

## Juvenile Court Case Law Update - SWILL 2017

### Cases returning from last year

#### Supreme Court case: In the Interest of M.W. and Z.W. (15-1256; 3-4-2016)

Younger sibling died in father's care: came to ER after rigor has set in, filthy clothes reeking of feces and urine, sores around neck. Death due to malnutrition and dehydration. Two months old and may have been bathed only three times because mother was tired after work. Father did not participate in parenting. Infant was fed sugar water in bottles.

TPR based on (1)(d) and (i), which each require a finding of abuse or neglect, defined as a nonaccidental physical injury resulting from acts or omissions of the parent. (1)(h) was also pled; however, the TPR order only based on (h) for M.W. No reason given; seemed like an oversight.

Court of appeals reversed as to Z.W. because no finding of abuse or neglect.

Supreme Court overturned and explicitly overruled precedent (court of appeals cannot terminate on grounds not relied on by juvenile court when State did not move to enlarge or cross-appeal<sup>1</sup>)

The court of appeals cited to a previous case, In re A.R., wherein the court of appeals held that it would not terminate parental rights on a ground not relied upon by the juvenile court when the State did not file either a rule 1.904(2) motion or a cross-appeal. 865 N.W.2d 619, 629–30, 633 (Iowa Ct. App. 2015). However, because our holding in this case is contrary to the court of appeals' conclusion, we overrule In re A.R. to the extent it held a rule 1.904(2) motion or cross-appeal was required for it to consider alternate grounds for affirmance that were raised before the juvenile court.

Specifically, on appeal the court can do a de novo review and find evidence that requirements of (1)(h) are met. Generally, successful party need not cross-appeal to preserve error on a ground ignored or rejected by the trial court. A party need not appeal from a favorable ruling.

Practice point: Look out for grounds that can be established but are not included in the court's reasoning; they still exist.

#### In the Interest of J.L. (16-0601; 6-29-2016)

Deaf mother was TPR'ed last year. Mother had self-reported suicidal ideation and poor basic parenting skills. Mother seemed to understand sign language interpreter but not vice versa due to mother's variations of sign language. Provider communication was in writing. Court advised mother to learn standard sign language. TPR reversed based on DHS failure to provide an interpreter for interactions.

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<sup>1</sup> In Re Interest of A.R. 865 N.W.2d 619, 629–30, 633 (Iowa Ct. App. 2015).

Mother requested a Certified Deaf Interpreter but did not qualify for one. Court also found that mother would not benefit from CDI services since she is not applying skills she's been taught and continues to make unsafe decisions. AND there is not a single CDI in Iowa.

Mother appeals second TPR based on lack of reasonable efforts because of failure to provide a CDI and the demand that she learn ASL.

Mother testified that she learned a lot of skills from foster mother with no interpreter. She said she understood all information exchanged during therapy, and the non-CDI interpreter was there. Court held that the mother's claims of inability to communicate without a CDI was false and a distraction.

### **Reversed on the Facts**

#### Interest of I.S. (16-0793; 7-27-2016)

Toddler was found at daycare to be bleeding from her vagina; only the mother and father could have injured the child. During the child abuse assessment process and criminal investigation, drug paraphernalia was found in the home. CINA grounds were physical abuse, failure to supervise and sexual abuse. All three grounds were determined to be established.

Court reversed on failure to supervise since it was based only on the mere possession of paraphernalia in a closed tote in the basement and a past positive drug screen.

#### Interest of A.G., T.G., and E.G. (16-0673; 6-15-2016) GAL appeals **NOT REVERSED**

GAL appeals CINA dismissal.

Drug paraphernalia found in mother's home during a search occasioned by an investigation of identity theft. Mother said they were not hers and maybe had been a prior boyfriends'. There were no allegations that children were harmed by the paraphernalia, and imminent danger of harmful effects was not shown.

Practice Point: There is a distinction between exposure to a parent's drug use and mere possession of paraphernalia.

