

IN THE SUPREME COURT OF IOWA

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No. 18-0813

Floyd County No. JVJV002481

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IN THE INTEREST OF B.H.A.,  
Minor Child,

J.R., Mother,  
Petitioner-Appellant,

M.A., Father,  
Respondent-Appellee.

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APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR FLOYD COUNTY  
THE HONORABLE KAREN KAUFMAN SALIC

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**APPELLANT'S FINAL BRIEF**

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**CERTIFICATE OF FILING**

I, Judith O'Donohoe, hereby certify that I filed the attached Appellant's Final Brief via electronic filing on the 21st day of September, 2018.

\_\_\_\_\_/s/Judith O'Donohoe\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I, Judith O'Donohoe, hereby certify that on the 21st day of September, 2018, the attached Appellant's Final Brief was served via electronically on all parties or their representative attorneys.

\_\_\_\_\_/s/Judith O'Donohoe\_\_\_\_\_  
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**CERTIFICATE OF COST**

I, Judith O'Donohoe, certify that the cost of producing the Appellant's Final Brief was \$0.

\_\_\_\_\_/s/Judith O'Donohoe\_\_\_\_\_  
Judith O'Donohoe #AT0005849

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## **STATEMENT OF THE ISSUES**

**I. Given that the Juvenile Court found the ground of abandonment under 600A.8(3) had been proved, did it err in finding that it was not in the best interest of the 3 year old child, with no knowledge of his father, to terminate his parental rights when the earliest he would be released from federal prison would be in 8 years?**

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### **ROUTING STATEMENT**

This appeal involves questions of applying existing legal principles and the case should be transferred to the Court of Appeals per Iowa Rules of Appellate Procedure Rule 6.14 and 6.401.

### **STATEMENT OF THE CASE**

On 02-03-2017, M.A., the father of the juvenile at issue, B.H.A., was sentenced to a term of 121 months in federal prison for Conspiracy to Deliver Methamphetamine over a period of 22 months ending on October 21, 2015. (App 59-64)

On 02-03-2017, B.H.A.'s mother, J.R. filed a Petition for Termination of Parental Rights of M.A. (App 23) The Petition was served on M.A. on 02-10-2017 at the Fayette County Jail in West Union, Iowa, where he was being held pending assignment to a federal penitentiary. (App 38) He was subsequently placed at MFC Fort Worth, a federal penal medical facility. (T.Vol.II p.5, L.2-11)

On 02-07-2017, the Juvenile Court appointed Mark Huegel to be the Guardian Ad Litem for M.A. and Ann Troge to be the Guardian Ad Litem for the minor child both at Petitioner's expense. (App 34) Attorney Huegel accepted service on 02-09-2017 (App 37) and Attorney Ann Troge accepted service on 03-

03-2017. (App 39) M.A. filed an Answer resisting the Petition on 03-08-2017.  
(App 40-41)

On 03-30-2017, the Juvenile Court entered an Order for paternity testing as there had been no such test conducted and M.A. was not on the birth certificate for B.H.A. The termination matter was heard on 11-07-2017 and 03-26-2018. (App 46-55; App58; T.Vol.I p.1, T.Vol.II p.1)

On day 1, testimony was heard on behalf of J.R. from Sharon Tieskotter, a daycare provider for B.H.A.; J.R., the mother of B.H.A.; Deneen Ritter, the mother of J.R.; Amanda McCarty, a friend of J.R. and Deneen's and Godmother to B.H.A.

The Direct Examination of M.A also occurred. On 03-26-2018, M.A. was cross-examined and J.R. called a licensed mental health counselor, Jennifer Judson-Harms, to discuss the impact on B.H.A. of a termination of his father's parental rights.

Exhibits Introduced by J.R.:

- A. B.H.A.'s birth certificate
- B. Judgment in the federal criminal case against M.A.
- C. M.A.'s Sentencing Memorandum to the Federal Court
- D. Report and recommendation concerning M.A.'s plea of guilty
- E. Order Re Magistrate's Report and Recommendation concerning Defendant's Plea of Guilty to the federal case
- F. Iowa Courts Online list of state convictions against M.A.

- G. House of Hope substance abuse treatment completion certificate for J.R. for the year 2011-12
- H. J.R.'s 2014 income tax return
- I. J.R.'s 2015 income tax return
- J. J.R.'s 2016 income tax return
- K. Photographs of B.H.A.'s house and bedroom
- L. Paternity test showing 99.99995% probability of paternity of M.A. as father to B.H.A.
- M. Photographs of activities and trips J.R. and B.H.A. have taken
- N. Record of earnings of M.A. from Jaslyn Cleaning Service, Inc. from 09/2013 through 6/2015
- O. Letter from Dr. Schrodtt, B.H.A.'s physician regarding lack of any contact with M.A. in relation to medical treatment for B.H.A. and the restriction preventing exposure of B.H.A. to smoke due to his premature birth and reactive airway disease
- P. Photographs of J.R.'s boyfriend, Walker Jung, with B.H.A.
- Q. Charles City Police reports for M.A. 06/19/2013 for alleged threat against his stepmother, Nancy Ackley; for his alleged harassment and threat of suicide against J.R. on 07/05/2015; a notation of a stop of M.A. and arrest for Driving While Suspended on 11/04/2015; a complaint of harassment of J.R. by M.A. via Facebook on 11/14/2015.

