

IN THE COURT OF APPEALS OF IOWA

No. 2-033 / 11-1061
Filed April 11, 2012

**IN THE INTEREST OF K.N.B. and E.L.B.,
Minor Children,**

C.B., Father,
Petitioner,

M.L.M., Mother,
Appellant.

Appeal from the Iowa District Court for Lee (North) County, Emily S. Dean,
District Associate Judge.

A mother appeals the juvenile court order terminating her parental rights in
this private termination action. **AFFIRMED.**

Mark D. Fisher of Nidey Wenzel Erdahl Tindal & Fisher, P.L.C., Cedar
Rapids for appellant mother.

Thomas T. Skewes of Johnson & Skewes, Fort Madison, for father.

Kimberly A. Auge of Napier, Wolf, Popejoy & Auge, Fort Madison, for
minor children.

Heard by Danilson, P.J., Bower, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.**I. Background Facts & Proceedings**

Christian and Michelle are the parents of two children, K.B. born in 1999 and E.B. born in 2002. The parents were never married, but they lived together until the fall of 2003. In mid-2004, a Missouri court granted the parties joint legal custody of the children, with Christian having physical care. Michelle was awarded visitation and ordered to pay child support of \$171 per month. That amount was modified in Iowa in early 2009 to \$301 per month.

Christian is employed as a contractor and carpenter. He married Shannon in 2004, and they have two children together. Shannon is involved with the children in their school and extra-curricular activities. She has expressed an interest in adopting the children. Shannon testified the children look to her as their mother, and come to her with their problems. In 2005, when the parties were exchanging the children in Illinois, Michelle hit Shannon on the shoulder. Shannon testified that sometimes Michelle called her names while they were exchanging the children.

Michelle also remarried after the parties separated. She is married to Brian, and they have a child together. Since Christian and Michelle's separation, Michelle has held a series of minimum wage jobs, many of them part-time jobs. She has not been involved in the children's school activities, such as attending parent-teacher conferences. On June 3, 2010, she was arrested in Illinois and charged with six counts of delivery of cocaine.¹ She pled guilty to one charge,

¹ Michelle's husband was also charged with drug-related offenses, and is in prison in Illinois.

and was incarcerated in Illinois. Michelle testified her tentative discharge date was June 3, 2012, but she hoped and expected to be released earlier by earning “good credit time,” and perhaps “school credit” as well.

Michelle regularly engaged in visitation with the children until she was arrested in June 2010. At the time of trial, Michelle was behind on her child support obligation by \$7306.36. Most of her payments of child support, historically, have been by income tax offsets and other government payments, rather than by voluntary payments. She has not made any child support payments since June 2009.

On November 3, 2010, Christian filed a petition to terminate Michelle’s parental rights under Iowa Code sections 600A.8(3) and (4) (2009). A termination hearing was held on March 9, 2011. Jamie Tweedy, the At Risk and Family Services Coordinator for the children’s school district, testified Shannon would keep her posted about things that were going on with the children. She stated K.B. referred to Shannon as her “mom.” Tweedy testified both of the children were doing well in school. She also testified that the school would have provided Michelle with information about school activities if she had requested that information.

Christian testified that after Michelle was arrested she did not attempt to contact the children until after the termination petition had been filed, nearly six months after her arrest. Even then, according to his testimony, she only sent them two or three letters. Shannon testified about her relationship with the children, and her desire to adopt them.

Michelle presented the testimony of her two sisters, Kelly and Leslie. The sisters testified Michelle was a good mother and she had engaged in many activities with the children while she had them during visitation. They also testified, however, that Michelle was capable of working full-time to support the children. Leslie testified Michelle told her she had used cocaine a few times. Kelly testified she talked to Michelle on the telephone every couple of days, and they exchanged letters all the time. Leslie stated she talked to Michelle at least once a week by telephone. Leslie was taking care of Michelle's child with Brian while Michelle was in prison, and she stated Michelle contacted this child every day.

Michelle testified she was not involved in the school activities of K.B. and E.B. because the school would not send her the information about those activities, and she also could not get the information from Christian or Shannon. She testified that in addition to paying toward her child support obligation, she purchased clothing and presents for the children. Michelle stated she had sent the children one or two letters each month while she was imprisoned. Also, after the petition was filed Michelle signed up for parenting skill and drug awareness classes at the correctional facility, and was on the waiting list to take those classes. Michelle stated she spoke to her child with Brian every day, and wrote Brian several letters each day.

