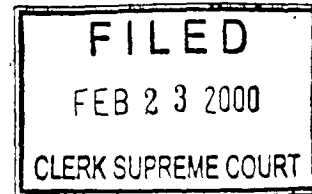


IN THE COURT OF APPEALS OF IOWA

No. 1999-524 (9-781) / 99-1100
Filed February 23, 2000



IN THE INTEREST OF D.B., Minor Child,

P.G., Mother,
Appellant.

Appeal from the Iowa District Court for Marshall County, Victor G. Lathrop,
Associate Juvenile Judge.

Mother appeals from the juvenile court order terminating her parental rights.

AFFIRMED.

JoAnn L. Barten of the Boliver Law Firm, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Tabitha Gardner, Assistant Attorney
General, and James J. DeTaeye, County Attorney, for appellee-State.

Chad Frese, Marshalltown, guardian ad litem for minor child.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

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HECHT, J.

P.G. ("Mother"), appeals from the district court's order terminating her parental rights. She claims the district court erred in its ruling on her motion to substitute counsel and her attorney's motion to withdraw. Mother also challenges the sufficiency of the evidence supporting termination of her parental rights to her son, D.B. We affirm.

I. Factual Background and Proceedings. D.B. was born June 11, 1988. In 1993, he began receiving counseling services from a therapist for attention deficit hyperactive disorder. In March of 1995, Mother and her husband (D.B.'s stepfather) sought help from the department of human services ("DHS") in dealing with D.B., who was defiant, and still soiling himself at the age of six years. Mother and her husband requested out-of-home placement for D.B., but this was delayed for forty-five days pending assessment by DHS. During the assessment period, D.B. was hospitalized for treatment of a broken leg suffered, according to DHS's determination, at the hands of his stepfather. Mother then voluntarily released D.B. to temporary foster care.

Attorney Doug Beals ("Beals") was appointed to represent Mother in the ensuing CINA proceedings. On August 9, 1995, the district court found D.B. to be a child in need of assistance and ordered foster care placement. The CINA order also directed DHS to assist Mother in obtaining services for gambling addiction, and ordered her to enforce the no-contact order between the stepfather and D.B. Mother and the stepfather subsequently separated and divorced.

In 1996, D.B.'s therapist concluded termination of Mother's parental rights would be in D.B.'s best interests. The focus of the therapy was no longer

reunification of D.B. and his mother. Nonetheless, on August 2, 1996, the district court ordered continuation of the foster care placement, and postponed the review and permanency hearing to a later date.

On April 8, 1997, the district court again continued the permanency order for six months. Mother's visitation was increased with the expectation she would either have D.B. returned to her within six months, or a hearing on permanency and termination options would be scheduled. The district court again noted its concerns about Mother's gambling addiction, and directed her to complete an evaluation to see if an addiction in fact existed.

A hearing on permanency was held on October 7, 1997. The State and D.B.'s guardian ad litem recommended long-term foster care. Beals appeared at the hearing for Mother who did not appear despite receipt of written notice of the hearing and discussion of the consequences of the hearing. The district court found termination of parental rights was not then appropriate because of "a good relationship between the child and Mother," but noted concern about Mother's failure to obtain a permanent residence or to complete the gambling addiction evaluation previously ordered by the court. The court ordered Mother to complete the evaluation and directed her to obtain a permanent residence. The court also directed DHS to continue to offer services requested by Mother in her efforts toward reunification.

On September 16, 1998, the State filed a petition to terminate Mother's parental rights to D.B. pursuant to Iowa Code section 232.116(1)(c), (d), and (e). Hearing on the petition was scheduled for November 5, 1998. On October 30, 1998, Beals filed a motion to withdraw as Mother's attorney. In the motion, he

informed the court he had sent Mother a letter on September 22, 1998, requesting her to ~~contact~~ him to facilitate preparation for the hearing on termination. As of October 30, 1998, Beals had not heard from Mother, who had scheduled oral surgery for November 5, 1998, the date of the hearing on termination. Beals obtained a new address and phone number for Mother, and withdrew his motion to withdraw when the hearing was continued to December 15, 1998.

The termination hearing was again continued, this time because of a conflict in the court's schedule, to January 8, 1999. On that day, Beals renewed his motion to withdraw as Mother's attorney. He informed the court Mother failed to contact him from early November until late in the afternoon of January 7, 1999. Beals made the following record:

BEALS: My notes do not reflect the last time I talked to [Mother]. It was right around the first part of November. She then did not contact me again and has made no contact with me until last night. There was a message left on my voice mail at work. It came in around 4:00 in the afternoon. I was out of the office from about quarter til four until 4:15. The message essentially said that she would – she did not have a phone for me to call her back at. That she would try to get back to me and if she didn't get back to me, that she'd simply meet me here at the courthouse around 9:00 this morning, and I got here about 9:00 and she was here shortly thereafter.

