IN THE COURT OF APPEALS OF IOWA

No. 9-672 / 09-1036
Filed September 17, 2009

IN THE INTEREST OF P.L.,
Minor Child,

O.L.-V., Father,
Appellant.

Appeal from the Iowa District Court for Woodbury County, Mary Jane Sokolovske, Judge.

A father appeals the termination of his parental rights to his child. **REVERSED.**

Matthew R. Metzgar of Rhinehart Law, P.C., Sioux City, for appellant father.

Thomas J. Miller, Attorney General, Janet L. Hoffman and Kathrine Miller Todd, Assistant Attorneys General, Patrick Jennings ,County Attorney, and David Dawson, Assistant County Attorney, for appellee State.

Jessica Noll, Sioux City, for mother.

Marchelle Denker of Sioux City Juvenile Office, Sioux City, for minor child.

Gerald Denney, Niobrara, Nebraska, for Santee Sioux Nation.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

A father appeals the termination of his parental rights to his child, P.L.[1] He argues that the State failed to prove that termination is in the child's best interests.[2] We reverse.

I. Background Facts and Proceedings.

P.L. was in her mother's custody from her birth in May 2007 until she was removed on December 26, 2007. On that evening, authorities received a complaint that P.L. and her mother were in a stranger's home and that her mother had passed out there. Earlier in the evening, the mother reportedly was drunk and assaultive while P.L. was in her care.

An emergency removal hearing took place on January 3, 2008. The mother did not appear. P.L. was placed in the care of her maternal grandmother.

The father, O.L.-V., appeared at the hearing and requested counsel. He has appeared at every court hearing from that date, with the assistance of an interpreter, and worked actively to gain custody of his then eight-month-old daughter. The court notes that O.L.-V. was not married to the child's mother, but is identified as the father on the child's birth certificate. He has signed a paternity affidavit[3] and paid support for P.L. No other person claims to be the biological father of the child.

On January 22, 2008, the court adjudicated P.L. as a child in need of assistance on the basis of an "indication" that the parents had a history of

[1] The mother has not appealed the termination of her parental rights to P.L.
[2] He does not raise the issue whether the statutory grounds for termination have been proved.
[3] Paternity testing was ordered, but not completed.

domestic violence and a finding that both parents had drug/alcohol related arrests. The mother did not appear. O.L.-V. appeared at the hearing, requested continued visitation, and "advised that he was receptive to any in-home or parenting services."

Although visits between the father and child were established, and the father was "receptive to provider suggestions in conducting his visitation," few visits took place because the grandmother did not cooperate. In February 2008, the Santee Sioux Tribe requested permission to intervene, alleging that P.L. is an "Indian child" as defined by the Indian Child Welfare Act (ICWA).[4] That same month, the grandmother took P.L. out of state, where she apparently was joined by P.L.'s mother. The grandmother asked for child support from O.L.-V. and for a paper giving her custody of the child. O.L.-V. refused to sign the paper and continued to work toward obtaining custody of the child.

In April 2008, the child's mother was located in Idaho, where she had given birth to another child, also fathered by O.L.-V. P.L. was with her mother. Idaho authorities removed both children from the mother's care, and P.L. was transported back to Iowa and placed in family foster care. She remained in a non-adoptive foster home at the time of trial.

A permanency/review hearing took place August 26, 2008, at which time Iowa Department of Human Services (DHS) representatives reported that the father "had difficulty following through with simple parenting skills," and refused to give the name of a roommate. The record was re-opened and the hearing

[4]25 U.S.C. § 1903(4) (2008) defines an "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."

reconvened on October 16, 2008, at the father's request to allow him to present evidence of his progress in parenting skills since the August hearing. The progress reportedly resulted at least partially from a change in the format of parenting instruction from critical comments to a classroom setting. The progress report of September 17, 2008, describes an occasion when O.L.-V. attended an emergency room visit with P.L. when she was suffering from an ear infection. The provider observed O.L.-V. tried "to keep [P.L.] calm in the waiting room," was "calm and careful in his interactions with [P.L.]," and "asked questions about [P.L.]'s health."

