FILED
OCT 0 5 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-303 / 89-282

IN THE INTEREST OF J.W.,
A Child,

S.W., Natural Mother,

Appellant.

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Appeal from the Iowa District (Juvenile) Court for Polk County, Larry J. Eisenhauer, Juvenile Referee.

The mother of a child appeals the juvenile court order terminating her parental rights. **AFFIRMED.**

Kenneth Benhart, Des Moines, for the appellant mother.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant Attorney General, for appellee State.

David Backstrom, Des Moines, guardian ad litem for the child.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

The child involved in this termination case is a young boy born in March of 1980--J.W. In September 1988, the State initiated proceedings to terminate the parental rights of his parents. The State alleged abandonment by the father. Termination of the mother's rights was based on Iowa Code section 232.116(1)(e), which specifies if a child has been adjudicated as a child in need of assistance and has been transferred from his mother's custody for at least twelve months, the court may order termination of parental rights if there is clear and convincing evidence the child cannot be returned to the custody of his mother. Iowa Code § 232.116(1)(e) (Supp. 1987). The issue raised on appeal by the mother is no clear and convincing evidence exists in the record to show J.W. would suffer harmful effects if returned to his home with his natural mother.

> Familiar principles guide our consideration of this appeal. Our review, of course, is de novo. . . . Thus, we examine the facts as well as the law and adjudicate rights anew on the record before us, mindful of our obligation to accord weight to the juvenile judge's factual findings, especially when considering the credibility of witnesses.
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> [C]entral to a determination of this nature are the best interests of the child. In this connection we look to the child's long range as well as immediate interest. Hence, we necessarily consider what the future likely holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care that parent is capable of providing.

* * *

> The grounds for termination of parental rights must be shown by clear and convincing proof. Iowa Code § 232.116(5)(c).

In Interest of K.F., 437 N.W.2d 559, 560 (Iowa 1989) (citations omitted).

The issue then, for this court, is whether there is clear and convincing evidence J.W. cannot be returned to his mother's custody as provided in section 232.102.

Section 232.102(4) provides in pertinent part:

> Custody of the child should not be transferred unless the court finds there is clear and convincing evidence that:
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> b. The child cannot be protected from some harm which would justify the adjudication of the child as a child in need of assistance and an adequate placement is available.

J.W. and his younger half-sister and brother lived with their mother until November 1985, when she became depressed and suicidal after inhaling paint thinner for three days. She voluntarily entered the hospital. In March the children were adjudicated to be children in need of assistance. J.W. has been in foster care or a treatment facility since November 1985.

S.W. has had serious chemical dependency problems involving paint thinner. When the children were in her care, she was incapable of adequately caring for them. Since these proceedings began, S.W. has twice begun

substance abuse treatment and twice left the facility against medical advice. At the time of the review hearing held in December 1986, she had not completed a court-ordered psychiatric evaluation or submitted to treatment for chemical dependency. In January 1987, she moved to Minneapolis and gave birth to another child. From November 1986 to December 1987, S.W. had no contact with J.W. He was placed in a foster home but was subsequently moved to a residential treatment program because he required constant supervision due to high anxiety and sexual acting out.

In December 1987, a termination petition was filed on the grounds of abandonment, but this could only be shown with regard to the two younger children. The termination of her relationship with J.W. was continued until a later date. Although S.W. agreed to a contract with J.W.'s treatment facility to maintain weekly contact with her son, attend parenting classes, and complete a chemical dependency evaluation and any recommended treatment, she only partially satisfied the conditions of the contract. Her visitation and telephone contacts with her son did increased, but she did not discuss those issues his therapists determined were essential to his continued improvement.

J.W. is a boy with very limited intellectual and social abilities. He was placed in a residential psychiatric program because of high anxiety and sexually inappropriate

behavior, which included exposing himself and climbing into bed with other children. He urinated on house plants, hid food, and talked to himself about not being liked. An evaluation concluded J.W. needed to be in a controlled environment in which he would be able to predict what will happen and how others will respond. Although he has improved considerably, it is estimated he will need at least another year of treatment.

