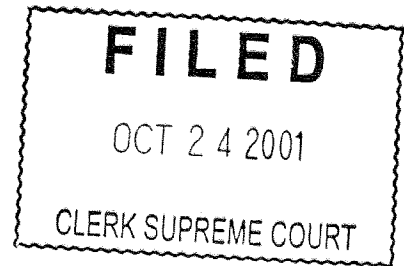


IN THE COURT OF APPEALS OF IOWA

No. 1-497 / 01-0278
Filed October 24, 2001



IN THE INTEREST OF C.E., Minor Child,

C.E., Minor Child,
Appellant,

J.M., Father,
Appellant,

IOWA DEPARTMENT OF HUMAN SERVICES,
Appellant.

Appeal from the Iowa District Court for Wapello County, William S. Owens,
Associate Juvenile Judge.

The father and minor child jointly appeal from the juvenile court order
dismissing the petition requesting termination of the mother's parental rights.
The department of human services has also appealed. **REVERSED AND
REMANDED WITH DIRECTIONS.**

Paul Zingg of Kiple, Denefe, Beaver, Gardner & Zingg, L.L.P., Ottumwa,
for appellant father.

Tom Kintigh of Griffin, Dew & Kintigh, Ottumwa, for appellant minor child.

Thomas J. Miller, Attorney General, and Charles K. Phillips, Assistant
Attorney General, for appellant Iowa Department of Human Services.

H. Michael Neary of H. Michael Neary Law Office, P.C., Ottumwa, for
appellee mother.

Karen Bastron, Assistant County Attorney, for appellee-State.

Heard by Hayden, Habhab, and Harris, Senior Judges.*

*Senior Judges assigned by order pursuant to Iowa Code section 602.9206
(2001).

HABHAB, S.J.

The father and minor child jointly appeal from the juvenile court order dismissing the petition requesting termination of the mother's parental rights. The Iowa Department of Human Services has also appealed. The father, the minor child, and the department argue that the court erred in determining that termination was not in the child's best interests. We agree and reverse.

I. Background Facts and Proceedings. James and Joanna are the parents of Christopher, born in August of 1996. The Iowa Department of Human Services (DHS) has been involved with Christopher since his birth when he tested positive for marijuana. Joanna admittedly used marijuana and methamphetamines during her pregnancy and acknowledged a history of drug abuse.

In March of 1997 Christopher was adjudicated a child in need of assistance pursuant to Iowa Code section 232.2(6)(c)(2) and (o) (1995). Christopher has been removed from Joanna's care since September 1998. After being placed briefly in foster care, Christopher resided with James and his paramour, Christina. Meanwhile, Joanna continued to experience problems with substance abuse. She was incarcerated in late 1998 and was again imprisoned in March 2000. She continued to be incarcerated at the time of the termination hearing.

In September of 2000 James filed a petition to terminate Joanna's parental rights. The juvenile court dismissed the petition, finding that although the statutory grounds for termination pursuant to section 232.116(1)(e) (1999)

were met, termination was not in Christopher's best interests. The court noted that although incarcerated, Joanna has maintained a strong and appropriate noncustodial relationship with her other two children and has attempted to do so with Christopher.

James and Christopher appeal jointly. The Iowa Department of Human Services also appeals.

II. Scope of Review. We review proceedings to terminate parental rights de novo. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). We give weight to the trial court's findings of fact, but are not bound by them. *Id.* The grounds for termination must be shown by clear and convincing evidence. *Id.*

III. Best Interests of the Child. James filed a petition to terminate Joanna's parental rights to Christopher. Iowa Code section 232.116(1)(e) provides for termination of parental rights if:

- (1) The child is four years of age or older.
- (2) The child has been adjudicated a child 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 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 as provided in section 232.102.

There is no dispute that the elements of section 232.116(1)(e) have been met and the district court so found.

The court applied Iowa Code section 232.116(3)(a) in making its determination to preserve the parent-child relationship. Section 232.116(3)(a) states the court may elect to not terminate parental rights when a relative has

legal custody of the child. This provision is permissive, not mandatory. *In re A.J.*, 553 N.W.2d 909, 916 (Iowa Ct. App. 1996). The court is to consider the best interests of this child when exercising its discretion on whether to apply the factors in section 232.116(3). *Id.*

The only issue is whether termination was in Christopher's best interest. To make this determination, we look at both the child's long-range and immediate interests. *In re M.T.*, 613 N.W.2d 690, 691 (Iowa Ct. App. 2000). We must consider what the future will hold for the child if returned to his or her parent. *In re C.K.*, 558 N.W.2d 170, 172 (Iowa 1997). We also look at a parent's past performance to determine the quality of the future care that parent is capable of providing. *Id.*

The district court determined that it was in Christopher's best interests to preserve the parent-child relationship because the evidence was unclear as to whether continued contact with Joanna would be harmful to Christopher. After reviewing the evidence presented at trial, we believe future contact with Joanna would be harmful to Christopher. Both James and Christina testified that after Christopher had visits with Joanna, he would become aggressive to Christina for several days afterward. While the court believed this testimony was the only evidence of the difficulties Christopher had with the visits, other witnesses testified the visits were harmful to Christopher. A worker with Family Solutions observed visits between Christopher and his mother and testified that Christopher was upset during the visits. She did not believe these visits were positive for Christopher. A CASA volunteer also testified that he had observed

Christopher become violent and aggressive during a visit, just as James and Christina had described. He believed the visits confused Christopher and were detrimental to his well-being. Finally, a social worker from DHS testified that the visits were detrimental to Christopher and that it upset him to have contact with Joanna. She testified that she did not believe the visits were in Christopher's best interests and that contact with Joanna could jeopardize his future progress. Based on the evidence presented, we find continuing contact between Christopher and his mother would not be in his best interest.

Because the elements for termination under section 232.116(1)(e) have been met and termination is in Christopher's best interest, we reverse and remand with directions to the juvenile court to enter its judgment terminating Joanna's parental rights to Christopher.

REVERSED AND REMANDED WITH DIRECTIONS.