The court's October 2008 order states that the care coordinator reports "a little and slow progress" on the father's part, and that he was more comfortable with his daughter in visits and had "responded appropriately" to quizzes on parenting DVDs. The court's order further grants the tribe's motion to intervene and finds that both state and federal ICWA applied to the case.[5]

The State filed its petition for termination of parental rights in November 2008. On November 21, 2008, a family case plan authored by Robin Garroway[6] reported that O.L.-V. has taken:

> more of a parental role with [P.L.] He is also using the skills he has been taught regarding parenting. [The father] brings home-made meals to the visits for [P.L.] to eat as he is concerned that she eat healthy foods. The provider report is very descriptive about how [O.L.-V.] and [P.L.] play together and how [the father] tries to teach P.L. new things. Previously, [the father] has been embarrassed

[5] *See generally In re N.N.E.*, 752 N.W.2d 1, 6-12 (Iowa 2008) (discussing Iowa and federal ICWA); *In re A.E.*, 572 N.W.2d 579, 580-85 (Iowa 1997) (discussing enactment and applicability of federal ICWA). The applicability of the ICWA is not disputed on appeal.

[6] Garroway was the DHS case manager for P.L. The family case plan was based, in part, upon the report of the in-home service provider.

> and did not want to be laughed at thus he was more reserved in his interactions with [P.L.] Now he is less concerned with what others think and is constantly amazed by how intelligent his child is. He encourages her in activities and praises her when she is able to follow directives. Overall the provider notes that [the father] has shown remarkable improvement as a parent.

The report goes on to state that "[the father is using more appropriate hygiene habits when he is with [P.L.]" and "has demonstrated appropriate protective capacities when interacting with her." The visits between O.L.-V. and P.L. were taking place in his home and the report notes that O.L.-V. was taking steps to obtain his own residence. The report states there is a "close bond" between P.L. and her father, that P.L. "does enjoy interacting with him and does initiate much of this interaction." However, the report states that its author is not certain "if [the father] wants to be a full time parent or if he just wants [P.L.] placed with his father and step mother."

According to the same report, the mother had convinced the juvenile court in Idaho to return the younger child to her care and the parties anticipated a dismissal of that juvenile court case. The report states the intention of DHS to ask that P.L. be placed in the care of the mother.

Despite its previously-filed petition for termination of parental rights, the State[7] filed a "Motion to Modify Permanency Order," requesting a transfer of P.L.'s care to her mother on January 13, 2009. The stated basis for the motion was the belief of DHS that P.L.'s best interests would be served by a return to her mother, who had completed services in Idaho, and had passed a preliminary home study.

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[7] The State appears to distinguish its pleadings from those of the DHS, while filing both over the signature of the county attorney.

Also in January, the Santee Sioux Nation moved to transfer jurisdiction to the tribe, a motion resisted by the father and overruled by the court on the basis of his resistance. *See In re A.E.*, 572 N.W.2d at 582 (noting that ICWA, 25 U.S.C. § 1911(b) gives veto power over transfer to either parent). The State's motion to modify was set for hearing on April 14, 2009.

As of January 16, 2009, the State, DHS, and the parents all appeared to believe that the termination petition would not proceed to trial. DHS increased the father's visitation with P.L. "to determine if he would be able to parent [P.L.] on a full-time basis to try to reunify." The increased visits included two overnights a week. The father was still cooperating with services and learning how to bathe the child more thoroughly. He had obtained his own apartment, which was inspected monthly. The reports from the in-home provider described a home that was fairly clean, although there was an instance when a kitchen knife was on the floor, and another when the father was yelling out the window to "two cute girls" while P.L. was in the apartment. The father continued to work, to pay child support for P.L., and to carry health insurance for her.

On March 9, 2009, the mother arrived back in Iowa with the younger child. DHS arranged two supervised visits with P.L.—the first time she had seen P.L. since the child was removed from her care in Idaho a year earlier. DHS arranged for both parents to spend time with both children, bringing the two parents together. Garroway testified at the termination trial that "we made arrangements for the parents to get together at the visits so they could try to come up with a plan to co-parent their kids, so they could communicate." Garroway thought the mother then returned to Idaho on March 10. However, another supervised visit

with both children and both parents was arranged by the in-home provider for March 11 at the father's apartment. The in-home provider conducted drop-in visits at the father's apartment on March 13, 14, and 17. Garroway testified that she planned to ask for a trial home placement for P.L. with her father.

