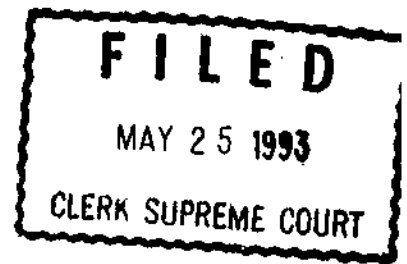


IN THE COURT OF APPEALS OF IOWA

No. 3-214 / 92-1945

IN THE INTEREST OF L.K.I.I.G., a Minor Child,
J.O.G., Father,
Appellant.



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

The natural father appeals a juvenile court order
terminating his parental rights. **AFFIRMED.**

Donna M. Humpal, Davenport, for appellant.

Scott H. Walters, Davenport, guardian ad litem for the
child.

Bonnie J. Campbell, Attorney General; John M. Parmeter,
Special Assistant Attorney General; Judy Sheirbon,
Assistant Attorney General; and Henry C. Filseth, Assistant
County Attorney, for appellee-State.

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

HABEAS, J. 000150

In November 1992, the juvenile court terminated the parental rights of J.O.G. and C.M. with respect to their son, L.K.I.I.G., born October 27, 1988. J.O.G., the natural father, appeals. We affirm.

The State had been concerned about violence in this family and their ability to parent before L.K.I.I.G.'s birth. C.M. had reported suffering domestic abuse by J.O.G., and he was arrested for assault and display of a deadly weapon during a domestic violence incident while C.M. was pregnant with L.K.I.I.G. He pleaded guilty to simple assault.

When L.K.I.I.G. was born, J.O.G. was not living with C.M. He claims he saw the child "weekly and every two weeks, sometimes two or three days out of a week" during the first fourteen months of L.K.I.I.G.'s life. He says he would take L.K.I.I.G. overnight, feed the child, and change his diapers.

Since January 11, 1990, J.O.G. has been incarcerated for willful injury, assault, and going armed with intent. The incident did not involve C.M. or any of her children. J.O.G. was given a fifteen-year sentence. His next scheduled parole hearing is in May 1993, and he has already been before the review board twice. Following the first review, he was told to get drug treatment. The board denied parole after the second review because J.O.G. had

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been in a fight in prison. J.O.G. has not seen L.K.I.I.G. since his incarceration.

The juvenile court adjudicated L.K.I.I.G. a CINA on September 24, 1991. It was established that C.M.'s sister, Lisa, had been caring for L.K.I.I.G. since January 1991. C.M. had been spending all the ADC money she received on herself and had missed all of L.K.I.I.G.'s health care and WIC appointments. The court placed L.K.I.I.G. with Lisa, who was willing to continue caring for him. J.O.G.'s attorney was present as he requested to be represented.

J.O.G. claims he told C.M. that he wanted to see L.K.I.I.G. and that she should bring the child with her when she visited him in prison, but she did not comply, and shortly after that she stopped visiting L.K.I.I.G. herself. J.O.G. also testified he wrote to Lisa and inquired after L.K.I.I.G., but that she never responded to his letters. He stopped trying to contact Lisa after getting "the first court papers," claiming he did not know if he "should" contact her. Presumably these were court papers related to the September 1991 CINA adjudicatory hearing.

In April 1992 a review hearing was held. J.O.G. was represented by counsel and C.M. did not attend. Placement continued with Lisa. In August 1992, the guardian ad litem filed a petition to terminate both parents' rights to L.K.I.I.G. At the termination hearing, C.M. did not

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attend or contest the termination of her rights. J.O.G. was transported to the hearing and was represented.

The court terminated C.M.'s rights pursuant to Iowa Code sections 232.116(1)(a) (voluntary consent), (b) (abandonment), and (d) (failure to maintain contact with child placed outside the home) (1991). J.O.G.'s rights were terminated pursuant to sections 232.116(1)(b), (d), and (e) (placement outside the home without significant intervening trial periods in the home). J.O.G. appeals.

Our review of termination proceedings is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984) cert. denied sub nom. J.G. v. Tauke, 469 U.S. 1222 (1985). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those determinations. Id. at 491-92.

The primary concern in termination proceedings is the best interest 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 preventative 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).

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We affirm the termination because there is clear and convincing evidence (1) the father cannot assume care of the child or provide a safe sure environment for him in the reasonable future, and (2) the father abandoned the child.