M.A.'s Exhibits:

- 1 Certificate of Completion of a parenting class in prison in 2017
- 2 Certificate of Participation in Alcoholics Anonymous dated 03/30/2017 while in prison

- 3 Certificate of Participation in Narcotics Anonymous dated 05/31/2017  
while in prison
- 4 Picture of M.A. holding B.H.A. at Mayo Clinic
- 5 Picture of M.A. holding B.H.A. at Mayo Clinic on a different date.
- 6 Picture of M.A. holding B.H.A. with a videogame controller
- 7 Picture of M.A. holding B.H.A. at pumpkin patch October 2014
- 8 Picture of B.H.A. lying down- he appears to be 2 months old
- 9 Picture of B.H.A. sitting up on a couch – appears to be 3-5 months old
- 10 Picture of Phillip Ackley, M.A.'s younger brother, feeding B.H.A. a  
bottle-he appears to be 4 months old
- 11 Picture of M.A. holding B.H.A. at his baptism
- 12 Floyd County District Court Order from 03/21/2016 refusing to  
change B.H.A.'s last name M.A.'s last name to J.R.'s due to lack  
of consent by M.A.

After hearing the evidence, the Court issued a decision 04-09-2018, finding that the Petitioner proved abandonment pursuant to Section 600A.8(3) by clear and convincing evidence but that it was not in the best interest of B.H.A. to terminate his father's parental rights at this time because M.A., "voices a desire to have contact with his son . . .", ". . . It is impossible to know if the circumstances will continue once he is released but if it does-like it did with J.R. when she overcame her addictions-it would not be in B.H.A.'s best interest to rob him of that



opportunity . . .” (to have contact with his father post-release sometime in 2024 or 2025). (App 51, 54)

J.R. filed a Notice of Appeal on 05-09-2018. (App56-57) M.A. Huegel withdrew as the Guardian Ad Litem. The Court appointed Danielle DeBower to replace him on 05-11-2018.

### **STATEMENT OF FACTS**

J.R. was born in 1989 in Iowa. (App58; T.Vol.I p.24, L.7-17) Her mother is Deneen Ritter and her father is Paul Ritter of Charles City, Iowa. (T.Vol.I p.141, L.1-7) She is the middle child of three children: Matthew, age 32 at the time of hearing, who is autistic, is the oldest and Tyler, age 26 at the time of hearing, is the youngest. (T.Vol.I p.144, L.10-20; p.164, L.16-25; p.165, L.1-3) The Ritter family are longtime residents of Charles City, Iowa. (T.Vol.I p.21, L.13-16; p.141, L.1-7) J.R. graduated from high school in May of 2008 and obtained her certified nurse’s aide certificate.

J.R.’s first job in that capacity was for New Hampton Nursing and Rehabilitation, a nursing home in New Hampton, Iowa. (T.Vol.I p.26, L.2-24) J.R. worked there for approximately two years. (T.Vol.I p.26, L.25; p.27, L.1-5) She then started to work for another nursing home in Charles City, Iowa, to avoid the commute from her Charles City parents’ home where she was residing. This was also full-time employment. She worked there for approximately six months.

(T.Vol.I p.27, L.6-22) J.R.'s mother became aware, in this timeframe of 2010, that J.R. was in the grip of substance abuse. (T.Vol.I p.141, L.21-5) J.R. has no criminal record except one plea to Public Intoxication in Cedar Rapids, Iowa. (T.Vol.I p.32, L.3-10)

\* J.R. went voluntarily to Prairie Ridge for substance abuse treatment at the end of 2010 or beginning of 2011 and was there for a period of 30 days. (T.Vol.I p.28, L.2-10) Following this treatment, she went to live with her grandparents in Ely, Iowa, in order to get away from the Charles City drug scene. (T.Vol.I p.28, L.15-23) While there, J.R. worked at an assisted living facility in Cedar Rapids full-time and remained in that employment for a period of one year. (T.Vol.I p.29, L.3-9) She entered a plea of guilty to Public Intoxication at the end of that year. This precipitated her decision to go back into treatment. She went to Mission Bible Training Center in Cresco, Iowa. At this time, she was drinking alcohol and using Xanax and Valium pills. (T.Vol.I p.29, L.10-25; p.30, L.7-11) She was in this program for approximately 15 months, getting out some time in 2013. (T.Vol.I p.30, L.12-18) In the last six months of this treatment, she volunteered as a training counselor and worked for the program in Indiana. (T.Vol.I p.31, L.2-19; App 79)

J.R. went back to residing with her parents in Charles City, Iowa, and found M.A. on Facebook in February of 2013. (T.Vol.I p.32, L.11-25) At the time, M.A. was also living in Charles City with his father, M.A. Sr.; stepmother, Nancy

Ackley, and younger brother, Phillip Ackley. (T.Vol.I p.33, L.1-20) M.A. and J.R. started dating in April of 2013. At that time, M.A. was unemployed. J.R. was aware that he was a substance abuser because he had been arrested in December of 2012 for Delivery of Marijuana and Methamphetamine. She was also aware, at the time they were dating, that he was using marijuana and methamphetamine.

(T.Vol.I p.34, L.2-13, L.24-5; p.35, L.1-3) After beginning this relationship, J.R. started using methamphetamine herself which was supplied to her by M.A..

