FILED
MAR 30 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No 5-121 / 94-1898

IN THE INTEREST OF
M.W.H., JR., Minor Child,

M.H., SR., Father

Appellant.

Appeal from the Iowa District Court for Polk County, Constance C. Welu, Associate Juvenile Judge

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

AFFIRMED.

Matthew S. Sheeley of Parrish, Kruidenier, Moss, Dunn, Montgomery, and Thomas, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Charles K. Phillips, Assistant Attorney General, and Ray Blase, Assistant County Attorney, for appellee-State.

Mike Bandstra of Youth Law Center, Des Moines, guardian ad litem for minor child.

Considered by Donielson, C.J., and Sackett and Habhab, JJ.

SACKETT, J.

Appellant Michael, Sr appeals a juvenile court judge's order terminating his parental rights to his son, Michael, Jr , born September 9, 1984. He contends the State failed to make reasonable efforts to reunite him with his son prior to filing a petition to terminate his parental rights We affirm.

Michael, Sr was charged with third-degree sexual abuse and lascivious acts with a child for allegedly having victimized Michael Jr 's half-sisters. When the events occurred, Michael, Jr was living with his father, mother, and two half-sisters. A petition was filed in August 1993, contending all three children were children in need of assistance under Iowa Code section 232.2(d) (1993). The children were subsequently found to be children in need of assistance and an order was entered ordering there be no contact between Michael, Sr. and the children. The children were placed in the custody of their maternal grandmother and Michael, Sr was ordered to participate in a treatment program.

Michael, Sr , meanwhile, pled guilty to the offenses and was sentenced. He currently is incarcerated in the Mount Pleasant Correctional Facility where he began a sexual offenders treatment program in May 1994.

In September 1994, the State filed a petition to terminate Michael, Sr.'s parental rights to Michael, Jr under Iowa Code sections 232.116(1)(e) and 232.116(1)(i). Michael, Sr testified at the hearing that he had been incarcerated since June 18, 1993, and his date of discharge was to be the end of July in the year 2000 He anticipated he would only need to serve twenty percent of his sentence.

There was no evidence the department of human services had contacted Michael,

Sr. A juvenile court officer testified the department had not offered Michael, Sr. services because he was not available. She said she had been in touch with the counselor of the sexual offenders treatment program about Michael, Sr

The juvenile court found clear and convincing evidence to support the termination. It dismissed Michael, Sr 's complaint reasonable efforts were not made to reunite him with his son and found, because he was incarcerated, it was not reasonable to offer him any service in addition to the prison treatment program and the juvenile court officer's contact with the counsel more than satisfied any reasonable efforts requirement. Michael, Sr appeals contending no reasonable efforts were.made to reunite him with is child and his rights to due process were violated.

The State agrees with Michael Sr 's statement of record The State says there is no state or federal requirement "efforts" be made to reunify a child with his or her parent or parents The State argues the federal and state requirement are only reasonable efforts be made The State argues the treatment program at the correction institution was all the State need do. The State takes the position in some situations any reunification services are unreasonable

Preserving families is the underlying principle in CINA proceedings. In re C.D., 508 N W.2d 97, 100 (Iowa App 1993); In re A Y H., 508 N.W.2d 93, 95 (Iowa App. 1993) (state must make reasonable efforts to reunite families and provide services in CINA proceedings). The reasonableness of the services the State has offered toward that end should be very carefully scrutinized. C.D., 508 N.W.2d at 100. Such reasonable efforts are required prior to the filing of a petition to terminate parental rights. In re

C.L.H., 500 N.W.2d 449, 453 (Iowa App. 1993) Termination of the parent-child relationship is considered a last resort In re S.O., 483 N.W 2d 602, 604 (Iowa 1992).

Iowa Code section 232 102(7) governs the transfer of legal custody of a child and placement and provides, in relevant part, the following:

> If [after a dispositional hearing] the court orders the transfer of the custody of the child to the department of human services or other agency for placement, the department or agency shall submit a case permanency plan to the court and shall make every reasonable effort to return the child to the child's home as quickly as possible consistent with the best interest of the child. (Emphasis added.)

Iowa Code § 232.102(7) (1993). The phrase "reasonable efforts," as used in section 232.102(7) means "the efforts made to prevent or eliminate the need for removal of a child from the child's home " Iowa Code § 232.102(9)(a) (1993). Such efforts may include "intensive family preservation services or family-centered services, . . . " Iowa Code § 232.102(9)(a) (1993). The reasonable efforts requirement is also codified at 441-175.4(232) and 441-202.12(234) in the Iowa Administrative Code. 441 Iowa Administrative Code rule 202.12 (1994) provides, in relevant part, the following:

> 202.12(1) Social services and treatment services shall be made available to the parents throughout the period of placement for the purpose of reuniting the family in an agreed upon time frame.
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> . .
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> 202 12(3) The case plan and treatment plan shall specify the services to be provided and the time frame for reuniting the family. These plans shall be developed in cooperation with the parents
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> 202 12(4) Personal contact shall be made regularly with the parents and the progress towards goal attainment reviewed and documented in the case record. The frequency of the personal contact shall be specified in the child's case plan. (Emphasis added.)

Iowa Admin . Code r. 821-202 12(1), 821-202 12(3), and 821-202.12(4) (1994) Generally, rules of statutory construction and interpretation also govern construction and interpretation of rules and regulations of administrative agencies. Messina v. Iowa Dep't of Job Serv., 341 N W.2d 52, 56 (Iowa 1983). Under Iowa's rules of statutory construction, the word "shall" imposes a duty. Iowa Code § 4 1(30)(a) (1993). Accordingly, both Iowa Code section 232.102(8) (1993) and 441 Iowa Administrative Code rule 202.12 (1994) impose a legal duty upon the department of human services to develop a case plan that would enable Michael, Sr. to preserve his parental rights.

The "reasonable efforts" requirements has been codified at the federal level as well. See, e.g., 42 U S C A. §§ 670 and 671. Additionally, administrative regulations, although not mandatory, have been promulgated at the federal level. 45 C F.R. § 1356.21(d)(4); 45 C.F.R. § 1357.15(4)(2). The Iowa Department of Human Services has adopted department protocol in the implementation of these federal mandates at 441 Iowa Administrative Code rule 175.1(235A) et seq. and rule 202.12 (234) (1994).

The State did not formulate any plan concerning Michael Sr. Neither the department of human services nor the juvenile court offered any services to Michael, Sr. The department of human services and the juvenile court's rationale for this denial was Michael, Sr. was "unavailable for services" by virtue of his incarceration.

Not only were no services offered, but there is little or no record to guide us in a determination of the severity of Michael, Sr.'s problems and the services that would be necessary to correct them. The State does not follow the mandates of the statute.

A child may be well served by an intensive rehabilitation program for a biological parent, particularly, if his or her future in state care promises no more than spending his or her childhood years in one or more foster homes with no promise of adoption.

However, we have consistently said, a parent has an obligation to request services if they are not offered at the appropriate time. See C.D., 508 N W 2d at 101. Michael, Sr.'s request has come too late.

Michael, Sr also argues the failure to offer him reasonable services was a constitutional violation and denied him due process of law. The State contends the issue was raised for the first time on appeal We agree.

AFFIRMED.