IN THE COURT OF APPEALS OF IOWA

No. 1-343 / 11-0456
Filed May 25, 2011

**IN THE INTEREST OF L.B.-A.D. and A.I.A.M.,
Minor Children,**

C.N.J., Mother,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Craig Dreismeier, District Associate Judge.

A mother appeals from the order terminating her parental rights. **AFFIRMED ON CONDITION AND REMANDED.**

Scott D. Strait, Council Bluffs, for appellant mother.

Sara Thalman, Council Bluffs, for father of L.B.-A.D.

Phil Caniglia, Council Bluffs, for father of A.I.A.M.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Matthew Wilber, County Attorney, and Dawn Landon, Assistant County Attorney, for appellee State.

Roberta Megel, Council Bluffs, for minor children.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

A mother appeals from the order terminating her parental rights. She contends the juvenile court failed to comply with the notice requirements of the Iowa Indian Child Welfare Act (ICWA) set forth in Iowa Code chapter 232B (2009). Additionally, she argues the State failed to prove the grounds for termination and that termination was not in the children's best interests. Upon our de novo review, we affirm on condition and remand.

***I. Background Facts and Proceedings*.**

C.J. is the mother of L.B.-A.D., born January 2009, and A.I.A.M., born January 2010. C.J. also has three older children, born in 2003, 2004, and 2006, respectively.[1] In 2005 and 2006, C.J. and her children lived in Ohio. There were allegations in Ohio that C.J. was failing to provide her children with suitable housing, and services were offered to the mother in Ohio. Ultimately, she moved to Iowa in 2008, and her children went to live with their fathers.

After moving to Iowa, the family came to the attention of the Iowa Department of Human Services (Department) in November 2009, after it was reported that the apartment where the mother and L.B.-A.D. were living was unfit for human occupancy. One of the officers that went to the family's apartment to investigate the report described the apartment's condition as follows:

> We were greeted by a strong foul odor emitting from within the house. Roaches were seen in abundance running up the kitchen walls, running across the kitchen counter.
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> . . . .
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> Roaches and flying insects were seen in every room of the [apartment]. There were roaches in the oven, refrigerator, microwave, [and] running all over the kitchen counter. The carpets

[1] These children are not at issue in this appeal.

> were greasy, extremely dirty, [and] littered with trash of various types and ages. The kitchen floor was covered with filth, spilled food, [and] bags of garbage. The rooms were littered with dirty clothes, dirty diapers, trash, dirty dishes, [and] other household items. The cat litter box was completely filled with cat feces.
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> It appeared that [L.B.-A.D.] had not been bathed recently. Her face was very dirty and she smelled like she hadn't been bathed recently.

The apartment was then inspected by the Council Bluff's rental property inspector, and he determined the apartment was unsafe and unfit for human occupancy due to unsafe and unsanitary living conditions and electrical code violations. The inspector checked other apartments in the same building and found they did not have the same issues with bugs as the family's apartment. Thereafter, the State filed its petition alleging L.B.-A.D. to be a child in need of assistance (CINA). L.B.-A.D. was then temporarily removed from the mother's care and placed in family foster care.

Services were offered to the mother, including visitation with L.B.-A.D. In early January 2010, the mother and her boyfriend found a new apartment that was at that time neat and clean. The mother gave birth to A.I.A.M. later that month. In February, the juvenile court adjudicated L.B.-A.D. CINA.

On March 3, 2010, the State filed an "Application for Notice, Order and Notice." The application stated L.B.-A.D. was allegedly an enrolled member of the Santee Sioux Tribe, and it noted that several of L.B.-A.D.'s relatives, including her grandmother, were allegedly enrolled members of the Cherokee Indian Nation. The same day, the juvenile court entered its order directing the Cherokee Nation of Oklahoma, the Easter Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians be served with a copy of the CINA

petition and the juvenile court's order setting the matter for the next hearing. The bottom of the order listed those persons specified by the court to receive notice, as well as the United States Secretary of the Interior. Next to each name was a United States Postal Service tracking number, indicating notice had been mailed to those persons. Although it appears the tribes were given notice of the CINA petition, there is no indication in the record the tribes responded to the notices.

