

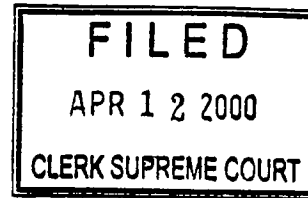
IN THE COURT OF APPEALS OF IOWA

No. 0-069 / 99-1411

Filed April 12, 2000

IN THE INTEREST OF A.M. and G.M.,
Minor Children,

E.M., Mother,
Appellant.



Appeal from the Iowa District Court for Tama County, Robert E. Sosalla,
District Associate Judge.

Mother appeals from the juvenile court's denial of her motion for a
continuance and the termination of her parental rights. **AFFIRMED.**

Christopher A. Clausen of Boliver Law Firm, Marshalltown, for appellant.

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

Stephen Brennecke, Grinnell, guardian ad litem for minor children.

Heard by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

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MAHAN, P.J.

Mother appeals from the juvenile court's denial of her motion for a continuance and the termination of her parental rights. She contends the court erred in (1) refusing her request for a continuance, (2) considering the foster parents have allowed continued contact between her children, extended family members, and the Meskwaki culture, and (3) failing to consider a relative placement. We affirm.

Elynn and Jorge were married in March 1997. They had two children together: Abigail, born in January 1996; and Grace, born in February 1997. In July 1997, Grace was treated by a physician who came to the conclusion she had multiple broken bones. The physician also estimated these broken bones to be four to six weeks old. The Department of Human Services (DHS) became involved at this point based on suspicions of child abuse. The juvenile court ordered the emergency removal of these children from their parents' custody when these injuries could not be explained. This temporary removal was continued by the court based on a stipulated agreement by the parties on August 6, 1997. The girls were placed in the temporary custody of their maternal grandparents, Eldon and Carolyn.

After a hearing in November 1997, the children were adjudicated to be in need of assistance. DHS maintained custody of the children for continued foster care with the permanency goal being family reunification. Although DHS devised a schedule for supervised visits between the parents and the children, the mother's visits were either quite sporadic or nonexistent. Elynn did not visit the

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children at all from approximately November 1997 to July 1998. After the July visit, she did not see the children again until November 1998.

Elynn has a substance abuse problem with alcohol, marijuana, cocaine, and crank. She reported in her substance abuse evaluation that:

she has been drinking 6 to 12 beers a week, smoking a 1/4 ounce of marijuana a week, using 2 1/2 grams of cocaine a month and using 2 to 3 grams of crank every other day. She reports that she has not used any marijuana, cocaine or crank in the last 30 days.

Part of the case permanency plan was for Elynn to receive substance abuse evaluations and to follow up on the recommendations. Elynn did obtain substance abuse evaluations but did not follow through with the recommendations.

Elynn's relationship with Jorge has had periodic episodes of domestic violence. It was unclear what the future of their relationship will be. There has also been no consistent housing or employment for either party. The safety of the home environment is also of concern. On one occasion Elynn's current boyfriend shot and killed another person in the apartment in which they were living.

In January 1999, the State filed petitions for termination of parental rights. A termination hearing was held on May 24, 1999. Elynn failed to appear at this hearing. Her attorney moved for a continuation of the termination hearing until a time when Elynn could attend. This request was denied. Elynn and Jorge's parental rights were terminated on August 20, 1999. Elynn appeals.

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I. Standard of Review. Termination proceedings are reviewed de novo. Iowa R. App. P. 4; *In re M.M.S.*, 502 N.W.2d 4, 5 (Iowa 1993). Although we are not bound by them, we give weight to the trial court's findings of fact, especially when considering credibility of witnesses. Iowa R. App. P. 14(f)(7); *M.M.S.*, 502 N.W.2d at 5. The primary interest in termination proceedings is the best interests of the child. Iowa R. App. P. 14(f)(15); *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). The State has the burden to prove the allegations of the petition by clear and convincing evidence. Iowa Code § 232.96 (1999).

We review a motion for continuance under an abuse of discretion standard and will only reverse if injustice will result to the party requesting the continuance. *In re C.W.*, 554 N.W.2d 279, 281 (Iowa App. 1996). We will not reverse a denial of a motion for continuance unless it is determined to be unreasonable under the circumstances. *Id.*

II. Termination. The actual grounds for the termination of Elynn's parental rights under Iowa Code sections 232.116 (c), (d), and (h) for Abigail and under sections 232.116 (c), (d), (g), and (h) for Grace are not being contested or appealed. Elynn concedes the grounds for termination have been met. Elynn contends the juvenile court erred in its consideration the foster parents allowed continued contact between extended family members and Abigail and Grace as well as the Meskwaki culture. Elynn also contends the juvenile court erred in failing to consider relative placement for the children before terminating her parental rights.