This morning, Your Honor, we did talk for a few minutes. It's become clear to me that I cannot function as [Mother's] attorney in this case. She's expressed her dissatisfaction with my services throughout this matter. She has essentially accused me of simply going along with what the Department of Human Services has recommended. In my own defense, I would state to the Court that any decisions to agree with the Department of Human Services' recommendations have been made by her consent and with her approval. Certainly I have given my recommendation and feelings to [Mother] and in many instances those recommendations and feelings have perhaps sided with what the Department of Human Services was recommending at that given time

....

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Given the fact that our relationship has deteriorated to the point where I believe she has lost all confidence in my ability to represent her, given the fact that she has not made contact with me to allow proper preparation of this case, I just don't see how I can continue to represent her in this matter.

The other thing I would, I guess, point out to the Court, and I'm sure the Court's going to want to talk to [Mother], and I'll just bring it up now so the Court is aware of it. She did express to me this morning that she had tried to call my office on several occasions, that she had left messages and either messages were not returned by me or if she left a message, there was no phone number at which I could reach her or that there were times when she'd call and not leave a message. Your Honor, I can only state to the Court that I'm not aware of any such messages. The only contact that I am aware of occurred last night at around 4:00 and before that occurred when we talked in late October, early November of 1998. I did not bring with me my phone records, message book, from our receptionist. I'm confident that it would show there are no messages which have been left within the last couple of months period of time. I can state that as far as my voice mail is concerned, the only message that I have received on my voice mail in the last two to three months has been the one I received last evening at around 4:00. I just don't think, Your Honor, that given all the circumstances that have now arisen, particularly this morning, and the desires expressed by [Mother], that there's any way that I can represent her and do her any kind of a good job, or decent job, in representing her interests in this case and given the serious nature of this case, I don't know that it would be fair to her to have someone representing her that she's lost confidence in and that [she] does not feel is looking for her best interests in this case

The district court then heard from Mother who gave the following version of the facts:

THE COURT: [Mother], where were you living in November?

MOTHER: In November I was living at [].

....

THE COURT: And did you give that address to DHS?

MOTHER: I gave that address to them in August when I moved there.

THE COURT: Did you give it to your attorney?

MOTHER: Yes, I did. I called and left a message with his receptionist.

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THE COURT: When was that?

....

MOTHER: Latter part of August, right after I moved there.

THE COURT: Now, end of October, first of November, he was having trouble getting ahold of you, right?

MOTHER: Yes.

THE COURT: And did you contact him then or did he contact you?

MOTHER: I tried several times to call him. At that point I didn't have a phone. I had no number to leave for him and –

THE COURT: Well, in October or first part of November, we had a hearing set. DHS had your address at that point?

MOTHER: Yes.

THE COURT: They gave it to Mr. Beals?

MOTHER: Yes.

THE COURT: And they told you to get ahold of him, correct?

MOTHER: Yes. And I have tried to get ahold of him since then. He's also – after having my address and sending it to the proper address – he's also sent me letters to an address on Bromley, which I have never lived at and I have told him I have never lived at. I usually get them forwarded to me about four days –

....

THE COURT: All right. When is the last time you walked into his office?

MOTHER: Probably in September. I did not find him there and I stopped going in just because I don't have a car, so it's more easy for me to walk across the street and use the telephone rather than walk all the way across town to find that I – I've found it increasingly difficult to find him in the office. I realize he's a busy man but I have not had any of my messages returned when I – I quit using the voice mail because I haven't been getting them returned and I leave messages with the receptionist, which he says he's not getting.

....

THE COURT: And you hadn't talked to Mr. Beals since September?

MOTHER: I had tried to get in contact with him but I was not

able to get through. I did finally find out the actual time – rechecking the time with his receptionist. I asked her to look it up for me because I was not able to talk to him.

THE COURT: So, again, from November 5 until now what you're saying is you haven't been able to contact him?

MOTHER: I haven't been able to call on a daily basis, no, but I've tried several times and have not been able to get through. In fact, Wednesday afternoon I specifically left a message with his receptionist and asked her to please tell him that I called and I will return the call on Thursday. She said he would be in pretty much all day. He didn't have court. Again, I was unable to get in contact with him when I called.

THE COURT: So when you're calling and leaving a message with the receptionist, you're telling him not to call you back because you don't have a phone? Is that what you're saying?

MOTHER: Yes, exactly. I'm just letting him know I'm calling. I'm trying to get in touch with him, but I don't have a phone that he can return my call.