(T.Vol.I p.35, L.4-10)

M.A. was a resident of BeJe Clark Residential Facility in Mason City, Iowa, from September through December of 2013. (T.Vol.I p.35, L.19-25; p.36, L.1-8) J.R. quit using controlled substances, including methamphetamine, at the beginning of October 2013 while she was still living with her parents. J.R. became pregnant with B.H.A. shortly thereafter. (T.Vol.I p.36, L.13-18, L.21-23) While M.A. was at BeJe Clark and J.R. became pregnant, they spent some time at M.A.'s mother's house in Mason City when he had furlough. During this period, M.A.'s father and stepmother were also using both marijuana and methamphetamine.

(T.Vol.I p.36, L.24-5; p.37, L.1-21; p.37, L.22-5; p.38, L.1-6)

M.A. and J.R. spent Thanksgiving and Christmas of 2013 at J.R.'s house. J.R.'s parents were not happy about her relationship with M.A. because they knew of him and his family's background and drug connections. They were concerned

about a relapse for J.R.. J.R.'s family tried to welcome M.A. into their family, however, M.A. was nonresponsive and not appreciative of their effort. (T.Vol.I p.142, L.11-25; p.143, L.1-15; p.145, L.3-18)

J.R.'s mother, Deneen, tried to talk to M.A. and take him in to the family to show him a better example of how a family could operate because M.A. had advised her that he had had a bad childhood. (T.Vol.I p.144, L.16-25; p.145, L.1-2) M.A.'s parents were divorced and at age 14 or 15, M.A. was already a heavy drinker and using marijuana and methamphetamines on a daily basis. (App 67; T.Vol.II p.6, L.1-8)

M.A. was born in 1989. (App 78) He was convicted of Operating While Intoxicated-First Offense in Winneshiek County on 05/03/2011 at the age of 22 and was fined and jailed. He gave false information for his substance abuse evaluation and was never required to get drug or alcohol treatment, although he believes he had both a drug and alcohol problem in 2011. (T.Vol.II p.7, L.5-25) M.A. was subsequently convicted of Driving While Revoked in Mitchell County on 05/24/2011 and in Chickasaw County on 11/21/2011. On April 15, 2009, he was found guilty of Trespass in Floyd County. On July 15, 2013, he was convicted of a felony controlled substance violation, fined, placed on probation and into the BeJe Clark Residential Facility. M.A. did another substance abuse evaluation but based on the information he provided, no treatment was ordered. However, he

agrees he did have a substance abuse problem in 2012 and 2013. (T.Vol.II p.8, L.1-18; p.9, L.14-25; p.10, L.1-2) M.A. was at BeJe Clark for a little over three months and did not participate in substance abuse treatment. (T.Vol.II p.10, L.3-21)

M.A. has a history of physical health problems. Beginning in 2012, he had extensive acute pulmonary embolism in both lungs and deep vein thrombosis. These health problems were recurring and he received treatment again in 2014 and 2015. (App 66; T.Vol.II p.25, L.16-25; p.26, L.1-10) Beginning at age 13, M.A. engaged in self-mutilation. (T.Vol.II p.26, L.11-14) He initially denied having participated in Russian roulette with a loaded gun at trial and then grudgingly acknowledged, "It could have happened." (T.Vol.II p.26, L.15-25; p.27, L.1-5) M.A. has serious mental health diagnoses, including major depressive disorder, mood disorder, generalized anxiety disorder, borderline personality disorder and ADHD. (T.Vol.II p.27, L.6-18) M.A. stated, as a child, he had been bullied and verbally abused. (T.Vol.II p.27, L.19-21) He has also experienced significant mood swings. (T.Vol.II p.27, L.22-24)

In addition to daily use of marijuana and methamphetamine, he experimented with heroin, acid, pain prescription medication and mushrooms. (T.Vol.II p.28, L.6-14) M.A. does not remember failing a substance abuse treatment program, however, his Sentencing Memorandum from the federal case

indicates that he had such treatment in about November of 2013 and failed to complete it. (T.Vol.II p.28, L.15-23; App 67)

Once Deneen and Paul Ritter discovered J.R.'s pregnancy in October of 2013, they advised both M.A. and J.R. if they had any inkling of drug use by either of them after their child was born, they would immediately turn a complaint in to the Department of Human Services. (T.Vol.I p.143, L.22-5; p.144, L.1-5) J.R. prepared a nursery at her parent's house before B.H.A. was born. She was excited about the birth and went to Lamaze classes and did a lot of research on childcare. (T.Vol.I p.146, L.6-15) M.A. did not share in her efforts. He went to one prenatal class. Further, despite the fact that he was working, he offered no money for buying supplies for the baby. (T.Vol.I p.146, L.16-23; p.147, L.3-7) M.A. was working at Jaslyn Cleaning Services, Inc. of Mason City from September of 2013 through July of 2015. He believes he was being paid \$8.25 per hour. (App 127; T.Vol.I p.91, L.24-5; p.92, L.1-2)

J.R. was working as a respite care worker, teaching life skills to disabled adults beginning sometime in 2013 for an agency called, "Consumer Choice". (T.Vol.I p.21, L.17-25; p.22, L.3-7) Deneen observed that M.A. offered no financial benefits for the baby despite his employment. (T.Vol.I p.147, L.3-7) J.R. observed that M.A. did not provide any money toward her medical bills associated with the pregnancy either. (T.Vol.I p.39, L.5-8) Although M.A. talked about

possibly quitting his drug use during her pregnancy, he continued to use Xanax and likely other illegal substances. (T.Vol.I p.40, L.7-14; p.42, L.14-18)

