IN THE COURT OF APPEALS OF IOWA

No. 3-599 / 13-0598
Filed June 26, 2013

IN THE INTEREST OF N.S.,
Minor Child,

B.P., Mother,
Appellant.

Appeal from the Iowa District Court for Marshall County, Stephen A. Owen, District Associate Judge.

A mother appeals a juvenile court order terminating her parental rights. **AFFIRMED.**

Melissa A. Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant-mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Jennifer Miller, County Attorney, and Luke B. Hansen, Assistant County Attorney, for appellee.

Darrell G. Meyer, Marshalltown, for father.

Reyne L. See of Peglow, O'Hare & See, P.L.C., Marshalltown, attorney and guardian ad litem for minor child.

Considered by Eisenhauer, P.J. and Potterfield and Tabor, JJ.

TABOR, J.

Bonnie, the mother of two-year-old N.S., appeals a juvenile court order terminating her parental rights. Bonnie argues the court did not follow notice procedures required in the state and federal Indian Child Welfare Acts (ICWA), and that termination was not in the child's best interest.

Because the district court properly determined N.S. was not an Indian child, the ICWA notice requirements were not violated in these proceedings. Bonnie continues to struggle with substance abuse and has made minimal progress toward reunification. Given the lack of a strong bond between N.S. and Bonnie, compared to the solid relationship N.S. has developed with her foster family, termination is in the child's best interest.

I. Background Facts and Proceedings

N.S. was born with traces of THC[1] and opiates in her body. She was placed in foster care in October 2011, when she was nearly one year old. The juvenile court adjudicated N.S. as a child in need of assistance on January 5, 2012, based on concerns of her parents' drug use, mental health issues, criminal behavior, and domestic violence.

On February 14, 2012, the court entered a dispositional order recognizing the father's claim to be part Ute Indian, and that ICWA could potentially impact the case. The court ordered the State to notify the Ute tribes to determine whether ICWA applies.

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[1] THC stands for tetrahydrocannabinol, a chemical contained in marijuana.

During 2012, the Department of Human Services (DHS) provided services to both parents. Although Bonnie participated in supervised visits, because of the parents' continued struggles including substance abuse and domestic violence, N.S. remained in foster care. During a July 17, 2012 review hearing, DHS recommended providing an additional six months of services to reunify N.S. with her parents.

On October 3, 2012, the State filed its petition to terminate parental rights. The petition acknowledged N.S. "may be an ICWA covered Child."

At the February 19, 2013 termination hearing, Bonnie appeared with her attorney. N.S.'s father, Richard, was not present, though he was represented by counsel. Bonnie testified Richard once told her his family history included Ute heritage; she and Richard once traveled to Colorado to visit Ute ancestral lands. Evidence showed he reported his Indian heritage to a DHS case manager, but he was not an enrolled member of any tribe. On this basis, Bonnie moved to dismiss the termination petition for lack of jurisdiction based on the State's failure to notify the Ute tribe. The court filed an order permitting parties to submit additional briefing and evidence on Bonnie's motion.

In its March 11, 213 order, the juvenile court listed the three Ute tribes recognized by the United States Department of the Interior: "(1) the Southern Ute Tribe, (2) the Ute of the Uintah-Ouray Reservations and (3) the Ute Mountain Ute." Although no evidence supported N.S.'s status as an Indian child beyond Richard's bare assertions, the court ordered the record remain open.

The Ute of the Uintah-Ouray Reservations and the Southern Ute tribe both provided express notification N.S. and Richard were not members. The Ute Mountain Ute tribe provided the court a copy of its constitution, and after contacting a tribal representative, the State submitted an affidavit conveying the tribe's position that N.S. was not a member. The juvenile court decided the evidence involving N.S.'s connection to the Ute Mountain Ute tribe was not conclusive and ordered a hearing on March 28, 2013, to allow any tribe to appear and be heard. The court ordered the State to provide notice to all three tribes, as well as the Bureau of Indian Affairs (BIA), at least ten days before the hearing. The State prepared a notice of service for the tribal representatives and the BIA. On March 26, 2013, at the request of the mother's counsel, the court rescheduled the hearing for April 2, 2013.

No tribe was present or otherwise asserted jurisdiction at the April 2, 2013 hearing. The juvenile court entered an order that same day finding N.S. was not an Indian child, and denying Bonnie's request to keep the record open to present additional evidence regarding whether N.S. was an Indian child. Also that day, the court terminated the parental rights of both Richard and Bonnie under Iowa Code section 232.116(1)(h) and (*l*) (2011).[2] This appeal involves only Bonnie's rights.

II. Scope and Standard of Review

Our review of the termination order is de novo. *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011). While we give weight to the juvenile court's factual

[2] The court additionally terminated Richard's parental rights under section 232.116(1)(e).

findings, especially regarding witness credibility, we are not bound by them. *Id.* We review statutory interpretation for correction of legal error. *In re N.N.E.*, 752 N.W.2d 1, 6 (Iowa 2008).

