

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.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 AMENDED FINAL REPLY BRIEF**

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JUDITH O'DONOHUE - AT0005849  
*ELWOOD, O'DONOHUE,*  
*BRAUN, WHITE, LLP*  
116 North Main Street, P.O. Box 307  
Charles City, IA 50616  
(641) 228-8054 Telephone  
(641) 228-8057 Facsimile  
[charlescity@elwoodlawfirm.com](mailto:charlescity@elwoodlawfirm.com)  
**ATTORNEY FOR APPELLANT**

**CERTIFICATE OF FILING**

I, Judith O'Donohoe, hereby certify that I filed the attached Amended Final Reply brief via electronic filing on the 22nd day of October, 2018.

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

**CERTIFICATE OF SERVICE**

I, Judith O'Donohoe, hereby certify that on the 22nd day of October, 2018, the attached Amended Final Reply Brief was served electronically on all parties or their representative attorney.

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

**CERTIFICATE OF COST**

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

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

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**REPLY TO STATEMENT OF THE FACTS**

**REPLY TO ISSUE II**

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**Other**

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232.116

232.116(1)(j)(2)

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**REPLY TO STATEMENT OF THE CASE**

The Statement of the Case offered by M.A. is very abbreviated but not accurate.

## REPLY TO THE STATEMENT OF FACTS

J.R. discovered that she was pregnant. This came as a surprise to her in October of 2013. M.A. was living in a residential facility due to a criminal conviction. J.R. testified that he was excited about the pregnancy when he was told in October but he only went to two doctor appointments prior to B.H.A.'s birth on April 17, 2014. He provided no financial support, although he was employed at Jaslyn Cleaning Service. (T.p.38, L.10-p.39, L.15; p.146, L.1-5) M.A. also continued to use illegal drugs and pills-Xanax. Jordan quit using controlled substances and/or drugs before becoming pregnant. (T.p.38, L.1-4; p.39, L.20-p.40, L.22)

M.A.'s next involvement with the pregnancy was not until he was advised that J.R. had gone into premature labor at the Floyd County Medical Center in Charles City, Iowa, in April. J.R. went to Lamaze and prenatal classes to prepare for birth. M.A. only went to one class. (T.p.146, L.6-23; p.147, L.3-7) J.R. was in labor for two hours. M.A.'s grandmother brought him to the Floyd County Medical Center delivery room one-half hour before B.H.A. was born. (T.p.43, L.3-22) B.H.A. was immediately transferred to St. Mary's Hospital at the Mayo Clinic by ambulance where he stayed for a period of nine weeks. (T.p.44, L.11-25)

J.R. was kept until the night at Floyd County Medical Center before she was released and was transported by a friend to the Mayo Clinic. J.R. stayed at the

Ronald McDonald House. M.A. was not allowed to stay at the Ronald McDonald House because of his prior criminal convictions. (T.p.45, L.1-14, 25-p.46) J.R.'s parents, Deneen and Paul Ritter, took M.A. to the Mayo Clinic on the day of B.H.A.'s birth. They paid for him to stay in a hotel and provided him with food from Thursday through Sunday. M.A. made no offer to contribute to the cost of his expenses during this time. M.A. did not ask the physicians questions about B.H.A. or his condition, although it was quite precarious. M.A. did not seem concerned about whether B.H.A. was going to survive. When B.H.A. became septic, Deneen Ritter suggested that M.A. have this explained to him by the doctor and he refused to talk to the doctor about it. (T.p.147, L.20-p.152, L.11)

J.R. remained at the Mayo Clinic with B.H.A. Her parents went up every weekend and sometimes several times during the week. M.A. only rode along twice although he was offered the opportunity. (T.p.152, L.12-p.153, L.12) M.A. claimed to have been in contact with the hospital or J.R. even when he was not visiting, however, there is no evidence other than his less-than-credible testimony. (T.p.192, L.11-p.193, L.1)

After B.H.A. was released from Mayo Clinic, he and J.R. went to live with her parents in Charles City, Iowa, for a while. M.A. stayed in an apartment in Mason City, Iowa. According to M.A., he and J.R. were looking for a place that was large enough to accommodate all three of them, "until finally it was things just

fell apart and it wasn't going to happen, and you know, she told me she had no plans on moving in anyways.” (T.p.193, L.6-13) There is no testimony that J.R. ever intended to live with M.A. after the birth of their child as represented in M.A.'s Statement of Facts.

