

IN THE IOWA SUPREME COURT

NO. 21-1472

IN THE INTEREST OF K.D. and K.D.,

Minor Children,

**PAUL L.WHITE, Guardian ad Litem,
Appellant,**

**C.H., Intervenor,
Appellant.**

**APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE LYNN POSCHNER, JUDGE**

**APPELLANT/GUARDIAN AD LITEM'S APPLICATION FOR FURTHER
REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS
FILED FEBRUARY 16, 2022**

JUVENILE PUBLIC DEFENDER

**PAUL WHITE
DES MOINES JUVENILE PUBLIC DEFENDER
505 Fifth Avenue, Suite 345
Des Moines, Iowa 50309
Telephone: (515) 725-1812 Fax: (515) 281-7279
pwhite@spd.state.ia.us
ATTORNEY and GUARDIAN AD LITEM
FOR THE APPELLANT MINOR CHILDREN**

QUESTIONS PRESENTED FOR REVIEW

1. Did the Juvenile Court err in denying the undersigned's request to remove the Department of Human Services as guardian of the Minor Children?
2. Did the Juvenile Court err in refusing to return the Minor Children to relative care?

CERTIFICATE OF SERVICE

I certify that on the February 26, 2022, I served this document by filing it through the EDMS with the Polk County Clerk of Court and the Iowa Supreme Court Clerk of Court thereby providing a copy to all parties or attorneys whose names are shown below.

/s/ Paul L. White

Paul L. White

pwhite@spd.state.ia.us

ATTORNEY and GUARDIAN AD
LITEM for APPELLANT/MINOR
CHILDREN

Natalie A. Deerr
Assistant Attorney General
Hoover State Office Bldg.
1305 E. Walnut Street, 2nd Floor
Des Moines, Iowa 50319

Andrea Flannigan
Flanagan Law Group, PLLC
108 Third Street, Suite 300
Des Moines, Iowa 50309

TABLE OF CONTENTS

Certificate of Service.....3
Question Presented for Review.....2
Table of Authorities.....5
Statement in Support of Further Review.....6
Statement of the Case.....7
Statement of Relevant Facts.....8
Brief.....10
Conclusion.....18
Statement of Compliance.....19

Attachment: Opinion of the Court of Appeals

TABLE OF AUTHORITIES

CASES

<u>In re E.G., 745 N.W.2d 741, 744 (Iowa Ct. App. 2007)</u>	18
<u>In re N.V., 877 N.W.2d 146 (Iowa App. 2016)</u>	14
<u>In re R.B., 832 N.W.2d 375 (Iowa App. 2013)</u>	12
<u>In re I.P., No. 19-0715, 2019 WL 3317922 (Iowa Ct. App. July 24, 2019)</u> ...15	
<u>In re W.L. No. 19-0424, 2019 WL 2375248 (Iowa Ct. App. June 5, 2019)</u> ...15	
<u>In re T.M. No. 21-1357 2021 (Iowa Ct of App. December 15, 2021)</u>	15
<u>In re P.L., 778 N.W.2d 33, 38 (Iowa 2010)</u>	15
<u>In re N.M., 528 N.W.2d 94, 97 (Iowa 1995)</u>	16

STATUTES AND OTHER AUTHORITY

Iowa Code section 232.84	7,12
Iowa Code § 223.120.....	11
Iowa Administrative Code 441-200.4	16

OTHER AUTHORITY

Families First Prevention Services Act (FFPSA).....	18
---	----

<i>Relative Placement: The Best Answer for Our Foster Care System</i> , by Judge Leonard Edwards, <u>Juvenile and Family Court Journal</u> , 69, No. 3, Pages 55-64, 2018 National Council of Juvenile and Family Court Judges.....	17
---	----

STATEMENT OF SUPPORT FOR FURTHER REVIEW

1. The Court of Appeals has decided a case where there is an important question of changing legal principles. Iowa R. App. P. 61103(1)(b)(3). Specifically, the recent and newly codified requirement under the Families First Prevention Services Act (FFPSA) that efforts be made in regard to family preservation, requires the Juvenile Court to engage in a new and different level of scrutiny when there is a question of maintaining family ties.

