**IN THE COURT OF APPEALS OF IOWA**

No. 9-593 / 08-1739
Filed September 2, 2009

**IN THE INTEREST OF O.M.F.,**
**Minor Child,**

**J.M.F., Mother,**
Petitioner,

**R.K.C., Father,**
Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, Mark J. Eveloff, District Associate Judge.

A father appeals the juvenile court order terminating his parental rights in proceedings under Iowa Code chapter 600A (2007). **AFFIRMED.**

R.K.C., Tecumseh, Nebraska, appellant pro se.

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

Eric C. Hansen, Glenwood, guardian ad litem for minor child.

Considered by Vaitheswaran, P.J., and Mansfield, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**SCHECHTMAN, S.J.**

## I. Background Facts & Proceedings

Richard and Jeanette are the parents of a daughter, born in 1999, now ten. They were married in 1998, and divorced in 2001 in Douglas County, Nebraska. Jeanette moved to Council Bluffs. She filed a petition to terminate Richard's parental rights under Iowa Code section 600A.8(3) (2007), claiming abandonment. Richard is an inmate in a state correctional facility in Tecumseh, Nebraska, serving a life sentence for first-degree murder and use of a deadly weapon.[1]

At the time of the termination hearing in August 2008, the child was nine years old. Richard has not lived with the child since his arrest, when she was ten months of age. O.M.F. has not seen Richard since she was two, when visiting Richard with her mother, in a county jail, while he was awaiting trial. She is unaware of Richard's existence or the role he has played in her life.[2] Jeanette and Richard's dissolution decree awarded sole custody to Jeanette, did not allow any visitation, did not provide for any child support, and provided that O.M.F. may visit Richard, at her option, following her thirteenth birthday. It further stated Jeanette should determine the manner and the timing to advise O.M.F. of Richard's previous role in her life. The child had never communicated in any form with Richard. He has sent cards or letters about twice a year, which

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[1] Richard was convicted of the murder of a nineteen-year-old college student, which occurred on April 28, 2000, after O.M.F.'s birth. The conviction was affirmed by the Nebraska Supreme Court.

[2] It is unclear why the grounds for termination did not include the provisions of Iowa Code section 600A.8(9), "the parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of five or more years."

Jeanette opted to withhold, concluding this response was in the child's best interests. Jeanette married Doug in 2003. The child knows and treats Doug as her father. Her surname has been legally changed to conform with the surname of her mother and stepfather. Doug wishes to adopt the child. The guardian ad litem recommended termination.

Richard prefers to maintain a relationship with his daughter. He claims a willingness to communicate more frequently, to turn over his prison pay, and to arrange periodic gifts for O.M.F., but these offers have been rebuffed by Jeanette exercising her discretion to decide whether it is in the child's best interest, per the dissolution decree. Richard has completed parenting classes in prison. He contends that when O.M.F. is sufficiently mature, she should be allowed to make her own decision as to whether she chooses to pursue a relationship with her father.

The juvenile court terminated Richard's parental rights. The court found it had jurisdiction of the parties and the subject matter. The court found that Richard will spend the rest of his life in prison, "and because of this, he cannot act in any meaningful way as a parent to his daughter." The court concluded there was sufficient evidence Richard had abandoned his child. The court also found termination was in the child's best interests. Richard appeals.

## II. Standard of Review

Termination proceedings under chapter 600A are reviewed de novo. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998). A petition for termination of parental rights under this chapter must be established by clear and convincing proof.

Iowa Code § 600A.8; *In re Kelley*, 262 N.W.2d 781, 784 (Iowa 1978). Our primary interest in termination proceedings is the best interests of the child. *R.K.B.*, 572 N.W.2d at 601.

