

**IN THE COURT OF APPEALS OF IOWA**

No. 8-125 / 07-1049

Filed May 14, 2008

**IN THE INTEREST OF D.A.,  
Minor Child,**

**J.M.A. and J.A.A.,**  
Petitioners-Appellants,

**A.V. and any Putative  
Biological Father,**  
Respondents-Appellees.

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Appeal from the Iowa District Court for Muscatine County, Mary Howes,  
Judge.

A child's legal guardians appeal from the district court's ruling that failed to  
terminate the parental rights of a putative father to the child. **AFFIRMED.**

Thomas Reidel, Muscatine, for appellants.

Jennifer Olsen, Davenport, for appellee father.

Mark Neary, Muscatine, for minor child.

Heard by Vogel, P.J., and Zimmer and Baker, JJ.

**ZIMMER, J.**

Jenny and Jeff, the appointed legal guardians of Daniel, appeal from the district court's ruling that failed to terminate the parental rights of a putative father, Johnny. The guardians contend Johnny's parental rights to Daniel should have been terminated because they established by clear and convincing evidence Johnny abandoned his son. We affirm the decision of the district court.

***I. Background Facts and Proceedings.***

Ashley is the mother of Daniel. Daniel was born October 20, 2004, at a hospital in Davenport, Iowa. Before Ashley gave birth, she told Jenny and Jenny's husband, Jeff, that she wanted them to adopt her child.<sup>1</sup> Jenny was present at the hospital when Daniel was born. On October 22 Jenny and Jeff brought Daniel home from the hospital with Ashley's oral consent.<sup>2</sup> The child was given Jenny and Jeff's last name. Ashley did not identify a father on her son's birth certificate. Ashley told Jenny and Jeff that she was not sure who Daniel's father was, but it was possible a man named "Johnny" was the father. Jeff and Jenny did not make any further inquiry about the father, and they did not establish a legal relationship between the child and themselves.

The record reveals that Ashley knew much more about Johnny than she disclosed at the hospital. Ashley and Johnny met during the early part of January 2004, or perhaps a little sooner. They were both living in Davenport at the time. Ashley and Johnny began having sex soon after they met. They often

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<sup>1</sup> Jenny was previously the manager of the teenage pregnancy service nursery at Ashley's high school. Jenny worked with mothers who knew Ashley and knew that she wanted to give her child up for adoption. Ashley met Jenny and Jeff in May 2004, when she was four months pregnant, and they began to discuss adoption at that time.

<sup>2</sup> Ashley did not execute a release of custody after the baby was born.

got together at the home of Ashley's mother. Ashley became pregnant and informed Johnny of her condition. She told Johnny that if the baby was biracial, then he was the father. Johnny is African-American and Ashley is Caucasian. Ashley also told Johnny that she intended to give the baby up for adoption if it was not his child.

When Ashley went to the hospital to give birth, she called Johnny to inform him the baby was about to be born. Ashley gave birth to a biracial child, and Johnny attempted to see the baby at the hospital on two occasions. He was unsuccessful both times. On one occasion, Ashley was upset and insisted Johnny leave. On the other occasion, Johnny could not see Daniel because the child was being circumcised. While she was still at the hospital, Ashley told Jenny and Jeff that she had to change rooms because Johnny had come to see the baby and was harassing her. Ashley did not tell Johnny that Jenny and Jeff would be taking Daniel home, and she did not tell Johnny that Daniel had been given the couple's last name.

Approximately two weeks after Daniel was born, Ashley began to have second thoughts about her decision to give up Daniel. On November 2, 2004, she went to Jenny and Jeff's home and left with her son. At that time, Ashley again informed Jenny and Jeff that Johnny had been harassing her. Because Jeff and Jenny had not signed any pre-adoption paperwork, they could not stop Ashley from removing Daniel from their home.

