IN THE COURT OF APPEALS OF IOWA

No. 9-403 / 09-0409
Filed July 2, 2009

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

P.B., Father,
Appellant,

S.B., Mother,
Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Peter B. Newell, District Associate Judge.

A mother and father appeal the termination of their parental rights to their child. **AFFIRMED.**

David C. Laudner, Mason City, for appellant-father.

Dylan J. Thomas, Mason City, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Paul L. Martin, County Attorney, and Shawn Showers, Assistant County Attorney, for appellee.

Mark Young, Mason City, attorney and guardian ad litem for minor child.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

EISENHAUER, J.

A mother and father appeal the termination of their parental rights to their child. Together they contend the court erred in hearing testimony from a witness prior to addressing pre-trial matters, in admitting reports from the court appointed special advocate (CASA), in finding the State made reasonable efforts to reunify them with the child, and in finding termination is in the child's best interest. The mother also contends the court erred in denying her application for new counsel, in denying her motion for new trial, and in failing to allow the maternal grandmother to intervene in the proceedings or otherwise participate in the termination hearing. She also alleges her trial counsel was ineffective. The father also contends the court erred in denying his motion for travel order and in overruling his objections to the termination hearing being held without his physical presence.

We review the decision to terminate parental rights de novo. *In re N.V.*, 744 N.W.2d 634, 636 (Iowa 2008). Evidentiary rulings are reviewed for an abuse of discretion. *In re E.H. III*, 578 N.W.2d 243, 245 (Iowa 1998). We review a denial of intervention for the correction of errors at law. *In re A.G.*, 558 N.W.2d 400, 403 (Iowa 1997).

The child, born in August 2002, was adjudicated in need of assistance in September 2004 after the child tested positive for methamphetamine and cocaine. The mother is a substance abuser who has been incarcerated on drug charges since April 2007. She expected to be paroled in March 2009.

The father did not participate in the juvenile court proceedings in this matter until December 2007. He was incarcerated at the time and remains incarcerated. It is unknown when he is schedule to be released, although he was sentenced in May 2007 to forty-five years in prison.

A termination hearing was held in February 2009. Both parents appeared and testified by telephone. The hearing commenced with testimony from the foster mother taken over the telephone. After her testimony the court, stated, "We put on Ms. Andrews right away before we actually introduce the case. So now, we're going to go back and start the way we—We did that because we had to get everybody involved in a conference call." The court then introduced the case, set the record, and had the persons in the courtroom introduce themselves. Preliminary issues were then taken up, including a motion to bifurcate the permanency hearing from the termination hearing, a renewed request to transport the father to the hearing, a request to sequester the witnesses, an "objection" to the ruling allowing Ms. Foos to continue as the mother's attorney, and a record regarding a DHS worker's marriage to the father's cousin. The court ruled the permanency issues would be taken up later, did not respond to the renewed request to have father personally present, sequestered the witnesses, and did not respond to the request by the mother and her attorney to have new counsel.

On March 3, 2009, the district court entered its order, terminating the parents' rights pursuant to Iowa Code section 232.116(1)(f) (2007). Neither

parent disputes the grounds for termination have been proved by clear and convincing evidence.

We note at the outset due process does not require the parents' physical presence at the termination hearing. *See In re J.S.*, 470 N.W.2d 48, 52 (Iowa Ct. App. 1991) ("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."). The juvenile court did not abuse its discretion in denying the father's motion for travel order.

At the end of the foster mother's testimony, the maternal grandmother, who had intervened in the CINA case, started to ask questions. After one question, the court asked the county attorney if he had a position on whether or not the maternal grandmother should be allowed to ask questions. The county attorney, the child's attorney, and the father's attorney all took the position the grandmother's questions had to do with permanency and not termination and she should not be allowed to ask questions. The mother's attorney stated her belief the maternal grandmother should be allowed to ask questions. The court ruled, "I'm not going to allow [the grandmother] to ask these questions at this time." We conclude the court did not err in denying the mother's request to allow the maternal grandmother to participate in the termination hearing. The court concluded that the questions went to the issue of permanency, not termination. The court decided to bifurcate the issues and simply address the question of termination at the hearing. The mother argues this was error because the

maternal grandmother "was not allowed the opportunity to use her knowledge of and experience with the case to point out inconsistencies in State witnesses' testimony and argue against termination." The grandmother never asked to intervene in the termination case and was available to testify as a fact witness. We find no error.