### III. Sufficiency of Notice

Richard contends the notice of termination was directed to another person, and not directed to him. The return shows Richard was served by a Johnson County, Nebraska, deputy sheriff at the correctional facility. The original notice was directed to a "Kevin Michael Dieatrick." But, the original notice's caption correctly listed the name of the mother and the child, and the petition was attached, which recited the names of Jeanette, Richard, and O.M.F. throughout. Furthermore, an answer, filed by his attorney, did not raise the issue,[3] nor was Richard misled. A pre-answer motion must raise the lack of jurisdiction over the person, or the issue is deemed waived. Iowa R. Civ. P. 1.421(3), (4). The juvenile court had personal jurisdiction of the parties.

### IV. Subject Matter Jurisdiction

Richard additionally claims the juvenile court did not have subject matter jurisdiction. He states contempt proceedings against Jeanette were then pending in Nebraska, under their divorce decree, for failing to provide him with semi-annual photographs and semester report cards of O.M.F. Richard asserts that since he has retained his parental rights under the dissolution decree, the termination action should be barred under the doctrine of res judicata.

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[3] Prior to that answer, a "Position Statement" was filed, prepared by Richard, though signed by his attorney, which purports to be an appearance, answer, reply, and pre-answer motion. This was not ruled upon, followed by the general answer.

We first note that subject matter jurisdiction refers to the court's authority to hear a general class of cases, not merely the particular case before the court. *State v. Mandicino*, 509 N.W.2d 481, 482 (Iowa 1993). A court may have subject matter jurisdiction, but may lack authority to hear a particular case. *Id.* A court may lack authority when a party fails to follow the statutory procedures for invoking the court's authority. *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 875 (Iowa 2007).

The juvenile court has subject matter jurisdiction to adjudicate termination cases under chapter 600A. *See* Iowa Code § 600A.5(1) (noting petitions for termination of parental rights under chapter 600A are filed in juvenile court). We turn then to the question of whether the court had authority to resolve this case. Contempt proceedings, arising from the parent's dissolution decree, would not bar a termination proceeding in the state of the child's residence.[4] Also, the alleged violation of the parties' dissolution decree would not bar a separate action to terminate parental rights, as abandonment was not a determining issue in the dissolution. *See Gardner v. Hartford Ins. Accident & Indem. Co.*, 659 N.W.2d 198, 202 (Iowa 2003) (noting issue preclusion applies when an issue has been determined in a prior action).

**V. Sufficiency of the Evidence**

Jeanette sought to terminate Richard's parental rights under section 600A.8(3)(b), which provides that if a child is six months of age or older, a parent

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[4] Additionally, Richard has not shown there were pending proceedings in Nebraska when this action was filed. Jeanette denied being served notice of any proceedings in Nebraska. A copy of the motion for contempt provided by Richard is not file stamped, and there is no indication it was served.

is deemed to have abandoned a child "unless the parent maintains substantial and continuous or repeated contact with the child as demonstrated by contribution toward the support of the child of a reasonable amount, according to the parent's means," by visiting at least monthly, regularly communicating, or living openly with the child for the period of six months within the previous year. Iowa Code § 600A.8(3)(b)(1)-(3). A qualification to those mandates is "when physically and financially able" and "not prevented . . . by the person having lawful custody of the child." Iowa Code § 600A.8(3)(b)(1).

The phrase "to abandon a minor child" is defined in section 600A.2(19) to mean that a parent "rejects the duties imposed by the parent-child relationship" by the parent "while being able to do so, making no provision or making only a marginal effort to provide for the support of the child or to communicate with the child." Abandonment is characterized as the giving up of parental rights and responsibilities accompanied by an intent to forego them. *In re Burney*, 259 N.W.2d 322, 324 (Iowa 1977). Thus, there are two elements necessary for abandonment – the conduct of the parent in giving up parental rights and responsibilities and the parent's intent. *In re Goettsche*, 311 N.W.2d 104, 106 (Iowa 1981); *In re N.D.D.*, 434 N.W.2d 919, 920 (Iowa Ct. App. 1988).

