

IN THE COURT OF APPEALS OF IOWA

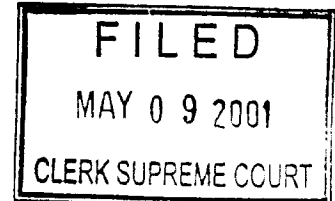
No. 1-220 / 00-1334

Filed May 9, 2001

**IN THE INTEREST OF
A.D.C., K.T.C., and C.S.H., Minor Children,**

**R.S.C., Father,
Appellant,**

**D.H. Mother,
Appellant.**



Appeal from the Iowa District Court for Ida County, Timothy Jarman,
District Associate Judge.

Mother appeals from the order terminating the parental rights to her three
children. **AFFIRMED.**

Patrick T. Parry of Forker & Parry, Sioux City, for appellant-mother.

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

Thaddeus Cosgrove of the Cosgrove Law Firm, Holstein, guardian ad
litem for minor children.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

ZIMMER, J.

A mother appeals the decision of the juvenile court terminating her parental rights to her three children. She claims: (1) the court lacked jurisdiction because she was not properly served; (2) she received ineffective assistance of counsel; (3) the court should not have admitted hearsay evidence; (4) the State did not present sufficient evidence to warrant termination of her parental rights; and (5) termination was not in the children's best interests.

Dana is the mother of Adrick, born in January 1986; Kayla, born in February 1988; and Cedric, born in May 1993. Dana has a history of alcoholism and mental health problems.

The family became involved with the Department of Human Services (DHS) in May 1998. Concerns arose about the condition of the home, and DHS issued a founded report of denial of critical care. Dana received family preservation services, individual counseling, and homemaker health services. In August 1998, Dana was committed to a mental health institute for a short period of time. The children were removed from her care and placed in foster care. The children were adjudicated to be children in need of assistance pursuant to Iowa Code sections 232.2(6)(b), (c), (g) and (j).

Dana entered a substance abuse treatment program, but was unsuccessfully discharged in December 1998 due to non-compliance with rules. In February 1999, Dana arrived at a school conference smelling of alcohol. She also attended a meeting with DHS workers smelling of alcohol. Dana agreed to go to a detox center, but left after a couple of hours.

In March 1999, social workers discovered Dana had been drinking during an unsupervised visit, and visits were changed to supervised. Dana completed a substance abuse evaluation, which recommended an outpatient treatment program. Dana continued to drink until June 1999, when she entered an inpatient alcohol treatment center. She was discharged in July 1999. By August 1999, Dana was drinking again. In September and October 1999, she attended an alcohol treatment program. Despite attending several treatment programs, Dana continued to abuse alcohol.

In October 1999, the State filed a petition to terminate her parental rights. Dana's attorney filed an acceptance of service on her behalf. At Dana's request, the termination hearing was continued until May 2000, in order to allow her to complete a dual-diagnosis program. Dana completed this program in April 2000.

The Ida County Sheriff reported he received a complaint of an intoxicated woman in May 2000, and when he investigated, the woman was Dana. Dana had been in a car accident and was heavily intoxicated. She was admitted to the hospital. During that same month, Dana was so intoxicated during a supervised visit she was unable to walk. The children helped her to her bedroom before the visit was terminated.

The termination hearing was held in May 2000. The juvenile court terminated Dana's parental rights under sections 232.116(1)(e), (h), and (k). The court found that despite the services provided, Dana was unable to overcome her alcoholism and was unable to care for the children. The court stated:

Clearly, these children may be harmed if returned to the mother's care at this time or at any time in the foreseeable future. The mother's numerous relapses with the alcohol, her current lack of a psychiatrist to address her mental health issues, and her reluctance

to follow through with aftercare treatment shows that she is incapable of providing a safe and secure home for these children.

The court determined termination of Dana's parental rights was in the children's best interests. Dana appeals the termination of her parental rights.

I. SCOPE OF REVIEW

The scope of review in termination cases is *de novo*. *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa Ct. App. 1997). The grounds for termination must be proven by clear and convincing evidence. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). Our primary concern is the best interests of the children. *In re T.B.*, 604 N.W.2d 660, 662 (Iowa 2000).

II. NOTICE

Dana contends her parental rights were improperly terminated because she did not receive notice of the termination. Section 232.112(1) provides that living parents of a child are entitled to receive notice of termination proceedings and an opportunity to be heard.

This issue was raised for the first time on appeal. Generally, issues raised for the first time on appeal, even those of constitutional dimension, will not be considered. *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994); *In re R.J.*, 495 N.W.2d 114, 117 (Iowa Ct. App. 1992). The reason for this rule is because a failure to make a challenge in a timely manner before the trial court leaves nothing for the appellate courts to review. *State v. McCright*, 569 N.W.2d 605, 608 (Iowa 1997). This issue has not been preserved for our review because it was not raised before the juvenile court. See *M.A. v. Iowa Dist. Court*, 517 N.W.2d 205, 208 (Iowa 1994).