J.R. went into premature labor in April of 2014. The baby was not due until June. B.H.A. was born at 28 weeks and 5 days gestation at the Floyd County Medical Center. M.A. did manage to get there for the birth. (T.Vol.I p.43, L.3-17) B.H.A. was tested for illegal substances at birth and had none in his system. (T.Vol.I p.49, L.24-5; p.50, L.1-3) B.H.A. was transferred immediately to the Mayo Clinic in Rochester, Minnesota, and he was there for a period of 9 weeks. (T.Vol.I p.44, L.11-21) At this time and all times subsequent during B.H.A.'s life, M.A. did not have a driver's license because of his various criminal convictions and nonpayment of fines. (T.Vol.I p.43, L.20-5; p.44, L.1-5)

Deneen and Paul Ritter took M.A. up to the Mayo Clinic with them immediately and provided him with food and a hotel from Thursday to Sunday. M.A. did not offer to contribute to the expenses. (T.Vol.I p.147, L.20-24; p.148, L.1-10) The doctor advised Deneen that B.H.A. had become septic and was not expected to live through the night. (T.Vol.I p.149, L.8-25; p.150, L.2-8) Accordingly, J.R.'s mother arranged for J.R. to be discharged from Floyd County Medical Center and brought immediately to the Mayo Clinic by her friend, Amanda McCarty so she could say goodbye. (T.Vol.I p.150, L.2-8; p.178, L.9-16)

Amanda expressed that J.R. was very concerned about B.H.A. while he was

in the NICU. (T.Vol.I p.178, L.17-23) Deneen observed that M.A. did not ask many questions considering the seriousness of B.H.A.'s condition, asserting, on the basis of no information, that B.H.A. would be fine. Further, M.A. did not provide J.R. with any emotional support, which she needed, as she was scared to death for the life of her son. B.H.A. was not out of the woods for a period of two weeks. (T.Vol.I p.149, L.8-25; p.150, L.13-20; p.151, L.7-25)

The Ritters never refused to take M.A. to the Mayo Clinic with them when he asked. Deneen was up every weekend and several times during the week. M.A. only rode along with her twice. (T.Vol.I p.152, L.12-25) At no time during B.H.A.'s nine-week stay at Mayo Clinic did M.A. verbalize concern to her over B.H.A.'s condition. (T.Vol.I p.153, L.9-12) J.R. observed that M.A. visited B.H.A. approximately four or five times but never overnight, just for a few hours at a time. (T.Vol.I p.45; p.46, L.1-4)

On B.H.A.'s discharge, it was made clear that he was not allowed to be around cigarette smoke, including any smoke that was clinging to a caretaker's clothes. He saw a homehealth nurse periodically for his breathing problems. (T.Vol.I p.46, L.5-15) M.A. did participate, to some extent, in B.H.A.'s care when he was at the Mayo Clinic. (T.Vol.I p.47, L.5-10) M.A. was still using controlled substances during B.H.A.'s hospitalization, according to J.R.. She verified this information from seeing text messages on his phone asking him to supply drugs



and him asking other people to supply him with marijuana. (T.Vol.I p.48, L.3-23)  
J.R. asked M.A.'s father and stepmother, who were also then still using drugs, not to supply M.A. with any drugs. (T.Vol.I p.41, L.25; p.42, L.1-13)

After taking some time off for maternity leave, J.R. went back to work at Consumer Choice. She remained in Charles City during the week but would travel with B.H.A. to Mason City, initially on the weekends, so they could spend some time with M.A.. (T.Vol.I p.39, L.20-25; p.40, L.1-2) During Christmas of 2014, immediately following B.H.A.'s birth, M.A. advised Deneen that he was going to teach his son to smoke cigarettes, like his father did him, when B.H.A. turns age 9. (T.Vol.I p.168, L.8-23) This alarmed Deneen because every discharge sheet from the hospital or from medical care for his lung problems, reported he should not be exposed to smoke. (T.Vol.I p.169, L.10-24)

Amanda McCarty, B.H.A.'s Godmother, observed that M.A. was not at the hospital much considering how serious the situation was involving B.H.A. (T.Vol.I p.179, L.3-7, 8-12) J.R. expressed to Amanda her concern over M.A.'s ongoing drug use after B.H.A.'s birth and threats he had made to grab B.H.A. and run with him. (T.Vol.I p.181, L.9-16)

J.R. tried to continue her relationship, to some extent, with M.A. through December of 2014. After that, they broke up because J.R. got tired of getting no help from M.A.. (T.Vol.I p.35, L.11-13; p. 54, L.4-6) The only support or items

which M.A. supplied for B.H.A. during this time period was \$100 and two packs of diapers. (T.Vol.I p.42, L.9-24; p.51, L.4-10)

M.A.'s interests by December of 2014 had strayed to other women. (T.Vol.I p.51, L.4-10) When they broke up, M.A. put J.R.'s and B.H.A.'s belongings out on the curb. By the time J.R. was able to pick them up, B.H.A.'s crib was broken and unusable. The plan was for M.A. to leave their things in the apartment and leave it open so she could pick them up. When J.R. did receive these items, they reeked of smoke. (T.Vol.I p.54, L.24-5; p.55, L.1-15) M.A. was apparently not concerned with J.R. having to replace the items or with B.H.A. having to do without the items. (T.Vol.I p.55, L.22-5) After this incident, Deneen and her mother continued to bring B.H.A. to Mason City to see M.A. on an every-other-weekend basis. According to Deneen, it was very important to J.R. that M.A. see B.H.A. Further, during December of 2014, M.A. did visit the Ritter's in Charles City. (T.Vol.I p.153, L.25; p.154, L.1-7)

