IN THE COURT OF APPEALS OF IOWA

No. 1-589 / 01-212
Filed November 28, 2001

K.A.H.,
Petitioner-Appellee,

vs.

R.M.,
Respondent-Appellant.

FILED
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CLERK SUPREME COURT

IN THE INTEREST OF
J.L.H., Minor Child,

R.M., Mother,
Appellant.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler, Judge.

A mother appeals the decision of the district court which denied her petition to terminate the father's parental rights to their child. **AFFIRMED.**

Matthew J. Brandes and Elizabeth V Croco of Simmons, Perrine, Albright & Elwood, P.L.C., Cedar Rapids, for appellant-mother.

Crystal L. Usher of Nazette, Marner, Wendt, Knoll & Usher, L.L.P., Cedar Rapids, for appellee-father.

Lucy Harrington, Cedar Rapids, guardian ad litem for minor child.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

MILLER, J.

A mother appeals the decision of the district court which refused to terminate the father's parental rights under Iowa Code section 600A.8 (1999). She claims: (1) the father abandoned the child; (2) he failed to pay child support; and (3) it is in the child's best interests to terminate the father's parental rights. We affirm.

Kevin and Rebecca are the parents of Jessica, born on May 20, 1994. The parents lived together until September 1994, when they separated. Rebecca began to receive public assistance. Kevin admitted to paternity, and was ordered to pay child support.

In January 1995 Kevin and Rebecca reunited and lived together until June 1995. In July 1995, Rebecca filed a petition for relief from domestic abuse, naming Kevin, and a no-contact order was issued. About a week later, Rebecca requested the no-contact order be canceled because she had accused the wrong party.

After the parties separated, Rebecca allowed Kevin's parents, Shirley and Leonard, to have visits with Jessica. Kevin participated in at least one of these visits, if not more. The visits continued for several months until Rebecca found out the paternal grandparents had taken Jessica to Sears, where she had her picture taken with Kevin. Rebecca became very angry over this incident and denied Kevin and his parents any further contact with Jessica.

Rebecca moved several times after the parties separated. In June 1995, Rebecca moved to Marion. Rebecca claimed Kevin called her repeatedly, but she would not speak to him. Rebecca considered Kevin's telephone calls

harassing, and she moved to the North Towne Apartments in August 1995 to get away from him. She stated Kevin saw her because he was working at a nearby hotel, and he then came over on different occasions wanting to talk to her, which she also considered harassment.

In September 1996, Rebecca moved to the Park Towne Apartments. She stated that Kevin never called her while she lived at Park Towne. Rebecca had an unlisted telephone number. She asked friends and relatives not to tell Kevin her address or telephone number. Rebecca was then dating Dan. In November or December 1996, Kevin and a friend, Ron, went to Dan's apartment at North Towne and Ron broke a window. Kevin testified police officers told him never to return to Dan's home.

In March 1997, Rebecca, Jessica, and Dan moved in together in a house in Marion. In April 1997, Rebecca contacted an attorney, and had him send a letter to Kevin's parents asking about Kevin's interest in having visitation with Jessica. Shirley called the attorney and told him she and Kevin were interested in visitation. According to Shirley, the attorney responded, "that would never happen." No further action was taken by either party to set up visitation. Dan testified he wanted to adopt Jessica at that time. Kevin testified he did not know where Jessica was living, he did not know Dan's last name, and he did not know how to find them. At one point Kevin's sister found Rebecca's e-mail address and contacted her, but Rebecca told her never to use that e-mail address again.

In 1997, and again in 1998, Shirley and Leonard accidentally ran into Rebecca and Jessica in public places. On these occasions, Rebecca allowed the paternal grandparents to visit with Jessica for a short period of time.

Rebecca stated she would allow them to visit Jessica in the future, but she later canceled the visits.

Kevin has some criminal convictions. In 1993 he was convicted of domestic abuse assault concerning his girlfriend at the time. He was convicted of operating while intoxicated in September 1997. Also, in December 1998, he pled guilty to assault against his sister's boyfriend. Kevin married Lainie in February 2000. He now has a stable job with a lawn care company. Kevin was not always current in his child support obligation, but is now paying for current and past-due support. As of December 2000, his child support arrearage was $1326.

On May 26, 2000, Kevin filed a petition seeking to be designated a joint custodian of Jessica and to have visitation. Rebecca responded by filing a petition to terminate Kevin's parental rights to Jessica under Iowa Code section 600A.8. The two cases were consolidated and a hearing was held in December 2000.

The testimony presented at the hearing was very contradictory. The district court noted this, and stated it would "carefully evaluate the credibility of each and every witness." The court found Rebecca was not credible. The court found Rebecca had systematically prevented Kevin from having any relationship with Jessica. The court determined Rebecca's mother, Linda, was credible in testifying:

> (a) Becky "would rather not have any contact with Kevin," (b) that she "would not have given Kevin Becky's address and phone number" had she been asked, (c) that she "knew that Becky didn't want Kevin to have any contact" with Jessica and, last, but certainly

not least, (d) that she "would have probably hung up" on Kevin if he had called.