The requirement of section 232.116(1)(e) is satisfied when the child cannot be returned to the parental home because of the existence of facts which would satisfy any definition of a child in need of assistance pursuant to Iowa Code section 232.2(6) (1989). In the Interest of A.M.S., 419 N.W.2d 723, 725 (Iowa 1988). Section 232.2(6) provides in pertinent part that:

> "Child in need of assistance" means an unmarried child:
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> b. Whose parent . . . has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.
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> c. Who has suffered or is imminently likely to suffer harmful effects as a result of:
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> (1) Conditions created by the child's parent . . . or
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> (2) The failure of the child's parent . . . to exercise a reasonable degree of care in supervising the child.

S.W. has been evaluated as having a below-average intelligence. She has an extensive history of substance

abuse and has not completed a treatment program. She has participated in, although not completed, parenting classes which would enable her to improve her parenting skills. She is not capable of providing the predictable, stable environment necessary to allow J.W. to conquer his own limitations.

After a careful review of the record, we conclude there is clear and convincing evidence J.W. would be in imminent danger of the harmful effects of neglect due to his mother's inability to exercise a reasonable degree of care in supervising her son.

AFFIRMED.

Habhab, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I respectfully dissent. The child's attorney made a thoughtful closing argument in the child's behalf. A substantial part of this argument is set out below:

> . . . I believe the legislature set forth explicit grounds in which parents can have their parental rights terminated. And I believe the County Attorney has indicated and made good argument. There are many things that S.W. has not done in the case. I would agree she has not done an awful lot of things with the exception that she has made pretty good contact, fairly consistent contact with J.W. since this case was set over in June of this year, beginning to start to do a little contact in April and June. After that time there seems to be a number of letters, phone calls, and two visits which was a lot more than she had done in the past.
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> My sole concern, Your Honor, is with whether or not it's in J.W.'s best interest. The Supreme Court of Iowa and the Iowa Court of Appeals deal with a lot of termination cases, but in most of those cases, they're dealing with what the parent did or did not do. They rarely deal with is this in the best interest of the child. . . . What is in the best interest of the child: Is the best interest of the child to terminate parental rights when the child is eight and a half years old and still has some deep feelings for his mother and some deep problems that he needs to work out with his mother.
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> . . . I think the other part of the termination statute where the legislature indicated that the Court may take into consideration a child who is hospitalized or in residential treatment and must consider if the continuation of the parent/child relationship is not preventing any permanent family placement. I saw that language a long time ago and wondered if the legislature knew what they were talking abut. After having gone through the case, I believe they did know what they were talking about; that when you have a child that has emotional problems, it's very important for that child to work through those problems and if those

problems involve the child's parent, mother or father, it seems to me if you would terminate parental rights and cut off that whole part of the problem and just leave it hanging because we say we can't deal with the problems. Your mother is gone. She's out of the picture. The testimony of Amity Blakey, he indicated when he was asked that question that he could not say that that would be -- that the termination would prevent -- or continuation would prevent any family problem and preventing a permanent family placement. And Mr. Douglas could not answer that question. And backing that up then we have the situation of the last witness, Kathy Cobb, who said it would in answer to my questions, it would be better, more prudent to have J.W. involved in treatment with his mother. And I don't know how he can be involved in treatment if her rights have been terminated and he's placed up for adoption.

* * *

So I think when you look at the statute and you look at those statements and look at this case, I'm struck with the fact that the legislature would be as stupid as sometimes we think they are. This section does have some meaning, does have some benefit. It's there for a purpose, and it's just this kind of a case it's there for.

How is this young man ever going to work through some of the problems if he doesn't have his mother around to be able to work through them with. I don't, by saying this, put any stamp of approval that S.W. has been any great parent because she hasn't. She's been anything but that. In fact, her parental rights with the two other children were terminated. . . . I don't think there was any question in those cases that their rights needed to be terminated.

