

IN THE COURT OF APPEALS OF IOWA

No. 7-717 / 07-0766
Filed December 12, 2007

**IN THE INTEREST OF C.J.D., H.M.D., and J.A.D.,
Minor Children,**

A.J.W., Mother,
Petitioner,

K.M.D., Father,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gary
Anderson, District Associate Judge.

A father appeals the termination of his parental rights to his children.

REVERSED.

Ryan Sewell of Stuart Tinley Law Firm, L.L.P., Council Bluffs, for appellant
father.

Jon Jacobmeier of Wilber & Jacobmeier, Council Bluffs, for appellee
mother.

William McGinn of McGinn, McGinn, Springer & Noethe, Council Bluffs, for
minor children.

Heard by Vogel, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Kevin appeals the termination of his parental rights. He claims the court erred in finding clear and convincing evidence that he failed to support his children without good cause according to Iowa Code section 600A.8(4) (2005) and in finding that termination was in the best interests of the children. He makes additional constitutional claims regarding section 600A.8(10) (Supp. 2005), including that it (1) should not have been retroactively applied to his conduct, conviction, and sentence; (2) deprives him of his substantive and procedural due process rights; (3) denies him equal protection of the law; and (4) constitutes an ex post facto law as applied to him. We reverse.

I. Background Facts and Proceedings

Kevin and Angela were married in 1993. The marriage produced three daughters: Christa, born in June 1994; Hannah, born in January 1998; and Jenna, born in July 2000. During the latter part of the marriage, Kevin seldom participated in family activities, stayed out all night, slept all day, and did not attend his children's school events. The parties separated in December 2001 when Angela came home in the middle of the day to find Kevin in bed and his teenage girlfriend in the shower. During the subsequent divorce proceedings, Angela was awarded temporary physical care of the children, and Kevin was allowed temporary visitation every other weekend. Angela testified that from January 2002 to November 2002 Kevin only exercised six to eight visits with his children including only one overnight stay. Kevin was unreliable in picking the children up for visits with him. He often left them packed up and waiting at their grandparents' house without calling to say he was not coming. He would also

call and say he was too busy for a visit. Kevin also failed to take the Children in the Middle course during this time, claiming it did not fit into his schedule.

Upon filing of the divorce decree on August 8, 2002, the court ordered joint legal custody of the children. Angela received primary physical care subject to Kevin's reasonable right to visitation. Kevin was also ordered to pay and did pay child support from January to November 2002. On November 20, 2002, Kevin was indicted in federal court for "using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct." Kevin was arrested and spent time in the Pottawattamie County Jail, the Polk County Jail, and the Newton Correctional Facility until March 2005 when he was transferred to a federal correctional facility in Pekin, Illinois.

On May 7, 2003, Kevin entered his guilty plea to the federal indictment charge in which he stipulated to the following facts:

- a. Sometime on or about the fall of 2000, he began a relationship with a girl named Brandy R.
- b. [Kevin] began his relationship with Brandy R. when she was fifteen years-old. Brandy R.'s birth date is November 28, 1984. [Kevin] was twenty-nine years-old when they met.
- c. Sometime on or about February 2001, [Kevin] had rented an apartment at 3018 ½ Avenue "B" in Council Bluffs, in the Southern District of Iowa, in which to house Brandy R.
- d. While Brandy R. was living there, she became acquainted with another teenager by the name of Heather S. who was also living in the downstairs apartment of this duplex.
- e. Sometime between on or about February 8, 2001, through on or about December 29, 2001, while [Kevin] was at the apartment, he made a videotape of Brandy R. and Heather S. engaging in sexually explicit conduct, i.e., oral-genital sexual intercourse, masturbation, and the lascivious exhibition of the genitals and pubic area.

- f. [Kevin] operated the video camcorder used to produce the videotape of the sexually explicit conduct.
- g. [Kevin] gave directions to Brandy R. and Heather S. and encouraged them on what acts they should perform while being videotaped by him.
- h. [Kevin] acknowledged that the materials, i.e., the video camcorder and video cassette, used to produce this visual depiction of Brandy R. and Heather S. engaging in sexually explicit conduct had been mailed, shipped or transported in interstate or foreign commerce.

