IN THE COURT OF APPEALS OF IOWA

No. 9-143 (1999-32) / 98-1717

FILED

IN THE INTEREST OF M.B., M.B., I.B., and M.F.,
Minor Children,

M.B., Father,
Appellant,

R.F., Father of M.F.,
Appellant.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Juvenile Court Judge.

Michael B. and Robert F., both fathers of minor children with mother R.B., appeal a district court order terminating their parental rights. **AFFIRMED.**

Michael B. Oliver, Des Moines, for appellant father M.B.

Thomas J. McCann, Des Moines, for appellant father R.F.

Thomas J. Miller, Attorney General, Chris C. Odell, Assistant Attorney General, and Christine Gonzalez, Assistant County Attorney, for appellee State.

Nicole Garbis Nolan, Des Moines, guardian ad litem for minor children.

Heard by Huitink, P.J., and Streit and Mahan, JJ.

HUITINK, P.J.

I. Background Facts and Procedure.

Ruth is the mother of Mike, born September 22, 1989, Melissa, born October 4, 1989, and Ike, born June 8, 1993. The children's father is Michael, Sr. Ruth is also the mother of Mary, born November 3, 1985. Mary's father is Robert. Ruth's parental rights to all four children were terminated on August 10, 1998, and she has not appealed from this ruling.

In 1994, a child in need of assistance (CINA) petition was filed alleging Ike was a child in need of assistance. The State filed the petition after doctors examined Ike and discovered serious bruising and a skull fracture. Ike was adjudicated CINA on May 26, 1994. In 1996, the remaining children were also adjudicated CINA based on the mother's denial of critical care and failure to properly supervise them.[1] The children were removed from the home and placed in foster care with Ike and Wyvonne, Michael Sr.'s aunt and uncle.

Michael, Sr. was sentenced to ten years in prison for drug possession in 1993. He was released on parole in April 1996, but returned to prison eight days later following his arrest for operating while intoxicated (OWI). From 1993 to 1996,

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[1] The record reflects the State's only attempt to serve notice of the CINA proceeding on Robert F. was by certified restricted mail addressed to "Robert [F], % General Delivery, Des Moines, IA 50318." The record also indicates Robert was incarcerated at the Federal Medical Center in Rochester, Minnesota at the time of the attempted service. The original notice was returned after five days as "unclaimed." Robert did not receive notice of the CINA proceedings and did not participate in the adjudicatory hearing. Robert first appeared at the January 23, 1998 CINA review hearing.

Michael had no contact with his children, including the brief period he was released on parole. Michael subsequently had some contact with them through cards and letters, but otherwise made no attempts to see them or participate in social services offered while he was in prison.

Robert has had no contact with his daughter, Mary, since 1986. From January 1993 until June 1996, Robert was incarcerated in Minnesota on drug-related charges. Once Robert was informed Mary was in foster care, he made several attempts to locate her, but did not seek or participate in social services.

In May 1998, the State filed a petition to terminate all parties' parental rights.[2] Prior to the termination hearing, Robert filed a motion to dismiss the termination petition on the grounds that he did not receive valid notice of the underlying CINA proceedings. The court denied Robert's motion to dismiss and terminated the parental rights of both Robert and Michael, Sr. on grounds of abandonment or desertion. *See* Iowa Code § 232.116(1)(b) (1997)(court may order termination upon finding child has been abandoned or deserted).

On appeal Michael maintains termination is inappropriate because the record does not support the court's finding of abandonment by clear and convincing evidence. He claims he attempted to maintain contact with the children over the years despite his incarceration. He asserts that for part of that time it was impossible to find Ruth or the children because they had moved and their whereabouts were unknown.

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[2] The mother's parental rights are not at issue on appeal.

On appeal Robert argues he was denied due process of law because he was not provided valid notice of the CINA proceedings. He likewise argues the record does not support a finding of abandonment.

II. Scope of Review.

We review proceedings to terminate parental rights de novo -- we review the facts as well as the law and adjudicate parents' rights anew. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). We give weight to the findings of the juvenile court, particularly with respect to the credibility of witnesses, but are not bound by them. *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990); *In re R.R.K.*, 544 N.W.2d 274, 275 (Iowa App. 1995); Iowa R. App. P. 14(f)(7).

