

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF MELAYA F. & MELYSSE F.

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IN RE INTEREST OF MELAYA F. AND MELYSSE F.,
CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

v.

MINDY F., APPELLANT.

Filed August 20, 2013. No. A-12-831.

Appeal from the Separate Juvenile Court of Lancaster County: ROGER J. HEIDEMAN,
Judge. Affirmed.

Nancy R. Wynner and Maria J. Thietje, of DeMars, Gordon, Olson, Zalewski & Wynner,
for appellant.

Joe Kelly, Lancaster County Attorney, and Shellie D. Sabata for appellee.

MOORE and PIRTLE, Judges, and MULLEN, District Judge, Retired.

PIRTLE, Judge.

INTRODUCTION

Mindy F. appeals from an order of the separate juvenile court of Lancaster County, which terminated her parental rights to her two minor children, Melaya F. and Melysse F., in a case in which the Nebraska Indian Child Welfare Act (ICWA) is applicable. Because we find that a statutory ground to terminate exists, that the additional requirements under ICWA were met, and that termination is in the children's best interests, we affirm.

BACKGROUND

Mindy is the biological mother of Melaya, born in 2006, and Melysse, born in 2010. On December 15, 2010, the State filed a petition alleging the children came within the meaning of

Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) in that they lacked proper parental care by reason of the fault or habits of Mindy and that they were in a situation dangerous to life or limb or injurious to their health or morals. The factual basis for the petition was as follows:

On or about December 12, 2010, law enforcement officers were dispatched to the home of Mindy . . . where it was discovered that the home was in an unsanitary and unsafe condition. [Mindy] was initially found to be unresponsive, and believed to be under the influence of drugs and/or alcohol. One or more of the children were crying, were minimally dressed, were dirty, and appeared to be in distress.

[Mindy] has a history of involvement in situations involving domestic violence, assaultive behaviors, and/or alcohol or drug abuse, and has had one of the above-named children previously removed from her care by order of the Juvenile Court of Lancaster County, Nebraska, in 2006.

The children were removed from their home on December 12, 2010, and the juvenile court subsequently entered an ex parte order for temporary custody. At the time of the children's removal, Melaya was 4 years old and Melysse was almost 1 year old.

In January 2011, Mindy filed a motion to transfer the case to the Yankton Sioux Tribal Court, and the Yankton Sioux Tribe (the Tribe) was subsequently allowed to intervene in the matter. The Tribe also filed a motion to transfer jurisdiction to the Yankton Sioux Tribal Court pursuant to the ICWA, Neb. Rev. Stat. § 43-1501 et seq. (Reissue 2008). The juvenile court denied the motion to transfer jurisdiction to the tribal court, and Mindy appealed. This court affirmed the juvenile court's decision. See *In re Interest of Melaya F. & Melysse F.*, 19 Neb. App. 235, 810 N.W.2d 429 (2011).

On December 21, 2011, Melaya and Melysse were adjudicated and determined to be juveniles within the meaning of § 43-247(3)(a) based on the allegations set forth in the State's petition.

On June 1, 2012, the State filed a motion for termination of parental rights, alleging that statutory grounds to terminate existed under Neb. Rev. Stat. § 43-292(2), (4), (6), and (7) (Cum. Supp. 2012); that active efforts had 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; that continued custody by Mindy is likely to result in serious emotional or physical damage to the children; and that terminating Mindy's parental rights was in the children's best interests.

Trial on the motion for termination was held in August 2012 on 2 separate days. Mindy did not appear for trial on either day.

Kathy Hohbein, who is employed by the Department of Health and Human Services (Department), testified that she was assigned as Mindy's family permanency specialist from December 14, 2010, to May 18, 2011. During that time, she was responsible for setting up services that would help achieve reunification. There was no court-ordered plan during the time Hohbein was assigned to the case.

Hohbein testified that Mindy refused to take responsibility for the situation that resulted in her children's removal. Mindy, her mother, and an individual from the Indian Center all maintained that the Lincoln Police Department planted evidence, such as empty beer cans, in her

home, and that none of the information in the police reports and the Department's reports was true.

Hohbein testified that Mindy indicated on a regular basis that the case was going to be transferred to the tribal court and that the Tribe would get her children back for her. Based on this belief, Mindy refused to work with Hohbein and refused services that she attempted to set up.

