IN THE COURT OF APPEALS OF IOWA

No. 9-828 / 09-1348
Filed November 12, 2009

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

D.M.J., Mother,
Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Peter B. Newell, District Associate Judge.

A mother appeals the termination of her parental rights to her son. **AFFIRMED ON CONDITION AND REMANDED.**

Rodney E. Mulcahy of Eggert, Erb & Mulcahy, P.L.C., Charles City, for appellant mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Paul L. Martin, County Attorney, and Shaun Showers, Assistant County Attorney, for appellee State.

Mark Young, Mason City, for minor child.

Joseph R. LaPointe, Mason City, for father.

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

POTTERFIELD, J.

A mother appeals the termination of her parental rights to her son.[1] She contends the State did not make reasonable reunification efforts and did not comply with the tribal notice provisions of the Indian Child Welfare Act (ICWA). We conditionally affirm and remand for further proceedings.

I. Facts and Prior Proceedings.

M.L. was born to D.J. in January 2007. A child-in-need-of-assistance (CINA) petition was filed on June 25, 2008, due to D.J. testing positive for marijuana and to a history of domestic violence in the home. An initial adjudicatory hearing was continued to October 15, 2008, to monitor D.J.'s participation in voluntary services, including drug testing, a substance abuse evaluation at Prairie Ridge Addiction Treatment Services (Prairie Ridge), Family Safety, Risk, and Permanency (FSRP) services, an Area Education Agency (AEA) evaluation, and cooperation with paternity testing.

M.L. was removed from D.J.'s care by ex parte order on September 26, 2008, after the maternal grandmother called police. The grandmother had received a call from D.J. that she was leaving the child. When she went to D.J.'s home, the grandmother found the twenty-one-month-old child alone and this note:

> Hey Mom,
> I am just writing to you to tell you that I am going to call or go up to DHS today to have [M.L.] go to foster care for two weeks if they can do it like that cause I just can't do it anymore! I can't raise him by myself anymore! You only take him every other week is not good

[1] The biological father of M.L. was identified by paternity testing in March 2009 and does not appeal the termination of his parental rights.

> enough! . . . I love him more than anything, but I can not do it all by myself!

A review hearing was held on October 3, 2008. The court ordered M.L. to remain in the temporary custody of the Iowa Department of Human Services (DHS) for placement in foster care upon the court's findings the "mother has a history of substance abuse, admits she is depressed, has been overwhelmed by his care and CINA Adjudication is pending."

M.L. was adjudicated CINA on October 28, 2008. At the October 21 adjudication hearing, a DHS worker testified that M.L. had been the subject of four prior child abuse investigations and all were founded for denial of critical care. She also testified about the circumstances leading to M.L.'s removal, her concern for D.J.'s mental health and possible drug usage. She testified that D.J. needed to meet consistently with a family therapist. Jennifer Dillavou, DHS social worker, testified that D.J. provided a "positive urinalysis sample" on August 13 and that D.J. had not followed through with recommendations for a follow-up appointment with Prairie Ridge or individual mental health treatment. The court ordered D.J. to attend weekly individual therapy, participate in FSRP services, maintain an appropriate, clean, and safe home for M.L., participate in any recommended substance abuse treatment, cooperate with random drug testing, and sign necessary releases.

D.J. was offered supervised visits with M.L. twice a week. She had one unsupervised visit on October 27, but following a positive UA result received on October 30, DHS determined future visits were to be supervised. D.J. did not attend visits on October 22 and November 3, 5, and 18, 2008. A DHS report to

the court noted that D.J. had attended only two of six mental health appointments; however, she had followed through with FSRP services, and signed the required releases. DHS requested a new psychological evaluation.

A dispositional hearing was held on December 2 and the court entered its order on December 9, 2008. The court concluded M.L. would remain in foster care and ordered visitation at DHS's discretion. The court ordered D.J. to participate in weekly individual therapy, FSRP services (to address issues of parenting skills, substance abuse, housing, and mental health), substance abuse treatment, random drug testing, and a psychological evaluation.

