

IN THE COURT OF APPEALS OF IOWA

No. 6-1089 / 06-1127
Filed February 28, 2007

**IN THE INTEREST OF P.N.B., JR. and K.B.,
Minor Children,**

Appeal from the Iowa District Court for Muscatine County, Gary P. Strausser, District Associate Judge.

The children's guardian ad litem appeals the juvenile court's denial and dismissal of their father's petition for termination of their mother's parental rights.

AFFIRMED.

Mark J. Neary, Muscatine, guardian ad litem for appellants-minor children.

Douglas E. Johnston, Muscatine, for mother.

Esther Dean, Muscatine, for father.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

MILLER, J.

Patrick is the father, and Brandy the mother, of Patrick, Jr. and Kierien (the children). The guardian ad litem for the children appeals the juvenile court's denial and dismissal of Patrick's petition for termination of Brandy's parental rights under Chapter 600A (2005). He contends the court failed to consider all the evidence introduced at the hearing and erred in finding Brandy had not abandoned the children. We affirm.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS.

The record reveals the following facts. Patrick and Brandy are the parents of Patrick Jr., born in September 1999, and Kierien, born in February 1998. Patrick and Brandy were together over an approximately three-year period but never married. They separated in 2000. Both parties abused substances, both while they were together and following their separation. Following their separation, Patrick filed a paternity action. In a final order filed April 4, 2001, the court granted the parties joint legal custody of the children, placed physical care with Patrick, and granted Brandy visitation. Brandy was ordered to pay \$75 per month in child support to Patrick.

Brandy exercised her visitation sporadically from April 2001 to September 2002. In September 2002, the Iowa Department of Human Services (DHS) began investigation of child abuse allegations regarding Patrick's failure to provide proper supervision of the children. The DHS determined the report was founded and the children were adjudicated children in need of assistance (CINA) in December 2002. Both parties were ordered to, among other things, obtain

mental health evaluations and Patrick was ordered to complete a substance abuse evaluation and any recommended treatment. The children remained in Patrick's care and Brandy was entitled to and exercised visitation every other weekend.

In February 2003 Brandy had a founded abuse report against her for physically abusing Kierien. In March 2003, Patrick completed outpatient drug treatment. In June 2003, Patrick placed the children with Brandy when he went to Cedar Rapids to find employment and housing. He contends he only intended to have them stay with Brandy for a couple of weeks. However, Brandy testified she had actually had the children since October of 2002. Also in June 2003, the juvenile court placed the children with Brandy, based in part on Patrick's leaving them with her and in part on concerns he was using drugs again.

Two months after being placed with Brandy the children were removed from her care pursuant to an emergency removal order and placed in foster care due to several issues with Brandy. Both parents were allowed visitation and advised to complete substance abuse evaluations and recommended treatment. In October 2003, Brandy completed the outpatient portion of her substance abuse treatment but did not complete the aftercare portion. In January 2004, she was arrested and later convicted of operating while intoxicated.

In January 2004, Patrick completed the outpatient portion of his substance abuse treatment. In April 2004, he completed the aftercare portion of the treatment. The children were returned to Patrick's custody in June 2004. The CINA case was dismissed effective August 11, 2004, and the children have

remained in Patrick's care and custody since that time. Patrick filed a contempt action against Brandy in October 2004, for unpaid child support. Brandy was in fact significantly behind on child support at that time. Evidence presented at the termination hearing shows that between 2001 and 2005 she accumulated a \$4,157.36 delinquency. However, it also shows she is currently employed and is paying her child support obligation through mandatory withholding from her wages. She testified she intends to continue to pay both her current and back support.

In November 2005, Brandy filed a contempt action against Patrick for his failure to allow her to have visitation. Patrick then dismissed his contempt action and in December 2005 filed the present application for termination of Brandy's parental rights. He alleged Brandy had abandoned the children under Iowa Code section 600A.8(3) and it would be in the best interest of the children if her parental rights were terminated. The children were appointed a guardian ad litem to represent their interests in the matter and a hearing was held.

