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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF B.L.A. and R.D.A., Minor Children.

B.A.,

Appellant.

Filed May 22, 1984

4-78
83-1390

Appeal from the Iowa District Court for Marshall County - Sandra J. Holien, Judge.

Natural father appeals from the juvenile court order terminating his parental rights to his two minor children on grounds of abandonment and nonpayment of child support, asserting that there was insufficient evidence to show: (1) that continuation of the parent-child relationship would result in any harm to the children; (2) that the natural father's parental rights should be terminated under Iowa Code section 600A.8(3) on the ground of abandonment, within the meaning of Iowa Code section 600A.2(16); or (3) that the natural father's parental rights should be terminated under Iowa Code section 600A.8(4) for failure to pay child support without good cause. REVERSED.

Beth A. Trout of Mowry, Irvine, Brooks & Ward, Marshalltown, for natural father-appellant.

Barry S. Kaplan of Fairall, Fairall, Kaplan & Condon, Marshalltown, for natural mother-appellee.

Kent Geffe of Welp Law Office, Marshalltown, guardian ad litem for the children.

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

This case concerns the parental rights of B.A., the natural father of two minor children, B.L.A. and R.D.A. In July 1983, B.A.'s ex-wife, Rita, filed and subsequently amended a petition seeking termination of B.A.'s parental rights to the parties' two minor children on grounds of failure to pay child support and abandonment. Following a hearing, the juvenile court filed an order on September 8, 1983, terminating B.A.'s parental rights on grounds of abandonment under Iowa Code section 600A.8(3) and failure to pay child support without good cause under Iowa Code section 600A.8(4).

The marriage between B.A. and Rita was dissolved by decree filed in August 1978. Rita was awarded custody of the parties' two sons, B.L.A., born January 4, 1975, and R.D.A., born June 17, 1977. B.A. was ordered to pay child support in the amount of $100 per month per child. He was awarded liberal visitation with the boys, but no specific visitation terms were set out in the decree.

Shortly after the dissolution Rita moved with the children from Osceola to Marshalltown. Rita has remarried, and her present husband wants to adopt the boys. He provides most of the financial support for the boys.

B.A. continues to reside in Osceola. Since the dissolution, he has had sporadic, mostly part-time employment, most recently pouring concrete for a local contractor. His income was minimal in 1981, 1982, and 1983. He currently lives with his girlfriend who is employed. She pays his major expenses.

B.A.'s child support payments have also been sporadic. In the five years since the dissolution, he has paid a little over $3,000 in child support and has a total arrearage of almost $9,000. He has gone for extended periods of time without paying any child support. The parties dispute whether he was financially able to pay more child support than he did. He was incarcerated for thirty days in May 1979 on a contempt finding for nonpayment of child support.

Due to friction between the parties and Rita's alleged refusal to allow B.A.

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to visit the boys alone, B.A. arranged visitation through his mother during the summer and on holidays. The parties dispute both the number of times the boys visited their grandmother in Osceola and the amount of time B.A. spent with the boys when they were visiting there. The grandmother testified that over the years she has given the boys gifts of small amounts of cash, clothing, and some assistance on dental bills. B.A. has sent a couple of cards and small gifts.

The juvenile court concluded that B.A. "has not seriously undertaken the support of either of the two children," that he "has failed to manifest any attempt to 'affirmatively parent' either of his two sons," and that termination of his parental rights was in the children's best interest.

B.A. appeals the termination, asserting that there was insufficient evidence to prove either abandonment or lack of good cause for failure to pay child support. He claims the evidence failed to show that continuation of the parent-child relationship would result in any harm to the children.

Our review of parental termination proceedings is de novo. In re Goettsche, 311 N.W.2d 104, 106 (Iowa 1981). We accord weight to the findings of the juvenile court, particularly where the credibility of witnesses is at issue, however, we are not bound by those findings. Iowa R. App. P. 14(f)(7); In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981). As always, the best interests of the children are our paramount consideration. In re Chad, 318 N.W.2d 213, 216 (Iowa 1982).

Iowa Code section 600A.8 sets out six grounds for ordering termination of parental rights. The grounds may be used separately or jointly and must be demonstrated by clear and convincing proof. Only two of these grounds concern us in this case. Parental rights may be terminated when "[a] parent has abandoned the child," § 600A.8(3), or when "[a] parent has been ordered to contribute to the support of the child . . . and has failed to do so without good cause." § 600A.8(4). It is not necessary to show both grounds for termination; clear and convincing proof of either circumstance is sufficient.

