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990104

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

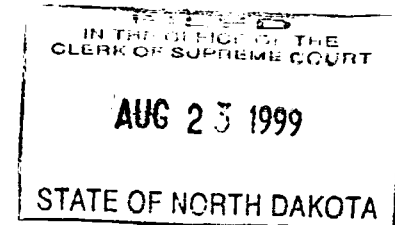
Constance L. Cleveland,

Petitioner, Appellee,

vs.

Director, Cass County Social Services,
R.G., F.B., D.F.G., E.K.B., and Steve
Mottinger, Guardian ad Litem,

Respondents, Appellants.



Supreme Court No. 990104
District Court No J98-399

BRIEF OF APPELLEE

APPEAL FROM JUDGEMENT TERMINATING PARENTAL RIGHTS
Entered in the East Central Judicial District, Judge Norman Backes

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NORTH DAKOTA CENTURY CODE

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STATEMENT OF ISSUE

- I. WHETHER THE PETITIONER HAS PROVEN TERMINATION OF R.G.'S PARENTAL RIGHTS IS JUSTIFIED UNDER N.D.C.C. 27-20-44?

STATEMENT OF THE CASE

D.G. and E.K.B. are the children of R.G. R.G. had been the primary parent for the children and neither father had participated in the parenting of these children. At the time of the Petition for Termination which resulted in this appeal, the father of D.G. was deceased.

R.G. had lived a rather chaotic life, including frequent moves, many jobs, several hospitalizations as a result of chemical dependency and mental health issues.(Transcript Volume I, pg.24) This chaotic lifestyle resulted in numerous placements in foster care for her children.(T. Vol.I, pg.25 and Pg.95)

In April of 1996, R.G. requested that her children be placed in foster care as she wished to seek treatment for bipolar manic depression and a history of chemical dependency.(T. Vol. I, pg.24) A petition for deprivation was filed, and in July of 1996, the children D.G. and E.K.B. were adjudicated deprived by the Juvenile Court, and placed in care of Cass County for a period of six months.

At that point, a treatment plan for reunification of the family was developed, which identified four general goals: 1) Maintain sobriety, 2) Maintain medication compliance, 3) Maintain treatment for mental health issues, and 4) Gain stability.(T. Vol. I. pg.26) R.G. did not meet these goals. During the months following the placement of D.G. and E.K.B. in foster care, R.G. repeatedly initiated programs and services to address her chemical dependency and mental health issues, but failed to successfully address either.

On August 5, 1998, a petition to terminate parental rights, supported by an affidavit of Roger

Flynn, was filed with the District Court. An arraignment was held on September 9, 1998, and the petition was denied.

Trial on the denied petition was commenced before Juvenile Referee John Dietz on November 19, 1998, and continued on November 20, 1998. On the second day of trial, the Court stayed the proceedings at the request of Wendy Helgemo, attorney for the Mille Lacs Band of Ojibwe Indians, as they had failed to appear for the trial, but desired time to prepare and appear with regard to the child E.K.B., a child subject to the Indian Child Welfare Act.(T. Vol. I, pg.191)

Trial resumed on March 5, 1999, before District Court Judge Norman Backes, due to the health issues of Referee Dietz. No objection to the substitution of fact finder was made by any party. Judge Backes noted that he had read the "entire transcript" before commencing this portion of the trial. (T. Vol. II, pg.4)

Present at the outset of the second portion of the trial was F.B., E.K.B.'s father, as well as representatives of the Mille Lacs Band of Ojibwe Indians. Before proceeding with the evidentiary portion of the trial, Wendy Helgemo, attorney for the Mille Lacs Band of Ojibwe Indians, requested that the Court rule on the Tribes motion for transfer of jurisdiction of the case involving E.K.B. (T. Vol. II, pg.6) No objections were made by any party, and the Court granted the request to transfer the case to tribal court, pursuant to the Indian Child Welfare Act.(T. Vol. II, pg.9)

After this requested was granted, Ms. Helgemo, representatives of the tribe, F.B. (E.K.B.'s father) and F.B.'s counsel left the courtroom, and did not participate in any of the remaining proceedings.(T. Vol. II, pg. 10)

The trial continued, then focusing on D.G. and his only living parent, R.G.

