

FILED

JAN 26 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**IN THE INTEREST OF J.E.M.,**)

A Minor.)

Filed January 26, 1983

T.A.P.,)2-402
3-58275

Petitioner-Appellant.)

Appeal from Des Moines District Court - Gary J. Snyder, Judge.

Petitioner, a prospective parent of the minor child, appeals the juvenile court's dismissal of his petition to terminate respondent natural father's parental rights to the child. **AFFIRMED.**

Gene R. Krekel of Hersh, Link, Adams, Hoth, & Krekel, Burlington, for petitioner-appellant.

Michael G. Dieterich of Pryor, Riley, Jones & Aspelmeier, Burlington, for respondent-appellee.

James R. Millen of Cahill & Millen, Burlington, guardian ad litem, for the minor child.

Heard en banc.

DONIELSON, J.

Petitioner, a prospective parent of the minor child, appeals the juvenile court's dismissal of his petition to terminate respondent natural father's parental rights to the child. On appeal petitioner asserts that he presented sufficient clear and convincing evidence to support termination of the father's parental rights pursuant to Iowa Code § 600A.8(3) (1981) providing for termination of parental rights upon proof that the parent has abandoned the child, and § 600A.8(4) (1981) providing for termination of parental rights upon proof that the parent was under court order to pay child support and failed to do so without good cause. We affirm.

Our review of the trial court's findings under section 600A(8) is de novo. Iowa R. App. P. 4; Klobnock v. Abbott, 303 N.W.2d 149, 150 (Iowa 1981). While we give weight to the court's findings, we are not bound by them. Id.

I.

The child in question, J.E.M., was born on June 27, 1978. His natural parents were married on December 23, 1977 and separated in December, 1978. The mother had custody of J.E.M. during the separation. The mother filed for dissolution of marriage, and the father was ordered to pay \$20 per week temporary child support during the pendency of the dissolution action. He paid no support during this time. A dissolution decree was filed on May 29, 1979, and the mother received legal custody of J.E.M. The father was ordered to pay \$25 per week child support and was granted reasonable visitation rights.

The mother married petitioner in 1981. J.E.M. has resided with them since the marriage. On August 17, 1981, petitioner, as J.E.M.'s "prospective parent" pursuant to Iowa Code § 600A.5(1)(a) (1981), filed a petition seeking to terminate the parental rights of the father on grounds of abandonment and failure to pay ordered child support without good cause, pursuant to Iowa Code §§ 600A.8(3) and (4).

A termination hearing was held on December 17, 1981. At the conclusion of the evidence the court dismissed the petition to terminate the father's parental rights. The court found that the evidence did not constitute clear and convincing proof that the father had abandoned the child or that he did not have good cause for his failure to provide support. The petitioner then instituted this appeal.

II.

The petitioner contends there was clear and convincing proof that the father intended to abandon J.E.M. and acted in a manner which evidenced that intention. See Iowa Code § 600A.2(16) (defining abandonment); In Interest of Goettsche, 311 N.W.2d 104, 106 (Iowa 1981) (abandonment includes both conduct and an intent element). We disagree that the father abandoned J.E.M.

The petitioner relies on the Goettsche case in which the court upheld the termination of the father's parental rights. In Goettsche, the parents were divorced in January, 1976, and had two children, ages 6 and 8. The father did not visit his children from December, 1976, until June, 1980, after the termination proceeding had begun. He made no effort to exercise his right to reasonable visitation for over three years even though the mother had been fully cooperative when he had exercised his visitation rights in 1976. While he did send the children birthday and Christmas cards, he made no attempt to inquire about their academic progress and did not speak to the children even when he saw them at a little league baseball game. The court found that, by these actions, the natural father "intended to relinquish parental rights, privileges and duties." Id. at 107.

