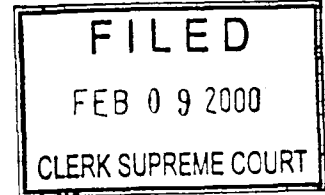


IN THE COURT OF APPEALS OF IOWA

No. 1999-607 (9-868) \ 99-1206
Filed February 9, 2000

**IN THE INTEREST OF A.J. and A.J.,
Minor Children,**

**B.J., Father,
Appellant.**



Appeal from the Iowa District Court for Polk County, James D. Birkenholz,
Juvenile Court Judge.

The father of two minor children appeals a juvenile court order terminating his
parental rights. **AFFIRMED.**

Ryan A. Genest of Borseth & Genest Law Office, Pleasant Hill, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant
Attorney General, and Emily A. McConkey, Assistant County Attorney, for appellee
State.

Christopher A. Kragnes, Des Moines, guardian ad litem for minor children.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

HECHT, J.

Bernard J. ("Bernard") appeals an order entered June 24, 1999, terminating his parental rights to his children, Amber J. ("Amber") and Anthony J. ("Anthony") pursuant to Iowa Code sections 232.116 (1)(c), (d), (e), (h), and (i) (1997). He challenges the sufficiency of the evidence supporting the district court's order. We affirm.

I. Factual Background and Proceedings. At all times material to this case, Bernard was the stepfather of Brandon, a teenage boy, and Branigha, a teenage girl. He is also the natural father of a daughter, Amber (now age nine), and a son, Anthony (now age seven). Bernard was married to the mother of all four children.

On November 11, 1997, Bernard admitted he had sexually abused his teenage stepdaughter on several occasions while abusing drugs. The State charged him with sexual abuse. He has been in jail since that time. Bernard thereafter pled guilty to sexual abuse in the third degree and was sentenced to ten years in prison.

On December 2, 1997, the State filed a CINA petition as to Amber and Anthony, the two children who are the subject of this case. The petition alleged Bernard had sexually abused and provided illegal drugs to Branigha. On January 23, 1998, the district court adjudicated Amber and Anthony to be children in need of assistance. Their mother received temporary legal custody of the children, and the court issued a no-contact order barring Bernard from contact with his children.

On January 21, 1999, the State filed a petition to terminate Bernard's parental rights. The district court held a hearing on the petition on April 12, 1999. On June 24, 1999, the district court entered an order terminating Bernard's parental

rights pursuant to Iowa Code sections 232.116(1)(b), (c), (d), (e), (h), and (i). Bernard appeals.

II. Standard of Review. Our review of termination cases is *de novo*. *In re A.J.*, 553 N.W.2d 909, 911 (Iowa App. 1996). The grounds for termination must be proved by clear and convincing evidence. *In re E.K.*, 568 N.W.2d 829, 830 (Iowa App. 1997). Although we are not bound by a juvenile court's fact findings, we give particular weight to the court's findings relating to witness credibility. See *A.J.*, 553 N.W.2d at 911.

III. Termination of Parental Rights. Our primary concern is the best interests of the child. *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa App. 1997). We look to the child's long range, as well as immediate, interests and consider what the future holds for the child if returned to his or her parents. *In re R.K.B.*, 572 N.W.2d 600, 601 (Iowa 1998). The State must prove the following elements in order to terminate Bernard's parental rights under section 232.116(1)(e):

- (1) The child is four years of age or older;
- (2) The child has been adjudicated in need of assistance pursuant to section 232.96;
- (3) The child has been removed from the physical custody of the child's parents for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been for less than thirty days;
- (4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents.

Iowa Code § 232.116(1)(e). Bernard concedes, and the record conclusively shows, the State proved the first, second, and fourth elements of its termination claim under 232.116(1)(e). He argues, however, the district court erred in finding the State proved the third element of its claim.

Bernard posits his rights can be terminated under 232.116(1)(e) only if he had the opportunity, but failed, to assume physical custody of the two children during the relevant time period. He has been imprisoned during the last eighteen months and his ability to contact the children was precluded by a no-contact order resulting from the sexual abuse of his stepdaughter. Bernard contends the State should not be permitted to terminate his rights under this section because the State prevented him from seeking physical care of the children by imprisoning him and ordering him to have no contact with them. We reject this argument, however, on both factual and legal grounds.

Bernard's imprisonment and the district court's order prohibiting contact with his children are the result of his repeated instances of sexual abuse of his stepdaughter. Thus, his contention the State "created the circumstances" which prevented him from seeking physical custody of the children is without merit. Bernard's argument is also lacking in legal merit. Our supreme court has previously considered the relevance of imprisonment in parental rights termination cases:

We do not hold or suggest that termination is a necessary result of conviction of a crime and resulting imprisonment. On the other hand [Father] cannot use his incarceration as a justification for his lack of relationship with the child. This is especially true when the incarceration results from a lifestyle that is chosen in preference to, and at the expense of, a relationship with a child.

In re M.M.S., 502 N.W.2d 4, 8 (Iowa 1993) (citations omitted). Bernard's imprisonment for sexual abuse was the result of his own actions. The State proved each element necessary to terminate his parental rights pursuant to Iowa Code section 232.116(1)(e).

Having found termination of Bernard's parental rights pursuant to

232.116(1)(e) was proper, we do not reach his assertions evidence was insufficient to support termination under other statutory provisions relied upon by the district court. See *A.J.*, 553 N.W.2d at 911.

IV. Best Interests. Bernard contends the State failed to prove termination of his parental rights was in the best interests of his children. Even if the statutory requirements for termination are met, the decision to terminate must still be in the best interests of the children. *In re C.W.*, 554 N.W.2d 279, 282 (Iowa App. 1996). A parent must be able to meet the present needs of children, as well as have the capacity to adapt to their future needs. *In re E.B.L.*, 501 N.W.2d 547, 552 (Iowa 1993). When making this decision, we look to the parent's past performance because it may indicate the quality of care the parent is capable of providing in the future. *In re L.L.*, 459 N.W.2d 489, 494 (Iowa 1990). Bernard is not able to meet the needs of Amber and Anthony at this time. He made no inquiry as to the well-being of his children for more than a year after his incarceration. Given his criminal history, we have grave doubts as to the level of care Bernard would be able to give the children in the future. He has shown escalating negative behavior regarding drug use and sexual abuse. Amber and Anthony need a stable and safe home. They currently have that stability with their mother. Termination of Bernard's parental rights is in the best interests of his children. We therefore affirm the district court's termination of Bernard's parental rights with respect to his children, Amber and Anthony.

AFFIRMED.