When the case was first assigned to Hohbein, she tried to set up five 2-hour supervised visits per week for Mindy and her children. During the first 6 to 8 weeks, Mindy made 5 out of 28 scheduled visits. Many of the visits were missed because Mindy was required to submit to a urine analysis (UA) test for drugs and alcohol before visits and either she refused to submit to the test or the results of the test would be positive for drugs and/or alcohol. There were also occasions where Mindy would call and confirm visits, and then fail to show up. During the time Hohbein was assigned to the case, there were several weeks at a time on more than one occasion that Mindy did not have visitation.

Hohbein attempted on multiple occasions to do a "walk through" of Mindy's home so that visitations could occur in the home rather than at a visitation center, but Mindy always refused. Mindy indicated that transportation to visits was an issue for her, so Hohbein offered to pick her up, which offer Mindy refused. Mindy was also given bus passes. She was offered the services of a family support worker who could assist her with a range of parenting and life skills. Mindy refused this service.

Hohbein testified that team meetings were held on a monthly basis and that Mindy attended most of the meetings, but she was hostile, aggressive, and threatening toward those in attendance and often left in the middle of the meetings.

Hohbein testified that because Mindy was continuing to test positive for different substances, Hohbein offered to set up a substance abuse evaluation and a pretreatment assessment on multiple occasions, but Mindy refused each time. In March 2011, Mindy set up and completed a substance abuse evaluation with the Ponca Tribe. The results recommended residential treatment, and Hohbein offered to arrange that treatment for Mindy but she refused.

In Hohbein's first few meetings with Mindy, Hohbein discussed the need to develop a cultural plan for the children to help maintain their Native American heritage. In addition to asking for Mindy's assistance in developing a plan, Hohbein also met with an individual from the Indian Center and an ICWA specialist. Neither Mindy nor the individual from the Indian Center were cooperative, but Hohbein continued to try to set up a cultural plan.

Mindy did not maintain employment or other legal means of financial support during the time Hohbein was assigned to the case. She asked Hohbein for assistance with paying her rent and utilities at different times.

Hohbein testified that Mindy did not make any progress toward reunification. She testified that Mindy did not maintain regular contact with her and that Mindy's anger, aggression, and threatening behavior never subsided during the time Hohbein was assigned to the case. She testified that from the first time she met Mindy, Mindy stated that she could not work with Hohbein. Mindy stated that she wanted a different caseworker on several occasions, but she only filed a grievance on one occasion.

Dr. Judith Bothern testified that she is Melaya's therapist and has been treating her since August 2011. Melaya had been treating with another therapist for a short time before she started seeing Bothern. Bothern testified that when Melaya started therapy with her, Melaya exhibited sexualized behaviors and was aggressive, noncompliant, and hypervigilant. Bothern diagnosed her with adjustment disorder, with a disturbance of conduct, and posttraumatic stress disorder. Bothern testified that her therapy goals for Melaya were for her to be compliant 70 percent of the time, to be able to transition well between visits, and to eliminate her aggression. Bothern testified that at the time of trial, Melaya had made great progress and was like a different child. She was compliant 80 to 90 percent of the time and had become more independent.

In January 2012, Bothern began doing therapeutic visits with Mindy, Melaya, and Melysse. These visits began as a result of an order of the juvenile court that Mindy's visits be therapeutic, rather than supervised. The first two scheduled sessions did not occur because Mindy failed her UA test on the day of the first scheduled session and did not show up for the second session.

Between mid-January and February 8, 2012, Mindy attended four sessions. Bothern testified that Mindy was not receptive to the goals she suggested for the therapeutic visits and did not want to hear what Bothern had to say. Mindy was noncompliant during the sessions, would complain about the case, and was hard to redirect. At the fourth session, Mindy did a few things that Bothern had coached her to do before and was not as belligerent as she had been in the prior sessions. However, Mindy acted like Bothern's presence was a nuisance, and she ignored Bothern during most of the visit. After the fourth visit, Bothern recommended that therapeutic visits be suspended until Mindy "took care of some of her own issues," including being in treatment and being sober. The last therapeutic visit, which occurred on February 8, is the last visit Mindy has had with the children.