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We agree with the juvenile court the Indian Child Welfare Act (ICWA) does not apply to Abigail and Grace. This Act “seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.” *In re J.D.B.*, 584 N.W.2d 577, 580 (Iowa App. 1998) (citing H.R.Rep. No. 95-1386, 95th Cong., 2d Sess. 23 (1978), reprinted in 1978 U.S.C.C.A.N 7530, 7531). There is concern too many Indian children were being removed from their homes and deprived of their cultural heritage. *Id.* However, the provisions of the ICWA are not applicable until the court determines the children are “Indian” as defined by the ICWA. *Id.* at 582. Neither Abigail or Grace are members of the Sac and Fox Tribe of Iowa nor are they eligible for membership. Elynn was once a member of the tribe but she is not currently a member. Therefore, we agree with the juvenile court’s assessment Abigail and Grace do not qualify for the protection of the ICWA. We find no error in the court’s treatment of the continued contact issue.

Elynn contends because Carolyn, the maternal grandmother, indicated she was willing to take custody and control of the children, the court erred in failing to consider this as placement for the children. In making this argument, Elynn refers to Iowa Code section 232.116 (3)(a). The relevant portion of this section states:

The court need not terminate the relationship between the parent and child if the court finds any of the following:

....
(a) A relative has legal custody of the child.

Iowa Code § 232.116(3)(a) (1999). A termination, otherwise warranted, may be avoided under this section. *In re D.E.D.*, 476 N.W.2d 737, 738 (Iowa App. 1991).

The factors under section 232.116(3) have been interpreted by the courts as being permissive, not mandatory. *In re A.J.*, 553 N.W.2d 909, 916 (Iowa App. 1996). The words "need not terminate" are clearly permissive. The court has sound discretion, based on the unique circumstances of each case and the best interest of the child, whether to apply the factors in this section to save the parent-child relationship. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa App. 1993).

Abigail and Grace were not in the legal custody of Carolyn or any other relative. The girls have been in foster care since the fall of 1997. Carolyn and her husband, Eldon, were given temporary custody of the girls in August 1997, where they stayed for about three weeks. There were some family problems unrelated to this case at that time and at the request of Carolyn and Eldon, the girls were removed from their care and placed in foster care. At trial, there was some evidence presented which alluded to the possibility of relative placement as an option for the girls. However, the juvenile court found this evidence to be speculative at best and the court was not given any definite information that would allow it to make an informed decision about the suitability of such relative placement. It is recognized there are cases in which children in the care of relatives should not have their parental rights terminated even when grounds for termination exist. *D.E.D.*, 476 N.W.2d at 738. This is not one of those cases.

The actual grounds in which the juvenile court terminated Elynn's parental rights are not in dispute. Though not necessary here, we agree the State has also established by clear and convincing evidence all the grounds for such termination.

III. Motion to Continue. A motion to continue was requested by Elynn's attorney when she failed to appear at the termination hearing. Her attorney had no assurances for the court that Elynn was absent due to some emergency or unforeseen circumstances. The court was also informed by her attorney Elynn did know of the hearing date. The court may look at the performance of the parent in the past in order to determine whether a continuance of a termination proceeding should be granted. *In re K.A.*, 516 N.W.2d 35, 37 (Iowa App. 1994). The court in the *K.A.* denied the mother's motion for a continuance in order for her to be present at the termination hearing. The court found her veracity questionable and concluded a continuance would not be in the best interest of the children. *Id.* at 36. Also the goals of the case plan were set two years prior and the court felt these children could not spare more time waiting for their mother to achieve these goals. *Id.* at 37.

K.A. very much resembles the present case. Abigail and Grace were adjudicated to be children in need of assistance in November 1997. Elynn's track record shows her lack of involvement in this case. In addition to her lack of cooperation and her lack of visitation with the children, Elynn did not appear at the adjudication hearing in November 1997, or the review hearing in June 1998. We agree with the State the juvenile court did not abuse its discretion in denying Elynn's motion for a continuance.

For the reasons above, we conclude the juvenile court was correct in terminating parental rights.

AFFIRMED.

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