

**INCARCERATED PARENT
CASE LAW UPDATE
2008-2017**

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Due Process & Other Constitutional Considerations

In the Interest of J.S., 470 N.W.2d 48, 52 (Iowa Ct. App. 1991).

In this appeal, the mother and father separately appeal the termination of their parental rights. In the father's appeal, he challenges the sufficiency of the evidence to support termination. At the time of the termination, he was incarcerated for assaulting the mother to keep her from testifying against him in his criminal case in which he assaulted her. He alleged he was deprived his due process because he was not allowed to attend the termination hearing due to his incarceration. The court cited a Court of Appeals case holding an incarcerated parent does not have the "absolute right to be physically present at judicial proceedings involving CINA adjudications." (citation omitted). As long as the parent receives notice of the petition, notice of the hearing, and opportunity to give a deposition to present as testimony at the hearing, due process will be satisfied. (citation omitted).

In the Interest of E.K., 568 N.W.2d 829 (Iowa Ct. App. 1997).

The father appeals the termination of his parental rights asserting his rights should not have been terminated because he was in prison. The Court of Appeals stated the time for parents to be able to assume care of their children should be "reasonably limited" to prevent intolerable hardship for the children. The children should not have to be harmed and time cannot be stopped while the parents try to find ways to fix their own problems and become responsible parents. As for reasonable efforts, the Court of Appeals found that he was incarcerated before the child was born and unavailable for services, which was not a failure of DHS.

In the Interest of S.J., 620 N.W.2d 522 (Iowa 2000).

The father of the child appeals from the termination of his parental rights on the grounds the department did not provide reasonable efforts toward reunification and insufficiency of the evidence to support termination. During the pendency of this case, the father was incarcerated on a drug charge and at the time of permanency he had eight months until he could resume care of S.J. The Court of Appeals held even though the father was incarcerated, which made it more difficult to provide services, the department still had the obligation to provide services that were *reasonable under the circumstances*, just as they would for any other case. The Court of Appeals laid out factors to be considered:

The age of the children, the bonding the children have or don't have with their parent, including any existing clinical or other recommendations concerning visitation, the nature of parenting deficiencies, the physical location of the child and the parent, the limitations of the place of confinement, the services available in the prison setting, the nature of the offense, and the length of the parents sentence.

As for the sufficiency of the evidence, the father argued that he complied with all case plans, was substance free, had previous parenting experience, and was getting engaged with parenting classes to address S.J.'s special needs. The court held these efforts came too late in the case. In addition,

the father still had approximately six to eight months to be in a position to assume care of S.J. Additionally, the Court of Appeals found the father's history of substance abuse was another factor to be considered, even though he had the intention to engage in treatment and become sober, the court held there is no guarantee that he will, which would cause unnecessary hardship to S.J.

In the Interest of G.P., 2006 Iowa App. LEXIS 576

The father was incarcerated in Oklahoma, at the termination pretrial conference, the father's attorney made a motion for the father to appear by telephone at the termination hearing. The juvenile court denied this motion. Father's attorney made a verbal motion to continue the hearing so the father could participate, which was overruled. Father's attorney also asked the record stay open so that the father could submit a deposition, which was also overruled. The father's parental rights were terminated under 232.116(1)(b). On appeal, the father argues he was not afforded due process because he was granted the opportunity to participate in the termination hearing. The Court of Appeals stated that due process does not require an incarcerated parent be able to participate by telephone. Additionally, he had the ability to submit a deposition before the termination hearing and it is not required by due process to delay the proceedings for a party to submit a deposition when the party had prior notice and opportunity to take said deposition and submit it to the court.

Due Process for a Parent in Prison: *In Re K.C. (Iowa Court of Appeals, March 26, 2009):* In this termination of parental rights (TPR) case, at the time of the termination hearing, the father—a seven-time convicted felon—was imprisoned in Illinois and was not expected to be released for several years. The father contended he was deprived of due process by the denial of his request to be personally present at the termination hearing. The Iowa Court of Appeals summarily rejected this claim:

This court has held: “Where a parent receives notice of the petition and hearing, is represented by counsel, counsel is present at the termination hearing, and the parent has an opportunity to present testimony by deposition, we cannot say the parent has been deprived of fundamental fairness.” (*citation omitted*) Accordingly, we reject the father's due process claim.

Refusal to Continue Hearing Due to Parent's Arrest: *In re: J.M. (Iowa Court of Appeals, May 12, 2010).* In this termination of parental rights case, the Iowa Court of Appeals held that it is proper for the juvenile court to deny a continuance requested by the parent because she was unable to attend the hearing because she had been arrested the night before the hearing:

The mother also contends the juvenile court abused its discretion in denying her motion for a continuance. The mother filed the motion for continuance when she was unable to attend the termination hearing as a result of a recent arrest. We review the juvenile court's denial of a motion to continue for abuse of discretion, and will only reverse if injustice will result to the party desiring the continuance and the denial was unreasonable under the circumstances. *See In re C.W.*, 554 N.W.2d 279, 281 (Iowa Ct. App. 1996).

There is no dispute that the mother was arrested the night before the termination hearing and remained in custody at the Polk County jail the morning of the hearing. She was also unable to be

transported to the hearing by Polk County jail staff due to concerns about her mental condition and state of mind. In addition, the juvenile court considered the mother's history of lack of cooperation with services and visitation, inconsistent communication with DHS service providers, and lack of progress toward reunification. The court has no obligation to grant a continuance because "children simply cannot wait for responsible parenting." *In re L.L.*, 459 N.W.2d 489, 495 (Iowa 1990). We find no abuse of discretion in the court's denial of the mother's motion for continuance.

