IN THE COURT OF APPEALS OF IOWA

No. 9-778 / 09-1203
Filed October 7, 2009

IN THE INTEREST OF E.J., C.W., and J.W.,
Minor Children,

R.J., Mother,
Appellant.

Appeal from the Iowa District Court for Jackson County, Nancy S. Tabor, Judge.

A mother appeals the termination of her parental rights to her children. **AFFIRMED.**

Stephen W. Newport of Newport & Newport, P.L.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and Chris Baker, County Attorney, for appellee.

Mark Lawson of Mark R. Lawson, P.C., Maquoketa, attorney and guardian ad litem for minor children.

Corliss Baty, Maquoketa, for father.

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

EISENHAUER, J.

A mother appeals the termination of her parental rights to her children. She contends the juvenile court erred in terminating her parental rights because the State failed to comply with the requirements of the Indian Child Welfare Act (ICWA). Specifically, she argues the State failed to (1) prove active efforts, (2) present a qualified expert witness, and (3) implement preferential placement requirements. She also contends the court used the wrong burden of proof and termination is not in the children's best interest. Our review of termination of parental rights cases is de novo. *In re T.P.*, 757 N.W.2d 267, 269 (Iowa Ct. App. 2008).

This case involves the mother's three children: E.J., born in February 1998; C.W., born in March 2001; and J.W., born in July 2006. Their involvement with the Department of Human Services (DHS) began in July 2005 when C.W. was discovered in a car with his parents and a driver, all of whom were under the influence of cocaine. At that time, E.J. tested positive for cocaine. C.W. and E.J. were adjudicated in need of assistance (CINA) in December 2005. J.W. was adjudicated CINA in January 2007. The children have been out of the mother's care since November 2007, after she tested positive for drug use.

Throughout the case, the mother denied the children were of American Indian heritage. After the termination petition was filed, the maternal grandmother contacted the DHS in February 2009, to indicate the children's Choctaw heritage. The Choctaw Tribe notified the DHS of the children's eligibility for membership on May 26, 2009, and intervened.

The termination hearing was held on June 23, 2009. The parties stipulated the children were Indian children and therefore subject to the federal and Iowa ICWA. On July 27, 2009, the juvenile court entered its order terminating the mother's parental rights to E.J. and C.W. pursuant to Iowa Code section 232.116(1)(f) (2009) and to J.W. pursuant to section 232.116(1)(h). The children were placed in the custody and guardianship of the DHS for adoption.

The mother first contends the court erred in terminating her parental rights because the DHS failed to initiate "active efforts" to provide remedial and rehabilitative programs to prevent the breakup of the family. Iowa Code section 232B.5(19) provides the State

> shall provide evidence to the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. The court shall not order the placement or termination, unless the evidence of active efforts shows there has been a vigorous and concerted level of casework beyond the level that typically constitutes reasonable efforts as defined in sections 232.57 and 232.102. Reasonable efforts shall not be construed to be active efforts. The active efforts must be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregivers.

Although the children have been involved with the DHS for years, there was no indication they were Indian children until February 2009, after the termination petition had been filed.

> The provisions of the Iowa ICWA do not apply until the court determines the children are "Indian" as defined in the Iowa ICWA. Therefore there can be no violation of the Iowa ICWA until the court determines it applies to the proceedings.

In re R.E.F.K., 698 N.W.2d 147, 151 (Iowa 2005). The court did not determine the children to be Indian children until the day of the termination hearing. By that point, the DHS had already initiated contact with the tribe, begun efforts to obtain membership for the children in the tribe, and consulted with the extended family and the tribe. We conclude the DHS made active efforts to provide remedial and rehabilitative programs to prevent the breakup of the family.

The mother next contends termination was not appropriate because the State failed to produce a qualified expert witness. In cases involving involuntary termination of the parental rights of the parent of an Indian child, the Iowa ICWA requires

> that qualified expert witnesses with specific knowledge of the child's Indian tribe testify regarding that tribe's family organization and child-rearing practices, and regarding whether the tribe's culture, customs, and laws would support the placement of the child in foster care or the termination of parental rights on the grounds that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Iowa Code § 232B.10(2). The term "qualified expert witness" includes, but is not limited to, "a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, spiritual leader, historian, or elder." *Id.* § 232B.10(1).

