IN THE COURT OF APPEALS OF IOWA

No. 1-140 / 11-0111
Filed March 30, 2011

IN THE INTEREST OF J.A.P.,
Minor Child,

V.A.P., Father,
Appellant,

A.E.S.P., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Constance Cohen, Associate Juvenile Judge.

A father and mother appeal separately from the order terminating their parental rights. **AFFIRMED ON BOTH APPEALS.**

Nicholas A. Sarcone of Stowers Law Firm, West Des Moines, for appellant father.

Jason T. Hauser of Pargulski, Hauser & Clark, Des Moines, for appellant mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Brown, Assistant County Attorney, for appellee State.

Kimberly Ayote of Youth Law Center, Des Moines, for minor child.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

DANILSON, J.

A mother and father appeal separately from the order terminating their parental rights. There is clear and convincing evidence the child is under the age of three, has been adjudicated a child in need of assistance, has been removed from the parent's custody for the last six consecutive months, and cannot be returned to either parent at the present time.

I. Background Facts and Proceedings.

The mother and father are the parents of a girl, J.P.,[1] born July 2009. This appeal concerns the parents' termination of parental rights to J.P. However, this is not the parents' first child together.

Their son, Jordan, came to the attention of the Iowa Department of Human Services (DHS) in March 2008 following a founded child abuse assessment. The mother had been arrested and charged with operating while intoxicated (OWI) and child endangerment after driving while intoxicated with one-month-old Jordan in the car. Then in April 2008, the father was arrested on a charge of domestic abuse assault after having stabbed the mother in the arm with a steak knife during an argument. Jordan was removed from the parents' custody by court order in August 2008 "due to unresolved alcohol, mental health, and domestic violence issues within the home." Jordan was placed with his maternal grandparents.[2] A March 2009 report to the court recommended termination of parental rights. The report noted the parents "have not utilized services proved to them to address the unresolved mental health, domestic violence, and

[1] The Indian Child Welfare Act (ICWA) applies to this case as J.P. is an eligible member of the Rosebud Sioux Tribe.

[2] The maternal grandparents are the mother's adoptive parents.

substance abuse issues that led to the removal." The report noted the mother had "been unable to complete an appropriate level of substance abuse treatment" and the father "has yet to engage in the recommended substance abuse education classes." The report also indicated the father had been "uncooperative with services"; "continued to engage in a violent relationship" and lacked "insight into the affects that domestic violence can have on his child"; and "has shown limited parenting skills during visits." Their parental rights to Jordan were terminated on April 21, 2009.[3]

J.P. was born at the end of July 2009. The mother and father were married in August. J.P. came to the attention of DHS because, at 2:45 a.m. on January 3, 2010, the mother was found driving the wrong way on the highway. J.P. was in a car seat in the back. The mother was drunk and again was arrested for OWI and child endangerment. The father reported to a child abuse investigator that even though he was with the mother and child that evening at a cousin's home, he was not aware the mother was intoxicated and he did not know she had taken the child and left.

On January 14, 2010, the parents consented to J.P.'s temporary removal, and J.P. was placed in the custody of her maternal grandparents. On January 21, the juvenile court confirmed the removal.[4] On February 24, J.P. was adjudicated a child in need of assistance (CINA) pursuant to Iowa Code sections 232.2(6)(b), (c)(2), and (n) (2009).[5] The court noted the "parents are fully

[3] Jordan was later adopted by the maternal grandparents.

[4] Notice of the proceedings was sent to the Rosebud Sioux Tribe.

[5] Iowa Code section 232.2(6) defines a "child in need of assistance" in pertinent part as

engaged in reunification services. Mother is medication compliant." The court noted services being afforded included "couples counseling, Parent Orientation, mental health evaluation, therapy, and AA." J.P. remained in the care of her grandparents where she was "placed with her birth sibling."

An April 9, 2010 case permanency plan authored by DHS social worker Kristen Marvin noted substantial progress. She stated the parents were meeting regularly with Family Safety, Risk and Permanency (FSRP) services in-home provider Leslie King, who reported the mother was doing

> an excellent job of identifying and utilizing all resources available to her including working on completing treatment, attending AA meetings with [father], obtaining a sponsor and actively working with her to maintain her sobriety, participating in individual and couples' therapy and following all recommendations from the Department, her treatment counsel and other professionals.

