

IN THE COURT OF APPEALS OF IOWA

No. 8-853 / 08-1334
Filed October 29, 2008

**IN THE INTEREST OF S.D.B., P.D.B., D.M.B., and A.C.B.,
Minor Children,**

M.D.R., Father,
Appellant,

T.L.B., Mother,
Appellant.

Appeal from the Iowa District Court for Carroll County, James A. McGlynn,
Associate Juvenile Judge.

The mother and father of four children appeal from the juvenile court's
order terminating their parental rights. **AFFIRMED.**

Joel Baxter of Beverly Wild Law Office, P.C., Guthrie Center, for appellant
father.

Mark J. Rasmussen of Rasmussen Law Office, Jefferson, for appellant
mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, John Werden, Jr., County Attorney, and Tina Meth-Farrington,
Assistant County Attorney for appellee.

Dee Ann Wunschel, Carroll, guardian ad litem for minor children.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

SACKETT, C.J.

The mother and father of four children born In October of 1995, July of 1999, July of 2001, and October of 2003, have filed a petition on appeal challenging the juvenile court's order terminating their parental rights. They ask the juvenile court be reversed or that we order full briefing. We affirm

The father, in seeking reversal, contends that (1) he received ineffective assistance of counsel, (2) the children received ineffective assistance of counsel, (3) the juvenile court erred in finding the State made reasonable efforts to reunite the children with their parents, (4) the juvenile court was arbitrary and capricious in ordering termination considering the therapeutic needs of the children. The mother, in seeking reversal, adopts all the contentions of the father and in addition contends that (1) she was able to take custody of her children, and (2) the State failed to provide the necessary services to permit her to fulfill the contract of expectations and be reunited with her children. We affirm.

I. BACKGROUND.

The children were removed by emergency order in March of 2007 because of a claim the father had sexually abused the third child. The children were found to be in need of assistance on July 27, 2007, as defined by Iowa Code section 232.2(6)(f) (2007).¹ On August 6, 2008, the juvenile court

¹ Iowa Code section 232.2(6)(f) provides:

6. "Child in need of assistance" means an unmarried child:

 f. Who is in need of treatment to cure or alleviate serious mental illness or disorder, or emotional damage as evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others and whose parent, guardian, or custodian is unwilling to provide such treatment.

terminated the parents' rights to all four children. The father's and mother's rights were terminated under Iowa Code section 232.116(1)(f)² and the father's rights were also terminated under 232.116(1)(j)³

II. SCOPE OF REVIEW.

The parent-child relationship is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511, 519 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15, 35 (1972). The State has the right to terminate the legal relationship between a parent and a child, but the Constitution limits its power to do so. *Quilloin*, 434 U.S. at 255, 98 S. Ct. at 554, 54 L. Ed. 2d at 519; see *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045 (1923); *In re T.R.*, 460

² Iowa Code section 232.116(1)(f) provides:

1. Except as provided in subsection 3, the court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds:

.....

f. The court finds that all of the following have occurred:

- (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.

³ Iowa Code section 232.116(1)(j) provides:

j. The court finds that both of the following have occurred:

- (1) The child has been adjudicated a child in need of assistance pursuant to section 232.96 and custody has been transferred from the child's parents for placement pursuant to section 232.102.
- (2) The parent has been imprisoned for a crime against the child, the child's sibling, or another child in the household, or the parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of five or more years.

N.W.2d 873, 875 (Iowa Ct. App. 1990). The State has the burden of proving the grounds for termination by clear and convincing evidence. Iowa Code § 232.96(2); *In re H.L.B.R.*, 567 N.W.2d 675, 677 (Iowa Ct. App. 1997). “The issue of whether or not to legally sever the biological ties between parent and child is an issue of grave importance with serious repercussions to the child as well as the biological parents.” *Id.* The goals of child-in-need-of-assistance proceedings are to improve parenting skills and to maintain the parent-child relationship. *Id.* An underlying issue in a termination action is whether the parent is beyond help, but a parent does not have an unlimited amount of time in which to correct his or her deficiencies. *Id.*; see *In re D.J.R.*, 454 N.W.2d 838, 845 (Iowa 1990).

III. INEFFECTIVE ASSISTANCE OF FATHER’S COUNSEL.

Ineffective-assistance-of-counsel claims are reviewed de novo. See *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999). Because a parent has a statutory right to counsel in a termination proceeding, the parent is entitled to effective assistance. *In re D.W.*, 385 N.W.2d 570, 579-80 (Iowa 1986). Although the Sixth Amendment is not implicated here, we nonetheless will apply the same standards adopted for counsel appointed in a criminal proceeding. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 687-98, 104 S. Ct. 2052, 2064-70, 80 L. Ed. 2d 674, 693-700 (1984), *D.W.*, 385 N.W.2d at 579. To succeed, the parents must establish two elements: “(1) counsel’s performance was deficient, and (2) actual prejudice resulted.” *In re C.M.*, 652 N.W.2d 204, 207 (Iowa 2002). The test for ineffective assistance of counsel in termination cases is generally the same as in criminal proceedings. *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa

1992). We presume that counsel's conduct falls within the range of reasonable professional competency. *D.W.*, 385 N.W.2d at 580. The burden of proving ineffectiveness is on the claimant. *A.R.S.*, 480 N.W.2d at 891.