When Orchard Place through Kathy Cobb and Four Oaks decided they needed to reinstitute contact with mother S.W. in my opinion they set in motion a chain of events that were to follow, and unfortunately they thought that she was not going to have contact with J.W. This would in some way convince him his mother was out of the picture. He would be ready to accept termination. Unfortunately for them, she did have contact with him. I don't think they properly thought out what they were doing, and I think this has caused -- certainly caused me some concern for future cases. I certainly wasn't consulted about that. Once they decided to do that then they set in motion this chain of events which has lead us to the situation where she has had substantial contact in the last few months, has got this child to the

point where it's going to be extremely difficult to indicate to him that he can never have any more contact with his mother.

I believe his testimony on the stand indicated that, in fact, he realized he may not be able to go live with his mother. I'm certainly not advocating that, but he envisions a situation of foster home or long term foster care in which he would have visits with his mother. I think that's what he was telling the Court. I still want to see my mother. And I indicated if you didn't see your mother would you be sad? Yes, I would be sad if I didn't get to see my mother. And I believe that's where this young man stands on that issue at the present time.

There is one other piece of evidence before the Court that I think primarily is the strongest piece of evidence and that is unlike some cases, in this case J.W.'s progress has improved according to Mr. Blakey since he's had more contact with his mother. The initial . . . reports indicate some improvement in J.W. and that occurred after he started to have regular contact with his mother and that, of course, is I think the strongest piece of evidence that's been introduced in this case because it indicates that actually through contact with his mother he may get better which is what we're trying to do with this young man, get him better. If that's the case it would be ridiculous to terminate parental rights when the one thing that seems to be helping him is this contact with his mom. The more contact she's had the better things have gone.

S.W. . . . is slow. She's not as articulate as a lot of people, but she tries the best that she can. I think her letters are appropriate, and I think they are indicative of the best that she can do. I was impressed that she as any mother, any parent would for their child saw fit that he got a bicycle, provided money for that. Certainly I think that shows some deep -- some indication of the development of an eight and a half year old. Certainly she didn't pass the test at the Reuben Lindh Center. She didn't graduate, but I think this mother has some things going for her. I think those letters indicate that.

I think that the Court ought not terminate parental rights in this case because of the statutory language regarding the fact that he is an emotionally disturbed child and needs his mother to get through treatment and because it would not be in his best interest, and I don't believe based upon the testimony of Amity Blakey regarding

> adoptive homes and the foster mother, Susan McKinsey, this child would ever accept a foster -- an adoptive home, be very difficult for him to do that, very difficult for him to bond to another woman whether that be a foster mother or an adoptive mother. She had difficulty even before he went . . . into treatment in accepting her as his mother, as his foster mother, and would be unwilling as a result of that to even adopt S.W. if his rights were terminated which leads us to the situation if rights are terminated he's not going to be wanted by that home, put in another home, split up from his siblings. Since he's going to be split up from his siblings in any event it would be far more prudent for the Court not to terminate parental rights, see if in fact eventually through a lot of hard work he can get back with his mother than to place him in another home somewhere, another adoptive family.
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> I think it would be, given the evidence in the case, almost very difficult -- I wouldn't say impossible but very difficult to try and get this young man to accept an adoptive home. For that reason I don't think it would be in his best interest, ask the Court not to terminate.

As the attorney for the child points out, there is a serious question about whether this child will be adopted. I therefore have difficulty understanding how terminating this eight and a half year old child's biological ties and making him an orphan will benefit him. The evidence is this child may be better able to work through problems with his mother's intervention. Studies have indicated biological parents, even when inadequate, are significant in a child's development. Fein, Maluccio, Hamilton & Ward, After Foster Care: Outcomes of Permanency Planning for Children, 62 Child Welfare 485 (1983).

I would reverse the termination.