Marvin noted that the mother had been sentenced on her OWI charge and was required to serve seven days in jail, complete a community service obligation, and establish a payment plan for her fines. Marvin stated the family interactions "have transitioned to semi-supervised" four times a week, with additional

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an unmarried child:

b. Whose parent, guardian, other custodian, or other member of the household in which the child resides has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.

c. Who has suffered or is imminently likely to suffer harmful effects as a result of any of the following:

. . . .

(2) The failure of the child's parent, guardian, custodian, or other member of the household in which the child resides to exercise a reasonable degree of care in supervising the child.

. . . .

n. Whose parent's or guardian's mental capacity or condition, imprisonment, or drug or alcohol abuse results in the child not receiving adequate care.

interactions when the father's aunt "has extra availability." No safety concerns were reported, and Marvin indicated:

> This case will safely close when [the mother] can demonstrate that she can safely parent [J.P.] and will abstain from using substances that impair her ability to do so. Additionally, [the father] will need to demonstrate an understanding of the [the mother's] alcohol abuse and demonstrate that he is able to protect his daughter at all times and not allow [the mother] to be [J.P.'s] caretaker when she is intoxicated. [The mother] is making progress towards safe closure in that she has demonstrated an understanding of the severity of her alcohol abuse how it has impacted her ability to parent [J.P.]

The case plan recommendations were that J.P. be confirmed a CINA and remain in the custody of her maternal grandparents; the parents continue to participate with FSRP and services and recommendations; each parent continue to participate in individual therapy services and recommendations; and, as a couple, the parents continue to participate in couples counseling.

A dispositional hearing was held on April 29. The Rosebud Sioux Tribe's motion to intervene was granted, and Shirley Bad Wound, an ICWA specialist, was qualified as an expert pursuant to Iowa Code section 232B.10. She testified the tribe was satisfied with the current placement of J.P. and with the active efforts being made to reunify the family. The court adopted the case permanency plan; ordered J.P. to remain in the care of her grandparents; and ordered additional services be offered, i.e., "assistance completing tribal enrollment forms and setting up community service for" the mother.

Unfortunately, at the time set for a permanency hearing on July 15, 2010, the court was informed of serious setbacks. The mother and father had been involved in a physical altercation on May 29 (the mother cutting the father with a knife) resulting in the mother being charged of domestic assault and a no-contact

order between the parents. Both the mother and father adamantly denied to DHS workers that the mother had been drinking. The no-contact order was later modified to allow contact during family interactions and "other case relevant events." Visits with J.P. were returned to twice weekly and supervised by King, the FSRP in-home provider. A June 22, 2010 FSRP report authored by King noted:

> Threats . . . of maltreatment are high due to the recent incident of domestic violence between [the parents], the no contact order, the allegations of [the mother's] relapse and incident of getting beaten up, robbed and breaking the no contact order and the lack of honesty from the parents about above issues.[6]

King wrote further, "The parent's protective capacity is minimal until the domestic violence issues, honesty, communication; [the mother's] drinking addictions can all be addressed openly and honestly." It had also been learned that the mother was born with Fetal Alcohol Syndrome, which "can have a dramatic impact on her impulse control."

The court also received Marvin's June 30 report, which provided in part:

> This worker feels strongly that both [the mother and the father] have demonstrated significant change during the first five months of this case and have made substantial progress towards reunification with [J.P.] Although this worker has great concerns with the recent domestic violence incident between [the parents], this worker believes [they] have taken the appropriate steps to move past the incident and continue to make progress towards reunification. This worker feels that if [the parents] continue to engage with services

[6] This refers to an incident in mid-June when the father called the maternal grandmother asking for advice as the mother had come to his home (in violation of the no contact order) reporting she had been beaten and robbed. The incident was reported to King by the grandmother. When King asked the parents about the incident, the parents first denied anything had occurred; later the mother stated she had been beaten up, but not robbed, and denied having been in the father's apartment. King wrote, the father's "only statement was 'her parents always change the stories.'" The grandmother also reported the mother had called her over the weekend of June 12 in the early morning hours with slurred speech.

> and remain focused on case goals and reunification, [J.P.] will be able to safely return to her parents care within the next six months.

Marvin recommended the court grant of a six-month extension.