Parent Has No Constitutional Right to Attend a TPR Hearing: *In re: A.S.*, (Iowa Court of Appeals, January 19, 2012): In this appeal in a termination of parental rights case (TPR) case, the Iowa Court of Appeals affirmed the termination and concluded that the incarcerated father's constitutional rights were not violated by no allowing him to attend the hearing:

The father mistakenly asserts rights granted to a criminal defendant in a criminal case apply in this civil termination. The father's asserted right to "face his accusers" seems to be an attempt to apply the confrontation clause in his case. The supreme court has already determined that the sixth amendment, which grants those accused in criminal proceedings the right to confront witnesses against them, applies only to criminal cases. *citation omitted*. A termination of parental rights is a civil case. *citation omitted*. Therefore, the father has no sixth amendment right to confront witnesses against him. Further, there is no due process requirement that an incarcerated parent be present at a termination trial, especially when the parent is represented by counsel at the trial and is not denied an opportunity to present testimony by deposition at the trial. *Id.* at 52 ("Where a parent receives notice of the petition and hearing, is represented by counsel, counsel is present at the termination hearing, and the parent has an opportunity to present testimony by deposition, we cannot say the parent has been deprived of fundamental fairness.").

But See: In re: A.M. (Iowa Court of Appeals, May 23, 2012).

In this appeal in a termination of parental rights case (TPR), the Iowa Court of Appeals reversed and remanded the termination and concluded that the judge abused his discretion in not granting a continuance. In this case, the mother had been arrested the day before the termination trial was to take place and was unable to attend the termination trial. The Court of Appeals recognized that it was the mother's own actions that led to her unavailability, but the limited amount of time continuance requested and the unexpectedness of the unavailability, the court should have granted the continuance.

Reasonable Efforts

Visitation While in Prison: *In the Interest of A.C. (Iowa Court of Appeals, February 13, 2008):* In a Child in Need of Assistance (CINA) action, a father of a child born in September of 2005 requested visitation with his child while the father was in prison. The Court of Appeals affirmed the trial court's denial of that motion for visitation.

Parents Cannot Use Incarceration as an Excuse: *In re: J.F. (Iowa Court of Appeals, May 29, 2009):* In affirming this termination of parental rights case, the Iowa Court of Appeals once again emphasized that a parent cannot excuse lack of contact with a child due to parental incarceration:

Although Barbara may have, as she asserts, “complied with services when she could and visited with her child as much as she was able to” until she was incarcerated, “[a]n incarcerated parent must take full responsibility for the conduct which has resulted in h[er] confinement.” *In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa Ct. App. 1994). Any services DHS could have provided to Barbara while she was in jail were limited due to her own actions that produced the situation.

Parent Cannot Complain of Barriers Created by Incarceration: *In re: A.D.B. (Iowa Court of Appeals, April 21, 2010):* In this Termination of Parental Right Case, the Iowa Court of Appeals stated that a parent must accept the responsibility for his inability to care for a child due to incarceration and deportation:

Javier was incarcerated and again facing deportation at the time of the termination hearing. Javier's incarceration was due to his own actions, resulting in his having virtually no contact with A.D.B. since March 2009. *Citation omitted.* He asserts he could care for A.D.B. once he was released and again deported, but his makeshift plans included returning to Mexico with A.D.B., with no evidence of a home, job, or any stability to offer A.D.B. While he claims he was offered no services, he could not fault DHS for being unable to provide services while he was either in Mexico or in prison.

Imprisonment May Limit the Reasonable Efforts Available: *In re: T.R. and M.R. (Iowa Court of Appeals, June 29, 2011):* In this appeal of a Termination of Parental Rights (TPR) case, the Iowa Court of Appeals held that father's incarceration limited the reasonable efforts required of the state:

“The services required to be supplied an incarcerated parent, as with any other parent, are only those that are reasonable under the circumstances.” *Citations Omitted.* The record made at the dispositional/termination hearing shows that the DHS sought and secured information for a social history, arranged requested paternity testing, and helped arrange the contacts Javon was able to have with the maternal great uncle who had A.T.-M.'s physical custody. The DHS provided all of the services that it could, given Javon's incarceration. We read the above-quoted language from the juvenile court's dispositional order as

simply recognizing that under the circumstances the DHS was unable to provide any services other than the several that it had provided. We affirm on this issue.

Parent Cannot Complain that Imprisonment Prevented Relationship with Child: *In re: N.S.W. and N.M.W. (Iowa Court of Appeals, September 19, 2012):* In this appeal of a Termination of Parental Rights (TPR) case, the Iowa Court of Appeals held a parent's incarceration may prevent a parent from developing the bond with a child necessary to prevent a TPR:

The father contends termination was not in the best interest of N.M.W. because he participated in aftercare services and consistently attended supervised visitation after his release from prison. He had less than three months to demonstrate that he was a suitable placement for N.M.W. after his release. However, this short period was the result of his own criminal actions and he has only visited with N.M.W. approximately ten times in her life because of his incarceration. Conviction of a crime resulting in incarceration does not invariably result in termination. *Citation Omitted.* However, G.G. cannot use his incarceration as a justification for his lack of a relationship with N.M.W.

Reasonable Efforts Requirement as Applied to Incarcerated Parents: *In re: T.J.L.R. and T.J.M. (Iowa Court of Appeals, January 9, 2013):* In this appeal of a Termination of Parental Rights (TPR) case, the Iowa Court of Appeals affirmed the termination, holding that the parent cannot complain about lack of contact with a child due to incarceration:

It is true that a parent's imprisonment does not excuse the DHS from the mandate that it make reasonable efforts toward reunification. *Citations Omitted.* But the DHS is only required to supply those services that are reasonable under the circumstances. *Citations Omitted.* The reasonableness of the services depends on the following non-exclusive list of factors: the child's age; the child's bond, if any, with the incarcerated parent; the limitations of the parent's confinement, and the nature and length of the sentence.

