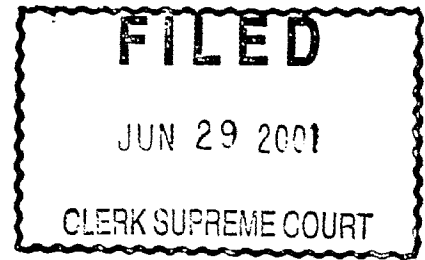


IN THE COURT OF APPEALS OF IOWA

No. 1-322 / 00-2059
Filed June 29, 2001



IN THE INTEREST OF

C.L., C.L., and C.L.,
Minor Children,

T. S., Mother,
Appellant.

Appeal from the Iowa District Court for Linn County, Michael J. Newmeister, District Associate Judge.

Mother appeals from the district court order terminating her parental rights to her three children. **AFFIRMED.**

Charles H. Nadler of Nadler & Weston, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Gordon E. Allen and M. Elise Pippin, Assistant Attorneys General, and Lance Heeren, Assistant County Attorney, for appellee State.

Judy L. Goldberg of Nidey Peterson Goldberg, P.L.C., Cedar Rapids, guardian ad litem for minor children.

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

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MAHAN, P.J.

Mother appeals from the district court order terminating her parental rights to her three children. Mother contends the court erred by: (1) denying her motion to dismiss the termination proceedings on grounds her children were subject to the Indian Child Welfare Act and a required notice under the Act had not been given; and (2) ordering termination when there was clear and convincing evidence it would be detrimental to the children due to the closeness of their relationship to her. See Iowa Code § 232.116(3)(c)(1999). We affirm.

Background Facts and Proceedings. Tammy and Michael are the biological parents of Chrishena (born 1990), Cayla (born 1991), and Cierra (born 1994). Tammy and Michael were married in 1987 and divorced in 1998. Tammy married Darren in 1999.

The family first came to the attention of the Iowa Department of Human Services (DHS) in 1992. An allegation of denial of critical care specified Tammy reportedly drove drunk with the two oldest children in the vehicle, often was seen with an open can of beer when picking up the children from daycare, did not have a car seat for one of the children, and often brought the children to daycare unclean and with bottles of sour milk. On July 3, 1992, police were called to Tammy's home because she had passed out from alcohol use, leaving unsupervised her two children, ages twenty-two months and eleven months. Police placed the children in a neighbor's care for the evening. The DHS worker investigating the incident found Tammy extremely defensive. She took the children and moved to Omaha, Nebraska for approximately one week. Upon her

return to Iowa, she met with the DHS worker. She admitted using alcohol and drugs on the day police found her passed out, and reported incidents of domestic violence in her marriage to Michael. The DHS worker reported a confirmed denial of critical care, and recommended an assessment be completed for a Child in Need of Assistance (CINA) petition. The family, however, moved out of state before further services could be provided.

Between 1992 and 1998, the family lived in Georgia, Florida, California and Missouri. While in California, the Sonoma County Department of Human Services provided services to the family. The Sonoma County DHS reported numerous incidents of domestic abuse between Tammy and Michael, and several alleged incidents of child abuse by Tammy. Tammy began drinking heavily. In April 1995, she was arrested on drug-related and child endangerment charges. The children spent several days in foster care due to Tammy's incarceration. Tammy began a substance abuse counseling program, but moved to Missouri before she could complete it. The Harrison County, Missouri Department of Human Services had contact with Tammy and her children in 1996. The children lived with an aunt in Missouri for a period of time. Tammy returned to Iowa after her arrest on an outstanding Johnson County, Iowa warrant for an operating while intoxicated—second offense charge.

In June 1998, the family once again came to the attention of the Iowa DHS. Tammy was convicted of operating while intoxicated—third offense, and sentenced to an indeterminate five-year term. The court suspended the term of incarceration, placed Tammy on probation for two years, and ordered her to

serve the minimum thirty-day sentence in the county jail. Tammy requested the children be placed in foster care while she served the jail sentence. Following her release from jail, Tammy, Darren, and the children moved to Illinois without permission from her probation officer. The family returned to Iowa in November 1998. Tammy dropped the children off with Michael, where they stayed until February or March 1999. During that time, she and Darren lived in a motel, drank heavily, and used drugs.

In April 1999, Tammy again requested services from DHS after the court revoked her probation and ordered her into the Hinzman Center correctional facility. Darren agreed to care for the children to avoid a foster care placement. DHS implemented family preservation and protective daycare services. DHS became concerned about Darren's ability to care for the children after he reported drinking while the children were in his care. DHS requested emergency removal of the children due to Darren's inability to care for the children and he and Tammy's history of domestic violence and substance abuse.¹ DHS did not recommend placement with Michael due to his past history of domestic violence and substance abuse. The court ordered a temporary removal of the children on May 20, 1999, and placed the children in family foster care, where they have remained throughout the pendency of this case.