During the last half of 2014, Deneen observed that M.A. had to be told what to do by J.R. in terms of care for B.H.A. and that he was frequently distracted by his phone, videogames or T.V. (T.Vol.I p.154, L.8-22) During 2014, Deneen also talked to M.A. about the fact that J.R. could not afford to do everything on her own. She needed some contributions and he should do whatever he could. As far as she knows, M.A. did not contribute anything. He did occasionally promise to help

and texted Deneen to come meet him at Kwik Star to collect money but he was never present when she arrived. (T.Vol.I p.155, L.9-25)

Between January and May of 2015, M.A. came to the Ritter house one time, on the occasion of B.H.A.'s first birthday. J.R. planned and executed a party and invited all of M.A.'s family to it. (T.Vol.I p.156, L.16-21) M.A.'s grandmother took him over for the occasion. (T.Vol.I p.160, L.14-25; p.161, L.1-6) Amanda McCarty observed that M.A.'s interaction with B.H.A. on his first birthday was awkward. (T.Vol.I p.180, L.2-14)

In March of 2015, J.R. stopped taking B.H.A. to Mason City. (T.Vol.I p.60, L.4-10) The visits were terminated because when J.R. appeared to drop B.H.A. off, M.A. did not want her to go up to the apartment, which made J.R. suspicious. J.R. went up anyway and there was at least one stranger there and the apartment reeked of cigarette smoke. Accordingly, she did not leave B.H.A. there. (T.Vol.I p.58, L.8-25)

On Father's Day of 2015, M.A. had arranged to see B.H.A. at the Ritter's house. When he arrived, his eyes were bloodshot and he appeared high. (T.Vol.I p.59, L.13-25; p.60, L.1; 113, L.5-17) J.R. observed that M.A. never participated in B.H.A.'s medical care after his discharge from Mayo Clinic. (T.Vol.I p.61, L.7-15)

M.A. made arrangements to visit B.H.A. in Charles City around the 4<sup>th</sup> of July, 2015. He was supposed to arrive around 1:00 or 2:00 pm but did not show up

or answer a text as to whether he was still coming. M.A. contacted J.R. on July 5 and stated he had overslept but he was coming to the apartment in Charles City anyway. M.A. stated on the telephone that he was going to kill himself, consistent with past behavior. (T.Vol.I p.62, L.1-15) Three or four times between April of 2015 and July 5, 2015, M.A. threatened suicide, indicating on one occasion that he would smash his car into J.R.'s and on another to blow his brains out. (T.Vol.I p.63, L.6-16) J.R. interpreted the statement to mean that if M.A. could not have J.R. then she should not have B.H.A. (T.Vol.I p.63, L.17-22; p.64, L.4-7) J.R. called the police and when they responded, they looked at a text message which they did not believe indicated suicidal intent, however, they checked on M.A. and he indicated to them that he was not planning on killing himself. In prior phone contact with J.R., she believed he threatened to kill himself. (T.Vol.I p.111, L.19; p.112, L.6-22; App 145)

On November 11, 2015, M.A. was stopped for Driving While Suspended and possible Possession of a Controlled Substance by the Charles City Police Department. (App 145; T.Vol.II p.12, L.1-5) He was released but then jailed again in Cerro Gordo County beginning on December 1, 2015. He has remained continuously incarcerated since that date. (T.Vol.II p.12, L.6-10; p.18, L.17-23)

M.A. acknowledged that he had been involved in the Conspiracy to Distribute Methamphetamine in the Northern District of Iowa for a period of 22

months immediately preceding 10-21-2015. (App 59; App 66) This would take the conspiracy back to approximately December of 2013, indicating that his claim that he gave up his criminal activity when his son was born, does not appear to be the case. (T.Vol.II p.21, L.2-22; T.Vol.I p.195, L.21-3)

At the time of hearing, B.H.A. was age 3 and attending daycare two days per week with Sharon Tieskotter. She believed that B.H.A. was a sweet, well-mannered boy, on target for his age and that his mother provided well for all of his needs. (T.Vol.I p.9, L.24-5; p.10, L.1-11) Ms. Tieskotter also indicated that B.H.A. never mentioned his father M.A.. (T.Vol.I p.12, L.2-9) She characterized B.H.A. as very affectionate and attached to his mother. (T.Vol.I p.12, L.13-25; p.13, L.1-3) B.H.A. also attended a preschool program at the Immaculate Conception School in Charles City. (T.Vol.I p.87, L.7-16; p.126, L.5-9)

J.R. has a relationship with M.A.'s Aunt Kim, who has ongoing contact with B.H.A. but no one else in M.A.'s family. (T.Vol.I p.134, L.5-8) M.A. has never inquired as to whether J.R. is able to support B.H.A. since his birth. (T.Vol.I p.133, L.6-14) M.A. saw B.H.A. at his convenience and never offered to take B.H.A. by himself. B.H.A. has never spent more than a few hours with his father at one time or on his own. (T.Vol.I p.133, L.15-23)

