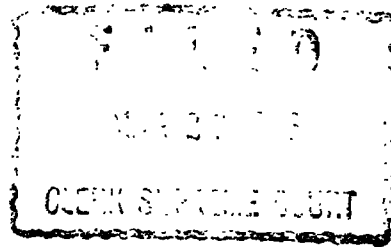


IN THE COURT OF APPEALS OF IOWA

No. 6-047 / 95-1529

000103



IN THE INTEREST OF S.R., Minor Child.

S.R.H., Father.

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Associate Juvenile Judge.

An incarcerated father appeals from a juvenile court order terminating his parental rights. **REMANDED WITH DIRECTIONS.**

Eric W. Johnson of Beecher, Rathert, Roberts, Field, Walker & Morris, P.C., Waterloo, for appellant.

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

Sharon Briner, Assistant Public Defender, Waterloo, for minor child.

Heard by Sackett, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

S.R. was born on December 28, 1984. Her mother is Kandy and her father is Sherman. On March 23, 1994, the State filed a child in need of assistance (CINA) petition based on the mother's substance abuse problem. On May 4, 1994, the court found S.R. and her siblings to be CINA pursuant to Iowa Code sections 232.26(b), (c)(2), (n), and (o) (1993).

On May 15, 1995, the State filed an amended and substituted termination petition seeking to terminate the parental rights of the mother and the putative fathers of the various siblings, including Sherman as S.R.'s father. Sherman received personal service of the notice of termination hearing on May 18, 1995, while in a residential treatment facility in Waterloo. The notice recited:

[Y]ou have a right to be represented by an attorney at the hearing. If you are financially unable to hire an attorney, the Court will appoint one for you, if you notify the Clerk of Juvenile Court of this fact within five days after you receive this Notice. If you do not employ an attorney or notify the Clerk within the specified time that you wish an attorney, you will be deemed to have waived this right.

Notice by publication was also had between May 30, 1995 and June 13, 1995.

Sherman did not contact the clerk to request counsel.

The termination hearing was held as scheduled on July 28, 1995. The father was in a residential treatment center in Mt. Pleasant, Iowa, at that time. He did not appear at the hearing nor was he represented by an attorney or a guardian ad litem.

The juvenile court entered an order on July 28, 1995, terminating Sherman's parental rights.

On August 3, 1995, the court received a letter from Sherman. He indicated he called on July 28 requesting a continuance of the hearing because he was in the residential treatment center in Mt. Pleasant. He asked that a copy of the letter be sent to his attorney; he claimed he thought an attorney had been appointed for him; and he noted his attorney had not contacted him. He then stated if no attorney had been appointed, he wanted one appointed. A second letter from Sherman was received by the district court on August 9th. On September 1, 1995, the court entered an order concluding there was not good cause to set aside the termination order. The court then appointed appellate counsel for Sherman.

Sherman appeals.

I. *Scope of Review.* Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1984) *cert. denied sub nom. J.G. v. Tauke*, 469 U.S. 1222 (1985).

II. *Due Process.* 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 at 870. 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.

Santosky v. Kramer, 455 U.S. at 753-54, 102 S. Ct. at 1394-95, 71 L. Ed. 2d at 606.

The termination of Sherman's parental rights requires that we scrutinize rather closely the procedure employed by the State in the termination proceedings to ensure that due process requirements have been met. Generally, the fundamental requirement of due process is an opportunity to be heard. *Goldberg v. Kelley*, 397 U.S. 254, 267, 90 S. Ct. 1011, 1020, 25 L. Ed. 2d 287, 299 (1970); *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972).

Sherman raises two procedural issues on appeal. We will consider each in the divisions that follow.

III. *Guardian Ad Litem.* Sherman contends the district court erred in not appointing a guardian ad litem pursuant to Iowa Rule of Civil Procedure 13. This rule states:

No judgment without a defense shall be entered against a party then a minor, or confined in a penitentiary, reformatory or any state hospital for the mentally ill, or one judicially adjudged incompetent, or whose physician certifies to the court that he appears to be mentally incapable of conducting his defense. Such defense shall be by guardian ad litem; but the regular guardian or the attorney appearing for a competent party may defend unless the court supersedes him by a guardian ad litem appointed in the ward's interest.

