

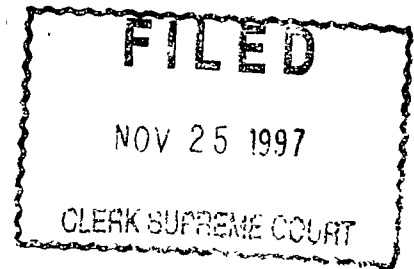
IN THE COURT OF APPEALS OF IOWA

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No. 7-381 / 96-2049

IN THE INTEREST OF
J.D., L.D., and T.D., Minor Children,

L.M., Mother,
Appellant.



Appeal from the Iowa District Court for Black Hawk County, Stephen C.
Clarke, Associate Juvenile Judge.

Mother appeals juvenile court's order modifying the dispositional order to
place her children in family foster care. **AFFIRMED.**

Kellyann M. Lekar of Randall, Nelson & Hawbaker, P.L.C., Waterloo, for
appellant.

Thomas J. Miller, Attorney General, Chris Odell, Assistant Attorney General,
and Stephen Halbach, Assistant County Attorney, for appellee-State.

Sara Kersenbrock, Waterloo, guardian ad litem for minor children.

Considered by Sackett, P.J., and Huitink, J., and Hayden, S.J.*

*Senior Judge from the Iowa Court of Appeals serving on this court by order
of the Iowa Supreme Court.

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HUITINK, J.

L.M. appeals the Juvenile Court's modification of a dispositional order resulting in placement of her children, J.D., L.D., and T.D., in foster care. We affirm.

On April 7, 1995, the Black Hawk County Attorney filed a petition alleging J.D., L.D., and T.D. were children in need of assistance based on episodic domestic violence involving L.M. and her then-paramour, now-husband, M.M.. The petition also cited L.M.'s failure to supervise her children by deferring custodial care to her mother, D.H., and L.M.'s continued residence with M.M., despite a no-contact order separating her from M.M. On June 2, 1995, prior to adjudication, the court ordered temporary care, custody, and control of these children continue with the Department of Human Services (DHS), and that their suitable placement include D.H.'s home. The court issued the order because L.M. left home for several days without informing D.H. of her whereabouts, making financial arrangements for her children, or leaving authorization for medical care for her children.

On July 12, 1995, the court adjudicated J.D., L.D., and T.D. children in need of assistance as provided by Iowa Code sections 232.2(6)(b), (c)(1) and (2), and (g). The court also ordered temporary custody of the children remain with DHS pending suitable placement, including D.H. or family foster care. The court's ruling cited four founded physical abuse or denial of critical care reports involving the children, domestic violence, L.M.'s extended absence from the family home since February 1995, and L.M.'s deferral of custodial care to her mother.

The court's dispositional order entered September 15, 1995, provided that the continued care, custody, and control of the children remain with DHS for suitable relative placement. This placement was continued following a review in March 1996.

On October 15, 1996, the court ordered care, custody, and control of T.D. and L.D. remain with DHS for family foster care, and the care, custody, and control of J.D. remain with DHS for placement to include contract level foster care or foster group care. In its order, the court noted that despite years of therapy and several months of "high levels of family centered services," the adults in this family had not improved their relationship or structured appropriate behavioral limits for the children. The court also noted the children have all displayed high degrees of stress and that D.H. ignored inappropriate behaviors, including intra-family violence. The court described the family situation as "unhealthy," concluding that reasonable efforts to prevent or eliminate the need for removal of the children had been made and that remaining in their family home was not in the children's best interests. The court further ordered all communication between the children and their biological family be supervised by DHS.

On appeal, L.M. argues the State did not offer her reasonable services to prevent the removal of the children from her custody. L.M. maintains that by placing the children in D.H.'s care and including D.H. in family services, DHS created an obstacle to reunification of her family. In anticipation of the State's claim that she did not preserve error on this issue, L.M. argues that she received ineffective

assistance of counsel. She cites her lawyer's failure to timely raise this issue until closing argument at the modification hearing.

I. Reasonable Efforts.

Our review of an action arising from CINA proceedings is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses, but we are not bound by these findings. Iowa R. App. P. 14(f)(7).

Just as the State had the obligation to offer reasonable services to prevent placement or reunify the family, L.M. had the responsibility to challenge the reasonableness of services when the services were offered. *In the Interest of L.M.W.*, 518 N.W.2d 804, 807 (Iowa App. 1994); *In the Interest of C.D.*, 508 N.W.2d 97, 100-01 (Iowa App. 1993). Over the last seven years, L.M. and her family have received extensive services, including in-home family therapy, a parent education program, mental health evaluations and treatment, and family preservation services. However, L.M. failed to challenge the offered services until closing arguments at the hearing to modify the disposition on September 12, 1996. Because L.M. failed to object to any of the services in a timely fashion, we reject L.M.'s argument that she may now challenge the reasonableness of the services offered. L.M. should have raised this issue earlier.

II. Ineffective Assistance of Counsel.

We review ineffective assistance of counsel claims in juvenile proceedings de novo, not because the Sixth Amendment applies, but because review of CINA cases is de novo. *In re J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984).

In claims of ineffective assistance of counsel, we are concerned with the “fundamental fairness of the proceeding whose result is being challenged.” *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987)(quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699 (1984)). The standards adopted in *Strickland* apply to appointed counsel in a CINA case. *In re D.W.*, 385 N.W.2d 570, 579-80 (Iowa 1986). The burden is on the claimant to prove by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) actual prejudice resulted. *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992). The claimant must overcome the presumption that counsel’s conduct was within the permissible range of reasonable professional competency, *Id.*, and that counsel’s conduct was sound trial strategy. *In re D.W.*, 385 N.W.2d at 579-80.

The first prong of the ineffective assistance of counsel test requires an affirmative factual basis demonstrating the alleged inadequacy of representation be set forth. *Hinkle v. State*, 290 N.W.2d 28, 31 (Iowa 1980). The second prong, prejudice, requires a showing that counsel’s failure to perform an essential duty worked to the client’s actual and substantial disadvantage, thereby constituting “a denial of the accused’s due process right to a fair trial, a fundamental miscarriage of

justice, or an equivalent constitutional deprivation.” *State v. Miles*, 344 N.W.2d 231, 234 (Iowa 1984). Prejudice to this degree requires a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699.

L.M. has failed to overcome the strong presumption that her counsel’s conduct was competent. The record does not indicate that L.M. was dissatisfied with or objected to any of the services provided by the State over the years, until closing arguments at the conclusion of the September 12, 1996, hearing. In fact, one year earlier, L.M. stipulated and agreed to the State’s recommendation that care, custody, and control of the children remain with DHS for suitable relative placement, which was part of the basis for the court’s September 15, 1995, finding that DHS offered reasonable services, and, at the time, returning the children to L.M.’s custody would not be in the children’s best interests. Thus, we conclude the conduct of L.M.’s counsel was not deficient.

Having failed the first prong, L.M.’s claim of ineffective assistance of counsel must fail; however, we further find L.M. cannot prove the second prong of the test, prejudice. The issue not pursued, reasonableness of services, lacks merit. The record reflects a number of services offered to L.M. and her family since 1988. The court’s October 15, 1996, order states that, despite therapy and family centered services, a healthy environment “has not occurred and is not likely to occur.” The court noted that family reunification remained a long-term goal. Thus, L.M. is unable to show the

result of the proceeding would have been different had the issue of reasonableness of services been raised before closing arguments. Accordingly, the decision of the juvenile court is affirmed.

AFFIRMED.