

IN THE COURT OF APPEALS OF IOWA

No. 7-189 / 96-1971

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

J.C., Father,
Appellant.

Appeal from the Iowa District Court for Scott County, John G. Mullen, District
Associate Judge.

Father appeals from juvenile court order terminating his parental rights.

AFFIRMED.

Donna M. Humpal of the M.W. Liebbe Law Office, Davenport, for appellant.

Thomas J. Miller, Attorney General, Diane Stahle, Special Assistant Attorney
General, Marne E. Woods, Assistant Attorney General, William E. Davis, County
Attorney, and Gerda Lane, Assistant County Attorney, for appellee-State.

Jack E. Dusthimer, Davenport, Guardian ad litem for minor child.

Considered by Habhab, C.J., and Huitink and Streit, JJ.

HUITINK, J.

J.C. appeals the termination of his parental rights to his son S.L. We affirm.

A.L., age twenty-one, and J.C., age twenty-four, are the parents of a son, S.L., born April 4, 1992. The family came to the attention of the Scott County Department of Human Services in March 1993 by way of a referral from S.L.'s maternal grandfather, W.L. W.L. reported A.L. had shown a consistent lack of interest in S.L. and often left him with inappropriate caretakers.

In June 1993, S.L. was adjudicated a child in need of assistance pursuant to Iowa Code sections 232.2(6)(a), 232.2(6)(c)(2), 232.2(6)(g), and 232.2(6)(j) (1993). The juvenile court found A.L. was immature and often left the care of S.L. to others. The court also noted J.C. was confined to a halfway house. S.L. was placed in the temporary custody of W.L.

In August 1993, the juvenile court entered a dispositional order continuing placement with S.L.'s grandfather with liberal visitation granted to A.L. An April 1994 Permanency/Review Order appointed W.L. as guardian and custodian of the child. Services through the DHS were discontinued. In October 1994, the court ordered supervised visits between S.L. and J.C. The guardianship continued until W.L. died as a result of an automobile accident in February 1995. Services were reinstated for A.L. and S.L. was placed in the custody of his maternal great aunt and

uncle. The court later found the placement was unsuitable and transferred the child to foster care in October 1995.

In August 1996, the juvenile court terminated the parental rights of A.L. citing her instability, her absence from S.L.'s life for extended periods of time, and her lack of remedial progress. A.L.'s rights were terminated pursuant to Iowa Code sections 232.116(1)(d), 232.116(1)(h), and 232.117 (1995). This decision was not appealed.

In June of 1992, J.C. was sentenced to ten years imprisonment for second-degree burglary, second-degree criminal mischief, fourth-degree theft, and assaulting A.L. He served seven months in prison and then seven months in a halfway house in West Union. J.C. has since not been charged with any additional crimes although he has violated his parole conditions. The record indicates J.C. avoided supervision by the Department of Corrections for over a year by hiding out with family members.

J.C.'s parental rights were terminated in October 1996 pursuant to Iowa Code sections 232.116(1)(d), 232.116(1)(h), and 232.117 (Iowa 1995). The juvenile court expressed dismay that J.C. had failed to take advantage of the October 1994 order authorizing supervised visitation with his son. The court further noted J.C. had not maintained contact with service providers or had demonstrated any interest in meeting S.L.'s needs. The court also observed J.C. had "demonstrated little ability to work within the correctional system" and that "given his past behavior," the court was "not satisfied that he will be able to meet the needs of this child or to parent in any

reasonable time.” The efforts made by J.C. to resume care of S.L. were initiated after the termination petition was filed and were thus deemed “too little too late.”

J.C. appeals the termination order asserting the following errors: (1) the juvenile court erred in finding clear and convincing evidence that he did not maintain contact with S.L.; (2) the court erred in concluding the circumstances surrounding the abuse or neglect of his son still constitute imminent danger to S.L.; (3) the court erred in not finding clear and convincing evidence that termination would be detrimental to S.L.; and (4) his counsel was ineffective for failing to secure the presence of the witnesses who instead testified by way of written stipulations.

Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1989), *cert. denied sub nom., J.G. v. Tauke*, 469 U.S. 1222 (1985). We give weight to the findings of fact made by the juvenile court, but we are not bound by them. *Id.* at 491-92.

The primary concern in termination proceedings is the best interests of the child. Iowa R. App. P.14(f)(15); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981):

We look to the child’s long-range, as well as immediate interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent’s past performance, for that performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventive as well as remedial. They are designed to prevent probable harm to a child.

In re R.M., 431 N.W.2d 196, 199 (Iowa App 1988) (citing *Dameron*, 306 N.W.2d at 745).

J.C. asserts he wrote frequent letters and cards to S.L. and his mother while he was incarcerated. After his release, he claims he made numerous requests for visitation but to no avail. J.C. offered photographs of family get-togethers where both he and S.L. were present in addition to witnesses who testified to the open and loving relationship between J.C. and his son. J.C. was incarcerated again in April 1996 but wrote to DHS requesting visits during that time. Finally, J.C. maintains he has completed drug and alcohol treatment as well as parenting courses in an attempt to become a more suitable father to S.L.

