

**IN THE COURT OF APPEALS OF IOWA**

No. 7-733 / 07-1435  
Filed October 12, 2007

**IN THE INTEREST OF J.B.,  
Minor Child,**

**T.M.J.B., Father,  
Appellant.**

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Appeal from the Iowa District Court for Polk County, Joe E. Smith, District Associate Judge.

A father appeals from an order terminating parental rights to his son.

**AFFIRMED.**

Erica Parkey, Des Moines, for appellant father.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant Attorney General, John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appellee State.

Christopher Kragnes, Des Moines, for appellee mother.

Jessica Miskimins, Youth Law Center, Des Moines, for minor child.

Considered by Huitink, P.J., and Vogel and Baker, JJ.

**BAKER, J.****I. Background and Facts**

T.B. is the father of J.B., who was born in June 2001.<sup>1</sup> J.B. first came to the attention of the Iowa Department of Human Services (DHS) in July 2005, when the mother consented to his removal due to her methamphetamine usage. The child was placed with his maternal grandparents.<sup>2</sup> In October 2005, J.B. was adjudicated a child in need of assistance (CINA) under Iowa Code sections 232.2(6)(c)(2) and (n) (2005). A no-contact order was issued prohibiting the father from contact with the child or the grandparents, which is still in place.

The child has received services through DHS, including individual therapy. The father has not participated in services because he has been incarcerated. He has a history of substance abuse. He has been convicted of numerous criminal offenses including thefts, escapes, attempted burglary, harassment, interference with official acts, and assault. He has a history of domestic abuse against the mother, which the child has witnessed. He has been to prison and in the Fort Des Moines facility several times. While in prison, the father wrote to his son, but the child did not see the letters because, in his therapist's opinion, the child was not ready to deal with correspondence from his father. The father was paroled in April 2007 and is in the Fort Des Moines work release program. He pays child support and provides health insurance coverage for the child.

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<sup>1</sup> L.D. is the mother of J.B. and is not a party to this appeal.

<sup>2</sup> In February 2006, the child was returned to his mother's custody, but removed and returned to the maternal grandparents in April 2006. In July 2007, the juvenile court ordered that, because "the mother is continuing to cooperate with all services and is ready for reunification," custody of the child be placed with his mother under DHS supervision.

On August 6, 2007, the juvenile court terminated the father's parental rights under section 232.116(1)(f). The father appeals. Other facts relevant to the issues raised on appeal will be addressed below.

## **II. Merits**

Our review in termination cases is de novo. *In re R.F.*, 471 N.W.2d 821, 824 (Iowa 1991). Grounds for termination must be proven by clear and convincing evidence. *In re T.B.*, 604 N.W.2d 660, 661 (Iowa 2000). Our primary concern is the best interests of the child. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). When we consider the child's best interests, we look to long-range as well as immediate interests. *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997).

Pursuant to Iowa Code section 232.116(1)(f), the court must find "clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents." The father asserts that the State has failed to prove the elements necessary to terminate the mother's parental rights under section 232.116(1)(f). He argues that, because the child is being returned to his mother's care, "the State failed to show by clear and convincing evidence that the child could not be returned to this parent's care."

Iowa's appellate courts have repeatedly held that one parent's legal custody of the child does not preclude termination of the noncustodial parent's parental rights. See, e.g., *In re N.M.*, 491 N.W.2d 153, 156 (Iowa 1992); *In re C.W.*, 554 N.W.2d 279, 282 (Iowa Ct. App. 1996). We therefore find no merit to this argument.

Termination of parental rights, however, is not mandatory upon meeting the statutory requirements for termination set forth in section 232.116(1)(f).

*C.W.*, 554 N.W.2d at 282. The termination must also be in the best interests of the child. *Id.* The father asserts that the juvenile court erred in terminating his parental rights because it was not in the child's best interests.<sup>3</sup> In support of his claim, he relies on Iowa Code section 232.116(3)(a), which provides that the juvenile court need not terminate parental rights when a relative has custody of a child. He argues that terminating his parental rights is unnecessary because the child was residing with his maternal grandparents and will be returning to his mother's custody.

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 this section. *Id.* We conclude the juvenile court did not abuse its discretion in not applying section 232.116(3)(a).

Although the father has made significant strides, including attending parenting programs and substance abuse treatment, the father's decision to engage in criminal activity has resulted in his incarceration for much of the child's life. The father has not seen the child since he went to prison in 2005, and due to his incarceration is currently unable to take custody of the child. The child witnessed acts of domestic violence between his parents. Further, the child is afraid of the father, and his behavior regressed when he learned the father was

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<sup>3</sup> The State asserts that error was not preserved on this issue because "[t]here is no indication in the record that the father ever raised the issue of the exceptions in Iowa Code section 232.116(3)." The juvenile court's addendum to the order terminating parental rights addresses the child's best interests. We will therefore consider the best interests issue on appeal. Without deciding whether the father properly preserved error in connection with his section 232.116(3) argument, we conclude the juvenile court did not abuse its discretion in not applying the section.

out of prison. The child's therapist testified that she did not see much benefit to continuing the current relationship between the father and child, the therapy required to improve their relationship would require significant emotional upheaval and distress for the child, and terminating the father's parental rights would help to bring needed stability to the child's life. "Children simply cannot wait for responsible parenting." *In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990). We agree with the juvenile court that it is clearly in the child's best interests that the father's parental rights be terminated.

We have carefully considered all of the issues raised on appeal and find them to be without merit or otherwise disposed of by the foregoing opinion.

**AFFIRMED.**