

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38560

IN THE MATTER OF THE	)	2011 Unpublished Opinion No. 499
TERMINATION OF PARENTAL RIGHTS	)	
OF JOHN (2011-07) DOE	)	Filed: May 27, 2011
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JANE DOE,	)	Stephen W. Kenyon, Clerk
	)	
Petitioner-Respondent,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
v.	)	BE CITED AS AUTHORITY
	)	
JOHN (2011-07) DOE,	)	
	)	
Respondent-Appellant.	)	
_____	)	

Appeal from the Magistrate Division of the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Carolyn M. Minder, Magistrate.

Order terminating parental rights, affirmed.

Alan E. Trimming, Ada County Public Defender; Joshua M. Wickard, Deputy Public Defender, Boise, for appellant.

Brooks Law P.C.; Kimberly D. Brooks, Nampa, for respondent.

GRATTON, Chief Judge

John Doe (Father) appeals from the magistrate’s order terminating his parental rights as to his three children, A.R., T.R., and J.R. Specifically, Father contends that the magistrate erred in finding that he abandoned his children as defined in Idaho Code § 16-2002(5). We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

Father and Mother were married on April 7, 2001. They separated on August 21, 2005, and were divorced on October 24, 2006. They had three children during their marriage, A.R., a female born in 2001, T.R., a female born in 2004, and J.R., a female born in 2005. The divorce decree awarded joint legal custody to Father and Mother, with Mother having primary physical custody and Father having reasonable visitation. Shortly after the birth of their first child, Father

was “in and out” of the home and had not visited the family since the youngest child was born in 2005.

Mother testified that a protection order was issued against Father in 2005 for a period of ninety days. She testified that he was still able to exercise visitation with the children every weekend, however, which he did consistently for the first month. Mother also stated that Father had limited contact with the children from the time they were separated in August 2005 until they were divorced in October 2006. She testified that Father exercised visitation with the children for one weekend following the divorce. Mother also stated that Father had provided no financial support for the children from 2006 until 2008, when the Department of Health and Welfare garnished his wages every two weeks for a total of ten payments of \$73.00, or \$730.00. She testified that Father had not otherwise supported the children through cash, groceries, or any other support since 2006, and that he was approximately \$30,000.00 in arrears.

At the end of 2006, Father was arrested and served jail time and has been in and out of jail since that time. Mother brought the children to visit Father while he was in jail in 2006. Then, in January 2007, a second protection order was issued against Father, which stemmed from an incident of domestic violence against Mother. This protection order precluded any visitation with the children and expired in January 2008. Father testified that he was also in and out of jail during 2008 and has remained in jail since March 2009. Father also testified that he planned to self-initiate parole in March 2011 which, if granted, would allow him to be released in June or July 2011.

On August 28, 2008, the divorce decree was modified and Mother was granted sole legal custody of the children, which the magistrate concluded was “justified by defendant’s habitual perpetration of domestic violence as set out in Idaho Code § 32-717(B)(3), and his failure to exercise visitation or pay child support for over one year.” Father’s visitation privileges were also suspended until he could demonstrate that he had obtained a child at risk assessment and followed and completed any recommendations in that assessment; that the criminal charge for the January 2007 incident of domestic violence be disposed of, including probationary terms; and that Father confirm through testing that he was drug free. Father has not sought to modify the August 2008 modified decree, and his visitation privileges remain suspended pending compliance with the court-ordered conditions.

On August 10, 2009, Mother married Husband. On April 20, 2010, Mother filed a petition to terminate Father's parental rights and, concurrently, a petition for adoption, with Husband. The petition alleged three grounds for termination of Father's parental rights, pursuant to I.C. § 16-2005(a), (b), and (d). Father filed a pro se answer to the petition on May 11, 2011, and was subsequently appointed counsel to represent him. A hearing was held on January 31, 2011, and the magistrate subsequently issued an order terminating Father's parental rights on February 10, 2011. A final judgment was entered on the same date, and Father timely appealed.

