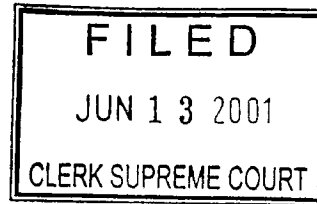


IN THE COURT OF APPEALS OF IOWA

No. 1-223 / 00-1677
Filed June 13, 2001

IN THE INTEREST OF
D.W. and A.W., Minor Children,

M.L., Father of D.W.,
Appellant.



Appeal from the Iowa District Court for Polk County, Karla J. Fultz, District
Associate Judge.

A father appeals the juvenile court order terminating his parental rights.

REVERSED AND REMANDED.

Christopher Kragnes, Sr., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Charles K. Phillips, Assistance
Attorney General, and Ray Blase, Assistant Attorney General, for appellee-State.

Kimberly S. Ayotte, Youth Law Center, Des Moines, for minor children.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

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MILLER, J.

A father appeals the decision of the juvenile court which terminated his parental rights. He claims (1) the juvenile court erred when it found clear and convincing evidence to support the statutory elements required for termination; (2) the juvenile court failed to follow the mandates of the Indian Child Welfare Act (ICWA); and (3) the juvenile court abused its discretion by terminating his rights when a relative had custody. We reverse and remand.

Montgomery and Jerri are the parents of Diamond, born in October 1990. Montgomery has had little participation in his child's life. He is a member of the Yankton Sioux Tribe.

Diamond was removed from her mother's care in January 1991. At that time, Montgomery was in prison on a conviction for burglary in the second degree. Diamond was adjudicated to be a child in need of assistance. Diamond was returned to her mother's care in March 1992, and the juvenile case was closed in 1994. At some point in time after the juvenile case closed, Diamond began to live with her maternal grandmother, Dorothy.¹

In July 1997, when Diamond was living with her mother, she was again removed from her mother's care due to the mother's illegal drug use. After a short period of time in foster care, she was returned to the care of Dorothy. Diamond was adjudicated to be a child in need of assistance pursuant to Iowa Code sections 232.2(6)(c)(2) and (n).

¹ Some documents in the case refer to Dorothy as Diamond's great-aunt, and other documents refer to her as Diamond's maternal grandmother. Dorothy testified she had adopted her niece, Jerri, and thus, she could be considered to be both Diamond's great-aunt and grandmother.

Montgomery has a history of illegal drug use. He never participated in services. He contacted the Department of Human Services (DHS) in October 1997, stating he was interested in having Diamond placed in his care. He stated he would come to the DHS office to sign some releases, but never did so. Montgomery had no further contact with DHS. In 1998, Montgomery was convicted of theft in the second degree and interference with prosecution, and was sentenced to five years in prison.

In September 1999, the State filed a petition to terminate the parental rights of Montgomery and Jerri to Diamond. Montgomery has had minimal contact with Diamond. She has stated she was not interested in further contact from her father. Dorothy has expressed an interest in adopting Diamond.

On the day of the termination hearing, May 15, 2000, the Yankton Sioux Tribe filed a document titled, "Motion to Intervene." The document stated the Tribe wished only to be kept informed of the child's whereabouts. The juvenile court determined the document was not actually a motion to intervene under the ICWA. The court also determined that if the document was a motion to intervene, it was untimely.

The juvenile court terminated Montgomery's parental rights under sections 232.116(1)(b), (d), and (e). Jerri's parental rights were also terminated. The court found it was in Diamond's best interests to terminate the parents' rights. Montgomery appealed.

I. SCOPE OF REVIEW

The scope of review in termination cases is *de novo*. *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa Ct. App. 1997). In equity cases, especially when

considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7). Our primary concern is the best interests of the child. *In re T.B.*, 604 N.W.2d 660, 662 (Iowa 2000).

In this case, Iowa statutory and case law is modified by the provisions of the ICWA. See *In re B.M.*, 532 N.W.2d 504, 506 (Iowa Ct. App. 1995). The provisions of the ICWA are to be strictly construed and applied. *In re J.D.B.*, 584 N.W.2d 577, 583 (Iowa Ct. App. 1998). Under the ICWA, the State bears the burden of showing "beyond a reasonable doubt" that parental rights should be terminated. *In re J.W.*, 528 N.W.2d 657, 662 (Iowa Ct. App. 1995).

II. MOTION TO INTERVENE

Montgomery contends the juvenile court should have permitted the Yankton Sioux Tribe to intervene in the proceedings. He states the Tribe's filing entitled "Motion to Intervene," should be treated as a motion to intervene. He asserts the Tribe should have been given the opportunity to come before the court and explain its intentions regarding Diamond.

The Tribe adequately explained its intentions, and it was not seeking any involvement in the termination proceedings. The Indian Child Welfare Representative for the Tribe sent a letter stating:

I have read the petition and notice of hearing, and as the Representative of the Tribe, I am sending a motion to intervene in this proceeding, however, this is the only involvement the Tribe will have due to the fact that these children have been in a stable environment since 1997. This intervention will allow the Tribe to keep track of this child, should she ever want to know her culture and heritage.

We determine the juvenile court correctly found the Tribe did not actually want to intervene in the termination proceedings, but only wanted to be kept apprised of the child's whereabouts.