A Parent's Imprisonment Can Diminish the Amount of Services Available to be Offered: *In re: W.E. (Iowa Court of Appeals, June 11, 2014):* In this appeal affirming an order terminating parental rights (TPR), the Iowa Court of Appeals held that a parent's imprisonment may result in his unavailability to take advantage of services offered to prevent termination:

Ollie also argues he should have been provided more time because the evidence showed he "was turning his life around." There is evidence that Ollie was experiencing success while living at a shelter upon his release from jail. Ollie's limited, positive steps toward rehabilitation do not cure or eliminate his past conduct. . . While the father was not able to use many of the services because he was in custody pending the resolution of the domestic violence charge, he was required to demand other, different, or additional services prior to a permanency or termination hearing that could have been provided to him. . . While those services may have been too little too late, it does not change the fact that Ollie had the obligation to demand other, different, or additional services and failed to do so. *See In re M.T.*, 613 N.W.2d 690, 692 (Iowa Ct. App. 2000) ("The only service DHS

was able to offer [the father] during his incarceration was supervised visitation. [He] cannot fault DHS for being unable to provide him additional services when his own actions presented him from taking advantage of them.”).

Participation in Services by an Incarcerated Parent: *In re: K.M. and C.M. (Iowa Court of Appeals, June 25, 2014):* In this appeal of a termination of parental rights (TPR), the Iowa Court of Appeals affirmed the TPR, holding that even a parent in prison must request services in order to preserve a claim that the state failed to make reasonable efforts for reunification:

The father’s incarceration “was due to his own actions, and he cannot fault DHS for being unable to provide services while he is in prison.” *Citation Omitted.* In fact, the father never requested services while he was in prison. He has not obtained a sex offender evaluation or treatment.

A Parent Cannot Complain when Incarceration Prevents a Relationship: *In re: T.E., (Iowa Court of Appeals, August 13, 2014):* In this appeal affirming an order terminating parental rights (TPR), the Iowa Court of Appeals held that a parent cannot complain that the state prevented her from maintaining contact with her child during the parent’s incarceration:

Though she does not contest she has not maintained significant and meaningful contact with the child, she asserts she was unlawfully prevented from doing so. . . The mother’s inability to maintain contact with the child is due to her own lifestyle choices that have resulted in her incarceration. This kind of inability to maintain meaningful contact is no legal excuse for failing to do so. The requirements of section 232.116(1)(e) have been satisfied, and the juvenile court’s order was proper.

Reasonable Efforts Required Even for Incarcerated Parents: *In re: J.H., (Iowa Court of Appeals, September 17, 2014):* In this appeal affirming an order terminating parental rights (TPR), the Iowa Court of Appeals held that a parent’s incarceration does not remove the duty of DHS to make reasonable efforts:

On our de novo review, we are less sanguine about the department’s reunification efforts. The department social worker overseeing the case admitted she did nothing to facilitate reunification while the father was incarcerated. Her only reason for declining to afford services during these periods was that the agency was not requested to do so.

The department’s reasonable efforts obligation is not triggered by a request. Although a parent is required to seek new and different services if the original services are deemed inadequate, the department’s duty to work towards reunification of parent and child begins at the moment of removal and continues through termination, unless statutorily waived. (*Citations omitted*). While incarceration may render the provision of services more difficult, it does not absolve the department of the obligation to make reasonable reunification efforts. (*Citations omitted*). Notably, the obligation was a substantive requirement of both statutory grounds on which the district court relied in terminating the father’s

parental rights. (*Citations omitted*). For these reasons, the department could and should have tried to address the concerns that led to the removal of the child, even when the father was behind bars.

While the department shirked its responsibilities to the father during his periods of incarceration, we nonetheless conclude the agency minimally satisfied its statutory mandate by paying for a psychosocial evaluation and by facilitating the father's participation in a drug treatment program.

Father Cannot Complain with a Criminal No-Contact Order Preventing Visitation: *In re: F.K., (Iowa Court of Appeals, January 28, 2015)*: In this appeal of an order granting a Termination of Parental Rights (TPR) on a father, the Iowa Court of Appeals affirmed the TPR, holding that the fact that a criminal no-contact order prevented the father from demonstrating his ability to parent does not prohibit a TPR:

We recognize the father was unable to test his progress towards reunification because of the no-contact order. However, the mother had every right to seek an extension of the order and the criminal court had every right to extend it. *See* Iowa Code § 664A.8 (authorizing State or victim to file application for extension of no-contact order). The department was obligated to follow the order. *See* Iowa Code § 664A.3(4) (stating an order “requiring the defendant to have no contact with the alleged victim’s children shall prevail over any existing order which may be in conflict with the no-contact order.”). Accordingly, the department did not violate its reasonable efforts mandate by declining to facilitate visits between father and child. (*Citation Omitted*)

Nor was a juvenile court order granting the district court concurrent jurisdiction required as a prerequisite to the district court's extension of the no-contact order. While a party to a juvenile court action must obtain permission to concurrently litigate “custody, guardianship, or placement of a child,” no mention is made of criminal proceedings. *See* Iowa Code § 232.3(1). The no-contact order was issued in a criminal proceeding

In the Interests of C.W. and L.W. Reversed and Remanded (August 17, 2016)

A 19-year-old father appealed the termination of his parental rights with regard to his one and two-year old daughters. The Court of Appeals disagreed with the trial court's decision to waive reasonable efforts in the case, reversed the TPR, and held that the father should have six additional months to work toward reunification. The Court noted that the father had been a caretaker for the children even though they had not lived with him. Due to his incarceration and delays in paternity testing, however, he was not offered visits until around the time of the permanency hearing. The trial court addressed that issue by waiving the reasonable efforts, but the Court of Appeals concluded that the state did not meet its burden regarding waiver with regard to the father. The state's failure to provide services to the father undermined its argument that services would not have helped. The court pointed to signs of potential (stable housing, a deferred sentence, work, and even his developing adolescent brain), and held that an additional six months should be granted toward permanency.

