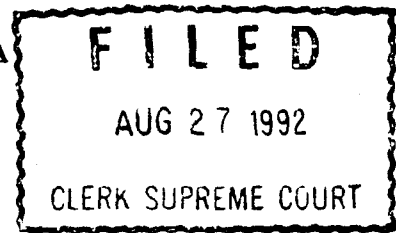


## IN THE COURT OF APPEALS OF IOWA

No. 2-205 / 91-1994

IN THE INTEREST OF R.L.P.R., A Minor Child,  
R.N.B., Natural Father,  
Appellant.

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Appeal from the Iowa District Court for Woodbury County,  
Mary L. McCollum, Juvenile Court Referee, and Robert C.  
Clem, District Associate Judge.

Father appeals a decision of the juvenile court  
terminating his parental rights. **REMANDED.**

Randy S. Hisey of Uhlir, Baker & Hisey, South  
Sioux City, Nebraska, for appellant.

Bonnie J. Campbell, Attorney General, John M. Parmeter,  
Special Assistant Attorney General, and Charles K. Phillips,  
Assistant Attorney General, for appellee State.

Debra Lulf, Sioux City, guardian ad litem for the child.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

**SACKETT, J.**

Appellant, the father of a child Richie,<sup>1</sup> born February 15, 1982, appeals from an order entered November 27, 1991, terminating his parental rights. Appellant contends the juvenile court should not have terminated his parental rights because he was incarcerated. He further contends his parental rights should not have been terminated because he has a close relationship with Richie and termination is not in Richie's best interest. Richie is not represented in this appeal by his guardian ad litem. Richie did not have an attorney appointed for him, even though at time of trial he was nearly ten years old and the record would reflect he does not want his father's parental rights terminated. We agree with the juvenile court there is clear and convincing evidence supporting the statutory grounds for termination. However, we find the juvenile court failed to adequately address the provisions of Iowa Code section 232.116(3) and failed to provide legal representation for Richie to address that code section. We remand to the juvenile court to appoint an attorney for Richie and to hold a hearing to determine whether under the directive of Iowa Code section 232.116(3) the interests of Richie are served by ordering termination. We do not retain jurisdiction.

Richie is one of three children who were removed from their mother's care because their mother was to be

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1. R. is the first initial of this child's name. Richie is not the child's given name.

incarcerated for food stamp fraud. On March 23, 1991, the mother's parental rights to the three children were terminated. The other children have different fathers and are not involved in this appeal.

Richie's father is currently incarcerated. Richie's paternal aunt and uncle are his current custodians. Richie has made a satisfactory adjustment in their care. The paternal aunt and uncle do not want to adopt Richie, and they are not in favor of Richie's father's parental rights being terminated. When asked about the termination of Richie's father's parental rights, his paternal aunt related:

Q. And do you think it is important appellant remain the father of Richie? A. I think it's very important because Richie -- it's all he has left mainly.

Richie does not want the court to terminate his father's parental rights. The guardian ad litem appointed for Richie has not appeared in this appeal. Richie did not have legal counsel appointed to advocate his wish not to have his father's parental rights terminated. Iowa Code section 232.113(2) provides:

Upon the filing of a petition the court shall appoint counsel for the child identified in the petition as a party to the proceedings. The same person may serve both as the child's counsel and as guardian ad litem.

The guardian ad litem recommended termination of parental rights in the trial court. Where the child is of an age to

express his or her wishes, and his or her wishes do not agree with the position advanced by the guardian ad litem, the guardian ad litem can no longer serve as both guardian ad litem and advocate for the child's interest. Richie was nine years and nine months old when the termination order was entered. He and his foster parents disagreed with the guardian ad litem's recommendation his father's parental rights be terminated.

Appellant claims the juvenile court referee abused the discretion required to be exercised by Iowa Code section 232.116(3) which, in relevant part, provides:

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.
- b. The child is over ten years of age and objects to the termination.
- c. There 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.

\* \* \*

Our review is de novo. In re Dameron, 306 N.W.2d 743, 745 (Iowa 1981).

The appellant lived with Richie and his mother on several occasions. While appellant was convicted of abusing one of Richie's half-sisters, there is no evidence that appellant ever harmed Richie. There is evidence of bonding between Richie and his father.

The State argues for termination because of the reason for appellant's incarceration, the sexual abuse of a female sibling. Additionally, the State points out Richie has been integrated into the home of his paternal aunt and uncle and he needs a permanent, positive figure in his life. The State also asks that we consider his bonding with his aunt.

We are unable to review this issue. Richie and his foster parents are against termination. The guardian ad litem has not appeared on appeal. Richie does not have legal representation to advance his position.

Obviously, Richie's father has not been a good parent. He does not argue there are not grounds for termination. He may not be released from prison in sufficient time to have contact with the child during his minority.

A legal termination does not terminate biological ties. Richie knows his father, recognizes his father's shortcomings, and wants the relationship maintained. The fact that Richie's father is a convicted felon is a problem Richie will carry whether his father's parental rights are terminated or not terminated. Additionally, because Richie is permanently placed with a blood relative who wants him to maintain his parental relationship with his natural father, a legal termination will not sever his emotional ties with his father. Richie has an excellent placement

with family members who do not want to adopt him and who do not want his father's parental rights terminated. The purpose of the termination of parental rights is not readily apparent from the record.

We remand to the juvenile court to appoint an attorney to represent Richie. The juvenile court shall then hold a hearing on the issue of whether a termination should be avoided under Iowa Code section 232.116(3). We do not retain jurisdiction.

**REMANDED.**