J.R. has received four to five letters from M.A. since his incarceration in December of 2015. She also received up to 8 phone calls, some of which came

while she was working and had no ability to return them. (T.Vol.I p.135, L.4-12) J.R. is concerned that even when M.A. gets discharged in 2024-2025, he will be a poor role model for B.H.A. (T.Vol.I p.133, L.24-5; p.134, L.1-2)

J.R. started dating Walker Jung, age 33, in May of 2016. He has had a positive influence on B.H.A. They have done many activities together. (App 139; T.Vol.I p.95, L.16; p.99, L.23) Mr. Jung does not have a substance abuse history or a criminal history. He has never been married. (T.Vol.I p.99, L.24-5; p.100, L.2-6) He does not have any children other than the child he and J.R. have together who was just born. He treats B.H.A. as his own. (T.Vol.I p.100, L.6-25) J.R. has not discussed getting married to Mr. Jung because he has been a bachelor for a long time and is set in his ways. (T.Vol.I p.101, L.5-11)

J.R. wants to terminate M.A.'s parental rights to give B.H.A. a chance to grow up without the knowledge that his father is a criminal in prison with a drug and alcohol abuse problem, as well as inflicted with many mental health problems. (T.Vol.I p.101, L.22-5; p.102, L.1) J.R. is also hopeful that B.H.A. will be adopted by a father in the future. (T.Vol.I p.102, L.2-3) M.A. admitted to J.R. that he does not know how to be a parent. (T.Vol.I p.102, L.21-5; p.103, L.1)

J.R. mostly had no concrete information from M.A. since his original incarceration as to where he was located. (T.Vol.I p.69, L.3-11, 20-3; p.70, L.17-18; p.72, L.1-19) He has been in Cerro Gordo County Jail, Linn County Jail,

Fayette County Jail, Winneshiek County Jail through 03-30-2017, and Fort Worth, Texas, since 03-31-2017. (T.Vol.I p.204, L.23-5; p.205, L.1)

## **ARGUMENT**

**I. Given that the Juvenile Court found the ground of abandonment under 600A.8(3) had been proved, did it err in finding that it was not in the best interest of the 3 year old child, with no knowledge of his father, to terminate his parental rights when the earliest his father would be released from federal prison would be in 8 years?**

A. Preservation of the Issue and Scope of Review

The Court found that abandonment, pursuant to Iowa Code Section 600A.8(3), had been proven by clear and convincing evidence. The Court also considered the question of whether it was in the best interest of B.H.A. to have his father's parental rights terminated at this time and decided this issue against the mother, J.R. A timely Notice of Appeal was filed by the mother.

The scope of review is de novo for private termination proceedings pursuant to Chapter 600A. In In Re G.A., 826 NW2d 125, 127 (IA App 2012), the Court held that weight is given to the District Court's factual findings, especially those concerning witness credibility but the Appeals' Court is not bound by them. Iowa Rule of Appellate Procedure 6.904(3)(g). The primary consideration is the best interests of the child. Iowa Code Section 600A.1; In Re R.K.B., 572 NW2d 600, 601 (IA 1998)

B. M.A. is not a credible witness and has not taken responsibility for his misconduct.

M.A. testified that he had used the earnings from his job at Jaslyn Cleaning to pay expenses for people who were taking him to see his son at the Mayo Clinic. (T.Vol.II p.192, L.3-4) However, he produced no witnesses who indicated that they had been paid anything by him and, further, Deneen Ritter specifically testified that she got paid nothing although they supplied not only transportation but hotel and food on M.A.'s first visit. Deneen would have no reason to lie about these facts. (T.Vol.I p.142, L.1-10; p.147, L.20-24)

M.A. also claims to not have been using or dealing drugs after B.H.A.'s birth. (T.Vol.I p.195, L.21-3) This is contradicted by the terms of his plea entry in which he admits he was dealing drugs over a 22-month period ending with a date of 10-21-2015. (App 59;App 66) M.A. also claimed not to be high on Father's Day, June 2015, when he was turned away from a visit because he was observed by J.R. and her mother as being intoxicated or under the influence. (T.Vol.I p.198, L.13-21; p.203, L.18-33; p.59, L.11-25; p.60, L.1; p.157, L.2-22; p.158, L.1-12) Since it was uncontradicted that the Ritters had opened their home for M.A. to visit his son when he wanted to, it does not make sense that they would have turned him away unless he was intoxicated or under the influence.

M.A. also testified that he kept working to see B.H.A. after the Father's Day debacle. (T.Vol.I p.199, L.18-22) However, the only documented attempt to see B.H.A. was the 4<sup>th</sup> of July. M.A. did not come as he had planned. He failed to



answer any texts from J.R. on July 4 and instead arrived on July 5, again, under the influence and this time claiming that he would kill himself. (T.Vol.I p.61, L.16-25; p.62, L.1-15)

M.A. also stated, categorically, that he had never threatened to kill himself to J.R.. (T.Vol.I p.200, L.25; p.201, L.1-4) It is believable that he would have done such a thing as he admitted to playing Russian roulette at some point in his life and he had many mental health problems. J.R. testified that he made threats three to four times between April 2014 and July 5, 2015, to kill himself and these included a claim that he was going to smash his car into hers as a means of killing himself. J.R. interpreted it as M.A. thought if he could not have J.R., then J.R. would not be allowed to have B.H.A. (T.Vol.I p.63, L.6-22; p.64, L.4-7)