In the Interests of K.M. Reversed and Remanded (August 17, 2016)

A mother appealed termination of her parental rights, arguing that her due process rights were violated when she was not allowed to participate by telephone in the permanency hearing, that reasonable efforts were not made, and that she should be allowed an additional 6 months to work toward reunification. With regard to the due process claim, the Court of Appeals reluctantly rejected it. She was allowed to testify via deposition. “Bound by precedent, we are obligated to conclude the mother received due process by presenting deposition testimony at the permanency hearing.” See *In re J.S.*, 470 N.W.2d 48, 52 (Iowa Ct. App. 1991) (holding the presentation of testimony by deposition is sufficient to meet due process requirements). The Court also ruled that the trial court’s unwillingness to allow the mother to remain on the phone for the later TPR hearing was also appropriate under Iowa Supreme Court precedent. The Court noted, however, that:

“Just because the process employed here was good enough does not make it right. We note that the due process requirements outlined in our prior cases are a floor, not a ceiling. Although the court was not required to permit the mother to remain on the telephone during the proceedings, we see ample reasons why an incarcerated parent should be permitted to do so. If a witness is providing untruthful or biased testimony about an interaction with the parent, it is the parent who is in the best position to recognize it. Hearing the evidence as it comes in—either in person or telephonically—provides a parent with the opportunity to confer with counsel and potentially offer points of rebuttal to that evidence. We see no reason for the denial of the mother’s participation in the termination hearing—nor was any articulated by the court. Certainly, the court must be allowed to run its own courtroom as it sees fit, and if the mother was disruptive during the proceedings, the court could have denied her continued participation. But where the mother was ordered to pay for the cost of her participation and no reason was shown to preclude her participation in the entire hearing, the better practice would have been to allow it. Just because a parent’s participation is not constitutionally required does not mean it should be denied without reason.”

In addition, the Court ruled that the mother was denied reasonable efforts when it denied her request for visitation at the prison. The Court explained that the social worker should have considered some or all of the following factors, among others, if applicable: the age of the children, the bonding the children have or do not have with their parent, including any existing clinical or other recommendations concerning visitation, the nature of parenting deficiencies, the physical location of the child and the parent, the limitations of the place of confinement, the services available in the prison setting, the nature of the offense, and the length of the parent’s sentence.

Because there was no real harm articulated by DHS to prevent visitation for the mother, the Court was unwilling to accept the social worker’s assertion that visits would not have been in the child’s best interests. The Court explained that Iowa Code section 232.107 states that “unless the court finds that substantial evidence exists to believe that reasonable visitation or supervised visitation would cause an imminent risk to the child’s life or health, the order shall allow the child’s parent reasonable visitation or supervised visitation with the child.” The juvenile court denied the mother’s request for visitation but made no such finding.

The Court of Appeals also reversed the trial court's denial of the parent's request for six additional months to work toward reunification. The Court explained: We recognize that in termination proceedings, time is typically "a critical element." C.B., 611 N.W.2d at 495. The legislature has established the amount of time the court must afford a parent before entertaining the termination of parental rights, see Iowa Code § 232.116(1), and we view termination proceedings with a sense of urgency once that time period has passed, see C.B., 611 N.W.2d at 495. However, "[t]ermination must only occur where more harm is likely to befall the child by staying with his or her parents than by being permanently separated from them." *In re H.H.*, 528 N.W.2d 675, 677 (Iowa Ct. App. 1995). We cannot yet say this is the case here.

Weighing the mother's participation in the DOC programs, her expected release from the correctional facility less than two weeks after the hearing, and the changes she planned to implement upon her release against the unknown—her ability to successfully abstain from using narcotics in order to provide safe and appropriate care for her child—we agree the mother should have been allowed an additional six months to prove she has made the necessary changes to reunite with the child. A good deal of prognostication is required in termination cases. While this court remains optimistic that the mother will hold true to her promise to make the changes necessary to reunite her with the child, we acknowledge that there are no guarantees of success.

It is important to note, however, that under the circumstances of this particular case, delaying permanency for six additional months will not result in any additional harm to the child. Here, the child was placed with the paternal grandmother after removal from the mother, has remained in the paternal grandmother's care throughout the pendency of the proceedings, and will likely be adopted by the paternal grandmother if the mother's parental rights are terminated. The child's life will not change by continuing that placement for six more months. If the mother is not successful in her bid to resume parenting of the child, the juvenile court can terminate her parental rights and the adoption may still occur. However, if the mother is successful, the statutory goal of preserving the family unit without further danger to the child will be achieved. See Iowa Code § 232.67

In re R.C., Reversed and Remanded (September 2016).

An incarcerated father sought appeal for the termination of his parental rights to his daughter R.C. He also asked the Court to defer permanency for six months. The father argued that DHS failed to make reasonable efforts to achieve reunification between him and his daughter. He further contended that permanency should be deferred for six months in order to give him the opportunity to reengage his daughter and the community. The Court of appeals reversed the TPR and remanded the case for further proceedings consistent with its rulings.

R.C., who was born in 2012, was initially removed from home and adjudicated a CINA because of substance abuse issues with both her parents. After R.C.'s mother relapsed continued to struggle with her substance abuse issue and relapsed, the father became the primary caregiver for R.C. Based on service providers' observations of R.S.'s interaction with her father, DHS believed the father had good parenting skills and that father and child were bonded. However, R.C. was found by a motorist unattended in her stroller in the street and the father was arrested for child endangerment and public intoxication as a result of this. In August 2015, the father received was sentenced to two two-year sentences to be served consecutively. At the TPR hearing, the DHS worker testified that DHS generally do not provide visits between incarnated parents and their

children when they are as young as R.C. The worker also testified that she did not bring R.S. to visit her father and neither did the FSRP worker. The father's only contact with R.C. involved monthly FSRP reports while he was incarcerated.

In satisfying the clear and convincing burden of proof in a TPR hearing, "the State must establish it made reasonable efforts to return the child to the child's home." Here, the Court of Appeals found that the State did not meet this reasonable efforts standard. The Court reasoned "DHS did not meet its obligation to document its consideration of providing R.C. visitation with Duane while he was incarcerated. The DHS worker offered only generalized testimony that 'a child that young' would not be provided visits with an incarcerated parent. 'The child's age alone does not justify denying visitation.'

