FILED
JAN 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-630 / 93-1140

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

K.S., Father,

Appellant.

Appeal from the Iowa District Court for Washington County, Michael R. Stewart, District Associate Judge.

Father appeals from the termination of his parental rights pursuant to Iowa Code sections 232.116(1)(b) and 232.116(2) (1991). **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

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

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, Judy Sheirbon, Assistant Attorney General, and Gerald N. Partridge, County Attorney, for appellee State.

Craig A. Davis, Washington, guardian ad litem, for appellee's minor children.

Craig S. Arbuckle, Washington, for appellee mother.

Heard by Oxberger, C.J., Sackett, J., and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

SACKETT, J.

Kenneth, the father of a son, Michael, born in February 1981, and a daughter, Tiffany, born in May 1986, appeals an order terminating his parental rights to both the children. We reverse and remand. We do not retain jurisdiction.

After the children were born they lived for a short time in various homes with either Kenneth or their birth mother. The birth mother's parental rights have been terminated. She is not a party of this appeal.

In 1986, the children began living with Kenneth's mother Zettia. They have continually resided with Zettia to this time. It is anticipated the children will continue to live with Zettia and will not be placed for adoption.

Neither Kenneth nor the children's mother have provided an adequate home for the children. Kenneth has failed to make financial contributions of any consequences to the children's care. Kenneth himself has had minimal employment and is on financial assistance.

Kenneth challenges the finding he abandoned the children under the definition of Iowa Code sections 232.111(3) and 232.116(b). He further contends that the juvenile court failed to find how the children would benefit from terminating his parental rights. He argues there is no evidence the termination will be in the children's best interest. Kenneth further advances that the juvenile court should not have allowed the attorney for

the birth mother to continue to play an active role in the termination hearing after the mother had signed a consent to the termination of her rights to the children and the court had orally terminated her parental rights.

Kenneth in challenging termination of his parental rights does not seek custody of the children. He does wish to have greater involvement in their lives.

The children were transferred to Zettia's custody. In March 1992, a permanency order continued her custody. Then on May 8, 1992, the state filed a petition to terminate parental rights contending the birth mother had voluntarily consented to the termination and the birth father, Kenneth, had abandoned the children. After a three day hearing, Kenneth's parental rights to the children were terminated.

The juvenile court found Kenneth had left his children in what the court referred to as "the highly questionable care" of their mother in early 1986, in response to a finding by the Department of Human Services Kenneth had abused Michael by hitting him with a board with a nail in it.

The court also notes the petition was filed at a critical time in the children's life when their birth mother consented to the termination of her parental rights and Zettia experienced difficulty in parenting the children. The court found it was not until this time that Kenneth reappeared contending he thought he was restricted from visits by an earlier court order.

We reject Kenneth's first ground on appeal and agree with the state that there are sufficient facts to support a finding by clear and convincing evidence that Kenneth has abandoned the children.

Iowa Code section 232.116(1)(b)(1991) provides:

> 1. [T]he court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds:
> b. The court finds that there is clear and convincing evidence that the child has been abandoned or deserted.

Id.

Iowa Code section 232.2(1)(1991) provides:

> 1. "Abandonment of a child" means the 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. The term does not require that the relinquishment or surrender be over any particular period of time.

Id.

Iowa Code § 232.2(1).

> There are two elements necessary for abandonment. The giving up of parental rights and responsibilities refers to the party's conduct. The intent to forego parental rights and responsibilities is the accompanying state of mind. In Interest of Goettsche, 311 N.W.2d 104, 106 (Iowa 1981). Parental responsibilities include more than subjectively maintaining an interest in a child. Affirmative parenting is required to the extent it is practical and feasible. Id. The affirmative duty requires a continuing interest in the child and a genuine effort to maintain communication and association with the child. Id. (quoting with approval In re J.L.Z., 492 Pa. 7, 421 A.2d 1064, 1064-65 (1980)).

In re S.K.C., 435 N.W.2d 403, 404 (Iowa App. 1988).

Kenneth had little or no contact with the children for a substantial period of time and he had given little to the children by way of financial support despite living in the general area of his mother's home during this period. See In re M.L.M., 464 N.W. 2d 688, 690-91 (Iowa App. 1990); S.K.C., 435 N.W.2d at 404.