On May 25, 1999, the State filed a child in need of assistance petition. Tammy agreed to the continued removal of the children, their placement in family

¹ The application for emergency removal indicated Darren had one charge of domestic abuse in Illinois and one in Iowa. He was ordered to attend the Batterer's Education Program, but had not.

foster care, and adjudication of the children as in need of assistance pursuant to Iowa Code section 232.2(6)(n).²

From April 1999 through the termination hearing in September 2000, Tammy remained incarcerated at Hinzman Center, Linn County jail, or the Mitchellville correctional facility for probation violations and a series of misdemeanor offenses.³ During this period, she refused to participate in substance abuse treatment programs and violated numerous rules at the facilities. In June 1999, after violating the terms of her probation, Tammy was ordered to complete the violator's program at Mitchellville, where she was incarcerated from July 1999 to September 1999. She returned to Mitchellville in March 2000, after the second revocation of her probation. At the time of the termination hearing in September 2000, Tammy testified her earliest possible release from Mitchellville would be in January or February 2001. She was denied parole once. Her formal discharge date is in 2002, but she first must complete substance abuse treatment. She was approximately halfway through a substance abuse program at Mitchellville when she was terminated for major rule violations.

Tammy had no face-to-face contact with the children from December 1999 through August 2000. During that period, Tammy maintained written and phone contact with the children. Phone contact was discontinued for a time due to

² The court adjudicated the children in need of assistance pursuant to sections 232.2(6)(c)(2), 232.2(6)(k), and 232.2(6)(n) "as to the interests of all other parties," and as to the interests of Michael "by reason of his default in appearance."

³ Domestic abuse assault (April 1999), interference with official acts (May 1999), public intoxication (May 1999).

continual conflicts and inappropriate comments by Tammy to the children, resulting in behavioral difficulties with the children. Tammy's stepfather began bringing the children to the prison for supervised visits in August 2000. The children's behavior at school and at home improved while in family foster care.

On June 29, 2000, the State filed a petition for termination of parental rights as to Tammy and Michael pursuant to Iowa Code sections 232.116(1)(e) and 232.116(1)(k). On September 27, 2000, the day of the termination hearing, Tammy filed a motion to continue, alleging the Indian Child Welfare Act (ICWA) may be applicable to the proceedings. At the hearing, Tammy's counsel asked the termination proceedings be dismissed in order to comply with the notice requirements of the ICWA. The juvenile court denied the motion based on the indefinite information provided to the court and the speculative applicability of the ICWA. The court concluded the permanency interests of the children outweighed any need for further delay. On November 17, 2000, the court filed an order terminating Tammy's parental rights pursuant to Iowa Code sections 232.116(1)(e) and 232.116(1)(k), and terminating Michael's parental rights pursuant to section 232.116(1)(e).⁴

Tammy filed a notice of appeal on December 15, 2000. The State filed a notice of inapplicability of the ICWA and request for findings on December 27, 2000. It requested the court amend its November 17, 2000 order by making an additional finding the children are not "Indian children" as defined by the ICWA, thereby rendering the ICWA inapplicable to the proceedings. Attached to and

⁴ Michael did not appeal, therefore, the termination of his parental rights is not an issue before us.

incorporated in the State's notice were letters from representatives of the Cherokee Indian tribes advising the children are not considered "Indian children" and the tribes would not be intervening. The juvenile court entered an order on December 29, 2000, finding the children were not "Indian children" and the ICWA was inapplicable to the proceedings and served no impediment to the court's prior orders.

Standard of Review. We review the juvenile court's denial of Tammy's motion to dismiss for errors at law. *In re L.F.*, 590 N.W.2d 284, 285 (Iowa Ct. App. 1998). To the extent Tammy's claim of error rests on statutory interpretation, our review is for correction of errors of law. *In re E.H. III*, 578 N.W.2d 243, 245 (Iowa 1998).⁵

We review termination proceedings de novo. Iowa R. App. P. 4; *In re M.T.*, 613 N.W.2d 690, 691 (Iowa Ct. App. 2000). The grounds for termination must be proven by clear and convincing evidence. *M.T.*, 613 N.W.2d at 691. The primary interest in termination proceedings is the best interest of the child. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000).

Applicability of Indian Child Welfare Act. Congress passed the Indian Child Welfare Act in 1978, in response to a perceived pattern of discrimination against American Indians in child welfare and child custody proceedings. *In re*

⁵ Tammy raised the ICWA issue in a motion to continue filed the day of the termination hearing. At the hearing, her counsel indicated the motion could also be considered a motion to dismiss. The juvenile court addressed the motion as a motion to dismiss. Tammy appeals the court's denial of a motion to dismiss. Therefore, we treat Tammy's motion as a motion to dismiss, but note our resolution of this issue would be the same whether we were considering the court's denial of a motion to dismiss or a motion to continue.

