

IN THE COURT OF APPEALS OF IOWA

No. 8-033 / 07-1169

Filed April 9, 2008

**IN THE INTEREST OF A.M.B.,
Minor Child,**

C.P., Custodian,
Petitioner,

H.R.R., JR., Father,
Appellant,

K.B., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,
Judge.

A mother and father appeal from the order terminating their parental rights
to a daughter. **AFFIRMED.**

Jeffery Wright of Carr & Wright, P.L.C, Des Moines, for appellant father.

Cathleen Siebrecht of Siebrecht Law Firm, Des Moines, for appellant
mother.

Jeffrey Mains of Mains Law Office, P.L.C., Des Moines and Barbara
Davis, West Des Moines, for appellee intervenor.

Robert Box, Ankeny, for minor child.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

In this appeal, parents Kristina and Harvey each claim the district court improperly terminated their parental rights to their daughter, Alivia, who was born in 2006. Because we agree with the district court that Kristina did not timely nor with good cause revoke her voluntary release of custody, we affirm the termination of her parental rights. We also agree the record establishes Harvey abandoned Alivia and therefore affirm the termination of Harvey's parental rights.

Background Facts and Proceedings.

Kristina, who was twenty years old at the time of these proceedings, is the mother of three other children.¹ She and Harvey were not married, nor were they living together, when she became pregnant again in March 2006. According to Kristina, Harvey was "excited and happy" when he learned of the pregnancy. He gave her a small amount of cash so she could get to her prenatal medical appointments. However, there were problems with Harvey, as he was a convicted sex offender and was not to be in Kristina's apartment or near her children. With a new baby on the way, Kristina told her in-home caseworker, Cindy Love, that she was going to "give the baby up for adoption." Although other options were discussed, Kristina was firm in her decision.

In August of that year, while the two children were the subject of children in need of assistance (CINA) proceedings, Kristina was evicted from her apartment and became homeless. The children were placed in foster care. In

¹ The oldest child lives in Arizona with her father, as Kristina was only fourteen years old when she was born.

October, Kristina moved to Des Moines, and Harvey provided no further financial or emotional support.

With adoption as Kristina's goal for the new baby, her caseworker searched for and finally located prospective adoptive parents, Levi and Amanda. Kristina met with the prospective parents several times and spoke with them frequently, developing a positive relationship. The prospective parents attended prenatal doctors' appointments with Kristina, and paid some of her bills. Kristina found the prospective parents to be "wonderful people" and indicated her intentions for them to adopt her child.

On December 6, prior to the birth of the baby, Charles Pritchard, the baby's proposed custodian, contacted Harvey as having possibly fathered the child. Harvey told Pritchard that he did not want to have his parental rights terminated. Five days later, on Monday, December 11, 2006, after an emergency cesarean section, Alivia was born. Because Kristina was not represented by counsel, Pritchard arranged for Jay Helton to serve as her attorney. Later that day, Helton met with Kristina and reviewed her willingness to terminate her parental rights to the baby. She then signed a petition Helton had prepared for termination of parental rights under chapter 600A. On December 13, Pritchard, having been appointed Alivia's custodian, again contacted Harvey, who reaffirmed he did not want his parental rights terminated. Pritchard then advised Harvey to seek legal counsel and on the same day, Harvey was served with the petition to terminate.

On Thursday, December 14, 2006, Helton again met with Kristina around 8:00 a.m. At approximately 9:40 a.m., after explaining to her that he was

presenting her with a document to release parental rights and that if she changed her mind she needed to do so within ninety-six hours, Kristina signed it and initialed each of ten separate paragraphs within the document. There was also a brief mention that the termination would not be final until an anticipated court hearing on January 11, 2007. Also present during the execution of the document were Pritchard and Joyce DeGroot, the hospital social worker. DeGroot had met with Kristina prior to this time and discussed Kristina's plans to have the baby adopted by the family she had selected.