Iowa R. Civ. P. 13. Rule 13 is intended to protect specifically listed classes of litigants and place these litigants on equal footing through representation by a guardian ad litem. *See In re Marriage of McGonigle*, 533 N.W.2d 524, 525 (Iowa 1995).

The specifically listed protected classes are: (1) minors; (2) parties confined in a penitentiary, reformatory, or any state hospital for the mentally ill; or (3) parties judicially adjudged incompetent, or whose physician certifies to the court that he appears to be mentally incapable of conducting his defense. Iowa R. Civ. P. 13. We are only concerned with the second class. The issue before us is whether Sherman was “confined in a penitentiary, reformatory, or any state hospital for the mentally ill” at the time of the hearing which resulted in the termination of his parental rights.

Digressing for a moment, we are reminded that the Iowa Rules of Civil Procedure were adopted in 1943. In the annotated Iowa Rules of Civil Procedure, the

comment to rule 13 states that rules 13 and 14 changed and consolidated prior separate statutes and made the practice identical in all cases as there described.

The two statutes referred to in the comment are sections 10989 and 10997 of the 1939 Iowa Code. Section 10989 provided, "No judgment can be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or, if there is none, by a person appointed by the court." Section 10997, although not relevant to this action, provides in essential part that no judgment could be rendered against a minor until after a defense by a guardian.

Under section 12889 of the 1939 Iowa Code and section 687.1 of the 1975 Iowa Code, public offenses were divided into felonies and misdemeanors. A felony was described as a public offense "which may be punished with death, or which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary or men's reformatory." Iowa Code § 12980 (1939).¹ Most convicted felons were imprisoned either in the penitentiary at Fort Madison or the men's or women's reformatory.² Section 13963 (1939) and section 789.16 (1975) provided:

¹ The 1975 Iowa Code at section 687.2 provided, "a felony is a public offense, which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary or men's reformatory or the women's reformatory."

² Section 13960 of the 1939 Iowa Code and section 789.13 of the 1975 Iowa Code provided that when a person was over sixteen years of age and was convicted of a felony, except treason or murder, the court imposing a sentence of confinement in a penitentiary, men's or women's reformatory, was not to fix the limit or duration of the penalty, but the term of imprisonment was not to exceed the maximum allowed by law for the crime committed.

Any male person who shall be committed to the penitentiary, except those committed of murder, treason, sodomy, or incest, and who at the time of commitment is between the ages of sixteen and thirty years, and who has never before been convicted of a felony, shall be confined in the men's reformatory; provided, however, that persons between the ages of sixteen and thirty years convicted of rape, robbery, or of breaking and entering a dwelling house in the nighttime with intent to commit a public offense therein, may, as the particular circumstances may warrant, in the discretion of the court, be committed to either the men's reformatory at Anamosa or the penitentiary at Fort Madison.

Iowa Code § 13963 (1939) and Iowa Code § 789.16 (1975).

We have referred to these provisions of the 1939 and 1975 Iowa Codes only to emphasize that in those time frames the trial judge did the sentencing and, when doing so, committed criminal defendants convicted or pleading guilty to a felony to either the men's reformatory at Anamosa, the women's reformatory, or the penitentiary at Fort Madison. In addition, as will be pointed out later, there has been a considerable extension of institutions where criminal defendants can be confined. In those instances, the places of confinement take on the semblance of a penitentiary and reformatory.

The massive revision and adoption of the new criminal code,³ which generally took effect on January 1, 1978, completely changed the method of confining criminal

³ Under our present code, a public offense is described as one which is prohibited by statute and is punishable by fine or imprisonment. Iowa Code § 701.2 (1995). A public offense is a felony of a particular class when the statute defining the crime declares it to be a felony. Felonies by statute carry different classes. Iowa Code § 701.7 All public offenses which are not felonies are misdemeanors and misdemeanors are aggravated misdemeanors, serious misdemeanors, or simple misdemeanors.

defendants. Unlike the prior law that vested this responsibility with the sentencing judge, Iowa Code section 901.7 (1995) does not dictate the place of confinement. Rather, that section directs that when imposing a sentence of confinement for more than one year,⁴ the court is to commit the defendant to the custody of the director of the Iowa Department of Corrections.⁵ Iowa Code § 901.7 (1995). The director, in turn, determines the appropriate place of confinement from the list of those institutions administered by him or her. Iowa Code § 902.5 (1995).

