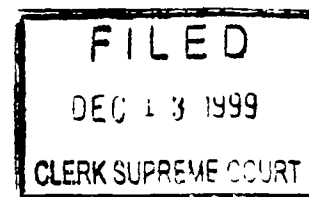


IN THE COURT OF APPEALS OF IOWA

No. 1999-235 (9-459) / 98-1944
Filed December 13, 1999



**IN THE INTEREST OF M.M., A.V., and A.C.,
Minor Children,**

**C.C., Mother,
Appellant,**

**WINNEBAGO TRIBE OF NEBRASKA,
Appellant.**

Appeal from the Iowa District Court for Woodbury County, Patrick H. Tott,
Associate Juvenile Judge.

The mother of three minor children and the Winnebago Tribe of Nebraska
appeal a juvenile court order terminating the mother's parental rights. **AFFIRMED.**

Al Sturgeon of Al Sturgeon Law Firm, Sioux City, for appellant mother.
Christine A. Stolarsky, Winnebago, Nebraska, and Martha M. McMinn, Sioux City,
for appellant Winnebago Tribe.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, and Marleen Loftus, Assistant County Attorney, for appellee State.

Marchelle M. Denker, Sioux City, guardian ad litem for minor children.

Heard by Streit, P.J., and Vogel, and Vaitheswaran, JJ.

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VAITHESWARAN, J.

A mother of three children and the tribe to which they belong appeal a juvenile court order terminating the mother's parental rights and denying the tribe's motion to transfer jurisdiction to the tribal courts. We affirm.

I. Background Facts and Proceedings

Catherine is the natural mother of Alejandra, born on October 2, 1990; Marcel, born on August 27, 1992; and Adrianna, born on August 23, 1994. Each of the three children have different fathers. On February 17, 1995, Catherine married Juan, the father of Adrianna. Three months later, Marcel's maternal aunt took him to the hospital after discovering bruises on his genitals. Marcel reported that Juan caused the bruising by punching him repeatedly. A physician explained the injuries were more consistent with "grabbing, squeezing, and twisting" than with a normal fall or accident. The aunt expressed concerns of other instances of unexplained bruising.

Following this incident, Catherine voluntarily placed the children first in the home of relatives, then in the home of a friend. On June 15, 1995, the State filed a child in need of assistance petition on behalf of the three children and, at the same time, sought to determine whether the Indian Child Welfare Act (ICWA) applied to the proceedings. The State agreed to allow the children to remain with relatives. The juvenile court ordered Juan to have no contact with Catherine and the children. Shortly thereafter, Catherine met Juan despite the no contact order, and both were arrested for shoplifting.

In August 1995, the juvenile court placed the children in foster care and ordered Catherine to receive therapy for abuse and male dependency issues. Following a hearing in October 1995, the court found the children to be in need of assistance and ordered their continued placement in foster care. The court based its decision on the abuse of Marcel, domestic violence between Catherine and Juan, Catherine's decision to ignore the no contact order against Juan, concern about Catherine's ability to keep Juan away from the home, the shoplifting incident, Catherine's willingness to leave the children unattended while she picked and dropped off Juan at the bus stop, and Catherine's poor financial condition.

In March 1996, Catherine moved to modify placement based on her apparent success in a supervised family living program. The juvenile court transferred the children to her for placement in the program.

The Winnebago Tribe moved to intervene in April 1996, asserting all three children were members of the Tribe. The juvenile court granted the motion.

In February 1997, the court scheduled a temporary removal hearing after learning that Catherine had been living with Juan since completion of the family living program in June 1996. Following entry of a removal order but before execution, Catherine took the children and went to Mexico with Juan. She returned with the two older children in May 1997. Adrianna remained in Mexico with Juan until November 1997. The court ordered the children placed in foster care and granted Catherine supervised visitation.

On June 25, 1998, the children's guardian ad litem petitioned to terminate the parental rights of Catherine, Juan, and the two fathers. The Winnebago Tribe moved to transfer jurisdiction to the tribal courts. Following a four day hearing, the juvenile court denied the Tribe's motion and terminated the parental rights of Catherine and each of the fathers. Only Catherine and the Tribe have appealed.

II. Scope of Review

Our review of termination cases is de novo. *In re A.J.*, 553 N.W.2d 909, 911 (Iowa App. 1996). We look at both the long range and immediate interests of the children with a view to determining their best interests. *In re M.N.W.*, 577 N.W.2d 874, 875 (Iowa App. 1998). A parent's past performance may be indicative of the quality of future care. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). Although we are not bound by a juvenile court's fact findings, we give particular weight to the court's findings relating to witness credibility. *See In re A.J.*, 553 N.W.2d at 911. Where children are tribal members, Iowa law is modified by provisions of the ICWA. *In re B.M.*, 532 N.W.2d 504, 506 (Iowa App. 1995). The provisions of the ICWA are to be strictly construed and applied. *In re J.W.*, 528 N.W.2d 657, 660 (Iowa App. 1995). Under the ICWA, the State bears the burden of showing beyond a reasonable doubt that parental rights should be terminated. *Id.* at 662.