J.R.H., 358 N.W.2d 311, 321 (Iowa 1984). There was concern too many Indian children were removed from Indian homes and deprived of their cultural heritage. *Id.* The Act applies to certain child custody proceedings involving Indian children. *Id.*

The provisions of ICWA do not apply until the court determines the children are "Indian" as defined in ICWA. *In re J.D.B.*, 584 N.W.2d 577, 582 (Iowa Ct. App. 1998). The party asserting applicability of ICWA has the burden to prove the children meet the criteria under ICWA. *Id.* Some evidence must establish the child is Indian. *In re M.N.W.*, 577 N.W.2d 874, 876 (Iowa Ct. App. 1998). It does not suffice the child *may* have a Native American heritage. *Id.*

The ICWA defines an "Indian child" as:

[A]ny 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.

25 U.S.C. § 1903(4). According to 25 U.S.C. section 1903, the child must be a member of an Indian tribe or eligible for membership therein *and* must also be a biological child of a Native American. *In re M.N.W.*, 577 N.W.2d at 876 (emphasis added). Prior to a termination proceeding involving an Indian child, the party seeking termination must notify the parent or Indian custodian and the Indian child's tribe of the pending proceedings and their right to intervene. 25 U.S.C. § 1912(a).

The children in this case do not meet the definition of "Indian child" under the ICWA. At most, Tammy raised an *indication* the children had an Indian connection. As stated previously, some evidence must establish the children are

Indian. Even if the children were eligible for membership in an Indian tribe, Tammy did not prove *she* was a member of an Indian tribe, thereby rendering her children "the biological child[ren] of a member of an Indian tribe," as required by the statute. See 25 U.S.C. § 1903(4)(b). The district court did not err in denying Tammy's motion to continue or dismiss the case, because Tammy failed to prove the children met the criteria under the ICWA.⁶

Termination of Parental Rights. The court terminated Tammy's rights pursuant to Iowa Code sections 232.116(1)(e) and 232.116(1)(k). Tammy does not argue the State failed to prove the elements of these sections by clear and convincing evidence. Therefore, we deem the issue waived. Iowa R. App. P. 14(a)(3); *In re W.R.C.*, 489 N.W.2d 40, 41 (Iowa Ct. App. 1992).

Rather, Tammy argues on appeal the juvenile court should have withheld termination based on clear and convincing evidence termination would be detrimental to the children due to the closeness of the parent-child relationship. See Iowa Code § 232.116(3)(c). She cites her insightful and detailed knowledge of the children as evidence of the closeness of the parent-child relationship.

The children have spent the last eight years in and out of Tammy's care and traveling from state to state. In one year, they changed schools four times.

⁶ The juvenile court's December 28, 2000 ruling came after Tammy filed her appeal in this case. At that point, the juvenile court did not have jurisdiction to make such a ruling. *Shedlock v. Iowa Dist. Ct.*, 534 N.W.2d 656, 658 (Iowa 1995) (As a general rule, the trial court loses jurisdiction over the merits of a controversy once an appeal is perfected). Tammy does not contest the juvenile court's jurisdiction to make the December 28 ruling. The juvenile court's lack of jurisdiction to make specific findings as to the applicability of the ICWA to the termination proceedings does not affect this court's determination the children do not meet the definition of "Indian child" under the ICWA. We make our determination independent of the additional evidence before the juvenile court at the time of its December 28 ruling.

They witnessed years of domestic violence between Tammy and Michael, and Tammy and Darren. They witnessed their mother's substance abuse. Due to her incarceration, the children had no direct, face-to-face contact with Tammy for an approximate eight-month period. While the girls are loyal to their mother and express fear and worry about her future, their contact with Tammy has not yielded positive results. An in-home worker and the children's foster mother noticed a change in the children's behavior after phone contact with their mother. The children fought more, and Chrishena became more "mouthy," argumentative and bossy. Consequently, Tammy's phone contact with the children was suspended for a period of time. A school counselor indicated the less contact the children have with their mother the better they do at school, and recommended against allowing the children to visit Tammy at the prison.

The record demonstrates the children have improved and thrived while in foster care. The school counselor reported the children were doing the best they have ever done socially and educationally. Their behaviors at home and at school have improved. We find no clear and convincing evidence termination would be detrimental to the children due to the closeness of the parent-child relationship. As the district court explained:

[Tammy] on at least two occasions during her testimony asked that this court not judge her future from her past. The court, however, finds that the evidence in this proceeding is so overwhelming that to do otherwise would be an injustice to her children. After eight years of documented alcohol abuse and countless opportunities for [Tammy] to recognize the gravity of her addiction, this Court finds it is hard to believe that she will remain sober for any significant period of time unless incarcerated. She has never placed the interest of these children above her addiction and they certainly do not need to be in limbo while awaiting another

missed opportunity by [Tammy]. Even should she be released from prison in the near future, there is sufficient basis to leave these children in foster care for an extended period of time to monitor [Tammy's] commitment to sobriety. The children have now been in foster care for eighteen months and need not wait any longer.

AFFIRMED.