The Iowa Department of Corrections was established to be responsible for the control, treatment, and rehabilitation of offenders committed under law to the following institutions: Iowa correctional institution for women; Iowa state men's reformatory; Iowa state penitentiary; Iowa medical and classification center; North central correctional facility at Rockwell City; Mt. Pleasant correctional facility; Clarinda correctional facility; correctional release center; rehabilitation camps; and

⁴ Iowa Code chapter 903 (1995) relates to misdemeanors. Section 903.4 concerns the confinement of misdemeanants for a period of one year or less; also, where confinement is for more than one year, custody is to the director of the Iowa Department of Corrections. *See also* Iowa Code § 903.5 (1995) (establishes a preference for commitment to local facilities for misdemeanants). There are a number of exceptions that have not been noted in this opinion.

⁵ Iowa Code section 902.3 (1995) requires that the court, in imposing a sentence of confinement, commit the person into the custody of the director of the Iowa Department of Corrections for an indeterminate term. There are exceptions to this general statement. As noted in section 902.3, the court may sentence a person convicted of a Class D felony for violation of section 321J.2 to imprisonment for up to one year in a county jail under section 902.9(4) and that person is not under the custody of the director of the Iowa Department of Corrections.

other institutions related to the preceding institutions but not attached to the campus of the main institution as program developments require. As it relates to Mt. Pleasant, Iowa Code section 904.204 (1995) provides:

The correctional facility at Mt. Pleasant shall be utilized as a medium security facility for men primarily for treatment of inmates who exhibit treatable personality disorders, with or without accompanying history of drug or alcohol abuse. Such inmates may apply for and upon their application may be selected for treatment by the staff of the treatment facility at Mt. Pleasant in accordance with section 904.503.

Iowa Code § 904.204 (1995).

Returning then to the problem at hand, all we have before us is that Sherman, at the time of the termination proceedings, was an inmate at Mt. Pleasant. We know not the circumstances surrounding his entry to Mt. Pleasant nor the crime involved that caused his commitment to the director of the Iowa Department of Corrections.⁶ We therefore are compelled to remand this case to the district court for the sole purpose of making a record as to the circumstances surrounding the reasons for his commitment to Mt. Pleasant.

Thus, we remand this case to the trial court to take additional evidence as to the circumstances surrounding Sherman's entry to Mt. Pleasant. A copy of the

⁶ There is little case law in Iowa as to what qualifies as a penitentiary, reformatory, or a state hospital for the mentally ill. The supreme court has suggested a drug addiction ward of St. Luke's Hospital in Cedar Rapids is not a state hospital for the mentally ill. *In re T.C.*, 492 N.W.2d 425, 428-29 (Iowa 1992). The court has also suggested the county jail is not a penitentiary or reformatory. *Id.* at 429.

transcript of the additional evidence, along with the pertinent exhibits, shall be filed with the clerk of the supreme court no later than six weeks following the filing of this decision. The parties may file additional briefs, if desired, but the same must be filed within the six-week limitation. We retain jurisdiction. Since we retain jurisdiction, we direct that the attorney appointed to represent Sherman on appeal shall continue to represent him at the remand proceedings.

IV. Court-Appointed Counsel. Sherman contends he had a right to counsel and the district court erred in not providing him counsel. When a petition to terminate parental rights is filed, the parent identified in the petition has the right to counsel or court-appointed counsel if they cannot afford counsel. Iowa Code § 232.113 (1995). Sherman was personally served with notice which stated, “If you are financially unable to hire an attorney, the Court will appoint one for you, *if you notify the Clerk of Juvenile Court of this fact within five days after you receive this Notice.*” (Emphasis added.) The requirements to obtain court-appointed counsel are very plainly stated in the notice. Sherman was personally served with this notice. Sherman made no effort to contact the clerk to request court-appointed counsel until the letter received by the district court on August 3. We find Sherman waived his right to court-appointed counsel due to his inaction following the notification of his rights in the personal service.