2. This case presents an issue of broad public importance that the Supreme Court should decide. Iowa R. App. P. 6.1103(1)(b)(4). The placement of minor children and the best interests of children are matters of broad public importance, as evidenced by the newly enacted FFPSA. The question of whether not the Department of Human Services, as the guardian of the Minor Children, acted reasonably and in a manner that was in the best interests of the children is of great public importance.

STATEMENT OF THE CASE

NATURE OF THE CASE

This is an appeal from a request from the undersigned Attorney and Guardian ad Litem to remove the Department of Human Services as the guardian of the Minor Children.

COURSE OF PROCEEDINGS

The present action is the second time the Minor Children in this case have been adjudicated as Children in Need of Assistance (CINA). The first CINA case was closed after a Bridge Order was entered giving the biological Father primary custodial rights and placement. The current case was initiated in February 2020, with new allegations against both biological parents. The Children were removed from their Father and the Department of Human Services (DHS) placed the Children with their Grandmother/Intervenor, C.H., by ex parte action pending the removal hearing on February 12, 2020. The DHS did not provide notice to relatives, as required under Iowa Code section 232.84. The CINA case ultimately proceeded to termination of the parental rights of both biological parents on April 14, 2021. The biological Mother appealed the juvenile court termination order. The TPR against the Mother was affirmed on

September 1, 2021. The Juvenile Court maintained the DHS as the guardian of the Minor Children. The Children remained with the Grandmother until the DHS unilaterally removed them, on July 26, 2021.

STATEMENT OF RELEVANT FACTS

On the afternoon of July 26, 2021, the undersigned GAL received a phone call from the Children's Grandmother informing the GAL that the DHS had taken the Children from her care for placement in foster care. Despite prior requests for information, the GAL was not provided with advanced notice of the intended action by the DHS. The taking of these Children was done without a court order. On July 27, 2021, the GAL contacted the worker assigned to the CINA case and was provided an email response from the adoption worker indicating that this action had been planned for some time. Further, the email indicated that the DHS deliberately deceived the Grandmother when the DHS went to her house on the afternoon of July 26, 2021. (Tr. Vol. I, page 87, line 10) The Grandmother thought that this would be a meeting regarding her adoption of the Children. (Tr. Vol II, page 85, line 17). The GAL had requested information and inclusion in any communication before any action might be initiated by the DHS. The GAL had unanswered questions and concerns about the need to modify the placement of these Children and had filed a written notice on June 9, 2021, with the Court

re¹garding these issues. In the written email response from the adoption worker, the DHS admitted that the taking of the Children from the Grandmother caused emotional harm and further trauma to the Children. (Tr. Vol. I, page 60, line 2). The Children had experienced emotional trauma, yet were thriving in the care of the Grandmother. Despite that, the DHS moved the Children anyway. (Tr. Vol. I, page 60, lines 7-15).

There is no dispute that there exists a strong bond between the Children and their Grandmother. Additionally, as supported by the photos submitted to the juvenile court during the hearing on September 1, 2021, the Children also have a strong bond and regular interactions with their extended relatives. (Exhibits 48 - 50, Polk County Case No. JV247530; Exhibits 47 - 49, Polk County Case No. JV247529; Exhibits 16 - 18, Polk County Case No. JV248871; Exhibits 14 - 16, Polk County Case No. JV248872.) Those relatives were supportive of placement of the Children with their Grandmother. Many of those relatives were also present during the hearing and indicated a desire to be placement for the Children. (Tr. Vol. II, page 10, line 4). In the Motion, the GAL requested the removal of the DHS as guardian for the Children and requested the Children be placed back in the care of their Grandmother or other suitable relative. Nonetheless, the Children were placed in a new foster

¹ Tr. Vol. I refers to transcript from September 1, 2021

² Tr. Vol II refers to transcript from September 9, 2021

care home. This home is not known to the Children and caused them further emotional harm.