III. Analysis

Bonnie argues the juvenile court erred in terminating her parental rights to N.S. without giving proper notice to the Ute tribes and by concluding termination was in N.S.'s best interest.

Termination of parental rights involves three steps. *In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010). The court first determines if the State established grounds for termination under section 232.116(1). *Id.* Next, the court applies the section 232.116(2) best-interest framework to determine if termination should proceed. *Id.* Last, the court must consider whether any statutory factors in section 232.116(3) weigh against termination. *Id.*

In addition to those three prongs, chapter 232B sets out Iowa's ICWA, which protects Indian families and tribes. *In re D.S.*, 806 N.W.2d 458, 465 (Iowa Ct. App. 2011). The Iowa legislature enacted chapter 232B to clarify policies and procedures regarding implementation of the federal ICWA. *In re J.L.*, 779 N.W.2d 481, 485–86 (Iowa Ct. App. 2009) (recognizing Iowa's ICWA may extend additional protections of the federal ICWA); *see also* 25 U.S.C. §§ 1901–63 (federal ICWA). "The ICWA has a dual purpose—to protect the best interests of a child and preserve the Indian culture." *D.S.*, 806 N.W.2d at 465 (noting ICWA must be applied even where no evidence shows child was raised in Indian

culture). While we strictly construe ICWA, our paramount interest remains protection of the child's best interest. *Id.*

A. Did the Juvenile Court Comply with ICWA's Notification Requirements?

Bonnie argues the juvenile court erroneously terminated her parental rights because it failed to follow ICWA notification procedures at 25 U.S.C. section 1912(a).[3] Bonnie contends because each proceeding triggers new notice requirements, the tribes were not properly notified of the juvenile court hearings, nor were they properly notified of the continuance of the termination hearing from March 28 to April 2, 2013.

N.S.'s guardian ad litem (GAL) argues because two of the three tribes provided conclusive proof the child is not a member, Bonnie's challenge applies only to the Ute Mountain Ute. The GAL highlights the tribe's eligibility requirement of at least one-half lineage and concludes because Richard claims

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[3] That statute provides:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

25 U.S.C.A. § 1912.

only partial Ute heritage, adequate evidence establishes N.S. is not covered under ICWA. The State concurs with the GAL's position.

Our legislature defines an "Indian child" as "an unmarried Indian person who is under eighteen years of age or a child who is under eighteen years of age that an Indian tribe identifies as a child of the tribe's community." Iowa Code § 232B.3(6); *see also* 25 U.S.C. § 1903(4) (defining "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"). If a child qualifies as an Indian child under section 232B.3(6), ICWA applies. Iowa Code § 232B.4(1).

The Iowa ICWA includes the following notice requirement for termination proceedings:

> In any child custody proceeding, including review hearings following an adjudication, the court shall establish in the record that the party seeking the foster care placement of, or termination of parental rights over, or the adoption of an Indian child has sent notice by registered mail, return receipt requested, to all of the following:
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> a. The child's parents.
> b. The child's Indian custodians.
> c. Any tribe in which the child may be a member or eligible for membership.

Id. § 232B.5(4); *see also id.* § 232B.4(2) (providing process to determine status as Indian child). Even if doubts remain as to whether the child is an Indian child, notice must be given: "The court or any party to the proceeding shall be deemed to know or have reason to know that an Indian child is involved whenever . . . [a] party to the proceeding or the court has been informed by any interested person . . . that the child is or may be an Indian child." *Id.* § 232B.5(3).

ICWA provisions do not apply until the court finds the children are "Indian" as defined in chapter 232B. *In re R.E.K.F.*, 698 N.W.2d 147, 151 (Iowa 2005). "Therefore there can be no violation of the Iowa ICWA until the court determines it applies to the proceedings." *Id.*

An Indian tribe's written determination or testimony by an authorized person that a child is neither a member of, or eligible for, membership in the tribe is conclusive as to that tribe. Iowa Code § 232B.4(3). In the absence of evidence of the child's status from the tribe, the juvenile court shall determine the child's status. *Id.*

The Ute Indian tribe of the Uintah and Ouray reservations declared neither N.S. nor Richard were members. The Southern Ute tribe likewise stated Richard was not an enrolled member and provided a copy of its constitution that showed N.S. could not be an Indian child. Therefore, the juvenile court properly found this evidence as conclusive proof N.S. did not belong to either of those tribes.

The third tribe at issue, the Ute Mountain Ute, provided only a copy of its constitution. The membership article of the constitution required a child of a member "be of one-half or more degree of Ute Indian blood." The State additionally presented an affidavit reflecting its contact with the Ute Mountain Ute and relaying the tribe did not consider N.S. to be an Indian child. After considering the vague heritage asserted by Richard and Bonnie, the information supplied by the third tribe, the State's contact with that tribe, and the tribe's decision not to appear, the court determined N.S. was not an Indian child. *See*

Iowa Code § 232B.4(2), (3). We believe the record supports the court's determination.