After Ashley took Daniel back, she placed him in Johnny's care. Daniel lived with Johnny at his home in Davenport for approximately six weeks. During this time, Johnny bought baby clothes and supplies for Daniel. On December 17

Ashley called Jenny and told her she wanted to return the baby to the care of Jenny and her husband. Jenny went to Ashley's place of residence in Davenport and listened as Ashley called Johnny and demanded that he return Daniel to her. Johnny called the police but was informed there was nothing the police could do to make Ashley leave the child with him. Johnny then returned Daniel to his mother. When Johnny asked Ashley to provide him with Daniel's social security number, Ashley gave Johnny a fake number.

Ashley returned Daniel to Jenny and Jeff's care. Once again, this was done without Johnny's knowledge. When Johnny asked Ashley where Daniel was, she did not disclose his whereabouts; instead, she told Johnny, "He is somewhere better."

After Ashley returned Daniel to Jenny and Jeff's care, the couple applied to become the temporary guardians for Daniel. They were appointed as such on January 14, 2005. On March 7, 2005, Ashley signed an affidavit, which was filed in the guardianship proceedings in support of an application to publish notice. In her affidavit, Ashley claimed she did not know who Daniel's father was and did not know his whereabouts. The record makes clear that neither of her assertions was true. Based on Ashley's affidavit, notice of the proposed guardianship was provided to the putative fathers of Ashley's child by publication in the Muscatine Journal, the local paper in Muscatine, Iowa. When publication occurred, Johnny was living in Davenport, where the local paper is the Quad City Times. In addition, the notice was published using Jenny and Jeff's last name for the baby rather than Ashley's. On August 3, 2005, Jenny and Jeff were appointed as permanent guardians of Daniel. Johnny was unaware that a guardianship had

been established for Daniel. Jeff and Jenny have provided all financial support for Daniel since he was returned to their care.<sup>3</sup>

On November 13, 2006, Jeff and Jenny filed a petition to terminate the parental rights of Ashley and any putative biological fathers under Iowa Code sections 600A.8(3) (2003) (abandonment), 600A.8(4)(b) (abandonment by putative father), 600A.8(5) (failure to contribute to support of the child or financially aid the child's birth).<sup>4</sup> A verified application to publish notice was filed on November 13, 2006, and an amended verified application for authority to publish notice was filed on December 8, 2006. The amended application stated the guardians were uncertain about the whereabouts of the mother and had no independent information related to the potential biological father of the minor child. The affidavit previously given by Ashley on March 7, 2005, was attached to the application. A notice of termination was published in the Muscatine Journal. Johnny was not personally served, and he did not see published notice because he resided in Davenport.

As we will discuss in more detail later in this opinion, Johnny repeatedly attempted to locate Daniel after Ashley removed the child from his home in December of 2004, but was unsuccessful for some time. Johnny eventually learned about the guardianship action for Daniel through Iowa Courts Online. In January 2007 Johnny was able to locate a phone number for Jenny and Jeff. Johnny called Jenny and Jeff the same day he learned their number. Johnny

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<sup>3</sup> By all reports, Jeff and Jenny are excellent parents.

<sup>4</sup> These code provisions were renumbered in the 2005 Iowa Code, which the district court applies in its termination ruling.

told Jenny he was Daniel's father and sought a meeting with the child. Jenny told Johnny to contact their attorney.

On February 8 Johnny personally appeared at the hearing, which had been previously scheduled to determine whether or not his parental rights should be terminated. He informed the court he was Daniel's biological father<sup>5</sup> and requested a continuance of the termination proceedings so he could hire an attorney. The court granted his request. A week later, Johnny applied for court-appointed counsel, and on February 22 the court appointed an attorney to represent him.

The termination hearing was held April 23, 2007. On May 3, 2007, a ruling was entered granting the guardian's petition to terminate Ashley's parental rights, and the parental rights of all putative fathers except for Johnny. The district court refused to terminate Johnny's parental rights because it concluded Jenny and Jeff had failed to establish by clear and convincing evidence that Johnny had abandoned the child. Subsequently, Jenny and Jeff filed a motion to amend or enlarge findings, which the court denied.