The court's July 15 permanency order noted there was a warrant out for the mother's arrest as she had failed to turn herself in despite her promise to do so two weeks earlier. The court also noted the mother "advised the CASA that she missed drug screens because of use." The court ordered J.P. remain with the grandparents and allowed that J.P. "will be able to return home within three (3) [months] if the following specific factors, conditions and/or expected behavioral changes are made": "demonstrate sobriety and protective decision making, resolve criminal matters . . . , continue to demonstrate adequate parenting skills and develop a nurturing bond . . . , avoid domestic abuse, and comply with the Case Plan expectations."

A petition to terminate parental rights was filed on September 16, 2010. The juvenile court held hearings concerning permanency and the termination petition on October 27 and November 19, 2010.

In a detailed and thoughtful January 6, 2011 order, the juvenile court terminated the mother's parental rights pursuant to section 232.116(1)(d), (g), (h), and (*l*). The court terminated the father's parental rights pursuant to section 232.116(d), (g), and (h). The order provides an extensive recitation of these proceedings and the parents' prior history with DHS involvement. The court observed that both parents had been dishonest about the mother's relapse during and after the May 29, 2010 domestic incident and had been dishonest about complying with the no-contact order, and noted the mother had been

discharged from one residential treatment program to another having learned she was pregnant.

The court found that despite numerous services and consequences, the father

> continued to lack an understanding of [the mother's] alcohol abuse issues and how they endanger [J.P.] His decision to lie to the Department of Human Services regarding her relapse with alcohol, rather than acknowledge her use and support her in re-engaging in recovery, support only one conclusion: That he has not, does not, and likely never will understand the severity of [the mother's] substance abuse problems and be able to safely care for [J.P.]

With respect to the mother, the court found she

> has a severe chronic substance abuse problem which presents a danger to herself and others as evidenced by prior acts and omissions. Given her prognosis and past behaviors, [J.P.] will not be able to be returned to her custody within a reasonable amount of time, considering J.P.'s age and the need for a permanent home.

The court observed there was a strong bond between each parent and J.P. and "[n]o protective concerns have arisen during supervised visits." The court further noted the father had several strengths, but "the bottom line is that he is not a safe caretaker for [J.P.]," citing the father's enabling the mother's addiction and his inability to keep his children safe from her care while she was intoxicated. The court stated, the father's "priority has been, and likely always will be, his relationship" with the mother.

The court observed the ICWA specialist concurred with the petition to terminate parental rights due to the parents' failure to complete an appropriate case plan, was satisfied with the current placement, and testified that continued custody of J.P. by the parents is likely to result in serious emotional and physical damage to the child.

Both parents separately appeal the termination of their parental rights to J.P. The mother contends the ICWA requirements have not been met, the statutory requirements for termination under Iowa Code section 232.116(1)(g), (h), and (*l*) have not been proved, an additional six-month extension should have been granted, and termination is not in the child's best interests. The father argues no statutory grounds for terminating his parental rights have been shown.

II. Scope and Standard of Review.

We review termination proceedings de novo. *In re Z.H.*, 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). Although we are not bound by them, we give weight to the district court's findings of fact, especially when considering the credibility of witnesses. Iowa R. App. P. 6.904(3)(*g*); *In re M.M.S.*, 502 N.W.2d 4, 5 (Iowa 1993). We are cognizant 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). The paramount concern in termination proceedings is the best interests of the child. *See In re P.L.,* 778 N.W.2d 33, 39 (Iowa 2010).

The provisions of the Iowa Indian Child Welfare Act (ICWA) are to be strictly construed and applied to protect Native American families. *In re J.L.,* 779 N.W.2d 481, 487 (Iowa Ct. App. 2009).

III. Statutory Framework and Dual Burdens of Proof Under ICWA.

The first step in our analysis is to determine if a ground for termination exists under section 232.116(1). *P.L.*, 778 N.W.2d at 39. When the juvenile court terminates parental rights on more than one statutory ground, we need only find that evidence supports one of the grounds cited by the juvenile court to affirm. *In re R.K.*, 649 N.W.2d 18, 19 (Iowa Ct. App. 2000). If a ground exists,

the second step in the analysis is to consider the factors under section 232.116(2), which requires that we "give primary consideration to the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional condition and needs of the child." *P.L.*, 778 N.W.2d at 39. Finally, the court must consider if any of the exceptions weighing against termination in section 232.116(3) are pertinent. *Id*.