III. Transfer of Jurisdiction

There is no dispute that Catherine and her three children are members of the Winnebago Tribe. Therefore, the ICWA grants the Tribe the right to seek a transfer of jurisdiction to the tribal courts. 25 U.S.C. § 1911(b) (1994). A juvenile court is

required to transfer the case in the absence of good cause to deny the motion. *Id.*; accord *In re J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984). Good cause is not defined in the ICWA. The Bureau of Indian Affairs, however, has issued nonbinding guidelines for determining whether good cause exists. See *In re J.W.*, 528 N.W.2d 657, 660 (Iowa App. 1995) (citing 44 Fed. Reg. 567,583, 67,591 (1979)). The guidelines state good cause may exist where “the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.” *Id.* The burden of establishing good cause is on the party opposing transfer, in this case the State. *Id.* We have previously applied these guidelines in deciding whether good cause exists not to transfer jurisdiction to tribal courts. *Id.* Ultimately, however, the determination “is made on a case-by-case basis, after a careful consideration of all the circumstances of the case.” *Id.*

The Winnebago Tribe moved to transfer jurisdiction to the tribal courts in June 1998, after the termination petition was filed. The Tribe contends its filing was timely because the ICWA authorizes petitions for transfer of jurisdiction “at the point of foster care placement or termination of parental rights proceedings.” Tribe’s Brief, p. 21. We have stated, however, that CINA and “termination proceedings are not separate and distinct actions, but are interdependent and interwoven.” *In re H.R.K.*, 433 N.W.2d 46, 48 (Iowa App. 1988). In this case, there is good cause to deny the transfer to the Tribe.

The juvenile court stated “the advanced stage language of the guidelines applies to the degree that the underlying proceedings, the Child in Need of Assistance proceedings, are advanced.” In denying the transfer motion, the court reasoned “[t]he underlying CHINA proceeding is nearly 3 years old. Many services have been offered and implemented. Clearly this CHINA proceeding is at a very advanced stage.” We agree with the court’s reasoning. These children were in juvenile court for three years, termination was imminent, and the Tribe did not actively participate in the proceedings.

The State filed its child in need of assistance petition on June 15, 1995, together with a motion to determine whether the ICWA applied. The following day, the court ordered the State to send notice of the proceedings to the Tribe via registered mail. Although the Tribe expressed its wish to intervene in the proceedings by letter dated July 11, 1995, it neither appeared nor formally moved to intervene until April 1996. The Tribe did appear at a dispositional hearing in February 1997, and assisted Catherine in returning the children from Mexico. However, it did not prepare a case plan or make arrangements for a foster home on the reservation. We conclude, under the facts of this case, the juvenile court correctly denied the Tribe’s motion to transfer jurisdiction. *Cf. In re A.L.*, 442 N.W.2d 233, 237 (S.D. 1989) (refusing to transfer jurisdiction where tribe did nothing more than orally petition for transfer a year after receiving notice of the proceedings).

IV. Reunification Efforts

A. Error Preservation

Catherine contends the State failed to provide reasonable efforts for reunification of the family. The Tribe raises a similar argument, asserting the State failed to make “active efforts” to provide reunification services, as required by section 1912(d) of the ICWA. A party must challenge the adequacy of services prior to the termination proceedings. *See In re B.K.K.*, 500 N.W.2d 54, 57 (Iowa 1993); *accord In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997). We conclude Catherine did not preserve error with respect to her claims that the State failed to provide adequate housing or transportation assistance. She did, however, timely challenge the State’s two visitation suspensions. Therefore, we find that issue was preserved for review

B. Merits

While we have reservations about whether Catherine’s visitation infractions warranted immediate suspension, we like the juvenile court, are compelled to view those infractions in the context of Catherine’s conduct over three years. As noted, that conduct evinced repeated violations of court orders and other requirements. Accordingly, we conclude the State’s efforts at reunification through supervised visitation were adequate under the circumstances of this case and do not warrant reversal of the termination order.