The district court then invited Beals to make any further record he wished, and the following colloquy occurred:

BEALS: I was never given a message from Wednesday that she called. If it happened, I can't say one way or another. I did not receive a message. I do know that our office practice is that if a client calls in and leaves a message saying anything or any kind of message at all, that those messages are recorded in our message book and a copy is given to the lawyer of the other staff person who receives the message. I did not receive any such message on Wednesday I'm not aware of any attempts by her to make an appointment with me to see me. Certainly if she made an appointment, I would be in the office. I have been out of the office on occasion on other matters but I guess I find it highly unlikely that I have been out or unavailable on every occasion that [Mother] has called or stopped in to the office.

Again, Your Honor, I would urge the Court to grant my request to withdraw. I don't think it is fair to [Mother] to be put in the position of having someone represent her that she's lost confidence in, that she believes cannot do a good job for her and cannot protect her interests and I guess I would essentially agree with Mr. Frese's statement that my truthfulness is being challenged today and that's – that makes it that much more difficult for me to represent this lady in this matter also

THE COURT: Well, this matter has been set for [hearing] since November and there is no good cause for a continuance today, no good cause not attributable to the mother. Basically what it sounds like to me is there's been no reasonable responsible efforts to have contact with her attorney. We're going to go ahead and proceed with the hearing today. What I will do is recess for about 15 minutes. Ma'am, you can make a decision either to have Mr. Beals represent you or you can represent yourself today, but we are going to go ahead with the hearing.

After the recess, Mother did not return to the courtroom. A man who identified himself as her fiancé appeared and notified the court Mother was outside in a car, and she was very upset. The court then allowed Mother an additional five minutes to appear, but she failed to reenter the courtroom. Beals renewed his motion to withdraw, but the court overruled it and directed him to continue in his representation of Mother during the termination hearing. The court received evidence from the State, and then allowed Beals the opportunity to contact his client and request in writing within one week to reopen the record, if she wished. Mother filed a request to reopen the record and the district court received additional testimony on February 9, 1999.

The district court entered its order terminating Mother's parental rights pursuant to Iowa Code section 232.116(1)(d) and (e) on June 1, 1999. Beals filed a notice of appeal on behalf of Mother on June 29, 1999. He renewed his motion to withdraw on July 12, 1999, asserting the attorney-client relationship had broken down and claiming a conflict of interest with respect to the merits of Mother's appeal of the district court's rulings on her motion to substitute counsel and Beals' motion to withdraw. The district court granted the motion to withdraw on July 29, 1999.

II. Standard of Review. Our review of the district court's decision regarding a motion to substitute counsel and counsel's motion to withdraw is for abuse of

discretion. See *State v. Brooks*, 540 N.W.2d 270, 272 (Iowa 1995). We find an abuse of discretion only upon a showing the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Vanover*, 559 N.W.2d 618, 627 (Iowa 1997). To the extent an issue implicates constitutional protections, we review it de novo. *Id.* Our review in cases involving termination of parental rights is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1984); *In re M.N.W.*, 577 N.W.2d 874, 875 (Iowa App. 1998).

III. Preservation of Constitutional Error. On appeal, Mother contends the district court's ruling abridged her constitutional right to the assistance of counsel in this case. The State asserts Mother did not present a constitutional claim in the district court, and may not do so for the first time on appeal. See *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa App. 1994). Although she did not expressly inform the district court of the due process considerations implicated by her motion to substitute counsel and her counsel's motion to withdraw, we may pass our doubts on whether error was preserved on this claim and decide the matter on its merits. See *State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999); *State v. Khouri*, 503 N.W.2d 393, 394 (Iowa 1993); *State v. Lam*, 391 N.W.2d 245, 252 (Iowa 1986). We so choose in this case.

IV. Merits of Rulings on Motions to Substitute Counsel and to Withdraw. Mother has a right to due process and a fair trial. See *In re R.B.*, 493 N.W.2d 897, 898 (Iowa App. 1992). State intervention to terminate a parent-child relationship must be accomplished by meeting the requisites of the Due Process Clause. See *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599, 606 (1982); *In re D.A.W.*, 552 N.W.2d 901, 903 (Iowa App. 1996).

This includes a right to be represented by counsel. See *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994) (citing *Goldberg v. Kelly*, 397 U.S. 254, 268-72, 90 S. Ct. 1011, 1020-22, 25 L. Ed. 2d 287, 299-301 (1970)).

In the present case, Mother did have counsel at all stages of this proceeding. Even when she left the courtroom and refused to return on January 8, 1999, the district court protected her right to counsel by denying Beals's motion to withdraw. The record reflects Beals conducted reasonable cross-examination of the State's witnesses under the difficult circumstances surrounding Mother's voluntary absence from the courtroom on January 8, 1999. When the record was reopened on February 9, 1999, for the purpose of receiving Mother's testimony, Beals again served as Mother's counsel without further objection from either Mother or Beals. Under the circumstances of this case, we conclude Mother's due process right to have counsel in the proceedings was not violated. Although Mother's counsel may well have been able to represent her more effectively if he had had more contact with Mother before the January 8, 1999 hearing, Mother cannot escape all responsibility for her failure to demand such contact in a timely manner. Even if, as she claims, she received no response to phone messages left for her attorney, she fails to explain why she failed to visit his office to assure adequate personal contacts with him. At times material to the hearing, she lived within ten blocks from her attorney's office. If she was thoroughly dissatisfied with her attorney's services, she had an obligation to bring this to the attention of the court before the hearing began. Under the circumstances of this case, Mother's due process rights were not violated. We turn now to the question of whether the district court abused its discretion in denying the motions to substitute counsel and to withdraw.