After their return from the hospital, J.R. took the initiative to try to maintain a relationship for B.H.A. with M.A. through December of 2014. (T.p.153, L.19-24) M.A. never attended doctor's appointments with B.H.A. as he continued to have medical problems post-discharge. M.A. was present when a home health nurse visited J.R.'s parent's house on one occasion. (T.p.51, L.11-18)

J.R. took B.H.A. to M.A.'s apartment in Mason City periodically. M.A. only came to Charles City two times to see B.H.A. from June 2014 through December 2014. (T.p.50, L.7; p.51, L.3) During this period, although B.H.A. was not supposed to be exposed to secondhand smoke, M.A. continued to smoke outside his son's immediate area but came back inside to handle him smelling of smoke. (T.p.51, L.19-25; p.52, L.1-12) M.A. continued to smoke marijuana. (T.p.52, L.13-22)

It upset J.R. that M.A. had money for marijuana but not for their son. (T.p.53, L.1-6) J.R. and M.A. broke up in December of 2014. Before that, on weekends when B.H.A. and J.r. were at M.A.'s apartment, “he would occasionally get up with B.H.A. and let me (J.R.) sleep.” When M.A. was allowing J.R. to sleep

in, he also did some feeding and changing but he was not regularly involved in B.H.A.'s care. (T.p.53, L.12-p.54, L.3)

After the breakup, M.A. threw J.R.'s and B.H.A.'s belongings from the apartment out on the curb. The crib was not usable and everything smelled of smoke. (T.p.54, L.25-p.55, L.1) At the point of the breakup, B.H.A. showed no visible signs of recognizing M.A. as a central figure in his life. (T.p.56, L.25-p.57, L.5) J.R. would then take B.H.A. over to see M.A. for a few hours in Mason City on Saturday morning or afternoon. (T.p.57, L.10-23)

In March of 2015, M.A. was still using controlled substances and smelled of smoke. On one occasion, J.R. dropped B.H.A. off to see M.A. He did not want J.R. to come up to the apartment. It reeked of smoke and there was a stranger inside so she did not leave B.H.A. there. That ended her trips over to Mason City. (T.p.58, L.8-p.59, L.5; p.60, L.4-10)

On Father's Day, M.A. did come to the Ritter's house to see B.H.A. At that time, his eyes were bloodshot and he did admit that he had been drinking the night before, therefore, J.R. asked him to leave. He did not specifically admit that he was under the influence of marijuana and methamphetamine but J.R. believed he was by her observations. (T.p.59, L.22-p.60, L.1)

M.A. attended a birthday party for B.H.A. which he was invited to and put on by J.R. (T.p.60, L.11-p.61, L.6)



In his Statement of Facts, M.A. fails to acknowledge that he admitted drinking to excess the night before. He also claims he offered to go up to the Sheriff's Office and perform a urinalysis. This was on a Sunday. There is no indication that anyone would have been present at the Sheriff's Office to take a urinalysis, nor did M.A. produce any evidence to that effect. He just denied being drunk the night before. (T.p.198, L.12-25)

M.A. indicates that he tried to see B.H.A. again on the 5<sup>th</sup> of July and was turned away because J.R. indicated that he was suicidal. (T.p.200, L.9-22) He denies threatening suicide. (T.p.200, L.25-p.201, L.1) M.A. made this sound as though he was being categorically denied any access to his son, however, this is contradicted by Jordan's testimony that they had a specific arrangement that M.A. was to come 07-04-2015 at about 1 or 2 pm for a visit. She tried to confirm this with M.A. by text and it was not confirmed. (T.p.61, L.16-25) Later that night, M.A. contacted J.R. and said he overslept and told her he was coming to her apartment in Charles City and was going to kill himself. (T.p.62, L.1-15) This was the evening of July 4<sup>th</sup>, not the evening of July 5<sup>th</sup>. M.A. was then harassing J.R., according to her, on July 5<sup>th</sup> when she notified the police with respect to that problem and asked for a welfare check. (T.p.62, L.16-p.63, L.3) The police may have been under the impression that the threat of suicide occurred on the 5<sup>th</sup> and checked those text messages but the call on the 5<sup>th</sup> was related to harassment. The

suicide threat was made the previous day. M.A. showed up at J.R.'s parent's house at approximately 8 o'clock but since there was no arrangement for that visit, no visit took place. (Ex.Q p.5-6) There was no evidence of any further attempts by M.A. to set up visits with B.H.A. (T.p.64, L.22-5) He never made any inquiry as to how B.H.A. was doing or about his general welfare. (T.p.65, L.7-22)

