foster family relationships. Other authorities indicate it does not. *See Kyees v. County Dep't of Pub. Welfare*, 600 F.2d 693, 698 (7th Cir. 1979); *Drummond v. Fulton County Dep't of Family and Children's Servs., Inc.*, 563 F.2d 1200, 1207 (5th Cir. 1977); but *see Brown v. County of San Joaquin*, 601 F.Supp. 653, 662 (E.D. Cal. 1985); *In re A.C.*, 415 N.W.2d 609, 615 (Iowa 1987), cert. denied sub nom *A.C. v. Iowa*, 485 U.S. 1008, 108 S. Ct. 1474, 99 L. Ed. 2d 702 (1988).

L.H. was not present at the CINA adjudicatory hearing on December 8, 1997. She received adequate notice and opportunity to be heard. However, she was incarcerated. An attorney represented her at that hearing and all subsequent hearings at which she was also present.

A. L.H. asserts that she was denied the mandate accorded her by Iowa Code section 232.91, which in part provides the child's parent be present at

hearings involving CINA proceedings. We do not believe that L.H. has preserved this issue for appellate review. She did not file a motion to enlarge the juvenile court decision pursuant to Iowa Rule of Civil Procedure 179(b), nor did she timely appeal the adjudicatory order. Rule 179(b) has been applied to CINA proceedings. *See In re A.M.H.*, 516 N.W.2d 867, 872 (Iowa 1994). An issue not presented in the juvenile court may not be raised for the first time on appeal. *In re R.J.*, 495 N.W.2d 114, 117 (Iowa App. 1992). As pointed out above, counsel represented her, and after conferring with her attorney she waived her presence at the adjudicatory hearing.

B. L.H. claims she was denied the statutory rights accorded her under Iowa Code section 232.96(10) (1997) because the court's order did not contain a statement concerning possible consequences of a permanent removal.

At the time of the adjudicatory hearing Iowa Code section 232.96(10) (1997) did not mandate that the juvenile court order contain a statement concerning possible consequences of a permanent removal. In any event, the court addressed this matter in a timely fashion both verbally and in written form.

C. L.H. further claims she was denied effective assistance of counsel by the attorney's failure to enforce the mandates of the statutes alluded to in A and B above, and not objecting to the guardian ad litem introducing unsubstantiated hearsay.

The test for ineffective assistance of counsel in termination cases is generally the same as in criminal proceedings. *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986). In order to establish an ineffective assistance claim, it must be shown that (1) counsel's performance is deficient, and (2) actual prejudice

resulted. *D.W.*, 385 N.W.2d at 580. We presume counsel's conduct falls within the range of reasonable competency. *D.W.*, 385 N.W.2d at 580. The burden of proving ineffectiveness is on the claimant. *In re J.P.B.*, 419 N.W.2d 387, 392 (Iowa 1988).

A statement is not hearsay if the statement is offered against a party and is: (a) his own statement, in either his individual or a representative capacity, or (b) a statement of which he has manifested his adoption or belief in its truth, or (c) a statement by a person authorized by him to make a statement concerning the subject, or (d) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (e) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. Iowa R. of Evid. 801.

Hearsay is admissible in termination cases. *In re E.J.R.*, 400 N.W.2d 531,533 (Iowa 1987). Hearsay, including multiple hearsay, is admissible in CINA cases. *In re Long*, 313 N.W.2d 473, 479 (Iowa 1981). As indicated above, we do not find L.H.'s rights were adversely impacted concerning the statutory matters. Nor do we determine counsel's representation was ineffective in any way. Counsel acted as shown in the record after consulting with L.H., and did so in a manner construed by us to be within the range of reasonable competency. L.H. was a necessary party to the termination action. *See* §232.112 (1). As a party the statements she made are admissible under Iowa Rule of Evidence 801.

III. The next issue to address is whether reasonable efforts were made to reunify L.H. with her children. Reasonable efforts to reunite parent and child are required prior to the termination of parental rights. *In re T.C.*, 522 N.W.2d

108, 108 (Iowa App. 1994). *See* Iowa Code § 232.102. Generally, the DHS must make reasonable efforts to provide services to eliminate the need for removal. *See* Iowa Code § 232.102(9)(a) (1995). The reasonable efforts concept would broadly include a visitation arrangement designed to facilitate reunification while protecting the child from the harm responsible for the removal. *Id.*

Visitation between a parent and child is an important ingredient to the goal of reunification. *See In re S.W.*, 469 N.W.2d 278, 280-81 (Iowa App. 1991). However, the nature and extent of visitation is always controlled by the best interests of the child. *See In re Augustus*, 158 N.W.2d 625, 629 (Iowa 1968) (best interest standard is the governing consideration in determining temporary custody). This standard may warrant limited parental visitation. See *In re C.G.*, 444 N.W.2d 518, 520 (Iowa App. 1989).

Preserving families is the underlying principle behind these proceedings. *In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993). A parent's challenge to services should be made when they are offered. *In re H.H.*, 528 N.W.2d 675, 678 (Iowa App.1995).

A myriad of reunification services were provided to L.H. including several psychological evaluations, supervised visitations, several treatment programs, the violator's program, residential treatment care and the Parent Survival Program. Additionally the children received individual counseling and their therapist also provided L.H. with counseling. L.H.'s continued use of drugs and alcohol as well as her ongoing criminal activity unfortunately lead to the

determination that although more than reasonable services were provided L.H. she did not take advantage of them.

IV. The last issue is whether the termination of parental rights is in the best interests of the children. Even if the statutory requirements for termination of parental rights are met, the decision to terminate must still be in the best interests of the children. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). In determining the best interests of a child, the court looks to the child's long-range and immediate interests. *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997). The court must consider the physical, mental, and emotional condition and needs of the children in deciding to terminate parental rights. *In re C.W.*, 554 N.W.2d 279, 282 (Iowa App. 1996).

A good prediction of the future conduct of a parent is to look at the past conduct. *In re N.F.*, 579 N.W.2d 338, 341 (Iowa App. 1998). The parent's past performance may indicate the quality of care the parent is capable of providing in the future. *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997).

Upon reviewing the record de novo we find the evidence clearly and convincingly reflects the statutory criteria of section 232.116(1)(e) and (g) have been met, and the best interests of the children dictate L.H.'s parental rights be terminated. During the two years prior to the termination hearing L.H. did little to provide structure and stability in her own life, let alone provide the children with a stable and safe environment in which to live with her. At the time of the termination hearing she was in danger of having her probation revoked and being returned to prison.

We affirm the decision of the juvenile court removing B.B. and A.B. from their mother's care and terminating her parental rights.

AFFIRMED.