On March 23, the juvenile court entered its dispositional order. The court found the mother had kept the house clean and sanitary during that reporting period, and it noted L.B.-A.D. had been in a trial home visit since March 7. The court directed the mother to maintain the condition of the home and to seek employment. L.B.-A.D. was then transitioned back into the mother's care.

By June 2010, the condition of the family's home had deteriorated substantially, and the State sought removal of the children from the mother's care. The Department's worker stated in support of the children's removal:

> This family has continued to live in an environment that was marginal at best. There is consistently dirty dishes with food waste on the kitchen counters, sink, and on the stove. There are consistently ashes surrounding the toilet from being spilled in an attempt to flush them. A flea infestation has overwhelmed the family and [their] apartment.

The worker also reported both children had numerous flea bites on their bodies; L.B.-A.D. had more than fifty bites that had been scratched so hard they scabbed over. The worker also stated A.I.A.M.'s head was flat from being confined to her car seat. On July 1, 2010, the court ordered the children be placed in family foster care. The court directed the mother to participate in family safety, risk, and

permanency services, to comply with the safety plans, and to maintain employment and suitable housing. A.I.A.M. was thereafter adjudicated CINA.

The mother became homeless in July 2010. In September 2010, following a review and dispositional hearing, the court entered its order noting that the mother continued to be homeless but had reported she was saving money to be able to establish a new home. She reported she was working hard to earn an income and she was hopeful to have a new place within a short period of time. The court noted the children were doing well in their foster home.

A permanency order was entered by the juvenile court in December 2010 following a permanency hearing. The court's order stated the mother had still not found suitable housing and continued to live in limbo. The court found that housing continued to be a "huge barrier to reunification" in the case, noting the mother chose to live with friends until she found adequate housing to accommodate the children. The court further noted L.B.-A.D.'s case had been involved with the court for a year and A.I.A.M.'s for nearly six months, without any significant changes in the mother's situation. The court directed the State to file a petition for the termination of the mother's parental rights.

On December 30, 2010, the State filed its petition for termination the mother's parental rights to L.B.-A.D. and A.I.A.M. Hearing on the petition was set for February 2011. There is no indication in the record that the tribes potentially affiliated with the children received notice of the petition or the hearing.

A few days before the scheduled termination hearing, the mother reported to the Department that she had secured housing. The Department's caseworker went to the apartment and identified several issues that needed to be resolved

before visits took take place as the apartment. The worker observed the floors in the kitchen and the living room were dirty, there were issues with items plugged into the electrical outlets, there were three to four inches of standing water in the bathtub, the mother's bedroom was cluttered, and there was no furniture in the home.

Hearing on the petition was held February 9 and 11, 2011. Although the mother had at last secured housing, the Department's caseworker testified it would be speculation as to whether the mother would be able to maintain the house in a livable condition, and the mother would need to maintain the home in good condition for at least three to four months before she could demonstrate she could possibly maintain stability for the children. The mother testified she had corrected the issues in her new home identified by the caseworker except she still had no furniture. She requested additional time to establish she could maintain a clean and stable home environment for the children. There was no testimony concerning the children's alleged affiliation with the various tribes, and the mother did not voice any objections or concerns that the tribes had not received proper notice of the petition for termination of her parental rights.

On March 27, 2011, the juvenile court entered its order terminating the mother's rights to the children under Iowa Code sections 232.116(1)(h) and (i). The court's order noted it had been alleged L.B.-A.D. was an enrolled as a member of the Santee Sioux Tribe and several of L.B.-A.D.'s relatives were enrolled members of the Cherokee Indian Nation. The court's order further indicated L.B.-A.D. "was not domiciled or residing within the reservation of the above mentioned tribes." There was no further reference as to notice to the

tribes concerning the termination petition or any response from the tribes from their notice of the filing of the CINA petition.

The mother now appeals. She contends the juvenile court failed to comply with the notice requirements of the Iowa ICWA set forth in Iowa Code chapter 232B. Additionally, she argues the State failed to prove the grounds for termination and that termination was not in the children's best interests.

II. Scope and Standards of Review.

We review the juvenile court's decision to terminate parental rights de novo. *See In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010). The State must prove grounds for termination by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). In considering whether to terminate, our primary considerations are the children's safety; the physical, mental, and emotional condition and needs of the children; and the placement that best provides for the long-term nurturing and growth of the children. Iowa Code § 232.116(2); *P.L.*, 778 N.W.2d at 37.