Jenny and Jeff have appealed. They contend the district court should have terminated Johnny's parental rights. Ashley has not appealed from the court's decision to terminate her parental rights to Daniel.

## ***II. Scope and Standards of Review.***

We review private termination proceedings de novo. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998). The grounds to terminate parental rights under

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<sup>5</sup> At the time of the termination hearing, a paternity test had not been completed to confirm Johnny is Daniel's biological father.

Iowa Code chapter 600A must be proved by clear and convincing evidence. Iowa Code § 600A.8. Although we are not bound by them, we give weight to the district court's findings of fact and determinations of the credibility of witnesses. Iowa R. App. P. 6.14(6)(g); *R.K.B.*, 572 N.W.2d at 601.

### ***III. Discussion.***

On appeal, Jenny and Jeff contend they proved by clear and convincing evidence that Johnny abandoned Daniel. They argue that Johnny's testimony was not credible and suggest the district court should have given more weight to the reports of Daniel's guardian ad litem. Upon our de novo review of the record and for the reasons which follow, we find no reason to disagree with the district court's conclusion that Jenny and Jeff did not meet their burden of proof with respect to their claim against Johnny.

After Daniel was born, Johnny went to the hospital to attempt to see the child on two different occasions. Approximately two weeks after Daniel's birth, Ashley placed Daniel in Johnny's care at his residence in Davenport. Daniel remained in Johnny's care for about six weeks. While Daniel was in his care, Johnny provided financial support for the child. Johnny testified that he never planned to live with Ashley, so he bought an additional set of baby supplies so the baby could also reside with him.

When Ashley called Johnny and demanded her son back on December 17, 2004, Johnny told her he did not want to give the child back, and he contacted the police to prevent this from happening.<sup>6</sup> Ultimately, however, he

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<sup>6</sup> A police report confirms that Daniel was at Johnny's house.

returned Daniel to Ashley because the police informed him he could not keep the child from the child's mother.

After Ashley removed Daniel from Johnny's care in December 2004, Johnny took a number of steps to find out where Daniel was living. Johnny's attempts to get information from Ashley were met with lies about the baby's whereabouts and Ashley's plans for the child. Ashley never informed Johnny that Daniel had been placed in Jenny and Jeff's care. The mother also failed to tell Johnny the child was not using either her last name or Johnny's. In addition, she provided an affidavit in March 2005 that was plainly false. We agree with the district court's conclusion that Ashley wanted Johnny out of the picture. Unfortunately, at the same time the mother was lying to Johnny, she was withholding information from Jeff and Jenny about the person she obviously believed to be her son's father.

After Johnny was unsuccessful in securing any accurate information from Ashley, he made additional attempts locate his son. Although Johnny never filed a paternity action in this case, he contacted the police, a father's rights group in Des Moines, and the Iowa Department of Human Services in attempting to locate his son. After being informed that he should contact an attorney, Johnny contacted Legal Aid, but was informed they did not handle this kind of case. Johnny testified that he never hired a lawyer because he said that he did not have the funds and did not know how to go about finding the child. At some point, he also hired someone to follow Ashley.<sup>7</sup>

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<sup>7</sup> The record does not make clear exactly when all of these events occurred.



In January 2007 Johnny learned about Iowa Courts Online. With the help of his probation officer, he was able to learn about the guardianship action for Daniel by utilizing this resource. He obtained a phone number for Jenny and Jeff. Johnny spoke with Jenny and requested a visit with his son. Jenny told Johnny that he needed to contact her attorney. Johnny appeared at the termination hearing on February 8, 2007. Subsequent to that hearing, Johnny applied for and was granted a court-appointed attorney. He has appeared at all hearings he had notice for concerning Daniel since that time.

