

IN THE COURT OF APPEALS OF IOWA

No. 7-932 / 07-1897
Filed December 28, 2007

**IN THE INTEREST OF M.H.,
Minor Child,**

C.G., Father,
Appellant,

A.W.H., Mother,
Appellant.

Appeal from the Iowa District Court for Linn County, Susan Flaherty,
Associate Juvenile Judge.

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

Cynthia Finley and Mary McGee Light, Cedar Rapids, for appellant father.

Kara L. McFadden, Cedar Rapids, for appellant mother.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant
Attorney General, Harold Denton, County Attorney, and Kelly Kaufman, Assistant
County Attorney, for appellee State.

Paul Stenzel, Shorewood, Wisconsin, for intervenor Ho-Chunk Nation.

Thomas O'Flaherty, North Liberty, for minor child.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

A father and mother appeal separately from the juvenile court order terminating their parental rights. We affirm on both appeals.

I. Background Facts and Proceedings

Christopher is the father¹ and Antoinette is the mother of Mohaghany, born in December 2004. Mohaghany is Antoinette's fourth child. Her parental rights to her three older children were terminated in 2003. Antoinette is an enrolled member of the Ho-Chunk Nation, an Indian Tribe. Mohaghany became an enrolled member of the tribe in June 2007.²

Mohaghany was removed from her parents' care in October 2005 after Christopher led police on a high-speed chase on the interstate near Cedar Rapids with Antoinette and Mohaghany in the vehicle. When the police caught up to Christopher, they discovered Antoinette sitting in the passenger seat of the vehicle holding then nine-month-old Mohaghany in her lap. Antoinette admitted to the officers that both she and Christopher had been drinking that night. The incident was reported to the Iowa Department of Human Services (Department).

At the beginning of its investigation, the Department learned Antoinette had sent Mohaghany to Wisconsin for a visit with Antoinette's grandmother. The grandmother was contacted, and she refused to return the child to Iowa. An ex parte temporary removal order was obtained, and Mohaghany was brought back

¹ Antoinette was married to Richard when Mohaghany was born. He disputed paternity, and testing later revealed Antoinette's paramour, Christopher, was Mohaghany's biological father. Richard is not appealing the termination of his parental rights.

² The Tribe was notified of the juvenile court proceedings pursuant to the state and federal Indian Child Welfare Acts (ICWA). The Tribe intervened and participated throughout the proceedings. It is not challenging the juvenile court's termination of parental rights order on appeal.

to Iowa where she was placed in foster care. Following a contested hearing, the juvenile court confirmed the removal due to concerns regarding Mohaghany's care, exposure to domestic violence, her parents' substance abuse issues, and Christopher's incarceration.

The court adjudicated Mohaghany as a child in need of assistance (CINA) on January 5, 2006. Following adjudication, Christopher failed to maintain contact with the Department and did not participate in any services. Antoinette, on the other hand, complied with drug testing requirements and took part in substance abuse treatment, domestic violence counseling, and parenting classes. She regularly visited with Mohaghany, demonstrated appropriate parenting skills, and had a home that was safe and adequately furnished. The court accordingly entered a dispositional order in March 2006 returning Mohaghany to her mother's custody.

The Department, however, remained concerned about Antoinette's ongoing relationship with Christopher. In mid-February 2006 the police found Christopher at Antoinette's apartment hiding under Mohaghany's crib. He was arrested due to outstanding warrants and violation of a protective order between him and Antoinette. In March 2006 shortly after Mohaghany was returned to her care, Antoinette reported she was assaulted by Christopher in her home while Mohaghany was present. One month later, Antoinette and Christopher got into an argument at a restaurant, and Christopher left with Mohaghany. He gave Mohaghany to an acquaintance he happened upon and asked her to return the child to Antoinette. In June 2006 Christopher kicked and punched Antoinette in the head while Mohaghany was present in the apartment.