However, an incident on March 18, 2009, changed DHS's opinion regarding P.L.'s mother and father. Garroway testified at the termination trial about the incident, based on information she received from the in-home provider and police reports. She testified that O.L.-V. went to the in-home provider's[8] house when he discovered that an incident occurred at his apartment on the night of March 17 and the early morning hours of March 18, while he was at work and P.L. was being cared for by a foster family. He reported to the provider that he was scared, and that the mother had stayed in his apartment. He said the mother had started drinking at about noon the previous day before he left for work.[9] The mother had friends in the apartment the night before while the father was at work; there was drinking and a stabbing, and windows were broken. The father found out about it the next day and "kicked the mother out," according to Garroway's testimony at trial. Although the younger child was with the mother in the apartment during this event, P.L. was with her foster parents. The in-home provider learned in the course of the investigation of the event that the father and mother had married on March 16 or 17.

[8] The provider speaks Spanish, and the father communicated primarily with her, since he otherwise required a translator.

[9] The father is employed at BPI in production and, at that time, worked from 9:30 p.m. to 5 a.m.

Garroway testified at the termination trial that DHS was concerned that O.L.-V.'s home was in disarray after the overnight visits, with coins and a closed Aleve bottle on the floor where P.L. might pick them up. However, she went on to say that DHS was not concerned with the father's housekeeping or general parenting issues. The father's previous alcohol use had not been a problem during the case, although DHS had not received formal verification that O.L.-V. had completed all of his substance abuse treatment. "It turned into judgment issues."

Garroway further testified that this incident represented a "huge relapse" for the mother during which she had placed her younger child in a dangerous situation. As to the father, Garroway's opinion was:

> We've been working with [the father] for over a year, and very slow progress on parenting skills. He does, you know, pick things up. He wants to learn. That is—that is for sure. There's no disputing that.
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> However, [the father] needs a parent himself. He has very poor decision-making skills. If he doesn't have somebody teach him these things, he doesn't know them. And right now he's taught how to parent an infant and a small toddler. He doesn't know how to parent a three-year-old, a four-year-old, a six-year-old, a teenager.

Once again, the mother was not present in court for the termination trial. The father was present and testified at length on direct examination and was cross-examined by all parties. He testified that he is twenty-six years old, a permanent resident of the U.S., and has his green card. His father and step-mother live in the same city as he. O.L.-V. testified that he spoke with P.L.'s mother on the phone several times after the hearing in January 2009 about getting back together and raising their children. He testified he thought this

would help them both get the children back. He said that he had the paperwork from Idaho indicating the mother was not drinking, and she seemed different to him when he saw her at the arranged visits. They married on March 16, and stayed together that night and until he went to work on March 17.

The father further testified that when he came home the next morning, he saw broken glass and blood in the common area of the apartment building. The mother was asleep on the couch in his apartment, and he could not wake her. He fixed a bottle for the younger child and put her in the child's bed he had for P.L. When the mother awoke, she brought people over to the apartment, and the father refused to open the door. The mother was "making a scene, knocking on all the doors," and she told the father she was going to call the police.

The father testified that he then left his apartment and went to the home of his in-home provider and asked her to help him. The provider and the father called the police, and learned about the details of the assault that occurred in the father's apartment the night before.

The father asked the court to re-establish his visits with P.L. He testified that he wanted to earn her custody. He also testified that he had "learned to love" P.L., a phrase that concerned the court.[10] He said that he would "need to look for a better place" for P.L. if the court granted him custody. He went on to say he could keep P.L. safe, but would need some help "because she's still being too little, and I don't want to have any problems in the future." When pressed,

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[10] The father testified through an interpreter. The transcript reveals disagreement among the interpreters in the courtroom, one translating for O.L.-V. and one translating for the court and the lawyers, about the translation of the father's testimony.

the father testified that he had had too little time in visits with his daughter to know everything he would want to know to parent her full time.