With regards to the father's request for six additional months to achieve reunification, the Court reasoned that it "cannot yet say R.C. faces greater harm in delaying permanency than being permanently separated from her father. Under the circumstances of this case, we conclude the father should have been afforded an additional six months to attempt reunification." The court placed emphasis on the fact that even DHS social worker opined that the father was attentive when sober, and was a good father. Furthermore, he has established a strong bond with his daughter before his incarceration. He was only serving a relatively short sentence and had taken significant steps while incarcerated to address his substance abuse issues. Under these facts, according to the court TPR ought to be reversed and the father ought to be given an additional six months to try and achieve reunification.

In the Interest of L.M.: Reversed and Remanded (May 17, 2017)

The juvenile court approved an order to terminate the mother's parental rights. The mother claimed reasonable efforts for reunification were not made and requested a six month delay to "afford her the opportunity to be released from prison, complete the RCF program, and assume care of L.M." The State argued that because the mother was incarcerated, DHS was not capable of providing reunification services and rejection of the mother's proposal to delay permanency was correct given the mother's history of drug use and incarceration.

At the adjudication hearing, the mother's attorney requested that DHS attempt visitation between the mother and L.M. at the County jail where the mother was housed at the time. The court found that visitation in that setting was not likely appropriate but stated in the order that "[t]he parties shall be allowed visitation as arranged and approved by the DHS." Subsequently, the mother was transferred to prison. DHS continued to not offer visitation citing incarceration as the reason. Despite no indication the DHS considered offering the mother visitation in prison, the juvenile court found that DHS had made reasonable efforts toward reunification.

The court found the mother had made "remarkable progress" that justified a six month extension. See Iowa Code § 232.104(2)(b) (requiring enumeration of "specific factors, conditions, or expected behavioral changes which comprise the basis for the determination that the need for removal of the child from the child's home will no longer exist at the end of the additional six-month period").

Further, the court emphatically expressed “that a parent’s incarceration does not absolve DHS of its duty to provide reunification services, included visitation if reasonable.” *See, e.g. In re S.J.*, 620 N.W.2d 522, 525 (Iowa Ct. App. 2000). DHS failed to make a record concerning the reasonableness of facilitating visitation or other contact between L.M. and the mother while the mother was incarcerated. *See id.* The issue of prison visitation had not been broached and the “State did nothing to actually investigate the jail’s policies or to follow up on the mother’s request in any other manner.” (See below for Supreme Court’s decision vacating this decision by the Court of Appeals).

In the Interest of K.W.: Affirmed (August 16, 2017)

Father appeals TPR on grounds that DHS did not make reasonable efforts toward reunification. The appellate court affirmed the juvenile court’s finding that reasonable efforts were made despite denying visitation to the father while incarcerated. DHS denied visitation due to a number of factors including: the child’s young age, the complete lack of a bond between the father and his child (father had been incarcerated since before the child was born), the father’s lack of experience in parenting young children, the great physical distance between the child’s foster home and the prison, the prison’s visiting room not being conducive to holding visits with very young children, the father’s drug-related offenses, and the tentative discharge date being April 2020.

In the Interest of L.M., 904 N.W.2d 835 (Decision of the Court of Appeals Vacated, District Court Affirmed (December 8, 2017):

The guardian ad litem of the minor child sought further review of a court of appeals decision reversing the termination of the mother’s parental rights. The court of appeals had reversed the order that IDHS failed to prove it made reasonable efforts to reunite the incarcerated mother with her child.

L.M. was born on December 28, 2015. She tested positive to methamphetamine, amphetamine, and benzodiazepines. She was removed from her mother’s care, had an initial visit with her mother, and then after that visitation ceased while the mother was in jail and later prison. Given the mother’s continued incarceration, the court ordered the State to file a TPR petition at the permanency hearing, and the district court ultimately terminated the mother’s rights. The court of appeals reversed the termination, concluding that DHS had failed to over reunification services-specifically visitation-without establishing that visits would have been inappropriate or infeasible. Given her progress while incarcerated, the court of appeals reasoned that the mother should be given a six month extension.

The Iowa Supreme Court vacated the court of appeals decision, noting that even though DHS must make reasonable efforts towards reunification, parents have a responsibility to object when they claim the nature and extent of services is inadequate. *See in re C.B.*, 611 N.W.2d 489, 493-94 (Iowa 2000). As a result, the Court concluded that her objection at the termination hearing came too late. The district court set visitation at DHS discretion, and the mother’s counsel never objected to the failure of DHS to provide visits. The lack of objection was probably the reason that the record is devoid of any evidence informing the court about whether there were appropriate facilities for visits at ICIW.

Justice Cady and Wiggins dissented. Justice Cady’s dissent explained that ground (h) (adjudicated CINA, removed for at least six months, and cannot be returned to the parent’s custody at the

present time) should not be applied to incarcerated parents because it was designed to apply to parents who fail to respond to reasonable efforts by the IDHS. In the present case, the mother's incarceration made it difficult to provide services- and if the state is going to terminate due to a failure to achieve reunification during a particular time, it should be required to provide services to the parent. A parent must alert the department of the inadequacy of services, but the department must first provide services.

Justice Cady noted that (j) (which was also alleged), permits termination based on a lengthy expected incarceration (5 years)- and given that, at the time of termination, no one expected the mother to be incarcerated for that length of time, it was inapplicable too.

Best Interests

Best Interests of Children Even Though Parents are in Custody: *In the Interest of D.G.-M. and M.M. (Iowa Court of Appeals, November 29, 2007);* After a permanency hearing, the trial court ordered the filing of a Termination of Parental Rights (TPR) petition. At the time of the TPR hearing (March, 2007), both parents were in prison. The mother's first parole hearing was scheduled for the Fall of 2007 and father would not be eligible for parole until July 2009. Both parents would be deported to Mexico upon their release from prison. The trial court dismissed the TPR petition, finding that, while the statutory grounds for termination had been established, termination was not in the best interests of the children. The Court of Appeals affirmed:

Upon our de novo review, we find that there is nothing in the record, beyond her present incarceration for her involvement in the sale of drugs to the undercover police officer, to suggest that Maria would provide anything less than appropriate care for her children. The evidence shows that Maria may be released from prison in the near future and that she has already arranged an adequate place for her children once she is released. We also find nothing in the record to suggest that termination of either father's parental rights would be necessary if Maria was able to resume care for her children. . . . The evidence suggests that the children are thriving in their relatives' care while they wait for the parents' release from prison. Because of the excellent care they are receiving from relatives, the strong bond between the mother and her children, and the fact that both children will remain under the supervision of the juvenile court and DHS through the CINA proceedings, we agree the mere lapse of the time set forth in the statutory grounds for termination does not mandate that termination is in the best interests of these children at this time.

