

IN THE COURT OF APPEALS OF IOWA

No. 8-806 / 08-1337
Filed October 15, 2008

**IN THE INTEREST OF C.W., T.W., and N.W.,
Minor Children,**

M.W., Mother,
Appellant,

T.L.W., Father,
Appellant.

Appeal from the Iowa District Court for Adams County, Monty W. Franklin,
District Associate Judge.

A mother and father appeal separately from the termination of their
parental rights. **AFFIRMED.**

Karen K. Emerson Peters, Atlantic, for appellant mother.

Kevin Hobbs, West Des Moines, for appellant father.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant
Attorney General, and Jeffrey Millhollin, County Attorney.

Scott Sobel, Des Moines, for minor children.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

MAHAN, P.J.

The mother and father appeal the termination of their parental rights. The parents claim the juvenile court erred in terminating parental rights due to the exception provided in Iowa Code section 232.116(3) (2007). We affirm.

I. Background Facts and Proceedings.

The mother and father are the parents of C.W., born in October 2006; N.W., born in December 2003; and T.W., born in September 2002. The children were adjudicated to be children in need of assistance (CINA) under Iowa Code sections 232.2(6)(c) and (n) in June 2007 and were removed from their parents' custody due to safety issues arising from the parents' substance abuse problems, criminal charges, relationship problems, and domestic abuse concerns. The court ordered the children's placement in foster care and ordered extensive services designed to reunify the family. Since their removal, the children have remained in family foster care with the same foster care family. Both parents have been incarcerated since June 2007.¹ Due to their incarceration, neither parent has seen the children since that time.

The termination hearing was held in July 2008. The district court found clear and convincing evidence supporting termination of the mother's and father's parental rights pursuant to Iowa Code sections 232.116(1)(f) (child age four or older; adjudicated CINA; removed for twelve of the last eighteen months; and cannot be returned to parents at time of hearing) and 232.116(1)(h) (child age three or younger; adjudicated CINA; removed for six of the last twelve months;

¹ The mother was scheduled to be released on parole on July 24, 2008, one day after the termination hearing.

and cannot be returned to parents at time of hearing). By order dated August 8, 2008, the mother's and father's parental rights were terminated. The parents appeal.

II. Scope and Standard of Review.

We review termination of parental rights *de novo*. *In re Z.H.*, 740 N.W.2d 648, 650-51 (Iowa Ct. App. 2007). Grounds for termination must be proved by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). Our primary concern is the best interests of the children. *Id.*

III. Merits.

The court terminated the mother's and father's parental rights pursuant to sections 232.116(f) and (h). The actual grounds for termination of their parental rights under these sections are not being contested or appealed. The parents concede the grounds for termination have been met.

The mother and father contend, however, that the district court erred in failing to consider the exception to termination as set forth in section 232.116(3)(a). The relevant portion of this section states:

3. The court need not terminate the relationship between the parent and child if the court finds any of the following:

(a) A relative has legal custody of the child.

Iowa Code § 232.116(3)(a). A termination, otherwise warranted, may be avoided under this exception. *In re D.E.D.*, 476 N.W.2d 737, 738 (Iowa Ct. App. 1991).

The factors under section 232.116(3) have been interpreted by the courts as being permissive, not mandatory. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa Ct. App. 1993). The words "need not terminate" are clearly permissive. *Id.* The court has discretion, based on the unique circumstances of each case and the

best interests of the children, whether to apply the factors in this section to save the parent-child relationship. *Id.*

After a careful review of the record, we conclude the exception in section 232.116(3)(a) does not apply to the facts of this case. At the time of the termination hearing, the children were not in the legal custody of a relative. Although the maternal grandfather intervened and sought to have the children placed in his care, the district court correctly found the maternal grandfather was not a suitable placement for the children. Even assuming, *arguendo*, that the children were placed in the legal custody of a relative, the exception in section 232.116(3)(a) is permissive, not mandatory. Upon our review, we determine the mother's and father's rights should be terminated, and we therefore decline to apply the exception.² The district court properly exercised discretion in this case.

The children have waited for more than a year for their parents to provide the safe and stable home they deserve. Both parents have placed their own needs before the needs of their children during the almost three years that the Iowa Department of Human Services has been involved with their family. Given the children's ages and need for permanency and their parents' failure to utilize

² The father also contends section 232.116(3)(c) should prevent termination of his parental rights. That section provides an exception for termination of parental rights where "[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." Iowa Code § 232.116(3)(c).

We do not find sufficient evidence to indicate a significant enough bond between the father and the children to prevent termination of his parental rights. The father has been incarcerated since June 2007 and has not seen the children since that time. Further, he has contacted the Iowa Department of Human Services only one time since that time to inquire about his children. We agree with the court's determination that the bond between the children and their parents was "minimal to nonexistent." We therefore decline to apply the exception in section 232.116(3)(c) to prevent termination of the parental rights of the father.

services that would have fostered reunification, it is in the children's best interests that parental rights be terminated. Accordingly, we affirm the district court's order.

AFFIRMED.