In terminating the father's parental rights to P.L., the district court found:

> [O.L.-V.] has made attempts to try to understand how to raise his child. While he does show a grasp of basic fundamentals, such as feeding and bathing [P.L.], he has not shown an ability to logically put these lessons into effect to insure the safety and development of his child. He has not demonstrated he knows enough about child development to be effective at parenting [P.L.] as she grows older . . . . [O.L.-V.] is easily talked into doing things that most logical people would hesitate to do and makes poor choices, as evidenced by his sudden marriage to [the mother], thus placing [P.L.] at risk of harm. [O.L.-V.] will always need assistance in parenting, not just financially, but educationally and emotionally. [O.L.-V.] testified that he has "learned to love" [P.L.] over the "last few months." An additional period of time and continued services to "teach" him to "love" his daughter, when he has already had over a year, is not likely to be of benefit.

A month later, in ruling on the State's application to enlarge the findings required by ICWA, the court found, "This court concludes beyond any reasonable doubt that [P.L.] would suffer serious physical and/or emotional injury should she be returned to the custody of her parents."

II. Discussion.

We review termination of parental rights de novo. *In re Z.H.*, 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). Because the child is an "Indian child", the provisions of Iowa Code chapter 232 governing children in need of assistance are modified by the ICWA. *In re A.E.*, 572 N.W.2d at 581.

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) (2009). We "afford a rebuttable presumption that the best interest of a child is served when custody is with the natural parents." *In re N.M.*, 491 N.W.2d 153, 156 (Iowa 1992).

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).

Upon our de novo review, we find the court's conclusions are not supported by evidence beyond a reasonable doubt that continued custody[11] of the child by the parent is likely to result in serious emotional or physical damage to the child. *See In re J.W.*, 528 N.W.2d 657, 662 (Iowa Ct. App. 1995) (noting heightened burden of proof where ICWA applies).

It is clear that the mother was the focal point of the initial involvement of DHS and the reunification efforts that were made. DHS and the court were prepared to return P.L. to the mother's custody—even after a year's absence. The record supports a finding that, once the mother relapsed, placement with the father was not seriously considered.

However, DHS and its provider, who knew the father and his abilities best, informed the court that he was progressing in his parenting abilities, that P.L. had

[11] *See In re Vaughn R.*, 2009 WL 1846510, PP19-29 (Wis. Ct. App. 2009) (discussing and rejecting claim that "continued custody" in 25 U.S.C. § 1912(f) means that the parent must have physical custody of the child).

a “close bond” with her father, and that there was no concern regarding his basic parenting abilities.[12] And even in the absence of other concerns about the father’s ability to keep P.L. safe and to provide a nurturing home for her, the court found that P.L. was endangered by her father’s decision to marry her mother without informing DHS. While the parents’ decision to marry may have seemed whimsical, these parents had been fighting with the State for a year for custody of their children. On the brink of success, they apparently believed that being married would help their cause. The father testified they had talked on the phone about getting married between January (when the tide of opinion turned in their favor) and March (when the mother returned to Iowa for her first visit with P.L. in a year). The case manager testified that the father was nervous or uncomfortable about seeing the mother again, and DHS arranged for a family visit on two separate days, involving both parents and both children. The father testified that he married the mother because the courts had scheduled P.L. to go with her, and he thought it was a way for both parents to have P.L. On cross-examination, the father testified he no longer planned to stay married to the mother. He also testified that communication with the mother was difficult, since she does not speak Spanish. He explained in his testimony that the mother told him she wanted a divorce in the aftermath of the events of March 18, 2009. Under these circumstances, the decision to marry cannot be a sufficient basis for

[12] On the other hand, the court emphasized the father’s lack of information about raising P.L. as she grew older. Many a first-time parent might recognize themselves in the description of the court, and be concerned—as this father was—that they would need help and age-specific information as their child matured.

a finding of danger to the child if returned to the father. It is not evidence beyond a reasonable doubt to justify severing the family ties between father and child.

