

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Korri F.,)
A child under 18 years of age.)
)
Appellee,)
)
v.)
)
Corey C.,)
)
Appellant.)

No. A-13-0507

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

JAN 22 2014

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

IRWIN, MOORE, and BISHOP, Judges.

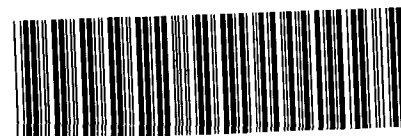
BISHOP, Judge.

Corey C. appeals from the decision of the separate juvenile court for Douglas County terminating his parental rights to his daughter, Korri F., under the Nebraska Indian Child Welfare Act. We affirm.

BACKGROUND

Corey and Katherine F. are the biological parents of Korri, born in September 2005. Because Katherine passed away in September 2009, she will only be discussed as necessary.

Korri was first removed from Corey's home on November 15, 2005, when she was 58 days old. Korri had been diagnosed with injuries consistent with non-accidental child abuse and/or battered child syndrome. In November 2005, Korri was living with Corey, as Katherine was in a work release program in Iowa. Corey left Korri with an inappropriate caregiver, at which time she



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sustained injuries. The caregiver had numerous arrests for prostitution, drug possession, and paraphernalia, and told law enforcement they had been selling drugs from the residence.

The State filed an Indian Child Welfare Act (ICWA) Notice with the juvenile court on November 22, 2005 (one day after the amended juvenile petition was filed), and such notice was also sent to the Omaha Tribe of Nebraska. The Notice was for the purpose of determining whether Korri was a member or eligible for membership in the Omaha Tribe, thus invoking the ICWA.

In January 2006, Korri was adjudicated to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013), due to the faults or habits of Katherine. Korri was adjudicated due to the faults or habits of Corey in May 2006.

Disposition and review hearings were held in 2006, the proceedings of which do not appear in our record. Corey was ordered to maintain a legal source of income, maintain adequate and secure housing, attend individual therapy, and participate in supervised visitation.

Corey was incarcerated on February 1, 2007, for possession with intent to deliver crack cocaine. He did not have visits with Korri while incarcerated. Upon his release in December, he resumed supervised visits.

In June 2007 the State filed a motion to terminate Corey's parental rights. In October, the State filed an amended motion

to terminate parental rights, adding allegations pertaining to ICWA (in a letter dated October 9, the Omaha Tribe confirmed Korri's membership in the tribe; and in an order filed on October 23, the juvenile court noted that Korri is an enrolled member of the Omaha Tribe). The State moved to dismiss the amended motion to terminate parental rights on March 25, 2008, without prejudice.

Numerous review hearings were held in 2007 and 2008. Corey and Katherine made significant progress, and Korri was placed back in their home on December 23, 2008. While Korri was placed in the parental home, there were concerns regarding Corey's sobriety; he had several positive UAs and several no-shows for UAs, and his attendance at intensive outpatient treatment was sporadic. Korri was removed from the parental home again on September 30, 2009, after Katherine passed away. At the time of the September removal, Corey's living arrangement was unknown (apparently he had separated from Katherine), and he had not been compliant with court-ordered UAs and chemical dependency treatment. Korri has remained in an out-of-home placement ever since.

In November 2009, Corey was arrested for distribution of crack cocaine. In a federal indictment filed on December 16, Corey was charged with (1) possession with intent to distribute 50 grams or more of crack cocaine, and (2) possession with

intent to distribute less than 5 grams of crack cocaine. He pled guilty to Count II, and on July 12, 2010, was sentenced to 151 months' incarceration and 3 years' supervised release.

On December 15, 2011, the State filed a third motion to terminate Corey's parental rights to Korri pursuant to Neb. Rev. Stat. § 43-292(2), (6) and (7) (Cum. Supp. 2012). The State specifically alleged that active efforts, pursuant to Neb. Rev. Stat. § 43-1505(4) (Reissue 2008) of ICWA, had been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the family, but that said efforts had proved unsuccessful. The State also alleged that continuing the custody of Korri by Corey would likely result in serious emotional or physical damage to the child (§ 43-1505(6) of ICWA), and that it was in Korri's best interest that Corey's parental rights be terminated.

The termination hearing was held on March 28, 2013. Testimony and exhibits will be discussed as necessary in our analysis.

In its order filed on May 14, 2013, the juvenile court terminated Corey's parental rights to Korri pursuant to § 43-292(2), (6), and (7). The juvenile court found that active efforts, pursuant to § 43-1505(4) of ICWA, had been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the family, but that said efforts had

proved unsuccessful. The juvenile court also found that continuing the custody of Korri by Corey would likely result in serious emotional or physical damage to the child, and that it was in Korri's best interests that Corey's parental rights be terminated. Corey has timely appealed the juvenile court's termination of his parental rights.

