

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-0854

IN THE INTEREST OF

J.H.,

Minor Child.

**APPEALED FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
Hon. Susan Cox, District Associate Judge**

**APPELLEE-STATE'S
APPLICATION FOR FURTHER REVIEW AND BRIEF**

THOMAS J. MILLER
Attorney General of Iowa

ELLEN RAMSEY-KACENA
Assistant Attorney General
Hoover State Office Building
1305 E. Walnut St., 2nd Floor
Des Moines, Iowa 50319

KEVIN BROWNELL
Assistant Polk County Attorney

ATTORNEYS FOR APPELLEE-STATE

OPINION, COURT OF APPEALS
(September 2, 2020)

ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE COURT OF APPEALS ERRED BY REVERSING THE JUVENILE COURT’S TERMINATION OF THE FATHER’S PARENTAL RIGHTS PURSUANT TO IOWA CODE §232.116(1)(G) WHERE THE FATHER’S PARENTAL RIGHTS HAD BEEN TERMINATED TO THE CHILD’S SIBLINGS JUST A YEAR EARLIER AND THE FATHER CONTINUES TO LACK THE ABILITY OR WILLINGNESS TO RESPOND TO SERVICES THAT WOULD CORRECT THE SITUATION AND AN ADDITIONAL PERIOD OF REHABILITATION WOULD NOT CORRECT SITUATION.**

Cases

In re M.B., 553 N.W.2d 343, 346 (Iowa Ct. App. 1996)

In re L.H., 480 N.W.2d 43, 46 (Iowa 1992)

In re M.W., 876 N.W.2d 212, 224 (Iowa 2016)

In re D.S., 806 N.W.2d 458, 465 (Iowa Ct. App. 2011)

In re A.M., 843 N.W.2d 100, 113 (Iowa 2014)

In re J.E., 723 N.W.2d 793, 802 (Iowa 2006)

In re A.B., 815 N.W.2d 764, 778 (Iowa 2012)

In re D.W., 791 N.W.2d 703, 709 (Iowa 2010)

In re T.B., 604 N.W.2d 660, 662 (Iowa 2000)

In re J.B.L., 844 N.W.2d 703, 705-06 (Iowa Ct. App. 2014)

In re C.W., 554 N.W.2d 279, 283 (Iowa Ct. App. 1996)

In re S.N., 500 N.W.2d 32, 34 (Iowa 1993)

Harter v. State, 149 N.W.2d 827, 829 (Iowa 1967)

Statutes

Iowa Code § 232.116(1)(g)

TABLE OF CONTENTS

	<i>Page</i>
ISSUES PRESENTED FOR REVIEW	2
TABLE OF CONTENTS	3
TABLE OF AUTHORITIES	4
STATEMENT SUPPORTING FURTHER REVIEW	5
STATEMENT OF THE FACTS	6
STANDARD OF REVIEW	10
ARGUMENT	11
I. WHETHER THE COURT OF APPEALS ERRED BY REVERSING THE JUVENILE COURT’S TERMINATION OF THE FATHER’S PARENTAL RIGHTS PURSUANT TO IOWA CODE §232.116(1)(G) WHERE THE FATHER’S PARENTAL RIGHTS HAD BEEN TERMINATED TO THE CHILD’S SIBLINGS JUST A YEAR EARLIER AND THE FATHER CONTINUES TO LACK THE ABILITY OR WILLINGNESS TO RESPOND TO SERVICES THAT WOULD CORRECT THE SITUATION AND AN ADDITIONAL PERIOD OF REHABILITATION WOULD NOT CORRECT SITUATION	11
CONCLUSION	15
CERTIFICATE OF COMPLIANCE	16
OPINION, COURT OF APPEALS (Dated, September 2, 2020).	
TERMINATION ORDER (Dated, May 30, 2020).	

