IN THE COURT OF APPEALS OF IOWA

No. 0-444 / 00-519
Filed October 25, 2000

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF
M.T., Minor Child,

B.T., Father,
Appellant.

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

B.T. appeals the termination of his parental rights to his daughter. **AFFIRMED.**

Penelope C. Souhrada, Davenport, for appellant.

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

Robert Phelps and Lauren M. Phelps, Davenport, guardian ad litem, for minor child.

Heard by Sackett, C.J., and Streit and Vaitheswaran, JJ.

STREIT, J.

Billy T. appeals the termination of his parental rights. He claims the State did not prove the grounds for terminating his parental rights, the termination was unnecessary, and his counsel was ineffective. We affirm.

I. Background Facts & Proceedings.

Billy T. and Karen P. are the biological parents of Misty, born September 21, 1983. Billy has been imprisoned in Illinois since he killed a man in 1986. He may be released in August of 2001.

At Karen's request, an Illinois court placed Misty in the guardianship of her maternal grandparents in 1988. Despite the guardianship, Karen resumed care of Misty several times. Misty's younger twin sisters also lived with Karen.

Misty and her sisters were adjudicated children in need of assistance as defined in sections 232.2(6)(b), 232.2(6)(c)(2), and 232.2(6)(n) of the Iowa Code in July of 1999.[1] In March of 2000 the juvenile court terminated the parental rights of Karen, Thomas S. (the father of Misty's sisters), and Billy. Karen and Thomas consented to the termination of their rights. The court terminated Billy's rights pursuant to sections 232.116(1)(c) and 232.116(1)(d).

Billy appeals. He claims the State did not prove the grounds for terminating his parental rights, the termination was unnecessary, and his counsel was ineffective.

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[1] These sections define a child in need of assistance as a child who has been physically abused or neglected by his or her parent; a child who has suffered or is likely to suffer harmful effects because of his or her parent's failure to exercise a reasonable degree of care in supervising him or her; and a child whose parent's mental capacity or condition, imprisonment, or substance abuse results in him or her not receiving adequate care. Iowa Code § 232.2(6)(b), (c)(2), (n) (1999).

II. The Merits.

We review termination proceedings de novo. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993). The State must prove the grounds for termination by clear and convincing evidence. *In re E.K.*, 568 N.W.2d 829, 830 (Iowa App. 1997). Our primary concern is the best interests of the child. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa App. 1996).

A. Clear and Convincing Evidence.

Billy claims the State did not prove by clear and convincing evidence the grounds for terminating his parental rights pursuant to section 232.116(1)(d). The termination was justified if Misty had been adjudicated a child in need of assistance; Misty had been removed from Billy's physical custody for at least six consecutive months; and Billy had not maintained significant and meaningful contact with Misty during the previous six months and had made no reasonable efforts to resume care of Misty despite being given the opportunity to do so. *See* Iowa Code § 232.116(1)(d) (1999). Only the first and last elements are at issue.

Billy acknowledges Misty was adjudicated a child in need of assistance but contends there was insufficient evidence for the adjudication because Misty was in her grandparents' care since 1988. The juvenile court's basis for the adjudication was Karen's "longstanding history of substance abuse and being involved in violent and abusive relationships." Although Misty was placed in the guardianship of her grandparents, Karen lived close to Misty's grandparents and allowed Misty to live with her on various occasions. Karen's behavior thus put Misty's safety at risk. The adjudication was appropriate.

Billy also contends the State did not prove he failed to maintain significant and meaningful contact with Misty as required by section 232.116(1)(d)(3).

> "[S]ignificant and meaningful contact" includes but is not limited to the affirmative assumption by [a] parent[] of the duties encompassed by the role of being a parent. This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parent[] establish and maintain a place of importance in the child's life.

Iowa Code § 232.116(1)(d).

Billy has not maintained significant and meaningful contact with Misty. According to Misty's grandfather, Billy has not seen Misty since he was incarcerated in 1986. He does not communicate with her.[2] He has not paid any child support for her. Simply stated, Billy does not have a parent-child relationship with Misty.

Billy blames others for the lack of this relationship. He states a court never ordered him to pay child support, the Iowa Department of Human Services's case permanency plans prescribed no responsibilities for him, and Misty's grandparents thwarted his attempts to communicate with Misty. Billy is pointing his finger in the wrong direction. He alone bears the responsibility to affirmatively assume "the duties encompassed by the role of being a parent."

