IN THE COURT OF APPEALS OF IOWA

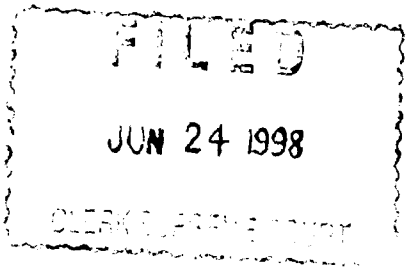
No. 8-242 / 97-1400

IN THE INTEREST OF P.M., R.M., and S.R.,

Minor Children,

R.M.B., Mother,

Appellant.



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

Mother appeals from a district court order terminating her parental rights. **REMANDED.**

Thomas H. Preacher of Stafne, Lewis, Jasper, Preacher & Rowe, Bettendorf, for appellant.

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

Eugene F. Dwyer of Dwyer & Wing, Davenport, guardian ad litem for minor children.

Considered by Sackett, P.J., and Streit and Mahan, JJ.

SACKETT, P.J.

Appellant mother, Roseanna, challenges a juvenile court order terminating her parental rights to her three children. The fathers of these children are not parties to this appeal. Roseanna contends: (1) any notice of the termination proceeding given her was not sufficient for the juvenile court to acquire personal jurisdiction over her, and (2) her attorney was not effective. We remand.

Roseanna was sentenced to a term at the Iowa Women's Reformatory at Mitchellville in August of 1996. She continued to be incarcerated there at the time of the hearing resulting in the order from which this appeal is taken.

Roseanna's children were removed from her care in June of 1994 and found to be children in need of assistance in September of that year.

In October of 1996, the State filed a petition to terminate Roseanna's parental rights to her three children on the grounds of abandonment. *See* Iowa Code § 232.116(1)(b). The State sought termination of the parental rights of the fathers of two of her children on the same grounds.

Notice of the hearing was served on Roseanna and she was personally present at the February 1997 hearing and represented by counsel. A notice of petition seeking termination of Roseanna's child born March 29, 1990, directed to Roseanna and a named putative father, was published in the Quad City Times on November 25, 1996; December 2, 1996; and December 9, 1996.

The juvenile court, by order filed March 5, 1997, denied termination of Roseanna's parental rights for failure of proof on grounds pled.

On April 7, 1997, the State filed a second petition seeking termination under Iowa Code sections 232.116(1)(e) and (k). The termination hearing was held on June 25, 1997. Roseanna was not present. The attorney earlier appointed for her appeared and represented to the court Roseanna was not present because she had no testimony to offer. The attorney did offer several exhibits evidencing completion of parenting classes. The attorney did not object to the trial court's lack of personal jurisdiction over Roseanna. The district court terminated Roseanna's parental rights to her three children. The court found it had jurisdiction of the parties, noting notice was published in the Quad City Times and that Roseanna appeared through counsel at the hearing. The court treated the February and June hearings as part of the same termination action, rather than two separate proceedings.

Roseanna first contends she was entitled to notice of the June 25, 1997 termination hearing, and because the notice served did not meet statutory dictates, it was defective and the juvenile court did not have personal jurisdiction over her.

Due process requires notice reasonably calculated, under all the circumstances, to inform interested parties of the pendency of the action and afford them an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865, 873 (1950). The Iowa legislature has also provided that parents of the child whose parental rights seek to be terminated are

entitled to notice and the opportunity to be heard. *See* Iowa Code §§ 232.111 and 232.112.[1] The necessary notice of a termination proceeding and the manner in which it shall be served is specifically provided for under Iowa Code section 232.112, which provides notice in termination proceedings shall be by personal service or by restricted certified mail, "whichever is determined by the court to be the most effective means of notification." Iowa Code § 232.112(3). Roseanna contends any notice served on her does not comply with the statute because the court never determined the most effective means of notification.

Scrupulous attention needs to be given to following notice requirements in a termination of parental rights. In fairness to the child, as well as prospective adoptive parents, doors to future challenges of a termination order by biological parents should not be left open.