TABLE OF AUTHORITIES

Page

Cases

<i>Harter v. State</i> , 149 N.W.2d 827, 829 (Iowa 1967)	15
<i>In re A.B.</i> , 815 N.W.2d 764, 778 (Iowa 2012).....	15
<i>In re A.M.</i> , 843 N.W.2d 100, 113 (Iowa 2014).....	11, 14
<i>In re C.W.</i> , 342 N.W.2d 885, 887 (Iowa Ct. App. 1983).....	10
<i>In re D.S.</i> , 806 N.W.2d 458, 465 (Iowa Ct. App. 2011).....	14
<i>In re D.W.</i> , 791 N.W.2d 703, 709 (Iowa 2010)	11, 15
<i>In re J.B.L.</i> , 844 N.W.2d 703, 705-06 (Iowa Ct. App. 2014).....	15
<i>In re J.E.</i> , 723 N.W.2d 793, 802 (Iowa 2006)	10, 14
<i>In re L.H.</i> , 480 N.W.2d 43, 46 (Iowa 1992)	13
<i>In re M.B.</i> , 553 N.W.2d 343, 346 (Iowa Ct. App. 1996).....	13
<i>In re M.W.</i> , 876 N.W.2d 212, 224 (Iowa 2016).....	14
<i>In re S.N.</i> , 500 N.W.2d 32, 34 (Iowa 1993).....	15
<i>In re T.B.</i> , 604 N.W.2d 660, 662 (Iowa 2000).....	15

Statutes

Iowa Code § 232.116(1)(g)	11, 12
---------------------------------	--------

STATEMENT SUPPORTING FURTHER REVIEW

The juvenile court terminated the father's rights to a then eleven month old baby with a serious eye condition which could result in permanent blindness if not properly cared for. Despite the overwhelming evidence that the father had not engaged in any medical appointments for the child, educated himself about the child's condition, and had prior terminations based upon his failure to adequately care for his children, the Court of Appeals reversed the Juvenile Court's decision to terminate the father's parental rights pursuant to Iowa Code §232.116(1)(g).

The determinative issue in this case is whether the Court of Appeals properly interpreted Iowa Code sections 232.116(1)(g) when it reversed the juvenile court order terminating the father's parental rights to J.H. In concluding that the father's parental rights to J.H. should not be terminated under this code provision, the Court of Appeals found that there was not clear and convincing evidence that the father lacked the ability or willingness to respond to services which would correct the situation and that an additional period of rehabilitation would not correct the situation.

The Court of Appeals focused on the father's progress in counseling related to domestic violence and substance abuse, but completely overlooked the father's failure to attend medical appointments, educate himself on the child's needs and even his failure to visit the child during a critical bonding period because he was

manipulated by others to refuse visitation. The State established by clear and convincing evidence that this father was unable to provide a safe, long-term environment for J.H. The Court of Appeals erroneously overlooked the father's unaddressed concerns impacting his ability to care for the child, for which he had been offered many services and years of support and found that the evidence was not sufficient under Iowa Code §232.116(1)(g).

The State requests this court to grant its application for further review, vacate the decision of the Court of Appeals with respect to J.H., and affirm the ruling of the juvenile court.

STATEMENT OF THE FACTS

The family came to the attention of the Department of Human Services (DHS) through a CINA Assessment done at the time of J.H.'s birth in April 2019. (7/10/2019 DHS Report, p. 1). On April 25, 2019, J.H. was removed from parental care and placed with paternal relatives. (TPR Ex. 9, p. 1; Father's Petition on Appeal (POA) p. 3). Since that time, visits with the parents have been fully supervised. (TPR Ex. 9, p. 5). The child has not returned to the care of a parent since removal. (TPR Order, p. 11).

J.H. is the ninth child shared by the parents. The Juvenile Court termination order outlined the history of these parents beginning in 2008. (TPR Order, pp. 1-8). The issues included the father's substance abuse, his propensity to engage in

domestic assault and his general inability to address daily cares for his children. The father's intellectual limitations also impact his ability to provide care for J.H. (*Id.*) The mother had gotten pregnant two months after the parents' most recent termination of parental rights. (POA, p. 3). Rights to each of the previous children have been terminated in 2009, 2010, 2011, 2013, 2014, and 2018. (TPR Ex. 1-6). The mother's rights were terminated to two other children in 2001 and 2008. (TPR Ex. 7-8). The parents remain living together. (Termination Trial Transcript 1 (TPR Tr. 1), p. 19).

