

IN THE COURT OF APPEALS OF IOWA

No. 7-555 / 07-0146
Filed October 24, 2007

**IN THE INTEREST OF N.J.W.,
Minor Child,**

BETHANY CHRISTIAN SERVICES,
Petitioner-Appellant.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Bethany Christian Services appeals the district court decision denying its petition to terminate the parental rights of the father of N.J.W. **AFFIRMED.**

Alice E. Helle of Brown, Winick, Graves, Gross, Baskerville and Schoenebaum, P.L.C., Des Moines, for appellant.

Eric Anderson, West Des Moines, and Judith Jennings Hoover, Cedar Rapids, for father.

Craig Rogers, Waukee, for minor child.

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

MAHAN, P.J.

Bethany Christian Services (BCS) appeals the district court decision denying its petition to terminate the parental rights of Kristopher, the father of N.J.W. We affirm.

I. Facts and Prior Proceedings

Kristopher began dating Shelby in May 2005. At the time, Kristopher was separated from his wife and children. Shelby moved in with Kristopher one month later and immediately quit her job.¹ The couple lived solely on his monthly income of \$1400.

Shelby soon became pregnant. When Kristopher learned she was pregnant, he told Shelby she needed to find a job. Shelby was unable to find a job over the next two months. This caused friction in their relationship.

On October 25, 2005, when Shelby was three and one-half months pregnant, an argument erupted and Kristopher told her she had to move out. Shelby checked herself in to the psychiatric ward at St. Luke's hospital that night, but checked out the next morning and moved back home to live with her mother. Shelby found a job and eventually moved out of her mother's home.

In November Kristopher called Shelby to try to reconcile, but Shelby told him she had moved on and wanted nothing to do with him. That same month, Shelby began to speak with BCS about putting the baby up for adoption.

At one point, Shelby told Kristopher that she needed money to pay a parking ticket she had received while he was driving her car. Kristopher promptly

¹ At trial, Shelby explained her reason for quitting as follows: "He told me if I didn't want to work, I didn't have to and he would take care of me."

paid her the money and offered to take her to lunch. Kristopher made another attempt to reconcile the relationship, but Shelby rejected his overtures. Ultimately, Shelby gave her cell phone to her mother because she did not want to speak with Kristopher anymore. Kristopher resorted to enlisting friends and relatives to try to communicate with Shelby on his behalf. Shelby continued to refuse to communicate with Kristopher.

N.J.W. was born in late April 2006. When Kristopher found out, he went to the hospital to try and meet his new daughter. Because Shelby had informed the hospital that Kristopher was not allowed to see the baby, he was escorted out of the building by hospital security.

Shelby signed a release of custody to BCS pursuant to Iowa Code section 600A.4 (2005). On May 3, 2006, when N.J.W. was approximately one week old, BCS filed a petition to terminate Kristopher's parental rights, specifically naming Kristopher as the father of N.J.W.² The petition stated that Kristopher had abandoned N.J.W. and that he was "expected to fail to appear" for the termination hearing.

Kristopher promptly filled out a declaration of paternity form. He also asked the court to appoint him counsel. After some delay, his appointed counsel was able to arrange a brief supervised visit on June 29, 2006. Kristopher had to travel from his home in Cedar Rapids to Des Moines to effectuate this visit.

Kristopher came to the visitation with his father's girlfriend for support. Inexplicably, BCS would not allow him to see N.J.W. unless his father's girlfriend left the building. Once she left, Kristopher was able to see N.J.W. for a very brief

²Neither the mother nor BCS have ever contended Kristopher is not the father of N.J.W.

period of time. Kristopher claims he was not even allowed to hold N.J.W., although the BCS representative claimed he never asked to do so. Kristopher wanted to take a picture of N.J.W., but the BCS representative would not allow it.

Kristopher's attorney arranged for a second visitation. Kristopher came to the visitation with a relative. Again, the attorney for BCS would not allow him to see N.J.W. unless his relative left the building. Frustrated, Kristopher left the building without ever seeing N.J.W.

The court held a hearing on the termination petition on September 28, 2006. The majority of evidence presented by BCS consisted of allegations that Kristopher was an inattentive father to his other children. BCS also presented evidence that Kristopher had not provided financial assistance for Shelby or N.J.W. and that he was behind on his child support obligations to his other children. BCS went on to argue it was in N.J.W.'s best interests to terminate his parental rights so that she could stay in the loving and financially secure pre-adoptive home. The court-appointed guardian ad litem also filed a report with the court concluding it was in N.J.W.'s best interests to terminate Kristopher's parental rights.

