IN THE COURT OF APPEALS OF IOWA

No. 8-288 / 07-1734
Filed June 25, 2008

IN THE INTEREST OF B.G.S., Minor Child,

M.S., Mother,
Petitioner,

J.G., Father,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Daniel L. Block, Associate Juvenile Judge.

Father appeals the district court's ruling terminating his parental rights on the ground he abandoned his child. **REVERSED AND REMANDED.**

Mary Kennedy, Waterloo, for appellant father.

Natalie Williams Burris of Swisher & Cohrt, P.L.C., Waterloo, and Timothy J. Luce of Anfinson & Luce, Waterloo, for appellee mother.

Andrew C. Abbott of Abbott Law Office, P.C., Waterloo, guardian ad litem for minor child.

Heard by Sackett, C.J., and Huitink and Eisenhauer, JJ.

SACKETT, C.J.

Jacob, the biological father of a female child born in May of 2007, challenges the termination of his parental rights. He contends there was not clear and convincing evidence he abandoned the child.

SCOPE OF REVIEW. We review termination proceedings de novo. Iowa R. App. P. 6.4; *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998). We are not bound by the district court's findings although we will give weight to its fact findings, especially when considering a witness's credibility. Iowa R. App. P. 6.14(6)(*g*); *R.K.B.*, 572 N.W.2d at 601.

BACKGROUND. Jacob, who was born in February of 1990, and Mannina, born in June of 1992, had a one-time sexual encounter which led to the birth of the child at issue. Mannina did not tell either Jacob or her own mother she was pregnant prior to the child's birth. The child was born on May 5, 2007, and on May 9, 2007, Mannina released custody of the child to custodian Timothy J. Luce. In doing so she represented she was revoking her rights to the child and consenting to the child being placed for adoption. The child had health problems of an undisclosed nature and was in University Hospitals in Iowa City for a period of time following her birth.

A petition to terminate the parental rights of both parents was filed on May 31, 2007. The petition named Jacob as the child's biological father. On August 9, 2007, the court, noting Jacob's denial of paternity, ordered Jacob to submit to DNA testing to determine if he was the child's father. The result of the test was that Jacob was not excluded as the child's father and the probability of his

paternity was determined to be 99.99999997%. The results were received on August 27, 2007.

The petition for termination came on for hearing under Iowa Code section 600A.7 (2007) on August 30, 2007, three days after the paternity test results establishing Jacob as the father were received. The parental rights of both parents were terminated.[1] The juvenile court found clear and convincing evidence supported termination of Jacob's parental rights finding Jacob had abandoned the child as defined by Iowa Code section 600A.8(3)(a). The court further found there was not sufficient evidence to show Jacob had made substantial efforts evincing a settled purpose to personally assume all parental duties as defined in Iowa Code section 600A.8(3)(a)(2)(b). The district court's ruling stated the child is in the care of prospective adoptive parents. There was no evidence presented addressing the attributes or location of the persons seeking to adopt.

ABANDONMENT. The difficulty of this case is evidenced in the statement of the guardian ad litem of the child questioning at the close of the evidence whether the evidence at trial supported the termination of Jacob's parental rights but indicating that termination was in the child's best interest.

Grounds for terminating parental rights must be proved by clear and convincing evidence. Iowa Code § 600A.8; *see In re Goettsche*, 311 N.W.2d 104, 107 (Iowa 1981). We can only address best interest after the grounds for termination have been proven by clear and convincing evidence. *In re M.M.S.*,

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[1] Mannina has not appealed the termination of her parental rights.

502 N.W.2d 4, 8 (Iowa 1993).[2] The custodian and mother argue the juvenile court was correct in terminating Jacob's parental rights because he abandoned the child.

Iowa Code section 600A.8 lists grounds for termination and provides in applicable part:

> 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.

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[2] There the court stated:

> [B]y mandate of the United States Supreme Court, due process rights accompany a father's relationship with a child, including a child born out of wedlock. *In re B.G.C.*, 496 N.W.2d 239, 244 (Iowa 1992) (citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599, 606 (1982)). Of course under the supremacy clause of the federal constitution, this rule is binding on us, and on our legislature. Under this rule it is settled law in termination cases that, when termination is grounded on a claim of abandonment, the abandonment must be established by clear and convincing evidence before the courts are authorized to explore the issue of the child's best interests. *In re B.L.A.*, 357 N.W.2d 20, 23 (Iowa 1984) (after deciding statutory grounds for termination exist, we must determine whether it would benefit children); *In re Adoption of Hangartner*, 407 Pa. 601, 608-09, 181 A.2d 280, 284 (1962) (welfare of child does not become material in adoption proceedings until abandonment is established or consent of natural parent proven); 2 Am. Jur. 2d *Adoption* § 60 (1962).

M.M.S., 502 N.W.2d at 8.

> (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.

Iowa Code § 600A.8(3)(a).