III. Standards for Termination of Parental Rights.

The controlling standard applied in cases involving the termination of parental rights is the best interests of the child involved. *Dameron*, 306 N.W.2d at 745.,

> We look to the child's long-range, as well as immediate, interests. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent probable harm to a child.

In re R.K.B., 572 N.W.2d 600, 601 (Iowa 1998)(quoting *In re C.M.W.*, 503 N.W.2d 874, 875 (Iowa App.1993)). The grounds alleged for the termination of parental rights must by statute be proven by clear and convincing evidence. *See* Iowa Code section 232.114(5)(c) (1997).

It is well-established that there exists a parental interest in the integrity of the family unit; nonetheless we also are cognizant that this interest is not absolute, but rather may be forfeited by certain parental conduct. *Dameron*, 306 N.W.2d at 745. The State has the duty to assure that every child within its borders receives proper care and treatment and it must intercede when parents abdicate that responsibility. *Id.*

Iowa Code section 232.116(1)(b) authorizes a court to terminate parental rights upon a finding of abandonment[3] or desertion.[4] *See* Iowa Code § 232.116(1)(b). There are two elements necessary for abandonment. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa App. 1996). The giving up of parental rights and responsibilities refers to the party's conduct. *In re S.K.C.*, 435 N.W.2d 403, 404 (Iowa App. 1988). The intent to forego parental rights and responsibilities is the accompanying state of mind. *In re Goettsche*, 311 N.W.2d 104, 106 (Iowa 1981). Parental responsibilities include more than subjectively maintaining an interest in a child. *Id.* Affirmative parenting is required to the extent it is practical and feasible. *Id.* The affirmative duty requires a

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[3] Abandonment is defined in Iowa Code section 232.2(1), which provides:

> "Abandonment of a child" means the permanent relinquishment or surrender, without reference to any particular person, of the parental rights, duties, or privileges inherent in the parent-child relationship. Proof of abandonment must include both the intention to abandon and the acts by which the intention is evidenced.

[4] Desertion is defined in Iowa Code section 232.2(14), which provides:

> "Desertion" means the relinquishment or surrender for a period in excess of six months of the parental rights, duties, or privileges inherent in the parent-child relationship. Proof of desertion need not include the intention to desert, but is evidenced by the lack of attempted contact with the child or by only incidental contact with the child.

continuing interest in the child and a genuine effort to maintain communication and association with the child. *Id.*

IV. The Merits.

A. Michael's Parental Rights.

Michael claims he has had limited opportunities to contact his children and affirmatively parent them based upon his imprisonment. We have consistently held incarceration cannot serve as an excuse for conduct. *See, e.g., In re R.L.F.*, 437 N.W.2d 599, 602 (Iowa App. 1989). The general rule is unavailability to parent as a result of being incarcerated is no excuse. *Id.* at 602. An incarcerated parent must take full responsibility for the conduct which has resulted in confinement. *See In re J.S.*, 470 N.W.2d 48, 51 (Iowa App. 1991).

Our supreme court faced a similar factual context when it noted:

> We are unpersuaded by [appellant's] claim of limited opportunities. In the first place it is appellant who is most responsible for the limited opportunities. Appellant's own actions resulted in incarceration. We think a showing of abandonment does not require a multitude of spurned opportunities. An abandoned child is no less abandoned because the parent can rationalize a reason for the abandonment. When opportunities for association with a child are few, they become more precious, and spurning them more egregious. If few opportunities for association are available, spurning all of them will suffice for a showing of abandonment.

In re M.M.S., 502 N.W.2d 4, 7-8 (Iowa 1993).

Michael has made recent efforts to assume some parental role for the children, albeit very limited. Although Michael has made attempts to contact the children through letters and has had some involvement in the children's placement with his

aunt and uncle as foster parents, the record indicates these contacts and efforts were facilitated by Michael's family rather than himself. Appellant's feeble contacts must be viewed in the light that total desertion is not required for a showing of abandonment. *In re Goettsche*, 311 N.W.2d 104, 105 (Iowa 1981).

