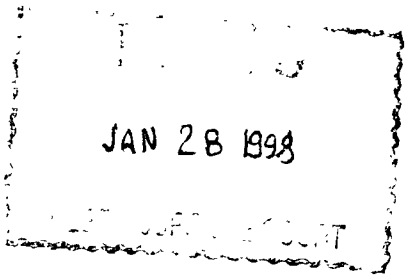
IN THE COURT OF APPEALS OF IOWA

No. 7-721 / 97-1085

IN THE INTEREST OF A.A., R.A., J.A. and B.A., Minor Children,

E.H., Father,
Appellant,

P.A., Mother,
Appellant.



Appeal from the Iowa District Court for Polk County, Artis Reis, District Associate Judge.

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

Nancy L. Pietz of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines, for appellant E.H.

Thomas J. McCann, Des Moines, for appellant P.A.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Jaki Livingston, Assistant County Attorney, for appellee State.

Considered by Cady, C.J., and Sackett and Huitink, JJ.

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CADY, C.J.

Patricia is the mother of Jane, born in 1989; Betty, born in 1990; Albert, born in 1992; and Randy, Jr., born in 1993. Edward is the father of Jane. Randy is the father of the other children. Patricia and Edward appeal the termination of their parental rights. We affirm on appeal.

Patricia has a history of substance abuse. In April 1992, she made a suicidal gesture and was diagnosed with an adjustment disorder and chemical dependency. The Department of Human Services (DHS) issued a founded report of denial of critical care against Patricia and Randy in May 1992 due to unsafe conditions in the home, including glass and cigarette butts on the floor in the children's room.

In November 1994, DHS issued a founded report of denial of critical care against Patricia and Randy because the children had been living in filthy conditions and the parents had not sought medical assistance for the children. The house was very dirty and infested with cockroaches. The children had not been bathed in some time. Albert and Randy Jr. had lice and scabies. Albert had tonsillitis and Randy Jr. had bronchitis and RSV.

In addition, DHS issued a founded report of illegal drug exposure because Patricia gave birth to a child who tested positive for the presence of marijuana and cocaine. This child is not involved in the present proceedings. Patricia and Randy also tested positive for the presence of marijuana and cocaine.

The juvenile court ordered the children removed from the home. They were placed in foster care. On November 20, 1994, the children were adjudicated children in need of assistance. The disposition order required the parents to comply with the case permanency plan.

Patricia completed outpatient treatment in January 1995 and was cooperative with services. Jane and Betty were returned to Patricia's care in June 1995, and Albert and Randy, Jr. were returned in September 1995. In December 1995, Patricia was the victim of domestic abuse by Randy. A no-contact order was issued prohibiting Randy from having contact with Patricia or the children.

In January 1996, DHS found Randy was living with Patricia and the children, in violation of the no-contact order. DHS issued a founded report of denial of critical care. The children were removed from the home and placed in foster care.

Patricia was hospitalized in April 1996 after she attempted suicide. She was incarcerated in May 1996 on forgery charges. In August 1996, Patricia escaped from jail. After her capture, she completed drug treatment. She left a recovery house against advice, however, and was placed in the Women's Correctional Institution.

In March 1996, Edward contacted DHS workers stating he wanted to see Jane. Edward did not know of Jane's existence until 1992. He was incarcerated shortly afterward, and remained incarcerated. He has never actually met his daughter, but has seen pictures of her. He told workers he was not interested in obtaining custody, but

wanted to visit Jane. He began to send letters and gifts to her. Jane told her therapist she was not ready to meet her father.

In February 1997, the State filed a petition to terminate the parental rights of Patricia, Edward, and Randy. Randy did not contest the termination of his parental rights. At the time of the termination hearing, Patricia remained incarcerated. Edward was on work release. He testified he was now seeking custody of Jane. The juvenile court terminated Patricia and Edward's parental rights pursuant to Iowa Code section 232.116(1)(e). Patricia and Edward have each appealed.

I. Standard of Review

The scope of review in termination cases is de novo. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1994). The grounds for termination must be proven by clear and convincing evidence. *In re E.K.*, 568 N.W.2d 829, 830 (Iowa App. 1997). Our primary concern is the best interests of the children. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa App. 1996).

II. Patricia

Patricia admits the State presented sufficient grounds to terminate her parental rights under section 232.116(1)(e). She asserts termination was not in the best interests of the children. Patricia relies on section 232.116(3)(c), which provides the juvenile court need not terminate parental rights if the termination would be detrimental to the child due to the closeness of the parent-child relationship.

Section 232.116(3) has been interpreted to be permissive, not mandatory. *In re C.L.H.*, 500 N.W.2d 449, 454 (Iowa App. 1993). It is within the sound discretion of the court, based upon the unique circumstances before it and the best interests of the children, whether to apply this section. *See In re J.V.*, 464 N.W.2d 887, 890 (Iowa App. 1990).

We agree with the juvenile court that the special circumstances of section 232.116(3) do not preclude termination. The closeness of the parent-child relationship has been lessened in this case because Patricia has not visited the children since August 1996 due to her incarceration. Patricia's inability to care for her children had been due to her substance abuse and criminal activity. We find termination is in the children's best interests.

III. Edward

A. Edward claims the juvenile court erred by not admitting into evidence three of his exhibits. Two of the exhibits were letters Edward wrote to the juvenile court in 1994 and 1995 seeking information about Jane. The other exhibit was a letter Jane wrote in 1996. These exhibits were not included on Edward's witness list. Edward asserted they were admissible as rebuttal evidence.

We determine Edward was not prejudiced by the juvenile court's exclusion of these exhibits. Edward testified at the termination hearing about the letters he wrote to the juvenile court officer and the judge, and thus, this evidence was admitted. The

letter from Jane was not relevant because it only concerned Jane's attitude toward her father in 1996, not her attitude at the time of the termination hearing.

B. Edward contends the State did not present clear and convincing evidence to show Jane could not be placed to his care. He states he is employed, has a suitable residence, and is now sober. He believes it would be best for Jane to be placed in his care.

We find Edward's parental rights were properly terminated under section 232.116(1)(e). Edward's own conduct placed him in prison during most of Jane's life, resulting in his inability to care for her. He was appointed an attorney in the child in need of assistance proceedings in January 1995. He did not contact DHS until February or March 1996. Furthermore, Edward did not decide until shortly before the termination hearing that he was interested in custody of Jane. Prior to this he stated he was only interested in visitation with her.

In addition, we find termination is in Jane's best interests. Jane is in a foster home with her siblings, Betty, Albert, and Randy, Jr. We believe it would be detrimental to Jane to separate her from her siblings and place her with a father she has never met.

We affirm the decision of the juvenile court terminating the parental rights of Patricia and Edward.

AFFIRMED.

Huitink, J., concurs; Sackett, J., concurs specially.

SACKETT, J. (specially concurring)

I concur specially. I agree with the majority the statutory grounds for termination have been met.

I cannot find that termination is in the children's best interest. These children's best interest would most reasonably be served by remaining with their biological parents in a loving, caring two-parent home. This option is not available to us. We can only choose between available alternatives.

Jane and Betty are bonded to their mother despite her shortcomings. A therapist testified if parental rights are terminated they will experience loss and grief. Jane has been adamant about returning home and being with her mother. Betty has vocalized she wants to go home.

The record gives us no evidence of specific plans for these children after termination. Termination does not assure adoption. I can only hope the State, in strongly advocating for termination, will be as aggressive in assuring these children are placed in a secure loving home.