

IN THE COURT OF APPEALS OF IOWA

No. 6-844 / 05-1732
Filed November 30, 2006

IN THE INTEREST OF D.M.C., Minor Child,

D.K.O., Mother,
Petitioner,

G.D.C., JR., Father,
Appellant.

Appeal from the Iowa District Court for Des Moines, County, Mark Kruse,
District Associate Judge.

A father appeals from a juvenile court order terminating his parental rights
to one child. **AFFIRMED.**

Shane M. Wiley of Hirsch, Adams, Putnam, Cahill, Rashid & Wiley, P.L.C.,
Burlington, for appellant-father.

Robert Engler of Schulte, Hahn, Swanson, Engler & Gordon, Burlington,
for appellee-mother.

Todd Chelf of Cray, Goddard, Miller & Taylor, L.L.P., Burlington, guardian
ad litem for minor child.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Diane is the mother, and George the father, of Delaney, born in mid-1998. George appeals from a September 2005 juvenile court order terminating his parental rights. We affirm.

In November 2003 Diane filed a petition seeking termination of George's parental rights to Delaney. She alleged as grounds that George had abandoned Delaney, see Iowa Code § 600A.8(3) (2003), and that he had failed to pay ordered support for Delaney without good cause, see *id.* § 600A.8(5). Trial was commenced in February 2004, but the conclusion of trial was continued pending a decision by the Iowa Supreme Court regarding the right in certain circumstances to appointed counsel in Iowa Code chapter 600A termination proceedings. Trial was concluded in September 2005.

In its September 2005 decision the juvenile court declined to terminate George's parental rights on the ground of abandonment, stating it "cannot find the intent [to abandon] by clear and convincing evidence." It did, however, find that clear and convincing evidence proved George had "failed to contribute to the support of [Delaney] . . . without good cause" within the scope and meaning of section 600A.8(5) and ordered George's parental rights terminated. George appeals.

A termination proceeding pursuant to chapter 600A is reviewed de novo. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998). 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. 6.14(6)(g). Our primary interest is the best interest of the child. Iowa R. App. 6.14(6)(o); *R.K.B.*, 572 N.W.2d at 601.

George states the issue on appeal as: “Whether the juvenile court erred in terminating father’s parental rights based on failure to pay child support.” Section 600A.8(5) provides a ground for termination when the evidence shows: “A parent has been ordered to contribute to the support of a child . . . and has failed to do so without good cause.” The issue of whether non-payment was without good cause focuses on the obligor’s ability to pay. *In re D.E.E.*, 472 N.W.2d 628, 630 (Iowa Ct. App. 1991). The petitioner has the burden to show that the other parent had the ability to pay child support. *R.K.B.*, 572 N.W.2d at 601-02. This is not, however, tantamount to a requirement that the petitioner prove willfulness in failing to pay. *Id.* at 602.

Diane and George have never been married, but lived together when Delaney was born. They continued to live together for about nine months thereafter, during which Diane provided Delaney’s primary care, George provided Delaney’s care while Diane was at work, and George provided minimal financial support. They then separated and have not subsequently lived together. When they separated Diane agreed she would not “push the child support issue” if George visited Delaney at convenient times and would “help us out when she needed something.”

However, at or about the time Diane and George separated an order was entered that George pay current support of \$50 per month, pay accrued support of \$100 which included accrued support for months in which public assistance had been paid, and provide medical support pursuant to Iowa Code chapter

252E. The order further required that payments be made through the Collection Services Center. Since that early 1999 order George has paid a total of only \$202.99, consisting of \$192.99 of wages withheld, mostly in 2001, and one voluntary payment of \$10.00 in 2004 about one year after this termination proceeding was filed. There is no evidence that George has provided medical support as required.

As shown by the unrefuted and unchallenged testimony of George's sister, Tammy, following Diane and George's separation George was employed at most times except when incarcerated. However, with the exception of the brief times when a small total of support was withheld from his wages, George paid a total of only \$10.00. He testified that he did at times give his sister, Tammy, money to buy presents, school supplies, and clothes for Delaney. Diane acknowledged that Tammy, who apparently has a good relationship with Diane and Delaney, had upon occasion bought clothes for Delaney. However, neither Tammy nor Diane suggested that such purchases were with money provided by George.

There is a large difference between being unable to support one's child and choosing not to do so. Even a nominal amount of support, paid as regularly as possible, would be evidence of George's intent to support Delaney. The record clearly and convincingly establishes that for at least substantial periods of time when George made no payments at all he had the ability to make at least some small payments. His failure to make any payments during those times manifests an indifference that is akin to abandonment. See *Klobnock v. Abbott*, 303 N.W.2d 149, 152 (Iowa 1981) ("[T]he legislature intended termination for nonpayment to occur where a parent's failure to pay manifests indifference to a

child and is therefore akin to abandonment.”). We conclude that Diane proved by clear and convincing evidence that George failed, without good cause, to appropriately contribute to Delaney’s support.

In addition to proving a statutory ground for termination, Diane was also required to prove that termination of George’s parental rights is in Delaney’s best interest. Although not stated by George as an issue, see Iowa R. App. P. 6.14(1)(c), George argues termination is not in Delaney’s best interest. We choose to address the question.

Since early 1999 George has had a very minimal relationship with Delaney. He was in prison for a period of time in about 2000 and 2001. In the ensuing four years he has seen Delaney a total of about twelve times. George was jailed on four occasions in 2004, ranging from fifteen days to thirty days on each occasion. He has been in prison since March 2005. Between March 2005 and the September 2005 conclusion of the termination hearing his only attempt to have contact with Delaney was one letter.

Delaney continues to harbor some fear of George, a result of seeing him physically abuse Diane and perhaps from seeing him “shoot up” with drugs. George has been through drug treatment many times, and has a lengthy record of criminal convictions. He is currently in prison with a tentative discharge date some time in the year 2007.

Diane began dating John in 2000, and they married in October 2002. John has been continuously employed by the same employer for five years. He is purchasing the home which he and Diane share with Delaney and Diane’s older daughter. John has a very good relationship with Diane and Delaney.

John has been providing support and medical insurance for Delaney, and participates in family, school, and recreational activities with her. He wishes to adopt Delaney if it is in her best interest, and believes that it is.

We find, as the juvenile court did, that termination of George's parental rights is in Delaney's best interest.

AFFIRMED.