The State has the burden of proving the grounds for termination by clear and convincing evidence. *Id*. Evidence is clear and convincing when it leaves "no serious or substantial doubt about the correctness of the conclusion drawn from it." *In re D.D.,* 653 N.W.2d 359, 361 (Iowa 2002). Under the ICWA, which all agree is applicable here, the juvenile court is to apply "the clear-and-convincing-evidence standard to all matters except the question whether [the parent]'s continuing custody is 'likely to result in serious emotional or physical damage,'" which must be supported by evidence beyond a reasonable doubt. *In re C.A.V.*, 787 N.W.2d 96, 100 (Iowa Ct. App. 2010) (quoting Iowa Code § 232B.6(6)(a)).[7]

IV. Mother's Parental Rights.

A. Section 232B.6(6)(a) requirements are satisfied. We have reviewed the entire record anew and find evidence beyond a reasonable doubt that the mother's continuing custody is likely to result in serious emotional or physical

[7] Section 232B.6(6)(a) provides,

> Termination of parental rights over an Indian child shall not be ordered in the absence of a determination, supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of the child by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

damage to J.P. ICWA specialist Bad Wound so testified as a qualified expert as required by section 232B.6(6)(a). At the time of this termination hearing, the mother was involuntarily placed in a residential treatment facility. The mother has not been able to demonstrate that she can maintain sobriety despite extensive services and treatment being offered to her over a period of about three years. Her criminal history and inability to overcome her addiction notwithstanding four prior attempts at treatment and the loss of the parental rights of one child along with the prospects of losing her parental rights to a second child clearly show her substance abuse represents a danger to herself and J.P. *See In re J.K.*, 495 N.W.2d 108, (finding it "clear" that to return child to parent with severe chronic substance abuse problem whose prognosis is extremely guarded "is simply irresponsible").

B. Statutory grounds for termination exist. The mother's rights were terminated pursuant to Iowa Code section 232.116(1)(d), (g), (h), and (*l*). Because we find clear and convincing evidence to support termination under section 232.116(1)(h), we need not address the additional grounds found by the juvenile court. *See R.K.*, 649 N.W.2d at 19.

Section 232.116(1)(h) allows for termination where (1) the child is three or younger, (2) the child has been adjudicated in need of assistance, (3) the child has been removed from the parent's custody for the last six consecutive months, and (4) the child cannot be returned to the parent's custody at the present time. The mother argues only that it has not been proved beyond a reasonable doubt that the child could not be returned to her at the time of the termination hearing. However, as noted above, we are to apply "the clear-and-convincing-evidence

standard to all matters except the question whether [the parent]'s continuing custody is 'likely to result in serious emotional or physical damage,'" which must be supported by evidence beyond a reasonable doubt. *C.A.V.*, 787 N.W.2d at 100.

The mother admits that she has a severe, chronic substance abuse problem. She has had two children removed from her custody in two years due to separate instances of her placing her children in danger by driving while quite intoxicated with a child in the car. She is currently involuntarily placed in a residential treatment program due to criminal proceedings. At the October 2010 hearing, she was in a residential treatment program where she intended to remain for four to six months, but she became pregnant and was no longer allowed to stay at that facility. As a result, she had the "choice" of entering the House of Mercy or going to prison. She has twice before been unsuccessfully discharged from the House of Mercy. Four prior treatment programs have not been sufficient to prevent the mother from returning to alcohol use. She has not been able to demonstrate she can maintain her sobriety without intensive supervision.

> We have repeatedly followed the principle that the statutory time line must be followed and children should not be forced to wait for their parent to grow up. We have also indicated that a good prediction of the future conduct of a parent is to look at the past conduct. Thus, in considering the impact of [an] addiction, we must consider the treatment history of the parent to gauge the likelihood the parent will be in a position to parent the child in the foreseeable future. Where the parent has been unable to rise above the addiction and experience sustained sobriety in a noncustodial setting, and establish the essential support system to maintain sobriety, there is little hope of success in parenting.

In re N.F., 579 N.W.2d 338, 341 (Iowa Ct. App. 1998) (citations omitted).

