IN THE COURT OF APPEALS OF IOWA

No. 1999-72 (9-229) / 98-2137

IN THE INTEREST OF M.K. and M.K.,
Minor Children,

S.K., Father,
Appellant

FILED
APR 30 1999

Appeal from the Iowa District Court for Linn County, Susan F. Flaherty, Associate Juvenile Judge.

The father of two minor children appeals a juvenile court order terminating his parental rights after he was convicted of murdering his wife and one child. **AFFIRMED.**

Michael M. Lindeman of Dolezal & Lindeman, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Charles K. Phillips, Assistant Attorney General, and Lance Heeren, Assistant County Attorney, for appellee State.

Judy L. Goldberg of Maher & Nidey Law Firm, Cedar Rapids, guardian ad litem for minor children.

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

ZIMMER, J.

Stephen, the father of two minor children appeals a juvenile court order terminating his parental rights. He argues the State failed to show by clear and convincing evidence his parental rights should be terminated even though he received two, consecutive life sentences for the murder of his wife and third child. He claims the State never allowed him a chance to continue any relationship with his remaining children. We affirm the termination of Stephen's parental rights.

Background: Stephen and Sandra were the parents of two minor children, Miranda, born in 1991 and Joshua, born in 1994. Stephen also has child from a previous marriage, Michael, born in 1988. In December 1996, a fire swept through Stephen's residence killing Sandra and Joshua. Miranda and Michael escaped the fire. Stephen was arrested and charged with two counts of first-degree murder. Michael and Miranda were removed from the home and temporarily placed in the care of their maternal aunt and uncle, Todd and Debra. In February 1997, the children were adjudicated in need of assistance. Susan, Michael's mother, appeared at the CINA proceeding and requested physical care of Michael.

In October 1997 a jury found Stephen guilty of two counts of first-degree murder and the court sentenced him to two consecutive life sentences. Stephen has had no contact with the children since that time. That same month, the maternal grandparents, Doug and Barbara, were awarded physical care of the children. Physical care of Michael was awarded to his mother, Susan, in January 1998.

Termination proceeding: In November 1998, the juvenile court terminated Stephen's parental rights. The court noted there was no reasonable likelihood Stephen would ever be released from prison and it would be unfair to the children to require them to wait while he argues his case through the appellate process. The court further found both Michael and Miranda suffered deep psychological scars after witnessing the death of their mother and sibling and will need continuing therapy. Their therapist stated they both viewed their father with fear and considered him a murderer.

Appellate claims: Stephen argues he never was given any chance to pursue a relationship with his surviving children after his arrest. He argues the State acted as if it had already decided to terminate his parental rights once he was arrested and charged with murder. Stephen next contends his parents should have been afforded an opportunity to care for the children. He asserts he had only a few days to prepare for trial, was not permitted to attend the trial, and was prejudiced by the court's denial of his request for appointment of an "independent" counselor for his surviving children. He also claims termination is premature since his appeal of his murder convictions has not been decided.

The State responds Stephen's claim provides no basis for reversing the termination. The State also cites current law which provides for concurrent planning by DHS and circumstances which now obviate the need for reasonable efforts to reunite the family. S.F. 2345, Sec. 1, 1998 Iowa Acts 1190, § 1. The State acknowledges the legislature made these changes after this case began.

Discussion: Stephen murdered his wife and one child by burning their home. He does not challenge the grounds for termination of his parental rights to his two surviving children. Rather, he argues the State moved too quickly toward termination, without giving him an opportunity to maintain his relationship with his children before his conviction or to have visitation.

Stephen cites numerous cases concerning the general principles governing termination of parental rights. However, once he begins his argument, he cites no authority for the claims he raises. His argument is almost empty of citations to the record to support the facts he asserts. No statutory or case law mandates visitation if would be harmful to the children. Our primary concern in a termination proceeding is the best interests of the child. *In re R.R.K.*, 544 N.W.2d 274, 275 (Iowa App. 1995). Compelling testimony was offered concerning the psychological needs of the children and the harm which would occur if Stephen were allowed contact with his children. Under the circumstances of this case, to afford Stephen an opportunity to continue a relationship with his children would have been detrimental to them.