Kenneth's second challenge to the proceeding being that termination of the children's parental rights is in their best interest is not so easily answered. A paramount consideration is the best interest of the child. In re D.T., 435 N.W.2d 323, 329 (Iowa 1989).

The state advances that the children will be benefited by the termination because it will allow Zettia to keep all four children in her home and she will, after termination, be more able to exercise the rights of a parent. The state also argues the home study does not indicate the children should be in Kenneth's home at this time.

There is no evidence Kenneth's continual legal tie to the children presents the children with any harm. Kenneth has living with him a son born January 17, 1984, and a daughter. Kenneth lives with the mother of this daughter and her son. The children in Kenneth's care have had a satisfactory upbringing. The evidence is Kenneth's son by this relationship has close ties to his father and Kenneth exhibits a genuine concern for his well being.

Zettia is not in favor of terminating Kenneth's parental rights. Kenneth contends Zettia has limited his involvement in the children's lives because of her fear that the Department of Human Services would take custody of the children away from her if she allows Kenneth to be with his children. Reviewing Zettia's testimony, we are convinced she has tried to follow carefully the directives of the department and has had concern the department might remove the children from her care.

The trial court made specific findings of abandonment but did not make any specific finding of reasons why it would be better for the children to have ties with their father cut and lose their rights to support from him.

Zettia raised seven children of her own. She is fifty-four years old and in good health. In addition to caring for Michael and Tiffany, she also cares for these children's two half-siblings who share a common mother but are not Zettia's grandchildren. Zettia also has responsibility for her thirty-three-year-old handicapped daughter who lives in her home.

Zettia has had difficulties parenting Michael. There is evidence Michael needs a father figure in his life.

Zettia testified when the children were placed with her she was of the opinion that visits between the children and Kenneth had to be supervised. Consequently, Zettia denied Michael's and Kenneth's requests on several occasions to allow Michael to go home with Kenneth. Zettia is concerned

about the department's approval of Kenneth's involvement in the lives of the children in her care. There was a move by the state at one time to put Michael in a group foster home.

Zettia testified she would be in favor of Kenneth taking Michael if Kenneth is ready to take on the responsibility of Michael, and if father and son have an opportunity to be better acquainted. Zettia also testified to the fact that Tiffany thinks the world of Kenneth.

The state in oral argument agreed terminating Kenneth's parental rights will terminate his responsibility for child support. The state argues correctly Kenneth has provided these children with very minimal support. Furthermore, the record shows at the current time Kenneth does not have a full-time job and his ability to provide child support is very limited. However, Kenneth has been trained in several areas and is seeking employment. We can not determine what ability he would have to contribute to his children's support in the future.

Termination does not change the living arrangements of the children. Kenneth is not currently seeking custody of the children. Kenneth is currently parenting other children. Zettia is supportive of Kenneth taking the children in the future and recognizes he is an important person in the children's lives. There is evidence Michael needs some adult male companionship. There is no evidence Kenneth presents a risk to the children. There is no

assurance Zettia will be able to parent these children until adulthood.

The biological family has remained intact because of the sacrifices and dedication of Kenneth's mother. She loves the four children in her care and is dedicated to seeing that their biological relationship is not fractured.

Kenneth cannot be forgiven for failing to provide more help to his mother with these children. However, the fact is the children are getting older, as is Zettia. The children accept Kenneth as their father figure and look up to him. Kenneth can be of major benefit in helping Zettia with both Michael and Tiffany. Zettia, who has dedicated her middle age years to caring for these children, is supportive of Kenneth's involvement with them. We cannot find under the unique facts of this case that terminating Kenneth's parental rights is in the children's best interest. We trust that Kenneth will work to involve himself in helping his mother with the raising of these children.

We need not address Kenneth's challenge to the continual participation by the attorney for the birth mother after her parental rights were terminated and choose not to do so.

We reverse the termination of parental rights. We affirm the permanency order leaving the children in Zettia's care. We remand to the trial court to establish a

visitation schedule for Kenneth and the children. We direct that the trial court determine Kenneth's ability to contribute to the support of his children and make a support order if one is justified.

Costs on appeal are taxed one-half to the state and one-half to Kenneth. We do not retain jurisdiction.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.