During both phases of the trial, the evidence produced by the Petitioner established that R.G.

had a dual diagnosis of chemical dependency and mental illness, that she repeatedly failed to seek or complete treatment for these issues, and that, left untreated, she was unable to meet the needs of her child. Additionally, evidence was introduced that D.G. suffered because of his mother's lifestyle and choices, and in order to address D.G.'s mental health issues, he needed stability and continuity that his mother could not provide.

At the conclusion of all evidence on March 22, 1999, Judge Backes terminated R.G.'s parental rights with regard to D.G.

R.G. filed this appeal.

STATEMENT OF THE FACTS

D.G. is the son of R.G. At the time of the Petition for Termination which resulted in this appeal, the father of D.G. was deceased.

R.G. had lived a rather chaotic life, including frequent moves, many jobs, several hospitalizations as a result of chemical dependency and mental health issues.(Transcript Volume I, pg.24) This chaotic lifestyle resulted in numerous placements in foster care for D.G.(T. Vol.I, pg.25 and Pg.95)

In April of 1996, R.G. requested that her children be placed in foster care as she wished to seek treatment for bipolar manic depression and a history of chemical dependency.(T. Vol. I, pg.24) A petition for deprivation was filed, and in July of 1996, the child D.G. was adjudicated deprived by the Juvenile Court, and placed in care of Cass County for a period of six months.

At that point, a treatment plan for reunification of the family was developed, which identified four general goals: 1) Maintain sobriety, 2) Maintain medication compliance, 3) Maintain treatment for mental health issues, and 4) Gain stability.(T. Vol. I, pg.26) R.G. did not meet these goals. During the months following the placement of D.G. in foster care, R.G. repeatedly initiated programs and services to address her chemical dependency and mental health issues, but failed to successfully address either.

During both phases of the trial, the evidence produced by the Petitioner established that R.G. had a dual diagnosis of chemical dependency and mental illness, that she repeatedly failed to seek

or complete treatment for these issues, and that, left untreated, she was unable to meet the needs of her child. Additionally, evidence was introduced that D.G. suffered because of his mother's lifestyle and choices, and in order to address D.G.'s mental health issues, he needed stability and continuity that his mother could not provide.

Roger Flynn, M.S.W., testified that R.G. stated at the time of the initial placement that she "needed to get her act together and wanted treatment for bipolar manic depression and ... chemical dependency."(T. Vol. I, pg.24)

Mr. Flynn testified that R.G. did not meet the goals originally set, as R.G. continued to drink and was resistant to treatment suggestions, and further that visitation was not "real consistent".(T. Vol. I, pg.27) By June of 1997, R.G. had dropped out of all services. (T. Vol. I, pg.28)

As a result of the lack of movement toward reunification of the family, Mr. Flynn referred R.G. to the Partnership Program, which was "a more complete package of services"(T. Vol. I, pg.29). Mr. Flynn also referred R.G. for Intensive in-home services.(T. Vol. I, pg.31) On August 5, 1997, R.G. signed a service contract with the Partnership Program, but by August 28, 1997, R.G. had quit that program.(T. Vol. I, pg.32)

Nancy Pillen of the Partnership Project testified that while chemical dependency was the main issue, R.G. was not working to resolve this long term problem and its causes, but she rather hid out from her friends to stay sober.(T. Vol. I, pg.111)

Because R.G. was so resistant to the suggestions of Social Services to modify behaviors and make life changes to provide for long term stability her child, R.G. was asked to draft a treatment plan to take the place of the suggestions of the agency, to specify what steps she would take to provide stability and safety for her children.(T.Vol. I, pg. 32) In response, R.G. sent a letter setting

out her plans, which included the same goals identified in the previous plans, including that she would not drink, and she would sever ties with her abusive boyfriend.