In summary, we agree with the trial court that Sherman waived his right to court-appointed counsel, but we remand this case to the trial court for proceedings not inconsistent with this opinion.

REMANDED WITH DIRECTIONS.

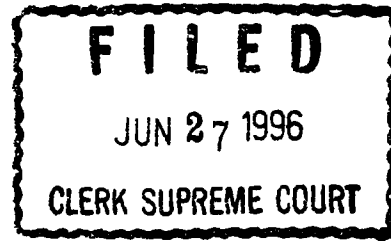
IN THE COURT OF APPEALS OF IOWA

No. 6-047 / 95-1529

IN THE INTEREST OF S.R., Minor Child.

S.R.H., Father,

Appellant.



Remand following appeal from the Iowa District Court for Black Hawk County. Stephen C. Clarke, Associate Juvenile Judge.

Following remand, an incarcerated father contests a juvenile court order terminating his parental rights. **AFFIRMED.**

Eric W. Johnson of Beecher, Rathert, Roberts, Field, Walker & Morris, P.C.,
Waterloo. for appellant.

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

Sharon Briner, Assistant Public Defender, Waterloo, for minor child.

Heard by Sackett, C.J., and Habhab and Huitink, JJ.

HABHAB, J.

This opinion supplements our prior opinion filed on March 27, 1996. *In re S.R.*, ___ N.W.2d ___ (Iowa App. 1996). In that opinion, we remanded this case to the trial court with instructions to take additional evidence as to the circumstances surrounding Sherman's entry to Mt. Pleasant. That record has now been made, filed, and reviewed by the court.

As noted in our previous opinion, Sherman received personal service of the notice of termination hearing on May 18, 1995, while in a residential treatment facility in Waterloo. The notice recited:

[Y]ou have a right to be represented by an attorney at the hearing. If you are financially unable to hire an attorney, the Court will appoint one for you, if you notify the Clerk of Juvenile Court of this fact within five days after you receive this Notice. If you do not employ an attorney or notify the Clerk within the specified time that you wish an attorney, you will be deemed to have waived this right.

Notice by publication was also had between May 30, 1995 and June 13, 1995.

Sherman did not contact the clerk to request counsel. In our earlier opinion, we held that Sherman waived his right to counsel.

Also as noted in our previous opinion, at the time of the termination hearing Sherman was an inmate at the correctional facility at Mt. Pleasant. From our review of the newly filed transcript, it appears the sheriff was directed to transfer Sherman "to the Iowa Mental Health Institute in Mt. Pleasant, Iowa."

We conclude, under the circumstances here, that the order to confine Sherman to the correctional facility at Mt. Pleasant is the equivalent to a confinement to a penitentiary or reformatory under Iowa Rule of Civil Procedure 13.¹

The State contends rule 13 does not apply, for Sherman was not in a penitentiary or reformatory at the time of the termination hearing but was in a residential facility for substance abuse treatment. The State relies on *In the Interest of T.C.*, 492 N.W.2d 425 (Iowa 1992), to support its position.

The holding in *T.C.* should be limited to the facts of that case. There, the father, even though he was timely and properly served with an original notice of the child in need of assistance proceedings, asserted that under Iowa Rule of Civil Procedure 13 he was entitled to a guardian ad litem to represent him at the CINA hearing for he was confined in the drug addiction ward of St. Luke's Hospital in Cedar Rapids. He claimed that since a guardian ad litem was not appointed, the CINA adjudication was void.