## II.

### ANALYSIS

Grounds for termination of parental rights must be shown by clear and convincing evidence because each parent has a fundamental liberty interest in maintaining a relationship with his or her child. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *Doe v. Doe*, 150 Idaho 46, 49, 244 P.3d 190, 193 (2010). On appeal, this Court will not disturb the magistrate's decision to terminate parental rights if there is substantial, competent evidence in the record to support the decision. *In re Doe*, 143 Idaho 343, 345, 144 P.3d 597, 599 (2006). Substantial and competent evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 345-46, 144 P.3d at 599-600. This Court is required to conduct an independent review of the record that was before the magistrate, but must draw all reasonable inferences in favor of the magistrate's judgment, as the magistrate has the opportunity to "observe witnesses' demeanor, to assess their credibility, to detect prejudice or motive and to judge the character of the parties." *Doe*, 150 Idaho at 49, 244 P.3d at 193 (quoting *In re Aragon*, 120 Idaho at 608, 818 P.2d at 312).

Idaho Code § 16-2005 permits either parent, when termination is sought with respect to the other parent, to petition the court for termination of the parent-child relationship when it is in the child's best interest and any one of the following five factors exist: (a) abandonment; (b) neglect or abuse; (c) lack of a biological relationship between the child and a presumptive parent; (d) the parent is unable to discharge parental responsibilities for a prolonged period which will be injurious to the health, morals, or well-being of the child; or (e) the parent is incarcerated and will remain incarcerated for a substantial period of time. Each statutory ground is an independent basis for termination. *State v. Doe*, 144 Idaho 839, 842, 172 P.3d 1114, 1117 (2007).

## A. Abandonment

In this case, the magistrate terminated Father's parental rights on the ground of abandonment, I.C. § 16-2005(1)(a). Pursuant to I.C. § 16-2002(5), abandonment occurs when "the parent has willfully failed to maintain a normal parental relationship including, but not limited to, reasonable support or regular personal contact." The word "or" is a disjunctive particle used to express an alternative and, thus, the willful failure to maintain a normal parental relationship can be based upon either the failure to pay reasonable support, or the failure to have regular personal contact, or some other failure. *Doe I v. Doe II*, 148 Idaho 713, 715, 228 P.3d 980, 982 (2010).

When a parent fails to maintain a normal parental relationship without just cause for a period of one year, prima facie evidence of abandonment exists. I.C. § 16-2002(5). There is no universal standard for what constitutes a normal parental relationship, and whether such a relationship exists depends on the facts and circumstances of each case. *Doe*, 150 Idaho at 50, 244 P.3d at 194. The petitioner bears the burden of persuasion to demonstrate that the defendant lacks a normal parental relationship with the child and that there is no just cause for the failure to maintain such a relationship. *Id.* If the petitioner is able to meet this burden, the defendant then has the burden of production to present evidence of just cause. *Id.* If the magistrate finds that just cause has not been established, the petitioning party has met its burden of persuasion. *Id.*

The magistrate set forth its findings of fact in two sections, titled "facts not in dispute" and "facts in dispute." With respect to the "facts not in dispute" section, the magistrate found that "[Father] has not established or maintained a normal parent-child relationship with the children since August 2005. The parties differ as to why this is so but it is uncontroverted that there is no normal parent-child relationship between [Father] and the children." With respect to the "facts in dispute" section, the magistrate outlined a number of facts that the parties disputed, including Father's contention that Mother prevented him from having contact with the children, and stated:

[Father's] testimony was not credible, nor consistent, and was self-serving. [Father] took no responsibility for fathering these three children and then willfully leaving them without any support or contact or relationship with him.

[Father] is convinced that [Mother] is jealous that he had girlfriends who had children by him and it is her anger about his girlfriends that motivates the Petition to Terminate his parental rights. [Father] blames everyone but himself for his total and abject failure to be a father to these children.