I. **Abandonment.** Iowa Code section 600A.2(16) tells us that, for the purposes of chapter 600A:

> "To abandon a minor child" means to permanently relinquish or surrender, without reference to any particular person, the parental rights, duties, or privileges inherent in the parent-child relationship. The term includes 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.

The Iowa Supreme Court has characterized abandonment as "a giving up of parental rights and responsibilities accompanied by an intent to forego them." In re Matter of Burney, 259 N.W.2d 322, 324 (Iowa 1977). Those two elements are:

> necessary for abandonment as the term is defined in section 600A.2(16). The giving up of parental rights and responsibilities refers to conduct. The intent element relates to the accompanying state of mind.
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> Moreover, parental responsibilities include more than subjectively maintaining an interest in a child. The concept requires affirmative parenting to the extent it is practical and feasible in the circumstances.

In re Interest of Goettsche, 311 N.W.2d at 106.

In the instant case, the decree dissolving the parties' marriage granted B.A. "liberal visitation rights . . . at reasonable times and places." Unfortunately, the relationship between B.A. and Rita has not been a good one since the dissolution. Rita has wanted no contact with B.A. and has insisted that visitation be arranged through B.A.'s mother, Phyllis. Rita has required that Phyllis pick up the two boys, that any overnight stays be at Phyllis's house, not B.A.'s, and that Phyllis return the boys. Obviously, this makes the arrangement of visitation difficult.

The testimony regarding the frequency of B.A.'s visits with the two boys is somewhat conflicting. It appears to be undisputed that the children would visit Phyllis six times per year until the summer of 1983. The boys spent two weeks each summer with Phyllis. During these visits with Phyllis, B.A. was apparently present also. Rita, however, said that June 16, 1983, was the only day B.A. saw the boys that year. The Christmas of 1982 had been the last time he'd seen them

before that. Since the 1983 visit, Rita apparently has not permitted visitation at all. She does not allow B.A. to talk to the boys by phone. B.A. claims he has attempted to see the children every couple of months but is unable to do so because of Rita's attitude towards him.

We do not find this pattern of visitation to constitute a clear and convincing case of abandonment. There has been no demonstration of either the intention to abandon or the acts by which the intention is evidenced. See Iowa Code § 600A.2(16). Rita argues that any visitation was at the initiation of Phyllis and that B.A. just attended; therefore, she claims B.A. was only maintaining a passive role and not "affirmative parenting," as required by the court in Goettsche, 311 N.W.2d at 106. We disagree. Taking into consideration the many obstacles Rita placed in the way of B.A.'s visitation privileges, we do not find clear and convincing evidence that B.A. neglected his duty of "affirmative parenting to the extent it [was] practical and feasible in the circumstances." Id. We agree with the children's guardian ad litem, who told the court it was his recommendation that the best interests of the children would be served best if B.A.'s parental rights continued.

B.A. argues that the clear and convincing standard requires that there be a showing of harm to the child by a continuation of the parental relationship. This requirement, stated in In re Interest of Chad, 318 N.W.2d at 219, applies to terminations under Iowa Code section 232.114(5), not terminations under section 600A.8(4). Therefore, we do not reach the issue of whether that standard was met in the trial court.

II. Nonpayment of Child Support. The Iowa Supreme Court has stated:

> A parent has a basic obligation to support a minor child. The legislature has determined that it is in the best interests of a child to terminate a parent-child relationship if the parent refuses to support the child. Although abandonment is a separate ground for termination, section 600A.8(3), we conclude that the legislature intended termination for nonsupport to occur where a parent's failure

> to pay manifests indifference to a child and is therefore akin to abandonment. "[A] bnegation of court-ordered financial responsibility to a child [is] the equivalent of abandonment. A parent who unjustifiably refuses to meet a support obligation manifests complete indifference to his child." [In re Kelley,262 N.W.2d 781, 785 (Iowa 1978).] A substantial, and not merely sporadic or insignificant, failure to pay ordered support without good cause justifies termination of parental rights under section 600A.8(4).

Klobnock v. Abbott, 303 N.W.2d 149, 150 (Iowa 1981).

