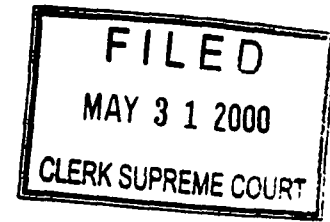


IN THE COURT OF APPEALS OF IOWA

No. 0-201 / 99-1734
Filed May 31, 2000



**IN THE INTEREST OF K.C.,
Minor Child,**

**C.C., Father,
Appellant.**

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

Father appeals the juvenile court's order terminating his parental rights.

AFFIRMED.

Marla Suddreth of Borseth & Genest Law Office, Altoona, for appellant.

Thomas J. Miller, Attorney General, Tabitha Gardner, Assistant Attorney
General, and Jennifer Navis, Assistant County Attorney, for appellee-State.

Mike Bandstra, Des Moines, guardian ad litem for appellee-minor child.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

STREIT, P.J.

Chris appeals the termination of his parental rights, claiming the State failed to prove the statutory elements for termination were met by clear and convincing evidence and he received ineffective assistance of counsel. We affirm, finding no merit to his claims.

I. Background Facts & Proceedings.

Kendall and Kevin, both born June 23, 1996, are the sons of Chris. Kevin subsequently died of pneumonia. The department of human services (DHS) became involved with Kendall in April of 1998 after he suffered a closed-head injury at the hands of Chris's then girlfriend. Chris was granted the opportunity to retain custody of his son if he would agree to move to a safe residence for his son. Chris, however, chose to remain in his present living situation and consented to Kendall's removal from the home. The court ordered Chris to comply with a substance abuse and psychosocial evaluation, submit to random urinalysis, and participate in visitation with his son. In May of 1998 Chris decided to move to Chicago, Illinois, in an effort to "get his life back together." During this relocation, he failed to obtain services in Chicago, failed to submit to urinalysis, and only visited Kendall on one occasion. During Chris's absence, Kendall was adjudicated a child in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(b) and (6)(c)(2) (1997). Chris returned to Des Moines in the middle of August 1998.

Upon his return, Chris visited his son sporadically, completed a substance abuse evaluation and a cognitive-behavioral program, lived a transient lifestyle

drifting between multiple homes, failed to submit to urinalysis with any degree of consistency, tested positive for cocaine on three occasions, and was arrested for harassment of a public official and interference with official acts. Chris again relocated to Chicago in November of 1998. During this hiatus, Chris did not receive any services, did not submit to urinalysis, and was found to be a perpetrator of sexual abuse on his girlfriend's six-year-old son. Chris returned to Des Moines in February of 1999.

Upon his return, visitation was suspended due to the harmful effects of Chris's inconsistency on Kendall; he continued to live a transient lifestyle, including a stint at the Polk County Jail; failed to submit to urinalysis, was unable to find employment, failed to properly fill out a sex offender evaluation, failed to follow through with individual counseling, admitted to continued use of cocaine, tested positive for cocaine and marijuana, and began living with a woman who had her parental rights terminated with regard to her three children. Ultimately, the State filed a petition to terminate Chris's parental rights. At the time of trial, Chris had not seen Kendall for eight months. The trial court terminated Chris's parental rights pursuant to Iowa Code sections 232.116(1)(b), (c), (d), (f), and (g) (1999).

Chris appeals, claiming clear and convincing evidence did not support termination and he was denied effective assistance of counsel.

II. Clear and Convincing Evidence Supports the Termination.

A. Standard of Review. Appellate review of proceedings to terminate a parent-child relationship is de novo; thus, "it is our duty to review the facts as well

as the law and adjudicate rights anew on those propositions properly preserved and presented to us.” *In re O’Neal*, 303 N.W.2d 414, 422 (Iowa 1981). We accord weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses whom the court heard and observed firsthand, but we are not bound by those findings. *Long v. Long*, 255 N.W.2d 140, 143 (Iowa 1977).

B. The Merits. Chris claims the State failed to show the statutory elements for termination were met by clear and convincing evidence. Although he professes error as to each statutory ground found by the trial court, “we need only find grounds to terminate under one of the sections cited by the juvenile court to affirm.” *In re S.R.*, 600 N.W.2d 63, 64 (Iowa App. 1999) (citation omitted). We will therefore limit our analysis to Iowa Code section 232.116(1)(g).