Our supreme court addressed the issue of abandonment in *In re Goettsche*, 311 N.W.2d 104, 106 (Iowa 1981). The court held that although total desertion is not necessary to establish abandonment, it does require clear and convincing evidence of giving up of parental rights and responsibilities accompanied by an intent to forego them. Between Daniel's birth in October 2004 and January 2007 when Johnny located Daniel, there were gaps of time during which Johnny did not actively search for the child. However, the overall record does not support the conclusion that Johnny ever intended to give up his parental rights and responsibilities. Instead, the record demonstrates that Johnny intended to find his son, rather than abandon him.

We agree with the district court's conclusion that Johnny did not know where Daniel was until January 2007 primarily because Ashley weaved a web of lies with Johnny and Jeff and Jenny. Although Jenny and Jeff published notice for all known and unknown fathers in July 2005 when they filed for guardianship of Daniel, and in December 2006 when they filed for termination of parental rights, they published the notification in Muscatine. Johnny, however, did not see

the notice because he resided in Davenport, and was never personally served with notice of either action.<sup>8</sup> As the district court noted, it is very unfortunate for all parties involved that Ashley did not supply the last name of Johnny so that personal service could be made on him.

Unlike cases such as *In re D.M.*, 516 N.W.2d 888, 891 (Iowa 1994), where minimum contact, including extended periods of time without knowing where a parent is, has been deemed to constitute abandonment, this case involves the situation where the putative father does not know the whereabouts of the child in large part because the child's mother withheld the baby's location from him. We agree with the district court that "Johnny could have taken more educated and more aggressive steps to locate the baby." However, we also agree with the district court that the guardians could have looked much harder for Johnny. As the court noted, Jenny and Jeff knew there was a putative father named Johnny who came to the hospital and later cared for Daniel in his home while the child was a baby. In December 2004 Jenny was present in Ashley's home in Davenport and heard Ashley tell Johnny to return the child to her. The record supports the district court's conclusion that Jeff and Jenny had a reasonable basis to believe Daniel's mother was lying when she said she didn't know who the father was or where he could be located. Nevertheless, the record on appeal indicates they did little, if anything, to locate Johnny.

The guardians also argue that Johnny abandoned his son because he did not provide financial support for Daniel after locating him in early January. The

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<sup>8</sup> Johnny also believed Daniel had either his or Ashley's last name, and was unaware the child's last name, as provided on the birth certificate, was Jenny and Jeff's last name.

district court concluded that “[t]he four-month window between January 2007 and the April 2007 termination hearing is not long enough to say that in discovering the baby, Johnny didn’t actively pay support or visit the baby when he was fighting the termination in court.” We agree with the district court’s conclusion.

Jenny and Jeff contend that Johnny’s testimony was not credible in many respects. The record reveals the district court gave careful attention to all the testimony and exhibits in this case. The court acknowledged that Johnny has a criminal background and has had trouble telling the truth on some occasions. However, after considering and weighing all the evidence presented, the court concluded the guardians had not met their burden of proving Johnny abandoned Daniel by clear and convincing evidence. We agree with the district court’s ultimate conclusion. The evidence simply does not support the conclusion that Johnny intended to abandon his child. Rather, the record reveals that Johnny continued to search for the child until he found him.

Jeff and Jenny also suggest the court should have given the guardian ad litem’s (GAL) recommendation more weight. The record reveals the court considered the GAL’s report, but did not agree with the GAL’s ultimate recommendation. The district court is not required to follow the GAL’s recommendation. See *in re J.V.*, 464 N.W.2d 887, 893 (Iowa Ct. App. 1990). We reject this assignment of error.

As the district court also pointed out and the parties concede, because the statutory grounds for termination were not met in this case, the court does not reach the analysis of whether termination is in the child’s best interests. *In re J.L.W.*, 523 N.W.2d 622, 625 (Iowa Ct. App. 1994).

***IV. Conclusion.***

We conclude Jenny and Jeff did not prove by clear and convincing evidence that Johnny abandoned Daniel. Because the grounds for termination have not been met, we affirm the district court's ruling.

**AFFIRMED.**

Baker, J., concurs; Vogel, P.J., concurs in part and dissents in part.