Kevin was then sentenced to prison for a total term of seventy-two months and was given credit for time served since November 2002.

On January 14, 2004, the district court modified the divorce decree to award Angela sole legal custody. On July 8, 2004, a modification order based upon an agreement of the parties ordered that the children were to have telephone contact with Kevin during their counseling sessions and that Kevin was not to have contact with the children while he was being held in a temporary facility. On January 23, 2006, the district court awarded Kevin the privilege of written communication and bi-monthly telephone contact with the children but allowed him no personal visitation while he was incarcerated.

During his time in prison, Kevin attempted to strengthen his relationship with his children through phone calls, gifts, cassette tapes of him reading story books, and letters. The children do not like talking to him on the phone. Jenna, now six years old, was two when Kevin was sent to prison and has no recollection of ever seeing him. Hanna, now nine years old, was four when Kevin was sent to prison. She also does not recollect her relationship with Kevin before he was sent to prison, does not like talking to him on the phone, throws away the

gifts he sends, and does not want to see him. Christa, now eleven years old, was six when Kevin was sent to prison. She also does not like talking to him on the phone, throws away his gifts, was hurt by him not picking her and her sisters up for visits before he went to prison, and states that she does not love her dad. It has been over five years since the children have seen their father.

Angela admitted that although she lets her children decide what kind of relationship they want with Kevin, she does not encourage a relationship and has openly expressed her displeasure of interaction with Kevin. Specifically, she testified that she has told the children she was “not going to force anything with him.” She admits Kevin has routinely called the children and that each girl receives a couple of letters each week from him. She lets the older two girls read their letters and reads Jenna’s letter to her. Angela testified that the girls always throw the letters away and have never written Kevin back. She stated that although she does not encourage her children to write to Kevin, she does give them the option.

Kevin was current on his child support obligations until he was incarcerated in November 2002. Since then, he has made no payments. After Kevin was incarcerated, his child support obligation was amended to require that he pay \$50 per month per child, or \$150 per month. Kevin was unable to begin a prison job until May 2005. The record shows that from April 2005 until October 2005, \$810.44 was deposited in Kevin’s prison account. The income was derived from both his prison job and a significant amount from unknown outside sources. The record does not reflect his income received from outside sources in 2006 or 2007, but Kevin’s salary from his prison job averaged \$17 per month.

He spent approximately \$356 between April 2005 and May 2005 on prison clothing and hygiene for himself. From June 2005 through October 2005, he spent approximately \$452 in attorney fees to appeal his conviction.

Kevin was scheduled to be released to a half-way house in Council Bluffs in August 2007. He will be released from prison on the terms that he have no contact with any child under the age of eighteen unless he is accompanied by a responsible adult who is aware of his conviction and supervision status and has been approved in advance by his probation officer. He will also not be allowed to congregate or loiter around school yards, playgrounds, swimming pools, arcades, zoos, or other places frequented by children under the age of eighteen. Further, he will not be allowed to possess any type of camera, including cameras within cellular telephones, or video recording devices without probation officer approval.

Angela filed her petition for termination of Kevin's parental rights pursuant to Iowa Code sections 600A.8(4) and (10) on October 2, 2006. The district court ordered termination of Kevin's rights on both grounds. Kevin appeals.

II. Standard of Review

We make a de novo review of proceedings terminating a parent's parental rights. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). The grounds for termination must be proved by clear and convincing evidence. *Id.* However, our primary concern is the best interests of the children. *Id.* Although not bound by them, we give weight to the district court's findings of fact and determinations of the credibility of witnesses. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998).

III. Merits

On appeal, Kevin argues there was not clear and convincing evidence that he failed to support his children without good cause, that Iowa Code section 600A.8(10) cannot be retroactively applied to him and is otherwise unconstitutional, and that termination was not in the best interests of the children.