Michelle testified she had not applied for any jobs that paid more money, such as factory work, because "[t]hat is not my kind of work that I want." She stated she felt she had the skills to be a secretary, but had not applied for that type of job. Michelle also stated she did not have any health reasons why she

could not work a forty-hour week. She admitted the reason she was unable to pay her child support was based on the types of jobs she chose.

The juvenile court terminated Michelle's parental rights on the grounds raised by Christian. The court determined the evidence presented by Christian was more credible than the evidence presented by Michelle. The court found Michelle had failed to contribute to the support of her children, as ordered by the court, without good cause for failing to do so. The court also found Michelle had abandoned the children because although she was capable of maintaining contact with them during her incarceration by letters and telephone calls, she had failed to do so. The court concluded termination was in the children's best interests. Michelle has appealed the juvenile court order terminating her parental rights.

II. Standard of Review

In cases involving termination of parental rights under Iowa Code chapter 600A, our review is de novo. *In re D.E.E.*, 472 N.W.2d 628, 629 (Iowa Ct. App. 1991). In cases in equity, we give weight to the factual findings of the juvenile court, especially considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re C.A.V.*, 787 N.W.2d 96, 99 (Iowa Ct. App. 2010).

III. Failure to Pay Support

Under section 600A.8(4), a parent's rights may be terminated if the "parent has been ordered to contribute to the support of the child or financially aid in the child's birth and has failed to do so without good cause." The elements of

section 600A.8(4) must be proved by clear and convincing evidence. Iowa Code § 600A.8; *In re C.M.W.*, 503 N.W.2d 874, 875 (Iowa Ct. App. 1993).

We first consider whether there has been a showing of a substantial failure to pay court-ordered support. *In re B.L.A.*, 357 N.W.2d 20, 21 (Iowa 1984). “A substantial, and not merely sporadic or insignificant, failure to pay ordered support without good cause justifies termination of parental rights under section 600A.8(4).” *Knoblock v. Abbott*, 303 N.W.2d 149, 152 (Iowa 1981).

If there has been a showing of a substantial failure to pay, the court must then consider whether that failure was without good cause. *B.L.A.*, 357 N.W.2d at 21. In considering whether there is good cause for failure to pay child support, the key factual issue is the parent’s ability to pay. *Id.* at 22 . A “parent’s intent is clearly tied to an ability to pay.” *D.E.E.*, 472 N.W.2d at 630. The burden is on Christian to show Michelle had the ability to pay child support. See *In re R.K.B.*, 572 N.W.2d 600, 601-02 (Iowa 1998).

The Iowa Supreme Court has stated:

A parent has a basic obligation to support a minor child. The legislature has determined that it is in the best interest of the child to terminate a parent-child relationship if the parent refuses to support the child. Although abandonment is a separate ground for termination, section 600A.8(3), we conclude that the legislature intended termination for nonsupport to occur where a parent’s failure to pay manifests indifference to a child and is therefore akin to abandonment. “[A]bnegation of court-ordered financial responsibility to a child [is] the equivalent of abandonment. A parent who unjustifiably refuses to meet a support obligation manifests complete indifference to his child.”

Knoblock, 303 N.W.2d at 152 (citation omitted).

We determine there has been a showing that Michelle has substantially failed to pay child support. At the time of the termination hearing, Michelle had

been ordered to pay a total of \$17,402 in child support. Of this amount she had paid \$10,095.64, and was behind in her child support obligation by \$7306.36. A printout from the Iowa Collection and Reporting System showed she did not pay any child support in 2004, 2005, 2006, or 2010.²

We turn to the question of whether Christian has shown Michelle had the ability to pay child support, and has not done so. Michelle admitted on cross-examination that it was her choice to work for minimum wages. The evidence showed she could have applied for a factory or secretarial job, but chose not to have this type of work. Michelle also admitted that she did not have any health reasons why she could not work forty hours per week. We determine there is clear and convincing evidence in the record to show Michelle had the ability to pay child support.

We also look at Michelle's intent regarding the payment of child support. We note that in those years when she paid child support, this was primarily due to the seizure of tax refunds or other government payments. Even during the times she was employed, Michelle made very few voluntary payments of child support. See *C.M.W.*, 503 N.W.2d at 876 (noting there was no showing of good cause for failure to pay child support in light of parent's failure to make voluntary payments during times he had the ability to pay). We conclude there is not "good cause" for Michelle's failure to pay child support.