Mr. Flynn testified that by January of 1998, R.G. had made no significant progress, and in fact was again commencing on another treatment plan, as she had just returned from the North Dakota State Hospital.(T. Vol. I, pg.44)

By May of 1998, R.G. had begun drinking again, lost her housing and again dropped out of treatment.(T. Vol. I, pg.46) Mr. Flynn told R.G. that he was seeking termination of parental rights and noted that there had been foster care on and off for the child “for as many years as D., is old, that is twelve years”,(T. Vol. I, pg.48)and that R.G.’s lack of predictability...is very destructive to children.(T. Vol. I, pg.49)

Flynn testified that services had been exhausted (T. Vol. I, pg.79), but that R.G. was unable to maintain stable housing, or stability with regard to mental health and chemical dependency issues.(T. Vol. I, pg.81)

These facts were echoed, and expounded upon by numerous other witnesses.

Barb Hilber, a licensed addiction counselor with the North Dakota State Hospital, testified that she had worked with R.G. in November and December of 1997, when R.G. sought help for chemical dependency.(T. Vol. I, pg.34) Ms. Hilber testified that R.G. met all seven criteria of the DSM-IV to have a dependency diagnosis.(T. Vol. I, pg.37)

Marsha Paulson, the director of the YWCA shelter testified that R.G. was a resident of the YWCA facilities on four occasions, two of which occurred during the time D.G. was in foster care.(T. Vol. I, pg.65)

Ms. Paulson testified that R.G.’s primary goal has been to deal with chemical usage (T. Vol.

I, pg.67), and that both of the stays during the pendency of D.G.'s foster care ended due to eviction for rule violations by R.G.(T. Vol. I, pg.66)

Dr. Elizabeth Faust, Psychiatrist with Southeast Human Services, testified that in April of 1996, she had evaluated R.G. and diagnosed R.G. with Bipolar Affect Disorder, Type II and Alcohol Dependence, Chronic, Severe.(T. Vol. I, pg.135)

Dr. Faust then provided a chronology of recommended treatment, initial follow-through by R.G., and inevitable discontinuation of numerous programs that spanned from April of 1996 to July 1998. Dr. Faust testified that after the initial consultation and assessment in April of 1996, R.G. began treatment, but then discontinued that treatment.(T. Vol. I, pg.135) After an interim D.U.I., R.G. initiated contact in July of 1996, but failed to show up for her appointment in August of 1996.(T. Vol. I, pg.136) In December of 1996, R.G. began medications again, but failed to maintain her appointment in January of 1997. R.G. restarted medication in May of 1997. In June of 1997, different medication was prescribed, as R.G. was not taking the medication previously prescribed. By September of 1997, R.G. was doing well, taking medications, and by October of 1997, R.G. again failed to maintain her appointment with Dr. Faust.(T. Vol. I, pg.137)

In November of 1997, R.G. was hospitalized and ultimately committed to the North Dakota State Hospital due to an overdose of the medication prescribed by Dr. Faust.(T. Vol. I, pg.138) Upon her release from the State Hospital in February of 1998, R.G. was doing well on medications. This continued to April of 1998, though Dr. Faust noted that by that time R.G. had discontinued an abuse and left treatment. By July of 1998, R.G. again failed to show for appointments.(T. Vol. I, pg.138)

Based upon the history provided by R.G., Dr. Faust noted that R.G. had been through thirteen prior chemical dependency treatment experiences.(T. Vol. I, pg.140) Dr. Faust noted that

left untreated, Bi-polar Disorder can worsen in cycling frequency and severity.(T. Vol. I. pg.152)

Dr. Faust noted that R.G. could not be appropriate as a parent because neither the mental health issues or chemical dependency was under control and they exacerbate one another.(T. Vol. I, pg.155) As such, Dr. Faust testified that she didn't believe R.G. was fit to parent, based upon the fact that both illnesses were illnesses that affect judgment, emotional regulation, decision making and behavior.(T. Vol. I, pg.141) In Dr. Faust's opinion, the prognosis for change in R.G. was "guarded"(T. Vol. I, pg.142), and Dr. Faust didn't have much confidence that R. was "invested in getting or staying in treatment".(T. Vol. I, pg.165)