During the hearing on the GAL's motion to remove DHS as guardian and to modify placement, the Juvenile Court allowed the Grandmother to intervene. The Juvenile Court found that the DHS had acted irresponsibly when it did not send the statutorily required notice to the relatives. The Juvenile Court directed the DHS to provide notification to relatives and to provide written notification to the juvenile court of the relatives contacted. However, the juvenile court declined to remove the DHS as the guardian of the Children or place them back in relative care. The GAL seeks further review of the Juvenile Court's ruling.

BRIEF

Did the Juvenile Court err in denying the undersigned's request to remove the Department of Human Services as guardian of the Minor Children?

The overriding principle in juvenile court is to act in a manner that protects the best interest of the child. Decisions should not further harm the welfare of the child in interest. The actions of the DHS demonstrate not only a neglect to carry out this duty, but a calculated effort to act in a manner contrary to the Children's best interests and contrary to the applicable law. At the outset of the CINA matter in February 2020, the DHS

removed the Children from the care of their Father and selected relative placement with the Grandmother. The Children remained in her care during the entirety of the CINA case and after the conclusion of the termination proceeding. The Children were then unilaterally, and without court order, removed from the Grandmother's care on July 26, 2021. See Iowa Code § 223.120.

The State and the DHS cited in support of their action that the Intervenor had allowed the Minor Children to be around harmful relatives. The Intervenor denied this allegation. (Tr. Vol. II, page 104, lines 16-20). As noted in the dissenting opinion from the Court of Appeals, there was no evidence that this was actually occurring:

As for the department's claim that the grandmother allowed inappropriate people around the children, the department employee conceded, "We have suspicions but no evidence." (Tr. Vol. I, page 13-16).

The other main justification for the DHS' action in removing the Minor Children was that the Grandmother was not taking seriously the mental health concerns of the Children. Again, the Grandmother disputed this allegation. (Tr. Vol. II, page 94, lines 7-12). She agreed that the Children needed therapy and she noted the challenges in maintaining the Children in therapy at the height of the Covid-19 lockdowns and the

technological limitations during that time. (Tr. Vol. II, page 94, line 21). In the dissenting opinion of the Court of Appeals, it is significant point that:

in the two months between the department's seizure of the children and the hearing on whether the agency should be removed as guardian, the department facilitated a total of three sessions with one of the children's therapists, a far cry from the weekly sessions it expected the grandmother to assist with.

As evidenced by their participation in the hearing on this Motion, there exist several relatives who would have wanted to be considered for placement. Iowa Code section 232.84 states, in relevant part, the DHS “. . . shall exercise ***due diligence*** in identifying and providing notice to the child's grandparents, aunts, uncles, adult siblings, parents of the child's siblings, and adult relatives. . .” (emphasis added). The DHS has the ultimate obligation to provide written notice to relatives:

The language places the onus on the department rather than the parents to identify relatives subject to notification. The provision next enumerates those close relatives. The statute then broadens the universe of relatives subject to notification to include “adult relatives suggested by the child's parents.” This is an additional category of relatives to whom the agency's identification and notification obligation extends; it is not a limitation on the relatives subject to notification. . . Our reading of section 232.84(2) is consistent with other provisions of chapter 232 that obligate the department to make “the least restrictive disposition.” See Iowa Code § 232.99(4). In the continuum of least restrictive to most restrictive dispositions, the statute lists relative placements as more restrictive than retention of custody by a parent, but less restrictive than placements with the department. . . . Our reading is also consistent with federal legislation, which requires the State to “consider giving preference to

an adult relative over a nonrelated caregiver when determining a placement for a child.” 42 U.S.C. § 671(a)(19).

In re R.B., 832 N.W.2d 375 (Iowa App. 2013)

The DHS has failed to comply with the notice provisions in the Iowa Code. The DHS knew about the existence of relatives. The DHS took no steps to identify relative placements for the Children and on July 26, 2021, placed them with a new foster home, not known to the Children, and admittedly a more restrictive placement for the Children.

