IN THE COURT OF APPEALS OF IOWA

No. 6-352 / 05-1679
Filed June 28, 2006

IN THE INTEREST OF

J.J.L.,
Minor Child,

M.E. and B.E.,
Petitioners-Appellees,

J.L., Father,
Appellant.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge.

A father appeals the termination of his parental rights. **AFFIRMED.**

Richard L. Pazdernik, Jr., Cedar Rapids, for appellant.

Lori L. Klockau of Bray & Klockau, P.L.C., Iowa City, for appellee.

Richard Boresi of King, Smith & Boresi, Cedar Rapids, for minor child.

Considered by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VOGEL, P.J.

Joseph appeals from the district court's order terminating his parental rights to his son, Jonathan. As we find the termination supported by clear and convincing evidence and in Jonathan's best interests, we affirm the district court.

Jonathan, born May 2000, is the son of Joseph and Melonie. Joseph has been incarcerated for the majority of Jonathan's life, and Melonie was killed in a car accident in Colorado in August 2002 that also injured Jonathan. Joseph was incarcerated at the time and unable to care for Jonathan. Two days after Melonie's death, Joseph's mother, Carol, arrived in Colorado from Iowa with a "full power of attorney" executed by Joseph and purporting to give temporary legal guardianship of Jonathan to Carol until Joseph was released by the Colorado Department of Corrections. After the Colorado Department of Human Services released Jonathan to Carol's care, she brought him to Iowa to live with her.

Concerns over Jonathan's placement with Carol arose soon afterwards, and relatives of Melonie, Marcy and her husband, Brian, who live in Illinois, challenged the placement. Marcy is Melonie's niece, and Jonathan's first cousin. A series of court filings ensued, with Carol ultimately seeking formal guardianship in Iowa, and Marcy and Brian intervening. Pertinent to this appeal is a Colorado court's May 2003 order prohibiting Jonathan from being placed in Joseph's care and ordering Joseph to have no physical contact with Jonathan but allowing communication via telephone and letters.

Marcy and Brian gained court-ordered visitation with Jonathan in July 2003, while he remained in Carol's care. Following the trial on Carol's petition for

permanent guardianship, the district court in Linn County granted guardianship and placement of Jonathan with Marcy and Brian in Illinois in June 2004. In January 2005, Marcy and Brian filed a petition for termination of Joseph's parental rights pursuant to Iowa Code section 600A.8(3)(b) (abandonment) (Supp. 2003). In the interim, Carol was allowed unsupervised visitation for a few months, changing to supervised visitation in November 2004, and ceasing altogether in January 2005 upon the recommendation of Jonathan's therapist. The record reflects that Carol had allowed Joseph to have contact with Jonathan contrary to the Iowa court order prohibiting such contact. In December 2004, Joseph was also denied visitation upon his petition after the court found him to be untruthful about his past criminal history and that Jonathan's best interests were served by continuance of the no-contact order. The district court terminated Joseph's parental rights by order in September 2005, finding clear and convincing evidence that he had abandoned Jonathan and it was in Jonathan's best interests that Joseph's parental rights be terminated. Joseph appeals.

Upon our de novo review of this private termination of parental rights proceeding, *In re R.S.N.*, 706 N.W.2d 705, 707 (Iowa 2005), we agree with the district court's findings and ruling. According to section 600A.8(3)(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.
>
> (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.

Id. Evidence from both the guardianship hearing and termination proceeding reveals that prior to Melonie's death, the couple had occasionally placed Jonathan with Carol for extended periods of time while Joseph and Melonie were either evading law enforcement or incarcerated, to prevent human services in Colorado from taking custody of Jonathan. In the few months that Joseph had contact with Jonathan before being incarcerated and before Melonie's death, he never assumed care of Jonathan without the assistance of either his mother or Melonie.

Joseph does not dispute that he has not resided with nor (lawfully) visited Jonathan since late 2002 or early 2003, due to his incarceration, the terms of his probation or parole, or several no-contact orders issued by the Colorado and Iowa courts. While Joseph and Carol testified at the termination hearing that Joseph kept in regular phone contact with his son and provided money, clothes, and toys for Jonathan the entire time he lived with Carol, Joseph was only able to produce three birthday cards as evidence of his contact during these years. Joseph also disputed the regularity of his financial support for Jonathan, although once again he could only offer eight money orders sent to Marcy and Brian for "child support," some of which were pre-dated to 2004 but all of which were purchased and sent after the termination petition was filed. We conclude

Joseph's abandonment of Jonathan was proven by clear and convincing evidence. Due to Joseph's choices to be almost continuously involved in criminal activity during these early years of Jonathan's life, he has been substantially absent in his role as a parent. As so stated by our supreme court,

> We do not hold or suggest that termination is a necessary result of conviction of a crime and resulting imprisonment. On the other hand [a father] cannot use his incarceration as a justification for his lack of relationship with the child. This is especially true when the incarceration results from a lifestyle that is chosen in preference to, and at the expense of, a relationship with a child.

In Interest of M.M.S., 502 N.W.2d 4, 8 (Iowa 1993). We affirm on this issue.

Joseph also argues that termination is not in Jonathan's best interests. Our primary concern is that termination of parental rights must be in the best interests of the child. *In re D.G.,* 704 N.W.2d 454, 460 (Iowa Ct. App. 2005). Joseph has a long criminal history hallmarked by violent domestic assaults, including the stabbing of the mother of his oldest child in 1988 when she was pregnant. In the spring of 2000 when Melonie was seven-months pregnant with Jonathan, Joseph hit her in the face forty times, choked her, and twice punched her in the abdomen. Jonathan himself has reported Joseph's threat to kill Marcy and Brian using a gun. He has also reported that Joseph demonstrated what he called a "blood maker" weapon and how it makes blood come out of people when used. Although Joseph has spent very little time with Jonathan since he was born, the record reflects Jonathan's anxiety and fear of Joseph's behaviors.

We also find the testimony of Jonathan's therapist, clinical psychologist Phyllis Rubin, compelling. She strongly recommended termination of Joseph's parental rights as serving Jonathan's best interests. Rubin testified that though

his cognitive ability seemed normal, four-year-old Jonathan initially was not potty-trained and was delayed in his speech and articulation. Marcy confirmed these deficits in her testimony, detailing the many social and emotional hurdles Jonathan has had to overcome. Jonathan also initially exhibited many disturbing behaviors including excessive and violent aggression, sexualized behavior, indiscriminate friendliness toward strangers, and anxiety over the stability of his placement. Marcy and Brian sought professional assistance almost immediately to help Jonathan. Rubin has noted great improvements with his attachment disorder issues, including processing painful memories of his mother's death, addressing fearful interactions with certain adults including Joseph, and forming a trusting bond and sense of stability and permanency with Marcy and Brian and their family. At the time of trial, Jonathan was potty-trained, enrolled in speech therapy, and progressing toward starting kindergarten. Finally, Rubin testified that in her opinion, were Jonathan to be removed from Marcy and Brian's care, he may never recover emotionally from yet another trauma, and that termination of Joseph's parental rights would give Jonathan the permanency that he needs to continue progressing forward. We agree with the district court that the record speaks well of the enormous progress Jonathan has made in Marcy and Brian's care and that Jonathan's best interests are served with the termination of Joseph's parental rights. We therefore affirm the district court.

AFFIRMED.