

IN THE COURT OF APPEALS OF IOWA

No. 6-484 / 06-0715

Filed July 12, 2006

**IN THE INTEREST OF A.W.,
Minor Child,**

J.E.W., Jr., Father
Appellant.

Appeal from the Iowa District Court for Story County, Victor G. Lathrop,
Associate Juvenile Judge.

Father appeals from the termination of his parental rights. **AFFIRMED.**

Victoria A. Feilmeyer and Aaron S. Fultz of Feilmeyer, Feilmeyer, Keenan
& Forbes, P.L.C., Ames, for appellant father.

Timothy Gartin, Ames, for mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, Stephen Holmes, County Attorney, and Cynthia McIntosh,
Assistant County Attorney, for appellee State.

Gerald A.L. Moothart, Ames, for minor child.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

MAHAN, P.J.

Joseph appeals from the termination of his parental rights to his child. We affirm.

I. Background Facts and Proceedings

Joseph is the father of Austin, born in 1999. Austin's mother and Joseph are married, but have been separated for several years.¹ Austin was removed from his parents' care in January 2004 and placed in the care of Joseph's sister. At the time of his removal, Austin and Joseph were living with Joseph's sister and her family, where they had been since Joseph's release from prison on felony drug charges in July 2003. The removal was due to allegations of Austin's mother using methamphetamine, and Joseph's arrest on drug charges. Austin was adjudicated CINA in April 2004.

The State filed a petition to terminate parental rights in October 2005. A hearing was held in March 2006. At the time of the hearing, Joseph remained incarcerated. He admitted to spending four years, or two-thirds, of Austin's life in prison. He testified he had recently been denied parole, but that he was on the waiting list to participate in a work release program. He anticipated it would be two to four months before his placement in the program. Joseph estimated he would complete the work release program in two months, and testified he would have employment available to him upon his release.

A family member, usually Joseph's mother, takes Austin to visit his father at the prison for three hours every other weekend. Joseph writes to Austin and

¹ The juvenile court also terminated the mother's parental rights. She is not a party to this appeal.

sends birthday cards and money for Christmas. He has participated in parenting classes and drug treatment while in prison.

In April 2006 the juvenile court filed an order terminating Joseph's parental rights pursuant to Iowa Code section 232.116(1)(f). The court further concluded termination was in Austin's best interests:

Based upon the length of time Austin has been outside of his parents' custody, the continuing length of time necessary before either parent could possibly regain custody, Austin's integration into the home of his aunt and uncle and his need to have a permanent placement, the court determines that Austin's best interests would be served by termination of parental rights, allowing him to be adopted by his aunt and uncle who want to continue to have him as part of their family. Even though it was not argued by either parent, that need for permanency also makes termination of parental rights more appropriate for Austin than continuing in the custody of a relative.

Joseph appeals, claiming termination was not appropriate based on the application of Iowa Code sections 232.116(3)(a) and (c)(2005). Our review is de novo. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000).

II. Discussion

Joseph waives any claim of error concerning the statutory grounds for termination by failing to raise such claims in his appeal. See Iowa R. App. P. 6.14(1)(c). Therefore, we affirm the termination of Joseph's parental rights on statutory grounds.

However, even if the statutory requirements for termination are met, the decision to terminate must still be in the child's best interests. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994). In support of his claim termination was not in Austin's best interests, Joseph relies on sections 232.116(3)(a) and (c), which provide that the juvenile court need not terminate parental rights if a relative has

custody of the child, or if “[t]here is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.”

The provisions of section 232.116(3) are permissive, not mandatory. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). It is within the sound discretion of the juvenile court, based upon the circumstances before it and the best interests of the child, whether to apply these sections. *Id.*; see also *In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998) (noting that a strong bond between a parent and child is “not an overriding consideration, but merely a factor to consider”).

The juvenile court’s order, quoted above, indicates neither parent argued the application of section 232.116(3)(a) at the termination hearing. Our review of the record reveals that Joseph *did* raise the application of this section at the termination hearing. However, Joseph did not file a post-trial motion to correct or otherwise challenge the court’s termination order. Therefore, he has not preserved error on this issue and we need only consider Joseph’s argument as it relates to section 232.116(3)(c). Even if Joseph had properly preserved error, we conclude the juvenile court did not abuse its discretion in not applying sections 232.116(3)(a) or (c).

Joseph’s decision to engage in criminal activity has resulted in his incarceration for most of Austin’s life. Since July 2003 Joseph has spent only six months with Austin. Although Joseph has taken parenting classes while in prison, he has not been available to his son for four of the past six years. Even if Joseph were to enter into a work release program in the near future and

successfully complete the program within a few months, it would be an additional several months into the future, at a minimum, before reunification could occur. Austin should not be required to wait for his father to become a responsible parent. See *In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990) (“Children simply cannot wait for responsible parenting.”). Austin’s aunt testified that Austin considers her house his home and that he “needs to know where he belongs. He needs to feel secure in one place.” Joseph himself testified that his son was “very afraid to lose . . . his stability.” We agree with the district court’s conclusion that Austin’s best interests would be best served by termination of Joseph’s parental rights, allowing him to be adopted by his aunt and uncle.

AFFIRMED.