A review of the file indicates a lack of careful attention to the details of notifying Roseanna the termination petition was filed and the hearing was set. There is no order from the court determining the most effective means of notification. Three affidavits of mailing dated April 8, 1997, certify a copy of the notice setting hearing was mailed on April 7, 1997, certified to Roseanna at the Iowa Women's Reformatory. Three U.S. Postal Domestic Return Receipts showing delivery on

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[1] "[E]xcept that notice may be dispensed with in the case of any such person whose name or whereabouts the court determines is unknown and cannot be ascertained by reasonably diligent search." Iowa Code § 232.112(1).

April 11, 1997, are signed with the name "Roseanna . . . ." At the top of the return receipt appear the words "order, petition, waiver, and letter." Though not raised by Roseanna as an issue, the affidavit of mailing is insufficient to show what was mailed to her. There is no acceptable proof the required papers were mailed to Roseanna by certified mail. The only thing the affidavit of mailing purports to mail is the "setting hearing notice." Yet, no copy of the notice is attached to the affidavit. *See In re J.W.*, 498 N.W.2d 417, 421 (Iowa App. 1993). While from the notation on the return receipt one might assume Roseanna was sent an order, petition, waiver, and letter, the affidavit of mailing does not claim to mail more than the setting hearing notice.

Returning to Roseanna's specific challenge the State failed to obtain a court order directing the most effective means of notifying her, we look to Iowa Code section 232.112(3), which states:

> Notice under this section shall be served personally or shall be sent by restricted certified mail, *whichever is determined by the court to be the most effective means of notification.* Such notice shall be made according to the rules of civil procedure relating to an original notice where not inconsistent with the provisions of this section.

Id. (emphasis added). Roseanna does not dispute she received certified mail. There are waiver of notice forms in the file, but they are dated the day before Roseanna received the certified mail. Signatures on the forms are not legible and do not conform to her signatures in the record.

Iowa Code section 232.112(3), in contrast to the rules of civil procedure which only allow alternative service by court order if personal service cannot be made,

provides two methods of service and does not require a claim personal service cannot be made before serving by mail. The question is whether the phrase "whichever is determined by the court to be the most effective means of notification" either prefers personal service or requires a court determination *in every case* which type of service would be "the most effective." Subsection 3 of the statute has not been interpreted by appellate courts. All the cases dealing with proper notice are based on interpreting subsection 1. *See Engstrom v. State*, 461 N.W.2d 309 (Iowa 1990); *In re J.R.*, 315 N.W.2d 750 (Iowa 1982); *In re R.E.*, 462 N.W.2d 723 (Iowa App. 1990).

A statutory provision is ambiguous if reasonable minds could differ or be uncertain as to its meaning. *Holiday Inns Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 728 (Iowa 1995). The words "Notice under this section shall be served personally or shall be sent by certified mail, whichever is determined by the court to be the most effective means of notification" is not ambiguous. Application to the court to determine the most effective means of notification is necessary. *See Schooler v. Iowa Dep't of Transp.*, ___ N.W.2d ___ (Iowa 1998). Roseanna was not notified according to statutory dictates.

The trial court found Roseanna was served by publication. There is no provision for service by publication under section 232.112. While it may be argued notice by publication is provided for by the reference in section 232.112 to the Iowa Rules of Civil Procedure, Iowa Rule of Civil Procedure 60 on service by publication does not provide for service in a termination action. Even if it did, the provision of

the rule requiring an affidavit be made that personal service cannot be had was not followed.[2] *See id.* Roseanna having been incarcerated when the notices were served, there can be no showing she *cannot* be personally served.

The trial court found this was a continuation of the other termination hearing. However, a new petition with new grounds was filed. Roseanna was entitled to notice of this petition. *See* Iowa Code § 232.112(1).

Any claim Roseanna has as to lack of personal jurisdiction was waived when her attorney appeared on her behalf and presented exhibits to the juvenile court. *See* Iowa R. Civ. P. 111(b).

Roseanna next contends her attorney was ineffective in appearing and not challenging the defective service. We review de novo claims of constitutional violations. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). We start with the presumption counsel performed within the normal range of competence. *Id.*; *State v. Palmer*, 569 N.W.2d 614, 617 (Iowa App. 1997). In order to establish a claim of ineffective assistance of counsel, a party must show: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the party as to give rise to a reasonable probability that, but for counsel's

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[2] The issue of jurisdiction to terminate the parental rights of putative fathers is not before us. However, we note there are no affidavits as to a diligent search for their whereabouts. *See also* Iowa Code § 232.112 as to findings necessary where a person or his or her whereabouts are unknown. Savanna's father, Efrain, did appear with counsel at the March 1997 termination hearing; consequently, any challenge to jurisdiction was waived as to him.

errors, the result in the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 698 (1984); *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997). The principle concern with claims of ineffective assistance of counsel is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Keesey*, 519 N.W.2d 836, 837 (quoting *Strickland*, 466 U.S. at 696, 104 S. Ct. 2069, 80 L. Ed. 2d at 699).

