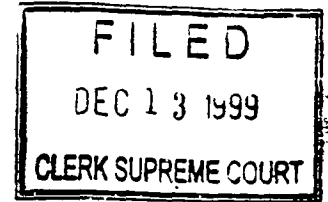


IN THE COURT OF APPEALS OF IOWA

No. 1999-426 (9-679) / 98-1530
Filed December 13, 1999



IN THE INTEREST OF K.P., J.P., M.H., Jr., and J.H., Minor Children,

M.H., Sr., Father of M.H., Jr. and J.H.,
Appellant,
B.P., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Karla J. Fultz, Associate
Juvenile Judge.

Father and mother appeal separately from the juvenile court order terminating
their parental rights pursuant to Iowa Code sections 232.116(1)(c) and 232.116 (1)(g)
(1997). **AFFIRMED.**

Lori M. Holm, and Christopher Kragne Des Moines, for appellant-father

Kermit L. Dunahoo, Des Moines, for appellant-mother.

Diane Stahle, Deputy Attorney General, for Appellee.

Catherine K. Levine, Guardian Ad Litem.

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

ZIMMER, J.

A father and mother appeal separately from the juvenile court order terminating their parental rights pursuant to Iowa Code sections 232.116(1)(c) and 232.116 (1)(g) (1997). We affirm.

Bonnie P. is the mother of four children: Kendra P., born in July 1989; Jesse P., born in July 1991; Matthew H., Jr., born in December 1992; and Jimmy H., born in February 1994. The father of Kendra and Jesse is Curtis P. The father of the two younger children is Matthew H., Sr. (Matt). This appeal involves only Bonnie's and Matt's parental rights.

These children were raised in a home of violence and chaos. After allegations of child abuse and drug use, all four children were removed from Bonnie's and Matt's custody on February 12, 1997. There had been three prior child abuse reports. While in foster care, all four children displayed severe behavioral disorders, including physical and verbal abuse of caregivers and siblings, self abuse, and sexual acting out. The two older children required hospitalization for their aggression and all four have received extensive individual therapy and psychotropic medications, even the youngest. All four are considered special needs children. They were adjudicated children in need of assistance (CINA) on June 12, 1997.

On July 31, 1998, the juvenile court terminated Bonnie's and Matt's parental rights pursuant to Iowa Code sections 232.116(1)(c) and 232.116(1)(g) (1997). The

court **determined none of the children could be returned to Bonnie's or Matt's custody without exposure to further harm.**

Bonnie and Matt appeal. Bonnie contends the State failed to use reasonable efforts to reunite her with her children. Matt asserts the juvenile court erroneously terminated pursuant to section 232.116(1)(c) and (g) and that he was denied effective assistance of counsel.

I. Scope of Review. We review proceedings to terminate a parent-child relationship de novo; we may review the facts as well as the law and adjudicate the parents' rights anew. *In re M.N.W.*, 577 N.W.2d 874, 875 (Iowa App. 1998) (citations omitted). Our primary concern is the best interests of the child. *Id.* The State need not delay until harm has actually occurred to a child, rather, “[o]ur statutory termination provisions are preventative as well as remedial.” *In re A.B.*, 554 N.W.2d 291, 293 (Iowa App. 1996) (citations omitted). The grounds for termination must be proven by clear and convincing evidence. *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa App. 1997) (citations omitted).

II. Bonnie's Parental Rights. Bonnie's only argument on appeal is that the State failed to use reasonable efforts to reunite her with her four children and provide services that would alleviate the problems that led to the children's removal. She claims she was not offered a sponsor to help her substance abuse recovery. Bonnie also states she did not receive therapy to address her domestic and sexual abuse problems.

Bonnie has not preserved error on the reasonableness of services. There is a requirement that reasonable services be offered to attempt to preserve the family unit. *In re H.L.B.R.*, 567 N.W.2d 675, 679 (Iowa App. 1997) (citations omitted). However, the reasonableness of reunification efforts are not the focus of termination hearings. *In re B.K.K.*, 500 N.W.2d 54, 57 (Iowa 1993). A challenge to services should be made when the case plan is entered, not when the termination is sought. *J.L.W.*, 570 N.W.2d at 781 (citation omitted). No evidence appears in the record that the parents challenged the services at the appropriate times.

Even if error had been preserved, Bonnie received extensive services. There were approximately sixteen months between the children's removal from the home and the termination. Bonnie underwent two different substance abuse evaluations. She began treatment on three occasions with two separate treatment facilities. She was discharged from both programs for unwillingness to work toward goals; she does not believe she has a substance abuse problem. She did not submit UAs on the required schedule. She displayed a similar pattern with individual therapists, being discharged for absences and unwillingness to participate.