J.H. is a sixteen month old (eleven month old at trial) baby with a serious eye condition which could result in permanent blindness if not properly addressed by his caretakers. (CINA Ex. 27). J.H. has been diagnosed with severe congenital glaucoma. (TPR Ex. 9, p. 5). He has had three surgeries on his eyes to lower his eye pressure level. (TPR Ex. 9, at p. 8). He will require several surgeries on his eyes throughout his life. (TPR Ex. 9, at p. 5). Both parents struggle to attend medical appointments for J.H. and struggle to understand his medical needs. (TPR Ex. 9, at p. 6). Because of this they are unaware of the possible long term issues that the child will have and have a lack of understanding why J.H. needs to have long term medical services followed by specialist doctors in Iowa City due to his severe congenital glaucoma. (TPR Ex. 9, p. 6-7; TPR Order, p. 19-20). The doctors confirmed if the congenital condition is not managed appropriately with medications and surgery, the

child is at risk of permanent blindness. (CINA Ex. 27, p. 3). The medical providers emphasized that follow-up care and treatment was essential. (CINA Ex. 27, p. 1). J.H. has a life-long medical condition. (CINA Ex. 27, p. 2). It is concerning that the father has not attended any of the medical appointments for J.H. (TPR Tr. 3, p. 14). He doesn't know about any of the surgeries. (TPR Tr. 3, p. 15). This is similar to the prior termination of the twins, who also needed regular doctor appointments and physical therapy, but the father did not attend the appointment and could not articulate the special needs of the twins. (TPR Order, p. 7). The father also has a history of not taking care of his own medical issues. During a medical exam in May 2019, the father admitted he had not taken his blood pressure medications for several days, despite his history of hypertension, resulting in blood pressure of 176/108. (CINA Ex. 20).

The father has a long history of substance abuse. (TPR Ex. 9, p. 5; POA, p. 3; TPR Tr. 1, p. 12), His main drugs of choice have been cocaine and marijuana. (TPR Ex. 9, p. 5). He reported starting drug use at age 13. (*Id.*) He also reported use of methamphetamine. (*Id.*) The father was asked to provide drug testing through a sweat patch on 6/20/2019, which was negative. (*Id.*) However, he had prior positive tests in October 2017 for cocaine, March 2018 for cocaine and May 2018 for cocaine. (*Id.*)

There has also been a long history of domestic violence between the parents. (TPR Ex. 9, p. 6; TPR Tr. 1, p. 31). The father's therapist indicated that he is not yet working on the mother and father's relationship in therapy. (TPR Tr. 1, p. 35). The father clearly still struggles with his anger, as the Court noted during the trial that the father was staring at the Guardian ad Litem in a threatening and intimidating way. (TPR Tr. 2, p. 56; TPR Order, p. 29).

The father also has a brain injury which causes functioning issues. (TPR Tr. 1, p. 151-152). He has been disabled since 1999 due to a brain injury received in a motorcycle accident. (TPR Ex. 1, p. 9-10). The father denied this and indicated that he has some memory issues that may be from his substance abuse. (TPR Tr. 3, p. 51). However, he acknowledges that he has special services because of a mental health history, but could not provide any further details. (TPR Tr. 3, p. 67). That individual helps him to pay bills. (*Id.*) The Court outlined its concerns that the parents' intellectual/mental health limitations preclude them from safely caring for themselves or J.H. (TPR Order, p. 35). The parents need help with daily living. (*Id.*) Even with this level of assistance, the parents have failed to care for their own basic medical needs. (*Id.*) J.H. will require significant medical attention and his parents do not fully grasp what is wrong or what the care entails. (TPR Order, p. 38).

The mother, who remains with the father, continues to struggle with her mental health and ability to regulate her emotions. The Court noted in the trial

transcript that the mother was getting upset during questioning and needed to use her coping skills. (TPR Tr. 1, p. 184).

There has been concern regarding the parents' supports. The parents were apparently taken advantage of by some church members during this case. (TPR Tr. 3, p. 31). These individuals manipulated the father into not visiting J.H. for a period of months. (TPR Tr. 3, p. 27). From April 25, 2019, after removal of J.H. from the father's custody until June 5, 2019, the father opted out of visits. (TPR Order at p. 12-13, 30; TPR Ex. 15). The father's lack of improvement and insight into his parenting skills were evident at trial. (TPR Tr. 3, p. 30). This was after many years of services.

