FILED
NOV 22 1978
CLERK SUPREME COURT

102

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF)
MARY ELIZABETH DENNIS and)
MICHELLE OLIVIA DENNIS,)
Minor Children.)

Filed November 22, 1978

663
3-61471

Appeal from Story District Court, Juvenile Division-Glenn C. Sedgwick, Judicial Magistrate.

Natural parents appeal order for termination of their parental relationship to minor children. - Affirmed.

Thomas R. Hronek, Ames, for Appellants.

Frank B. Johnston, Ames, Attorney for Custodians.

Dale E. Ruigh, Ames, Guardian Ad Litem.

Richard C. Turner, Attorney General of Iowa, Francis Hoyt, Assistant Attorney General, Stephen C. Robinson, Special Assistant Attorney General, and Theodore R. Boecker, Assistant Attorney General, for Appellees.

Heard by Donielson, Acting C.J., and Snell, Oxberger and Carter, JJ.

PER CURIAM

This is an appeal from an order of the trial court terminating the parental rights of appellants, Lawrence Dennis and Carolyn Dennis, with respect to their minor children, Mary Elizabeth and Michelle. The proceeding for termination was brought pursuant to chapter 600A, The Code.

The parents' appeal raises several issues. We consider the following: (1) whether the petition for termination is deficient for failure to contain "a plain statement of the facts" which indicate that the parent-child relationship should be terminated; (2) whether the trial court erred in failing to grant a continuance sua sponte when the parents failed to appear at a re-convened session of the termination hearing; and (3) whether § 600A.8(4), The Code, is sufficiently definite to justify the termination of parental rights under that statute.

I. Does the petition contain a sufficient factual statement? The petition for termination is a form which lists all of the statutory grounds for termination and indicates with an "x" mark those grounds relied upon in the particular case. By this means it is made to appear that the statutory grounds contained in subsections 3, 4, and 6 of §600A.8, The Code, form the basis for the action being taken. Section 600A.5(3)(c), The Code, requires that the petition contain "a plain statement of the facts and grounds in § 600A.8 which indicate that the parent-child relationship should be terminated." The parents urge that the petition contains only a statement of grounds with no statement of facts. Their motion for more specific statement was overruled by the trial court.

While we find the petition to be skeletal, we cannot conclude that it is so insufficient as to serve as a basis for reversing the termination adjudication. We find no statutory or constitutional deprivations of the parents' rights in this respect. The allegations of the petition are cast in the form of conclusory factual averments stating, in substance, that the circumstances provided in the statutes for termination of parental rights exist with respect to the parents in the instant proceeding. This constitutes a pleading of the ultimate facts. We deem it neither necessary nor desirable that the evidentiary facts sought to be proved be set forth in the pleadings. If the instant case may be taken as an example, such a requirement in parental termination

actions would render the pleading unnecessarily voluminous.

In the present case the trial court, in overruling the parents' motion for more specific statement, directed their counsel's attention to a report in the file indicating the basis for the impending termination proceedings. This was three days prior to the trial. No continuance was sought. In addition, counsel for the parents did undertake some discovery procedures through interrogatories which were answered by the State prior to the evidence being concluded. We find no basis for reversal due to the insufficiency of the pleadings.

II. Should the trial court have granted a continuance sua sponte when the parents failed to appear for the re-convened hearing of October 11, 1977? The hearing on the termination petition was commenced on September 22, 1977 with the parents in attendance. At the conclusion of that day's testimony the proceedings were continued until October 12, 1977 (later changed to October 11, 1977 with notice to the parents). When the hearing re-convened on October 11,1977 the parents were not present. Inquiry was made by the court as to their whereabouts and their counsel advised the court that the parents had traveled to Glouster, Ohio. They had called their attorney from that location on October 8 and advised him that they would like to attend the hearing but did not have transportation or money to obtain transportation back to Iowa. When the hearing commenced on September 11, both of the parents resided in Story County, Iowa and were employed there. There is evidence that on or about October 2, 1977, they both terminated their respective jobs, abandoned their mobile home residence, and left for Ohio without notice to their employers or their attorney. The only explanation offered for this circumstance by the parents' attorney was the fact that they felt frustrated from the way things were going at the initial session of the termination hearing. He stated on the record that "I don't feel in good faith that I can request a continuance." Under the circumstances presented the trial court did not err in failing to continue the case sua sponte.

III. Was the trial court's adjudication validly premised upon § 600A.8(4), The Code? We review the evidence in support of the decree of termination of parental rights de novo. In re Interest of Kelley, 262 N.W.2d 781, 782 (Iowa 1978). Among other reasons for termination of parental rights the trial court found that the parents had

substantially, continuously and repeatedly refused and neglected to comply with the duties imposed upon the parents by the parent-child relationship. The trial court's lengthy decree details the evidence in support of that finding which satisfies the requirements for the termination of parental rights under the provisions of § 600A.8(4), The Code.