Nor are we willing to place weight on the father's choice of words in his translated testimony that he had "learned" to love his daughter. Although the phrase may not be employed by parents living with their children from birth, this father had a different experience. His year-long journey to earn the chance to raise his daughter involved much effort at learning on his part, including learning his daughter's nature and spirit in the limited time offered to him in visits.

In light of the obvious bonds between father and daughter and the history of O.L.-V.'s care during visitations, his desire to learn to be a better parent, and his growing success at that endeavor, we conclude there was not evidence beyond a reasonable doubt supporting the termination. We thus reverse the order terminating O.L.-V.'s parental rights.

REVERSED.

Doyle, J. concurs. Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully dissent.

This appeal is about the best interests of P.L., not whether the State proved the allegations in the petition to terminate the father's parental rights. Those findings were not appealed. Nonetheless, our de novo review of the trial exhibits and testimony should confirm that the father was not in a position to safely parent P.L., and termination was in P.L.'s best interests. The various DHS reports, as well as the testimony of DHS worker Robin Garroway, detail the progress the father has made, but also record grave concerns as to his ability to care for P.L. At trial, when asked if P.L. could be returned to her father's custody, Garroway answered:

> No. . . . We've been working with [the father] for over a year, and very slow progress on parenting skills. He does, you know, pick things up. He wants to learn. That is — that is for sure. There's no disputing that.
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> However, [he] needs a parent himself. He has very poor decision-making skills. If he doesn't have somebody teach him these things, he doesn't know them. . . . And if nobody's there to help him, he will make some critical judgment issues just as he has shown when he's left to make his own decisions that he has been. Very poor decision.
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> [P.L.'s] waited the majority of her life for her parents to become parents. She — it would not be fair to her to continue to wait for permanency in her life. She can't safely return to her parents at this time, and I couldn't even predict if it would ever be possible.

The father's rights were terminated pursuant to Iowa Code sections 232.116(1)(d), (child CINA for physical or sexual abuse (or neglect), circumstances continue despite receipt of services; (h) (child is three or younger, child CINA, removed from home for six of last twelve months, and child cannot

be returned home); and (i) (child meets definition of CINA, child was in imminent danger, services would not correct conditions).

On appeal, the father does not claim that the State failed to prove by clear and convincing evidence that the statutory basis for the three code sections noted above was not satisfied. Rather, he claims termination was not in P.L.'s best interests. Iowa Code section 232.116(3) provides in relevant part:

> The court need not terminate the relationship between the parent and child if the court finds any of the following:
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> . . . .
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> (c) There is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.

P.L. was removed from her mother's home on December 26, 2007 when she was only seven months old. Other than a few overnight visits with her father, P.L. has never been in his care. The DHS Family Case Plan dated April 6, 2009, details the progress the father has made, along with some setbacks, in his learning how to safely parent P.L. and provide her a home. The report included this troubling statement:

> The provider has been working for months on teaching [the father] common sense skills and healthy decision making skills. [The father] himself still requires ongoing parenting as he has never been taught or he has not retained what he was taught regarding life, relationship, or judgment skills growing up.
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> . . . .
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> [P.L.] deserves to have permanency in her life now rather than continuing to wait for her parents to grow up and live healthy lives.

We have previously noted, "[a]t some point, the rights and needs of the child rise above the rights and needs of the parents. The legislature, through section 232.116 directs us to that point." *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). Iowa Code section 232.116(3) is permissive, not

mandatory. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). It is within the sound discretion of the juvenile court, based upon the unique circumstances before it and the best interests of the child, whether to apply this section. *Id.* Little in this record points to any bond between this young child and her father; however, even a strong parent-child relationship is not an overriding consideration in determining whether to terminate rights, but merely a factor to consider. *In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998) Although the father has made an effort to learn how to parent P.L., those efforts were found by the district court to be lacking, such that the statutory basis to terminate his parental rights were proved by clear and convincing evidence.

As those findings were not challenged on appeal, and as contemplated in Iowa Code section 232.116(3) there is little evidence of a bond that would override those findings, the termination should be affirmed. The best interests of P.L. call for permanency. She has waited long enough, and the tenuous bond between parent and child is not such that the termination of parental rights should be reversed. *See In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990) (stating that children simply cannot wait for responsible parenting). I would affirm the district court.