M.A. denied saying he would teach his son to smoke at age 9. (T.Vol.II p.19, L.15-22) However, the suggestion is so bizarre that it seems unlikely it would have been made up by Deneen. It is not something that would have occurred to her and she had no motive to make up the story. Likely, it was just a show of bravado as the only parenting that M.A. could think of at the moment, reflecting back on the way he had been parented by his father. (T.Vol.I p.168, L.8-23)

M.A. also claimed that he never threatened to take B.H.A. away from J.R.. (T.Vol.I p.201, L.17-20) It is unclear why both J.R. and Deneen would claim that they experienced this conduct if it had not occurred. (T.Vol.I p.159, L.3-12)

Further, Amanda McCarty testified that J.R. was a good friend and confided in her contemporaneously that she had concerns of M.A. taking B.H.A. and running with him. (T.Vol.I p.181, L.14-16)

M.A. also testified that J.R. blackmailed him to get him to pay support by claiming if he did not buy this, that or the other thing for B.H.A., that she would withhold B.H.A. from seeing him in Mason City. (T.Vol.I p.203, L.7-14) This is among the most outrageous claims made by M.A.. There is no companion claim by him that he made any payments of significance for B.H.A.'s support. When he talked about the visits he was having with his son in Mason City, he never mentioned this fact. The record is clear that the visits tapered off after J.R. decided to drop any idea of having a relationship with him in December of 2014 because she was tired of having no help and then in March of 2015 because he was going to have B.H.A. in his apartment on his own when it reeked of smoke and had strangers in it.

M.A. also claims to have sent 10-12 letters to J.R. and/or B.H.A. for the time period during which he was incarcerated, December 1, 2015 through the date of trial. (T.Vol.I p.205, L.5-25; p.206, L.1-2) J.R. claimed that she received 4-5 letters and had saved the 2 that he addressed to B.H.A. on his second and third birthdays. (T.Vol.I p.76, L.18-25; p.77, L.1-9, 19-25; p.78, L.1) The claim that he wrote this number of letters was also inconsistent with the lack of knowledge by J.R. of

M.A.'s location once he was arrested and his scanty phone call record. J.R. testified that he called her on 12-20-2015 from Mason City to say that the charge was not valid and he had committed no crimes. (T.Vol.I p.69) M.A. contacted her again around April of 2016 and told her he was incarcerated but not where. He continued to deny that he was guilty of anything. (T.Vol.I p.70; L.17-18) M.A. called again in May to advise her she was a bad mother. (T.Vol.I p.71, L.3-10) M.A. called again in October 2016 for the last time to say he was in Winneshiek County. (T.Vol.I p.71, L.20-25; p.72, L.1-19)

M.A. also claimed that he was going to be released on 09-18-2024 due to credit he received for time served back to 12-01-2015. (T.Vol.I p.218, L.5-15) M.A. was sentenced to 121 months. At the Plea Hearing, M.A. was advised that parole had been abolished, i.e. he would have to fully serve whatever sentence he received. (App 74) This would mean that his actual release date will be around 01-01-2026.

M.A. also denied that his apartment reeked of smoke in March of 2015 when Deneen and J.R. arrived to drop off B.H.A. and that he did not put J.R. and B.H.A.'s property out on the curb some time later. (T.Vol.II p.16, L.17-25; p.17, L.1-4) M.A. did not claim that J.R.'s decision not to continue to bring B.H.A. over to Mason City but to have him come to Charles City was unjustified in March of 2015, which would have been expected if his apartment had been smoke-filled

without a stranger in it. Further, M.A. did not explain how J.R. got any of her and B.H.A.'s property from the apartment if it wasn't just put out on the curb as explained by her and picked up by her friend.

Although M.A. toyed with the idea that he was accepting responsibility for his mistakes and misconduct, he could not resist the opportunity to blame J.R. for both his drug taking and for his lack of any relationship with B.H.A. (T.Vol.I p.204, L.5-20; T.Vol.II p.31, L.23-25; p.32, L.1-9) His exact testimony is that, "J.R. has done everything in her power to prevent you (him) from seeing B.H.A." This shows an inability to face reality. Clearly, his not seeing B.H.A. had to do with the efforts he did or did not make once J.R. stopped doing everything to promote these visits. Further, he was incarcerated due to his own actions, and that once incarcerated, his ability to have contact with B.H.A. between the ages of 1½ and 3 were minimal. A child this age would not be able to carry on a conversation with a stranger on the telephone and would get nothing out of the letters that M.A. wrote to him on his second and third birthdays. Realistically, a relationship is not possible with a stranger, incarcerated parent, 900 miles away.

- C. M.A. has a troubled childhood, a longstanding record of substance abuse, mental health problems and participates in criminal conduct, all of which were not been addressed substantively through the date of hearing.

As Jennifer Judson-Harms, a psychiatric clinical social worker, indicated several times during her testimony, the best predictor of future behavior is past

behavior. Accordingly, the psychiatric diagnoses of M.A., his poor childhood, his lack of interest in parenting through the date of his incarceration, his criminal behavior and his substance abuse all lead to the best prediction that he will not, in the future, upon release, substantially aid B.H.A. in maturing to adulthood. Ms. Harms offered that M.A.'s mental health diagnoses are serious and hard to treat. (T.Vol.I p.45, L.13-25; p.46, L.1) Further, M.A. testified that his mental health problems were not being addressed in prison. (T.Vol.II p.30, L.25; p.31, L.1-10)

Prisons are not noted for teaching people how to be parents or curing mental health problems. M.A. was unable to point to any program or circumstance which would aid him in either of these regards. Given that fact, it is totally unlikely that he would be an appropriate parental figure for B.H.A. upon his release in 2026.

