

IN THE COURT OF APPEALS OF IOWA

No. 9-956 / 09-1526
Filed December 17, 2009

**IN THE INTEREST OF I.W. and Z.R.,
Minor Children,**

**W.W., Father,
Appellant.**

Appeal from the Iowa District Court for Muscatine County, Gary P. Strausser, District Associate Judge.

A father appeals from a juvenile court order terminating his parental rights to his children. **AFFIRMED.**

Jeffrey L. Powell of Tindal Law Office, P.L.C., Washington, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Gary Allison, County Attorney, and Korie Shippee, Assistant County Attorney.

Considered by Eisenhauer, P.J., and Potterfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

The appellant is the father of a three-year-old child and an almost-one-year-old child. He appeals from an October 2009 juvenile court order terminating his parental rights to these children. We affirm.

The relationship of the children's parents began in 2005. The older of the two children was born in August 2006 and the younger of the two was born in October 2009. The parents' relationship was plagued by the mother's and father's substance abuse, domestic violence, and instability in residences and employment.

The parties separated in May 2008, when the mother sought involuntary commitment of the father and sought and secured a protective order prohibiting the father from having contact with her or the parties' older child. The father was apparently taken into immediate custody but released in two days based upon a report that he was not a threat to himself or others. He moved to Florida in late May or early June 2008, and subsequently moved to Oregon, where he lived with his mother for about one month and was thereafter essentially homeless. The father returned to Iowa in August 2009.

In October 2008 the children's mother voluntarily placed them in foster care. The children were formally removed from parental custody in January 2009. They were adjudicated children in need of assistance (CINA) in January 2009.

In late June 2009 the State filed a petition seeking termination of the father's parental rights¹ pursuant to Iowa Code sections 232.116(1)(b) (2009), (e), (h), (k), and (l). Following a hearing held on two days, in October 2009 the juvenile court filed detailed findings and conclusions and an order terminating the father's parental rights pursuant to section 232.116(1)(b) (abandonment). The father appeals.

We review termination proceedings de novo. Although we are not bound by them, we give weight to the trial court's findings of fact, especially when considering credibility of witnesses. The primary interest in termination proceedings is the best interests of the child. To support the termination of parental rights, the State must establish the grounds for termination under Iowa Code section 232.116 by clear and convincing evidence.

In re C.B., 611 N.W.2d 489, 492 (Iowa 2000) (citations omitted).

The father first claims the juvenile court erred in finding he had abandoned the children. "Abandonment" is the giving up of parental rights and responsibilities accompanied by an intent to forego them. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa Ct. App. 1996). The giving up of parental rights and responsibilities refers to conduct. *Id.* The intent element involves an accompanying state of mind. *Id.* Parental responsibilities include more than maintaining a subjective interest in a child. *In re D.M.*, 516 N.W.2d 888, 891 (Iowa 1994). The concept of parental responsibilities requires affirmative parenting to the extent practical and feasible. *Id.* "The affirmative duty to parent a child requires a continuing interest in the child and a genuine effort to maintain communication and association with the child." *In re S.K.C.*, 435 N.W.2d 403,

¹ The mother had died in late March 2009.

404 (Iowa Ct. App. 1988). Total desertion is not required for a showing of abandonment. *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993).

The older of the parents' two children came to the attention of the Iowa Department of Human Services (DHS) in May 2008 as a result of domestic abuse of the mother by the father.² When the father left Iowa in May or June 2008 he was aware the DHS was involved with the family and that the mother was pregnant with the younger of their two children. In October 2008 the father became aware of the birth of the younger child, and became aware that the DHS intended to have a CINA petition regarding the children filed. From October 2008 to April 2009 the father did not contact the DHS and the DHS was unable to contact him because of some combination of misinformation and mistakes concerning addresses and phone numbers at which he could purportedly be reached, and unavailability or unusability of the phone numbers he had given. The DHS's attempts to mail documents to the father from September through December 2008 at the addresses he had given were all returned marked "return to sender," "no longer at this address," or "unable to deliver." The phone numbers he had given were not working or were not taking calls.

The children's mother died of a drug overdose in late March 2009. The father apparently learned of the death and thereafter contacted the DHS by leaving a voice mail on April 15, 2009. He then contacted the DHS by phone on April 21. The DHS worker explained the importance of the father participating in services and encouraged him to participate in the case plan, accept services that

² The father had a history of domestic abuse of the mother, having abused her on two or more prior occasions.

were being offered,³ and work toward reunification with his children. He responded that he intended to begin nine months of welding school and would be unavailable for that nine months. It appears that the father did return some releases to allow the DHS worker to communicate with his family members.

