

**IN THE COURT OF APPEALS OF IOWA**

No. 8-189 / 07-1569  
Filed June 11, 2008

**IN THE INTEREST OF S.M.M.,  
Minor Child,**

**M.M., Mother,  
Petitioner,**

**C.D., Father,  
Appellant.**

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Appeal from the Iowa District Court for Polk County, Don C. Nickerson,  
Judge.

A father appeals the district court's termination of his parental rights to his  
minor child. **AFFIRMED.**

Jennifer Oetker, Des Moines, for appellant father.

Ryan Genest, Des Moines, for petitioner mother.

Michael Ensley, Des Moines, for minor child.

Heard by Vogel, P.J., Zimmer, J., and Nelson, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**ZIMMER, J.**

A father appeals the district court's termination of his parental rights to his minor child. He contends the court erred in allowing the child's mother to amend her termination petition to include Iowa Code section 600A.8(9) (Supp. 2005) as a basis for termination and in denying his request for a continuance. He also contends the court erred in granting termination pursuant to section 600A.8(9). Finally, he contends that termination was not in the child's best interests. We affirm the decision of the district court.

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

Michele and Carlos are the natural parents of Shelby, born in November 2002. Michele and Carlos have known each other for over twenty years and have engaged in an "on-again, off-again" relationship. They have never been married to each other. Carlos was married to another woman when Shelby was born. Michele has always been the child's primary caregiver. Carlos is currently incarcerated for sexually abusing one of his adopted daughters.

At the time Shelby was born, Carlos was living with his wife and his three adopted children. Michele filed a paternity action after Shelby was born to establish Carlos's rights and responsibilities with respect to the child. On October 31, 2003, the court entered an order granting Carlos midweek and weekend visitation with Shelby. Carlos exercised this visitation schedule for approximately one year until September 2004.

In September 2004 Carlos separated from his wife and moved into his parents' home. Subsequently, he informed Michele that he was being investigated by the Iowa Department of Human Services (Department) for

allegedly sexually abusing one of his adopted daughters. After being made aware of the investigation, Michele proposed changes in Carlos's contact with Shelby. Initially, Michele proposed that visitation occur at her home. Carlos agreed to that, and he had a one-hour visit with Shelby on September 22, 2004. That was the last time Carlos saw Shelby.

On September 27, 2004, Carlos informed Michele he had been arrested and charged with sexual abuse. After his arrest, Carlos agreed that his future visitation would be supervised. The district court subsequently entered an order that granted a temporary suspension of Carlos's visitation with Shelby.

After Carlos's visitation with Shelby was temporarily suspended, Michele continued to allow contact between Shelby and Carlos's parents. Because Carlos was staying with his parents at this time, Michele would call prior to any visits by Shelby so Carlos could leave his parents' residence. From January through June 2005, Michele brought Shelby to visit Carlos's parents for lunch or dinner every two or three weeks.

On June 30, 2005, a jury found Carlos guilty of second-degree and third-degree sexual abuse involving his adopted daughter. On August 9 Carlos was sentenced to twenty-five years for his second-degree sexual abuse conviction, and ten years for his third-degree sexual abuse conviction. The sentences were ordered to be served consecutively, and Carlos was to required to serve at least seventy-percent of the maximum term of his incarceration for his second-degree sexual abuse conviction. Following Carlos's conviction, Michele ceased all contact with his parents.

On October 3, 2005, Michele filed a petition for termination of Carlos's parental rights alleging he had abandoned Shelby pursuant to Iowa Code section 600A.8(3).<sup>1</sup> The petition also requested that a guardian ad litem be appointed for Shelby and for Carlos due to his incarcerated status.

On May 11, 2007, Shelby's guardian ad litem submitted his report to the court. He recommended that Carlos's parental rights be terminated.<sup>2</sup> On May 15, two days before the termination hearing, Michele filed a motion for leave of court to amend her petition to add Iowa Code section 600A.8(9) (Supp. 2005). That section provides that a parent's parental rights may be terminated where:

The parent has been imprisoned for a crime against the child, the child's sibling, or another child in the household, or the parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of five or more years.