The Children had been in the care of their Grandmother since the temporary removal order was entered on February 6, 2020, and had been dependent upon her for their care. The adoption worker testified about the strong bond between the Children and their Grandmother. (Tr. Vol I, page 91, line 3) The DHS’s actions had no regard for the welfare of the Children and their actions clearly demonstrate they have not acted in their best interests.

II. Did the district court err in refusing to return the Minor Children to relative care?

The State and the DHS maintain that these Children can be moved to a more restrictive placement because the matter is post-termination. Assuming that the DHS can disregard the preference for relative placement,

that position still must be supported by what is in the best interests of child. First, the State initiated the action for separation of these Children from their parents and then unilaterally removed them from their Grandmother, where they had been residing for a year and a half. The removal of the Minor Children from their Grandmother caused them additional unnecessary emotional trauma. (Tr. Vol. II, page 27, line 1-19). Further, just because a case is post-termination does not require us to suspend doing what is in the best interest of children. *In re N.V.*, 877 N.W.2d 146, 153 (Iowa Ct. App. 2016). The assigned adoption worker acknowledged during her testimony that children do better with their family, if that can be done safely. (Tr. Vol. II, page 13, line 3). That worker further testified that the DHS's current plan for the Children is that they be adopted by the current foster home. The worker admitted that was no guarantee that the Children would have any contact with their biological family. (Tr. Vol. II, page 33, line 12).

In *In re N.V.*, 877 N.W.2d 146 (Iowa App. 2016), the Court of Appeals reversed the juvenile court's denial of relatives' motion for guardianship and custody, finding that:

The department's actions must serve the best interests of the child. D.H., 2010 WL 4484849, at *6. In this case, they did not. The department declined to notify relatives who previously expressed an interest in the child, who were identified by the mother as potential

placements, and who were statutorily preferred over nonrelatives. The department also placed the child with a non-relative who violated protocols governing in-home daycare and the agency informed the non-relative to refrain from telling the relatives of the child's placement. As a result, the relatives lost contact with the child for ten months. Given the relatives' active participation in the child's life prior to the removal, this disruption of contact was not in the child's best interests.

In this case, the Children have had an active and on-going relationship with their extended biological family as evidenced by the exhibits admitted during the contested hearing regarding placement. Kids do better when family ties are safely maintained, a concept grounded in caselaw and supported by clear principles of the “Families First” legislation which designates a preference for relative placement over foster care. Finally, the decision to place a child must still be in the best interests of the Child, even when the case is post-TPR. *In re I.P.*, No. 19-0715, 2019 WL 3317922 (Iowa Ct. App. July 24, 2019); *see also, In re W.L.* No. 19-0424, 2019 WL 2375248 (Iowa Ct. App. June 5, 2019). *see also, In re T.M.*, No 21-1357, (Iowa Court of Appeals, December 15, 2021):

“A stable, loving homelife is essential to a child’s physical, emotional, and spiritual well-being.” *In re P.L.*, 778 N.W.2d 33, 38 (Iowa 2010). . . . “[C]hildren who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline.” *Id.* We wish that we had a crystal ball so that we could determine what the future holds for

T.M. But when we weigh the documented low risk presented by the aunt's husband against the harm of moving this young child into a stranger's home, we agree with the juvenile court's decision to place T.M. in the custody of her aunt subject to the department's supervision. See *In re N.M.*, 528 N.W.2d 94, 97 (Iowa 1995) (noting chapter 232 "favors relative placements over nonrelative placements"). We thus affirm the modification of the permanency order. *In re T.M.* at page 9.

The DHS violated the Iowa Administrative Code by placing these Children in foster care. The Administrative Code provides that relatives should be considered first, especially when the child has a significant bond to the relative.

441-200.4 Adoption services . . .