In May 2009 the DHS mailed to the father an application for appointment of counsel and other documents. As of late July he had not completed and returned them. From April to August 2009 the father did not contact the DHS. The State filed its petition to terminate parental rights in late June 2009. The father returned to Iowa in early August 2009 and then contacted the DHS. He refused to give an address. He agreed to meet with the DHS staff in Muscatine on August 13, but did not appear for that meeting.

The termination hearing scheduled for August 24 was continued on August 21 after it was learned the father was in jail serving time on a prior criminal mischief conviction. Counsel was appointed to represent the father. The father finally met with DHS personnel on September 2, more than a week after the originally scheduled termination hearing and just a week before the hearing commenced.

At the commencement of the termination hearing the father had not seen the older child for sixteen months and had never seen the almost-one-year-old younger child. The father had no personal residence and no employment. He had provided no financial or material support or assistance for the children in the

³ The father has a substantial criminal history, has a lengthy history of substance abuse, and had been diagnosed in May 2008 as having an anxiety disorder, suffering from alcohol abuse, and having an anti-social personality disorder.

past sixteen months. The father had been aware since October 2008 that the children were in the care of relatives and foster parents, but had taken no steps toward resuming custody until August 2009. As of the termination hearing he had made appointments for drug and alcohol evaluations and to address his anger management problems, but had not yet attended any such appointments or begun to deal with his mental health and domestic violence issues.

The father was prohibited from contact with the older child by the domestic abuse protective order. He did nothing, however, to have that order modified so he could have contact. Further, nothing prevented him from having contact with the younger child. The father testified that he had communicated with the older child despite the no-contact order. The juvenile court found such testimony largely lacking in credibility. We defer to the court's well-supported credibility finding. See *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990) (holding we give weight to the fact findings of the juvenile court, especially when considering credibility of witnesses); *In re A.S.*, 743 N.W.2d 865, 868 (Iowa Ct. App. 2007) (deferring to the juvenile court's adverse credibility finding).

We do not doubt that the father maintained some subjective interest in the children. However, for the fifteen months from May 2008 to August 2009 he did nothing to exercise parental rights or fulfill parental responsibilities. The father abdicated his parental rights and responsibilities, accompanied by an intent to do so. Upon our de novo review we find, as the juvenile court did, that he abandoned the children.

At the start of the termination hearing the father requested a continuance of the hearing “to allow [the father] to perhaps begin supervised visitation and also to begin the services that the [DHS] had requested of him several months ago.” The juvenile court denied the request. The father claims the court “erred in not continuing the case six months to allow [the father] to engage in services necessary for a successful reunification.”

Our review of a denial of a motion for continuance is for an abuse of discretion, and the denial must be unreasonable under the circumstances, resulting in injustice to the party seeking the continuance, before we will reverse. *In re C.W.*, 554 N.W.2d 279, 281 (Iowa Ct. App. 1996). A motion for continuance is not to be granted except for good cause. Iowa Ct. R. 8.5 (2009).

From October 2008 to his return to Iowa in August 2009 the father was aware the children were in the care of persons other than their parents, and was aware the DHS was overseeing them. During that time he did nothing toward accepting his parental responsibilities or seeking reunification with the children. The children had been removed from their mother, placed in the care of a family member, and later transitioned to a foster family. We fully agree with, and find no abuse of discretion in, the juvenile court’s denial of a last-minute continuance.

The father claims termination of his parental rights is not in the children’s best interest. Even if statutory requirements for termination are met, a decision to terminate must still be in the best interest of a child. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994).

The primary concern in a termination of parental rights proceeding is the best interest of the children. Iowa R. App. P. 6.904(3)(o); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981); *In re R.R.K.*, 544 N.W.2d 274, 275 (Iowa Ct. App. 1995). Children's safety and need for a permanent home are the primary concerns in determining their best interests. *In re J.E.*, 723 N.W.2d 793, 801 (Iowa 2006) (Cady, J., concurring specially). Temporary or long-term foster care is not in a child's best interest, especially when the child is adoptable. *In re T.T.*, 541 N.W.2d 552, 557 (Iowa Ct. App. 1995).

As noted above, the children had been removed from their mother, placed with relatives, and later moved to family foster care. The younger child was fully integrated with his foster family and the older child was becoming so. Both were doing very well. The evidence shows that further change or disruption, including introduction to a parental figure unknown to the younger and hardly known to the older, would be harmful to them. The foster family stands ready to adopt the children. The children need security and permanency, and need it now rather than at some indefinite time in the future. We agree with the juvenile court that termination of the father's parental rights is in the children's best interest.

AFFIRMED.