On May 16 Carlos filed a resistance to the motion for leave of court to amend pleadings requesting that the court deny Michele's motion or, in the alternative, grant a continuance of the termination hearing.

The court held a contested termination hearing on May 17. At the hearing Carlos's counsel requested a continuance and additional time to research the issue of whether Shelby and Carlos's adopted daughter were "siblings" within the meaning of section 600A.8(9). The court denied Carlos's request for a continuance and granted Michele's amendment to the termination petition. The court then heard testimony and received evidence from both parties.

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<sup>1</sup> Michele also alleged Carlos had failed to pay child support. However, prior to the termination hearing, Michele conceded that Carlos was current on his child support obligation.

<sup>2</sup> Also on May 11, 2007, a district court judge entered an order denying the reinstatement of Carlos's visitation rights with Shelby.

After the termination hearing, the court allowed Carlos to submit a post-trial brief. Carlos's counsel submitted the brief on May 24. On August 23 the court entered its ruling granting Michele's request for termination under Iowa Code section 600A.8(9).

Carlos has appealed.

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

We afford district courts considerable discretion in ruling on motions for leave to amend pleadings. *Davis v. Ottumwa YMCA*, 438 N.W.2d 10, 14 (Iowa 1989). Consequently, we will reverse only if the record indicates the court clearly abused its discretion. *Id.*; *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 179 (Iowa 1987). We will find an abuse of discretion when the court exercises its discretion to a clearly unreasonable extent or upon clearly untenable grounds. *McElroy v. State*, 637 N.W.2d 488, 495 (Iowa 2001); *Davis*, 438 N.W.2d at 14.

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 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.***

### **A. Amended Petition and Continuance.**

On appeal, Carlos asserts the court should not have allowed Michele to amend her petition to include 600A.8(9) as a ground for termination. He also

contends the court erred in not granting Carlos a continuance to provide him with an opportunity to research and defend against the new claim.

Iowa Rule of Civil Procedure 1.402(4) governs the amendment of pleadings. This rule instructs district courts to freely grant leave to amend when required by the interests of justice. Iowa R. Civ. P. 1.402(4); *Davis*, 438 N.W.2d at 14. Our supreme court has found that amendments are the rule and denials are the exception. *Ackerman v. Lauver*, 242 N.W.2d 342, 345 (Iowa 1976). Generally, a party may amend a pleading at any time before a decision is rendered, even after the close of the presentation of the evidence. *Id.* The court should permit the amendment as long as the amendment does not substantially change the issues or defense of the case. *Glenn v. Carlstrom*, 556 N.W.2d 800, 804 (Iowa 1996); *Davis*, 438 N.W.2d at 14; *Ellwood*, 404 N.W.2d at 179; *Ackerman*, 242 N.W.2d at 345. Even an amendment that substantially changes the issues may still be allowed if the opposing party is not prejudiced or unfairly surprised. See *McElroy*, 637 N.W.2d at 495; *Chao v. City of Waterloo*, 346 N.W.2d 822, 825-26 (Iowa 1984).

In this case, the evidence does not support Carlos's contention that he was caught by surprise or was otherwise prejudiced by the amendment to Michele's petition. Michele's original petition stated Carlos was "currently incarcerated," and requested a guardian ad litem be appointed to represent his interests. Obviously, Carlos was aware of the circumstances that led to his incarceration. Carlos had fair notice of the fact that Michele was seeking to terminate his parental rights. The amendment to include an additional ground under the same code section Michele had originally pleaded did not substantially

change the issues before the court and did not result in any unfair prejudice to Carlos. Therefore, we conclude the court did not abuse its discretion in allowing the amendment.

We also reject the argument that the district court abused its discretion by failing to grant a continuance. Carlos requested a continuance of the termination hearing so he could research whether Shelby and Carlos's adopted daughter were "siblings." Although the court did not continue the termination hearing, it allowed Carlos's counsel to address the legal issue in a post-hearing brief before the court made any final ruling. Carlos does not contend that a continuance was necessary so he could offer additional evidence regarding the "sibling" issue, and we conclude a continuance would have served no real purpose. We find no prejudice resulted when the court refused to grant Carlos's continuance.

