

IN THE COURT OF APPEALS OF IOWA

No. 2-437 / 92-658

IN THE INTEREST OF M.M.S., A Minor Child,
B.C., Father,
Appellant.

FILED

NOV 30 1992

CLERK SUPREME COURT

Appeal from the Iowa District Court for Greene County,
David R. Danilson, District Associate Judge.

The father appeals the juvenile court's termination of
his parental rights to M.M.S. **REVERSED.**

James B. Malloy of Nelson, Johnson & Malloy, Ogden, for
appellant.

Michael F. Mumma and Rita Harmening Pedersen of Mumma &
Pedersen, Jefferson, for mother.

Dennis W. Ladd, Jefferson, guardian ad litem for the
child.

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

SACKETT, J.

The question in this appeal is whether the parental rights of Mary Smith's¹ biological father, established by a decree in September 1990, should have been terminated a little more than a year later. We determine, under the facts of this case, there is no showing appellant, Brian Cone² the biological father, abandoned the child. We reverse the order terminating his parental rights.

There is little precedent for this case. This case is probably before us because the advent of sophisticated testing to determine biological fathers has placed a certainty that did not previously exist in correctly identifying biological fathers. It also has created new and difficult issues for the courts.

The biological parents of Mary have never been married to each other. They only had one casual sexual encounter. Mary was born in March 1989. Mary's mother testified she believed a man other than Brian was Mary's father, and it was not until a blood test in August 1990 revealed Brian was Mary's father, that she realized Brian was in fact Mary's biological father.

In 1990 Mary's mother applied for welfare, and the state sought identity of the biological father for the

1. M.S. are the child's initials. Mary Smith is not her given name.

2. B.S. are the father's initials. Brian Cone is not his given name.

purpose of seeking support from him. By testing, it was shown the man the mother believed to be the father was not the father.

In April 1990 a petition was filed to establish that Brian was the biological father. In July 1990 Brian submitted to a blood test. In August 1990 the blood test revealed Brian was Mary's father. On August 28, 1990, Brian signed a stipulation admitting he was Mary's father. On September 17, 1990, the trial court entered an order that established Brian was Mary's natural father, and that her birth certificate should be amended to show he was the father. Brian was not ordered to pay support. Brian was scheduled to be incarcerated on federal drug and perjury charges. Nine days later, Brian was incarcerated and has continued to be incarcerated. On October 21, 1990, Brian wrote Mary's mother expressing joy at the prospects of seeing the first pictures of his child, advancing that he realized the sacrifices she had made, that he wanted to help with the child and hoped she would get back to him.

During this time, Brian's parents made contact with Mary and had one visitation period with her. The grandparents' second request for visitation with Mary was denied. The grandparents contacted their attorney who contacted the natural mother. In a letter to the grandparents' attorney, the mother made it very clear she did not want the child told about her biological father at

this time, and she did not want any financial help with the child from the grandparents. The mother said the grandparents could have visitation, but she set very specific ground rules, including that visitation would be at her convenience, the grandparents were not to tell Mary where her biological father is, the mother's family comes first at holidays, the visits were not to include taking the child out of town and the visits were to be a four-hour maximum, and if any of her rules were broken the grandparents would be denied a visitation period. Under the mother's terms, the grandparents had fifteen other visitations before the termination hearing.

In January 1991 the mother responded to Brian's October letter, asking that Brian agree to her new husband adopting Mary. Brian did not answer this letter. The mother wrote a similar letter in March. Brian did not answer the second letter. In October 1991 a petition was filed to terminate Brian's parental rights alleging:

- a. Brian had abandoned Mary, has never seen her, and has never contributed to her care or support.
- b. Brian has been ordered to contribute to Mary's support but has failed to do so.
- c. Brian has been confined in a jail or penitentiary for more than one year.
- d. Brian has not objected to terminating his parental rights, having been given the proper notice and the opportunity to object.

After a hearing, the trial court concluded Brian's responsibilities began with the birth of Mary, even though

he was not aware he was Mary's parent until paternity was established. The trial court went on to find:

[H]e was not unaware of the sexual encounter with the mother and knew that she was pregnant and later gave birth to a child. He admits to assuming the validity of the rumor that the child's father was another man. Such a cavalier and immature response towards her pregnancy and the childbirth should not now benefit him in this action. Although [the natural mother] did not seek him out, [Brian] could have exercised responsibility by pursuing the identity of the child's natural father. . . .

Termination of parental rights is a creature of statute, consequently, to terminate parental rights, one of the grounds of the statute must be shown.

The grounds for termination of parental rights in cases such as this are set forth in Iowa Code section 600A.8. The applicable section in relevant part provides:

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.

4. 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.

Iowa Code § 600A.8(3), (4) (1992).