M.A. was arrested in November of 2015 (T.p.66, L.2-10) in Floyd County. J.R. knew nothing of M.A.'s criminal trouble until she read an article in the newspaper in June of 2016 indicating that M.A. had been charged with federal crimes of delivering a controlled substance. J.R. had no financial support from M.A. through the date of his arrest and ongoing incarceration (T.p.68, L.5-13) except for \$100 in 2015. (T.p.68, L.14-22) M.A. called J.R. on 12-20-2015 from Mason City to say that any charges against him were a big mistake and it was not him. (T.p.69, L.3-23) J.R. did not hear from M.A. again until April of 2016 when he advised her that he was incarcerated but did not tell her where and, again, denied his guilt. (T.p.70, L.17-18)

The next contact was May of 2016 when M.A. called J.R., not to ask about B.H.A., but to tell her she was a bad mother. (T.p.71, L.3-16) The last time M.A. called J.R. was in October of 2016, when he indicated for the first time where he was located, in Winneshiek County, and he was expected to be moved shortly. (T.p.72, L.1-19)

J.R. received very few written communications. She indicated there were four or five total from December of 2015 through April of 2017. (T.p.77, L.4-9) Of those letters, two were sent to B.H.A. for his birthday, one around April of 2016 and the other around April of 2017. (T.p.77, L.22-p.78, L.11) The substance of the two letters, ostensibly addressed to B.H.A., was read into the record. The first one, on B.H.A.'s second birthday, reads, "I want to wish you a Happy Birthday. It is hard to believe you are going to be two years old. I am sorry I am not able to be there, little man, I hope some day you will be able to forgive me, but I have to learn how to grow up and be a man and get on the right path. It is scary that I don't know what you look like or even know the sound of your voice and soon it will be a year since last seen you. I still have that burned into my head. Anyways, Peanut, I wish you a Happy Birthday and I'm always going to love you even if I don't get to see you for a while. I'll always love you, my son."

The second letter dated 03-06-2017 says, "How are you doing? I hope you are doing good. Little man, you're getting pretty big. Can't believe next month is your birthday, turning the big 3-0, Dude. I'm sorry I won't be around for a few of them but does not mean I'm not thinking about you all the time. You're my son, my flesh and blood and I'll always love you. I'm not sure if I'll be able to drop a card for you. It might come late but I'm still trying to get one out to you. Just not sure where I'll be at the time, but I'll figure something out hopefully. Soon I'll be

able to send you some books. Also, have you gone sledding or for some walks these past few nice days or maybe even cruising in a power car or tractor? Anyways, Peanut, I want to write. I love and miss you. I'll keep writing every month. I'll try to call once I get to my place and get a few things set up for you. Love always, Dad." (T.p.22, L.13-p.24, L.18)

There was a short hearing held on 03-21-2016 to determine whether J.R. could change B.H.A.'s last name. M.A. filed a written Resistance but was not present and did not give any testimony. The Judge's Findings of Fact, one paragraph long, revealed very little information regarding contact between B.H.A. and M.A.. (Ex.12) Accordingly, even with this potential wake-up call, M.A. did very little to step up his contacts or solicitation of information about B.H.A. and his welfare.

There is no official information that M.A.'s release date is 09-18-2024. He did testify to that and that he is currently at a federal facility in Ft. Worth, Texas. (T.p.218, L.7-15; Vol.II p.4, L.21-p.5, L.5) However, since he was sentenced to 121 months with credit for time served back to December of 2015, applying the math, his release date would be December of 2025. At that time, B.H.A. would be over 10 years old.