² Michelle also did not pay any child support in 2011. We recognize Michelle was arrested on June 3, 2010, and has not had any income since that time. The record shows, however, that she did not pay any child support in 2010 prior to the time of her arrest.

We determine the juvenile court was correct in determining that Michelle has failed, without good cause, to contribute to the support of her children. Because we have affirmed on this ground, we do not need to address the alternative ground relied upon by the juvenile court, abandonment. See *id.*

IV. Best Interests

“Once the court has found a statutory ground for termination under a chapter 600A termination, the court must further determine whether the termination is in the best interest of the child.” *In re A.H.B.*, 791 N.W.2d 687, 690 (Iowa 2010). Section 600A.1 provides:

The best interest of a child requires that each biological parent affirmatively assume the duties encompassed by the role of being a parent. In determining whether a parent has affirmatively assumed the duties of a parent, the court shall consider, but is not limited to consideration of, *the fulfillment of financial obligations*, demonstration of continued interest in the child, demonstration of a genuine effort to maintain communication with the child, and demonstration of the establishment and maintenance of a place of importance in the child’s life.

(Emphasis added).

The Iowa Supreme Court has determined that the statutory best interest framework described in sections 232.116(2) and (3) is useful in determining the best interest of a child under chapter 600A. *A.H.B.*, 791 N.W.2d at 690. Thus, we give consideration to the child’s safety, to the long-term nurturing and growth of the child, and to the physical, mental, and emotional condition and needs of the child. See *In re P.L.*, 778 N.W.2d 33, 40 (Iowa 2010) (considering section 232.116(2)). We also give weight to the closeness of the parent-child bond. *A.H.B.*, 791 N.W.2d at 691 (citing section 232.116(3)(c)).

Michelle's failure to contribute to the support of her children shows the children do not have a place of importance in her life. See Iowa Code section 600A.1. Even before she was incarcerated, Michelle was not involved with the children's school and extra-curricular activities. Furthermore, we note that while she has been incarcerated, Michelle has contacted her child with Brian at least once each day and sometimes several times in a day. She has also had extensive contact by telephone calls and letters with her sisters, and by letters with Brian. Michelle asserted she attempted to send letters to K.B. and E.B. once or twice each month. The juvenile court, however, expressly found that the evidence presented by Christian was substantially more credible than that presented by Michelle, and found that since her incarceration "Michelle's contact with the girls has been limited to two letters." Christian's testimony would show her attempts were even less than this, and amounted to only two or three letters. All of the circumstances show Michelle has not been interested in meeting the needs of her children. Shannon has been actively involved in meeting the needs of the children for the past seven years. Shannon is committed to adopting the children, if possible. We conclude termination of Michelle's parental rights is in the children's best interest.

We affirm the decision of the juvenile court terminating Michelle's parental rights to K.B. and E.B.

AFFIRMED.

Danilson, P.J., and Bower, J., separately concur specially.

DANILSON, J. (concurring specially)

I concur specially as I believe the facts support termination, but solely upon abandonment pursuant to Iowa Code section 600A.8(3)(b). Although the mother has not fully complied with her support obligation, there have been some sporadic payments, and she has paid nearly sixty percent of her total support obligation. However, in light of both the mother's payment history, and her ability to stay in contact with K.B. and E.B. while incarcerated but meager effort to do so (in contrast to her regular contact with a third child), I agree termination is appropriate.

BOWER, J. (concurring specially)

I concur specially. Although sufficient evidence exists for termination for failure to pay support, termination of the mother's parental rights is further supported on the ground of abandonment. The record is clear that M.L.M., during her incarceration, had the opportunity and ability to have daily contact with K.N.B. and E.L.B. as she had this level of contact with new her husband and their child. M.L.B., short of two letters in nine months, failed to continue her relationship with K.N.B. and E.L.B. While incarceration alone does not qualify as grounds for termination, *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993), incarceration does not excuse conduct that qualifies as grounds for termination. *In re R.L.F.*, 437 N.W.2d 599, 602 (Iowa Ct. App. 1989). M.L.B. has not fostered a relationship with the children of this action and it is apparent that she intended to forego her relationship with K.N.B. and E.L.B. I specially concur for the reasons set forth.