Stephen claims a right to be present at the termination hearing. This court already has answered that claim in the negative:

> Due process requires "fundamental fairness" in judicial proceedings. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 25, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640, 648 (1981). Where a parent receives notice of the petition and hearing, is represented by counsel, counsel is present at the termination hearing, and the parent has an opportunity to present testimony by deposition, we cannot say the parent has been deprived of fundamental fairness. *Accord Valero v. Department of Human Resources*, 511 So.2d 200 (Ala. Civ. App. 1987) (incarcerated parents were not required to be present at termination of

> parental rights hearing where given notice of petition and hearing, represented by counsel, and opportunity to present testimony by deposition); *Pignolet v. Department of Pensions and Security*, 489 So.2d 588 (Ala. Civ. App. 1986) (due process does not require incarcerated father be allowed to attend termination hearing); *Utah v. Vargas*, 736 P.2d 1031 (Utah App. 1987).

In re J.S., 470 N.W.2d 48, 52 (Iowa App. 1991). Stephen had more access to the proceeding via speaker phone than he would have if only allowed to participate by deposition. This claim is without merit.

Stephen claims the juvenile court should should have appointed an additional counselor at state expense to address the issue of his visitation with his children. The case cited by the State to support its assertion such experts are not allowed as a matter of right in juvenile proceedings does not stand for that proposition. In *In re H.R.K.*, the court refused to allow the parents' attorney to question the children, refused to order an independent medical exam, or to force H.R.K. to testify, given the trauma from sexual abuse. *In re H.R.K.*, 433 N.W.2d 46, 49 (Iowa App. 1988). Nevertheless, Stephen provides no authority for his claim, nor does his claim require reversal of the termination. The court did authorize a payment not to exceed $300 as an expert witness fee for a counselor who had worked as a therapist with the children after their mother and brother were killed. Under the circumstances presented here, Stephen was not prejudiced by the court's failure to appoint an additional counselor.

Finally, Stephen argues it would be a "travesty of justice" if his criminal conviction is reversed on appeal and the juvenile court has already terminated his parental rights. He cites no authority. The State cites only a Colorado case which

allowed a termination before the mother's murder conviction appeal was decided. *See People v. J.R.*, 845 P.2d 539, 541 (Co. 1992). Stephen provides no reason to believe his murder convictions will be overturned. He also does not suggest keeping the children in foster care would be in their best interest. Under chapter 232 the State must act to prevent probable harm to a child and need not delay until harm has actually occurred. The termination statutes are preventative as well as remedial. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

Stephen concludes, "the state has failed to prove clearly and convincingly that his rights should be terminated." However, he raises no claim meriting reversal of the termination and does not challenge the findings or conclusions of the juvenile court.

Upon consideration of all arguments raised on appeal, we affirm the ruling of the juvenile court.

AFFIRMED.

No. 98-2137. [1999-72 (9-229)] IN RE M.K. and M.K.

Appeal from the Iowa District Court for Linn County, Susan F. Flaherty, Associate Juvenile Judge. **AFFIRMED.** Considered by Sackett, C.J., and Streit, and Zimmer, JJ. Opinion by Zimmer, J. (6 pages $2.40)

Stephen, the father of two minor children appeals a juvenile court order terminating his parental rights. He argues the State failed to show by clear and convincing evidence his parental rights should be terminated even though he received two, consecutive life sentences for the murder of his wife and third child. He argues the State acted as if it had already decided to terminate his parental rights once he was arrested and charged with murder. He asserts he had only a few days to prepare for trial, was not permitted to attend the trial, and was prejudiced by the court's denial of his request for appointment of an "independent" counselor for his surviving children. He also claims termination is premature since his appeal of his murder convictions has not been decided. **OPINION HOLDS:** Under the circumstances of this case, to afford Stephen an opportunity to continue a relationship with his children would have been detrimental to them. Stephen was not prejudiced by the court's failure to appoint an additional counselor. Stephen concludes, "the state has failed to prove clearly and convincingly that his rights should be terminated." However, he raises no claim meriting reversal of the termination and does not challenge the findings or conclusions of the juvenile court.