Bothern testified that Mindy did not make any progress during the sessions and that they were damaging for the children due to Mindy's interactions with them and her failure to recognize how her actions affected them.

Bothern testified that it was her opinion within a reasonable degree of psychological certainty that reunifying the children with Mindy would cause serious emotional damage to them. She based her opinion on her observations of Mindy's interactions with the children and the children's reactions to the interactions, as well as on other information she had read about the case. In addition, her opinion was based on the changes she has seen in the children's behavior since they have stopped seeing Mindy. She testified that the tension and anxiety in the children is gone and that they are relaxed, happy children.

Alexandra English, a Department caseworker, testified that she was assigned to this case on December 22, 2011, and was still assigned at the time of trial. At the time she took over the case, the children had just been adjudicated. English testified that throughout her involvement with the case, Mindy has been aggressive and defensive, and not receptive to services that English attempted to arrange.

English has tried to maintain contact with Mindy, but her efforts have been unsuccessful. Mindy apparently did not have her own telephone, so she told English to call her mother's telephone when English needed to contact her. English testified that when she would call and leave a message with Mindy's mother, sometimes Mindy would call her back and other times she

did not. English testified that there have been times when she had no contact with Mindy for several weeks because Mindy would not return her telephone calls. When Mindy would talk to English on the telephone, Mindy regularly called her a “bitch” and often hung up on her.

English went to Mindy’s home on one occasion, and Mindy’s mother would not allow her inside. English testified that based on what she saw, she believed that Mindy was under the influence of alcohol or drugs at the time.

During English’s time on the case, Mindy was to submit to two to three UA tests per week, most of which she has refused. She has complained that transportation is a problem for her to get to the UA testing site, so English has offered her transportation which she has declined.

English testified that Mindy was in a 28-day residential treatment program from January to February 2012, which she did successfully complete. English provided Mindy with transportation to and from the therapeutic visits that occurred with Bothern during that time.

English testified that she offered Mindy the service of a “parent partner” who would meet one-on-one with Mindy and assist her in finding employment, help her with transportation needs, and offer informal support. The parent partner that English referred was Native American. Mindy met with the parent partner on a weekly basis at first, but then the frequency in contact decreased.

English has made sure that the foster family is following a cultural plan. She testified that the plan is discussed on a monthly basis during her visits to the foster home and that the foster family keeps her updated on cultural events that they attend.

English testified that following Mindy’s last therapeutic visit on February 8, 2012, Mindy was told at a team meeting that based on Bothern’s recommendations, visits would resume only after certain goals were met. Mindy had to complete a parenting and psychological evaluation, submit to UA tests and produce negative results, and participate in outpatient treatment. Mindy completed the evaluation, but has not met the other goals.

The last two UA tests Mindy submitted to occurred 2 months before trial, and both tests were positive for several substances.

In regard to outpatient treatment, Mindy chose a location she wanted to do such treatment and English sent a referral for her. Mindy entered the program but was “unsuccessfully discharged” due to her lack of attendance and because she was aggressive and disruptive in group therapy. English testified that Mindy told her that the instructor and the people in the program were racist and biased against her. English subsequently referred her for outpatient treatment at the Indian Center. Mindy went to two sessions and then stopped going because she felt like the people there were harassing her.

English testified that Mindy has made minimal progress during her time she has been assigned to the case. She testified that Mindy continues to be aggressive and noncompliant. English does not believe that Mindy is able to provide permanency for the children, Mindy has refused to participate in the necessary rehabilitative services, and she was still testing positive for illegal substances.

English also testified that the children have been in foster care consistently since their removal on December 12, 2010.

Following trial, the juvenile court entered an order terminating Mindy’s parental rights, finding that statutory grounds to terminate existed under § 43-292(2), (4), (6), and (7); that active

efforts had 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; that continued custody by Mindy is likely to result in serious emotional or physical damage to the children; and that terminating Mindy's parental rights was in the children's best interests.

ASSIGNMENTS OF ERROR

Mindy assigns, restated, that the juvenile court erred in (1) finding that the State proved by clear and convincing evidence that § 43-292(2), (4), and (6) were met; (2) finding that the State proved that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts had been unsuccessful; (3) finding that the State presented evidence beyond a reasonable doubt, including the testimony of a qualified expert witness, that the continued custody of the children by Mindy was likely to result in serious emotional or physical damage to the children; and (4) finding that terminating her parental rights was in the best interests of Melaya and Melysse.