III. Discussion.

A. Notice Requirement under the ICWA.

On appeal, the mother first contends the juvenile court failed to provide the proper tribal notice required under the Iowa ICWA. The State asserts the mother failed to preserve the issue for our review, as there is no indication or assertion that the mother raised this issue below.

Generally, "an issue not presented in the juvenile court may not be raised for the first time on appeal." *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994). We note that this court has previously observed that "[o]ur rules requiring

litigants to preserve error for appeal do not conflict with any provision of [the federal] ICWA or frustrate congressional policy." *In re J.D.B.*, 584 N.W.2d 577, 581 (Iowa Ct. App. 1998). However, that case specifically concerned a claim that a juvenile court failed to comply with the expert testimony provisions of the federal ICWA in the underlying CINA proceedings. *Id*. at 580-81. The mother's claim here concerns notice to the tribes concerning the termination of her parental rights.

"Congress passed the [federal ICWA] in 1978," establishing "minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which . . . reflect the unique values of Indian culture." *In re N.N.E.*, 752 N.W.2d 1, 6-7 (Iowa 2008) (citing 25 U.S.C. §§ 1901-63 (2006)). Thereafter, in 2003, the Iowa General Assembly enacted the Iowa ICWA to "clarify state policies and procedures regarding implementation" of the federal ICWA. *In re A.W.*, 741 N.W.2d 793, 798 (Iowa 2007), *see also* Iowa Code § 232B.2; Jerry R. Foxhoven, *The Iowa Indian Child Welfare Act: Clarification and Enhancement of the Federal Ac*t, 54 Drake L. Rev. 53 (2005). "The provisions of the Iowa ICWA are to be strictly construed and applied." *In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005).

The federal ICWA imposes minimum standards that must be met before an Indian child may be removed from his or her family and placed in foster care or an adoptive home. *See* 25 U.S.C. § 1902. In a dependency court proceeding in which the court knows or has reason to know a child is an Indian child, the federal ICWA requires notice to the child's Indian custodian and tribe, or the

Bureau of Indian Affairs (BIA) if the tribe cannot be ascertained. *Id*. § 1912(a). Iowa has enacted similar standards for such notice. *See* Iowa Code § 232B.5(4).

The tribal notice provisions of the Iowa ICWA require the juvenile court to notify the proper Indian tribe whenever it has reason to know that an Indian child may be involved in an involuntary termination. *R.E.K.F*., 698 N.W.2d at 149. (citing Iowa Code § 232B.5(4)). Notice must be given even if doubts remain about whether the child is an Indian child. *Id*. (citing Iowa Code § 232B.5(3)). This is so, because whether or not a child is an Indian child is a question for the tribe to answer in the first instance. *Id*. As one court explained, "[o]ne of the purposes of the notice requirement is to enable an Indian tribe to participate in determining whether the child involved in the proceeding is an 'Indian child.'" *In re Arianna R.G.*, 657 N.W.2d 363, 368 (Wisc. 2003).

> Depending upon an individual tribe's criteria for membership, or its process for acquiring or establishing membership, which may or may not include some form of formal enrollment or registration, the ability of a court to ascertain membership in a particular tribe without a tribal determination may vary greatly. *See United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979); *In re Baby Boy Doe*, [849 P.2d 925, 931 (Idaho 1993)]; [*In re Arianna R.G.*, 657 N.W.2d at 369]; [Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67586 (Nov. 29, 1979)] (some tribes do not keep written rolls and others have rolls that only list members as of a certain date).
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> Not only are the tribes themselves therefore the best source of information concerning tribal membership, see Guidelines, 44 Fed. Reg. at 67586, but the [federal ICWA] also recognizes that Indian tribes have a separate interest in Indian children, distinct from, but equivalent to, parental interests, [*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52, 109 S. Ct. 1597, 1609, 104 L. Ed. 2d 29, 47-48 (1989)]. Consequently, tribes must have a meaningful opportunity to participate in determining whether the child is Indian, *e.g.*, *Arianna R.G.*, 657 N.W.2d at 368, and to be heard on the issue of ICWA applicability, *e.g.*, [*In re H.D.*, 729 P.2d 1234, 1239 (Kan. Ct. App. 1986)]. An Indian tribe, like an Indian parent from whom custody was removed, is therefore permitted by

> [ICWA] to petition any court of competent jurisdiction to invalidate an order terminating parental rights upon a showing that notice was not provided as required by [ICWA]. *See* 25 U.S.C. § 1914.