The facts of the instant case are distinguishable. J.E.M. was only 11 months old at the time of the dissolution and only 3 years old at the time of the termination hearing. The record indicates that the father visited J.E.M. once in 1979, once in 1980, and in 1981 only after the petition for termination was filed in August of 1981. There is, however, considerable dispute regarding the reason for

the father's infrequent visitation. There is considerable evidence suggesting that the father attempted to exercise his visitation rights under the decree. It appears that the mother denied his attempts to visit J.E.M. and, therefore, inhibited his chances to develop a parent-child relationship with his son. The mother unilaterally dictated the terms of visitation, allowing the father to see J.E.M. only at her parents' home and only for a brief period of time. She changed residences several times without informing the father of her new address. Moreover, she testified that she refers to J.E.M.'s last name as being that of her present husband, even though his legal name is that of his natural father. The evidence further suggests that the father wrote to the mother requesting to see his son and to set up a visitation schedule. No schedule was ever agreed upon. While the father did not send J.E.M. birthday or Christmas presents, his mother, J.E.M.'s paternal grandmother, did send J.E.M. gifts.

Based on our de novo review of the record, we agree with the trial court that there is not clear and convincing evidence that the father has abandoned his child. On the contrary, while he has not been extremely persistent about establishing a visitation schedule, he has displayed an interest in J.E.M. and a desire to maintain an association with him. We believe it is the duty of the mother to accommodate the father's right to reasonable visitation under the decree, not to inhibit his exercise of that right. Accordingly, we find that the father did not abandon J.E.M. such that parental rights should be terminated.

III.

We also disagree with petitioner's second contention that there is clear and convincing proof that the father's parental rights should be terminated due to his failure to make child support payments pursuant to the dissolution decree. The father paid no temporary child support prior to the filing of the dissolution decree. He paid no child support from the date of the decree in May of 1979 through July,

1981. He made his first child support payment in August of 1981, just prior to the filing of the petition for termination, and paid a total of \$125. After the proceedings were initiated he paid an additional \$100. There is evidence that J.E.M.'s mother did not cash the checks because she thought there would not be enough money in the bank to cover them. It appears that the father was often unemployed and did not have much money. He was employed as a factory worker from November, 1979, until April, 1980. During this time he was temporarily laid off for approximately five weeks. He was then hired by his father as a farm hand on subsistence pay from April, 1980, through November, 1980. He was again employed as a factory worker from April, 1981, through October, 1981. At the time of the termination hearing he was unemployed with no source of income. He was living in a mobile home which was paid for by his parents.

Iowa Code § 600A.8(4) provides that parental rights may be terminated when the "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" (emphasis added). While "good cause" has not been specifically defined by the Iowa Supreme Court, we believe the authorities suggest that inability to make the court-ordered payments would constitute good cause within the meaning of Iowa Code § 600A.8(4). See Klobnock, 303 N.W.2d at 152 (natural father admitted being financially able to make court-ordered support obligation, but refused to do so). In Klobnock, the court cited "Mullins v. Mullins, 606 P.2d 573 (Okla. 1980) (willful failure to pay support as ordered in divorce decree a ground for termination); [and] Brazier v. Brazier, 597 S.W.2d 442 (Tex. Civ. App. 1980) (failure to support when able to do so ground for termination)." Id. (emphasis added). In In Interest of Kelley, 262 N.W.2d 781, 785 (Iowa 1977), the court noted that failure to meet support obligations is similar to abandonment and that "[a] parent who unjustifiably refuses to meet a support obligation manifests complete indifference to his child."

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In the instant case, the father had purchased life insurance for J.E.M. and had opened a joint savings account with J.E.M. The father did not pay into the joint account after the dissolution and the mother closed the account prior to the initiation of the termination proceedings. The father was often unemployed and, when employed, used his paychecks to cover his personal living expenses. In light of his inability to obtain meaningful employment, he filed for modification of the dissolution decree seeking to reduce the child support. We agree with the trial court that, on these facts, there is not clear and convincing evidence that the father did not have good cause for failure to make the support payments. Should he obtain gainful employment, the child support payments must be made. However, in light of the evidence indicating his inability to pay, we cannot find the father's parental rights should be terminated. We note that the father's record of parenting is, most assertively, less than desirable. He has not demonstrated himself to be a loving, caring and concerned parent. Nevertheless, while it is close, the record is insufficient for termination of his parental rights.

Having found no clear and convincing evidence to support termination of parental rights, we affirm the trial court's order dismissing the petition.

AFFIRMED.