**B. Termination under Section 600A.8(9).**

Carlos also contends the court erred in granting termination pursuant to Iowa Code section 600A.8(9). This section provides two alternative grounds for termination: (1) if the parent is imprisoned for a crime against the child, the child's sibling, or another child in the household, or (2) if the parent is imprisoned for any other reason, and is unlikely to be released for a period of five or more years.

We will examine ground one first. It is conceded Shelby did not live in the same house as Carlos or his adopted children and Carlos was not convicted of any crime against Shelby personally. The issue remaining is whether the provision regarding conviction of a crime against Shelby's sibling applies here. On appeal, Carlos argues that because his parental rights to his adopted

daughter had been terminated prior to the time Michele filed her amended petition, Carlos's adopted daughter would no longer be considered Shelby's sibling.

Carlos's parental rights to his three adopted children were terminated on April 27, 2006. In support of his argument against termination of his parental rights to Shelby, Carlos cites Iowa Code section 232.2(39), which defines a "parent" as "a biological or adoptive mother or father of a child *but does not include a mother or father whose parental rights have been terminated.*" (Emphasis added.) Carlos argues that because he ceased being a "parent" to his adopted children on April 27, Shelby and these children also ceased being siblings to each other because they no longer shared "one common parent." See *Merriam-Webster's Collegiate Dictionary*, 1088 (10th ed. 1999) (defining sibling as "one of two or more individuals having one common parent"). We are not persuaded by Carlos's argument. As the trial court noted, at the time of Carlos's conviction and subsequent imprisonment, his parental rights had not been terminated to his adopted children. We agree with the district court's conclusion that Michele established by clear and convincing evidence Carlos had been imprisoned for a crime against Shelby's sibling. Therefore, we conclude the court properly terminated Carlos's parental rights under the first ground listed in section 600A.8(9).

As we have mentioned, the second prong of section 600A.8(9) provides for termination in the event "the parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of five or more years." Carlos argues the trial court improperly denied him the opportunity to present evidence



with regard to the likelihood of success in attacking his convictions in postconviction relief proceeding.<sup>3</sup> Because we have concluded the court properly terminated Carlos's parental rights under the first ground listed in section 600A.8(9), we find it unnecessary to address this issue.

### **C. Best Interests.**

Finally, Carlos contends that termination was not in the child's best interests. Upon our review of the record, we disagree.

On the issue of whether termination was in Shelby's best interests, the district court stated:

It is unlikely that [Carlos] will have the ability to support [Shelby] financially or emotionally in the immediate or long term future. It is unlikely that [Carlos] will be released from prison when [Shelby] is at an age that would allow him to create a strong parent-child bond as [Shelby] will be an adult at the time of [Carlos'] likely release. Reintroduction of [Carlos] into [Shelby's] life after such an extended absence poses great risks for [Shelby], emotionally and physically.

At the time of the termination hearing, Shelby had no memory of Carlos. Shelby deserves stability and permanency, which her father cannot provide. *In re C.D.*, 509 N.W.2d 509, 513 (Iowa Ct. App. 1993). We agree with the trial court's conclusion that Shelby "should be able to grow up as healthy and confident as possible without [questioning] why her father is in prison." Therefore, we agree with the trial court's finding that termination of Carlos's parental rights is in the child's best interests.

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<sup>3</sup> This court affirmed Carlos's sexual abuse convictions on direct appeal, and our supreme court declined his request for further review.

***IV. Conclusion.***

We conclude the court did not abuse its discretion in allowing Michele to amend her petition. We also conclude Carlos suffered no prejudice as a result of the court's refusal to grant him a continuance. Upon our review of the record, we conclude the court properly terminated Carlos's parental rights under the first ground listed in section 600A.8(9). Additionally, we find termination of Carlos's parental rights is in the child's best interests. Accordingly, we affirm the district court's ruling.

**AFFIRMED.**