I. Iowa Code section 232.116(1)(e).

Iowa Code section 232.116(1)(e) (1991) permits the juvenile court to terminate the parent-child relationship if the court finds all of the following have occurred:

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

J.O.G. admits L.K.I.I.G. was four years of age at the time of the termination hearing, had been adjudicated a child in need of assistance, and custody had been transferred for at least twelve of the last eighteen months. However, J.O.G. argues there was not clear and convincing evidence that L.K.I.I.G. would not be able to return to his father within the next several months. We disagree. J.O.G. is currently unavailable to parent his son due to his voluntary criminal actions. At the time of the November 1992 termination hearing, he was not scheduled for a parole hearing for six months. There is no guarantee

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J.O.G. will be paroled in May. J.O.G. admitted he was not granted parole at his last hearing because of his involvement in a fight. If parole is denied, he would still have three and a half years of his sentence to serve. Given J.O.G.'s history of violent behavior, we find L.K.I.I.G. could not safely be placed with him immediately upon parole, whenever that may be. We therefore find there is clear and convincing evidence that the child cannot be returned to his father's custody in the reasonable future.

II. Iowa Code section 232.116 (1)(b).

The juvenile court also terminated J.O.G.'s parental rights because J.O.G. abandoned L.K.I.I.G. Clear and convincing evidence is required to establish abandonment. Iowa Code § 232.116(1)(b) (1991). Abandonment is defined as:

"Abandonment of a child" means the relinquishment or surrender, without reference to any particular person, of the parental rights, duties, or privileges inherent in the parent-child relationship. Proof of abandonment must include both the intention to abandon and the acts by which the intention is evidenced. The term does not require that the relinquishment or surrender be over any particular period of time.

Iowa Code § 232.2(1) (1991).

There are two elements necessary to establish abandonment: 1) the giving up of parental rights and responsibilities as exhibited by the party's conduct; and 2) an accompanying state of mind which shows an intent to forego these rights and responsibilities. In re Goettsche,

311 N.W.2d 104, 106 (Iowa 1981). Affirmative parenting to the extent practical and feasible in the circumstances is required. Id. It is not enough to subjectively maintain an interest in the child. Id.

J.O.G. could have taken numerous affirmative actions to indicate a true interest in this child, even given his incarceration, and has failed to do so. J.O.G. admits he made no attempt to contact the Department of Human Services throughout the period of the CINA proceedings. His only contact was through his attorney. He never objected, through his counsel, to his non-inclusion in any of the case plans filed in the CINA proceedings. He never requested services through the DHS or visits with L.K.I.I.G. He has not checked with service providers regarding L.K.I.I.G.

J.O.G. contends he sent letters to Lisa, but she did not respond. He admits he made no attempt to contact her after he received the first "court papers". J.O.G. did have his sister check in on L.K.I.I.G.

We find the abandonment ground was established by clear and convincing evidence in the present case. We find J.O.G. failed to maintain meaningful communication and associations with his son to the extent practical after his imprisonment in January of 1990.

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III. Ineffective Assistance of Counsel.

J.O.G.'s final argument is that he received ineffective assistance of counsel since counsel did not request a continuance of the termination until after his release. We do not find J.O.G.'s ineffective assistance of counsel claim to be persuasive.

Established principles govern our review of defendant's Sixth Amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see *Schertz v. State*, 380 N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption that counsel performed competently. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Appellant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986) (citation omitted).

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In proving the first prong of this test, the appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. a reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984).

[S]crutiny of the CHINA counsel's performance must "be highly deferential," and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [party] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"

In re D.W., 385 N.W.2d 570, 580 (Iowa 1986) (citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 694-95) (citations omitted).

After reviewing the record, we conclude even if J.O.G.'s trial counsel should have requested a continuance, J.O.G. has failed to show prejudice resulted. A continuance would have allowed the juvenile court a more certain determination of when J.O.G. would be released on parole. To obtain this information, the juvenile court would have to delay the termination proceedings for six months. We do not know whether this additional information

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would have been favorable to J.O.G. We are unable to find to a reasonable probability that, but for the alleged error committed by his trial counsel, the court would have denied termination of J.O.G.'s parental rights.

IV. Conclusion.

We find the State proved the elements of section 232.116(1)(e) and section 232.116(1)(b) by clear and convincing evidence. We further find it is in the child's best interest to terminate J.O.G.'s parental rights. We are unable to conclude J.O.G. was denied ineffective assistance of counsel. We affirm the juvenile court's termination of J.O.G.'s parental rights.

Costs of this appeal are taxed to the appellant.

AFFIRMED.