B.H. v. People ex rel. X.H., 138 P.3d 299, 303 (Colo. 2006).

> A tribe cannot participate in determining tribal membership unless the tribe is aware of the proceeding. The notice requirement recognizes that Indian tribes have an interest in Indian child welfare proceedings apart from the parties and that the information supplied by the parties regarding the "Indian child" status of the child may be incomplete. [*In re M.C.P.*, 571 A.2d 627, 633 (Vt. 1989)]. Thus, the ICWA creates the notice requirement and uses the "reason to know" threshold as the basis for when notice is required.

Arianna R.G., 657 N.W.2d at 368; *see also In re N.A.H.*, 418 N.W.2d 310, 311 (S.D. 1988) (concluding that inadequate notice of termination proceedings divests a trial court of jurisdiction to terminate parental rights; thus, an appellate court must consider the question even if the parties do not raise it); *In re Custody of C.C.M.*, 202 P.3d 971, 974 (Wash. Ct. App. 2009) ("The deficiency resulting from a defective notice may be cured only if an interested tribe expressly waives its right to intervene or later intervenes and has the opportunity to fully participate in the custody proceeding.").

Here, the juvenile court's order states it had had notice that L.B.-A.D. was allegedly an enrolled member of the Santee Sioux Tribe and potentially a member of the Cherokee Indian Nation. However, no notice to those tribes or the BIA concerning the termination petition appears in the record, and there is nothing in the record that indicates that the tribes responded to the initial notices concerning the CINA petition and made a determination as to whether the children were "Indian" children as defined by either the federal or Iowa ICWA. Consequently, we must conclude the failure to provide notice of the termination

petition to the tribes under the circumstances here conflicts with the purpose of the federal ICWA, unlike our determination in *J.D.B.*, 584 N.W.2d at 581. Accordingly, we find the mother's failure to preserve error on the issue does not waive the issue on appeal, although it is unfortunate the mother waited until this appeal to first raise the notice issue. Had the juvenile court been timely alerted, corrective measures could have been taken and delay of the finality of this matter would have been avoided.

The Iowa Supreme court has concluded where notice had not been sent,

> the proper procedure, at least when there is no other evidence the child is an Indian child, is to affirm the termination on the condition that the proper notification be provided. Only if it turns out the child is an Indian child and the tribe wants to intervene must the termination be reversed.

R.E.K.F., 698 N.W.2d at 150. As a result, if we determine the mother's other arguments, that the State failed to prove the grounds for termination and that termination was not in the children's best interests, have no merit, the termination need not be reversed child unless it is determined the children are Indian children and the tribe wants to intervene. *Id*. We therefore turn to the mother's other arguments.

***B. Grounds for Termination*.**

We need only find termination proper under one ground to affirm. *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995). Termination is appropriate under section 232.116(1)(h) where there is clear and convincing evidence:

> (1) The child is three years of age or younger.
> (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 six months of the last twelve

> months, or for the last six consecutive months and any trial period at home has been less than thirty days.
>
> (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102 at the present time.

There is no dispute the first three elements of this section have been proved. However, the mother contends there is insufficient evidence to show the children cannot be returned to her care at the present time. Upon our de novo review, we find the State has met its burden.

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). The legislature incorporated a six-month limitation for children adjudicated a CINA aged three and younger. Iowa Code § 232.116(1)(h)(3). Our supreme court has stated that "the legislature, in cases meeting the conditions of [the Iowa Code], has made a categorical determination that the needs of a child are promoted by termination of parental rights." *In re M.W.*, 458 N.W.2d 847, 850 (Iowa 1990) (discussing Iowa Code § 232.116(1)(e)). The public policy of the state having been legislatively set, we are obligated to heed the statutory time periods for reunification.