V. Termination

A. Waiver of Argument

The State concedes Catherine preserved error on the termination of her rights, but asserts Catherine has failed to challenge the evidence supporting termination under Iowa Code sections 232.116(1)(c), (d), (e) and (h). Therefore, the State submits, Catherine waived her right to contest the sufficiency of that evidence. We agree with the State that Catherine did not parse and tie the evidence to the separate grounds on which the juvenile court relied in terminating her rights. We conclude an appellant must specifically identify each subsection under which a parent's rights were terminated and separately set forth facts supporting reversal. *See* Iowa R. App. P. 14(a)(3) (noting failure in brief to state, argue, or cite authority in support of issue may be deemed waiver of issue); *cf. In re A.J.*, 553 N.W.2d at 911-16 (identifying error under each subsection of Iowa Code section 232.116(1)). We will consider waived any statutory grounds not expressly identified and argued in this fashion

Here, we elect to also affirm termination of Catherine's parental rights on the merits. We will assume Catherine challenges all the grounds for termination relied on by the juvenile court. We will affirm if we find a basis to terminate under any one of those statutory sections. *Id.* at 911.

B. Merits

We conclude termination of Catherine's rights was warranted under Iowa Code sections 232.116(1)(e) and (g). Subsection (e) requires a court to find:

1) the child is four years of age or older; 2) the child has been adjudicated in need of assistance; 3) the child has been removed for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been for less than 30 days; and 4) there is clear and convincing evidence the child cannot be returned to the custody of the parents as provided in section 232.102.

The juvenile court relied on this subsection to terminate Catherine's parental rights vis-a-vis the two older children. The court used subsection 232.116(1)(g) to terminate Catherine's rights to parent the youngest child. That subsection mirrors subsection (e), except the child must be three years old or younger and must have been removed from the physical custody of the parents for at least six of the twelve months preceding the termination action or for six consecutive months preceding the action

In support of reversal, both Catherine and the Tribe rely heavily on evidence of Catherine's good parenting skills. They note that, in March 1996, the juvenile court returned the children to her care after she received an "A" grade in parenting and successfully completed the Villa Family Program. The juvenile court, however, did not base its termination order on Catherine's poor parenting skills and indeed conceded she "had the skills to be an acceptable parent." Instead, the court relied on Catherine's pattern of placing her own interests before those of her children.

All three children were in foster care from the middle of 1995 through mid-March 1996. Although Catherine completed the Villa program in June 1996, she did so only by representing she was willing to do whatever was necessary to protect her children and herself from Juan's abuse.

In February 1997, the State presented affidavits, that disclosed Juan had been living with Catherine since June 1996, in violation of a no contact order. The same month, Catherine left the country with Juan and all three children, after the juvenile court entered an order for temporary removal of the children but before the order was executed. She and the two older children returned in May 1997, with assistance from the State and Tribe. Adrianna remained with Juan in Mexico. The court again temporarily placed the children in foster care and granted Catherine supervised visitation. Catherine did not appear at a hearing in June 1997. The court ordered the children to remain in foster care, citing Catherine's misrepresentations to the court, State and other providers. Catherine initially performed well during supervised visits but, by the end of 1997, failed to follow through with State imposed visitation requirements.

Catherine characterizes her visitation infractions as trivial and not grounds for termination. Viewed in isolation, we would tend to agree. However, Catherine's noncompliance with court orders and provider rules began in mid-1995, and continued into 1997. For example, Catherine ignored a no contact order, misrepresented her involvement with Juan, and removed the children from the country. We have stated, "the crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems." *In re J.L.W.*, 570 N.W.2d at 781.

Catherine also suggests termination is not warranted because she had not seen Juan "for well over a year" before the termination proceedings and she obtained a

divorce from him during the proceedings. The record evidence supports Catherine's contention that she had no contact with Juan from May 1997 until November 1997, when she went to Mexico to pick up Adrianna. However, the record also indicates that, as of the time of the termination proceedings, Catherine had not resolved her male dependency, a key factor in removal of the children in the first instance. Additionally, Catherine left her youngest child with the very person who had abused Marcel. Therefore, we are not persuaded that Juan's apparent absence from the scene for a period of time invalidates the juvenile court's action under Iowa Code sections 232.116(1)(e) and (g).

Finally, Catherine suggests she was singled out for termination on the basis of her poverty. She explains she had a job at the time of the proceedings and could not help the fact that her employer paid low wages. Consideration of economic factors alone is error. *In re Z.T.D.*, 478 N.W.2d 426, 428 (Iowa App. 1991). The juvenile court, however, did not base its termination decision on Catherine's poverty, but on her refusal to place her children's interests ahead of her own. Therefore, we reject Catherine's contention.

We affirm the termination of Catherine's parental rights under subsections 232.116(1)(e) and (g), noting in addition to the previously cited reasons that we did not have the benefit of assessing witness credibility over a period of three years, as the juvenile court did. We also affirm the juvenile court's order based on qualified expert testimony that the children would likely suffer serious emotional or physical

damage if returned to the mother's custody. *See* 25 U.S.C. § 1912 (f) (setting forth termination standard under the ICWA).

AFFIRMED.