IN THE COURT OF APPEALS OF IOWA

No. 1999-244 (9-468) / 99-851
Filed October 27, 1999

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CLERK SUPREME COURT

IN THE INTEREST OF L.C.K., Minor Child,

T.D.M., Father,
Appellant.
T.L.K.,
Petitioner-Appellee,
vs.

T.D.M.,
Respondent-Appellant.

Appeal from the Iowa District Court for Marion County, Robert A. Hutchinson Judge.

A father appeals the district court order terminating his parental rights and dismissing his petition for visitation. **AFFIRMED.**

Brad McCall of Brierly Law Office, L.L.P., Newton, for appellant.

Chris D. Shepperd of Kreykes & Shepperd, Pella, for appellee.

Franklin R. York, Pella, for minor child.

Considered by Sackett, C.J., and Zimmer, J., and Peterson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

PETERSON, S.J.

T.D.M. appeals the order terminating his parental rights and dismissing his petition for visitation. He contends the district court erred in finding clear and convincing evidence he failed to pay court-ordered support without good cause and the termination is in the best interest of the child. We affirm the district court.

Background and Proceedings. T.L.K. (hereinafter referred to as Terri) and T.D.M. (hereinafter referred to as Toby) are the mother and father of L.C.K. (hereinafter referred to as Lori).

Terri and Toby began living together in the Knoxville, Iowa area in April of 1995. In October of that year, they moved to Phoenix, Arizona so Toby could attend the Motorcycle Mechanic's Institute. This was a stormy relationship with frequent arguments. They returned to Iowa for the Christmas holidays in December, 1995. After the holidays, Toby returned to Arizona to resume his schooling; however, Terri remained in Iowa.

While she remained in Iowa, she rekindled an affair with a former boyfriend, David. However, she returned to Arizona on February 14, 1996.

Shortly after Terri returned to Arizona, she discovered she was pregnant. When she told Toby about this, he became angry and upset and suspected she had been having a relationship with David. He also questioned the paternity of the unborn child. This conflict increased the tension between Terri and Toby, and they separated

when Terri returned to Iowa in April of 1996. Toby remained in Arizona to complete his schooling.

By October of 1996, Terri was living with David, and he was present when Lori was born on December 4, 1996. David, Terri, and Lori have lived together as a family unit since Lori's birth. David and Terri were married in October of 1998.

Toby returned to Iowa for a visit in December of 1996, however, did not make any effort to contact Terri or see Lori. In January of 1997, Toby contacted Terri from Arizona to inquire about Lori and asked who was Lori's father. Terri responded she did not know.

Toby again contacted Terri in April of 1997, wondering about the identity of Lori's father. During that telephone conversation, Toby suggested the possibility of initiating paternity blood testing.

A paternity proceeding was filed by the child support recovery unit and, as part of that proceeding, paternity blood tests were ordered. On November 18, 1997, after the blood tests verified Toby was Lori's natural father, an administrative paternity order was entered. This order directed Toby to pay $136 a month as child support beginning on October 20, 1997, and required him to maintain health insurance for Lori.

Toby returned to Iowa from Arizona in April of 1998. Since that time, Toby has had visitation with Lori between thirty-five and forty times, including a visitation shortly before the trial on March 31, 1999. He requested visitation on other occasions

and the requests were denied at least eighteen times. During these visitations, Lori recognized Toby and referred to him as "daddy" and appeared to be happy and at ease with him. He changed her diapers, fed her, and took her places. He purchased birthday and Christmas gifts in 1997, and birthday and Christmas gifts in 1998, but did not have the opportunity to give them to her. The visitations between Toby and Lori were halted by Terri in August or September of 1998. Toby filed a petition for visitation on October 23, 1998, and the petition for termination of parental rights was filed on November 6, 1998.

Terri is a high school graduate and in good health and has not been employed outside the home since Lori's birth. David has been the sole source of support for Terri and Lori, which includes health insurance coverage. He has been employed by the same employer for the past ten years.

Toby was unemployed from October of 1997 until February of 1998. From that date through September of 199 3, he was employed by three different employers. In September of 1998, he began his own business working out of his own home repairing and rebuilding pickup trucks. He believed he earned between $750 and $1000 a month from this endeavor which continued to the time of trial. He was also in the process of beginning a motorcycle business and planned to obtain seasonal employment with construction companies later in the year.

