

IN THE COURT OF APPEALS OF IOWA

No. 0-856 / 10-1280
Filed February 9, 2011

**IN THE INTEREST OF H.N.P. and B.W.P.,
Minor Children,**

J.M.P., Mother,
Petitioner-Appellee,

A.E.P., Father,
Appellant.

Appeal from the Iowa District Court for Poweshiek County, Randy S. DeGeest, District Associate Judge.

A father appeals from the district court's order terminating his parental rights to his two children. **AFFIRMED.**

Dennis E. McKelvie of McKelvie Law Office, Grinnell, for appellant.

Michael W. Mahaffey of Mahaffey Law Office, Montezuma, for appellee.

Donald Schild, Grinnell, attorney and guardian ad litem for minor children.

Heard by Vogel, P.J., and Doyle and Tabor, JJ.

VOGEL, P.J.

Adam appeals the termination of his parental rights to his two children, Hailey and Ben. Because we find clear and convincing evidence he abandoned the children under Iowa code section 600A.8(3) and that termination is in the children's best interests, we affirm. Our review is de novo. *In re M.M.S.*, 502 N.W.2d 4, 5 (Iowa 1993).

I. Background Facts and Proceedings

Hailey was born in August 2008, and Ben in November 2009, to Jenny and Adam, who were never married. No legal custodial arrangement was ever established. For the majority of the time since Hailey's birth, Jenny has lived at her parents' house. Adam provided some child care for a few months after Hailey's birth, but that ended when Jenny found him to be unreliable. Complicating Adam's availability as a parent was his conviction on burglary charges in June 2008, and two subsequent arrests for probation violations in October 2009 and May 2010. Adam saw Ben approximately a week after his birth, and again just before Christmas 2009. Jenny moved to Georgia in December 2009 for a few months to attend school, where she lived with an aunt. Jenny has since returned to Grinnell, and is again living with her parents. Adam has not seen the children since December 2009.

In December 2009, Adam signed a consent to terminate his parental rights to the two children. In February 2010, Jenny petitioned the court to terminate Adam's parental rights to both children, indicating Adam's agreement to the termination. Adam subsequently sought to withdraw his consent for termination, later testifying he felt "forced to sign." After an April 2010 hearing, the court

granted Adam's withdrawal. Following a June 2010 contested hearing on Jenny's petition, the court terminated Adam's parental rights to both Hailey and Ben.¹

II. Abandonment

Adam first asserts the court erred in finding he abandoned Hailey and Ben. According to Iowa Code section 600A.8:

b. If the child is six months of age or older when the termination hearing is held, a parent is deemed to have abandoned the child unless the parent maintains substantial and continuous or repeated contact with the child as demonstrated by contribution toward support of the child of a reasonable amount, according to the parent's means, and as demonstrated by any of the following:

(1) Visiting the child at least monthly when physically and financially able to do so and when not prevented from doing so by the person having lawful custody of the child.

(2) Regular communication with the child or with the person having the care or custody of the child, when physically and financially unable to visit the child or when prevented from visiting the child by the person having lawful custody of the child.

Iowa Code § 600A.8(3)(b)(1), (2) (2009). A showing of abandonment does not require total desertion; feeble contacts can also demonstrate abandonment. *M.M.S.*, 502 N.W.2d at 7.

Adam argues circumstances prevented him from having the amount of contact with his children that he sought, and therefore the grounds for abandonment were not met. He argues he maintained continuing contact with Hailey and Ben, and did not intend to forgo his rights, nor reject his parental duties. See *In re Goettsche*, 311 N.W.2d 104, 106 (Iowa 1981) (stating that although total desertion is not necessary to establish abandonment, it does

¹ Adam was incarcerated at the time of the termination hearing for a second probation violation.

require clear and convincing evidence of giving up of parental rights and responsibilities accompanied by an intent to forego them).² After the birth of Hailey, Adam maintained some contact for a couple of months, including weekend visits. Although visits became increasingly infrequent, he asserts Jenny did not allow him a “meaningful opportunity to develop a relationship with his children,” and he saw them whenever he was physically able. At the time of the hearing, Adam had seen Ben only twice since his birth, and had not seen either child since December 2009. Although Jenny did move to Georgia for a few months, which Adam contends diminished the amount of time he could spend with his children, the district court found, Adam “was not visiting much before [Jenny] left; so the court finds that as a practical matter, it did not stop [Adam] from visiting, as he was not initiating visits, nor taking much interest in the children anyway.” There is no evidence Adam requested additional visitation, or sought a custodial arrangement through any legal channels.

