

IN THE COURT OF APPEALS OF IOWA

No. 1-010 / 10-1388
Filed February 9, 2011

**IN THE INTEREST OF J.M.,
Minor Child,**

STATE OF IOWA,
Appellant.

Appeal from the Iowa District Court for Story County, Victor G. Lathrop,
Associate Juvenile Judge.

The State appeals from an order by the juvenile court adjudicating a child to be in need of assistance based on one ground, the lack of supervision; the State requests a finding of the additional ground of abandonment in support of the adjudication. **REMANDED WITH DIRECTIONS.**

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Stephen Holmes, County Attorney, and Tiffany Meredith, Assistant County Attorney, for appellant.

Gerald A.L. Moothart of Moothart Law Office, Ames, for appellee-mother.

Lucas J. Richardson of Lucas J. Richardson Law Offices, Ames, for appellee-father.

James W. Thornton of Thornton Law Office, Ames, attorney and guardian ad litem for minor child.

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

TABOR, J.

The State appeals from an order by the juvenile court adjudicating a child to be in need of assistance (CINA) based on the lack of adequate supervision, but rejecting the State's additional ground for adjudication: abandonment of the child by the mother. The question presented is whether the State proved the mother abandoned her daughter, J.M., within the meaning of Iowa Code section 232.2(1) (2009). Because our de novo review reveals clear and convincing evidence to support the additional ground of abandonment, we remand the case for further disposition.

I. Background Facts and Proceedings

From the day of her daughter's birth in December 2009, the mother has relied on a family friend, Laura Bennett, to provide care and sustenance for the child. The mother and J.M. both lived with Bennett in Nevada, Iowa, until March 2010, when the mother moved in with her boyfriend in Ames. The mother left three-month-old J.M. in Bennett's custody and never returned for her. She would call Bennett occasionally, but never provided Bennett with her new address or other contact information. Between March and June 2010, the mother visited her infant daughter just once; that visit occurred on Mother's Day.¹

In late May or early June, the mother was living with her boyfriend in Texas when she told Bennett she wanted to come home to Iowa. Bennett wired her a bus ticket. The mother stayed with Bennett for only two days before she

¹ In contrast, J.M.'s father had visits with the child once or twice a week and occasionally provided supplies such as diapers and wipes. Pursuant to a juvenile court order, the father has custody of another child he has in common with J.M.'s mother.

allegedly stole money from the household and Bennett asked her to leave. Bennett also testified that a social worker with the Department of Human Services told her the mother should not stay in the home as long as J.M. was there. When the mother left, she made no attempt to take J.M. with her. The mother has never expressed to Bennett that the instant custodial arrangement would be temporary or that she intended to assume care of J.M. at some point in the future.

At the time of the July 19, 2010 adjudication hearing, the mother had four pending arrest warrants and her exact whereabouts were unknown. The mother called Bennett about five times in the month leading up to the adjudication hearing and would sometimes—but not always—ask about her daughter's welfare. The mother also was on probation for operating while intoxicated. Her probation officer, Christy Boyer, last spoke to her on July 1, 2010. In that telephone conversation, Boyer informed the mother she needed to attend the CINA hearing on July 19. Boyer believed the mother was living with an aunt in West Virginia, in violation of the terms of her probation. The mother told Boyer that she was pregnant² and did not plan to return to Iowa until after the baby's birth in January 2011. When Boyer asked the mother for her telephone number and address, the mother hung up on her.

The State filed a petition alleging three grounds for adjudicating J.M. as a CINA: abandonment under Iowa Code section 232.2(6)(a), inadequate

² This pregnancy was the mother's fourth. The Department of Human Services has had ongoing contact with the family since 2006. The mother's parental rights to her daughter, G.C., were terminated and another daughter, L.M., was living with the father.

supervision under section 232.2(6)(c)(2), and inadequate care due to the parents' imprisonment or drug or alcohol abuse under section 232.2(6)(n).