The court denied the petition to terminate Kevin's parental rights. The court determined Kevin should have visitation with Jessica, and created a visitation schedule. Rebecca appeals the denial of her petition to terminate.

I. SCOPE OF REVIEW

Termination proceedings are reviewed de novo. Iowa R. App. P. 4. Although we are not bound by them, we give weight to the trial court's findings of fact, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). Our primary concern is the best interests of the child. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998).

II. ABANDONMENT

Rebecca contends Kevin abandoned Jessica within the meaning of section 600A.8(4). This section applies if a putative father abandons a child.[1] Iowa Code § 600A.8(4). Kevin claims section 600A.8(4) should not apply to him because he is not a putative father. He points out that he signed a consent to paternity in 1994. Rebecca responds that Kevin did not object to the application of section 600A.8(4) at the time of the trial, and so has not preserved this issue for our review. The district court cited sections 600A.8(3) (parent abandoned child) and 600A.8(4) (putative father abandoned child). Under either section, our analysis will be the same because we must focus on Kevin's intent since the parties admit Kevin has not had contact with Jessica for quite some time.

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[1] Iowa Code section 600A.2(15) defines a putative father as "a man who is alleged to be or claims to be the biological father of a child born to a woman to whom the man is not married at the time of birth to the child."

Section 600A.2(18) provides:

> *"To abandon a minor child"* means that a parent . . . rejects the duties imposed by the parent-child relationship . . . which may be evinced by the person, while being able to do so, making no provision or making only a marginal effort to provide for the support of the child or to communicate with the child.

We have found a father abandoned a child "through his conduct in failing to have any contact with her whatsoever, in failing to provide any financial or emotional support to her, and in failing to express significant interest in her welfare by contacting her caretakers." *In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa Ct. App. 1994).

In the present case, it is clear Kevin has not had any contact with Jessica since about 1995. Also, because he has not been in contact with Rebecca, it is unlikely he expressed significant interest in Jessica's welfare. Kevin claims the problem was not that he wanted to avoid contact with Jessica, but that Rebecca acted to prohibit contact. The statute recognizes there may be circumstances in which a custodial parent raises barriers to visitation by including the phrase "while being able to do so" in section 600A.2(18) and the statement, "when not prevented from doing so by the person having lawful custody of the child," in section 600A.8(4)(b)(1).

In order to ascertain Kevin's intent, we must consider which is more credible, Kevin's claim he wanted to have visitation with Jessica, but was unable to because of Rebecca's conduct, or Rebecca's claim that Kevin was not interested in his child. As noted above, weight is to be accorded the finding of the trial court, especially in regard to the credibility of witnesses. *J.L.W.*, 523 N.W.2d at 625. The district court specifically found Rebecca was not credible.

The court found Rebecca, her friends, and family had engaged in a systematic and well-reasoned effort to forever bar Jessica from having any involvement with her father. The court concluded Kevin had been prevented from communicating with Jessica. Based on the weight we should give the district court's findings regarding credibility, we affirm the court's conclusion Kevin had not abandoned Jessica.

III. SUPPORT OF THE CHILD

Rebecca also contends Kevin's parental rights should be terminated under section 600A.8(5), which applies when "A parent 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." The key factual issue in determining whether a failure to pay is "without good cause" concerns a parent's ability to pay the ordered child support. *In re R.K.B.*, 572 N.W.2d 600, 602 (Iowa 1998). The burden is on the party seeking termination to show the parent had the ability to pay child support. *In re D.E.E.*, 472 N.W.2d 628, 630 (Iowa Ct. App. 1991).

Kevin has not always been current in his child support obligation. He has generally had low-paying jobs. His approximate earnings were $10,000 in 1995, $6000 in 1996, $2000 in 1997, and $11,000 in 1998. His current job, which pays $11.00 per hour for seasonal employment, is the best job he has ever had. Kevin has paid a total of $10,105 in child support since 1994, and as of December 2000, had an arrearage of $1326. Kevin testified he expected to be current in his child support by the end of 2001.

We determine the district court properly rejected Rebecca's claim Kevin had failed, without good cause, to contribute to Jessica's support. The evidence

showed Kevin paid as best he could in years when his income was low. He currently is making great strides to eliminate his child support arrearage. There was no evidence Kevin had ever acted in a manner to avoid paying his child support.

We affirm the decision of the district court. Rebecca has not sufficiently proven her claims of abandonment or failure to pay support to warrant termination of Kevin's parental rights under section 600A.8. We do not need to address the third issue, the best interests of the child, because we have found there are insufficient grounds for termination.

AFFIRMED.