In the Interest of C.C. Affirmed (March 9, 2016)

Father appeals a termination of his parental rights to his child. He contends that the termination is not in the best interest of the child. He argues that since he is presently incarcerated and cannot take custody of the child that he should be given more time to complete his treatment programs. The court reminds us that children do not come with "pause buttons." Time is the most critical component of these cases and the rights and needs of the child must be more important than needs of the parents. The child should not have to wait to see if the father can beat his drug habit, after waiting an entire year already. Moreover, the child would have to wait until the end of 2016 to

have a clear idea of where he would be, which the father agreed would not be best. Order was affirmed

Abandonment and Desertion

Incarceration and Abandonment: *In Interest of K.D.J. (Iowa Court of Appeals, June 13, 2007).* This case involved a termination of parental rights (TPR) based on the grounds of abandonment. The Iowa Court of Appeals addressed the issue of the effect of imprisonment on the claim of abandonment:

The record also indicates M.M.-J. has been incarcerated for a substantial period of time while this case was pending in juvenile court. She, however, cannot use her incarceration as an excuse for her failure to establish and maintain a relationship with her children. (*Citations omitted*) Based on this evidence, the juvenile court found: ‘These children have been abandoned by their respective parents as evidenced by the parents’ lack of motivation/interest in assuming a parental role by failing to involve themselves in services and visitations, failing to provide any emotional or financial support, and continued involvement in criminal activities, resulting in ongoing incarcerations.’ We agree and adopt the juvenile court’s findings of fact and conclusions of law as our own. Moreover, we expressly reject M.M.-J.’s claim that her request for placement in the Woman and Children’s Program so that she could reside with the children during treatment is conclusive proof she did not intend to abandon her children. M.M.-J.’s requested placement falls short of the affirmative parenting contemplated by section 232.116(1)(e)(3).

Imprisonment May Constitute Abandonment: *In re: B.W.G., N.J.G. and T.W.G. (Iowa Court of Appeals, May 29, 2009):* In this termination of parental rights (TPR) case, the father argued, among other things, that he did not abandon his children just because he was sentenced to a total of 97 years in prison, with some of the sentences to run concurrently resulting in a sentence of a maximum 65 years in prison. The Court ruled that this may qualify as abandonment:

However, upon our de novo review of the record, we conclude there was clear and convincing evidence to find that Richard abandoned the children. *See In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993) (stating that a parent “cannot use his incarceration as a justification for his lack of relationship with the child”); *In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa Ct. App. 1994) (discussing that a parent must take full responsibility for conduct that resulted in his incarceration).

The father also argued that, while his direct appeal was unsuccessful, there is still a possibility of success in other post-conviction actions. The Iowa Court of Appeals disagreed:

Regardless, we view Richard’s arguments as unconvincing. His convictions were upheld on direct appeal and if we would allow him to exhaust all avenues of postconviction relief prior to termination, the ensuing litigation could be protracted for many years. The children’s best interests outweigh waiting for years for Richard to pursue further litigation.

Imprisonment May Constitute Desertion: *In re: C.G. (Iowa Court of Appeals, October 6, 2010):* In this appeal of a Termination of Parental Rights (TPR) case, the Iowa Court of Appeals held that father's unavailability to the child due to incarceration can constitute desertion:

The child was born in July 2009. The father was incarcerated in September 2009 and remained incarcerated through the termination hearing in May 2010. Although he was aware he had a child and testified he visited him and voluntarily paid child support prior to his imprisonment, he acknowledged he had no contact with the child after his confinement. Based on this record, we conclude the father deserted the child within the meaning of Iowa Code section 232.116(1)(b).

Imprisonment May Constitute Desertion: *In re: T.R. and M.R. (Iowa Court of Appeals, June 29, 2011):* In this appeal of a Termination of Parental Rights (TPR) case, the Iowa Court of Appeals held that father's unavailability to the child due to incarceration can constitute abandonment:

At the time of trial, Thomas had not been a significant part of T.R. and M.R.'s lives in nearly two years. *See In re C.A.V.*, 787 N.W.2d 96, 101 (Iowa Ct. App. 2010) (explaining that minimum contact, including extended periods of time without inquiry from a parent, has been deemed to constitute abandonment). He acknowledged that since August 2008, he has spent most of his time in jail, substance abuse treatment, or prison, and his children have not been central to his life. Under our case law, a parent "cannot use his incarceration as a justification for his lack of relationship with the child." *Id.* Thomas made a conscious choice to engage in criminal activities, resulting in his multiple convictions and incarcerations, and by failing to maintain meaningful communication and association with the children, he relinquished his parental rights and privileges.

Imprisonment May Limit the Reasonable Efforts Available: *In re: T.R. and M.R. (Iowa Court of Appeals, June 29, 2011):* In this appeal of a Termination of Parental Rights (TPR) case, the Iowa Court of Appeals held that father's incarceration limited the reasonable efforts required of the state:

"The services required to be supplied an incarcerated parent, as with any other parent, are only those that are reasonable under the circumstances." *Citations Omitted.* The record made at the dispositional/termination hearing shows that the DHS sought and secured information for a social history, arranged requested paternity testing, and helped arrange the contacts Javon was able to have with the maternal great uncle who had A.T.-M.'s physical custody. The DHS provided all of the services that it could, given Javon's incarceration. We read the above-quoted language from the juvenile court's dispositional order as simply recognizing that under the circumstances the DHS was unable to provide any services other than the several that it had provided. We affirm on this issue.