The child is integrated into his current home with his paternal aunt and uncle. (TPR Ex. 9, p. 8). They have taken care of his medical needs. (*Id.*) The concurrent plan if termination occurs is to have the relatives adopt J.H. (*Id.*) The relatives have also adopted two siblings of J.H. (TPR Tr. 2, p. 73-74).

STANDARD OF REVIEW

Appellate review termination-of-parental-rights proceedings is *de novo*. *In re L.T.*, 924 N.W.2d 521, 526 (Iowa 2019). The Court gives weight to the juvenile court's factual findings, but is not bound by them. *In re M.D.*, 921 N.W.2d 229, 232 (Iowa 2018). The paramount concern is the child's best interests *In re L.T.*, 924 N.W.2d 521, 526 (Iowa 2019); *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006).

The State must present clear and convincing evidence to support termination. *In re A.M.*, 843 N.W.2d 100, 110-111 (Iowa 2014). “Evidence is ‘clear and convincing’ when there are no serious or substantial doubts as to the correctness [of] conclusions of law drawn from the evidence.” *In re D.W.*, 791 N.W.2d 703, 706 (Iowa 2010).

ARGUMENT

I. WHETHER THE COURT OF APPEALS ERRED BY REVERSING THE JUVENILE COURT’S TERMINATION OF THE FATHER’S PARENTAL RIGHTS PURSUANT TO IOWA CODE §232.116(1)(G) WHERE THE FATHER’S PARENTAL RIGHTS HAD BEEN TERMINATED TO THE CHILD’S SIBLINGS JUST A YEAR EARLIER AND THE FATHER CONTINUES TO LACK THE ABILITY OR WILLINGNESS TO RESPOND TO SERVICES THAT WOULD CORRECT THE SITUATION AND AN ADDITIONAL PERIOD OF REHABILITATION WOULD NOT CORRECT SITUATION.

The Court of Appeals found that the State has failed to establish the grounds for termination under Iowa Code §232.116(1)(g), a conclusion which was not shared by the dissent.

To terminate under paragraph (g), the State must prove that all of the following have occurred: (1) The child has been adjudicated a child in need of assistance pursuant to Iowa Code §232.96; (2) The court has terminated parental rights pursuant to Iowa Code §232.117 with respect to another child who is a member of the same family or a court of competent jurisdiction in another state has entered an order involuntarily terminating parental rights with respect to another child who

is a member of the same family; (3) There is clear and convincing evidence that the parent continues to lack the ability or willingness to respond to services which would correct the situation; and (4) There is clear and convincing evidence that an additional period of rehabilitation would not correct the situation. The father conceded the first two elements: that the child has been adjudicated as a child in need of assistance and the Court has terminated parental rights to another child who is a member of the same family; but he contested that the State established that the father lacked the ability or willingness to respond to services which would correct the situation or that an additional period of rehabilitation would not correct the situation. The majority of the Court of Appeals agreed and reversed the case. The dissent disagreed and would have affirmed the decision of the trial court.

The State provided clear and convincing evidence that the father lacks the ability or willingness to respond to services which would correct the situation, and that an additional period of rehabilitation would not correct the situation. The father's rights to eight prior children shared with the mother have been terminated, the most recent termination occurring in July 2018. (TPR Ex. 1). The father had tested positive for cocaine in March and May 2018, just prior to that termination. (TPR Ex. 1).

The father remains married to and living with the mother. Both parents have cognitive issues, which limit their ability to parent children. The father has a history

of being unable to meet a child's needs due to his functioning abilities, the domestically violent relationship with the mother, and drug usage. (TPR Ex. 9, p. 7). J.H. is a child with substantial medical needs. (CINA Ex. 27). He will require significant medical attention and his father does not fully grasp what is wrong with the child or what the care entails. Despite that, the father has not attended medical appointments or surgeries for the child. He has not demonstrated that he has any knowledge of what would be necessary to care for the child's eyes. There are substantial concerns that the father cannot even take care of his own medical needs.

The State has established the grounds for termination under Iowa Code §232.116(1)(g) by clear and convincing evidence. Despite having services in place for years, the father has not been able to internalize any change.

