

IN THE COURT OF APPEALS OF IOWA

No. 7-633 / 07-1289
Filed September 6, 2007

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

**L.E.B., Father,
Appellant.**

Appeal from the Iowa District Court for Polk County, Constance Cohen,
Associate Juvenile Judge.

A father appeals from the order terminating his parental rights.

AFFIRMED.

Jesse A. Macro, Jr., Des Moines, for appellant father.

Nancy Pietz, Des Moines, for mother.

Thomas J. Miller, Attorney General, Kathrine Miller-Todd, Assistant
Attorney General, John P. Sarcone, County Attorney, and Stephanie Brown,
Assistant County Attorney, for appellee State.

Nicole Garbis Nolan of the Youth Law Center, Des Moines, for minor
children.

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

MAHAN, P.J.

Lawrence appeals from the order terminating his parental rights to his twin daughters, L.R.B. and L.J.B. We affirm.

I. Background Facts and Prior Proceedings

L.R.B. and L.J.B. were born in February 2006. At the time of their birth, Lawrence was serving a nineteen-year prison sentence for possession of crack cocaine with intent to deliver.¹

The twin girls came to the attention of the Iowa Department of Human Services in August 2006 when their mother tested positive for PCP. The children were immediately removed from their mother's care and adjudicated children in need of assistance on October 19, 2006. The children were eventually placed with the mother's aunt.

The State filed a petition to terminate parental rights on May 31, 2007. The mother consented to the termination of parental rights. Lawrence testified at the hearing and resisted the termination. He testified that he has only met these children on one occasion, but he planned to establish a relationship with them when he was paroled within the next thirty to forty-five days. He also revealed that he has child support obligations for four other children from a previous relationship.

After a full hearing, the State terminated Lawrence's parental rights pursuant to Iowa Code sections 232.116(1)(d), (g), and (h) (2007). He now appeals.

¹ Lawrence has been incarcerated since September 2005.

II. Standard of Review

We review termination of parental rights de novo. *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

Lawrence concedes there was clear and convincing evidence to sustain the statutory elements for termination. He only claims the termination should have been avoided under Iowa Code section 232.116(3)(a) because a relative had legal custody of the children and “[b]y terminating the parental rights of an able bodied member of society, the court in essence has created financial orphans of these children.”

We disagree. Under section 232.116(3)(a), the juvenile court “need not” terminate parental rights if a relative has legal custody of the child. Section 232.116(3) is a permissive, not a mandatory statute. *In re J.L.W.*, 570 N.W.2d 778, 781 (Iowa Ct. App. 1997). It is within the sound discretion of the juvenile court, based upon the unique circumstances before it and the best interests of the children, whether to apply this section. *Id.* Furthermore, the “determination to terminate a parent-child relationship is not to be countermanded by the ability and willingness of a family member to take the child [because the child’s] best interests always remain the first consideration.” *In re C.K.*, 558 N.W.2d 170, 174 (Iowa 1997). Upon our de novo review of the record we find that Iowa Code section 232.116(3)(a) should not be applied in these circumstances.

We also do not agree that termination will make these children “financial orphans.” To date, Lawrence has made only meager financial contributions

toward their care. While his eventual release from prison may lead to larger support payments, his current child support obligations to four other children and his history of previous criminal activity will likely limit his ability to adequately provide for these children. On the other hand, their maternal great aunt is willing to adopt both children and assume the corresponding financial responsibility.

Lawrence has been incarcerated for the duration of these children's lives. Based on his prior behaviors, there is a strong possibility he may never be able to provide for their basic needs. See *J.E.*, 723 N.W.2d at 798 (noting a parent's past performance is indicative of the quality of care the parent will provide in the future). On the other hand, both girls have thrived in the care of their maternal great aunt. Waiting for Lawrence to be released from prison and waiting for him to learn how to be a parent does not advance their immediate or long-range best interests. They deserve permanency now. See *id.* at 801 (Cady, J., concurring specially) ("A child's safety and the need for a permanent home are now the primary concerns when determining a child's best interests."). Termination is in their best interests. Accordingly, the juvenile court's order terminating Lawrence's parental rights to L.R.B. and L.J.B. is affirmed.

AFFIRMED.