The State contends error was not preserved because the issue was not raised in the juvenile court. Part way through the proceedings the father indicated his dissatisfaction with his then attorney and a second attorney was appointed for him. The second attorney represented him throughout the termination proceedings in juvenile court and is the attorney of record here. We assume the father's challenges made to his attorney's effectiveness apply to the first attorney, yet his petition on appeal does not reference whether he is talking about the first attorney, the second attorney, or both. It is true that the issue of the ineffectiveness of the first attorney could have been addressed in the juvenile court. However, the second attorney could be held ineffective for not addressing it there.

There is no procedural equivalent to postconviction relief following proceedings to terminate parental rights. *In re J.P.B.*, 419 N.W.2d 387, 390 (Iowa 1988). Direct appeal is the only way for a parent to raise an ineffective assistance of counsel claim in a termination case. *Id.* We address the issue of the ineffective assistance as to both attorneys here. See *C.M.*, 652 N.W.2d at 207-08.

The father focuses his ineffective of counsel claim on the alleged failure of his attorneys to communicate with him consistently, to advise him of options available for additional services for himself and his children, and to represent his interests at hearing and meetings. Assuming without deciding that said

allegation are true, we find that the father failed to show he was prejudiced. The father at the time of the termination hearing was in prison after having pled guilty to a charge of sexual abuse in the third degree for the sexual abuse of his third child. He had also pled guilty to sexual abuse of his second child and was awaiting sentencing on that charge. He has failed to show how further communication, advice, and representation would have changed the result that was reached here. Nor has he shown that if the claims against the first attorney had been raised in the juvenile court the result here would have been different.

The mother joined in and incorporated all the issues and arguments from the father's brief. As they relate to the termination of the father's parental rights, the mother lacks standing to raise the issues. *In re D.G. & L.G.*, 704 N.W.2d 454, 459-60 (Iowa Ct. App. 2005). As they relate to her, she too has failed to show how further communications between the children's father and the attorneys or different advice or representation or raising these claims of ineffective assistance of counsel in juvenile court would have changed the result here. She too has failed to show prejudice.

IV. INEFFECTIVENESS OF THE GUARDIAN AD LITEM.

The father and mother also contend that the guardian ad litem was ineffective.⁴ They contend she failed to maintain consistent communication with the children regarding the proceedings and the options available to them and failed to act and advocate for their best interests. The parents have failed to show that any failure of the guardian ad litem prejudiced their case.

⁴ We do not decide whether parents have standing to raise a claim that a guardian ad litem who is an attorney rendered ineffective assistance.

V. FAILURE TO PROVIDE REQUESTED AND REASONABLE SERVICES.

The evidence is that the father was the dominant person in the home and it is his sexual abuse of the third child that brought the Department of Human Services to the family's door. The mother, on the other hand, was submissive, and testing found her to have a borderline intellectual functioning disorder. There was evidence she had difficulty learning.

The juvenile court made the following findings:

It is an unfortunate fact that the mother is low functioning. She has difficulty reading and comprehending. Accommodations were made for the mother, but it is clear that the mother also has difficulty retaining information. Her disability is no one's fault. It is simplify an unfortunate circumstance which contributes to the Court's finding that the Department of Human Services made reasonable efforts, under all of the circumstances of this case, to help the mother gain reunification.

The family was given substantial services. The children have serious problems and are and will be extremely difficult to parent. They are in separate foster homes because they have a toxic relationship with each other. It would be extremely difficult even for a person with superior parenting skills to care for all four. The mother has minimal parenting skills and we agree that the four children cannot be cared for by the mother alone in the family home and that the children's interests would be impaired if they were returned to her care. This is in part because they are difficult to parent and in part because the mother's mental ability impairs her ability to parent. The State is not able to provide services of the type that would allow her, because of her low functioning and the special needs of the children, to care for the four children in her home. The mother makes no claim that because of her disability she is entitled to other specific special accommodations so we do not address that issue.

Clear and convincing evidence supports the juvenile court's finding the children cannot be returned home. The family has had substantial services and the State made reasonable efforts to reunite the children with their mother. The State has shown by clear and convincing evidence the children cannot be returned to their mother's home. There is clear and convincing evidence supporting termination of the mother's parental rights under section 232.116(1)(f). Contrary to the parents' argument, the juvenile court was not arbitrary and capricious in ordering the termination of parental rights and the court properly considered the children's therapeutic needs.

AFFIRMED.