Termination under section 232.116(1)(g) is permitted without waiting for a specific period of time following removal when parental rights involving another child in the family have been terminated, the parent continues to lack the ability or willingness to respond to services, and any services to correct the problem would be futile. Both standards focus on the parental response to services. *In re M.B.*, 553 N.W.2d 343, 346 (Iowa Ct. App. 1996); *In re L.H.*, 480 N.W.2d 43, 46 (Iowa 1992). Although the State will acknowledge that the father made some progress in counseling during this case, the father still lacks the basic understanding of the child's medical needs which will be critical to care for J.H.

When the Court considers whether parental rights should be terminated, the Court “shall give primary consideration to the child’s safety, to the best placement for furthering the long-term nurturing and growth of the child and to the physical, mental and emotional condition and needs of the child.” *In re M.W.*, 876 N.W.2d 212, 224 (Iowa 2016)(quoting Iowa Code §232.116(2)). The paramount concern in a termination proceeding is the best interests of the child. *In re D.S.*, 806 N.W.2d 458, 465 (Iowa Ct. App. 2011). The child’s safety and the need for a permanent home are the “defining elements in a child’s best interest.” See *In re A.M.*, 843 N.W.2d 100, 113 (Iowa 2014) (citing *In re J.E.*, 723 N.W.2d 793, 802 (Iowa 2006) [Cady, J., concurring specially]). The father was not involved and not prepared to provide for the most important issue for J.H. – the basic health care and the ability to see. The father’s behavior in choosing not to educate himself about his child’s substantial medical needs, supports termination of the father’s rights. The greatest concern in this case was the father’s lack of interest and inattention to the medical concerns of the child that impacted the ability to provide a safe environment for such a young child. The past is a great predictor of the future. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006). The father’s history related to the twins (who were the subject of the termination in 2018), showed a similar inability to recognize or respond to the medical needs of his children. This case shows the father still has not been able to grasp the need to demonstrate his ability to care for a child with substantial medical

needs. The Court is to consider what the future likely holds for the child if that child is returned to his or her parents. Insight for that determination is to be gained from evidence of the parents' past performance, for that performance may be indicative of the quality of the future care that the parent is capable of providing. *In re A.B.*, 815 N.W.2d 764, 778 (Iowa 2012); *In re D.W.*, 791 N.W.2d 703, 709 (Iowa 2010); *In re T.B.*, 604 N.W.2d 660, 662 (Iowa 2000); *In re J.B.L.*, 844 N.W.2d 703, 705-06 (Iowa Ct. App. 2014); *In re C.W.*, 554 N.W.2d 279, 283 (Iowa Ct. App. 1996). Case history records are given substantial weight when using the parents' past performance to assess their ability to provide future care. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993); *Harter v. State*, 149 N.W.2d 827, 829 (Iowa 1967).

CONCLUSION

The State respectfully requests that the Application for Further Review be granted, decision of the Court of Appeals be vacated, and the decision of the juvenile court be affirmed.

THOMAS J. MILLER
Attorney General of Iowa

/s/ Ellen R. Ramsey-Kacena
ELLEN R. RAMSEY-KACENA
Assistant Attorney General
Second Floor
Hoover State Office Building
Des Moines, IA 50319
Tel. (515) 281-8330
ellen.ramsey_kacena@ag.iowa.gov
ATTORNEYS FOR APPELLEE-STATE

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Application for Further Review complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e). This brief has been prepared in a proportionally spaced typeface and created in Microsoft Word in font Times New Roman 14. The number of words is 2,746.

s/ Ellen R. Ramsey-Kacena
ELLEN R. RAMSEY-KACENA
Assistant Attorney General

Original E-Filed.

Copies electronically served on parties of record.

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on September 14, 2020.

- | | |
|---|--|
| <input type="checkbox"/> U.S. Mail | <input type="checkbox"/> FAX |
| <input type="checkbox"/> Hand Delivery | <input type="checkbox"/> Overnight Courier |
| <input type="checkbox"/> Federal Express | <input type="checkbox"/> Other |
| <input checked="" type="checkbox"/> ECF System Participant (Electronic Service) | |

Signature: /s/Wendi M. Danitz-Hart