After a contested hearing, the juvenile court concluded that J.M. should be adjudicated as a CINA based only on Iowa Code section 232.2(6)(c)(2),

in that the child is one who has suffered or is imminently likely to suffer harmful effects as a result of . . . the failure of the child's parent . . . to exercise a reasonable degree of care in supervising the child.

The juvenile court explained: "The question of abandonment by [the mother] is close, but the Court does not believe it has been established by clear and convincing evidence. [The father] continues to have visits with his daughter." At the hearing, the court expressed its opinion:

This is a situation where I think the grounds for adjudication have to apply to both parents because at this point [the father] has a right to this child. He's a custodial father. So I don't think I can enter an order for abandonment under 232.2(6)(a).

The State sought reconsideration of the ruling, arguing that a ground for adjudication may be based on the conduct of just one parent because the adjudication focuses on the child's needs, not the parents' culpability. The juvenile court issued a subsequent order clarifying that in its view the State failed to prove the abandonment ground for either parent. The State appealed.

II. Standard of Review/Burden of Proof

We review the evidence in CINA adjudications de novo. *In re B.B.*, 500 N.W.2d 9, 11 (Iowa 1993). We examine both the facts and law, and adjudicate anew those issues properly preserved and presented. *In re L.G.*, 532 N.W.2d 478, 480–81 (Iowa Ct. App. 1995). We accord considerable weight to the factual

findings of the juvenile court, especially concerning the credibility of witnesses, but we are not bound by those findings. *Id.* Our main concern lies with the child's welfare and best interests. *Id.* at 481.

The State bears the burden to prove its allegations by clear and convincing evidence. Iowa Code § 232.96(2). "Clear and convincing evidence is more than a preponderance of the evidence and less than evidence beyond a reasonable doubt." *L.G.*, 532 N.W.2d at 481. "It means that there must be no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence." *Id.*

III. Analysis

We begin our resolution of this case by considering whether it is necessary to reach the abandonment issue presented. Generally appellate courts confine their review to judicial action or inaction, not the reasons underlying the decision. See *State ex rel. Miller v. Nat'l Farmers Org.*, 278 N.W.2d 905, 906 (Iowa 1979). We may affirm the district court if one ground, properly urged, exists to support the decision. *Id.* In this case, no party challenges the finding by the juvenile court that the parents failed to exercise reasonable care in supervising J.M. or that its finding was insufficient to support the CINA adjudication. See Iowa Code § 232.2(6)(c)(2). Thus, a proper ground supports the court's decision. Notwithstanding, we believe the State may properly raise the juvenile court's refusal to base the adjudication on the additional ground of abandonment by the mother under section 232.2(6)(a).

Our court has previously allowed such an appeal, explaining:

The underlying grounds of adjudication in child in need of assistance cases have important legal implications beyond the adjudication. The grounds for adjudication may affect the course of the dispositional phase of the case, and may even be the basis for a subsequent proceeding for termination of a parent-child relationship. . . . Much may be at stake. For that reason, we believe the issue is properly presented on appeal.

L.G., 532 N.W.2d at 480.

Turning to the merits of the State's position, we must decide whether the evidence presented at the adjudication hearing concerning the mother's conduct satisfies the definition of abandonment in the juvenile justice chapter. Iowa Code section 232.2(1) defines abandonment as follows:

[T]he relinquishment or surrender, without reference to any particular person, of the parental rights, duties, or privileges inherent in the parent-child relationship. Proof of abandonment must include both the intention to abandon³ and the acts by which the intention is evidenced. The term does not require that the relinquishment or surrender be over any particular period of time.