#### Interest of K.K., I.K. and G.M. (15-2110; 4-27-2016)

CINA was secondary to the birth of a child who tested positive for meth exposure. The mother and father admitted to have parented under the influence. Mother appeals as to adjudication her three older children but not the baby. The basis was failure to supervise.

Between removal and disposition the mother actively participated in services and remained drug free. Everyone involved agreed that the mother was sober and accomplishing her goals. At disposition the mother was caring for the children daily from 6:30 am to 11:30 pm.

Court of appeals did not find clear and convincing evidence that mother's use of meth on two occasions while pregnant puts her older children at imminent risk of harm.

Practice Point: Client's compliance with DHS recommendations following removal ARE important.

#### Interest of M.S. (16-0975; 10-26-2016)

Father established by DNA after adjudication complied with every aspect of orders and recommendations other than cessation from cannabis. Has visits four days a week and does well; works full time; has an appropriate home with his mother; attended drug counseling.

TPR based on substance-related disorder & dangerous prior acts. No evidence of disorder or danger. Also, length of time removed and risk of adjudicatory harm if returned. There was no adjudicatory harm since father was not even identified until after adjudication. Father's continued positive drug tests is not sufficient. "The mere fact of use does not establish adjudicatory harm." There must be a nexus between use and risk of adjudicatory harm. Speculation and conjecture are not enough.

Practice point: Physical harm cannot be presumed from a parent's substance abuse. It is not the parent's burden to prove a negative: that his drug use is not harming the child.

#### Interest of M.F., M.F. and M.F. (16-0434; 5-11-2016)

Youngest child TPR'ed based on (h) - length of time out of the home and cannot be returned (**NOTE: NE does not TPR on this basis. It requires proof of unfit parent.**). Mother testified that the child could not be returned that day. TPR affirmed.

Older two TPR'ed based on 6 months without meaningful contact. Children had been removed less than six months prior to TPR. Reversed. Based on removal for 12 months. Children had been removed less than 12 months prior. Reversed. Based on substance-related disorder and dangerous prior acts. No finding of substance-related disorder. Reversed.

Practice Point: State must prove each prong of each basis for TPR.

#### Interest of H.E. and A.R. (16-0473; 5-11-2016)

Mother appealed continued placement with intervenor step-mother. CINA was due to physical abuse by the father in the father's home. The parents had week on-week off custody prior to CINA, and the mother consented to the step-mother having the kid for a while because the mother needed to find a new place to live. The new home was fine, and the mother lived there with her 5-year-old daughter. Court denied return to the mother on December 5 and again on March 3, when DHS recommended return, because of "unresolved issues:" lack of income and driver's license. The intervenor step-mother submitted a brief on appeal.

The mother's home is the preferred outcome, and the mother established that the children would not suffer harm if returned.

Practice Point; Financial condition does not preclude placement.

#### Interest of P.C. and D.C. (16-0893; 8-17-2016)

CINA was based on domestic violence by the father. Children remained in the home but were later removed because the father was found still to be in the household.

TPR was based on three bases. First, sexual abuse. There was no sexual abuse alleged. Reversed. Second, no meaningful contact for six months. Mother had weekly visits and demonstrated use of parenting advice and instruction. Reversed. Finally, time of removal and cannot be returned without risk of adjudicatory harm. Mother's continuing relationship with the father, who was not engaging in services, is not enough to establish that the children could not be

returned. Reversed.

Practice Point: A parent who brings little support and stability does not necessitate termination.

### **Reversed based on reasonable efforts**

#### Interest of C.W. and L.W.

Young father is incarcerated at the time of the CINA adjudication and disposition. When he is released he immediately requests visitation but is denied because he didn't have a DNA test. Father had one "accidental visit". 11 days after DNA was established, court waived reasonable efforts based on contentions by DHS including that the father had only engaged in one visit since being released from jail.

When the father requested visitation he was denied because the children had been moved to Des Moines and the TPR was pending.