Under the circumstances presented, there is clear and convincing evidence J.P. cannot be returned to her mother's custody at present.

C. Further extension not warranted. The mother argues the juvenile court should have granted an extension under section 232.104(2)(b). That provision authorizes the juvenile court "[a]fter a permanency hearing" to continue placement for an additional six months, enumerating "the specific factors, conditions, or expected behavioral changes which comprise the basis for the determination that the need for removal of the child from the child's home will no longer exist at the end of the additional six-month period." Iowa Code § 232.104(2)(b). The mother concedes the court already allowed an extension of time at the July 15, 2010 permanency hearing. She was then fairly apprised of what was expected of her: "demonstrate sobriety and protective decision making, resolve criminal matters . . . , continue to demonstrate adequate parenting skills and develop a nurturing bond . . . , avoid domestic abuse, and comply with the Case Plan expectations."

In October 2010 the mother testified she was not asking that J.P. be returned to her care. Rather, she stated, "I really wish that we could have a little longer before our rights get terminated or at least J.P. be returned to her father." The termination hearing continued in November 2010, and the mother remained involuntarily placed in treatment. We do not believe the juvenile court erred in not further extending the time J.P. waited for her mother to be able to parent her safely. *See In re C.B.*, 611 N.W.2d 489, 494 (Iowa 2000) (noting "the crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems" (internal citation omitted)).

D. Termination is in child's best interests. J.P. has been placed in the care of her maternal grandparents since January of 2010 and is fully integrated and doing very well in this preadoptive home with her birth sibling. *See* Iowa Code § 232.116(2)(b). While there is a bond between mother and child, that bond is not sufficient to deny this child the permanency she needs and deserves. *See id.* § 232.116(3). We affirm the termination of the mother's parental rights.

V. Father's Parental Rights.

The father contends the juvenile court "rests its decision on its virtually unsupported belief that the father has failed to exhibit good decision-making abilities." The record and termination order belie that claim.

There is clear and convincing evidence to support termination of the father's parental rights pursuant to section 232.116(1)(h) as (1) the child is three or younger, (2) the child has been adjudicated in need of assistance, (3) the child has been removed from the parent's custody for the last six consecutive months, and (4) the child cannot be returned to the parent's custody at the present time. There is no doubt as to the first three factors. On our de novo review of the record, we find the father is unable to provide a safe home for his child even with the services provided. He has yet to understand the nature and extent of the mother's alcoholism or its effects on the children. He continues to enable her. While he has demonstrated an ability to care for the child for a limited time under supervision, he has never advanced to overnight visits. He had an apartment that was found to be suitable for the child, but he recently moved in with his brother and the suitability of that residence had not been evaluated.

We agree with the case manager's assessment that the father has very poor decision-making skills and his poor decision making makes him unable to provide a safe and nurturing home for his child.

The child is in a pre-adoptive home with her grandparents and sibling. The juvenile court terminated the mother's parental rights in the same proceedings. Terminating the father's parental rights so the child can be permanently placed gives primary consideration to the child's safety, to the best placement for furthering the long-term nurturing and growth of the child, and to the physical, mental, and emotional needs of the child under section 232.116(2). *P.L.*, 778 N.W.2d at 41. "It is well-settled law that we cannot deprive a child of permanency after the State has proved a ground for termination under section 232.116(1) by hoping someday a parent will learn to be a parent and be able to provide a stable home for the child." *Id.* Consequently, termination was proper under sections 232.116(1) and (2) and we find no exception to termination exists under section 232.116(3).

We do not find the bond between parent-child relationship is a bar to termination here. Father and daughter spend a few hours a week together. The father is more concerned with his relationship with his wife and is unable to understand the effects of alcoholism. Accordingly, this exception will not prevent the termination.

VI. Conclusion.

There is clear and convincing evidence the child is under the age of three, has been adjudicated a child in need of assistance, has been removed from the parent's custody for the last six consecutive months, and cannot be returned to

either parent at the present time. The record also reflects beyond a reasonable doubt that the mother's continuing custody is likely to result in serious emotional or physical damage to the child. Further, termination is in the best interest of the child and no exceptions to termination exist. Therefore, we agree with the juvenile court that clear and convincing evidence supports the termination of both the mother's and father's parental rights.

AFFIRMED ON BOTH APPEALS.