ASSIGNMENTS OF ERROR

Summarized, Corey assigns that the juvenile court erred in: (1) finding that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family, but that said efforts proved unsuccessful; (2) finding that continuing the custody of Korri with Corey would likely result in serious emotional or physical damage to said child; (3) finding that terminating his parental rights was in Korri's best interests; and (4) terminating his parental rights.

STANDARD OF REVIEW

Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted on version of the facts over

the other. *In re Interest of Rylee S.*, 285 Neb. 774, 829 N.W.2d 445 (2013).

ANALYSIS

In Nebraska statutes, the bases for termination of parental rights are codified in § 43-292. Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010). The ICWA, however, adds two additional elements the State must prove before terminating parental rights in cases involving Indian children. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). First, § 43-1505(4) provides an "active efforts" element:

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Second, § 43-1505(6) provides a "serious emotional or physical damage" element:

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of

qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Grounds for Termination.

In its order terminating Corey's parental rights to Korri, the juvenile court found that Corey substantially and continuously neglected to give the child necessary parental care and protection (§ 43-292(2)); reasonable efforts failed to correct the condition which led to the adjudication (§ 43-292(6)); and the child had been in out-of-home placement for 15 or more months of the most recent 22 months (§ 43-292(7)).

Corey does not contest the juvenile court's finding that grounds for terminating his parental rights exist. And having reviewed the record, we find that grounds did exist. Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." Korri was removed from parental care the second time on September 30, 2009. At the time the operative motion to terminate parental rights was filed on December 15, 2011, Korri had been in an out-of-home placement for 26 months. And at the time of the termination hearing in March 2013, Korri had been in an out-of-home placement for 2 days shy of 30 months. Our de novo review

of the record clearly and convincingly shows that grounds for termination of Corey's parental rights under § 43-292(7) were proven by sufficient evidence.

Because we have already found that grounds existed to terminate Corey's parental rights under § 43-292(7), we would not ordinarily address the juvenile court's finding of grounds for termination under § 43-292(6) (parental rights may be terminated when "reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have failed to correct the conditions leading to the determination"). However, because this is an ICWA case, we do address whether the requisite active efforts were made.

§ 43-1505(4)--Active Efforts.

Corey argues that the juvenile court erred in finding that active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. Section 43-1505 requires in part:

(4) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

The "active efforts" element under Nebraska's ICWA termination of parental rights provision requires proof by clear and convincing evidence in parental rights termination cases. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). The ICWA requirement of "active efforts" requires more than the "reasonable efforts" standard applicable in non-ICWA cases and that "at least some efforts should be 'culturally relevant.'" *In re Interest of Walter W.*, 274 Neb. at 865, 744 N.W.2d at 61. In *In re Interest of Walter W.*, the Nebraska Supreme Court found that a "cultural plan" discussed with the foster mother--without further elaboration about such--constituted a sufficient active effort. 274 Neb. at 867, 744 N.W.2d at 62.

Sherri Eveleth is an ICWA specialist with DHHS. Corey stipulated to Eveleth's qualifications as an ICWA expert. Eveleth testified as to the differences between reasonable efforts and active efforts. According to Eveleth, reasonable efforts are geared toward reunification, whereas active efforts are geared toward keeping the family together, not only the parents with the child, but the child with extended family and with the child's tribal cultures as well. Eveleth testified that active efforts have been made in this case. Eveleth testified that a written cultural plan was put into place for Korri and there had been communication with the foster parent regarding the importance of the cultural connection. Additionally, the

case worker made contact with the Nebraska Urban Indian Health Center (for cultural lessons) and signed Korri up for the Ponca youth group. Although referrals have been made, Korri had not begun involvement with the Urban Indian Health Center or the Ponca youth group.

The record reveals that DHHS looked into Native American foster homes for Korri, but none were available. DHHS also looked into family placements, but none were suitable.

Korri has four older siblings and one younger sibling. DHHS made efforts to provide her with sibling visits. Korri is not able to have visits with her oldest sibling, who is incarcerated. Korri has also not had visits with her youngest sibling because he is located in Iowa and DHHS has had trouble contacting his guardian. Korri had sibling visits with her other three siblings for several months in 2012, but visits were discontinued after two of those siblings ran away and the other sibling had scheduling conflicts with his extracurricular activities.

Prior to his incarceration, Corey was offered parenting classes, visitation, UAs, a chemical dependency evaluation, a psychological evaluation, residential therapy, individual therapy, and bus tickets. Corey frequently tested positive or no-showed for UAs. His attendance at intensive outpatient

treatment was sporadic. And Corey did not attend all visits with Korri.