Incarceration Makes a Parent Unavailable and Leads to TPR: *In re: T.S. and B.R. (Iowa Court of Appeals, March 13, 2013):* In this appeal of a trial court's order terminating two fathers' parental rights, the Court of Appeals found that a parent's incarceration does not excuse a parent's inability to be available to the child:

The juvenile court correctly determined that T.S. was younger than three years of age, had been adjudicated a CINA, was out of the home for more than six months, and could not be placed in his father's care. Leondo was incarcerated at the time of the termination hearing and was not presently able to care for his son. Incarceration does not justify an inability to carry on the duties of parenting.

Termination

Termination While Father is in Prison: *In the Interest of T.L.* (Iowa Court of Appeals, February 13, 2008): An imprisoned father conceded that there was clear and convincing evidence proving grounds for termination of his parental rights, but contended that termination was not in his child's best interests. The Court of Appeals affirmed the termination:

The father is incarcerated on six counts of forgery, one count of second-degree theft, and two counts of second-degree robbery. He has been imprisoned throughout the child's life and it is unlikely he will be released from prison in the next five years. He has no relationship with the child. The father is essentially asking for the child to wait until he is released from prison and establishes a relationship with her to be able to assume parenting responsibilities. Children should not be forced to endlessly await the maturity of a natural parent. (*citation omitted*) At some point, the rights and needs of the child rise above the rights and needs of the parent. (*citation omitted*)

TPR on Parent in Prison for Life: *In re: O.M.F.* (Iowa Court of Appeals, September 2, 2009): In this private action for termination of parental rights under Iowa Code Chapter 600A (where a step-parent adoption was the intent), the Court was faced with the claim by a father serving a lifetime prison sentence that he did not evidence intent to abandon his child but that his divorce decree and imprisonment prohibited his visitation of the child. The trial court and the Iowa Court of Appeals disagreed:

The imprisonment for life and the contents of the dissolution decree each directly emanate from Richard's horrific conduct and choices. Richard chose to leave the child the evening of the brutal murder of a young woman. That conduct destroyed the family unit, not, as Richard contends, Jeanette's conduct in isolating the child from him. It was this violent behavior that placed him in the position that now threatens to totally absent him from his child's life.

It has long been our rule that an imprisoned parent must assume full responsibility for the conduct that has resulted in his estrangement and imprisonment. *In re J.S.*, 470 N.W.2d 48, 51 (Iowa Ct. App. 1991). Unavailability to parent, by one incarcerated, is no excuse for his conduct or failure to parent. *In re J.L.W.*, 523 N.W.2d 622, 624 (Iowa Ct. App. 1994). Each of these tenets are exacerbated by the fact that Richard is imprisoned for his lifetime and a generous portion of his child's lifetime.

We conclude that Jeanette has shown by clear and convincing evidence that Richard has abandoned his child within the meaning of section 600A.8(3)(b). He has not maintained “substantial and continuous or repeated contact with the child.” *See* Iowa Code § 600A.8(3)(b). Richard’s conduct shows his intent to forego his parental rights. We affirm the finding of abandonment under section 600A.8(3)(b).

We also find termination of Richard’s parental rights is in the child’s best interests. *See R.K.B.*, 572 N.W.2d at 601 (stating we look to a child’s long-range, as well as immediate, interests). The primary consideration in termination cases is the best interests of the child. *In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000). A child deserves the stability and security of a home with parental presence. *In re C.K.*, 558 N.W.2d 170, 175 (Iowa 1997). The termination of Richard’s parental rights are in the child’s best interests under all these circumstances.

The Standard for TPR for an Incarcerated Parent. *In re: M.M., M.G. and M.M. (Iowa Court of Appeals, March 10, 2010):* In this case, the father was in prison and claimed that he was doing as much as he could to develop a relationship with his child, but was unable to do so because of his incarceration. The Iowa Court of Appeals had little sympathy for his position:

Although termination is not a necessary result of conviction of a crime and resulting imprisonment, the father cannot use his incarceration as a justification for his lack of relationship with the child. *In re M.M.S.*, 502 N.W.2d 4, 8 (Iowa 1993). This is especially true when the incarceration results from a lifestyle that is chosen in preference to, and at the expense of, a relationship with a child. *Id.* The father’s own actions produced this situation. *See In re J.S.*, 470 N.W.2d 48, 51 (Iowa Ct. App. 1991).

Imprisonment May Support TPR: *In re: C.P., S.P., and C.R. (Iowa Court of Appeals, July 25, 2012):*): In this appeal of a Termination of Parental Rights (TPR) case, the Iowa Court of Appeals held a parent’s incarceration may support TPR:

Conviction of a crime resulting in incarceration does not invariably result in termination. (*Citation omitted.*) However, “[w]e do not gamble with the children’s future by asking them to continuously wait for a stable biological parent, particularly at such tender ages.” . . . R.P. asserts that termination is not in the best interests of her children because she is actively engaged in multiple services while incarcerated and placement with a relative is anticipated. However, R.P. is serving a fifteen-year sentence. Her tentative discharge date is in 2018. In that year, C.P. and S.P. will no longer be minors, and C.R. will have entered his teens. As the juvenile court aptly observed, “these children need to know where they are going to grow up and they need to be part of a family that will help them do so without the possibility of disruption.”

Incarcerated Parent Must Suffer the Consequences that May be TPR: *In re: C.M. and K.M.* (Iowa Court of Appeals, December 12, 2012): In this appeal of a Termination of Parental Rights (TPR) case, the Iowa Court of Appeals held that a parent’s incarceration which limited contact with the children, can result in termination:

Prior to the termination hearing, the paternal grandparents had taken the children to visit the father in prison approximately ten times. At the time the juvenile court ordered termination, the father had still never completed a substance abuse treatment program. A parent must take personal responsibility for the circumstances leading to incarceration and resulting in their inability to parent. (*citation omitted*) “Insight for the determination of the child[ren]’s long-range best interests can be gleaned from ‘evidence of the parent’s past performance for that performance may be indicative of the quality of the future care that parent is capable of providing.’” (*citation omitted*) In light of the father’s limited contact with the children, significant substance abuse issues, and current incarceration, we find it is in the children’s best interest to terminate the father’s parental rights.