Following the assault in June, the State obtained a temporary removal order and filed an application to modify the dispositional order that had returned Mohaghany to her mother's custody. A hair stat test was performed on Mohaghany after she was removed from Antoinette's home. The test was positive for cocaine. The juvenile court consequently entered an order in July 2006 modifying the dispositional order and returning custody of Mohaghany to the Department for placement in foster care.

Antoinette continued to participate in services and regularly visited with Mohaghany. However, in September 2006 Christopher was discovered hiding in Antoinette's apartment with a gun after he failed to return to jail following a furlough. Antoinette was arrested a couple of weeks later and charged with possession of cocaine and public intoxication. In November 2006 Antoinette appeared at a dispositional review hearing smelling of alcohol and admitted she had been drinking before the hearing.

The State filed a petition to terminate Antoinette's and Christopher's parental rights in January 2007. Shortly before the first termination hearing in March 2007,³ Antoinette was arrested and charged with her third offense of operating while intoxicated. Following this arrest, it appears Antoinette stopped attending visits and participating in services. She did not maintain contact with her attorney or the Department, and she did not appear at the termination hearings. Christopher appeared by telephone at the first hearing because he was incarcerated and serving a five-year prison sentence.

³ Three termination hearings were held in this matter due to the State's difficulty in locating and serving Mohaghany's legal father, Richard. The hearings were also delayed to allow Mohaghany's enrollment process with the Tribe to be completed.

The juvenile court entered an order in October 2007 terminating Antoinette's parental rights pursuant to Iowa Code sections 232.116(1)(b), (g), and (h) (2007) and terminating Christopher's parental rights pursuant to sections 232.116(1)(b) and (h). Antoinette and Christopher appeal.

II. Scope and Standards of Review

We review termination proceedings de novo. *In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005). In this case, the provisions of the ICWA apply because Mohaghany is an "Indian child."⁴ See 25 U.S.C. § 1903(4); Iowa Code §§ 232B.3(6), 232B.4(1). Under the ICWA, the State bears the burden of showing "beyond a reasonable doubt" parental rights should be terminated. *In re J.W.*, 528 N.W.2d 657, 662 (Iowa Ct. App. 1995). We are primarily concerned with the children's best interests in termination proceedings. *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa Ct. App. 1997).

III. Discussion

Both parents claim the State did not prove the statutory grounds for termination existed and termination of their parental rights was not in Mohaghany's best interests. Upon our de novo review, we find no merit to these claims.

When the juvenile court terminates parental rights under more than one statutory ground, we need only find grounds to terminate under one of the sections cited by the juvenile court to affirm. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa

⁴ Mohaghany is one-quarter Ho-Chunk Indian and is an enrolled member of the Tribe. She accordingly meets the definition of an "Indian child" under both the federal and state ICWAs. Cf. *In re A.W.*, ___ N.W.2d ___, ___ (Iowa 2007) (holding section 232B.3(6) defining "Indian child" was unconstitutional as applied to the children in that case because they were ineligible for membership in an Indian Tribe).

Ct. App. 1999). Because we find termination proper under section 232.116(1)(h), we need not address the merits of termination under sections 232.116(1)(b) or (g).

Termination under section 232.116(1)(h) requires proof that Mohaghany is three or younger, has been adjudicated CINA, removed from her parents' care for six of the last twelve months, and cannot be returned to her parents' care as provided in section 232.102. The first three elements were clearly proved and are not in dispute. Thus, we need only address whether Mohaghany can presently be returned to her parents' custody.

At the time of the termination hearings, Christopher was serving a five-year prison sentence, but he testified he expected to be released in "no more than about eight months." He acknowledged it would take him an additional "two or three months with family helping me and making sure I do . . . what I got to do" after his release from prison before he would be ready to take care of Mohaghany. Christopher also acknowledged it had been over a year since he had seen Mohaghany due to his incarceration. He did not participate in the juvenile court proceedings until his appearance at the termination hearing, explaining, "I wasn't out [of jail] for no more than six months and I got locked back up, so I really couldn't have done nothing really."