While we agree Roseanna was not served in accordance with the statute, Roseanna cannot show prejudice on this ground for, had her attorney complained, notice by personal service or restricted certified mail could have been ordered and Roseanna served with seven-day (personal service) or fourteen-day (restricted certified mail) notice and a hearing held. Iowa Code § 232.112(3). A claim of ineffective assistance of counsel may be resolved by a finding of no prejudice without addressing counsel's performance. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997); *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

Roseanna's second claim is that her trial attorney was not effective in that he made an untrue statement when he said her absence was a conscious choice on her part. She was incarcerated at the time and claims to have had minimal contact with her attorney and believed she would be taken to the hearing. Roseanna advances this claim is consistent with her earlier challenge to jurisdiction as she wanted to be physically present at the hearing. She recognizes her claim in most part focuses on

a factual dispute between her and her attorney. She advances, unlike a criminal proceeding, there is no postconviction proceeding to address her challenges.

To succeed on this challenge, Roseanna must show both (1) her attorney incorrectly represented she did not want to appear, and (2) if she had appeared she could have presented evidence that would have changed the result of the hearing. Neither issue can be adequately addressed on this record.

We remand to the juvenile court for the very limited purpose of having the juvenile court take such limited evidence as is necessary for it to determine whether Roseanna's trial attorney correctly represented that Roseanna did not wish to appear at the hearing and whether she had any additional evidence to offer at that time that would probably have changed the result of the hearing. If the juvenile court finds against her on either on these issues, a copy of the juvenile court's decision and the transcript of any proceedings shall immediately be returned to us. Should the juvenile court find Roseanna did not authorize her attorney to waive her appearance and she could have offered evidence that would probably have changed the result, the juvenile court may conduct such additional hearing as it deems necessary and return a transcript and its decision to us. All of which shall be completed within sixty days of this remand. Any additional briefs are limited to five pages and shall be filed simultaneously within ten days of our receipt of the court's decision and transcript. We retain jurisdiction.

REMANDED.

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No. 8-242 / 97-1400

IN THE INTEREST OF P.M., R.M., and S.R.,

Minor Children,

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Appellant.

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CLERK SUPREME COURT

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

Mother appeals from a district court order terminating her parental rights. **AFFIRMED.**

Thomas H. Preacher of Stafne, Lewis, Jasper, Preacher & Rowe, Bettendorf, for appellant.

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

Eugene F. Dwyer of Dwyer & Wing, Davenport, guardian ad litem for minor children.

Considered by Sackett, C.J., and Streit and Mahan, JJ.

SACKETT, C.J.

Appellant mother, Roseanna, challenged a juvenile court order terminating her parental rights to her three children. Roseanna contended: (1) any notice of the termination proceeding given her was not sufficient for the juvenile court to acquire personal jurisdiction over her; and (2) her attorney was not effective. In an opinion filed on June 24, 1998, we determined the juvenile court had proper jurisdiction and remanded the ineffective assistance issue to the juvenile court "for the very limited purpose of having the juvenile court take such limited evidence as is necessary for it to determine whether Roseanna's trial attorney correctly represented that Roseanna did not wish to appear at the hearing and whether she had any additional evidence to offer at that time that would probably have changed the result of the hearing." *In re P.M., R.M., and S.R.*, No. 97-1400, slip op. at 9 (Iowa App. June 24, 1998).

The juvenile court held a hearing at which Roseanna testified, called witnesses, and presented exhibits. Having reviewed the record of that hearing and the evidence and exhibits submitted, we find nothing to change the result of the original termination proceeding. Without a showing of prejudice, Roseanna cannot demonstrate her attorney was ineffective. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 698 (1984); *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997).

For the reasons set forth in this opinion and the June 24, 1998 opinion, we affirm the termination of Roseanna's parental rights.

AFFIRMED.