**Reply to the Argument that the Juvenile Court was Correct in Finding it is Not in B.H.A.'s Best Interest to Terminate M.A.'s Parental Rights**

M.A. advances several arguments: 1) that he has taken responsibility for his actions; 2) that he has shown he can change; 3) that he has always shown an interest in B.H.A. and made whatever attempts he could to stay in contact with him; 4) that he is bettering himself for the future by obtaining employment skills and parenting skills; and 5) that it is too early to terminate his parental rights because B.H.A. may derive some future benefit from associating with him as his father.

The third point that M.A. has always shown an interest in B.H.A. is in direct contradiction to the finding of the Juvenile Court. On page 6 of the decision, “The grounds under 600A.8(3)(b) have been proven by clear and convincing evidence...” It found specifically that M.A. had not attempted to stay in contact with the child or visited the child when physically able to do so until he was incarcerated and then he made some attempt to communicate with the child and was physically unable to visit because of the incarceration. There is no clear and convincing evidence to show that M.A. has always been interested in B.H.A., the contrary has, in fact, been proved.

M.A.’s first claim that he is taking responsibility for his actions is debatable and irrelevant to the best interests of B.H.A. Most of his communication with J.R., since being incarcerated, has been to blame his shortcomings as a parent on her. In May of 2016, he made a call to J.R. specifically to advise her that she was a bad

mother while not making any inquiry as to B.H.A.'s situation and welfare. During his testimony, M.A. endorsed this statement from his attorney, "J.R. has done everything in her power to prevent you (him) from seeing B.H.A." (T.p.32, L.35-p.33, L.19)

M.A.'s second argument is that he has shown he can change. When he was not incarcerated, he refused to forego smoking, taking controlled substances, drinking and committing criminal acts by his own admission. The only changes urged in M.A.'s Brief are that he is purportedly doing well in prison. There have been no actual prison records produced other than a certificate of completion of "active parenting class", "2017 ACE program", (Ex.1) a certificate indicating attendance at Alcoholics Anonymous dated 05-30-2017 without specifics and indicating an address of Federal Correctional Institution, Ft. Worth, Texas (Ex.2), and Ex.3, a similar certificate for attendance at Narcotics Anonymous. M.A. had been in the Ft. Worth Federal Correctional Facility since 03-31-2017. (T.p.204, L.25-p.205, L.1) Accordingly, the only prison record we have is that he attended some sort of a parenting class, N.A. and A.A. sometime in the period of 03-31-2017 through 05-31-2017. This is not much of a prison record. We only have his word for the fact that he is planning on trying to obtain some employment skills and enrolling for an AA Degree. M.A. testified 11-07-2017 and again 03-26-2018

but presented no additional concrete information to back up his claims of what he is doing to better himself or that he has made any real change.

The last argument advanced is that it is too early to cut off a future opportunity that M.A. might have to be a father figure to B.H.A. In order to evaluate this argument, it is necessary to evaluate what negatives B.H.A. might derive from having actual knowledge of M.A., which he does not have at the present time, as well as M.A.'s background and what the likelihood is that M.A. will be able to be a parent to a child that he meets for the first time at age 10½ . Neither of these points was addressed by M.A. in his Brief.

At the moment, B.H.A. has no knowledge of M.A. If he did have knowledge, what there would be to know is that M.A. is and has been absent from his life. The primary reason for this is criminal behavior which caused him to be incarcerated 700 miles away. In addition to having a criminal record, he is a substance abuser and had a poor childhood, which included mental health issues exhibited by self-mutilation at age 13, playing Russian roulette with a loaded gun, a diagnosis of major depressive disorder, mood disorder, general anxiety disorder, borderline personality disorder and ADHD. Further, M.A. is subject to significant mood swings with an extensive history of heavy drinking since age 15 and use of controlled substances. (T.p.25, L.21-p.28, L.14)

If M.A.'s two letters are an example of the quality of his expected communications to B.H.A. from prison, these would not provide B.H.A. with any benefit. They are not age-appropriate and seem to be centered more on M.A. and not on B.H.A.