A psychological evaluation was completed on January 19, 2009. D.J. acknowledged a long history of mental health treatment and interventions, including psychiatric hospitalizations and DHS involvement when D.J. was an adolescent. The evaluation indicated: D.J. is of borderline intellectual ability with a history of adolescent behavior problems; polysubstance abuse for which D.J. struggled to achieve and maintain abstinence; and "personality dynamics and generally immature behavior associated with conduct disorder." The evaluator noted that D.J.

> is utilizing a variety of mental health and chemical dependency treatment services including both counseling and medical treatment that should help to regulate her mood, irritability and impulsivity. She also seems to be very well versed in the various programs, financial and social, offered through the Department of Human Services and other government agencies. She will need a good deal of support, monitoring and supervision in order to ascertain that she takes full advantage of those and that she provides a safe environment for her son.

In a February 19, 2009 review order, the court noted that D.J.'s random UAs had tested positive for methamphetamine and marijuana on December 3, 2008; for marijuana on January 21, 2009; and for methamphetamine and marijuana on February 2 and February 4, 2009. The court also noted that D.J. and her boyfriend J.L. had been in a fight on the morning of January 21, 2009, but D.J. later denied that an assault had taken place. D.J. asked the court to return M.L. to her and the court advised her:

> that it would not be appropriate to return this Child until [D.J.] had established some stability in her life. . . . [S]he would have to demonstrate ongoing sobriety; that she could not test positive for the presence of any controlled substances; that she must attend all of her substance abuse treatment appointments; that she must meet with the Department and their providers as scheduled; and she must establish some stability in her relationships, as well as maintaining a safe and stable home for the Child.

Ms. Dillavou submitted a report to the court dated May 19, 2009, in which she noted: D.J. missed appointments with her substance abuse counselor on April 28 and May 1, and did not attend appointments with her individual counselor on April 9 and 16; D.J. submitted eight UAs that were negative, and one that was positive on March 13; AEA had been unable to reach D.J. for a month and thus could not offer services; D.J. had no visits between April 28 and May 7; and on May 2, 2009, D.J. was arrested for serious assault with J.L. listed as the victim in the police report.

A petition to terminate her parental rights was filed on May 5, 2009.

On May 19, 2009, a review hearing was held. In its review order the court noted D.J.'s arrest and that D.J. had not had contact with Prairie Ridge since May 11 and had not seen her individual therapist in May. The court found M.L.'s

removal "must continue" and that "reasonable efforts have been made to prevent or eliminate the need for this removal," including FSRP services and substance abuse treatment. D.J. was again ordered to attend individual and substance abuse therapy, FSRP services as recommended, and submit to drug testing.

At the termination trial on July 30, 2009, Ms. Dillavou testified that D.J. had made recent progress. She had submitted clean UAs.[2] However, D.J. continued to be inconsistent with her individual mental health and substance abuse treatment. Ms. Dillavou acknowledged that D.J. had asked Prairie Ridge about residential facilities available to young mothers at one point. However, due to her lack of consistent participation in treatment over the years, Prairie Ridge indicated that she would have to follow through with other services before the residential facility would be appropriate. Ms. Dillavou testified she had attempted to speak to D.J. and J.L. about domestic abuse, but both denied any abuse in their relationship, despite the fact that each had been arrested for domestic violence involving the other.

Ms. Dillavou also testified that M.L. is developmentally delayed and has issues regarding security and anxiety. She testified that there were concerns about M.L.'s eyesight and hearing, but D.J. was resistant to testing. Ms. Dillavou testified that M.L. was in need of consistent care and nurturing to address his developmental delays.

Jacquelyn Ploeger, a family consultant with Mid-Iowa Family Therapy Clinic, testified that her agency had provided parent skill development and

[2] D.J.'s boyfriend, J.L., testified she had been "clean" for four months, but did acknowledge that she had been drinking the night of her arrest and had been drinking on a "couple" of occasions in that time period.

supervised visits twice a week since September 2008. She testified D.J. was making progress, but unsupervised visits would only be safe for very limited periods of time. Ms. Ploeger testified that D.J. minimizes her substance abuse and "side-steps" domestic abuse issues.