The supreme court first ruled that the only language in rule 13 which might apply to the father was the reference to a party confined in a penitentiary,

¹ **Defense by incompetent, prisoner, etc.** No judgment without a defense shall be entered against a party then a minor, or confined in a penitentiary, reformatory or any state hospital for the mentally ill, or one judicially adjudged incompetent, or whose physician certifies to the court that he appears to be mentally incapable of conducting his defense. Such defense shall be by guardian ad litem; but the regular guardian or the attorney appearing for a competent party may defend unless the court supersedes him by a guardian ad litem appointed in the ward's interest.
Iowa R. Civ. P. 13.

reformatory, or any state hospital for the mentally ill. The supreme court went on to say, however, that St. Luke's Hospital in Cedar Rapids did not precisely fit into that language. It concluded that St. Luke's "is not a state hospital for mentally ill nor is the county jail a penitentiary or reformatory." But here, Mt. Pleasant is a state correctional facility which is to be utilized as a medium security facility "for men primarily for treatment of inmates who exhibit treatable personality disorders, with or without accompanying history of drug or alcohol abuse." Iowa Code § 904.204 (1995).

The State advances a strong argument that rule 13 does not apply under the circumstances of this case for it applies only in civil cases in which the defendant does not have a right to court-appointed counsel. The State points out that in civil actions between private parties, each party is generally responsible for its own counsel. Thus, to prevent injustice towards one who is confined in a penitentiary, the rule allows for the defense of a person by a guardian ad litem.

The State then proceeds to argue that, unlike a party in a civil suit, a parent, whether incarcerated or not, is entitled to an attorney for a termination hearing pursuant to Iowa Code section 232.113 (1995). If the parent desired an attorney and could not afford one, a request could be made for one to be appointed. It continues with its argument that this code provision gives the father a greater right than a defendant in a civil suit for the father has the right to a court-appointed attorney. Thus, the State concludes the code section is controlling, not rule 13.

We find considerable merit in this contention of the State. The supreme court has stated the purpose of rule 13 is to “bring before the court, through one acting as an officer of the court, *the vicarious presence* of one who for some reason is unable to attend a civil trial or present a defense.” *In re Marriage of McGonigle*, 533 N.W.2d 524, 525 (Iowa 1995) (emphasis added). Here the father had, and waived, a statutory right to be represented by counsel.² He had an opportunity for a “vicarious presence” in court and opted not to utilize it.

Another recent decision of the supreme court reflects that the appointment of a guardian ad litem is not necessary if the purposes of rule 13 are otherwise satisfied. In *In re Marriage of Smith*, 537 N.W.2d 678, 680 (Iowa 1995), the supreme court held a judgment of dissolution entered against an otherwise competent incarcerated person was not void where the incarcerated person had voluntarily entered into a stipulation adopted by the dissolution decree. The *Smith* decision reflects that the court appears to be looking to see if the circumstances of a case “satisfied everything intended for [the incarcerated defendant] by rule 13.” *Smith*, 537 N.W.2d at 680.

The *Smith* and *McGonigle* cases indicate rule 13 is merely intended to put an incarcerated party on equal footing with other civil litigants not under the impediment of incarceration. *Smith*, 537 N.W.2d at 680; *McGonigle*, 533 N.W.2d at 525. It “is

² On appeal from the remand, the father argues he did not waive his right to counsel. Our prior opinion conclusively disposed of the waiver issue. To the extent Sherman offered additional evidence on this issue on remand, it was beyond the scope of the remand directed by this court and we will not consider it.

not intended to go any further for the classes it protects than to place them on an equal footing with those not under one of the impediments listed.” *McGonigle*, 533 N.W.2d at 525.

Sherman’s statutory right to counsel would have satisfied everything which was intended for an incarcerated defendant under rule 13 and would have given him a vicarious presence in the case. He was given the opportunity to be represented by counsel -- the same right accorded all parents in termination proceedings. To compel the juvenile court to appoint a guardian ad litem even after the father has waived his statutory right to counsel would appear to accord the father greater rights than other civil litigants in termination proceedings. We reject Sherman’s argument that the absence of a guardian ad litem rendered the termination order void under rule 13.

In his appeal, the only issue raised by Sherman was the application of rule 13, and he did not challenge the merits of the court’s decision to terminate his parental rights. Given that there is no appeal on the merits of the order, it is affirmed.

AFFIRMED.

Huitink, J., concurs; Sackett, C.J., specially concurs.

SACKETT, C.J. (concurring specially)

I concur with the majority opinion, although I question whether the Rules of Civil Procedure apply to juvenile cases.