As indicated by the psychiatric social worker who testified, Jennifer Judson-Harms, after a question regarding M.A.'s history, (T.p.40, L.6-10), the best predictor of M.A.'s future behavior is his past behavior. Unfortunately, the types of problems that he has had in the past from a very young age are not easily treatable. There is no indication that M.A. had any significant mental health treatment during his lifetime up to the point of him testifying, nor did he mention the possibility of any such treatment in the future. (T.p.41, L.11-p.42, L.6; p.43, L.12-20)

Ms. Harms specifically indicated, "And this man's mental health history of – one of the things from that diagnosis is borderline personality disorder. In the mental health world, there are three realms. There are mood disorders, thought disorders and personality disorders. Mood disorders and thought disorders can be treated with medication; personality disorders cannot. You can treat the symptoms but you don't treat personality disorders. They are extremely hard to treat and very intractable." (T.p.45, L.13-p.46, L.1)

Ms. Harms also indicated that there was no detriment to B.H.A. to have M.A.'s parental rights terminated as long as information about this is carefully



transmitted. (T.p.41, L.24; p.42, L.6, 19-p.43, L.11) She opined that it was in B.H.A.'s best interest to terminate the parental rights of M.A. (T.p.43, L.12-20) She also offered the opinion that there was no bonding at the point of the trial between B.H.A. and his father. (T.p.41, L.19-p.42, L.6)

In response to this testimony regarding B.H.A.'s best interests, M.A. presented nothing other than his own thought that he did not want his parental rights terminated. Nothing had occurred from B.H.A.'s birth through the time of trial in May of 2018 that would improve the outlook for B.H.A. having a positive supportive relationship at some point in the future with M.A.

As expected, M.A. relied heavily on the case of In Re Q.G. and W.G., 911 NW2d 761 (IA 2018) to claim that despite all the bad behavior, substance abuse problems and mental health problems, his parental rights should not be terminated. This case, as explained in J.R.'s Brief, is distinguishable for a number of reasons: 1) the father had a prior relationship with the minor children and resided in their home; 2) the father had a personal visit with the children while in prison and maintained good phone contact for a period except when the prison ruled that he could not have such phone contact; 3) the children had a very close relationship with the father's parents which would have been terminated in a termination of parental rights; 4) shortly before the Petition for Termination of Parental Rights was filed, a dissolution Decree indicated that upon release from prison, the father

would have visitation rights. Accordingly, the Petition to Terminate was a radical departure from the previous agreement and the father had an excellent prison record over a period of years; and finally, he was due to be released in a matter of months from the date of the trial.

In this case, the Court, which was examining termination pursuant to Chapter 232, specifically indicated that if, at the time of the proposed termination, the incarcerated parent was not going to be able to contribute to the child's physical, mental or emotional needs for a period of more than five years, that this should be sufficient to justify a termination as being in the best interest of the child. *Id* p.771-2

A subsequent case, In Re O.H. and P.H., 2018 WL 3060273 (IA App decided 06-20-2018), emphasized that the decision not to terminate in In Re Q.G. and W.G., was substantially based on the short period of time between the hearing and the expected release date of the father. In In Re O.H. and P.H., the father's parental rights were terminated because the father was unlikely to be released in less than five years, citing 232.116(1)(j)(2). While this termination is under Chapter 600A rather than Chapter 232, this Section, 232.116, demonstrates a legislative conclusion that if the period of absence due to incarceration is going to exceed five years, that termination would be appropriate and in the best interest of the child. See In Re O.H. and P.H., pg.3, footnote #5.

In In Re W.W.,J.W. and E.W., 826 NW2d, 706 (IA 2012), the Court found that an absence of a parent from her children of almost seven years would support a finding of termination and that the termination was in the best interests of the children. See pg. 709-11.

In In Re G.A., 826 NW2d, 125 (IA App 2012), the Court found that a parent who had abandoned a child could not meet the requirements of the best interest test due to lack of demonstrated continued interest and genuine effort to maintain communication and establish and maintain a place of importance of the child in his life, his being a substance abuser and having federal criminal charges pending.

The facts of these two cases are much more similar to what we are dealing with here than in In Re Q.G. and W.G. Accordingly, the weight of the law supports the finding that it is in the best interest of B.H.A. to terminate M.A.'s parental rights.

### **CONCLUSION**

The Juvenile Court Order should be reversed as to a finding that best interests of B.H.A. have not been shown to support a termination of M.A.'s parental rights.

**Certificate of Compliance**

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

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      /s/ Judith O'Donohoe        
Judith O'Donohoe

      10/22/2018        
Date