Court of appeals reviewed the reasonable efforts waiver as part of the TPR appeal. Waiver found unsupported. No proof services would not have corrected conditions because services were never offered.

#### Interest of R.C. (16-1131; 9-14-2016)

Incarcerated dad successfully argued for an additional six months based in part by DHS failure to provide reasonable efforts. TPR was in June, and father's release date was August.

Father had been child's primary care provider before going on a bender. The child was found alone in a stroller at 1:00 am. DHS did not provide any visitation due to child's young age. The father was the first incarcerated parent that the caseworker had worked with, and she did not know how to arrange visits. Father did not request visits since he did not know they were available to him. NOTE: Reasonable efforts argument successful even though father failed to preserve prior to TPR.

Practice Point: Regardless that visitation would not have changed the fact that the child could not be returned at time of TPR, reasonable efforts is a requirement.

#### Interest of J.W. (16-0266; 4-6-2016) NOT REVERSED

Father appeals TPR of his third child. His rights to his older two were terminated secondary to physical abuse, and he consented to removal of J.W. based on the other children's abuse. Reasonable efforts included anger management, parenting classes and supervised visits that went well. Reasonable efforts were not waived, but DHS did not move to unsupervised visits due to the father having prior engaged in many services and then he broke the arm of his seven month old. DHS did not have an obligation to "test the waters" with unsupervised time, and the father was TPR'ed without any unsupervised time being attempted.

Practice Point: If DHS has legitimate concern for safety, it can withhold unsupervised time regardless of the actual success of the contacts.

### **Bridge order case**

Interest of W.S. and D.S. (16-0321; 4-6-2016)

GAL appeals and says that father should have been TPR'ed. The State filed the motion for the bridge order. Father was at semi-supervised visitation at the time of the bridge order, but he established that his failure to progress was due to provider interference. Could not prove that children could not be returned to father, and TPR was not in children's best interest

"Life is not perfect nor is it always easy... yet the boys are safe."

**Constitutional cases - Due Process**

Interest of J.S. and J.S. (16-0125; 4-6-2016)

Mother contends her due process rights were violated because the CINA Petition was vague. The Petition was amended to specify that the mother placed her children at risk due to her "uncontrolled and manipulative behavior towards University of Iowa hospital staff." One of the children had been put into inpatient placement by the mother, and the other had been withheld from the father in violation of the parties' custodial order. Both children were the subject of multiple unsupported allegations and were alienated from their father, who was their sole legal custodian. The mother also argued that the CINA proceedings were "fundamentally unfair" because the court admitted evidence beyond the scope of the Petition. The court HELD that the amended petition granted sufficient notice and the claims of unfairness were not adequately developed.

On mother's claim that the State failed to prove that she intentionally inflicted mental injury, intention is not an element of the allegation.

Interest of K.K. (16-1089; 9-14-2016)

Incarcerated father moved to continue because his attorney had not been able to arrange a phone hookup for father to participate by phone. Attorney stated that the father did not have any evidence to present, but he wanted to be present. Attorney did not raise the issue as a due process violation. The court of appeals did not consider the possibility of a due process violation and HELD that overruling the motion to continue was within the court's discretion

Practice Point: Due process violations must be raised as such at trial. (See also, 16-1359 - motion for continuance to review 35 exhibits filed two days before trial not raised as a due process violation.)

Interest of J.G., I.G. and I.G. (15-1755; 1-27-2016)

Father contends his due process rights were violated because he was not permitted to testify by phone and other due process claims that were not preserved.

Court tried to have him testify by phone, but the connection was poor. Father was permitted to give a written statement, which he did - 10 pages worth. Not ideal, but sufficient.

Practice point: Due process is satisfied when a parent has notice of the petition and hearing, has counsel, counsel is present and the parent has the opportunity to present testimony.

## **Constitutional cases - Right to trial by jury**

Interest of K.C. and J.P. (15-1782; 2-10-2016)

Practice point: The rights of 'persons accused' does not apply to child welfare cases.