Iowa Code section 232.116(1)(g) (1999) permits the juvenile court to terminate the parent-child relationship if the court finds all of the following have occurred:

- (1) The child is three years of age or younger.
- (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
- (3) The child has been removed from the physical custody of the child’s parents for at least six months of the last twelve months, or for the last six consecutive months and any trial period at home has been less than thirty days.
- (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child’s parents as provided in section 232.102 at the present time.

Chris does not dispute the first three elements are supported by clear and convincing evidence. Rather, he focuses his attention on whether Kendall can be safely returned to his care under subsection four.

The court has long recognized there exists a parental interest in the integrity of the family unit, but such interest is not absolute and may be forfeited by certain conduct. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). The State has the duty to see that every child within its borders receives proper care and treatment and must intercede when parents abdicate that responsibility. *In re I.L.G.R.*, 433 N.W.2d 681, 689 (Iowa 1988). The State must act to prevent probable harm to children and need not delay until actual physical harm has occurred. *Id.* The threat of probable harm will justify termination of parental rights, and the perceived harm need not be the one that supports the children's initial removal from the home. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992). Our primary concern in a termination proceeding is the best interests of the child. Iowa R. App. P. 14(f)(15); *In re Dameron*, 306 N.W.2d at 745.

Returning Kendall to Chris would expose him to a threat of identifiable harm. We can gain insight into a child's prospects for remaining safe and healthy by reviewing evidence of the parent's past performances, for it may be indicative of the parent's future capabilities. See *In re K.F.*, 437 N.W.2d 559, 560 (Iowa 1980). Chris simply does not possess the dedication, foresight, sense of responsibility, or willingness to raise Kendall. He is unable to provide a stable and safe living environment for his son. He cannot maintain steady employment to provide for Kendall's core essentials. Chris cannot resist the temptation of illicit substance abuse. He has failed to follow the court's directives concerning his drug abuse, his psychosocial health, and the allegation of sexual abuse. He refuses to consistently visit his son and when things become tough he runs from

his problems as demonstrated by his numerous relocation efforts to Chicago. Although each problematic area outlined above may not be worthy of termination in isolation, in the aggregate the problems are overwhelming and endangered Kendall's future health and safety. The juvenile court, based on clear and convincing evidence, correctly terminated Chris's parental rights under Iowa Code section 232.11(1)(g).

Chris also claims his case is one of extenuating circumstances under Iowa Code section 232.116(3) and therefore the court needlessly terminated his parental rights. He claims the death of his son and the grief inherent in such a loss is the source of his present difficulties. While respectful of that pain, the best interests of Kendall are our paramount consideration. See *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990). For

[t]here are a number of stern realities faced by a juvenile judge in any case of this kind. Among the most important is the relentless passage of precious time. The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems. Neither will childhood await the wanderings of judicial process.

In re A.C., 415 N.W.2d 609, 613 (Iowa 1987). We cannot, therefore, grant Chris any additional time. Kendall is a prime candidate for adoption, has made significant strides since his placement in foster care, and there are but scattered remains of any parent-child bond. Termination is Kendall's best interests.

III. Ineffective Assistance of Counsel.

A. Standard of Review. We review de novo constitutional claims of ineffective assistance of counsel. *In re D.P.*, 465 N.W.2d 313, 314 (Iowa App. 1990).

B. The Merits. Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). The burden is on the father to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See *Risdal*, 404 N.W.2d at 131-32. An ineffective assistance of counsel claim may be disposed of if he fails to prove either prong. See *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm the termination based on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. See *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996). The test for prejudice is whether counsel's failure worked to Chris's actual and substantial disadvantage to the extent a reasonable probability exists that but for the trial attorney's unprofessional errors, the result would have been different. See *State v. Johnson*, 534 N.W.2d 118, 128 (Iowa App. 1995). A reasonable probability is one sufficient to undermine confidence in the outcome. See *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996).

Chris cannot carry his burden of proving prejudice by a preponderance of the evidence. The case for termination was so overwhelming that the mere addition of a couple character witnesses or the exclusion of some rather meaningless evidence would not have radically altered the court's decision. The evidence for termination is simply too strong. The juvenile court is affirmed.

AFFIRMED.