Even if this issue had been preserved, however, we find Dana received adequate notice of the termination hearing. Dana's counsel signed an acceptance of service on her behalf. An attorney may accept service of notice, or waive it, if the attorney has authority to do so. *Superior/Ideal, Inc. v. Board of Review*, 419 N.W.2d 405, 408 (Iowa 1988). Where an attorney has actual notice of matters, this notice is imputed to the client. *Carroll v. Martir*, 610 N.W.2d 850, 859 (Iowa 2000); *State v. Roghair*, 390 N.W.2d 123, 124 (Iowa 1986). Our supreme court has held a mother received actual and timely notice of a contempt application through service of notice on her attorney. *M.A.*, 517 N.W.2d at 208.

In the present case, Dana had the termination continued for several months while she completed a dual-diagnosis program. Thus, Dana knew of the date of the termination hearing, and was able to reschedule it to a time more convenient for her. She appeared at the rescheduled termination hearing and participated in the hearing. Notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them a reasonable opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed.2d 865, 873 (1950). Here, Dana was aware of the pendency of the action and had a reasonable opportunity to present her objections.

III. INEFFECTIVE ASSISTANCE

Dana asserts she received ineffective assistance because her counsel failed to preserve error on the service of notice issue. The test for ineffective assistance of counsel in termination cases is generally the same as in criminal proceedings. *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992). In order to

establish an ineffective assistance claim, it must be shown that (1) counsel's performance is deficient, and (2) actual prejudice resulted. *Id.* As noted above, however, we have determined that even if the issue of service of notice had been preserved, Dana received adequate notice of the termination hearing. Dana was not prejudiced by her counsel's performance.

IV. HEARSAY EVIDENCE

Dana claims the juvenile court should not have accepted State's Exhibits 1 and 2, which were a DHS termination report and addendum, because they were hearsay. Dana raised her hearsay objections at the termination hearing, but the juvenile court determined the reports were admissible. The author of the reports testified at the termination hearing.

In considering this same issue, we have previously stated:

The exhibit contained reports prepared by the social worker in this case as well as other reports and information relied upon by the social worker in carrying out her duties and in testifying at the termination hearing. Such reports have previously been held to be admissible over hearsay objections.

In re A.J., 553 N.W.2d 909, 916 (Iowa Ct. App. 1996). We conclude the juvenile court properly admitted the reports.

V. SUFFICIENCY OF THE EVIDENCE

Dana contends the State did not present sufficient evidence to warrant termination of her parental rights. She claims the State did not show the children could not be returned to her care at the present time. Dana admits the evidence shows she continued to relapse into alcohol use, but she claims there was insufficient evidence her drinking presented a danger to the children.

In considering a parent with substance abuse problems, we stated:

We have repeatedly followed the principle that the statutory time line must be followed and children should not be forced to wait for their parent to grow up. We have also indicated that a good prediction of the future conduct of a parent is to look at the past conduct. Thus, in considering the impact of a drug addiction, we must consider the treatment history of the parent to gauge the likelihood the parent will be in a position to parent the child in the foreseeable future. Where the parent has been unable to rise above the addiction and experience sustained sobriety in a noncustodial setting, and establish the essential support system to maintain sobriety, there is little hope of success in parenting.

In re N.F., 579 N.W.2d 338, 341 (Iowa Ct. App. 1998) (citations omitted). Similar principles should apply in this case involving alcohol abuse. Despite several attempts at treatment, Dana has not been able to maintain sobriety. When Dana is binge drinking, she is unable to care for the children. There was sufficient evidence in the record to support termination of Dana's parental rights.

VL BEST INTERESTS

Dana asserts termination of her parental rights is not in the children's best interests. She states her relapses were growing shorter, and there was a greater time between relapses. She claims it would be in the children's best interests to give her more time to cope with her addiction.

Even if the statutory requirements for termination of parental rights are met, the decision to terminate must still be in the best interests of the children. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). In determining the best interests of a child, the court looks to the child's long-range and immediate interests. *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997). The court must consider the physical, mental, and emotional condition and needs of the child in deciding to terminate parental rights. *In re C.W.*, 554 N.W.2d 279, 282 (Iowa Ct. App. 1996).

We find termination of Dana's parental rights is in the children's best interests. The evidence shows the children took care of Dana while she was drinking. During one supervised visitation they helped her to her bedroom when she became too intoxicated to walk. The children need permanency. They should not be required to wait any longer for Dana to resolve her problems. The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their problems. *C.K.*, 558 N.W.2d at 175.

We affirm the decision of the juvenile court which terminated Dana's parental rights to her three minor children.

AFFIRMED.