## **Constitutional cases - Right to Counsel**

Interest of J.K. and R.K. (16-0105; 3-23-2016)U

Father contends his attorney was ineffective because he failed to submit certain evidence at trial. His appellate counsel filed the appeal without having reviewed the transcript due to the tight timelines. The evidence the father complained about actually had been admitted.

Practice point: A parent must show that counsel's deficient performance actually resulted in prejudice to the parent.

## **Constitutional cases - Confrontation**

Interest of K.M. (16-0795; 8-17-2016) REVERSED

An incarcerated mother alleged a due process violation because she was permitted to give evidence by telephone but was not allowed to remain on the telephone for the entire trial. The court of appeals agrees that there was no reason for her not to be present by telephone for the entire hearing; however, it reversed based on fact that the mother was set for release two weeks later and reasonable efforts had not been made for reunification because the mother's motion for visitation while incarcerated was overruled.

Practice Point: Parents have a due process right to be present for the entirety of a proceeding.

Interest of M.H., R.H., L.H., and C.H. (15-1803; 2-24-2016)

Parents of six adopted special needs children accused of excessive discipline practices - appealing disposition removing four children from their care. CASA wrote a scathing report and provided it to attorneys and not parents. Attorneys sought permission from the court to give the report to the parents, but it was denied as protection against the parents confronting the children with their disclosures. Oldest child testified and minimized the concerns from the report. The child then asked to speak privately with the judge. The child spoke with the judge with only the court reporter present, and the judge then entered a removal order with the balance of the hearing continued to the next day. The child was in court the next day, and the judge dismissed the mother's attorney's suggested that she might call the child to testify: no notice nor subpoena. Child had a statutory right to attend the hearing and not be subject to questioning.

**HOLDING:** The court can excuse a parent when the court finds it to be in the best interest of the child, but the attorneys have the right to be present during the parent's absence; however, the court's error was not prejudicial since the child's statements were for the most part affirming the CASA report, and a school nurse and provided additional persuasive testimony.

Practice point: Parents' attorneys must be permitted to be present for a child's testimony

at any time that a parent is excused.

### **Constitutional cases - Self-Incrimination**

#### Interest of I.H. and O.H. (16-0815; 8-17-2016)

Physical abuse allegation against the father including bruising over child's entire body and bruising of the father's hands. Child was often locked in the basement day and night. Engagement in court-ordered therapy would have required the father to admit to perpetrating abuse.

Compliance with a case plan cannot require a parent to make an admission of guilt. In this case, the court did not order the father to admit guilt. Instead, the father chose not to engage in services to address the allegations. He could have pled guilty to the abuse charges and been free to engage in services. His choice has consequences. There was no right violation because the father was not ordered to admit guilt.

### **Constitutional cases - Church and State**

#### Interest of S.H. et al. (15-1939; 02-24-2016)

Amish family with ten children five of whom were subject to TPR proceedings. While the parents were away (from April to September) two children made allegations of sexual and physical abuse by the father. The children were removed and adjudicated while the parents were away. Services were limited by religious beliefs, such as transportation challenges and refusal to engage in anything other than Christian-based therapy. The parents only had visitation with the youngest three because the older two refused and their therapist agreed. The parents right were terminated.

The father argues on appeal that the parents should have been permitted to handle the matter within their Amish community. He only referenced the U.S. Constitution at trial and did not adequately flesh out his argument; however, the court of appeals did examine it and held that the State may intervene to prevent or stop conduct that presents a safety or health hazard despite individuals' religious beliefs.

Practice point: A parent's religious beliefs do not render the State powerless to protect his children from abuse.

### **Voluntary and knowing waiver**

#### Interest of A.C.-B. (16-0106; 4-6-2016)

Father's attorney states that the father is stipulating. Court confirms with father that statement is accurate, not coerced and is voluntary. After TPR father appeals because he would not have consented had he known that he would no longer have contact with his child. The father failed to preserve because he first raised the issue at appeal.