We find the State produced the required expert witness. At trial, Lari Ann Brister testified as an expert about the Choctaw Tribe's culture, customs, and law. Brister is a member of the Choctaw Tribe, as well as a Foster Care/Adoption Specialist for the Choctaw Nation. She has a Master's Degree in counseling, as well as twelve years experience as a foster care and welfare specialist. Brister acts as the supervisor for the tribe's foster care/adoption

program and is knowledgeable in regard to the tribe's customs pertaining to family organization and its child-rearing practices. Under section 232B.10(3)(a), "[a] member of the child's Indian tribe who is recognized by the child's tribal community as knowledgeable regarding tribal customs as the customs pertain to family organization or child-rearing practices" is given the highest preference as a qualified expert witness.

The mother argues Brister only "briefly scanned" the record just before the hearing and therefore was unable to form any opinions as to the propriety of terminating her parental rights. She does not dispute Brister's qualifications as an expert, only her ability to form an opinion about this case. The mother chose not to cross-examine the witness regarding her knowledge of the case and whether it impeded her ability to form an opinion. Accordingly, she failed to challenge the foundation for Brister to offer her opinion. Generally, issues raised for the first time on appeal, even those of constitutional dimensions, will not be considered. *In re R.J.*, 495 N.W.2d 114, 117 (Iowa Ct. App. 1997). However, in a case tried to the court without a jury, as this case was, a party on appeal may challenge the sufficiency of the evidence to sustain any finding without having objected to it by motion or otherwise. Iowa R. Civ. P. 1.904(2). We, as trier of fact, are free to accept or reject the opinions of experts. *In the Interest of Long*, 313 N.W.2d 473, 482 (Iowa 1981). We conclude Brister's testimony was adequate to fulfill the requirement of qualified expert witness testimony.

The mother also contends the court erred in applying the wrong burden of proof. In an ICWA case, a termination of parental rights may only be ordered

where the juvenile court finds "evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f); Iowa Code § 232B.6(6)(a). In its ruling, the juvenile court stated:

> Upon consideration of this record, this court finds clear and convincing evidence to support each of the statutory grounds alleged by the State in support of its petition to terminate parental rights. Furthermore, this court concludes beyond a reasonable doubt that these children would suffer serious physical and/or emotional injury should they be returned to the custody of their parent(s).

The court clearly made the required determination regarding the likelihood the children would suffer serious injury if returned to the mother. In so doing, it used the beyond a reasonable doubt burden of proof as set forth in the federal ICWA.

The mother complains the "beyond a reasonable doubt" burden of proof was not used in determining the children cannot be returned to her care as provided in sections 232.116(1)(f) and (h). Her argument is not supported by the law; the finding relating to the risk of serious injury is separate from the State's burden to prove the elements of termination by clear and convincing evidence. There is no requirement in the ICWA statutes that the grounds for termination set forth in section 232.116(1) likewise be proved by proof beyond a reasonable doubt.

Clear and convincing evidence supports termination of the mother's parental rights. Although the mother disputes there is proof the children cannot be returned to her care, as is required in sections 232.116(1)(f) and (h), we

conclude they cannot be returned without exposing them to adjudicatory harm. After receiving services for approximately four years, the mother had not progressed beyond supervised visits with her children. The mother continues to be involved a relationship with a substance abuser, although it puts her own sobriety at risk.

The mother contends the juvenile court did not have good cause to place the children with someone other than a member of their extended family, a member of their tribe, another Indian family, or a non-Indian family approved by the child's tribe or who is committed to enabling them to have extended family visitation and participation in tribal events. *See* 25 U.S.C. § 1915(a); Iowa Code § 232B.9. We conclude good cause exists to deviate from these preferences. The children have no connection with the tribe and did not even know they were eligible to be members until February 2009. The tribe did not ask for the case to be transferred to their jurisdiction, nor did it raise an objection to the children's placement. Additionally, the juvenile court cited the bonds the children had developed living in eastern Iowa and noted the nearest Indian settlement is over sixty miles away.

Finally, the mother contends termination is not in the children's best interest. We disagree. The harm the children suffered in their mother's care has led to attachment issues. The children are angry at their mother and do not trust her. Conversely, the children are together in a placement with a foster parent who is interested in adopting them and with whom they are bonded. They need and desire the permanency their mother cannot provide. Accordingly, we

conclude termination is in the children's best interests. *See In re J.E.*, 723 N.W.2d 793, 801 (Iowa 2006) ("A child's safety and the need for a permanent home are now the primary concerns when determining a child's best interests.") (Cady, J., concurring specially).

AFFIRMED.