On appeal the parents do not argue the sufficiency of the evidence to sustain a finding based upon clear and convincing proof that they repeatedly neglected to comply with their duties, as parents, toward their children. The record is replete with clear and convincing evidence of such neglect on their part. Rather, the parents challenge the termination of their parental rights under § 600A.8(4) by attacking the vagueness of that statute. No constitutional challenge to this statute was raised in the trial court. When a constitutional issue is not first presented in the trial court it will generally not be considered on appeal. Long v. Long, 255 N.W.2d 140, 144 (Iowa 1977).

Apart from the apparent failure to preserve this constitutional issue, we believe that the record in the present case reveals that the parents had ample and repeated notice from the social service case worker assigned to their case regarding the factual basis for the termination of their parental rights and were given a fair opportunity to correct the deficiencies which ultimately gave rise to the adjudication. Under the rationale expressed in In Interest of Hochmuth, 251 N.W.2d 484 (Iowa 1977), this renders the statute specifically precise as applied in the particular case. Although Hochmuth involved § 232.41(2)(b) of the 1973 Code and the present case involves § 600A.8(4) of the present Code the two provisions are strikingly similar. It may in no way be claimed that the present statute is less specific than the former.

In making this determination we note that the parents in the present appeal make no claim that notice of the factual basis for termination imparted to them under § 600A.8(4) must be contained in a court order to pass constitutional muster. That argument in the present appeal is asserted only with respect to the application of § 600A.8(6). There is some reason to distinguish between the two statutory provisions with respect to such requirement, if indeed there is such a requirement.[1] Section

[1] In Interest of Crooks, 262 N.W.2d 786 (Iowa 1978) strongly infers that it is a condition for termination under § 600A.8(6), The Code, that there be an order of the juvenile court containing directions to follow to correct the conditions giving rise to an adjudication of neglect (child in need of assistance). But termination was approved

600A.8(6) requires by its own terms efforts "under the direcion of the court." There is no such requirement in § 600A.8(4). In Interest of Crooks, 262 N.W.2d 786 (Iowa 1978), cited by the parents in their challenge to § 600A.8(6) did not involve § 600A.8(4). It involved the statutory predecessor to § 600A.8(6). We do not interpret Hochmuth as requiring that the directives of social service case workers be embodied in orders of the court in order to satisfy due process.

Because we conclude that the order of termination was properly issued under § 600A.8(4), The Code, we need not consider the parents' attack upon the other statutory grounds relied upon by the trial court.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

under that statute in Long v. Long, 255 N.W.2d 140 (Iowa 1977) despite the apparent absence of such an order. The Crooks decision approves Long on the basis that "in Long, the petitioner for termination specifically represented that actions had been taken under the direction of the court, but that the conditions complained of had not been alleviated." That description fits the situation in the present case with respect to the efforts to terminate pursuant to § 600A.8(6). But because we uphold the termination order under § 600AA.8(4) we need not consider the challenge made to § 600A.8(6) nor the finding of "abandonment" pursuant to § 600A.8(3).

OXBERGER, C. J. (dissenting)

Section 600A.6, The Code, provides that termination of parental rights may be ordered only after notice has been served on necessary parties and they have been given an opportunity to be heard. The parents in this case never testified at the termination hearing. They were present on the first day of the hearing September 22nd. After a full day's testimony, the State was granted a continuance to October 12 because of the unavailability of a witness. In the interim, the parents returned to Ohio and informed their attorney on the date the hearing reconvened that they wanted to attend but did not have enough money to get back to Iowa. In view of the serious nature of termination proceedings, the grant of one continuance at the State's request, the absence of an urgent need to proceed, and the statutory mandate noted above, I think trial court should have continued the hearing sua sponte.

To date, the supreme court has not construed the requirements of § 600A.5, The Code. That section states, in pertinent part: "3. A petition for termination of parental rights shall include: . . . c. A plain statement of the facts and grounds in section 600A.8 which indicate that the parent child relationship should be terminated." The petition in the instant case contained only a citation of the statutory grounds of § 600A.8 relied on for termination with no reference to specific factual allegations. This point was discussed in Alsager v. District Court of Polk County, 406 F. Supp. 10, 24 (S. D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976), as follows: "The Fourteenth Amendment requires notice in parental termination proceedings to contain both the alleged factual basis for the proposed termination and a statement of the legal standard authorizing termination." Accordingly, I would find the instant petition insufficient to satisfy § 600A.5(3)(c), The Code, and the procedural due process guarantees of the Fourteenth Amendment.