"Abandonment" as a ground for termination of parental rights within the meaning of this section involves a giving up of parental rights and responsibilities accompanied by an intent to forego these rights. See In re Guardianship of Burney, 259 N.W.2d 322, 324 (Iowa 1977).

The ground of failure to pay child support is not applicable because there has never been an order that Brian pay child support. For a court to grant a petition for termination of parental rights on a failure to pay support, there must be clear and convincing evidence that the parent whose rights are sought to be terminated was ordered to pay child support and has failed to do so without good cause. See In re D.E.E., 472 N.W.2d 628, 629-30 (Iowa App. 1991) (a father's parental rights were held to be erroneously terminated on grounds of failure to pay child support where there was no evidence to demonstrate the father's ability to pay support).

The evidence also is that any ability Brian would have to pay child support is severely limited. Brian works seven-hour days at the prison and, in the month prior to trial, Brian had earned a little over \$14.

We have some difficulty with the trial court's reasoning in this case that Brian should have exercised responsibility toward Mary since birth, where the biological mother testified she thought someone else was the father of Mary, and she was not aware Brian was the father until the blood tests revealed he was Mary's father.

Brian argues the contact that put him in prison occurred before the issue of his fatherhood was ever raised and before the order was signed establishing he was the father of Mary.

The natural mother was a petitioner in behalf of the child in the paternity action. The issues then existing relating to Brian's paternity were resolved or should have been resolved in that petition. We agree with Brian, we look only to facts that have existed since the paternity was established in determining whether his parental rights should be terminated.

We do, however, look at Brian's past conduct in assessing his future conduct. Brian's past conduct was far from exemplary. The evidence of his life since the paternity action was decided reflects that Brian is seeking to improve his life. Brian took blood tests within a few months of the date of the filing of the paternity petition. When the result of the blood tests revealed Brian was the father, he almost immediately stipulated to his paternity. After the order establishing paternity was entered, he was incarcerated.

Brian's parents have been in contact with Mary and have offered their interest and support. Brian has written Mary's mother professing his joy at being a father and his desire to do what he can for Mary. While Brian could have written more often, the natural mother has made it very clear she did not want Mary to know about Brian's situation at this time. The natural mother's answer to Brian's letter asking what he could do for Mary was that he could agree to the termination of his parental rights. Brian

certainly could not be faulted in assuming any letter from prison would not reach his daughter.

The only conclusion the record supports is that since Brian's incarceration, he has attempted to reform his life. In testimony Brian admitted his past mistakes, indicated he was changing his associations with certain persons, has given up drug and alcohol use, and has no desire to return to that life. Brian also has taken college courses during his incarceration, had received an "A" in courses for the past semester, and was enrolled in college courses for the current semester. Brian was taking a religion course from the University of Iowa and a mathematics course from the University of South Dakota. When the mathematics course is completed, Brian will receive an Associate's Degree in Child Development. Brian's term of incarceration was forty-eight months. At the time of the hearing, Brian had been in three different locations, and currently was in a federal prison camp which is a low-level institution with minimum security. Brian's projected release date is March 1994, and he anticipates release for placement in a halfway house in the late fall or early winter of 1993. There is not clear and convincing evidence Brian abandoned Mary.

REVERSED.

Hayden, J., specially concurs; Donielson, P.J., dissents.

HAYDEN, J. (specially concurring)

I concur in the result.

DONIELSON, P.J. (dissenting)

I respectfully dissent. I find there was clear and convincing evidence that Brian has abandoned Mary, and I would affirm the judgment of the district court terminating Brian's parental rights of Mary.

Despite the hardship imposed upon Brian because of his incarcerated status, Brian has been given ample opportunities to assert a parental role in Mary's life. It is not enough for Brian to have sent one letter to the mother in the fall of 1990 which expressed an interest in taking part in Mary's life. When the mother sent two letters to Brian in early 1991, asking if Brian would consent to the adoption of Mary by the mother's husband, Brian never even bothered to respond. Between the last letter the mother sent to Brian and the mother's petition to terminate Brian's parental rights, some seven to eight months had passed. Neither Mary nor her mother heard anything from Brian during that entire period. Finally, when Brian was transferred from a Minnesota prison to a South Dakota prison, he failed to notify the mother of the transfer.

In sum, from the time the Department of Human Services first brought Brian into the paternity action and gave Brian notice of his parental rights to the time of the mother's petition, Brian contacted his daughter only once. I agree with the district court's finding that Brian's conduct has reflected a refusal to initiate and maintain

communication with Mary. While Brian claims to be interested in being Mary's father, he has not taken any affirmative steps to do so. To send Mary one Christmas card in over a year simply is not enough.

Brian is currently still incarcerated in federal prison. He has never seen or talked to Mary, who is now over five years old. While Mary has been raised by her mother, no relationship has ever existed between Mary and Brian. I find it is in the best interests of Mary to terminate Brian's parental rights.

I would affirm the judgment of the district court.