We find the State proved beyond a reasonable doubt that Mohaghany could not be returned to Christopher's care now or in the foreseeable future. "Children simply cannot wait for responsible parenting." *In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990). Christopher's incarceration does not excuse his unavailability to parent or his failure to fulfill his parental responsibilities. See *In*

re M.M.S., 502 N.W.2d 4, 8 (Iowa 1993) (holding incarceration is no justification for father's lack of relationship with child).

We also find the State proved beyond a reasonable doubt that Mohaghany could not be returned to her mother's care now or in the foreseeable future. Although Antoinette made admirable progress early in the case, she ultimately could not overcome her substance abuse issues and violent relationship with Christopher despite the State's active efforts to reunite her with her daughter. She was arrested for possession of cocaine and public intoxication and charged with her third OWI offense during these proceedings. "Where the parent has been unable to rise above the addiction and experience sustained sobriety in a noncustodial setting . . . there is little hope of success in parenting." *In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998). In addition, she continually allowed Mohaghany to be exposed to her abusive relationship with Christopher. See *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa Ct. App. 1994) (detailing the detrimental effects of violence between parents on children).

We must consider what the future likely holds for Mohaghany if she is returned to her mother's care. *In re A.A.G.*, 708 N.W.2d 85, 92 (Iowa Ct. App. 2005). Antoinette was facing possible imprisonment due to her pending criminal charges at the time of the termination hearing in March 2007. It unfortunately appears Antoinette simply stopped participating in services, including visitation with Mohaghany, towards the end of February 2007.

The record clearly demonstrates Mohaghany cannot be returned to her parents' care at the present time or in the near future. We therefore find the

State proved beyond a reasonable doubt that Christopher's and Antoinette's parental rights to Mohaghany should be terminated under section 232.116(1)(h).

Even when the statutory grounds for termination are met, the decision to terminate parental rights must reflect the child's best interests. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). When we consider the child's best interests, we look to the child's long-range as well as immediate best interests. *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997). In addition, the ICWA provides,

No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f); see also Iowa Code § 232B.6(6)(a).

Christopher and Antoinette both argue termination of their parental rights was not in Mohaghany's best interests due to the closeness of their relationship with her. We recognize that a strong bond between parent and child can be a special circumstance that militates against termination even when the statutory grounds have been satisfied. Iowa Code § 232.116(3)(c). There is no evidence in the record to support Christopher's assertion that he enjoyed a close relationship with Mohaghany given that he had not had any contact with her for over a year at the time of the March 2007 termination hearing. Although the caseworker for the Department testified that Antoinette and Mohaghany "had a very good bond," this is not an overriding consideration, but merely a factor to consider. *N.F.*, 579 N.W.2d at 341.

Mohaghany has been in an out-of-home placement since June 2006. The parents have not followed through with treatment recommendations, and they

have not exhibited the ability to parent their child successfully. The expert witness for the Tribe agreed Mohaghany could not be returned to her parents' custody without suffering emotional and physical damage "based on the domestic violence that she has witnessed" "as well as her testing positive for cocaine."

There is no credible evidence in the record that suggests additional time would allow Mohaghany to be returned to her parental home. Mohaghany deserves stability and permanency, which neither of her parents can provide. *In re C.D.*, 509 N.W.2d 509, 513 (Iowa Ct. App. 1993). This child should not be made to wait any longer for Christopher and Antoinette to become responsible parents. *J.L.W.*, 570 N.W.2d at 781. We consequently conclude termination of Christopher's and Antoinette's parental rights is in the child's best interests.

IV. Conclusion

We affirm the juvenile court's decision to terminate Christopher's and Antoinette's parental rights.

AFFIRMED ON BOTH APPEALS.