Within a couple of days, Kristina began having second thoughts about her release of custody. However, she did not attempt to contact Helton until Monday, December 18 and, unsuccessful in her attempts, left three phone messages. She eventually spoke to Helton late that afternoon and told him she felt very conflicted about her decision. She did not, however, tell him she wanted to revoke her release of custody. Helton advised her that the ninety-six hour revocation period had already expired and advised her to think it over before making a final decision. On Thursday December 21, Kristina contacted Helton and advised him she wished to revoke her release.

On Friday, December 22, 2006, Kristina filed a motion to revoke her release of custody. Pritchard, as Alivia's custodian, responded by filing a counterclaim in which he sought termination of Kristina's and Harvey's parental rights. Following a hearing on April 24, 2007, the court granted the custodian's request to terminate both Harvey's and Kristina's parental rights. It concluded Kristina had not revoked her release of custody during the ninety-six hour time period, had not shown good cause for the late attempted revocation, and that

Harvey had abandoned the child. Both Kristina and Harvey appeal from this ruling.

Scope of Review.

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

Revocation of Kristina's Release.

If a parent revokes his or her release of custody within ninety-six hours of the time it was signed, the Iowa Code provides that the court *shall* order the release revoked. Iowa Code § 600A.4(4). However, if the parent attempts to revoke the release after ninety-six hours, the juvenile court may

order the release or releases revoked only upon clear and convincing evidence that good cause exists for revocation. Good cause for revocation includes but is not limited to a showing that the release was obtained by fraud, coercion, or misrepresentation of law or fact which was material to its execution. In determining whether good cause exists for revocation, the juvenile court shall give paramount consideration to the best interests of the child including avoidance of a disruption of an existing relationship between a parent and child.

Id.

On appeal Kristina first claims the court erred in failing to find that she revoked her release of custody within ninety-six hours. We first note that, while

Kristina testified she was understandably still in some pain when she signed the release, she was not on any medication other than an over-the-counter pain reliever. By her own admission, Kristina signed the revocation around 9:00 or 9:30 a.m. on Thursday, December 14, 2006. She also admitted she did not tell her attorney that she wanted to revoke her release until December 21, seven days later and well beyond the ninety-six hour timeframe. The motion to revoke was then prepared and filed by Helton on December 22. The district court was correct in finding Kristina did not revoke her release of custody within the statutory time frame.

In the alternative, Kristina claims good cause existed for her to revoke the release of custody after ninety-six hours. She contends that any fault for failing to timely file the revocation lies with her attorney, that she felt pressured to agree to adoption by her in-home worker, and that she generally felt duress during the pregnancy. However, Love's testimony was that Kristina was consistent throughout her pregnancy that she wanted the prospective parents to adopt her baby. Pritchard, Helton and DeGroote all testified Kristina was resolute in her decision, not showing any signs of confusion or ambivalence. Love, who had the longest relationship with Kristina, testified in detail that releasing custody of the baby for adoption was Kristina's decision, with no coercion or pressure from her or anyone else. We also note that Love was not present in the room when Kristina signed the release of custody or the petition to terminate her parental rights. The district court made quite explicit adverse credibility findings regarding Kristina's claims, noting her "version of events . . . have no credibility." We give weight to this finding. Iowa R. App. P. 6.14(6)(g). In addition, the court made the

following findings, which we find are supported in the record, and which we adopt as our own.

The fact is that Kristina's revocation is not the result of any fraud, misrepresentation or coercion, but rather is the result of her changing her mind. After much testimony and cross-examination, Kristina finally admitted that she simply changed her mind. She has failed to produce any evidence, let alone clear and convincing evidence, of good cause for revocation of the release.

The testimony of Kristina's attorney indicates he accurately and fully informed her of the legal implications of the release prior to her signing as well as informing her of the requirements for a revocation of the release. On cross examination, Kristina finally admitted that she simply changed her mind. As such, we concur in the determination good cause did not exist on this record to allow Kristina to withdraw her release of custody.