Upon de novo review of the record, we find clear and convincing evidence J.C. has failed to develop and nurture a significant relationship with his son. J.C. was incarcerated shortly after S.L.'s birth and then was incarcerated again after absconding while on parole. Accordingly, J.C., by his actions, bears responsibility for the absence of a relationship with his son. *See In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa App. 1994) (unavailability to parent as a result of being incarcerated is no excuse for parent's conduct for purposes of proceedings to terminate parental rights). His inability to abide by the conditions of his parole and to rehabilitate himself demonstrates that reunification was not a priority for J.C.

We note that after being granted supervised visitation in October 1994, J.C. failed to exercise the visitation despite the efforts of DHS to facilitate contact with his son. He has also failed to provide financial support for S.L. At the time he was granted visitation, J.C. had not seen 2 ½ year old S.L. since the child was three months old. Moreover, testimony by the caseworker revealed S.L. has never identified J.C. as his father.

J.C. requests that we recognize the unsupervised visitation he insists surreptitiously took place while he was absconding from the law. We refuse to do so. Unlawful contact with his son outside the supervision of the court and DHS cannot be credited toward J.C.'s remedial efforts. Assuming the visits actually took place, they were initiated with total disregard for the safety and well-being of S.L. and will not be condoned.

J.C. also asserts the State failed to provide reasonable services to reunite him with S.L. He claims he made numerous attempts to contact the caseworker to determine what was required of him. J.C. further asserts no evidence was presented demonstrating S.L. would be in imminent danger in his custody.

The State is required to make reasonable efforts to reunite the parent and child prior to termination. *In re C.L.H.*, 500 N.W.2d 449, 453 (Iowa App. 1993). In proceedings to terminate parental rights, the reasonableness of services the State has

offered in an effort to preserve the family should be very carefully scrutinized. *In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993).

We conclude the State made sufficient efforts to contact J.C. and to initiate services. During the time J.C. claims he should have been offered services, he was absconding from the law and his whereabouts were unknown. J.C.'s illegal behavior was the obstacle to his receipt of services and reunification with S.L. Furthermore, we note J.C. rejected the opportunity to begin supervised visits with S.L. beginning in October 1994. Finally, the record indicates J.C. spent a year hiding from authorities and ultimately delayed his release from the correctional system. This kind of criminal behavior unequivocally places S.L. at risk and renders placement with his father impossible.

J.C. complains that services were provided to S.L.'s mother while DHS neglected his needs. We have already acknowledged DHS unsuccessfully attempted to offer services for J.C. In any event, J.C. had an obligation to demand services prior to the termination hearing. *In the Interest of B.K.K.*, 500 N.W.2d 54, 57 (Iowa 1993); *In the Interest of L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994). It is too late to challenge a reunification plan at the termination hearing. *In re L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994).

J.C. also disputes the court's finding that termination of his parental rights is in S.L.'s best interests. He asserts a bond exists between he and his son and, therefore, termination would be detrimental to S.L.

We have already determined J.C. has not established a meaningful relationship with his son. Accordingly, we reject his assertions that he and his son have bonded. Furthermore, the record indicates S.L. has experienced placements in numerous homes throughout his life and now lives in a foster home. To continue placement in long-term foster care while J.C. resolves his legal troubles is not in S.L.'s best interests. *See In re J.L.P.*, 449 N.W.2d 349, 353 (Iowa 1989). J.C.'s inability to fulfill the responsibilities of parenting S.L. are the direct result of his own conduct. *See In re J.S.*, 470 N.W.2d 48, 51 (Iowa App. 1991) (incarcerated parent must take responsibility for conduct leading to the confinement). As we have stated many times, we will not force a child to endlessly await a parent's decision to make the necessary commitment essential to reunification. *See In re T.D.C.*, 336 N.W.2d 738, 744 (Iowa 1983).

Finally, J.C. contends his counsel was ineffective for failing to subpoena the presence of his witnesses. He argues trial counsel's submission of written stipulations in lieu of live testimony undermined the outcome of the proceeding. J.C. emphasizes, while it is uncontroverted he did not have visits arranged through DHS, he did have clandestine visits during the time he was absconding from the law. He argues the

testimony of the witnesses he intended to present at trial would have more effectively corroborated his assertions than the written stipulations.

Due process requires counsel appointed under a statutory directive to provide effective assistance. *In re J.P.B.*, 419 N.W.2d 387, 390 (Iowa 1988). We apply the same standard adopted for counsel appointed in a criminal proceeding. *Id.*; *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984).

On review, we may initially determine whether J.C. was prejudiced without resolving the duty element of the foregoing test. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992). J.C. bears the burden to show a reasonable probability that, but for his trial attorney's alleged deficiencies, the outcome of the termination proceeding would have been different. *See State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990).

We do not find J.C. was prejudiced by his attorney's failure to present the live testimony of his witnesses. We note many of the witnesses listed in the stipulation of facts were family members and were not disinterested in the outcome of the proceedings. J.C. cannot demonstrate the actual presence of these individuals at trial would have bolstered the credibility of his assertions. Accordingly, we reject this argument.

We affirm the juvenile court's order in its entirety.

AFFIRMED.