At the time the CINA case terminated in August 2004 Brandy was being allowed one hour of supervised visitation every two weeks. However, she testified at the termination hearing she had not seen the children from about the time they were placed with Patrick in June 2004 until the termination hearing in February 2006. She testified this was partly because of her continued drug use from May 2004 until she was incarcerated in February 2005 for unpaid fines, and her subsequent incarceration for approximately four and one-half months. She further testified, however, that she did attempt to contact both the children and

Patrick before, during, and especially after her incarceration. In fact following her incarceration Brandy attempted to make contact with the children through her attorney. Patrick, however, would not allow any contact or visitation whatsoever. She testified Patrick would scream at her and tell her she could not see the children. Brandy also stated she had sent cards, letters, and made phone calls, but all attempts at establishing contact were denied by Patrick. Evidence was admitted that showed Brandy had sent at least two cards to the children and Patrick had returned them without telling the children about them.

At the hearing Patrick testified that even though the CINA case had been terminated, it was his understanding from DHS that he was still not to permit Brandy visitation with the children due to her failure to complete her substance abuse treatment and doing so would risk him losing his children again. He testified he would not have allowed Brandy to have visitation with the children regardless of what efforts she made to do so. However, Patrick never sought a modification of the April 4, 2001 order which provided for Brandy to have reasonable visitation with the children.

The juvenile court denied and dismissed Patrick's petition for termination of Brandy's parental rights. The court concluded Patrick had not proven, by clear and convincing evidence, the necessary elements for abandonment pursuant to section 600A.8(3). It further concluded that termination of Brandy's parental rights was not in the children's best interest.

The guardian ad litem appeals the juvenile court's denial of Patrick's petition to terminate Brandy's parental rights, contending the court did not

consider all of the evidence introduced at the hearing and erred in concluding Brandy had not abandoned the children under section 600A.8. Patrick has not appealed.

II. SCOPE AND STANDARDS OF REVIEW.

A termination proceeding pursuant to chapter 600A is reviewed de novo. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998). The statutory grounds for termination under chapter 600A must be proved by clear and convincing evidence. Iowa Code § 600A.8. Although not bound by them, we give weight to the district court's findings of fact, especially when considering the credibility of witnesses. Iowa R. App. P. 6.14(6)(g). Our primary interest is the best interest of the child. Iowa R. App. P. 6.14(6)(o); *R.K.B.*, 572 N.W.2d at 601.

III. MERITS.

The guardian ad litem first contends the juvenile court failed to consider all the information contained in five separate case files that were introduced in evidence at the termination hearing. He predicates his argument on the fact that in its written order the court identified certain documents that were received in evidence but did not expressly identify these five files as having been received. However, it is evident from various portions of the court's ruling that it did in fact take these case files into account and consider their contents, because the court specifically refers to portions of them. Furthermore, there was other evidence the court clearly considered, including testimony of witnesses, but did not list separately in its ruling. The mere fact that the juvenile court did not expressly identify these files, while identifying other documents, does not mean it did not

The petitioner has the burden to prove a statutory ground for termination under Chapter 600A. See *R.K.B.*, 572 N.W. 2d at 601-602. Proof of a statutory ground, however, is not dispositive. We must also determine whether it is in the children's best interests to terminate parental rights. *In re J.L.W.*, 523 N.W.2d 622, 625 (Iowa Ct. App. 1994).

The juvenile court concluded both that Patrick failed to prove the asserted statutory ground for termination of Brandy's parental rights and that termination was not in the children's best interests. Both must be proved to warrant termination. See *id.* The court concluded termination was not in the children's best interest because they know Brandy is their mother and her absence from their lives was caused, in part, by Patrick's actions.