III. QUALIFIED EXPERT WITNESS

Montgomery claims the State failed to present the testimony of a "qualified expert witness," as required by the ICWA. The State claims this issue was not preserved for our review. 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. 179(b).

.. In the case *In re R.L.F.*, 437 N.W.2d 599, 602 (Iowa Ct. App. 1989), a father argued on appeal that the juvenile court's decision to terminate was not based on testimony of a qualified expert within the meaning of the ICWA. He asserted the DHS case worker who testified at trial was not a qualified expert because she did not have substantial experience in working with Indians. *R.L.F.*, 437 N.W.2d at 602. We stated:

Regardless of the merit of his contention, R.H. [father] failed to preserve error as to the trial testimony of DHS case worker Vogel due to his failure to object to her testimony. Consequently, his failure to object operates as a waiver of any improprieties in the testimony.

Id. (citation omitted). There is no discussion in the opinion concerning whether foundational evidence was presented to qualify the case worker as a "qualified expert witness" as required by the ICWA, or whether the juvenile court found the

case worker to be a “qualified expert witness.” The opinion states only that she recommended termination. *Id.*

We determine *R.L.F.* is distinguishable from the present case, because here the record is clear the State provided no foundational evidence to qualify the one possible expert witness, caseworker White, as the “qualified expert witness” required by the ICWA, the State never expressly offered White's testimony as an expert under the ICWA, and the district court did not rule on her qualifications as such an expert. Under the circumstances Montgomery had neither a reason nor an opportunity to object to White's lack of qualifications as an expert required by the ICWA.

The Montana supreme court addressed this issue in the case *In re K.H.*, 981 P.2d 1190 (Mont. 1999). The State claimed the mother had “waived” her claim on appeal that the State did not present the testimony of a qualified expert witness, because she did not object at the termination hearing to the testimony of a social worker. *K.H.*, 981 P.2d at 1193. The Montana supreme court found the mother did not have an adequate opportunity to object at the trial level because, as in our case, the State did not offer the social worker's testimony as an expert, and the district court did not rule on her qualifications. *Id.* at 1194. The court went on to consider whether the social worker qualified as an expert. *Id.* at 1197. Following this example, we will proceed to consider the merits of Montgomery's argument on this issue.

Section 1912(f) of the ICWA provides:

No termination of parental rights may be ordered in such proceeding 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 or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912 (f). The testimony of a qualified expert witness is to provide the court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias. *In re S.M.*, 508 N.W.2d 732, 734 (Iowa Ct. App. 1993).

The term "qualified expert witness" is not statutorily defined. *In re L.N.W.*, 457 N.W.2d 17, 18 (Iowa Ct. App. 1990). While the Department of the Interior has issued guidelines for state courts, these guidelines are not published as regulations because they are not intended to have binding legislative effect. *Id.* Under these guidelines, there are three possible types of expert witnesses:

- (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
- (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
- (iii) A professional person having substantial education and experience in the area of his or her specialty.

S.M., 508 N.W.2d at 734 (quoting 44 Fed. Reg. 67,584, 67,593 (1979)). The phrase "qualified expert witness" is meant to apply to expertise beyond the normal social worker qualifications. *In re Krefft*, 384 N.W.2d 843, 846-47 (Mich. Ct. App. 1986) (citing H.R. Rep. No. 95-1386, 95th Cong. (1978)); *In re D.S.P.*, 480 N.W.2d 234, 239 (Wis. 1992).

The only witnesses at the termination hearing in this case were Dorothy, the grandmother; Melinda (Mindee) White, a DHS social worker; and Montgomery. The evidence concerning White's qualifications is as follows:

Q. And how are you employed? A. With the Department of Human Services child protective treatment unit.

Q. How long have you held that position? A. Over five years.

Q. And have you held other positions within the Department?

A. No, I have not.

Q. So for five years you've been with the child protective unit?

A. Yes.

Q. And what are your duties and responsibilities as an employee of the Department of Human Services in the child protective treatment unit? A. To do assessments of families and determine what needs that they may have that the Department can make available to keep the children safe and preferably within a relative placement.

Q. And that's what you've been doing for five years? A. Yes.

Q. What is your education and training that prepares you to discharge those duties for the Department of Human Services? A. I have a bachelor's and a master's in sociology. I have continuous education training from the Department. I did family preservation for a year and two years in corrections work prior to coming to the Department.

On cross-examination White was asked:

Q. Have you ever worked with a Native American tribe in relation to a CINA case? A. This would be my first.

Q. Did you do any investigation or work with the Yankton Sioux Tribe at all? A. I wasn't even aware of how to reach them, and I was stressing to the county attorney's office to do that piece.

While specific knowledge of Indian life is not necessary where a professional person with substantial education and experience testifies on matters not implicating cultural bias, *In re Doe*, 902 P.2d 477, 485 (Idaho 1995), we determine White is not a qualified expert witness because it does not appear she has any expertise beyond the normal social worker qualifications. See *D.S.P.*, 480 N.W.2d at 239. Furthermore, even if we were to find White was a qualified expert witness, there was no testimony (and no determination by the juvenile court) 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.

The State has failed to meet the requirements of section 1912(f) of the ICWA, because it did not present the testimony of a qualified expert witness "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." We determine the case must be reversed and remanded.

Because we have decided the case must be reversed and remanded, we need not address the remaining issues Montgomery raises on appeal.

REVERSED AND REMANDED.