

**IN THE COURT OF APPEALS OF IOWA**

No. 9-878 / 09-1356  
Filed November 25, 2009

**IN THE INTEREST OF J.J.,  
Minor Child,**

**A.R., Mother,**  
Appellant.

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

A mother appeals the termination of her parental rights. **AFFIRMED.**

Lynn C.H. Poschner of Borseth Law Office, Altoona, for appellant mother.

Nancy Trotter, Des Moines, for appellee father.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Andrea Vitzthum, Assistant  
County Attorney, for appellee State.

Kayla Stratton, Des Moines, for minor child.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

**POTTERFIELD, J.****I. Background Facts and Proceedings**

Angela and Scott are the parents of Johnathon, who was five years old at the time of trial. On January 11, 2006, the State filed a petition alleging Johnathon to be a child in need of assistance. Following a hearing, the parties stipulated to an adjudication of Johnathon as a child in need of assistance on March 15, 2006. The juvenile court allowed Johnathon to remain in Angela's custody.

During the summer and fall of 2007, while Johnathon was in Angela's custody, Scott began to take an active role in Johnathon's life and complied with recommendations of the court and DHS. After Scott successfully participated in several supervised visits with Johnathon, the court allowed unsupervised contact between Scott and Johnathon.

Johnathon was continued in Angela's custody until November of 2007. During this time, concerns about placement with Angela arose. Angela's home became extremely unclean, she failed to participate in services willingly, she failed to take Johnathon to therapy appointments, and her mental health deteriorated.<sup>1</sup> The State filed a motion to modify custody on June 13, 2007, based on Angela's faltering mental health and unwillingness to follow through with services. However, the court continued Johnathon in Angela's care. After

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<sup>1</sup> The record reflects that Angela's mental health deteriorated significantly due to ongoing grief after a tragic fire in August of 2004 resulted in the death of her three-year-old daughter. This fire apparently occurred because Angela was using candles to light her apartment after her electricity was cut off. Both Angela and Johnathon were injured in the fire.

an October 11, 2007 review hearing, the juvenile court ordered a psychiatric evaluation for Angela and a review of her and her children's medical records by an independent expert based on concerns that Angela was obtaining prescription medications that she later sold or abused. Medical professionals reviewed records and confirmed drug-seeking behavior.

On November 16, 2007, the State again requested a modification of custody. The juvenile court granted the request for modification pending hearing. Johnathon was placed in the custody of his paternal aunt and uncle. Johnathon's health improved remarkably once he was removed from Angela's care. Following Johnathon's removal from her custody, Angela showed little improvement. She continued her drug-seeking behavior, showed no insight into how her actions affected Johnathon, and was accordingly allowed only supervised contact with Johnathon. After a hearing on February 15, 2008, the juvenile court found Johnathon could not safely be returned to Angela's custody without serious risk of further adjudicatory harm.

In February of 2008, Johnathon's aunt and uncle notified the court they could no longer provide full-time care for Johnathon. On February 27, 2008, Johnathon was placed in Scott's custody, where he has remained to date with no trial periods with Angela.

After a review hearing on August 22, 2008, the juvenile court granted concurrent jurisdiction to enable Scott and Angela to litigate custody and visitation issues in district court. However, the parties were unable to reach an agreement with respect to custody and visitation. Following hearings on November 2, 2008, and February 5, 2009, Johnathon was continued in Scott's

custody, where he was thriving. After a visit with Angela in February of 2009, Johnathon exhibited startling symptoms of sexual abuse. Angela has not been allowed visitation with Johnathon since this time.

On April 7, 2009, the State filed a petition to terminate Angela's parental rights.<sup>2</sup> Trial took place on June 24 and August 12, 2009. The juvenile court terminated Angela's parental rights pursuant to Iowa Code section 232.116(1)(f) (2009). Angela appeals, arguing: (1) the State failed to establish by clear and convincing evidence that Johnathon could not be returned to Angela's care; (2) a termination of Angela's parental rights was not in Johnathon's best interests; (3) Angela's rights should not be terminated because Johnathon is in his father's custody; and (4) the State failed to provide Angela with reasonable services to reunify her with Johnathon safely.