It is undisputed that [Father] has not raised these children; that [Father] has never lived in the same household on a regular and normal basis with these children and that [Father] is a complete stranger who continues to pose a danger to [Mother] and to these children.

[Father] testified about being at the birth of the only child with whom he might have possibly had any relationship with, [A.R.]. It was a moving story of the delivery and his kissing her bloody head. Sadly for [Father], it was a complete fabrication. [Father] was in custody when [A.R.] was born. His story was a complete lie and this Court cannot understand why a person who is simply a sperm donor and whose interactions with the mother of three children is one of only violence, would argue that he is justified in having done nothing for these children and not having established any relationship with these children.

[Father] attributes blame to everyone around him for the fact that he is a terrible parent who has completely abandoned these three children.

[Father] has never been a normal parent with normal interaction and responsibility for these children. There is no parent-child relationship to preserve or protect. These are children born of violence, into violence and then willfully abandoned.

While Father maintains on appeal that there was not substantial and competent evidence in the record for the magistrate to conclude that he abandoned his children, he does not challenge any of the magistrate's findings. He simply argues, as he did below, that he did not willfully fail to maintain a normal parental relationship because he did not have the ability to do so as he was in custody since March 2009. He contends that since 2009, he has not known how to contact the children or where they were living until Mother filed the petition to terminate his parental rights. Father asserts that even if he is deemed to have willfully failed to maintain a normal parental relationship, there is just cause for his failure due to Mother's hostility towards him and the fact that he was incarcerated and unable to locate his children.

Father's arguments completely ignore the magistrate's findings in this case and rely exclusively upon his own testimony at the termination hearing. The magistrate specifically found, however, that Father was not credible, a finding which he does not challenge on appeal. While this Court conducts an independent review of the record, the magistrate has the opportunity to observe witnesses' demeanor and assess their credibility, and we will not substitute our view for that of the magistrate as to credibility determinations. *See Doe*, 150 Idaho at 49, 244 P.3d at 193. The magistrate also found that Father had abandoned the children since August 2005, well before he was incarcerated in 2009. The magistrate clearly understood the

burden that Mother needed to meet in order to demonstrate that Father had abandoned his children and applied the correct standards to the facts of this case. The magistrate concluded:

It is uncontroverted that [Father] has not provided any financial support for his children when he was not incarcerated. [Father] presented no evidence that he has no ability to pay support to these children when he wasn't in custody. [Father] possessed the ability to be a parent but he chose not to be a parent.

Whenever [Father] was not in custody; or whenever a Protection Order did not directly impact his contact with the children; or, whenever [Father] decided to meet the conditions which suspended his visitation rights, he held all the power to address the Court orders and to establish that it was safe for him to be introduced to these children so that a normal parent-child relationship could develop. He did nothing.

....

Other than the \$730.00 in garnished wages, [Father] has taken no responsibility to support these children. [Father] did not go to prison until 2009. For a significant period of time, he could have supported these children. He did not do so.

[Father] had the ability from 2005 to establish and maintain a normal parent-child relationship and he did not avail himself of that opportunity. For four years he willfully abandoned his family. This was his choice.

The notion that because he was sent to prison in 2009 and then sent a couple of letters or commanded his critically ill sister to figure out what he could have done had he had any interest in assuming any parental role in these children's lives, should not create just cause and it is not acceptable nor sustainable as a matter of law to the Court that this behavior is justifiable.

....

[Father] did nothing to support these children and did nothing to establish or maintain a normal parent-child relationship with these three children. His actions were and are willful. There has been no justifiable excuse for [Father] abandoning his family beginning upon the separation in 2005 and established in earnest by 2007.

There is no credible evidence that from the date of separation in 2005 until present that [Mother] interfered with [Father's] ability to visit and actually get to know who these children are. A mother's ability to protect her children and herself from chronic violence should not operate to justify [Father's] failures.