We find the record supports the district court's finding of abandonment by Michael and that termination of his parental rights is in the children's best interests. We accordingly affirm the termination of Michael's parental rights.

B. Robert's Parental Rights.

We initially reject Robert's argument that the termination proceeding should be dismissed based on the State's failure to effect valid service of the CINA proceedings. Although Iowa Code section 232.88 requires notification of the pendency of a child in need of assistance proceeding shall be served upon known parents, termination based on abandonment or desertion does not require a previous CINA proceeding or offering of services to assist with parenting. *In re M.L.M*, 464 N.W.2d 688, 690-91 (Iowa App. 1990).

We affirm the termination because there is clear and convincing evidence Robert abandoned Mary and he is not willing or able to assume care of her and provide a safe and sure environment for her in the reasonable future.[5] From the evidence, we find Robert was entirely absent from Mary's life since she was six months old. She is now thirteen. He has provided her no care and no financial or

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[5] We note that even now, Robert has expressed no intention of assuming Mary's custody or providing care. He merely wants visitation rights.

emotional assistance. As noted above with Michael, incarceration cannot serve to excuse Robert's conduct.

We also reject Robert's contention that he could not locate Mary due to the mother's hiding the child from him. From the evidence, we find he knew or could have known the whereabouts of Mary. The record reflects he made no attempt to locate Mary until he heard she was in foster care in late 1997. Although he has recently paid child support and made efforts to contact Mary, abandonment does not require a showing of total desertion. *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993). We find clear and convincing evidence to support a finding Robert abandoned his daughter. He intended to and did give up his parental rights and responsibilities.

V. Conclusion.

We affirm the district court's termination of Michael's and Robert's parental rights to the children subject to this appeal.

AFFIRMED.

No. 98-1717. [9-143 (1999-32)] IN RE M.B.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Juvenile Court Judge. **AFFIRMED.** Heard by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Huitink, P.J. (8 pages $3.60)

Ruth is the mother of Mike, Melissa, and Ike. The children's father is Michael, Sr. Ruth is also the mother of Mary. Mary's father is Robert. Ruth's parental rights to all four children were terminated on August 10, 1998, and she has not appealed. In 1994 a petition was filed alleging Ike was a child in need of assistance. Ike was adjudicated CINA on May 26, 1994. In 1996, the remaining children were also adjudicated CINA based on the mother's denial of critical care and failure to properly supervise them.In May 1998, the State filed a petition to terminate all parties' parental rights. Prior to the termination hearing, Robert filed a motion to dismiss the termination petition on the grounds that he did not receive valid notice of the underlying CINA proceedings. The court denied Robert's motion to dismiss and terminated the parental rights of both Robert and Michael, Sr. on grounds of abandonment or desertion. **OPINION HOLDS:** ***Michael's Parental Rights.*** Michael claims he has had limited opportunities to contact his children and affirmatively parent them based upon his imprisonment. The general rule is unavailability to parent as a result of being incarcerated is no excuse. Although Michael has made attempts to contact the children through letters and has had some involvement in the children's placement with his aunt and uncle as foster parents, the record indicates these contacts and efforts were facilitated by Michael's family rather than himself. Appellant's feeble contacts must be viewed in the light that total desertion is not required for a showing of abandonment. We find the record supports the district court's finding of abandonment by Michael and that termination of his parental rights is in the children's best interests. ***Robert's Parental Rights.*** We initially reject Robert's argument that the termination proceeding should be dismissed based on the State's failure to effect valid service of the CINA proceedings. Although Iowa Code section 232.88 requires notification of the pendency of a child in need of assistance proceeding shall be served upon known parents, termination based on abandonment or desertion does not require a previous CINA proceeding or offering of services to assist with parenting. We affirm the termination because there is clear and convincing evidence Robert abandoned Mary and he is not willing or able to assume care of her and provide a safe and sure environment for her in the reasonable future. From the evidence, we find Robert was entirely absent from Mary's life since she was six months old. She is now thirteen. He has provided her no care and no financial or emotional assistance. We find clear and convincing evidence to support a finding Robert abandoned his daughter. We affirm the district court's termination of Michael's and Robert's parental rights to the children subject to this appeal.