

IN THE COURT OF APPEALS OF IOWA

No. 9-245 / 08-1952
Filed April 22, 2009

**IN THE INTEREST OF A.L.S. Jr.
Minor Child,**

A.T., Mother,
Appellant.

Appeal from the Iowa District Court for Woodbury County, Brian L. Michaelson, Associate Juvenile Judge.

A mother appeals from the order terminating her parental rights.

AFFIRMED.

Douglas Roehrich, Sioux City, for appellant mother.

Randy Hisey, Sioux City, for father.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant Attorney General, Patrick Jennings, County Attorney, and David Dawson, Assistant County Attorney, for appellee State.

Michelle Drebelbis of the Juvenile Law Center, Sioux City, for minor child.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

MAHAN, P.J.

April appeals the juvenile court's order terminating her parental rights to her nine-year-old son, A.L.S. We affirm.

I. Background Facts and Proceedings.

A.L.S. is the child of April and Alberto.¹ This case came to the attention of the Iowa Department of Human Services (DHS) in April 2007, when A.L.S. was removed from April's care because April's residence was unfit and because April exposed him to a violent environment, could not address his hygiene, and emotionally abused him. April's two other children, A.T. and M.S., ages seven and three, were also removed from her care at that time.² The Indian Child Welfare Act, both State and Federal, was found to apply to all three children because April was an enrolled member of the Oglala Sioux Tribe.

Upon their removal, A.T. and M.S. were initially placed with April's mother in South Dakota, but were later transferred to the custody of the Oglala Sioux Tribe under agreement of the parties. A.T. and M.S. were therefore not adjudicated in Iowa.³ Although the Oglala Sioux Tribe intervened in the underlying child in need of assistance (CINA) proceeding with regard to A.L.S., it later withdrew any effort to take jurisdiction of A.L.S.⁴ Upon A.L.S.'s removal, he

¹ The parental rights of Alberto were also terminated, but he does not appeal.

² A.T. and M.S. are A.L.S.'s half-siblings. The children have different fathers.

³ Although the children were not returned to April's care, April at some point resumed care of A.T. and M.S. In February 2008 A.T. and M.S. were present when the police were called regarding a domestic dispute involving April and her current paramour. A.T. was injured in the incident. A child protective assessment was founded, but April fled to South Dakota with A.T. and M.S. before DHS investigated the incident.

⁴ The Oglala Sioux Tribe has not assisted in considerations of traditional support resolutions, family member consultations, and tribally appropriate preservation alternatives to A.L.S.'s separation from April as a result of April's disinterest in resuming care of A.L.S.

was placed in family foster care. Thereafter, on July 26, 2007, A.L.S. was adjudicated CINA and was placed in Alberto's care. From July 2007 until the termination petition was filed, April did not contact A.L.S., made no effort to resume care of A.L.S., provided no financial support for A.L.S., and did not otherwise assume the parental duties or responsibilities for A.L.S.

A.L.S. remained in Alberto's care until December 2007, when he was removed as a result of Alberto's arrest for domestic assault upon his live-in girlfriend after an all-night alcohol party. A.L.S. spent approximately one month in shelter and was returned to Alberto's care. A.L.S. remained in Alberto's care until July 2008, when he was again removed due to Alberto's arrest for driving while intoxicated with A.L.S. in the car and Alberto's assault with a knife of the same live-in girlfriend. A.L.S. has not been returned to Alberto's care since that time.⁵ At the time of termination, A.L.S. was placed in family foster care.

As concerns A.L.S., the mother and child first came to the attention of DHS in January 2001, when April abandoned A.L.S. with friends of Alberto's and stated that she no longer wished to care for him. A.L.S. was placed in shelter care and then family foster care, but he was eventually re-placed in April's care in May 2001. In August 2001 A.L.S. was again removed from April's care for two days when it was suspected that he had been sexually abused.⁶ At that time, April was pregnant with A.T., and M.S. was not yet born. A.L.S. has been the subject of several more child protective assessments while in April's custody prior to the instant case.

⁵ Alberto was awaiting criminal prosecution for OWI fifth offense and habitual offender at the time of termination.

⁶ The report was subsequently unfounded.

On September 8, 2008, the State filed a termination petition. At that time, April established contact with DHS. She refused to give her current address, but informed the DHS case manager that her other children were currently on the reservation with a relative under a guardianship. April called on numerous occasions, providing different numbers and leaving messages asking for visitation. DHS efforts to contact April at the numbers she gave were unsuccessful.

On November 18, 2008, at the hearing on the petition to terminate parental rights, April's attorney informed the court that he had received a telephone call from April several hours prior and she had indicated she was in Sioux Falls, South Dakota, without transportation. The court denied the attorney's motion to continue, and the hearing proceeded in April's absence. In an order filed November 20, 2008, the court terminated April's parental rights pursuant to Iowa Code sections 232.116(1)(b) (2007). April now appeals.

II. Scope and Standard of Review.

We review termination of parental rights de novo. *In re Z.H.*, 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). Grounds for termination must be proved by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). Our primary concern is the best interests of the child. *Id.*

III. Issues on Appeal.

A. Clear and Convincing Evidence.

April argues the State failed to prove the grounds for termination by clear and convincing evidence. Under section 232.116(1)(b), parental rights may be terminated if the court finds by clear and convincing evidence that the child has

been abandoned or deserted. April contends the evidence does not show that she had given up on parenting A.L.S. or that she had any intention of doing so. She claims there was merely a problem in making contact because of missed telephone calls.