Our cases have characterized abandonment as "a giving up of parental rights and responsibilities accompanied by an intent to forego them." *In re A.B.*, 554 N.W.2d 291, 293 (Iowa Ct. App.1996). Two elements are involved in this characterization: (1) the giving up of parental rights and responsibilities refers to conduct, and (2) the intent element refers to the accompanying state of mind. *In re D.M.*, 516 N.W.2d 888, 891 (Iowa 1994). The responsibilities of being a

³ Inclusion of "the intention to abandon" language in the juvenile justice chapter contrasts with the definition of abandonment in chapter 600A governing private terminations. The legislature removed the intention language from Iowa Code section 600A.2(19), which now provides:

"To abandon a minor child" means that 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.

parent include more than subjectively maintaining an interest in a child. *Id.* “The concept requires affirmative parenting to the extent it is practical and feasible in the circumstances.” *A.B.*, 554 N.W.2d at 293. Total desertion of a child is not required for a showing of abandonment. *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993) (holding “feeble contacts” insufficient to avoid finding of abandonment).

In *D.M.*, our supreme court found in a termination case that a mother had abandoned her children by leaving the state for a year without any word of her location. The mother testified that she fled in fear for her safety and needed the time to “get her own life back together.” *D.M.*, 516 N.W.2d at 892. While the court acknowledged her fear may have been legitimate, the court concluded that the long drought of communication with her children “belie[d] [the mother’s] claim that she never intended to abandon her children.” *Id.*

In *A.B.*, our court found sufficient proof of abandonment in a termination case when the father had visited his daughter only twice during the year she was in foster care and offered no reasons that would excuse his failure to maintain regular contact. The father also failed to provide financial support and failed to follow the treatment plan developed by DHS. These circumstances prompted our court to surmise: “For all intents and purposes he abandoned his daughter.” *A.B.*, 554 N.W.2d at 293.

In the case we have before us, the juvenile court concluded the evidence was insufficient for a finding of abandonment because

the mother is having contact with the care provider and has expressed her intention to return to Iowa in January 2011 after the birth of her unborn child and attempt to rectify the situation.

Therefore, the Court is unable to conclude the intent element of abandonment.

In our de novo review of the record, we reach a different impression of the mother's intent. Probation officer Boyer testified that after January 2011, the mother "planned on coming back to Iowa and turning herself in and taking care of everything so she can kind of get on with her life at that point." But Boyer said the mother did not indicate that she was going to come back for J.M. after the new baby was born.

The mother left her three-month-old infant with a family friend, moved in with a boyfriend, and did not provide the care taker with any way to reach her. The mother visited the house where her daughter lived just two times in the four months between March 2010 and the CINA hearing. Then the mother moved out of state and did not provide the care taker, the DHS social worker, or her own probation officer with any contact information. She failed to show up for the hearing on the adjudication of her daughter as a child in need of assistance, despite having notice of its significance. When she did telephone her daughter's care taker, she did not consistently bother to ask how the child was faring in her absence. The mother has never been to one of her child's doctor appointments. She has not indicated to the care taker that she ever plans to reunite with her child. While the mother has not flat out reported an intent to abandon J.M., "actions speak louder than words." *In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa Ct. App. 1994). We believe the mother's actions viewed in their entirety show her intent to abandon the child.

The mother cannot use her decision to leave the state to avoid service of outstanding Iowa arrest warrants to justify her lack of contact with her young daughter. See *M.M.S.*, 502 N.W.2d at 8 (demonstrating that pursuit of crime in preference to family life supports finding of abandonment in termination case). She also cannot avoid a finding of abandonment by visiting her daughter on Mother's Day and phoning the care taker once a week in advance of the adjudication hearing. Mothering is not a one day a year affair or an occasional phone call when it is convenient. The mother has failed to engage in "affirmative parenting to the extent it is practical and feasible in the circumstances." See *D.M.*, 516 N.W.2d at 891 (citation omitted). We find clear and convincing evidence to support a finding of abandonment under section 232.2(6)(a) and remand for the juvenile court to incorporate this alternative in its CINA adjudication.

REMANDED WITH DIRECTIONS.