Where a party moves to substitute counsel, she must prove sufficient cause to justify the substitution especially when the motion is made on the eve of, or during, trial. *State v. Atley*, 564 N.W.2d 817, 830 (Iowa 1997); *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994) (holding justifiable dissatisfaction with appointed counsel includes a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between attorney and client.) The district court must balance a party's right to counsel of choice and the public's interest in the prompt and efficient administration of justice. Last minute requests to change counsel must not be allowed to become a tactic for delay. *Webb*, 516 N.W.2d at 828.

In this case, Mother claimed to have had long-standing dissatisfaction with Beals's services. She claimed to have made efforts prior to the hearing to meet with her attorney. Beals made a professional statement to the court suggesting Mother's effort may have been less than diligent. On this record, we find no abuse of discretion in the district court's rejection of Mother's attempt to change counsel on the first day of the hearing. She failed to take timely measures to change counsel, and the district court properly concluded her motion on the day the termination hearing commenced was too late under the circumstances of this case.

When Beals made his motion to withdraw on the first day of the hearing, the district court properly balanced Mother's need for counsel against the need to promptly adjudicate the matter before it. The hearing on termination of Mother's parental rights had been continued several times, and counsel for the State and the guardian ad litem resisted further delay. Among the stern realities facing the district court is the "relentless passage of precious time." *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987). The crucial days of childhood cannot be suspended while parents

~~experiment with~~ ways to face up to their problems. *Id.* D.B. had been placed in foster ~~care for~~ approximately three years, and the district court justifiably concluded the proceeding should go forward and viewed the proceedings with a proper sense of urgency. After giving Mother the option to continue pro se or with Beals as her attorney, she left the courtroom and refused to return until several days later. When she did return to give testimony, the record reflects she and Beals communicated effectively. Under the circumstances, the district court properly exercised his discretion to deny Beals's motion to withdraw.

V. Termination of Parental Rights. Our primary concern is the best interests of the child. *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa App. 1997). We look to the child's long range, as well as immediate, interests and consider what the future holds for the child if returned to his or her parents. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998).

Although the district court's findings of fact and conclusions were not set forth with great clarity, we find on de novo review the record clearly supports the termination of Mother's parental rights pursuant to Iowa Code section 232.116(1)(e). This statute requires proof of the following elements:

- (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 child has been removed from the physical custody of the child's parents 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.

Iowa Code § 232.116(1)(e) (1997). The record contains clear and convincing

evidence of the following facts. D.B. was ten years old when the termination hearing commenced on January 8, 1999. He was adjudicated CINA in August of 1995, and has since then been in continuous foster care placement. D.B.'s therapist, Mark Smith, recommended termination of Mother's parental rights. We find Smith's recommendation of termination in this case to be particularly compelling because it was the first time he urged termination in nearly twenty-five years of practice as a social worker. His reasons were explained as follows:

We've had a child now that has been out of home placement since May of 1995 and was in foster care for a few months prior to that on a voluntary basis placed by the mother. We've had a child that's been in limbo during that time period with inconsistent involvement by his mother. I think that this child needs to have some attachment to someone and needs to be able to identify someone as permanent relatives, permanent members of his family.

The other evidence in the record demonstrates Mother's history of participation in services has been poor and inconsistent even during times when she was not incarcerated. Despite several directives to do so, she never did complete the gambling addiction evaluation.

Other evidence, as well, clearly supports a finding D.B. cannot be returned to Mother's custody. The record reflects a history of residential and vocational instability. At the time of the hearing, Mother was again a party to an eviction action and wasn't certain where she would be living in the near future. She was unemployed, having quit her job because of panic attacks. She conceded during her testimony her living environment would not permit D.B. to come home at that time. Under the circumstances shown in the record, we find clear and convincing evidence D.B. could not be returned to his Mother's custody and find the State met its burden of proof under section 232.116(1)(e).

V. Conclusion. Mother's due process rights were adequately protected when the district court denied her motion to substitute counsel and her attorney's motion to withdraw. The district court did not abuse its discretion in those rulings. The State did prove, by clear and convincing evidence, the elements of Iowa Code section 232.116(1)(e). Accordingly, we affirm the decision of the district court. We have reviewed the other assignments of error advanced by Mother and find them to be without merit.

AFFIRMED.