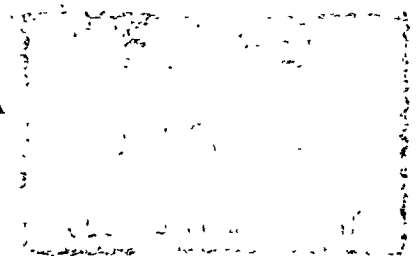


IN THE COURT OF APPEALS OF IOWA

No. 7-795 / 97-0452
Filed January 28, 1998



IN THE INTEREST OF W.S.H., M.O.T., and J.A.T., Minor Children,

**K.H., Mother,
Appellant,**

000205

**L.T., Father,
Appellant.**

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

The mother and father appeal from the termination of their parental rights.

AFFIRMED.

Robert J. Rehan, Sioux City, for appellant mother.

Richard Kallsen, Sioux City, for appellant father.

Thomas J. Miller, Attorney General, Chris Odell, Assistant Attorney General,
and Rhoda Tenuta, Assistant County Attorney, for appellee State.

Joseph Kertels, Sioux City, for minor children.

Considered by Cady, C.J., and Sackett and Streit, JJ.

STREIT, J.

Wendy, Marcellus, and Jeremiah are the minor children of Lester and Kyndra. Kyndra is an enrolled member of the Winnebago Tribe of Nebraska. The children lived with their parents until their emergency removal on February 9, 1995. All three children were adjudicated in need of assistance on March 17, 1997, pursuant to Iowa Code section 232.2(6)(b) and (c), because Kyndra left them alone and unsupervised. This incident led to the fourth founded child abuse report against Kyndra. The court confirmed the children's custody with the Department of Human Services (DHS) for foster care placement. Wendy was placed in the care of an aunt. Marcellus and Jeremiah initially were placed with relatives, but later placed in emergency foster care. None of the children have been returned to either parent's care since their removal in February 1995. The unmarried parents have a history of violence and substance abuse.

In January, 1997, after hearing, the court terminated Kyndra's and Lester's parental rights to Wendy, Marcellus, and Jeremiah pursuant to Iowa Code sections 232.116(1)(b), (c), (d), (e), (h), and (k). During the termination hearing, the parents requested the court place the children in the guardianship of their paternal uncle, Ron, a member of the Winnebago Tribe residing in New Mexico. He had expressed a willingness to be the guardian of the children. A home study had been ordered earlier, but was overdue and not completed at the time of the termination proceeding.

On appeal, both parents argue the juvenile court improperly terminated their parental rights rather than transferring the children's guardianship and custody to their uncle pursuant to Iowa Code section 232.104. They assert the standard of proof for termination under the Indian Child Welfare Act, 25 U.S.C. sections 1901-1963, is beyond a reasonable doubt rather than clear and convincing. They also argue the Indian Child Welfare Act places a strong emphasis on placement with family members. 25 U.S.C. 1915.

We review termination of parental rights de novo. *In re A.Y.H.*, 508 N.W.2d 92, 94 (Iowa App.1993). The primary concern in termination proceedings is the best interests of the children. Iowa R. App. P. 14(f)(15); *In re R.J.*, 495 N.W.2d 114, 115 (Iowa App. 1992). The Indian Child Welfare Act applies to the termination of parental rights with respect to these Indian children. 25 U.S.C. § 1903. Before terminating parental rights, the act requires evidence beyond a reasonable doubt "that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912.

Foster care or preadoptive placement should be within a reasonable proximity to the child's home with preference given to a member of the child's extended family or a foster home approved by the child's tribe. 25 U.S.C. § 1915(b); *see* Iowa Code §§ 232.102(1)(a) and 232.104(2)(d)(1). Iowa Code section 232.117(3) lists the options for placement of children if the court terminates parental rights. The juvenile court has the authority to place the children with DHS, a suitable child-placing

agency, or a relative or suitable person. Iowa Code § 232.117(3). There is no statutory preference in Iowa for a relative. *Id.*; *In re R.J.*, 495 N.W.2d at 117 (Iowa App. 1992). However, there is a statutory preference for adoptive placements in the federal act. 25 U.S.C. § 1915(a).

The record reveals evidence beyond a reasonable doubt termination of parental rights is in the children's best interests. The circumstances which have given rise to past founded child abuse reports still exist. Both parents abuse alcohol and are unwilling to be evaluated or undergo treatment. There is strong evidence of physical abuse within the home. Both parents have been unwilling to work with DHS, comply with its requirements, or obey court orders concerning the children.

The parents argue if the children were placed in the guardianship of their uncle, the court could impose restrictions on the parents' contact with the children. Iowa Code § 232.117. They also assert they would be unlikely to challenge the guardianship later. We find their past unwillingness to work within the constraints of DHS requirements and court orders confirms the court acted properly in terminating their rights rather than choosing a guardianship with restrictions. We affirm the juvenile court's termination of Lester's and Kyndra's parental rights to Wendy, Marcellus, and Jeremiah.

We note the paternal uncle has stated his interest in adopting all three children. A home study has been ordered. If approved, the children being adopted by their uncle would accomplish the desires of the parents to have the children placed with a

family member and the desire of the children and parents to be able to maintain a relationship. Such an adoption would also meet the preferences of the Indian Child Welfare Act. 25 U.S.C. 1915(a).

AFFIRMED.