Practice point: The proper method to preserve error is to file a motion for a new trial under Iowa R. Civ. Pro. 1.1004(7) [newly discovered evidence -within 10 days with an

additional 30 for good cause] or file a petition pursuant to Rule 1.1013 [vacating or modifying judgment - one year].

## **Intervenors**

### Interest of M.M. (16-0335; 5-25-2016)

Native American child placed with her aunt, same tribe. Problems cropped up in including involvement of the TPR'ed mother and physical assault by an older child in the home. The aunt had not expressed an interest in adopting until two years later. Child was removed to another relative, and the tribe did not object. The first placement's adoption home study was denied. While they had a legal interest in intervening based on their relationship to the child, the court was right to deny their request.

Practice Point: The court should be reluctant to allow intervention when it may delay a child's adoption.

### Interest of A.S. (15-2193; 4-6-2016)

Maternal grandparents with placement sought to intervene after father was released from prison and began having overnight visits. In the interim, custody was transferred to the father. Court found that the grandparents had an interest but were not seeking placement at that time. The court was not in a dispositional phase.

Practice Point: A party has a right to intervene at the dispositional phase of a CINA proceeding and not at other times.

### Interest of R.H. (16-1688; 12-21-2016)

Intervenors are Colorado relatives of a child who was placed of with her half-brother and his paternal grandmother (Current placement was not R.H.'s biological relative.). Intervenors had a positive home study and started having in-person and Skype visits with R.H., whom they had not previously met.

At TPR the court denied the couple's request to intervene as "not germane" to TPR. The couple intervened at a later hearing and sought placement, but the court ruled that DHS would determine whom would adopt. On appeal, they argue that the relative-placement preference is being violated. The court determined that the best placement is with the family the child had been with for two years.

Practice Point: Following TPR there is no longer a relative-preference.

### Interest of N.V. (15-2022; 2-24-2016) REVERSED

In the course of voluntary services, the child was placed with her grandfather. She returned to her mother, but was then judicially removed. DHS failed to notify family members of the child's removal, and it did not investigate relative's homes. Three months later, the child was transferred from foster care to his daycare provider's home, and the relatives were not notified. The record suggests that DHS and the daycare provider colluded to keep the relatives in the dark.



Seven months later, the grandparents filed to intervene, asked for placement and sought visitation. Court denied saying it would reconsider if there were a later modification of disposition. An aunt also intervened and asked for placement testifying that the mother shared with her an intention to relinquish and have the daycare provider adopt the child, and the mother did not want her parents to know.

After termination, the court denied the intervenors' requests for placement. Following TPR, there is no longer a familial preference for placement.

The failure by DHS to notify the relatives of the child's removal and subsequent change of placement was unreasonable, and disrupting the relatives participation in the child's life was not in her best interest.

Practice Point: Guardianship in DHS will be terminated when DHS acts unreasonably.

#### Interest of X.O. and J.O. (16-0313; 5-11-2016)

Children removed secondary to medical neglect of one child. Grandparents were not notified of removal, and children were placed 2.5 hours away in Des Moines. They remained in Des Moines since the child's medical providers were there. Mother asked to have her parents considered, and DHS turned them down because of their dogs and their failure to provide care while the children were with their mother. Grandparents' motion to intervene was granted.

At TPR, the State objected to evidence about placement with the grandparents since that issue was not before the court. Sustained. Grandparents moved to intervene, again, and have DHS removed as guardian. For some reason, hearing did not take place for many months. The motion was denied.

DHS must act reasonably, and the onus is on it to notify relatives of removal. Even if the relatives know of the removal, DHS must formally notify them. Here DHS acted unreasonably. In regards to placement, DHS acted reasonably since the grandparents had multiple animals and had not attended the sick child's medical appointments. However, DHS acted unreasonably after TPR in failing to involve and respond to the grandparents. However, again, the children are thriving and continued placement is in their best interest notwithstanding DHS's failures.

Practice Point: Guardianship in DHS may not be terminated when DHS acts unreasonably if the court concludes the child's best interest is being served.