Kristopher presented evidence supporting his assertion that he had not abandoned N.J.W. He testified that he was willing to provide financial assistance to Shelby, but had not done so because she had refused to communicate with him and, in turn, had not asked for any support. He also stated that he was making child support payments for his other children, though he had not yet paid off the delinquency. Kristopher also asked the court to enter an order placing N.J.W. in his custody.

The court entered an order denying the termination petition.³ The court noted that Shelby had engaged in a pattern of denying Kristopher information during the later months of the pregnancy. Then, “[a]fter the birth of the child, the child was secreted away by [BCS] and [Shelby,] thereby securing the father’s inability to have contact with the minor child.” The court found BCS could not use this lack of contact as a “hammer” to terminate Kristopher’s parental rights. While the court concluded Kristopher had not abandoned the child, it specifically refused to rule on the issues of custody, visitation, and support.

On appeal, BCS claims the district court should have terminated Kristopher’s parental rights pursuant to Iowa Code section 600A.8(3)(a) (2005). BCS contends the court erred in (1) failing to consider the credibility of the witnesses, (2) failing to give due consideration to the evidence in the record, (3) failing to give due consideration to the guardian ad litem’s report, (4) stating facts inconsistent with the record, (5) impliedly putting the burden of proof on BCS, and (6) misconstruing its role in deciding the level of economic support a father must pay in order to avoid abandonment. Kristopher contends the court was correct in finding there was clear and convincing evidence to prove he did not abandon his child.⁴

³ BCS filed a motion to reconsider, arguing the court had applied the wrong legal standard under Iowa Code section 600A.8 (2005). The court vacated its prior ruling, noting it had applied the wrong legal standard when it assigned BCS the burden to prove that Kris intended to abandon N.J.W. In its new ruling, the court cited Iowa Code section 600A.8 and denied the petition for termination for the reasons mentioned above.

⁴ Kristopher does not raise a constitutional argument that the mere filing of a petition to terminate his parental rights should not create a statutory presumption that he abandoned his child. Accordingly, we will not address this argument on appeal.

II. Standard 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). We, like the district court, must base our factual findings on clear and convincing proof. 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 in termination proceedings is the best interests of the child. Iowa Code § 600A.1.

III. Discussion

Throughout these proceedings, the thrust of BCS's argument has centered on Kristopher's alleged inattentiveness to the needs of his other children. BCS has repeatedly argued that it has no burden to prove Kristopher abandoned N.J.W. Rather, BCS has contended that statutory abandonment is presumed unless Kristopher can prove by clear and convincing evidence that he did not abandon the child. The basis for this argument is contained in the following portion of Iowa Code section 600A.8:

The juvenile court shall base its findings and order [for termination] on clear and convincing proof. The following shall be, either separately or jointly, grounds for ordering termination of parental rights:

. . . .

3. The parent has abandoned the child. For the purposes of this subsection, a parent is deemed to have abandoned a child as follows:

a. (1) If the child is less than six months of age when the termination hearing is held, *a parent is deemed to have abandoned the child unless the parent does all of the following:*

(a) Demonstrates a willingness to assume custody of the child rather than merely objecting to the termination of parental rights.

(b) Takes prompt action to establish a parental relationship with the child.

(c) Demonstrates, through actions, a commitment to the child.

(2) In determining whether the requirements of this paragraph are met, the court *may* consider all of the following:

(a) The fitness and ability of the parent in personally assuming custody of the child, including a personal and financial commitment which is timely demonstrated.

(b) Whether efforts made by the parent in personally assuming custody of the child are substantial enough to evince a settled purpose to personally assume all parental duties.

(c) With regard to a putative father, whether the putative father publicly acknowledged paternity or held himself out to be the father of the child during the six continuing months immediately prior to the termination proceeding.

(d) With regard to a putative father, whether the putative father paid a fair and reasonable sum, in accordance with the putative father's means, for medical, hospital, and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child, or whether the putative father demonstrated emotional support as evidenced by the putative father's conduct toward the mother.

(e) Any measures taken by the parent to establish legal responsibility for the child.

(f) Any other factors evincing a commitment to the child.

(Emphasis added.)