Parent’s Residence in a Correctional Halfway House May Lead to TPR: *In re: Z.F.* (Iowa Court of Appeals, April 10, 2013): In this appeal of a trial court’s ruling granting a Termination of Parental Rights (TPR), the Iowa Court of Appeals held that the parent’s incarceration in a halfway house prevented sufficient contact with the child and supported TPR:

We agree a six-month extension was not warranted. While the child enjoyed the company of her father during the thirteen visits that preceded his incarceration, the relationship could not progress beyond supervised visits as long as the father remained in a halfway house. After that point, there was no guarantee he would be allowed to have any further contact with her.

A Parent’s Incarceration in a Half-Way House Can Still Lead to TPR: *In re: J.H. and S.H.* (Iowa Court of Appeals, November 6, 2013): In this appeal of a ruling terminating parental rights (TPR), the Iowa Court of Appeals affirmed the termination finding that the recent release from prison and location at a half-way house did not support return to the parent, but supported TPR:

Insight for that determination is gained from evidence of the parents’ past performance, for that performance may indicate the quality of future care the parent is capable of providing. *Citation omitted.* By the time of the second day of the termination hearing, the father had been out of prison for about ten weeks. He did not have steady employment or income. He had not moved from the halfway house to a residence where the children could live with him. Considering the factors in section 232.116(2), we conclude termination of the father’s parental rights is in the children’s best interests. We affirm the order terminating the father’s parental rights.

Parent’s History of Criminal Activity Supports TPR: *In re: K.C., (Iowa Court of Appeals, November 20, 2013):* In this appeal of an order terminating parental rights, the Iowa Court of Appeals affirmed the TPR finding that father’s history of criminal activity supports a finding that the child cannot be safely returned to the father:

Although it appears the father loves the child, he was unable to distance himself from criminal activity to act as her father. The father has a significant history with methamphetamine, and though he denies using the drug, he admitted he sold precursors to manufacturers of the illegal drug. We must agree with the Indiana home study’s finding that the father’s extensive criminal history “would lead a reasonable person to believe that his behaviors could pose a significant safety risk to a child.” Further, given the father was in jail at the time of the termination trial, there was no evidence the child could be returned to his care at that time. Permanency for this child should not be deferred until the father reestablishes himself as a law-abiding citizen. Under the circumstances presented, we find the State proved by clear and convincing evidence the child could not be safely returned to the father’s care at the time of the termination hearing.

Incarceration of a Parent May Lead to TPR: *In re: G.N., S.N. and B.B., (Iowa Court of Appeals, December 18, 2013):* In this appeal of an order terminating parental rights (TPR), the Iowa Court of Appeals affirmed the TPR, agreeing that the father’s incarceration prevented meaningful contact with the child:

The father argues he has made an effort to resume care of his children, thus meeting the affirmative duty imposed by Iowa Code section 232.116(1)(e). We acknowledge the father did request a continuance for additional time to establish a home for the children and took some parenting classes while incarcerated. He also sent some cards to the children on their birthdays and holidays. However, the father went the entire time of his incarceration without seeing his children due to his inability to arrange transportation of the children. Unfortunately, at his first visit after his release, his children did not recognize him. The father did not offer any evidence at the proceedings he had provided financial support for his children while he was incarcerated, and the juvenile court determined it could “reasonably infer” he had not done so. In light of the father’s lifestyle leading to incarceration, we cannot say the father maintained “significant and meaningful” contact with his children. *See* Iowa Code § 232.116(1)(e)(3) (“[S]ignificant and meaningful contact’ includes but is not limited to the affirmative assumption by the parents of the duties encompassed by the role of being a parent. This affirmative duty, in addition to financial obligations, requires continued interest in the child, a genuine effort to complete the responsibilities prescribed in the case permanency plan, a genuine effort to maintain communication with the child, and requires that the parents establish and maintain a place of importance in the child’s life.”) Furthermore, the father cannot use his incarceration as an excuse for his lack of relationship with his children.

A Parent Cannot Complain of TPR When His Absence was Due to Incarceration: *In re: A.H.*, (Iowa Court of Appeals, January 28, 2015): In this appeal of an order granting a Termination of Parental Rights (TPR), the Iowa Court of Appeals affirmed the TPR, holding that a parent cannot complain when his inability to assume his parental duties is due to his incarceration:

The father's scant contact with the child during most of her life indicates he has little interest in ministering to the physical, mental, and emotional needs of the child. The father suggests his involvement with the child will improve once he is released from incarceration. However, he "cannot use his incarceration as a justification for his lack of relationship with the child. This is especially true when the incarceration results from a lifestyle that is chosen in preference to, and at the expense of, a relationship with [the] child."

In the Interest of R.T., Reversed and Remanded (September 13, 2017)

A father appealed a district court decision terminating his rights under 232.116(1)(i). The father did not challenge the first two prongs of the termination ground- but he argued that the state failed to prove that "the offer or receipt of services would not correct the conditions which led to the abuse or neglect of the child within a reasonable period of time." The father had been incarcerated for the majority of the proceedings, but had asked for visitation at the prison and the state's response was to unsuccessfully petition for waiver of reasonable efforts. The social worker never did the required analysis under *In re S.J.* to determine whether visitation was appropriate- she simply relied on her assumption that "[i]t's... a prison, you know, with criminals, and I just don't think that's a good environment for a little boy." Given the lack of services provided, and the other concerns- like poor nutrition choices and resulting dental problems, were not problems that could not be addressed, the court of appeals reversed the termination. The court explained, in a footnote, that the district court had also declined to terminate under 232.116(1)(h) because the child turned four before the termination hearing. That ground would have only required that the child could not be returned at the time of the hearing, which the father would have conceded.