**VOGEL, P.J.** (concurring in part and dissenting in part)

I dissent in part, and would reverse the district court's denial of the request to terminate Johnny's parental rights. I would find that Daniel's guardians, Jeff and Jenny, proved by clear and convincing evidence that Johnny abandoned Daniel. See *In re Goettsche*, 311 N.W.2d 104, 106 (Iowa 1981) (holding that abandonment requires conduct and intent).

The record demonstrates that after December 2004, Johnny did little to assert his parental rights. At all times, Johnny knew where Ashley lived and where Ashley's family lived. He also knew that Daniel was living with a family in Muscatine. He even had Ashley followed to Muscatine in March 2005, in hopes of discovering exactly where Daniel was living. In spite of obtaining good information, he chose not to follow up on this lead until January 2007. When asked why he waited so long to pursue the information, he testified, "I got frustrated, and I was, like, well, at least I've got this information. At least, I can try and start, you know." Nonetheless, he waited one year and nine months, a clear demonstration of his intent to remain absent from his son.

Without providing any dates, Johnny claims to have made phone calls to the police, a father's rights group in Des Moines, the Department of Human Services, and Legal Aid. However, there was little in the record to support his claims. Even the district court, as to other claims, found he "has trouble with the truth."

Johnny's delay resulted in his failure to take the necessary steps to find Daniel and establish a parental relationship. See *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993) (citing *In re D.J.R.*, 454 N.W.2d 838, 841-42 (Iowa 1990)

(abandonment established by failing to pursue relationship to whatever extent allowed by a no-contact order)). He admitted that on multiple occasions he was advised to hire an attorney, but claims he did not have the resources. However, on February 8, 2007, he told the district court that he owned his own business with income of \$2,500 a month and was a full-time college student in his third semester. He stated: "I am willing to pay whatever it takes, but I would rather spend it on Daniel or spend it on something positive instead of spending it on an attorney." He further stated: "Money is not an issue. I would like to reassure you that money is not an issue. My parents are both chiropractors." Subsequently, Johnny applied for a court-appointed attorney and a hearing was held on February 22, 2007. At this hearing, Johnny testified that prior to January 2007, he had operated his business but was paid on the side. He stated that the business legally began in January 2007 because "I needed to get a tax ID number and go the legal route because I was making too much money and needed to pay taxes on it." However, he then claimed that his business had not been that profitable in the last few months, but maintained that his income prior to January 2007 was approximately \$2,500 a month. He also testified to wages earned from two jobs as well other income in 2006 that was "under the table." His position was that if he was required to spend money for an attorney it would be "unnecessary money that I am spending when I have been wronged." Ultimately, Johnny was granted court-appointed counsel despite the district court's suspicion that Johnny was being untruthful about his income. Finally, at the hearing on the petition to terminate parental rights, Johnny testified that between his employment, studio work, and student loans, he has enough income

to support his household. Throughout the district court proceedings, Johnny asserted that he had money and resources, but it appears that he chose not to spend the money on an attorney to timely follow through with his efforts to find his son.

The majority focuses sharply on the fault of the mother and guardians as the reasons why Johnny had no contact with the child for over two years. However, from that perspective, Johnny's half-hearted effort is obscured. See *Goettsche*, 311 N.W.2d at 106 (stating that parenting responsibility demands more than merely maintaining a subjective interest in the child, but requires affirmative parenting to the extent it is practicable and feasible under the circumstances). Over more than a two-year period, the only affirmative action that Johnny took to locate Daniel was to make a few phone calls. Had he not intended to abandon this child, and with the financial resources he claimed to have, he would have worked incessantly and tirelessly to find the child. Instead, he came to the termination hearing with only halfhearted attempts to defend against a claim of abandonment. I would find the guardians proved Johnny not only failed to overtly claim a place in the life of the child, but also, by his lack of sincere efforts, had the requisite intent to abandon this child. Therefore, I respectfully dissent.