Richard's incarceration is not an excuse for his conduct and his paternal inattention. *See, e.g.*, *In re R.L.F.*, 437 N.W.2d 599, 602 (Iowa Ct. App. 1989). Nor are the provisions of the Nebraska divorce decree, which prohibits visits, disallows child support, and grants Jeanette the absolute discretion to decide what communications are in the child's best interests. Richard appeared and

was represented in the dissolution proceeding, and sought further review by the appellate court of Nebraska.[5]

The imprisonment for life and the contents of the dissolution decree each directly emanate from Richard's horrific conduct and choices. Richard chose to leave the child the evening of the brutal murder of a young woman. That conduct destroyed the family unit, not, as Richard contends, Jeanette's conduct in isolating the child from him.[6] It was this violent behavior that placed him in the position that now threatens to totally absent him from his child's life.

It has long been our rule that an imprisoned parent must assume full responsibility for the conduct that has resulted in his estrangement and imprisonment. *In re J.S.*, 470 N.W.2d 48, 51 (Iowa Ct. App. 1991). Unavailability to parent, by one incarcerated, is no excuse for his conduct or failure to parent. *In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa Ct. App. 1994). Each of these tenets are exacerbated by the fact that Richard is imprisoned for his lifetime and a generous portion of his child's lifetime.

We conclude that Jeanette has shown by clear and convincing evidence that Richard has abandoned his child within the meaning of section 600A.8(3)(b). He has not maintained "substantial and continuous or repeated contact with the child." *See* Iowa Code § 600A.8(3)(b). Richard's conduct shows his intent to

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[5] The sole grounds on appeal, which was affirmed, were (1) denial of visitation at the prison; and (2) allowing the child's surname to be changed to the mother's surname. The granting to Jeanette the discretion to determine the child's best interests, relating to communications, gifts, and support, was not appealed.

[6] The dissolution court gave Jeanette sole control to determine when and under what circumstances O.M.F. will learn of Richard's incarceration and the facts underlying it.

forego his parental rights. We affirm the finding of abandonment under section 600A.8(3)(b).

We also find termination of Richard's parental rights is in the child's best interests. *See R.K.B.*, 572 N.W.2d at 601 (stating we look to a child's long-range, as well as immediate, interests). The primary consideration in termination cases is the best interests of the child. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). A child deserves the stability and security of a home with parental presence. *In re C.K.*, 558 N.W.2d 170, 175 (Iowa 1997). The termination of Richard's parental rights are in the child's best interests under all these circumstances.

**VI. Court-Appointed Counsel**

The juvenile court appointed Jay Mez as counsel for Richard, and directed his fee was Jeanette's responsibility under section 600A.6B(1). Mez continued to represent Richard throughout the juvenile court proceedings, although Richard also made pro se filings. After the juvenile court's decision, Richard filed a request for appointment of appellate counsel. Richard filed a pro se notice of appeal.

The juvenile court denied Richard's request for court-appointed counsel for the appeal. The court assumed, without deciding, that Richard had the right to counsel during the appeal. The court concluded, however, that Richard did not qualify for court-appointed counsel under Iowa Code section 600A.6A(2). This section provides:

> If the parent against whom the petition is filed desires but is financially unable to employ counsel, the court, following an in-court

> colloquy, shall appoint counsel for the person if all of the following criteria are met:
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> a. The person requests appointment of counsel.
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> b. The person is indigent.
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> c. The court determines both of the following:
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> (1) The person, because of lack of skill or education, would have difficulty in presenting the person's version of the facts in dispute, particularly where the presentation of the facts requires the examination or cross-examination of witnesses or the presentation of complex documentary evidence.
>
> (2) The person has a colorable defense to the termination of parental rights, or there are substantial reasons that make termination of parental rights inappropriate.