Corey pled guilty to possession with intent to distribute less than 5 grams of crack cocaine. On July 12, 2010, he was sentenced to 151 months' incarceration and 3 years' supervised release. At the time of the termination hearing he was incarcerated at Leavenworth Penitentiary. Corey is not scheduled to be released until 2020.

James Ross, the family permanency specialist assigned to this case, testified that he has tried to contact Corey in Leavenworth, via phone calls and letters, but has been unsuccessful. Ross did speak to Corey's counselor at Leavenworth, and the counselor informed Ross that Corey did not want to have contact with Ross. The "active efforts" standard requires a case-by-case analysis. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Given that Corey is in prison for 151 months and does not want to have contact with case workers, we are not sure that there was much else that DHHS could have done for Corey.

Eveleth testified that active efforts have been made in this case. We agree and find that the evidence was sufficient to prove by the requisite standard, clear and convincing evidence, that active efforts were undertaken to prevent the breakup of the family and that further efforts would be futile and are not

required under ICWA. See *In re Interest of Louis S. et al.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009).

Continued Custody with Corey.

Corey argues that the juvenile court erred in finding that continuing the custody of Korri with Corey would likely result in serious emotional or physical damage to said child. Section 43-1505 requires in part:

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

Corey stipulated to Eveleth's qualifications as an ICWA expert. Eveleth testified that continued custody of Korri by Corey is likely to result in serious emotional or physical damage to the child. Eveleth stated that there had been very little contact between Korri and Corey throughout Korri's life. Corey has a lengthy history of criminal drug charges. He has had a number of opportunities to access services, but has had little participation in services.

Korri's foster mother testified that Korri has had no visits with Corey since December 2009. Since that time Corey has sent approximately 15 letters to Korri and called her about 15

times. Korri's conversations with Corey are basically, "Hi dad. I love you. Bye dad."

Korri was originally removed from Corey's home in November 2005, when she was 58 days old. He was incarcerated from February to December 2007, for possession with intent to deliver crack cocaine; she had no visits with Corey during his incarceration. Korri was placed back in the parental home in late December 2008, but was removed again in September 2009, due to the death of her mother and the instability of her father. Corey was arrested again in November 2009 for possession with intent to distribute less than 5 grams crack cocaine, and he is currently serving a term of 151 months in a federal prison. He is not scheduled to be released until 2020. Korri has had no visits with Corey since December 2009. She has spent the majority of her life in foster care. Ross testified that Korri needs permanency.

Based on the totality of the evidence presented at the termination hearing, it is clear beyond a reasonable doubt that continued custody of Korri by Corey is likely to result in serious emotional or physical harm to Korri. Furthermore, Corey is currently incarcerated and it would be quite some time before Korri would even be able to be returned to his custody.

Best Interests.

Under § 43-292, once the State shows that statutory grounds for termination of parental rights exist, the State must then show that termination is in the best interests of the child. *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). But that is not all. A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit. *Id.*

The evidence is clear that it is in Korri's best interests that Corey's parental rights be terminated. Otto Burton, the child and family permanency specialist on this case from April 2006 to December 2009, testified at a 2010 proceeding that termination of Corey's parental rights was in Korri's best interests. (Burton's testimony from the 2010 proceedings was received as an exhibit in the current termination hearing without objection.) Ross, the family and permanency specialist at the time of the hearing, testified that Korri needed permanency. And Eveleth testified that she has had contact with the Omaha Tribe and the tribe supports the termination of Corey's parental rights.

Corey is incarcerated, and will be incarcerated for quite some time, on drug-related convictions, and he has had little contact with Korri since his incarceration. Corey is not

scheduled to be released until 2020, and Ross testified that it is "probably not" likely that Corey will ever be able to be reunified with Korri. Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012).

At the time of the termination hearing, Korri had already been in foster care for 30 months; in fact, other than for a 9-month period in 2009, Korri, who is now 8 years old, has been in foster care since she was 58 days old. Corey is not scheduled to be released from prison until 2020, at which time Korri will be 15 years old. "Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity." *In re Interest of Walter W.*, 274 Neb. 859, 872, 744 N.W.2d 55, 65 (2008). Korri needs a safe, permanent home, and unfortunately, Corey cannot provide her with such. Corey is an unfit parent. Therefore, after our de novo review, we find that it is in Korri's best interests that Corey's parental rights be terminated.

CONCLUSION

For the reasons stated above, we affirm the order of the juvenile court terminating Corey's parental rights to Korri.

AFFIRMED.