Not only did Bonnie receive adequate services, she failed to cooperate or make progress with them. At the time of termination, Bonnie continued to be unemployed and had inadequate living arrangements. Bonnie denied that her children's behavioral problems stemmed from the way they were raised. She continued to deny she had a substance abuse problem. Bonnie has had regular involvement with the criminal

justice system since 1991. Her criminal history has contributed to the chaos of the home. The juvenile court properly terminated Bonnie's parental rights.

III. Matt's Parental Rights. Matt asserts three grounds in support of reversal. He first contends termination was in error under sections 232.116(1)(c) and (g). He also argues he was denied effective assistance of counsel because his attorney failed to present affirmative evidence at the termination hearing.

A. Section 232.116(1)(c). This code section permits termination when both of the following occur:

(1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents, or the court has previously adjudicated a child who is a member of the same family to be a child in need of assistance after such a finding.

(2) Subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

Matt argues the latter condition was not satisfied. He states that at the time of the termination hearing, he had a stable residence, was sober, attended AA meetings, and had graduated from a substance abuse program.

We disagree. The children were initially removed because of allegations of drug use, physical abuse and denial of critical care. These conditions had changed very little. At the time of the termination hearing, Matt was living with his mother in a three-room apartment. It is unclear how long he could continue employment and substance abuse treatment when he was unable to drive and faced jail on OWI (third

offense) and driving while barred charges. Just months before the termination hearing, Matt had been arrested for domestic abuse as well. Matt failed to maintain the schedule for urinalysis submission and failed one of the UAs. His sobriety began a mere two months before the termination hearing, one year after the original removal of his children. He attended individual therapy irregularly.. Matt's therapist noted that although Matt is "coming along," he "needs to work on [personal issues] before he would be able to parent two children. . . ." The foster care worker also had strong concerns that the children would be physically abused again if returned to Matt's custody. We find clear and convincing evidence the circumstances leading to the CINA adjudication continued to exist.

B. Section 232.116(1)(g). Matt contends it was error for the juvenile court to terminate under section 232.116(1)(g) because his children were not under age three at the time of the hearing. The petition alleged three statutory grounds for termination, sections 232.116(1)(c) (e) and (k); subsection (g) was not alleged in the petition. The juvenile court found clear and convincing evidence that sections 232.116(1)(c) and (g) were met. The guardian ad litem contends the latter was a typographical error and the juvenile court clearly intended to use subsection (e). The State concedes there was no basis for termination under subsection (g).

We find it unnecessary to address this argument. Where parental rights are terminated on several grounds, we need only find sufficient evidence under one of the sections in order to affirm the termination. *In re A.J.*, 553 N.W.2d 909, 911 (Iowa

App. 1996) (citation omitted). We have already found clear and convincing evidence under subsection (c).

C. Ineffective Assistance of Trial Counsel. Matt claims his trial counsel was ineffective for failing to present any ‘affirmative evidence.’ No witnesses were called on Matt’s behalf; Matt contends this was per se deficient. Matt claims the attorney should have called Matt’s mother and his counselors to testify or provided evidence of Matt’s attendance at AA meetings. Matt admits, however, that “trial counsel did an excellent job of pointing out the facts [a] witness did not know,” on cross-examination. Matt claims this failure resulted in termination.

We do not find Matt’s trial counsel was ineffective. Trial counsel in terminations are generally governed by the same ineffectiveness standard used in criminal proceedings. *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992) (citations omitted). In order to prevail on an ineffective assistance claim, a parent must show (1) counsel's performance was deficient, and (2) actual prejudice resulted. *Id.* (citations omitted). We afford trial attorneys a presumption that their conduct falls within the range of “reasonable professional competency.” *Id.* (citation omitted). The burden of proving ineffectiveness is on the claimant. *Id.* (citation omitted).

Matt has not demonstrated ineffectiveness or prejudice. Failure to call witnesses is often a strategical decision. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). A claim of ineffectiveness for failing to call a witness collapses where the defendant cannot show a reasonable probability that, but for his trial counsel's failure to call a particular witness, the outcome would have been different. *Id.* It

would be mere guesswork on our part as to the substance of the proposed witnesses' testimony and its effect on the outcome. The evidence against Matt more than justified termination. Affirmative evidence was received. Matt himself testified he was attending AA meetings. Through cross-examination, his counsel effectively raised Matt's defenses and questioned the reliability of some witnesses' testimony. We find neither a failure to satisfy a duty nor prejudice.

AFFIRMED.