D.J. testified she had not used controlled substances since March 13, 2009. She did not consider alcohol a problem. She testified she was attending her mental health appointments and taking her medications (Depakote, Prozac, and Trazodone), had completed her parent skill development class, and was working with Voc-Rehab. She did not believe M.L. was in need of hearing and sight testing as recommended by DHS, but would allow it.

On August 20, 2009, the court entered an order terminating D.J.'s parental rights pursuant to Iowa Code sections 232.116(1)(h) (child is three years of age or younger, adjudicated CINA, has been removed from parent's care for at least six of last twelve months, and cannot be returned to parent at present time) and 232.116(1)(*l*) (child adjudicated CINA, parent has severe, chronic substance abuse problem and presents a danger to self or others as evidenced by prior acts, and parent's prognosis indicates that child not able to be returned in a reasonable period of time) (2009). The court made several findings: that D.J. "has made progress but is not at a point where the Court could safely authorize unsupervised visits for any length of time"; that D.J. was facing criminal charges for an assault of her boyfriend related to the consumption of alcohol; that "[D.J.] has not demonstrated that she will consistently address her substance abuse and mental health issues"; and "this Child cannot be safely returned to his mother's care at this time." D.J. now appeals.

II. Scope and Standards of Review.

Our review of termination cases is ordinarily de novo. *See, e.g.*, *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). To the extent D.J.'s claim of error rests upon statutory interpretation, however, our review is for correction of errors of law. *See In re E.H. III*, 578 N.W.2d 243, 245 (Iowa 1998). The provisions of the ICWA are to be strictly construed and applied. *Cf. In re J.W.*, 498 N.W.2d 417, 421 (Iowa Ct. App. 1993).

III. Discussion.

A. Reasonable Efforts. D.J. argues that the court erred in finding the State made reasonable efforts to reunify parent with child. She does not otherwise challenge that the statutory requirements have been met for termination.

DHS is required to "make every reasonable effort to return the child to the child's home as quickly as possible consistent with the best interests of the child." Iowa Code § 232.102(7). What constitutes reasonable services varies based upon the requirements of each individual case. *In re C.H.*, 652 N.W.2d 144, 147 (Iowa 2002). The trial court found that reasonable efforts had been made. Upon our de novo review, we agree.

D.J. has been offered numerous services including individual mental health evaluation and treatment, substance abuse evaluation and treatment, and parenting skills training. She did not take full advantage of the services offered and did not request additional or different services from DHS or the court. *See In re A.A.G.*, 708 N.W.2d 85, 91 (Iowa Ct. App. 2005) (noting a parent has an

obligation to demand other, different, or additional services prior to a permanency or termination hearing).

B. Tribal Notice. On May 30, 2008, a child abuse report was completed. This report noted: "[D.J.] said she is Caucasian, African American, and has Cherokee Indian Heritage. [D.J.] reported her father, Don [J.], belongs to a Cherokee Indian tribe and used to live on an Indian reservation years ago." D.J. now contends that notice of the termination proceedings should have been given to the Indian tribe pursuant to the requirements of the Indian Child Welfare Act (ICWA). *See* Iowa Code ch. 232B (2009).

The State acknowledges that D.J. advised DHS that her father belonged to a Cherokee Indian tribe and that no notice has been sent. However, it argues error is not preserved.

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. *In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005) (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.*

In *R.E.K.F.*, 698 N.W.2d at 150, the court concluded that 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.

IV. Disposition.

This matter is remanded to the juvenile court, which shall give notice of the termination proceedings to the appropriate Indian tribe. *See id.* If the tribe fails to respond within the appropriate timeframe or replies and determines M.L. is not eligible for tribal membership, the juvenile court's original order of termination will stand. If the tribe responds and intervenes, reversal of the termination and further proceedings consistent with the requirements of the ICWA will be necessary. We affirm the district court's termination ruling on this condition. We do not retain jurisdiction. Costs are assessed against the State.

AFFIRMED ON CONDITION AND REMANDED.