STANDARD OF REVIEW

An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Candice H.*, 284 Neb. 935, 824 N.W.2d 34 (2012).

ANALYSIS

In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). 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.

See, also, *In re Interest of Phoebe S. & Rebekah S.*, 11 Neb. App. 919, 664 N.W.2d 470 (2003) (under ICWA, determination to terminate parental rights must be supported by evidence beyond reasonable doubt).

Statutory Grounds Under § 43-292.

The juvenile court found that the State presented evidence beyond a reasonable doubt that termination of Mindy's parental rights to her children was proper under § 43-292(2), (4), (6), and

(7). As previously noted, the State need only prove that one of the statutory grounds enumerated in § 43-292 exists. See *In re Interest of Kendra M. et al.*, *supra*.

Mindy assigns that the juvenile court erred in finding that § 43-292(2), (4), and (6) were met. She does not challenge the court's finding that § 43-292(7) was met.

Under § 43-292(7), the State must show that the children have been in an out-of-home placement for 15 or more months of the most recent 22 months. The evidence showed that Melaya and Melysse have been in out-of-home placement since mid-December 2010, which was about 17 months of the most recent 22 months at the time the motion to terminate was filed, and 20 months of the most recent 22 months at the time of trial. Accordingly, the State proved beyond a reasonable doubt that § 43-292(7) was met.

Because the State need prove only one ground for termination, we decline to consider Mindy's assigned errors regarding the court's determination that the State proved other grounds enumerated in § 43-292.

Active Efforts--§ 43-1505(4).

Mindy argues that the juvenile court erred in finding the State proved that the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts had been unsuccessful, as required by § 43-1505(4). We disagree.

Throughout the case, the Department has had monthly team meetings in which Mindy was invited to attend. When Mindy did attend meetings, she was hostile, aggressive, and threatening toward those in attendance and often left before the meetings were over. Supervised visits were arranged just after the children were removed from Mindy's home in December 2010. However, Mindy missed many because she either refused to submit to a UA test or the test results were positive. Other visits were missed because Mindy did not show up.

The Department attempted on multiple occasions to do a "walk through" of Mindy's home to determine whether it was safe and sanitary so that visits with the children could take place at her home, but Mindy always refused.

The caseworkers have tried to stay in regular contact with Mindy, but without much success. The Department has offered Mindy various forms of transportation to and from visits and drug testing. Mindy has often refused to accept the transportation offered by the Department. The Department transported Mindy to and from the therapeutic visits that took place.

When Hohbein was assigned the case, she offered Mindy the services of a family support worker, which she refused. English offered her the services of a "parent partner," which Mindy initially took advantage of.

Mindy's caseworkers have tried to set up various evaluations and assessments on multiple occasions, but Mindy has refused. In regard to outpatient substance abuse treatment, English sent referrals for two different programs, one of which Mindy was "unsuccessfully discharged" from and the other of which Mindy attended two sessions and then stopped attending.

Upon first meeting with Mindy, Hohbein discussed the possibility of placing the children with a family member and she gave her background check forms that family members could fill out if they wanted to be considered for placement. No family members filled out the forms and

turned them in. Mindy's mother was ruled out for placement because of her criminal background and because she had already failed a home study by the Department. Since February 2011, the children have been placed in the same foster home with a Native American family. The Department specifically looked for placement with a foster family who was Native American.

Further, when the case was first assigned to Hohbein, she discussed the need to develop a cultural plan for the children to help maintain their Native American heritage. Neither Mindy nor the individual from the Indian Center were cooperative, but Hohbein continued to try to set up a cultural plan. English testified that she has made sure that the foster family is following a cultural plan. She testified that the plan is discussed on a monthly basis during her visits to the foster home and that the foster family keeps her updated on cultural events that they attend.

The State provided sufficient evidence that active efforts were made to provide services and programs designed to prevent the breakup of the Indian family. These efforts were unsuccessful based on Mindy's failure to cooperate with the caseworkers and her unwillingness to take advantage of the services offered by the Department to help her reunify with her children. This assignment of error is without merit.