We next address Kristina's claim the court erred in failing to dismiss the petition to terminate her parental rights when she filed her motion to revoke her release of custody. While simply captioned "Motion to Revoke Release of Custody," she also requested within that motion a dismissal of the termination petition. She argues that had she filed a separate document, captioned as "dismissal," the termination would have been dismissed. Iowa R. Civ. P. 1.943. Therefore she claims the court should have acknowledged the request by dismissing the termination, prior to the custodian's answer and counterclaim. While the court could have dismissed the petition for termination of parental rights, we find no grounds for reversal. The custodian's counterclaim, which requested termination of parental rights under the appropriate statutory framework, could have been filed separately had the petition been dismissed.

See Iowa Code § 600A.5(1)(b) (providing that a child's custodian may file a petition for termination of parental rights).

Finally, Kristina asserts termination of her parental rights was not in Alivia's best interests. We disagree. Kristina's behavior and immaturity evinces a pattern of lack of parenting insight and inability to protect her children from potentially dangerous men. She repeatedly left her older children in the care of Harvey, who is a registered sex offender after having been convicted of sexually abusing his thirteen-year old stepdaughter on multiple occasions. Also, Kristina used both methamphetamine and alcohol while pregnant with Alivia. Although required at the House of Mercy to participate in drug and alcohol group therapy, she diminished the applicability of such to herself. She has not been able to safely parent any of her three older children, which does not bode well for placing Alivia in her care. See *In re J.E.*, 723 N.W.2d 793, 802 (Iowa 2006) (Cady, J., concurring specially) (stating children's safety and their need for a permanent home are the defining elements in a child's best interests). We affirm the termination of Kristina's parental rights.

Harvey's Abandonment.

Under the authority of Iowa Code section 600A.5, Alivia's custodian petitioned to terminate Harvey's rights to the child following the statutory scheme located in section 600A.8.² Under that section, a court may terminate a parent's

² This statutory scheme for terminations based on abandonment in chapter 600A is far more expansive than that provided for in section 232.116, which allows the court to terminate simply when it finds "that there is clear and convincing evidence that the child has been abandoned or deserted."

rights if the parent has abandoned the child. For purposes of this section, a parent is deemed to have abandoned a child as follows:

(3)(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.

Iowa Code § 600A.8 (emphasis added).

Harvey now maintains the court erred in ruling he abandoned Alivia as it “improperly considered evidence relating to the best interests of the child without a showing of abandonment as alleged in the petition” We conclude the court did not err in its analysis, and believe Harvey’s argument ignores the clear language of section 600A.8(3)(a)(2)(a), which provides that he must demonstrate his willingness to assume custody of Alivia rather than “merely objecting” to the termination of his parental rights. This is because the child’s best interests are the “paramount consideration” in all proceedings under chapter 600A. *Id.* § 600A.1. Accordingly, it would be impossible, and in fact counter to the statute, for a court not to include consideration of the best interests when determining the appropriateness of termination. It is clear the best interests of the child are to be considered under the statute as part and parcel of the abandonment analysis.

Harvey also claims that the steps he took preclude a finding of abandonment. However, total desertion is not required to show abandonment. *In re Goettsche*, 311 N.W.2d 104, 106 (Iowa 1981). Moreover, the statute’s

broad language clearly anticipates the court will consider a variety of factors in analyzing whether a parent has abandoned a 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.

Id. § 600A.8 (3)(a)(2).

Therefore, as did the district court, on our *de novo* review of the record we examine all the circumstances in light of the considerations provided in the statute. The first requirement under 600A.8(3)(a)(1) is whether the parent has demonstrated a "willingness to assume custody of the child." We read that in context with the parent's "fitness and ability . . . including a personal and financial commitment which is timely demonstrated." Iowa Code § 600A.8(3)(a)(2). At trial, Harvey claimed he could provide for Alivia's needs and described his living conditions. The district court, however, after making very specific factual and credibility findings, described Harvey's living conditions as "deplorable." Harvey

also testified to his engagement to another woman, yet he had difficulty recalling her name. In addition, Harvey has a considerable criminal record and is a registered sex offender. He was convicted after having sex on multiple occasions with his thirteen-year old step-daughter and served ten years of a twenty-year sentence for the crime. When asked if he completed sex abuse treatment when offered the same while in prison, he answered that “it just didn’t happen.” He also has a felony conviction for burglary and has admitted to having five convictions for operating while intoxicated. He readily admitted to driving when he has a car available, but has no driver’s license. Harvey also has two older children, but has little if any relationship with them and has also failed in providing for those children. Again, the district court found that “little credibility should be given to [Harvey’s] testimony.” We agree Harvey failed to demonstrate a willingness coupled with the ability to assume custody of Alivia.