The district court accepted this interpretation of section 600A.8 and did not assign BCS the burden of proving abandonment. However, the court ultimately found Kristopher had proved he did not abandon N.J.W. On appeal, BCS argues that the six additional factors, set forth in sections 600A.8(3)(a)(2)(a)-(f), require

this court to find Kristopher did not meet his burden to prove, by clear and convincing evidence, that he did not abandon his child.

We disagree. The most important subsections of this statute are the three requirements set forth to rebut the “deemed” abandonment: whether the putative father (1) demonstrated a willingness to assume custody of the child rather than merely objecting to the termination of his parental rights, (2) took prompt action to establish a parental relationship with the child, and (3) demonstrated, through actions, a commitment to the child. See Iowa Code §§ 600A.8(3)(a)(1)(a)-(c). The six factors contained in section 600A.8(3)(a)(2) are merely additional factors the court “may” consider “when determining whether the requirements of this paragraph are met.”

The word “may” generally confers a power, while the word “shall” imposes a duty. See *id.* §§ 4.1(30)(a), (c). While the word “may” can be interpreted to mean “shall” where the context evidences such an intent, *State v. Klawonn*, 609 N.W.2d 515, 521 (Iowa 2000), we find the context of this statute does not suggest that the juvenile court “shall” use these six factors in all contexts. Instead, the statute clearly sets forth three necessary requirements to rebut the “deemed” abandonment and provides these six factors as optional considerations. If the three requirements are conclusively met, there is no need to venture into the six additional considerations. Accordingly, our analysis will first focus on whether Kristopher: (1) demonstrated a willingness to assume custody of the child rather than merely objecting to the termination of his parental rights, (2) took prompt action to establish a parental relationship with the child,

and (3) demonstrated, through actions, a commitment to the child. See Iowa Code §§ 600A.8(3)(a)(1)(a)-(c).

Willingness to Assume Custody of the Child. Before N.J.W. was born, Shelby expressed fear that Kristopher would try to steal or take N.J.W. She testified that she put N.J.W. up for adoption so Kristopher would not have access to N.J.W. Similarly, Kristopher's posture throughout this proceeding has not been a mere objection to the termination of his parental rights. He manifested a willingness to assume custody by specifically asking the termination court to enter an order granting him custody. The record clearly demonstrates Kristopher wants to assume custody of N.J.W.

Prompt Action to Establish a Parental Relationship with the Child. Despite Kristopher's efforts, Shelby successfully kept Kristopher from meeting his daughter for more than two months, at one point using hospital security to keep him from seeing his newborn child. She then quickly signed away custody and turned the child over to BCS. Kristopher was only allowed a very brief and very limited chance to meet his daughter through the help of his attorney. In light of the extreme measures Shelby took to prevent Kristopher from establishing a relationship with this child, it would be absurd to conclude that he should have tried harder to attempt to establish the relationship. We find the record establishes that Kristopher took prompt action to establish a parental relationship.

Demonstrated a Commitment to the Child. We also find the record establishes that Kristopher demonstrated a commitment to this child. He publicly held himself out to be the father of the child. He prepared his home for the baby,

procuring a crib, car seat, high-chair, walker, diapers, bottles, receiving blankets, and toys. He also made arrangements so the baby would have child care while he was at work. Shelby's consistent pattern of refusing to communicate with Kristopher and her actions to keep him from meeting N.J.W. do not excuse his obligation to make financial contributions towards N.J.W.'s care. However, in light of her actions, we will not find abandonment based solely on his lack of financial contributions.

The record indicates that Kristopher has demonstrated a commitment to N.J.W. and a willingness to assume custody. He has also made sufficient attempts to establish a parental relationship with her. Because these three factors clearly demonstrate that he did not abandon this child, we need not address the six additional factors that a court may consider when ruling on abandonment. There is no statutory basis for abandonment here.

IV. Conclusion

Because, after a de novo review of the record, we find there was not clear and convincing evidence of abandonment, we need not address the remaining issues raised on appeal.⁵ We affirm the district court decision denying the petition to terminate Kristopher's parental rights.

AFFIRMED.

⁵ Parental rights may not be terminated solely on consideration of the child's best interests. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554-55, 54 L. Ed. 2d 511, 520 (1978); *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1992). Statutory grounds for termination must be established along with the child's best interests to terminate. *In re L.H.*, 480 N.W.2d 43, 47 (Iowa 1992). Consequently, we need not address BCS's arguments for termination pertaining to the best interests of the child. Our de novo review also resolves any question as to whether the district court should or should not have placed more emphasis on the evidence more favorable to BCS.