Serious Emotional or Physical Damage--§ 43-1505(6).

Mindy next assigns that the juvenile court erred in finding that the State presented evidence beyond a reasonable doubt, including the testimony of a qualified expert witness, that the continued custody of the children by Mindy was likely to result in serious emotional or physical damage to the children, as required by § 43-1505(6).

Bothern was the expert witness who testified in regard to whether returning the children to Mindy would likely result in emotional or physical damage to the children. Bothern is a licensed psychologist, and her practice is exclusively with children, adolescents, and their families. She testified that she frequently works with children who are victims of abuse or neglect and with children who are the subject of juvenile court cases.

Bothern was familiar with the case, because she had been Melaya's therapist since August 2011 and had seen Melysse at times also. Before Bothern began working with Melaya, she was provided with information about the case, including Mindy's psychological evaluation and substance abuse evaluation and visitation notes. Bothern had also conducted four therapeutic visits between Mindy and the children.

Bothern testified that it was her opinion within a reasonable degree of psychological certainty that reunifying the children with Mindy would cause serious emotional damage to them. She based her opinion on her observations of Mindy's interactions with the children at the therapeutic visits and the children's reactions to the visits, as well as on other information she has read about the case. In addition, her opinion was based on the changes she has seen in the children's behavior since they have stopped seeing Mindy. She testified that the tension and anxiety that she observed in the children at the visits and in therapy is gone and that they are relaxed, happy children.

Bothern also testified that Mindy did not make any progress during the therapeutic visits with the children and that the visits were damaging for the children due to Mindy's interactions with them and her failure to recognize how her actions affected them.

In addition to Bothern's testimony, the evidence also showed that on the occasions that Mindy submitted to a UA test, she was still testing positive for drugs. The last two tests she submitted to, which took place 2 months before trial, were both positive for several substances. Mindy's drug use was one of the reasons the children were initially removed from Mindy's home, and this reason for removal still exists. Mindy's continued drug use was likely to result in serious emotional or physical damage to the children if they were returned to her care.

There is no merit to Mindy's argument that the juvenile court erred in finding that the State presented evidence beyond a reasonable doubt that the continued custody of the children by Mindy was likely to result in serious emotional or physical damage to the children.

Best Interests.

As her final assignment of error, Mindy argues that the juvenile court erred in finding that terminating her parental rights was in the children's best interests. We conclude that the juvenile court did not err in so finding.

As previously discussed, Mindy's drug use was one of the conditions that led to the children's being removed, and this condition still exists. Mindy has repeatedly refused to submit to UA tests throughout the case, and when she does submit, she has tested positive. Further, although she did complete a residential drug treatment program, she has not followed through with additional treatment.

She has not had a visit with the children since February 2012, which was 6 months before trial. This was due to her failure to submit to UA tests on a regular basis and her failure to complete an outpatient drug treatment program. Bothern testified that since visits have stopped, the children are no longer tense and anxious and seem to be happy.

From the time the children were removed in December 2010, Mindy has been offered visitation and numerous services by the Department to help her achieve reunification with her children. Rather than cooperate and work with the caseworkers to get her children back, she has been hostile, aggressive, and threatening, and has failed to maintain contact with them. She has not been receptive to services and has made little to no progress toward reunification.

The children have been in foster care since December 2010. They deserve stability and permanency, which does not appear to be possible with Mindy. When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.* Therefore, we conclude the State provided evidence beyond a reasonable doubt that terminating Mindy's parental rights was in the children's best interests.

CONCLUSION

We conclude that the juvenile court did not err in finding that Mindy's parental rights to Melaya and Melysse should be terminated under § 43-292(7). Regarding the requirements of the ICWA, the juvenile court did not err in finding that active efforts were made and that those efforts have proved unsuccessful, pursuant to § 43-1505(4), or in finding that Mindy's continued custody of the children would likely result in serious emotional or physical damage to them, pursuant to § 43-1505(6). Finally, the juvenile court did not err in finding that it was in the

children's best interests that Mindy's parental rights be terminated. Therefore, the juvenile court's order terminating Mindy's parental rights to Melaya and Melysse is affirmed.

AFFIRMED.