

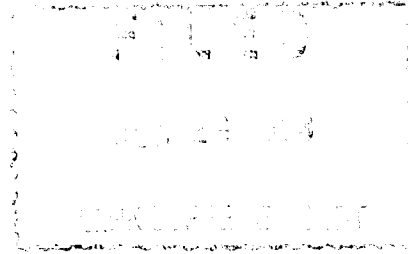
IN THE COURT OF APPEALS OF IOWA

No. 8-247 / 97-2361

**IN THE INTEREST OF T.S. and M.S.,
Minor Children,**

J.O., Father of M.S.,

Appellant.



Appeal from the Iowa District Court for Washington County, Lucy J. Gamon,
District Associate Judge.

Father appeals from an associate district court order terminating his parental
rights. **AFFIRMED.**

Leslie D. Lamping of Day, Meeker, Lamping & Schlegel, Washington, for
appellant.

Thomas J. Miller, Attorney General, and Chris Odell and Gordon E. Allen,
Deputy Attorneys General, for appellee-State.

Daniel P. Kitchen of Tindal, Erdahl, Goddard & Nestor, Iowa City, guardian
ad litem for minor child.

Heard by Cady, C.J., and Vogel and Mahan, JJ.

MAHAN, J.

John O., the father of Michael, appeals from an associate district court order adjudicating Michael to be a child in need of assistance. He contends the court erred by: (1) finding his rights were not prejudiced by lack of notice of the first child in need of assistance proceeding; (2) finding he had abandoned his child; and (3) admitting into evidence the report of a foster care review meeting. We affirm.

Michael was born on August 20, 1995. Michael and Trevor are the biological children of Candy. It was originally thought that Michael and Trevor were also the biological children of Candy's husband, Sean. It later became known that only Trevor is Sean's child. Michael is the child of John and was conceived during a "truth or dare" partner-swapping incident which occurred at a drinking party. Trevor was placed with Sean and is not a subject of this appeal.¹

A petition alleging Michael to be a child in need of assistance was filed by the State of Iowa on October 25, 1995. Sean was listed as Michael's father. John's paternity was not yet known, and he did not receive notice of this action.

On December 14, 1995, Michael was adjudicated to be a child in need of assistance pursuant to Iowa Code section 232.2(6)(a)(2) and 232.2(6)(b). The dispositional order was entered on January 24, 1996, placing Michael in the legal custody of Sean. On March 19, 1996, Sean voluntarily placed Michael in foster care where he has remained ever since. The court then granted a motion for change of

¹ Candy and Sean separated in November 1995.

custody on April 16, 1996, in which Michael was placed in the care, custody and control of the Washington County Department of Human Services for suitable foster care placement. Subsequently, in December 1996, Candy and Sean agreed to a termination of their parental rights with regard to Michael. At that time, the juvenile court was unaware of the existence and possible paternity claim of John. It was not until March 4, 1997, prior to a planned permanency hearing, that the court was advised John is Michael's biological father.

On March 7, 1997, the State filed a second petition alleging Michael was a child in need of assistance on the grounds of abandonment by John. Leslie D. Lamping was appointed as counsel for John and filed an Application for Visitation and Home Study on March 11, 1997. The juvenile court granted the home study request on March 28, 1997, and deferred on the visitation request pending the receipt of a court-ordered "psycho-social evaluation" and a "psychological evaluation."

The adjudicatory hearing was held on August 13 and September 10, 1997. On October 17, 1997, the court entered an adjudication of child in need of assistance pursuant to Iowa Code section 232.2(6)(a). A dispositional hearing was held on November 20, 1997. The dispositional order resulting from that hearing placed Michael under the continued care, custody and control of the Washington County Department of Human Services for purposes of continued placement in family foster care. The court further ordered that there be no visitation between Michael and John

based upon the evidence presented at the dispositional hearing as well as the "Social Report" from the Department of Human Services.

I. STANDARD OF REVIEW. Juvenile proceedings are reviewed de novo. *In re J.D.F.*, 553 N.W.2d 585, 587 (Iowa 1996). Questions of both law and fact are subject to review. *Id.* We give weight to the findings of fact of the juvenile court, especially as to the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

II. LACK OF NOTICE OF FIRST CINA PROCEEDING. John argues his rights were prejudiced by lack of notice of the first child in need of assistance proceeding filed on October 25, 1995. Iowa Code section 232.88 provides that notice must be given for child in need of assistance adjudication hearings as provided for in section 232.37. Iowa Code section 232.37(2) requires notice of the pendency of a case be served on "known parents." John was not a "known parent" at the time these proceedings commenced on October 25, 1995. It is true the Department of Human Services became aware in November 1995 of an allegation that John might be the biological father of Michael. The juvenile worker involved checked the birth certificate of Michael and found Sean was named as the biological father. The worker also contacted the county attorney's office. The county attorney's office told the juvenile worker to advise John he should seek the help of counsel in determining whether to intervene in the juvenile case and pursue paternity testing. John did seek the advice of counsel, but did not intervene in the case or pursue blood tests.