Toby provided no financial support to Terri or Lori prior to the entry of the order on November 18, 1997. He made one payment of $140 on December 9, 1997,

and payments were received through a wage withholding order on May 2, May 9, May 16, each in the amount of $47.07. He made a cash payment of $50 on August 18, December 16, and December 31, and a payment of $50 shortly before trial. The total amount of child support due at the time of the hearing on March 31, 1999, was $2448; however, he had paid only $481.21.

Terri in her petition alleged two alternate grounds for termination of Toby's parental rights. She alleged he had abandoned the child and failed to pay court-ordered child support. The trial court determined Terri had failed to establish the abandonment alternative, but concluded there was clear and convincing evidence of failure to pay court-ordered support without good cause, and it was in the best interest of Lori to terminate the parental rights of Toby. As a result of this ruling, Toby's petition for visitation was dismissed.

Standard of review. Our review of proceedings to terminate parental rights under Iowa Code chapter 600A is de novo with weight given to the findings of fact of the trial court, especially when considering credibility of witnesses. *In re T.Q.*, 519 N.W.2d 105, 106 (Iowa App. 1994). Termination will be upheld if one of the grounds for termination is established by clear and convincing evidence. *In re B.L.A.*, 357 N.W.2d 20, 22 (Iowa 1984); *In re Voeltz*, 271 N.W.2d 719, 723 (Iowa 1978). The primary concern in termination proceedings is the best interest of the child. Iowa R. App. P. 14(f)(15); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

Discussion. Section 600A.8(4) provides parental rights may be terminated upon a showing by clear and convincing proof that a parent who has been ordered to contribute to the support of the child or financially aid in the child's birth and has failed to do so without good cause. Termination for nonsupport occurs when a parent's failure to pay manifests an indifference to the child and is therefore akin to abandonment. It must be substantial and not merely sporadic or insignificant. *Klobnock v. Abbott,* 303 N.W.2d 149, 152 (Iowa 1981).

At the time of the trial, $2448 in child support had accrued. The total amount of payments he had made as a result of the child support order was $481.21.

Toby was employed from February through September of 1998 with three different employers; however, he paid only $191.21 in child support, three of those through a wage assignment. In September he began his own business and contends he earned between $750 and $1000 a month. During that time, he paid only $150, $50 of that shortly before the trial.

Toby, in his argument, offers the following as a basis for not paying child support. He contends he incurred expenses moving to and from Arizona, he was behind on his bills, he made a car payment for Terri, his regular expenses exceeded his income, and he was unable to secure stable employment. When there are insufficient funds to go around, then support payments must have priority. The obligation is to support, not to support after the payment of debts. *Moen v. McNamara,* 272 N.W.2d 438, 442 (Iowa 1978). The car payment he made reference

to was actually made by his mother and was in 1995, as well as the moving expenses. He said it was a loan, but no payments have been made.

Toby contends he has been unable to secure stable employment. However, he has worked for three different employers and voluntarily left each one. This belies the idea he is unable to secure employment.

Toby also contends he did not pay support because he was denied visitation. He did visit the child a number of times, and he was denied visitation at times. However, denial of visitation is not good cause for failure to pay support. *Klobnock,* 303 N.W.2d at 152.

Toby also contends he should have been held in contempt of court for not paying child support rather than using it as a basis for terminating his parental rights. Proof of contempt requires a willful showing of a violation of a court order. *In re Marriage of Spears,* 529 N.W.2d 299, 304 (Iowa App. 1994). By this contention, Toby would be admitting he willfully violated the child support order.

We find it has been shown by clear and convincing proof Toby has failed to contribute to the support of Lori without good cause.

We further find termination of Toby's parental rights is in the best interest of Lori. Toby made no attempts to visit Lori until he returned to Iowa sometime after her birth. During the visitations, Lori recognized Toby and referred to him as "daddy" and appeared to be happy and at ease in his custody.

Lori, since her birth, has been living with David and Terri in a stable home situation. David has indicated he wished to adopt Lori. The trial court was impressed with David, not only with his words but with his past actions, but also expressed no confidence Toby would ever pay child support in a regular and reasonable manner. The trial court had the opportunity of seeing all of the parties, and we defer to the trial court's assessment of credibility.

In conclusion, we find Toby has failed to contribute to the support of Lori without good cause, and it would be in Lori's best interest to terminate Toby's parental rights.

AFFIRMED.