Analyzing this case on a case-by-case basis, it is not in the best interest of B.H.A. to wait for a future fact finder to determine whether to sever the relationship until 2026. Leaving B.H.A. to wait and worry about what kind of a father M.A. might be upon his release, given his terrible past history, is inconsiderate to B.H.A.

The Trial Court, after making extremely negative findings regarding M.A.'s conduct and abandonment of B.H.A., incongruously concludes that although abandonment has been proved, termination is not in B.H.A.'s best interest because, "Obviously, what kind of parent M.A. could be in six years is unknown. He has a

troubling and negative history and in some respects is not entirely accepting responsibility for his past actions. . . M.A. certainly has made positive gains while incarcerated (7 months at Fort Worth as of November of 2017); is learning a trade; has been substance free for years and voices a desire to have contact with his son. It is impossible to know if these circumstances will continue once he is released, but if it does . . . it would not be in B.H.A.’s best interest to rob him of that opportunity.” (App 48-54)

An explanation for this decision is the fact that one of the Judge’s cases: In the Interest of Q.G. & W.G., 908 NW2d 540 (Table)(IA App 2017) and 911 NW2d 761 (IA 2018) was on further review to the Iowa Supreme Court from a decision by the Court of Appeals to uphold termination of parental rights of an incarcerated parent who was soon to be released.

That case is distinguishable from the current case. The primary directive in that Supreme Court’s opinion is that decisions with respect to the best interest of a child to terminate the parental rights of an incarcerated parent must be made on a case-by-case basis with a fact intensive analysis of the burdens and benefits to the child. In In Re Q.G. & W.G., 911 NW2d 761, 771 (IA 2018), the Supreme Court observed that case law is of limited utility in deciding these cases because, “We have not adopted a formulaic or rule-based approach . . . each case must be decided on its own facts.” Id 771

It also observed that the best interest test requires both a look backwards and a look forward, “We look to the child’s long-range, as well as immediate, interest. We consider what the future holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parents’ past performance for that performance may be indicative of the quality of future care the parent is capable of providing. Our statutory termination provisions are preventative as well as remedial. They are designed to prevent harm to a child.” Id 771

Factors which the Court found persuasive in the Q.G. & W.G. case do not exist in this case. The parties were married; the incarcerated father had lived with the children; and been the primary care parent for the first ten months of the older child’s life; the parties entered into a dissolution stipulation in May 2016 which provided for a review and provision of visitation rights upon the father’s release. The father’s projected release date was June of 2017. The Petition to Terminate was filed 08-15-2016 and hearing was held in November of 2016. The incarcerated parent was only sentenced to serve a term of two years, from May 2015 through June 2017. Id 772 The incarcerated father’s prison record was judged after he had been incarcerated for over a year. He had an award for exceptional behavior in prison. He was not known to have any significant mental health problems other than some mild history of depression. There is no evidence that his upbringing was

substandard. In fact, his parents had been very supportive and had a good relationship with him and his children. Id 772-4 The children were going to be ages 4 and 6 at the time of the incarcerated father's release and it was found by the Court that, given their young age, they could benefit from a good relationship with their father which had a realistic possibility of occurring. Id 772-774

Given the requirement for a case-by-case analysis, the facts in this case demonstrate that it is not in the best interest of B.H.A. to continue to have a legal relationship with M.A. as his parent. M.A. never provided much in the way of financial or emotional support or time to B.H.A. for the first year and a half of his life when he was not incarcerated. He did not show any significant concern for his substantial health problems related to his prematurity. He was not particularly nice or appreciative to B.H.A.'s mother. He made no serious effort to address his mental health and substance abuse problems and he pursued a consistent course of criminal behavior. While it is true that he has likely been substance free in prison, although there has been no drug tests presented, the fact that it is involuntarily imposed by the system, does not indicate that he would remain drug free once he was released. There are no indications, since he has been an adult, that he has had any significant mental health treatment for his very serious mental health conditions which have been characterized as very difficult to treat. The Court gave absolutely no consideration to the fact that B.H.A., if M.A.'s rights were not



terminated, would be legally tied to a stranger and be concerned about what demands this stranger was going to make on him to fulfill a filial relationship either during his incarceration or upon his release. This is clearly going to, at some point, cause anxiety for B.H.A.

M.A.'s letters to B.H.A. emphasizing "flesh and blood" do not bode well. His past tendencies to threaten violence to himself and to take B.H.A. away from his mother are also not encouraging. His lack of any support network for good parenting, mental health, substance-free living and noncriminal behavior is also troubling, in addition to his unwillingness to really accept responsibility for his own actions. He prefers to blame his criminal conduct, his substance abuse, and his lack of relationship with his son on J.R..

Under the facts and circumstances of this case, delaying a decision on termination until 2026 is not in B.H.A.'s best interest. One of the most serious problems with it is that it does not contemplate B.H.A.'s fate should his responsible parent, J.R., die or become incapacitated. Perpetuating the bond with M.A. raises a specter that he might at some point be the sole parent of B.H.A.

### **CONCLUSION**

In conclusion, this Court should reverse and remand the case for termination of the parental rights of M.A.

### **REQUEST FOR ORAL ARGUMENT**

The Appellant requests that she be allowed oral argument in this appeal.

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