## **II. Standard of Review**

We review proceedings to terminate parental rights *de novo*. *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981). We review the facts as well as the law and adjudicate parents' rights anew. *Id.* We give weight to the findings of the juvenile court, particularly with respect to the credibility of witnesses, but are not bound by them. *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990). Grounds for termination must be proved by clear and convincing evidence. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006).

## **III. Termination of Parental Rights**

Section 232.116(1)(f) provides that termination is appropriate when: (1) the child is four years of age or older; (2) the child has been adjudicated a child in

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<sup>2</sup> Angela's parental rights to Johnathon are the only rights at issue on appeal.

need of assistance; (3) the child has been removed from the physical custody of the child's parents for at least twelve of the last eighteen months; and (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)(f). The first three elements are not disputed.

After a review of the record, we find clear and convincing evidence proved that Johnathon could not be returned to Angela's custody. Angela has been involved with DHS for several years and has shown little improvement over the life of this case. Although Angela was fairly consistent in attending visits, she was never allowed unsupervised visitation. Angela did not consistently participate in services offered to assist her and failed to take Johnathon to therapy consistently. Jill Cook, an in-home care provider, noted that Angela failed to accept responsibility for her situation, and therefore was unwilling to make necessary changes. When a parent is incapable of changing, termination is necessary. *In re T.T.*, 541 N.W.2d 552, 557 (Iowa Ct. App. 1995). Further, Cook reported that Angela failed to understand the consequences her behavior had on Johnathon.

In February of 2009, Johnathon returned from a visit with Angela and reported watching scary movies with her. Following this visit, Johnathon was distraught and began to act out at daycare. Following several episodes at daycare, Marie Muench, the DHS worker assigned to this case, recommended stopping Angela's visitation with Johnathon. After working with Angela for more than two years, Muench reported that Angela "has not gained the necessary insight to provide . . . Johnathon with a safe and secure home." "A child's safety

and the need for a permanent home are now the primary concerns when determining a child's best interests." *J.E.*, 723 N.W.2d at 801 (Cady, J., concurring specially).

Cheryl Long, a court appointed special advocate working with Angela, recommended terminating Angela's rights based on the deplorable conditions of her house, her drug-seeking behavior, her inability to properly care for her child, and her failure to comply with DHS procedures. Care providers that worked with Angela noted that she showed "little to no progress" between court dates and that she had in fact "slipped even more" in the months leading up to termination. "The future can be gleaned from evidence of the parents' past performance and motivations." *In re T.B.*, 604 N.W.2d 660, 662 (Iowa 2000). It is unlikely that Angela will be able to parent Johnathon properly any time in the near future.

Angela asserts the juvenile court erred in terminating her parental rights when Johnathon is in his father's custody. The court need not terminate the parent-child relationship if the child is in the custody of a relative. Iowa Code § 232.116(3)(a). However, multiple witnesses reported that Angela was extremely difficult when trying to negotiate a custody agreement with Scott and expressed concern that Angela would try to modify the custody order in the future. We agree with the juvenile court that a termination of parental rights is necessary to ensure permanency for Johnathon. See *J.E.*, 723 N.W.2d at 801. Johnathon has thrived while living with his father. His school attendance has improved significantly. His health is much improved, and he has not experienced any significant health issue since he stopped living with Angela. We find it is in Johnathon's best interests that he be given the stability of knowing he will be in

his father's care permanently. We find the State has proved the statutory grounds for termination by clear and convincing evidence and that termination is appropriate in spite of Johnathon's placement with a relative.

For all of the reasons listed above, we find termination is in Johnathon's best interests. He is in need of a stable, permanent home. The only way Johnathon will be able to truly have permanency and stability is through a termination of Angela's parental rights.

Angela also argues the State failed to provide her with reasonable services to reunify her with Johnathon safely. Angela did not raise this issue before the juvenile court, and therefore we decline to address it now. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

**AFFIRMED.**