The mother was previously offered services in Ohio due to concerns she had not provided her older children suitable housing. Upon moving to Iowa and the birth of L.B.-A.D., those concerns arose again as a result of the deplorable living conditions of the mother's home, requiring that child's removal in November 2009. Services have been offered to the mother in Iowa since that time, and she was only able to maintain a clean home for approximately three months such that

L.B.-A.D. was returned to her care. Two months after L.B.-A.D. was returned to her care, the living conditions of the mother's home deteriorated requiring the removal of both children, despite the continued receipt of services. The mother was then homeless from July 2010 until just before termination hearing, although she received income from her SSI disability benefits and employment. During that period, she did little to nothing demonstrate she could maintain the necessary stability and basic home cleanliness to parent the children safely. The mother has been given more than adequate time to address the safety hazards and general sanitary issues posed in her home and to fully participate in services. Although the mother moved to a clean apartment just prior to the termination hearing, such efforts are simply too little, too late, and it is far too early to have any confidence that the mother will be able to maintain a safe and sanitary home environment for the children. *See In re C.B.*, 611 N.W.2d 489, 495 (Iowa 2000) ("A parent cannot wait until the eve of termination, after the statutory time periods for reunification have passed, to begin to express an interest in parenting."). Under the circumstances presented, we find the State has proved by clear and convincing evidence the children could not be safely returned to the mother's care at the time of the hearing.

***C. Best Interests*.**

If a statutory ground for termination is determined to exist, the court may terminate a parent's parental rights. *P.L.*, 788 N.W.2d at 37. In considering whether to terminate, the court must then apply the best-interest framework established in section 232.116(2). *Id.* The legislature highlighted as primary considerations: the child's safety, the best placement for furthering the long-term

nurturing and growth of the child, and the physical, mental, and emotional condition and needs of the children. *Id*.

Taking these factors into account, we agree with the juvenile court that the children's best interests require termination of the mother's parental rights. While we do not doubt the mother's love for the children and the children's for her,

> [i]t 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. at 41. The record reveals that the children cannot be returned to the mother's care at this time, and the children should not be forced to wait for permanency. Children have no pause buttons. "The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." *In re A.C*., 415 N.W.2d 609, 613 (Iowa 1987). "At some point, the rights and needs of the child rise above the rights and needs of the parents." *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997), *overruled on other grounds by P.L.*, 778 N.W.2d at 39-40. The children should not be forced to endlessly suffer the parentless limbo of foster care. *In re J.P*., 499 N.W.2d 334, 339 (Iowa Ct. App. 1993). The children are in need of protection and permanency. Given the mother's lack of progress during the case, we agree with the juvenile court that termination of the mother's parental rights was in the children's best interests. Accordingly, we affirm the decision of the juvenile court terminating the mother's parental rights.

***IV. Conclusion*.**

Under the circumstances presented, we find the State has proved by clear and convincing evidence grounds for termination under section 232.116(1)(h). Additionally, we find no error in the juvenile court's determination that termination of the mother's parental rights was in the best interests of the children. However, because we determine the court erred in failing to give proper notice to the tribes in which the children could be determined to be "Indian children," we remand the matter to the juvenile court, which shall give notice of the termination proceedings to the appropriate Indian tribes.[2] *See R.E.K.F.*, 698 N.W.2d at 150. If the tribes fail to respond within the appropriate timeframe or reply and determine the children are not eligible for tribal membership, the juvenile court's original order of termination will stand. If a tribe responds and intervenes, reversal of the termination and further proceedings consistent with the requirements of the Iowa ICWA will be necessary. We therefore affirm the juvenile court's termination ruling on this condition. We do not retain jurisdiction.

AFFIRMED ON CONDITION AND REMANDED.

[2] As stated earlier in this opinion, L.B.-A.D. was alleged to be an enrolled member of the Santee Sioux Tribe. The Santee Sioux Tribe shall be given proper notice of the termination proceedings. It was alleged several of L.B.-A.D.'s relatives were enrolled members of the Cherokee Indian Nation. The Cherokee Indian Nation shall be given proper notice of the termination proceedings. There is nothing in the record before us as to why notice of the CINA petition was made upon the Cherokee Nation of Oklahoma, the Easter Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians. On remand, a record shall be made as to any additional tribes upon which notice of the termination proceedings should be made, and they shall be served with proper notice.