A. Termination Under Section 600A.8(4)

Under section 600A.8(4) there are grounds for termination of a parent's rights if that 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." This must be established by clear and convincing proof. Iowa Code § 600A.8. "Without good cause" primarily concerns the parent's ability to pay the ordered child support. *In re B.L.A.*, 357 N.W.2d 20, 22 (Iowa 1984). It is Angela's burden to show that Kevin had the ability to pay child support but refused to do so. *R.K.B.*, 572 N.W.2d at 601-02. It is not necessary that Angela show that Kevin willfully failed to pay, but Kevin's intent is clearly tied to his ability to pay. See *B.L.A.*, 357 N.W.2d at 22; *Klobnock v. Abbott*, 303 N.W.2d 149, 152 (Iowa 1981).

Kevin was current on his child support at the time of his incarceration in November 2002. Upon incarceration, the district court reduced his child support obligation to \$50 per month per child. He made no further payments. Kevin's prison job paid approximately \$17 per month, and he received significant income in 2005 from outside sources. He spent \$356 on various items for himself and \$420 to hire an attorney to appeal the conviction for which he pled guilty. In addition, Kevin spent \$6 per month for two phone calls each month to his

children, \$8 per month to send two letters per week to each of his three daughters, and spent money to send his daughters storybook tapes and crafts.

Incarceration alone cannot excuse Kevin's failure to pay. *In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa Ct. App. 1994). An incarcerated parent must take full responsibility for the conduct that resulted in his confinement. *Id.* Our courts are generally unsympathetic toward self-created obstacles to supporting one's children. See *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993) (holding that incarceration is no excuse for the lack of relationship with a child); *In re J.S.*, 470 N.W.2d 48, 51 (Iowa Ct. App. 1991) (noting that a father's incarceration did not justify his failure to fulfill his parental responsibilities). Our legislature, however, "intended for termination for nonsupport to occur where a parent's failure to pay manifests indifference to a child and is therefore akin to abandonment." *Klobnock*, 303 N.W.2d at 152.

Even though Kevin failed to contribute to the financial support of his children, his actions do not manifest indifference to his children. He made numerous attempts to maintain a relationship with his daughters by calling them twice every month and sending letters and small gifts to them on a weekly basis. Although gifts are no replacement for child support, this statute was not intended to terminate an involved parent's parental rights. *In re C.M.W.*, 503 N.W.2d 874, 875-76 (Iowa Ct. App. 1993); *Klobnock*, 303 N.W.2d at 152. It is very clear that Kevin wishes to repair and maintain his relationship with his daughters.

Kevin was earning only \$17 per month in prison. He spent \$14 of this amount for phone calls and letters. Any money paid in child support would have been merely a token amount. Kevin made stringent efforts to maintain his

relationship with his children. Because his actions show no intent to abandon his children or any manifestation of indifference toward them, and he used virtually his entire prison paycheck to stay in touch with his daughters, good cause exists for his failure to contribute to their support. Therefore, the evidence is inadequate to terminate his parental rights under section 600A.8(4).

B. Termination Under Section 600A.8(10)

Section 600A.8(10) allows termination of parental rights if:

[t]he parent has been convicted of a felony offense that is a criminal offense against a minor as defined in section 692A.1, the parent is divorced from or was never married to the minor's other parent, and the parent is serving a minimum sentence of confinement of at least five years for that offense.

This law is specific to this case and was passed due to the lobbying efforts of these children's maternal grandmother. It went into effect July 1, 2006. Angela submitted affidavits of two Iowa legislators, which stated the legislature's intent in enacting the statute was that it be applied retroactively. However, affidavits from two legislators are not sufficient to show the entire legislature's intent in passing the statute. We can find no legislative history that implies this statute was intended to be applied retroactively.

Statutes are presumed to be prospective in operation unless expressly made retrospective. Iowa Code § 4.5 (2007). Given no such express language, we must presume this statute is prospectively applicable only. *Id.* It therefore cannot be applied to terminate Kevin's parental rights since he was convicted, sentenced, and incarcerated in 2002 and 2003 before the statute was passed into law. Because we find section 600A.8(10) to be inapplicable to Kevin, we do not address his constitutional challenges to the statute.

C. Best Interests of the Children

Although it may arguably be in the best interests of the children for their father's parental rights to be terminated, we do not reach that analysis because we find no grounds for termination have been established by clear and convincing evidence. *J.L.W.*, 523 N.W.2d at 625. The children are adequately protected under the court's visitation order and will continue to be protected under safeguards provided by the court in the dissolution matter.

REVERSED.