Bonnie compares her notice complaint to that considered in *R.E.F.K*., yet she urges a different result than reached in that case. In *R.E.F.K.*, a father informed the court he had "Native American heritage through the Seneca tribe, which is out in the eastern United States, and . . . maybe in Canada," and requested to continue the proceedings to provide notice as required by the Iowa ICWA. *See* 698 N.W.2d at 148. Our supreme court found the father's statement was specific enough to require the State notify the tribes. *Id.* at 149–50. Because the State notified the wrong tribe, the supreme court "affirm[ed] the termination on the condition that the proper notification be provided." *Id.* at 150. The court recognized the solution is consistent with the Iowa ICWA mandate:

> 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. Reversal is not yet, if ever, a proper remedy in this case.

Id. at 151.

Like the father in *R.E.F.K.*, Richard claimed an Indian lineage. But unlike that case, here all three Ute tribes were notified. Two submitted conclusive proof N.S. was not a member. The third, though not tendering conclusive proof, provided sufficient evidence for the juvenile court to make its determination that N.S. was not an Indian child. Because the court properly determined ICWA did not apply, Bonnie's argument for reversal of the termination on that ground must fail.

B. Is Termination in N.S.'s Best Interest?

Bonnie contends the record does not support the juvenile court's conclusion that termination is in N.S.'s best interest.

The State argues because of the minimal connection between N.S. and her mother, compared to the strong bond with her foster family, N.S.'s best interests were served by terminating Bonnie's parental rights. The GAL highlights several instances throughout the case suggesting neither parent is able to provide for the child and both continue to struggle with substance dependency.

When assessing the best interests of a child, we consider factors such as the child's mental, physical, and emotional needs; safety; and long-term nurturing and growth. Iowa Code § 232.116(2). By reviewing evidence of a parent's past performance, which indicates future capabilities, we gauge what is likely to happen if the child is returned to the previous environment. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). When substance abuse is at issue, we consider the parent's treatment history to predict if the parent will be able to care for the child in the foreseeable future. *In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998). An inability to maintain sustained sobriety in noncustodial settings and establish support systems to maintain sobriety leaves "little hope of success in parenting." *Id.*

As the juvenile court noted, over the course of proceedings, both parents would only periodically participate in services: "The father's compliance only occurred during two periods of time during which he was a resident of the

Marshalltown half-way house[, and t]he court is not convinced the mother ever showed periods of substantial or material compliance." Bonnie and Richard both have a long history of substance abuse, and at the termination hearing, both had active warrants for their arrests.

Bonnie averaged two to three supervised visits with N.S. per week. In April 2012, DHS attempted semi-supervised visits for one month, but after receiving reports that Bonnie continued to abuse drugs and alcohol, the visits returned to complete supervision. In June 2012, Bonnie began living at the YSS Lighthouse Program, but within two months she relapsed to abusing drugs, testing positive for methamphetamine and marijuana. After she was discharged from the YSS Lighthouse Program, she cut communications with the department of corrections and DHS until September 2012, when she checked herself into an inpatient substance abuse treatment program. Urinalysis taken two months later indicated the presence of benzodiazepines in her body. Another random urinalysis less than a week before the termination hearing indicated THC in her body. She admitted to marijuana use.

Bonnie has not maintained a stable home during the fifteen months of DHS involvement. The juvenile court counted "not less than four to five different residences," not including inpatient substance abuse treatment. Nor has she maintained consistent employment. Based on this history, we do not foresee her ability to offer a safe environment for N.S. any time soon.

While the law requires a full measure of patience with troubled parties attempting to shore up their parenting skills, our state has built this patience into

the statutory framework of chapter 232. *In re C.B.*, 611 N.W.2d 489, 494 (Iowa 2000). N.S. should not be forced to wait any longer for her mother to become a responsible parent. *See In re K.R.*, 737 N.W.2d 321, 324 (Iowa Ct. App. 2007).

Since N.S. was first removed from Bonnie's care, the child has developed a close tie with her foster parents, whom she refers to as "mommy" and "daddy." The foster family already has two adopted children and intends to adopt N.S. By contrast, the record shows no strong bond between N.S. and Bonnie. To keep N.S. in limbo is not in her best interests, especially when her foster family is willing to adopt. *See In re Z.H.*, 740 N.W.2d 648, 452 (Iowa Ct. App. 2007). This is especially true considering N.S.'s young age. *See In re D.W.*, 791 N.W.2d 703, 708 (Iowa 2010) (disfavoring delaying placement while waiting for stable parent, particularly at such a tender age). Accordingly we agree with the juvenile court's determination that termination is in N.S.'s best interest.

AFFIRMED.