Upon our review, we find clear and convincing evidence supports termination of April's parental rights. April has been involved with DHS in some capacity since 2001, when she left A.L.S. with friends of Alberto's because she did not want to parent him anymore. Since that incident, A.L.S. has been the subject of several more child protective assessments while in April's custody.

At the time of termination, April had not had any contact with A.L.S. since the CINA proceeding in July 2007. She had not even attempted to make any contact with A.L.S., or otherwise question his whereabouts, until the termination petition was filed in September 2008. She had not provided financial support for A.L.S. or assumed parental duties and responsibilities throughout that time. Even when April discovered her rights might be terminated and she initiated contact with DHS, she still refused to give her address. She left messages for the DHS worker with different numbers, but the DHS worker was unable to reach her at any of the numbers. Furthermore, although the parties agreed that the Oglala Sioux Tribe should take jurisdiction of April's other children, A.T. and M.S., the tribe withdrew any effort to take jurisdiction of A.L.S. due to April's complete disregard for A.L.S.

As the juvenile court stated, "April has shown no concern for this child for over the last year until approximately one month ago when she found out about

the pending termination petition.” We agree that clear and convincing evidence supports termination of April’s parental rights.

B. Indian Child Welfare Act.

April argues the evidence did not establish beyond a reasonable doubt that continued custody of A.L.S. by April or an Indian custodian is likely to result in serious emotional or physical damage to A.L.S. In support of her argument, April relies on 25 U.S.C. § 1912(f) (2008), and Iowa Code section 232B.6(6)(a), which provide:

No termination of parental rights may be ordered in the absence of a determination, supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that continued custody of the child by the child’s parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

April contends the record does not support the determination that returning A.L.S. to her custody would likely result in serious emotional and physical damage to A.L.S. The State and guardian ad litem argue that April has failed to preserve error with regard to this issue. Even if we were to assume, *arguendo*, that error has been preserved, we find the evidence proves beyond a reasonable doubt that A.L.S. will likely suffer serious harm if returned to April’s care.

A.L.S. has been subject to many years of emotional and physical danger. He has been the subject of five child protective assessments while in April’s custody and has changed placements numerous times. April has an extensive police record due to alcohol abuse and domestic disputes. Her behavior has continually put A.L.S. and his half-siblings in dangerous situations. She has

abandoned A.L.S. on more than one occasion and, most recently, for more than a year after the CINA proceedings.

The Oglala Sioux Tribe intervened in the underlying CINA proceeding in order to monitor and facilitate active efforts toward reunification in compliance with State and Federal Indian Child Welfare Acts. The tribe designated a representative to participate in proceedings who appeared telephonically at a hearing to transfer jurisdiction of A.L.S.'s half-siblings, A.T. and M.S. However, the tribe withdrew any effort to take jurisdiction of A.L.S. due to April's abandonment of the child.

At the hearing on the petition for termination of parental rights, April's attorney stipulated to the State's synopsis of what testimony the DHS case manager would give if called to testify:

If [the DHS case manager in this case was] called to testify, she would testify that she has been the case manager since roughly May of 2007; that she is a member of the Native American and Indian team of the Department of Human Services; that she has an extensive history of managing cases involving Native American Indian persons; that she has been qualified in previous hearings as an expert in both the Federal and State Indian Child Welfare Acts; that she has a history of working with the Oglala Sioux Tribe and has substantial knowledge of the tribe's customs; that active efforts have been made to reunify the family, but they have not been successful; that serious emotional or physical damage to the child would be caused by being placed in the custody of either parent; . . . and that it is in the best interest of the child that the rights of the parents be terminated in order that he can enjoy some stability for the rest of his minority that he has not been able to enjoy thus far.

April's attorney further waived the right to cross-examine the DHS case manager.

Upon our review of the record, we find the evidence in this case proves beyond a reasonable doubt that A.L.S. is likely to suffer serious emotional or physical damage if returned to the custody of April.

C. Best Interests.

April also argues termination of her parental rights is not in the best interests of A.L.S. We disagree. A.L.S. was removed from April's care in April 2007 because April's residence was filthy and unfit and because April was exposing the children to a violent environment. Furthermore, April was emotionally abusive to the children, calling them "motherfucker, asshole, jackass, [and] bastards." The children further reported that April drank a lot, smoked "blunts," and did not regularly feed them. A.L.S.'s school reported the children had behavioral and hygiene issues.

We are convinced that A.L.S.'s interests are best served by terminating April's parental rights and making A.L.S. eligible for placement in a safe and stable home. Since A.L.S. was removed from April's care, he has changed placements six times. April did not show any concern about A.L.S.'s well-being for over a year prior to the termination petition and has not seen him for longer than that. Since A.L.S. has been removed, April continues to put her other children in dangerous situations. A.L.S. deserves the opportunity to establish permanency in a healthy and safe environment. We find termination of April's parental rights is in A.L.S.'s best interests.

AFFIRMED.