Jacob was not certain the child was his until three days before trial. In *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992), the court addressed the claims of a biological father contending he had not abandoned his child where he did not learn from the mother until after the child's birth that he was the putative father. *See B.G.C.*, 496 N.W.2d at 241, 246. The court rejected as unrealistic an argument that the father abandoned his rights in failing to protect them beginning at the time the pregnancy became known even though he had no indication from the mother he was the father, and even though the mother was dating another man at the time. *Id.* at 241 n.1. The court reasoned finding otherwise would require a potential father to become involved in the pregnancy on the mere speculation he might be the father because he was one of the men having sexual

relations with her at the time in question. *Id.* The court further reasoned that while the father did not share in expenses in connection with the child's birth, he had never been requested to do so, nor was there a need to pay until he learned the child was his. *Id.* at 246.

The facts here are similar. This pregnancy was the result of a one-time encounter, not a long-term relationship. The mother kept the pregnancy hidden from Jacob. When a rumor reached Jacob that the mother was pregnant and there was talk the child was his, he contacted his lawyer and asked that arrangements be made for a paternity test. He testified he did this because he believed the mother had other relationships. The paternity test was not completed until three days before trial. Jacob was never asked to pay any expenses in connection with the birth and did not have the ability to do so. *See id*. at 246.

At trial Jacob, who had not graduated from high school, testified he planned to finish his high school education through an alternative school program that offered individualized teaching. He testified he had experience providing child care, having lived for a time with his brother and having helped take care of his brother's daughters. Jacob lived at the time of trial with his mother who was not employed and indicated she intended to help Jacob care for the child. Jacob's sister is a day care provider and also would assist with the child's care. Jacob currently receives approximately $600 a month social security disability. The child also qualifies for a payment. Jacob testified he had applied for several jobs, has obtained a crib and clothing for the child from a relative, and can arrange for his sister or mother to provide child care while he works. He also

claims he has not abandoned the child because he has consistently asserted, since learning of his potential paternity, he will not give up any rights to the child and has made weekly contact with his attorney about the status of the case.

At time of trial Jacob demonstrated a commitment to parent the child with the means he has available and clearly indicated a commitment to the child. He made inquiry to determine if the child was his but did not learn the positive results until three days before trial. He did not abandon his rights in failing to protect them until he learned the child was his. Demanding otherwise would require a potential father to become involved in the pregnancy on mere speculation he might be the father because he was one of the men having sexual relations with the mother at the time in question. *See id.* at 241 n.1. The abandonment statute does not specify the time required to show abandonment; but, clearly a parent under these circumstances could not be found to have abandoned a child in three days particularly where, as here, Jacob sought to have paternity verified when he first learned there may be a child and it may be his.

The custodian has not directly refuted Jacob's testimony on these issues but has understandably focused on Jacob's past record, his youth, and lack of finances. Jacob has been a troubled young man. He was in the State Training School at Eldora from October 19, 2006, until August 19, 2007, being released less than two weeks before the termination hearing. He has learning disabilities that make reading more difficult for him and has a history of assaulting authority figures and peers. He has received extensive treatment and counseling through the juvenile court system to address his behavioral issues and teach him better coping skills. He also received vocational training in residential construction and

drug treatment as he had used marijuana. The progress notes of Jacob's counselors over the course of his stay at Eldora show that Jacob struggled with controlling his anger at times. However, there were no significant incidents documented after Jacob learned of the child and the counselors noted Jacob was motivated to change and made progress from May of 2007 until his release.

Jacob appears to have done what was necessary in the three-day period since he learned he definitely was the father to demonstrate that he is willing to assume custody rather than just object to termination. The court can, in assessing his intentions, consider his fitness and ability to parent in personally assuming custody, but that is not a specific ground for termination. We reverse the termination.

BEST INTEREST. Statutory grounds for termination must be established in addition to establishing the child's best interests in order to terminate. *Id.* at 245; *In re L.H.*, 480 N.W.2d 43, 47 (Iowa 1992); *In re B.L.A.*, 357 N.W.2d 20, 23 (Iowa 1984). Parental rights may not be terminated solely on consideration of the child's best interest but specific grounds for termination under chapter 600A must also be established. *B.G.C.*, 496 N.W.2d at 245.

Because we have not found that there is clear and convincing evidence of abandonment we need not address the best interest challenge and cannot. We recognize Jacob's current situation does not present the child with an ideal home life; yet, we are presented with no evidence about the attributes of the persons seeking to adopt this child. While the guardian ad litem and the juvenile court have said termination of Jacob's parental rights is in the child's best interest,

other than evidence adverse to Jacob, there is nothing else to review to assure us that the persons seeking to adopt will in fact provide a better home.

We reverse and remand to the district court to do all that is necessary to protect the child's interest including taking additional evidence.[3]

REVERSED AND REMANDED.

[3] The difficulty in terminating under 600A is that the parent has no opportunity to receive reasonable efforts to assist in reunification with his or her child, and the child in a preadoptive home has no state supervision.