It is clear the juvenile court did not become aware of John's status as the father of Michael until March 4, 1997. Immediate action was taken and a second petition alleging Michael to be a child in need of assistance was filed on March 7, 1997. An attorney was appointed for John and he became an active party in this matter on that date. The State argues there was no prejudice because the court took immediate actions to correct the matter. The juvenile court stated in its order of October 17, 1997, as follows:

The Court concludes that the Department's failure to notify John O. of the CINA proceedings was bad policy, but not violative of John O.'s legal rights. A noncustodial parent has no absolute right to be part of a CINA proceeding. It is within the Court's discretion whether to make a noncustodial parent a party. *See Iowa Code § 232.91; In re T.M.C.*, 429 N.W.2d 165 (Iowa App. 1988).

We agree. The juvenile court was not aware until March 4, 1997, of John's existence as the biological father of Michael. Immediate action was taken to file a second child in need of assistance proceeding and include John as a party thereto. The juvenile worker involved had taken steps to check the birth certificate and advise John of his right to intervene and commence paternity testing. John consulted with an attorney but did not follow through. We conclude John's rights were not prejudiced by the failure to give him notice of the first child in need of assistance proceeding. The juvenile court acted properly in having a second CINA proceeding instituted once John's position as biological father became known.

III. FINDING OF ABANDONMENT. The juvenile court made the following findings in the adjudicatory order dated October 17, 1997:

1. The evidence is undisputed that John O. never requested any blood tests or took any other legal steps to establish his paternity of Michael;

2. Michael lived with Candy and Sean from his birth on August 20, 1995, until he was placed in foster care on March 19, 1996, where he remained at the time of the hearing;

3. John O. saw Michael a total of four to five times in Michael's life, with each visit lasting from fifteen minutes to one hour;

4. John O. has only seen Michael once since he was placed in foster care on March 19, 1996;

5. Sean testified that he told John O. he could see Michael any time and even have unsupervised visits lasting a few days. John's response was that he didn't want to cause marital problems between Sean and Candy;

6. John O. told Sean that he wasn't going to assert his parental rights as long as he could occasionally see Michael.

Iowa Code section 232.2(1) defines abandonment as follows:

Abandonment of a child means the relinquishment or surrender, without reference to any particular person, of their 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. The term does not require that the relinquishment or surrender be over any particular period of time.

Iowa Code § 232.2(1).

The juvenile court concluded the two basic elements of abandonment were established in the instant case. *See In re Goettsche*, 311 N.W.2d 104, 106 (Iowa 1981) (abandonment is a giving up of parental rights and responsibilities accompanied by an intent to forego them). The "conduct" element was established in the above

findings. The juvenile court summarized John did not take advantage of the opportunities he had to develop a proper parent-child relationship. The juvenile court concluded the "intent" element was established by the fact John never obtained blood tests or took any action to establish his paternity. The juvenile court stated in the adjudicatory order:

The court finds, however, that the primary reason that John did not take immediate steps to assert parental rights was that John was actually quite content to take a minor role in Michael's life. As long as Candy or Sean had custody of Michael and had assured him that he could visit Michael, he found no reason to do more. The court finds that from the beginning John did not intend to establish a parent-child relationship with Michael. He really was not interested in taking on the parental rights, duties or privileges inherent in the parent-child relationship. What he was interested in was being able to visit occasionally and to watch from the sidelines as Michael grew up. It appears to the court that from the beginning John intended to take on a role more like that of an uncle, grandparent, or other close relative to Michael. His role was that of a relative who was interested in the child, who expects to visit occasionally, but who expects visitation to be the extent of his involvement. In fact, it is not even clear that John intended to act in the role of a very close relative. Almost six months went by while Michael was in foster care before John, by his own testimony, even knew that Michael was out of Sean's care. There was no contact or attempted contact with the child during that time.

We agree with the juvenile court's conclusions. Affirmative parenting is required, and the parental responsibilities of a person include more than "subjectively maintaining an interest in a child." *Goettsche*, 311 N.W.2d at 106. We find abandonment was shown by clear and convincing evidence.

IV. FOSTER CARE REVIEW REPORT. John contends the juvenile court erred by admitting into evidence the report of a foster care review meeting. Review

on the issue of admissibility of evidence is for abuse of discretion. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996).

The report of the Foster Care Review Board was admitted in this case. The board was created by Iowa Code section 237.20(1) to make a periodic review of all foster care cases. Reports from the board are to be filed with the juvenile court and the board "shall ensure that the most recent report is available for a court hearing." Iowa Code § 237.20(2)(a).

John argues the report was erroneously admitted pursuant to Iowa Code section 232.96(6). John claims the report is inadmissible because the Foster Care Review Board is not specifically listed within this section. We disagree. John took part in the review contained within the report. In addition, there is no evidence the juvenile court even relied on this report in making its adjudicatory decision. Finally, John has failed to show prejudice in the admission of the report.

For the reasons stated above, we affirm the decision of the juvenile court.

AFFIRMED.