The mother contends the court erred in denying her request for new counsel. This request was made one week prior to the termination hearing. The mother's trial counsel had represented the mother throughout the underlying CINA proceedings and the court found she would have more knowledge of the case than any newly appointed counsel. Determining appointing new counsel would cause extensive delays in a case already four and a half years old, the court denied the request. We find no abuse of discretion in so doing. To the extent the mother argues her due process rights were violated by not being present at the hearing, we reject her claim. As noted above, due process did not require her presence.

The parents both contend the court erred in allowing testimony from the first witness—the child's foster mother—prior to hearing various motions. The foster mother testified by telephone as soon as the record was opened. Neither parent objected to her testimony or asked to have witnesses sequestered. Nonetheless, they complain proceeding in this manner prevented them from seeking the sequestration of other witnesses before receiving the foster mother's testimony. However, neither parent cites to any attempt to sequester the witnesses before the foster mother's testimony or explains how this failure tainted

the other witnesses' testimony. We conclude the court did not abuse its discretion in the manner in which it conducted the termination hearing.

We likewise conclude the court did not abuse its discretion in admitting the CASA reports. The father objected to admission of the CASA report as containing hearsay and the mother joined in this objection. However, Iowa Code section 232.89(5) states:

> 5. The court may appoint a court appointed special advocate to act as guardian ad litem. The court appointed special advocate shall receive notice of and may attend all depositions, hearings, and trial proceedings to support the child and advocate for the protection of the child. The court appointed special advocate shall not be allowed to separately introduce evidence or to directly examine or cross-examine witnesses. The court appointed special advocate shall submit a written report to the court and to each of the parties to the proceedings containing results of the court appointed special advocate's initial investigation of the child's case, including but not limited to recommendations regarding placement of the child and other recommendations based on the best interest of the child.

The reports were properly admitted. Finding no error in the procedural and evidentiary rulings of the court, we also conclude the court did not err in denying the mother's motion for new trial.

Mother also claims her attorney was ineffective. Due process requires counsel appointed under a statutory directive to provide effective assistance. *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986). A party claiming ineffective assistance of counsel to show (1) that counsel's performance was deficient, and (2) that actual prejudice resulted. Unless both showings are made, the claim must fail. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Our scrutiny of counsel's performance must "be highly deferential," *id*. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694, and must

"indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [party] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, 104 S. Ct. at 2066, 80 L. Ed. 2d at 694-95 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83, 93 (1955)).

We conclude the mother cannot establish prejudice. The overwhelming evidence supports the trial court's conclusion: "There is absolutely no reason to expect that [the mother] will in the near future develop the capabilities of providing a safe and stable home for this child."

We now turn to the parents' contention termination is not in the child's best interest. We have reviewed the entire record de novo as required. *N.V.*, 744 N.W.2d at 636. The father has had limited contact with the child and did not participate in the CINA proceedings until December 2007. He is currently incarcerated and it is unknown when he will be released. The father failed to demonstrate he had any significant bond with the child or that he would be in a position to develop a bond any time in the near future.

The mother contends she is closely bonded with the child and termination would be devastating to the child. She also argues her impending release from prison would allow for reunification shortly after the termination hearing. However, the mother has significant issues with substance abuse and domestic violence. Although she participated in various programs while in prison, additional time would be necessary to determine whether the mother is able to

maintain sobriety and healthy relationships. Given the mother's lengthy history of involvement in the juvenile court, as well as her illegal substance abuse, and domestic violence issues, the future does not bode well for reunification. *See In re T.B.*, 604 N.W.2d 660, 662 (Iowa 2000) (holding the future can be gleaned from a parent's past performance).

While the law requires a "full measure of patience with troubled parents who attempt to remedy a lack of parenting skills," this patience has been built into the statutory scheme of chapter 232. *In re C.B.*, 611 N.W.2d 489, 494 (Iowa 2000). Children should not be forced to endlessly await the maturity of a natural parent. *Id.* At some point, the rights and needs of the child rise above the rights and needs of the parent. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). This child was adjudicated CINA four and one-half years ago. She has been out of her mother's care for the majority of that time. The child needs and deserves permanency. Termination is in her best interest.

The parents also contend the State failed to make reasonable efforts to reunify them with the child. However, the mother has been receiving services from the DHS since 1997 and has received "all the services which are possible to be offered to a family."

The father argues he did not receive the visits with the child he requested. The reasonable efforts requirement is not a strict substantive requirement for termination. *C.B.*, 611 N.W.2d at 493. Instead, the services provided by DHS to reunify parent and child after removal impacts the State's burden of proving the

child cannot be safely returned to the care of a parent. *Id.* The requested visits would have in no way impacted the ability of the father to care for his child.

We affirm the termination of the mother and father's parental rights.

AFFIRMED.