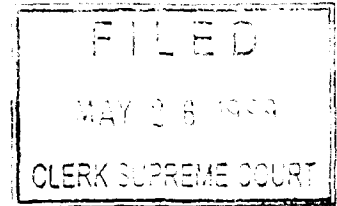


IN THE COURT OF APPEALS OF IOWA

No. 1999-112 (9-299) / 99-0088

Filed May 26, 1999



IN THE INTEREST OF W.S.S., Minor Child,

R.S., Father,
Appellant.

Appeal from the Iowa District Court for Jasper County, Thomas W. Mott,
District Associate Judge.

A father appeals a district court order terminating his parental rights.

AFFIRMED.

Steven J. Holwerda of Shelby, Updegraff, Smith & Holwerda, Newton, for
appellant.

Thomas J. Miller, Attorney General, Barbara E. B. Galloway, Assistant
Attorney General, and Scott W. Nicholson, Assistant County Attorney, for appellee-
State.

Ryan A. Genest, Pleasant Hill, guardian ad litem for minor child.

Considered by Sackett, C.J., and Vogel and Mahan, JJ.

MAHAN, J.

A father appeals a district court order terminating his parental rights to his daughter. He claims his parental rights should have been preserved under Iowa Code section 232.116(3)(a) because the child had been in the legal custody of her aunt for the past two years. We affirm the district court.

Background: Roger S. and Julie W. are the parents of Wendy, born in December 1991. Their second child, Justin, was born with methamphetamine in his system. Their parental rights to Justin were terminated in October 1997. Julie has two older daughters, Amanda W. and Johnna W. All three girls were removed from the home in August 1996 after Roger sexually abused Johnna and physically abused Amanda. Roger has not had contact with Wendy since August 1996 because the court issued a no-contact order after the allegations of sexual abuse.

CINA proceedings: All three girls were adjudicated in need of assistance in October 1996 under Iowa Code section 232.2(6)(d).¹ Wendy was placed in her maternal aunt's custody and remained with her at the time of the termination hearing in November 1998. Following a hearing, Roger's parental rights were terminated pursuant to Iowa Code sections 232.116(1)(c), (d). The court found termination was warranted because Roger failed to complete his court-ordered sexual abusers and

¹ One definition of a child in need of assistance in Iowa Code section 232.2(6) is:
d. Who has been, or is imminently likely to be, sexually abused by the child's parent, guardian, custodian or other member of the household in which the child resides.

substance abusers programs, he has continued to be involved with methamphetamine, and no additional period of rehabilitation would correct the situation.

Claim on appeal: Roger does not challenge the termination of his parental rights to Wendy under any subsection of Iowa Code section 232.116(1). Rather, he claims the court should not have terminated his parental rights because section 232.116(3)(a) gives the court discretion *not* to terminate when a relative has legal custody of the child. He argues even though grounds for termination exist under section 232.116(1), “the legislature has decided that placement with a relative can be an overriding factor.” He argues the court should have addressed the issue of relative placement and asks the court either to reverse the termination or to remand for a hearing on “whether termination is necessary in light of the relative placement.”

The State asserts Roger did not preserve error because this issue was not raised in the district court.

Scope of review: Matters not raised in the trial court, including constitutional questions, cannot be raised for the first time on appeal. *In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993). The record includes testimony Wendy had been in her maternal aunt’s custody for two years at the time of the termination hearing.² There is no mention in the record of any challenge to the termination based on relative placement. The primary thrust of Roger’s evidence is he denies he sexually abused

² The aunt did not testify at the hearing. Her willingness to continue caring for Wendy was in dispute. The record suggests she told the caseworker she was willing, but testified in her deposition she was not willing.

Johnna, so he does not think he needs to go through a sexual perpetrator program before resuming contact with Wendy.

Roger's claim the factors in section 232.116(3) are overriding factors is contrary to Iowa law. Section 232.116(3) has been interpreted to be permissive, not mandatory. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa App. 1997). It is within the sound discretion of the district court, based upon the unique circumstances before it and the best interests of the child, whether to apply the factors in section 232.116(3). *In re A.J.*, 553 N.W.2d 909, 916 (Iowa App. 1996). We have held a juvenile court need not make any findings under 232.116(3) unless it, in its discretion, is applying the factors in order *not* to terminate:

We observe Iowa Code section 232.116(3) does not require the juvenile court make specific findings to this section. It is in the Code to provide guidance. It merely provides "the court need not terminate *if it makes any of the findings* therein specified" (emphasis ours). *In Interest of L.P.*, 370 N.W.2d 839, 843 (Iowa App. 1985). In the instant case, the court terminated rather than refused to terminate appellant's parental rights. In the event the juvenile court relied upon any one of the grounds enunciated in Iowa Code section 232.116(3) to *not* terminate the child-parent relationship, then the court should make appropriate findings accordingly.

In re M.K., 460 N.W.2d 191, 193 (Iowa App. 1990) (determining the juvenile court did not err in not making findings under section 232.116(3)(e)). Roger has a long history of drug abuse. He sexually abused Johnna and physically abused Amanda. At the time of the termination hearing he was incarcerated. He had had no contact with Wendy for more than two years and had provided no support for her. He has no prospects for having the no contact order rescinded. Wendy's best interests require

the relationship with her father be terminated. Roger will never be able to assume custody of this child. It is in Wendy's best interest to sever all contact with Roger notwithstanding the fact she is currently in placement with her maternal aunt.

Future placement: We have affirmed the termination of Roger's parental rights as being in the best interests of Wendy. Wendy has been in placement with her aunt since November 8, 1996. The district court continued this placement after the entry of the termination order. We direct the Department of Human Services to initially explore the feasibility of permanent placement of Wendy with her maternal aunt.

AFFIRMED.

No. 99-0088. [1999-112 (9-299)] IN RE W.S.S.

Appeal from the Iowa District Court for Jasper County, Thomas W. Mott, District Associate Judge. **AFFIRMED.** Considered by Sackett, C.J., and Vogel and Mahan, JJ. Opinion by Mahan, J. (5 pages \$2.00)

Roger S. and Julie W. are the parents of Wendy, born in December 1991. Julie has two older daughters, Amanda W. and Johnna W. All three girls were removed from the home in August 1996 after Roger sexually abused Johnna and physically abused Amanda. Roger has not had contact with Wendy since August 1996 because the court issued a no-contact order after the allegations of sexual abuse. Wendy was placed in her maternal aunt's custody and remained with her at the time of the termination hearing. Roger claims the court should not have terminated his parental rights because section 232.116(3)(a) gives the court discretion *not* to terminate when a relative has legal custody of the child. Roger's claim the factors in section 232.116(3) are overriding factors is contrary to Iowa law. Section 232.116(3) has been interpreted to be permissive, not mandatory. We have held a juvenile court need not make any findings under 232.116(3) unless it, in its discretion, is applying the factors in order *not* to terminate. We find it is in Wendy's best interest to sever all contact with Roger notwithstanding the fact she is currently in placement with her maternal aunt. We direct the Department of Human Services to initially explore the feasibility of permanent placement of Wendy with her maternal aunt.