We next consider whether Harvey took “prompt action to establish a parental relationship” with Alivia. *Id.* § 600A.8(3)(a)(1)(b). Again, this subsection is to be considered in conjunction with the more defined levels of commitment found in subsection (2), including whether Harvey’s efforts were “substantial enough to personally assume all parental duties.” *Id.* § 600A.8(3)(a)(2)(b). In spite of being informed on December 13 that he should seek legal counsel, Harvey did not file an application for court-appointed counsel until December 29. Then, on February 8, 2007, to his credit, Harvey filed an application for visitation, which was granted on March 26. However, because visitation was to be supervised, it was not until April 23, the day before the termination hearing began, that Harvey participated in a one-hour visitation with Alivia, done at his

own expense. While Harvey did pay for the supervised visit, he then failed to appear in court until the second day of the termination hearing. Moreover, Harvey took no effort to actually establish his paternity until the final day of trial, well over four months after Alivia's birth. At that time he signed an affidavit of paternity and underwent genetic testing pursuant to the court's order. *See id.* § 600A.8(3)(a)(2)(e) (allowing the court to consider "[a]ny measures taken by the parent to establish his legal responsibility for the child."). Although Harvey made some minimal effort, we agree with the district court, considering all the circumstances, that Harvey did not take prompt action to establish a parental relationship with Alivia.

Finally, we look at whether Harvey demonstrated, "through actions, a commitment" to Alivia in light of the many considerations under sections 600A.8(3)(a)(2)(a) through (f). In doing so, we re-emphasize many facts previously mentioned, such as his delayed efforts to secure legal counsel and his failure to sign an affidavit of paternity and undergo genetic testing until the final day of trial. In addition to the negligible responsibility Harvey demonstrated towards Alivia, we consider the paltry financial and emotional support he gave to Kristina during her pregnancy. *See id.* § 600A.8(3)(a)(2)(d) (emotional and financial support provided by a putative father) and (3)(c) ("In making a determination regarding a putative father, the court may consider the conduct of the putative father toward the child's mother during the pregnancy."). Harvey did not even begin to fulfill his financial obligations to Kristina before Alivia was born, as required under 600A.8(3)(a)(2)(d). From May until October 2006, Harvey only gave Kristina approximately \$200, despite Kristina's pregnancy and grim financial

situation. When Kristina moved to Des Moines in October 2006, two months prior to Alivia's birth, Harvey made no meaningful effort to contact Kristina despite the fact he had her cell phone number. He claims she refused to answer his calls; however, he also testified that he was simply comfortable assuming Kristina was somewhere in Des Moines. He did not support her in any fashion during this time. After Alivia's birth he contributed nothing to her financially or emotionally as required under 600A.8(3)(a)(2)(a). When explaining why he had contributed nothing, Harvey claimed, "I figured if the baby needed anything, [Alivia's custodian] would get ahold of me"

In determining Harvey abandoned Alivia as contemplated in Iowa Code section 600A.8(3), the district court summed up its factual findings as follows:

[Harvey] provided no financial support for Alivia since her birth, and no emotional support for the child or her mother. He responds to criticisms of his inaction by stating that no one asked him for support, and he believed Alivia was receiving everything she needed. His passivity for the past six months demonstrates completely his unacceptability as a custodian for the child and his abandonment of the child.

Because of the many factors set forth for the court's consideration under section 600A.8(3), we agree with the district court's factual findings and legal conclusions and affirm the termination of Harvey's and Kristina's parental rights.

AFFIRMED.