Iowa Code § 600A.6A(2). The juvenile court found Richard did not have a colorable defense, and there were not substantial reasons that termination of parental rights was inappropriate.[7]

Richard then filed a "Motion to Appoint Counsel" before the Iowa Supreme Court. The supreme court denied the request. Richard renewed his motion, attaching an affidavit to support his request for appellate counsel. The supreme court responded with a similar denial.

The appellate court has already ruled on Richard's entitlement to the appointment of counsel on appeal. The court considered Richard's claims under section 600A.6A, and determined he was not entitled to such an appointment. That ends it. We concur with the denials.

On appeal, Richard raises issues of due process and equal protection. The juvenile court addressed only Richard's statutory grounds seeking appellate counsel, and did not address his constitutional claims. When a ruling fails to

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[7] Richard's brief, prepared by him, boasts of a college degree, completion of a legal research course in prison, and his assistance in countless legal matters of fellow prisoners.

address an issue properly presented, a party must file a motion under Iowa Rule of Civil Procedure 1.904(2) to preserve error. *In re N.W.E.*, 564 N.W.2d 451, 455 (Iowa Ct. App. 1997). We conclude Richard's constitutional claims have not been preserved for our review.

We affirm the juvenile court order terminating Richard's parental rights.

**AFFIRMED.**

Vaitheswaran, P.J., concurs; Mansfield, J., concurs specially.

**MANSFIELD, J.**, (specially concurring)

It would be difficult to conceive of a less deserving litigant than Richard, whose brutal murder of a college student has led to this situation. However, in my view, even this undeserving litigant should have his arguments presented to us by an attorney.

I agree with my colleagues that the Iowa Code section 600A.8(3) requirements for termination have been met and that termination is in the best interests of the child. Having said that, some aspects of this case give me pause.

The district court treated this matter as if it were simply a termination case. However, one can take the position that the district court was also modifying a dissolution decree. In October 2001, *after* Richard had already been sentenced to prison for the rest of his life, a Nebraska court entered a final decree of dissolution between Richard and Jeanette. A guardian ad litem had been appointed for O.M.F. The Nebraska court adopted the recommendation of that guardian at litem. In its final decree, the Nebraska court declined to order any visitation of O.M.F. by Richard, but ordered that "following her thirteen[th] birthday [O.M.F.] may visit Respondent as she may choose; and that visitation be established at [O.M.F.'s] own time and circumstance." Thus, the dissolution decree left it up to O.M.F.–when she reaches thirteen–whether to have any relationship with Richard. As Richard points out, by terminating his parental rights, the Iowa district court has effectively modified this aspect of the Nebraska dissolution decree. Furthermore, the Iowa district court was relying in large part

upon a circumstance that existed when that decree was entered–namely, Richard's lifetime incarceration.

Typically, to modify a dissolution decree, there has to be a showing of a material change in circumstances. In Nebraska, that appears to be true, even when the modification involves a termination of parental rights. *See Timothy T. v. Shireen T.*, 741 N.W.2d 452, 459 (Neb. Ct. App. 2007). Also, there is a general requirement that full faith and credit be given to judgments of another state, and a specific federal law protecting "visitation determinations" made by courts of another state. *See* 28 U.S.C. § 1738A(h).

In his pro se briefing, Richard makes the basic argument that the Iowa district court should have adhered to the earlier decision of the Nebraska district court, but his arguments unsurprisingly are not well-developed. Thus, we do not have the benefit of attorney advocacy for Richard or of Jeannette's responses to that advocacy.

I believe an appellate attorney should have been appointed for Richard. The district court denied Richard's request on the ground that Richard did not have a "colorable defense" to termination of parental rights. Iowa Code § 600A.6A(2). I think that was error. I believe Richard's arguments are sufficiently colorable that an attorney should have been appointed to present them on appeal. However, as my colleagues note, the supreme court also denied Richard's motion for appointment for counsel and, as far as this court is concerned, "that ends it." Thus, bound by the supreme court's order denying appointment of counsel, I concur in the judgment.