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[2] Misty's grandfather testified Billy sent letters to Misty no more than five or six times during the thirteen years prior to the termination hearing. He also testified Billy occasionally sent Misty a card with a ten-dollar check at Christmas. Billy, on the other hand, in a letter to his attorney wrote "I have done everything possible to stay in contact with my child, I have tryed [sic] calling her, sending her birthday cards and Christmas cards, mailed her little gifts on her birthday and Christmas and whatever money I could send her." Despite this conflicting evidence, it is clear Billy and Misty do not communicate with each other: Misty refuses to accept whatever correspondence Billy sends to her.

See Iowa Code § 232.116(1)(d). His incarceration—which is the consequence of his own actions—does not excuse him from this responsibility. *See In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993).

Even if Billy's purported efforts to maintain significant and meaningful contact with Misty have been hindered by matters beyond his control, the record shows Misty does not want such contact with him. She returned the cards and money he sent to her. She told her grandparents and her caseworker she did not want anything to do with him. When she was nearly sixteen years old, she wrote "I don't want to see him cause [sic] I don't want him in my life." Billy does not have a place of importance in her life. *See* Iowa Code § 232.116(1)(d)(3).

The juvenile court correctly terminated Billy's parental rights pursuant to section 232.116(1)(d). We need not, therefore, address Billy's claim the State did not prove the grounds for terminating his parental rights pursuant to section 232.116(1)(c). *See In re A.J.*, 553 N.W.2d 909, 911 (Iowa App. 1996).

B. Necessity.

Billy also claims the termination of his parental rights was unnecessary given Misty's grandparents' guardianship and Misty's age. Because this issue was not raised at the termination hearing, error has not been preserved for us to decide it on appeal. *See In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa App. 1994).

Even if error was preserved, Billy's claim has no merit. Section 232.116(3)(a) states the juvenile court "need not terminate the relationship between a parent and a child if . . . [a] relative has legal custody of the child." This provision is permissive, not mandatory. *In re C.L.H.*, 500 N.W.2d 449, 454

(Iowa App. 1993). It does not bar the termination of parental rights when—as is true in this case—the State has proven the grounds for the termination and the termination is in the child's best interests.

The Iowa Code also does not bar the termination of Billy's parental rights merely because Misty is nearing the age of majority. Section 232.116(1) outlines the circumstances in which the juvenile court can terminate parental rights "with respect to a child." Section 232.2(5), in turn, defines a "child" as "a person under eighteen years of age." Misty, therefore, is entitled to the protections chapter 232 provides. As stated previously, the juvenile court correctly terminated Billy's parental rights.

C. Effective Assistance of Counsel.

Billy's final claim is he received ineffective counsel. Counsel in termination proceedings are governed by the same effectiveness standard used in criminal proceedings. *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992). In order to prevail on his ineffective assistance claim, Billy must show his counsel's performance was deficient and actual prejudice resulted from his performance. *See id.*

Billy contends his counsel should have contested the juvenile court's adjudication of Misty as a child in need of assistance. As was explained above, the adjudication was appropriate given Misty often stayed with her mother, a woman who had a history of substance abuse and involvement in abusive relationships. Because Billy's counsel had little reason to contest the adjudication, his failure to do so was not deficient. *Cf. State v. Greene*, 592

N.W.2d 24, 29 (Iowa 1999) (stating defense counsel will not be deemed incompetent for failing to pursue a meritless issue).

Billy also contends his counsel should have advised him to contact the department of human services so he could request services from them. If Billy had contacted DHS in a timely manner, *perhaps* the State would have been unable to prove the grounds necessary for terminating his parental rights pursuant to section 232.116(1)(c).[3] The State, however, could still have terminated his rights pursuant to section 232.116(1)(d). Billy was not prejudiced by his counsel's alleged failure to give him proper advice.

Finally, Billy contends his counsel did not cross-examine the State's witnesses properly or present evidence regarding his efforts to communicate with Misty until it was "too late." We presume counsel's conduct falls within the range of reasonable professional competency, especially when evaluating trial tactics and strategies. *In re D.W.*, 385 N.W.2d 570, 580 (Iowa 1986). Billy has failed to rebut this presumption. Moreover, the State had a strong case against Billy—better cross-examinations or different offers of evidence would not have prevented the juvenile court from terminating his parental rights. We deny Billy's ineffective assistance of counsel claim.

We affirm the juvenile court's termination of Billy's parental rights.

AFFIRMED.

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[3] The second element of section 232.116(1)(c) reads as follows: "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."