² While “intention to abandon” is no longer a statutory element in the definitions of Iowa Code chapter 600A, at the time *Goettsche* was decided, the Iowa Code stated, “To abandon a minor child’ . . . includes both the intention to abandon and the acts by which the intention is evidenced.” Iowa Code § 600A.2(16) (1979). However, the intention language has since been removed from this section and “[t]o abandon a minor child” is now defined as when

a parent . . . rejects the duties imposed by the parent-child relationship . . . which may be evinced by the person, while being able to do so, making no provision or making only a marginal effort to provide for the support of the child or to communicate with the child.

Iowa Code § 600A.2(19) (2009). Although we have referred to the element of intent since the statute was amended, we recognize that the legislature has redefined the proof requirements so that the parental mental state now is based on the parent’s conduct in rejecting parental duties rather than the intent to abandon.

Adam also asserts his low financial means prevented him from financially supporting the children, and points out that Jenny did not apply for child support through the Child Support Recovery Unit, nor file a petition with the court for financial support. However, Adam failed to show that he made any effort to support either of his children. He did not graduate from high school, and has only occasionally held a job. He worked for approximately one month after Hailey's birth, and did not work again until approximately one week prior to the termination hearing. When questioned at trial how he had supported himself since Hailey's birth, he responded, "Mainly my mom. I didn't support myself at all really." The district court found Adam has "an almost non-existent work history. . . . [he] has provided absolutely no financial support for either of the children, and . . . is not likely that he will even be capable of doing so in the near or the distant future."

While Adam asserts he has not had a "meaningful opportunity to develop a relationship with his children" and therefore the grounds for abandonment have not been proved, he has not shown he is responsible enough to parent these children or put their needs first. *M.M.S.*, 502 N.W.2d at 7 ("An abandoned child is no less abandoned because the parent can rationalize a reason for the abandonment."). Minimum contact, including extended periods of time without inquiry from a parent, has been deemed to constitute abandonment. See *In re D.M.*, 516 N.W.2d 888, 891 (Iowa 1994). While Adam claimed "there's nothing out there that's more important to me than [the children], his actions totally belied that assertion. The district court terminated Adam's parental rights on the ground

of abandonment, finding, “The Father is physically and mentally able to obtain work and provide for his child but simply has not done so,” and we agree.

III. Best Interests

Adam also argues that termination of his parental rights is not in the children’s best interests, and termination provides no “benefit” to the children. Once we affirm the district court’s finding that a ground for termination under Iowa Code section 600A.8 has been established by clear and convincing evidence, we next consider whether termination is in the child’s best interest. *In re R.K.B.*, 572 N.W.2d 600, 602 (Iowa 1998). The best interest of the child “shall be the paramount consideration” while also “giving due consideration” to “the interests of the parents.” Iowa Code § 600A.1.

Adam, at age twenty, has been using marijuana since the age of thirteen. He testified that he continued using up until a week prior to his probation violation. He also consumes alcohol every day. Whereas he has not shown he puts the interests of the children first, the district court found,

The Mother has her life on track. Although she and the children live with her parents in Grinnell, Iowa, she has obtained her high school diploma and has plans to further her education so she can be on her own to raise her children. She has solid family support from her parents and her brother and sister-in-law. And, quite appropriate for her and the children, she has ended her relationship with Adam.

We agree with the district court that Adam failed to significantly participate in Hailey and Ben’s life. Adam’s track record of minimal parenting and providing absolutely no financial support for the children does not speak well for his future parenting capabilities. See *In re M.S.*, 519 N.W.2d 398, 401 (Iowa 1994). We find termination of his parental rights is in the children’s best interests.

IV. Guardian Ad Litem

Adam also argues that because the guardian ad litem (GAL) was not present at trial, this constitutes reversible error.³ Jenny asserts this issue was not preserved, as Adam did not object to the GAL's absence at the termination hearing. Issues not presented in the juvenile court may not be raised for the first time on appeal. *In re C.D.*, 508 N.W.2d 97, 100 (Iowa Ct. App. 1993). Because this issue was not properly preserved in the underlying proceedings, we are unable to address its merits on appeal.

AFFIRMED.

³ The GAL was appointed on February 23, 2010, and filed an answer and appearance on March 18, 2010, "waiv[ing] my clients' right to present evidence at the hearing herein and also the right to be present at the hearing herein . . . in light of the consent of the birth father." This was filed prior to Adam withdrawing his consent for termination.