200.4(3) Selection of family. The family that can best meet the needs of the adoptive child shall be selected as follows:

a. Before preplacement visits occur, a conference shall be held to select an approved family. A minimum of two department social workers and a department supervisor shall be included in the conference. The child's special needs, characteristics, and anticipated behaviors shall be reviewed in the conference to determine a family that can best meet the needs of the child. Approved families shall also be reviewed in an effort to match the specific family's parenting strengths with a particular child's needs.

b. The following selection criteria shall be observed:

(1) Preference shall be given to placing children from the same birth family together. If placement together is not possible, or is not in the best interest of the children, the reasons shall be identified and documented in each child's case record. Efforts shall be made to ensure continuous contact between siblings when the siblings are not placed together.

(2) Race, color, or national origin may not be routinely considered in placement selections except when an Indian child is being placed pursuant to Iowa Code section 232.7 or Iowa Code chapter 232B. Placement decisions shall be made consistent with the best interests and special needs of the child.

(3) A relative who is within the fourth degree of consanguinity shall be given consideration for selection as the adoptive family for a child who is legally available for adoption if the child has a significant relationship with the relative or the child is aged 14 or older and elects adoption by the relative.

(4) Foster parents shall be given consideration for selection as the adoptive family for a child in the foster parents' care who is legally available for adoption if the child has been in the foster parents' care for six months or longer or the child has a significant relationship with the family.

Iowa Administrative Code 441-200.4.

It is clear that the directives enumerated in the Iowa Administrative Code were not followed in this case.

The best answer is placement with relatives. . . Relative care placement is now considered a best practice, one that benefits the child in many ways. Studies show that children in relative care tend to be just as safe, or safer, than children placed in foster care. As the children likely know the relatives, relative placement minimizes trauma. The relatives are more likely than foster parents to take large sibling groups, which maintains sibling contacts. Research has demonstrated that children placed with their kin fare better than those placed in foster care. They experience better stability, have fewer placement changes, fewer behavior problems, and not as many school changes. Living with relatives helps preserve a child's cultural identity and community connections, and eliminates the unfortunate stigma that many foster children experience.

Relative Placement: The Best Answer for Our Foster Care System, by Judge Leonard Edwards, Juvenile and Family Court Journal, 69, No. 3, Pages 55-64, 2018 National Council of Juvenile and Family Court Judges

The DHS's erroneous action is even more egregious when viewed under the lens of the changing juvenile landscape with the onset of the

Family First Prevention Services Act. The principles of the current “Families First” legislation is that children do better when relative bonds can be secured and there is an obligation on the DHS to notify, and maintain, relative placements to continue those bonds.

The foster care system is designed to provide temporary, not permanent, homes for children. This is to facilitate the goals of reunification with the parents or placement in a relative's home. We certainly recognize the bond that is developed between a foster parent and child. We also recognize that a bond between the foster parents and the child signifies a good foster home. However, if every foster parent who formed a bond with a child were given enforceable rights to the children, it would upset the goals of the system.

In re E.G., 745 N.W.2d 741, 744 (Iowa Ct. App. 2007). In light of the foregoing, the undersigned respectfully requests this Court grant further review of the Juvenile Court’s order. Because suitable relative placement is available and preferred over foster care placement, the undersigned requested that the Children be placed back in relative placement

CONCLUSION

For the reasons stated above, the undersigned, as Attorney and Guardian ad Litem for the Minor Children respectfully requests that this court grant further review, overrule the decision of the Court of Appeals, and find that the Department of Human Services should be removed as the

guardian of the Minor Children; that the Minor Children should be placed back in relative placement and the relative should be appointed as guardian.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[x] Based on a word count from Microsoft Word 2007 this brief contains approximately 3784 words *including* the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[x] this brief uses a proportionally spaced, 14-point Georgia font.

/s/ Paul L. White

Juvenile Public Defender

505 Fifth Ave., Suite 345

Des Moines, Iowa 50309

(515) 725-1812

pwhite@spd.state.ia.us

ATTORNEY and GUARDIAN AD LITEM

FOR THE APPELLANT/MINOR CHILDREN