The child support payments for which B.A. is in arrears total almost $9000. He payed only $10 in 1983 and none in 1982. Normally, this record probably would demonstrate indifference to the children. However, "[o]nce a court finds a failure to pay ordered support, the question is whether that failure was without good cause." Id. In the instant case, we find that B.A.'s failure to keep up his payments was for good cause.

During the years following the dissolution, Barry made the following amounts in income and child support payments:

Year	Income	Child Support Payments
1979	$5000	$1300
1980	7000	1175
1981	1000	616
1982	1500-2000	0
1983	600-700	10

Obviously, it would have been difficult for B.A. to pay $2400 per year in child support during these years. This case is not like those in which the parent in arrears had an adequate income to pay the required amounts. See, e.g., Goettsche, 311 N.W.2d at 107; Klobnock v. Abbott, 303 N.W.2d at 152-53.

Rita argues that B.A.'s unemployment is his own fault because he refuses to leave the county to search for work. B.A. claims his only mode of transportation is his roommate's pick-up truck, which is not safe enough to travel out of the

county. We strongly suggest that B.A. make a more sincere effort to find employment, including searching outside his county, so that he may be able to pay his monthly child support obligations. At this time, we find that B.A.'s unemployment and meager income is good cause for his nonpayment of child support. However, continued apathy towards finding employment, combined with continued nonsupport, could amount to grounds for termination in the future, notwithstanding a further demonstration of little income due to unemployment. We reiterate that nonsupport alone may be a ground for termination; a demonstration of abandonment is not an additional requisite.

We admonish Rita's efforts to discourage visitation between the children and B.A. Although we understand that she is trying to set up a new home with her new husband, we do not find that this gives her cause to deny the two boys their right to see their natural father. The dissolution decree provided for liberal visitation; despite her animosity towards B.A., Rita must comply with the terms of the decree and make efforts to abide by it rather than take actions to frustrate it.

We do not find clear and convincing evidence to support a termination of B.A.'s parental rights. The best interests of the children would be served by continuing the parent-child relationship.

REVERSED.

DONIELSON, J. (dissenting)

I believe the record contains clear and convincing evidence that B.A. has failed, without good cause, to pay child support as ordered. Iowa Code § 600A.8(4). Accordingly, I would affirm the trial court's order terminating B.A.'s parental rights.

The majority does not dispute that B.A. has not been paying support; rather, they conclude that his failure to do so was for good cause. I cannot agree. B.A. has made no real effort to obtain or sustain employment. There is no question as to his ability to work and earn an income. His self-imposed limitation by which he professes that he, an able-bodied 31-year-old man, cannot seek employment outside of Clarke County is ludicrous and wholly unsatisfactory. I am not convinced that his alleged transportation problems are so severe that he is unable to consider employment outside of this county which contains less than one-half of one percent of the population of the State of Iowa. In addition, B.A. apparently has no incentive to seek employment at this time by which he would pay his child support obligation since he is now living with a woman who has a good income (approximately $19,000) and who pays his expenses.

B.A.'s attitude is perhaps best exemplified by his own testimony. The record reflects that in 1982 he paid no support at all with an income between $1,500 and $2,000. The following exchange between Rita's attorney and B.A. occurred at the hearing:

> Q. How much money do you spend in the local tavern during the course of a normal week? A. Not hardly anything now because I don't have any money.
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> Q. How about in 1982, how much did you spend in 1982? A. Maybe a couple hundred dollars.
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> Q. And you prefer spending a couple hundred dollars in a tavern as opposed to giving that for support. A. No.
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> Q. But you did, didn't you? A. I suppose. (emphasis added).

I believe it is clear that B A. has simply chosen not to live up to his obligation to support his children He obviously has not seriously sought employment. His protestation that the economy was such that he could not find a job has a hollow ring to it based upon the record. As noted above, I reject his unwillingness or alleged inability to seek employment outside of Clarke County. His "inability" to find steady employment of any kind may be accepted by some but not this writer. He has paid only about one-fourth of his support obligation since the decree was entered in 1978 and next to nothing in the last two years. He simply is not going to work and is not going to meet his own or his parental obligations; I believe we might just as well face that fact now rather than at some point in the future I conclude that his failure to pay support was without good cause. I would affirm