On appeal the guardian ad litem challenges only the juvenile court's determination that the statutory ground for termination based on abandonment was not proved. He does not challenge the court's determination that termination is not in the children's best interest. We deem any claim the court erred in finding termination is not in the children's best interest is waived. See Iowa R. App. P. 6.14(1)(c) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."); *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996) ("When a party, in an appellate

brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived.”). Accordingly, we affirm the juvenile court’s ruling based on the absence of a challenge to this outcome-determinative finding. However, because we agree with the juvenile court that it is not in the children’s best interest to terminate Brandy’s parental rights, and that Patrick did not prove abandonment, we will not rest our decision on waiver grounds alone.

The children knew Brandy as their mother, and even Patrick testified that Brandy and Kierien have a strong bond. In addition, Brandy testified that at the time of the hearing she had not abused substances for approximately a year; she was employed full time; and she was paying, and intended to continue paying, her child support obligations. The juvenile court found her testimony to be credible and the record before us supports the court’s credibility finding. Finally, Brandy’s absence from her children’s lives, especially since her release from jail, was caused in large part by Patrick preventing her from having contact and communication with them.

The guardian ad litem further argues that even if the court did properly consider all of the evidence introduced at the hearing it nevertheless erred in not finding Brandy had abandoned the children. Termination of parental rights is appropriate under chapter 600A where a parent has abandoned a child. Iowa Code § 600A.8(3). To establish abandonment it must be shown that the parent has rejected the duties imposed by the parent-child relationship. Iowa Code § 600A.2(18). Abandonment is deemed to have occurred for children six months or older when the parent fails to maintain

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.

(3) Openly living with the child for a period of six months within the one-year period immediately preceding the termination of parental rights hearing and during that period openly holding himself or herself out to be the parent of the child.

Iowa Code § 600A.8(3)(b). Incarceration does not excuse a parent's unavailability or conduct when abandonment is claimed. *J.L.W.*, 523 N.W.2d at 624. Nor does it qualify as a justification for a parent's lack of a relationship with a child. *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993).

The juvenile court found Brandy's testimony to be credible and that while her attempts to maintain contact with the children were "marginal at best," the evidence was clear that additional attempts at contact by her would have been denied by Patrick. The court further noted that Brandy had been employed for over a month and had been sober since she was incarcerated in February of 2005. In addition, she had made three child support payments in January of 2006, and was now capable of making such payments consistently because the payments were being withheld directly from her wages. Accordingly, the court found that while

[Brandy's] efforts were minimal and . . . her incarceration does not excuse her minimal contacts, the evidence is equally clear that any attempts that she made to establish visitation with the children would have been denied by [Patrick]. She was effectively discouraged from making additional contact with the children by [Patrick] and his conduct contributed to her minimal contact with the children. The Court cannot find the elements of abandonment are satisfied, that clear and convincing evidence of abandonment exists under these circumstances. While the mother's efforts to maintain contact with the children were minimal at best, [Patrick] thwarted her efforts to build a relationship with the children. Thus, the evidence fails to establish she has abandoned the children.

We agree with the juvenile court's determination that Patrick did not meet his burden to prove, by clear and convincing evidence, that Brandy had abandoned the children. We adopt its findings and conclusions quoted above as our own. Although Brandy's efforts to maintain contact with her children were minimal, and her incarceration does not excuse a lack of contact, it is clear that the efforts she did make before, during, and after her incarceration were thwarted by Patrick and he would have denied any additional requests for visitation or attempts at contact.

IV. CONCLUSION.

Based on our de novo review we conclude the guardian ad litem has not shown that the juvenile court failed to consider all of the evidence properly before it. We affirm the court's finding that termination of Brandy's parental rights is not in the children's best interest, deeming any claim of error with respect to this finding waived. We nevertheless agree with the court that termination is not in the children's best interest. We conclude Patrick did not prove by clear and convincing evidence that Brandy had abandoned the children.

AFFIRMED.