Having reviewed the record in this case, we conclude that the magistrate's finding that Father abandoned his children is supported by substantial and competent evidence.<sup>1</sup>

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<sup>1</sup> Father also argues that the magistrate erred when it ignored relevant evidence that he had sent the children multiple letters and that Mother did not allow the children to read them. Again, this argument ignores the fact that the magistrate did not believe any of Father's testimony. Moreover, the magistrate did not ignore the evidence as it explicitly acknowledged that

## **B. Best Interest**

The magistrate also concluded that it was in the best interest of the children to terminate Father's parental rights. Father contends that the court erred because it did not discuss the factual basis for its finding that termination was in the children's best interest. Father argues that the magistrate ignored relevant evidence, specifically his own testimony that it would not be in the children's best interest for his rights to be terminated because he loves them. This argument, again, disregards the magistrate's findings. First, the magistrate did not ignore Father's testimony. Rather, the magistrate did not believe any of Father's testimony. Second, the magistrate set forth several findings of fact, which supported both its conclusions, i.e., that Father had abandoned his children and that termination was in the best interest of the children. The magistrate was not required to reiterate all of its findings again in the context of its conclusion that termination was in the best interest of the children.

The magistrate found that Father had not "established or maintained a normal parent-child relationship with the children since August 2005." The magistrate further found that it was "undisputed that [Father] has not raised these children; that [Father] has never lived in the same household on a regular and normal basis with these children and that [Father] is a complete stranger who continues to pose a danger to [Mother] and to these children." The magistrate also addressed Father's relationship with the children as follows:

The two youngest children have no relationship, nor have ever had any relationship with [Father]. The oldest child, who witnessed the violence perpetrated on [Mother] by [Father], has not seen her father or had any contact since 2007. Fortunately, this child has been in counseling to address her exposure to the domestic violence and the oldest child never mentions [Father] or asks about him. She knows he is her biological father. [Father] has no parental connection to these children other than having impregnated [Mother]. The children do not know him as their father.

It is apparent that the magistrate appropriately considered all of the relevant facts in making its determination that termination of Father's parental rights was in the children's best interest, and there is substantial and competent evidence in the record to support the magistrate's conclusion.

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"[Mother] disputes [Father's] claims of numerous letters after the Petition was filed being sent to the children."

### **C. Attorney Fees**

Mother has requested an award of attorney fees on appeal pursuant to I.C. § 12-121, arguing that the appeal has been brought and pursued unreasonably and without foundation. An award of attorney fees on appeal is proper under I.C. § 12-121 only if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, or without foundation. *Doe v. Roe*, 133 Idaho 805, 810, 992 P.2d 1205, 1210 (1999). Mother contends that this appeal “is driven by [Father’s] dissatisfaction with the Magistrate’s Order and does little more than request this Court to second guess the Magistrate’s findings.” Generally, when an appeal simply disputes the trial court’s factual findings which are supported by substantial, although conflicting, evidence, the appeal is considered frivolous and an award of attorney fees is proper under I.C. § 12-121. *Id.* (citing *Zanotti v. Cook*, 129 Idaho 151, 155, 922 P.2d 1077, 1081 (Ct. App. 1996)). Nevertheless, we recognize that because of the seriousness of the interest affected in parental termination cases, a request on appeal to re-examine conflicting evidence is not necessarily frivolous. *See Doe*, 133 Idaho at 810, 992 P.2d at 1210.

In this particular case, however, the appeal does not even dispute the trial court’s factual findings. Father generally argues the facts as he did below. However, he does not even acknowledge that the magistrate made specific findings of fact, including a determination that his testimony was not credible. His arguments on appeal are based upon his incredible testimony, and there is no other testimony upon which to support his arguments. We conclude that under the circumstances of this case, Father has brought and pursued this appeal frivolously and, therefore, Mother is awarded attorney fees on appeal.

### **III.**

### **CONCLUSION**

Substantial and competent evidence supports the magistrate’s decision to terminate Father’s parental rights. The magistrate’s order terminating Father’s parental rights to A.R., T.R., and J.R. is, therefore, affirmed. We award costs and attorney fees on appeal to Mother.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**