

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF)

B. B., A Child.)

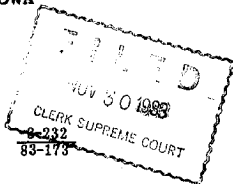
B. B.,)

Plaintiff-Appellant,)

vs.)

L. B. G.,)

Defendant-Appellee.



Filed November 30, 1983

 Appeal from Allamakee District Court - C.W. Antes, Judge

Plaintiff natural father appeals the juvenile court's refusal to terminate defendant natural mother's parental rights on grounds of abandonment.

AFFIRMED.

Robert J. Hearity, O'Brien Law Firm, P. C., Oelwein, Iowa, for plaintiff-appellant.

Barry S. Mueller, Kelly & Mueller, P. C., Postville, Iowa, for defendant-appellee.

James U. Mellick, Waukon, Iowa, guardian ad litem, for the child.

Heard by Donielson, P. J., Schlegel and Sackett, JJ.

SACKETT, J.

The natural father, B. B., has appealed from the juvenile court's refusal to terminate L. B. G.'s, the natural mother, parental rights to the parties' minor child, B. B. We affirm.

The minor child was born to the parties on May 26, 1976. Her parents were divorced in Kansas in May of 1978. The mother was granted custody of the minor in late 1978. There were outbreaks of violence in the mother's neighborhood, which caused her to fear for her child's safety. She asked the father to take care of the child. After the father had had the child for a short time, he filed in Kansas a motion to change custody of the child. The Kansas court, on September 5, 1978, changed custody to the father and ordered that the mother have reasonable visitation which was to include two weeks summer visitation subject to thirty days advance notice. The Kansas court also ordered that as long as either party was living, the child could not be adopted without the consent of both parties. The father continued to live in Kansas until April of 1979, at which time he moved to Iowa. When he left Kansas he did not notify the mother that he was leaving or where he was going. The mother had, however, left Kansas prior to the father and had moved to Michigan. Following the modification of the decree and prior to the father's leaving Kansas, the mother had contact with the minor child three or four times while the child was in the father's care. The mother's parents lived in Kansas and they had the child three or four weekends a month while the father lived in Kansas. The natural mother had further contact with the minor child while the child was with her maternal grandparents. When the father left Kansas, he failed to advise the grandparents that he was leaving or where he was going.

During the summer of 1979 the maternal grandparents contacted the father about taking the child with them on a trip to Minnesota. He refused their request.

During the summer of 1980 the natural mother sought to bring the child to Kansas for visitation. The father refused, telling the mother that if she wanted to see her child, she would have to see her in Allamakee County, Iowa, which was his residence at the time.

On August 26, 1980, the natural father filed a petition in Allamakee County to terminate the natural mother's parental rights. This was prompted by his second wife's desire to adopt the child. The natural mother was not served with a notice of the filing until November 18, 1981. The natural mother answered the petition, alleging that she had attempted to keep in contact with the child despite her lack of money and the distance between herself and the child. The mother alleged that the father was attempting, by his termination action, to modify the Kansas decree and that he was estopped from doing so because the adoption issue had been litigated in the prior action. The father's petition was subsequently recast to allege that the natural mother had abandoned the child.

The matter was heard by the juvenile referee, who refused to terminate the natural mother's parental rights. A rehearing was requested, and on January 27, 1983, the district court affirmed the order of the referee. The father has appealed from the district court's order. He claims that there is clear and convincing evidence to support termination of the natural mother's parental rights under Iowa Code section 600 A.8(3). We disagree and affirm the trial court decision.

Section 600 A.8(3) provides:

Grounds for termination. The juvenile court shall base its findings and order under section 600A.9 on clear and convincing proof. The following shall be, either separately or jointly, grounds for ordering termination of parental rights:

* * *

3. A parent has abandoned the child.

* * *

In Doan Thi Hoang Anh v. Nelson, 245 N.W. 2d 511, 515 (Iowa 1976), the supreme court said:

To constitute an abandonment, there must be a relinquishment or surrender of rights or property by one person to another; a giving up; a total desertion. It includes both the intention to abandon and the external act by which the intention is carried into effect.

The court then went on to say:

Voluntary abandonment, as used in adoption statutes, does not include an act or course of conduct by a parent which is done through force of circumstance or dire necessity, but relates to intentional and wilful acts, or a course of conduct implying conscious disregard or indifference to parental obligations to the child, or a settled purpose to be rid of those obligations and to forgo all parental rights. The factual question must be determined by ascertaining the mental attitude and intent of the parent; there must be both the intention to abandon and the external act of abandonment. It has been said that silence and inaction of the parent must be prolonged to such a point that an intention to abandon the child must be inferred as a matter of law. Mere involuntary separation from a child or loss of its custody is alone insufficient to constitute an abandonment which dispenses with consent, but coupled with more definitive factors, such as imprisonment of the parent, may be deemed sufficient to establish abandonment.

Doan Thi Hoang Anh, 245 N.W. 2d at 516 (quoting 2 Am. Jur. 2d Adoption §33 at pp. 887-88).

While our review of the proceedings before the referee and the district court is de novo, we accord weight to the findings of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those findings. In re Interest of Chad, 318 N.W. 2d 213, 216 (Iowa 1982).

In applying the law to the facts here, we find no grounds for termination. The natural mother allowed the natural father to take custody of their child because of her concern for the child's safety. After custody was changed to the natural father, the mother visited with the child both when the child was in her father's custody and when under the care of the maternal grandparents. The natural father left Kansas without advising the natural mother or the maternal

grandparents that he was leaving. He refused visitation in 1979 and 1980 by the maternal grandparents, and in 1980 by the child's mother. It also appears that he attempted to frustrate contacts with the child by the mother and her parents. We do not deny that the child probably has an excellent home with her natural father and her stepmother, but that is not the issue here. The natural mother is not seeking a change of custody. All she seeks to do by her challenge to the termination proceedings is to exercise her rights as a noncustodial parent. We hope that the natural father will permit her to do so by allowing her some contact with her child. Because we find that the natural mother has not "abandoned" her child within the meaning of section 600A.8(3), we affirm the trial court decision.

AFFIRMED.