Rose Beck, a licensed addiction counselor, previously associated with Southeast Human Services, outlined R.G.'s failed attempts at addressing her chronic addiction problems through programs at Southeast Human Service Center.(T. Vol. I. pg.180-181) Ms. Beck testified that R.G. suffered from "untreated chemical dependency".(T. Vol. I, pg.182)

Dr. Kevin Schumacher testified that D.G. suffered from mental health issues identified as Parent-Child issues and Disruptive Behavior Disorder, Not Otherwise Specified. Dr. Schumacher described D.G. as a "very guarded, very defensive, very angry child" who couldn't handle intense emotions such as anger and couldn't tolerate frustration.(T. Vol. I, pg.14) Dr. Schumacher noted that D.G. would clearly meet the educational criteria for Seriously Emotionally disturbed.(T. Vol. I, pg.16)

In response to a question by Petitioner's counsel, Dr. Schumacher responded that instability, inconsistency and a perceived lack of commitment on the part of a parent or care provider for D.G. would be "Incredibly destructive".(T. Vol. I, pg.16)

The majority of testimony to support the Petitioner's case was introduced at the first phase

of the trial in November of 1998, including extensive testimony about the untreated mental illness and chemical addiction of R.G. and the impact those conditions had on the children. Charles Sullivan, a police officer with the Fargo Police Department testified during the second phase of the trial that on November 29, 1998, he stopped a car R.G. was riding in and observed that R.G. was intoxicated.(T. Vol. II, pg.22)

The Respondent mother, R.G., called several witnesses to testify on her behalf, but provided the most extensive and enlightening testimony when she herself took the stand.

While R.G. conceded that she did not consider herself successfully treated for alcoholism.(T. Vol. II, pg.76), she did not agree that she needed formal treatment for mental health issues or chemical addiction,(T. Vol. II, pg.82 and pg. 86) noting that she had maintained stable employment for several months, and had her own apartment. R.G. asserted that she didn't understand why her children were not with her, and stated that what she had learned was that if you go to the system for help, "this happens".(T. Vol. II, pg.83)

Interestingly, while R.G. testified that she believed treatment was of no use, and a person can only fix themselves from within, R.G. also testified that as of March 5, 1999, she hadn't made the choice to fix herself yet.(T. Vol. I, pg.94)

ARGUMENT

I. WHETHER THE PETITIONER HAS PROVEN TERMINATION OF R.G.'S PARENTAL RIGHTS IS JUSTIFIED UNDER N.D.C.C. 27-20-44?

The Supreme Court of North Dakota reviews a juvenile court's decisions to terminate parental rights in a manner similar to a trial de novo, giving deference to the juvenile court decision. In the Interest of A.S., 1988 ND 181, 584 N.W.2d 853. The Court will review the files, records, and minutes or transcript of the evidence of the juvenile court, giving appreciable weight to the findings of the juvenile court, because that court has had the opportunity to observe the candor and demeanor of the witnesses. In the Interest of A.S., 1988 ND 181, 584 N.W.2d 853 (citing In Interest of N.W., 510 N.W.2d 580, 581 (N.D.1994)).

N.D.C.C. 27-20-44(1)(b) creates a three-part test for termination of parental rights: (1) Is the child deprived? (2) Are the conditions and causes of the deprivation likely to continue? (3) Is the child suffering, or will the child in the future probably suffer serious physical, mental, moral, or emotional harm? Where clear and convincing evidence in the record affirmatively proves these elements, the juvenile court's decision terminating parental rights is affirmed. In the Interest of L.F., 1998 ND 129, 580 N.W.2d 573. The state must prove all three parts by clear and convincing evidence. In the Interest of A.S., 1988 ND 181, 584 N.W.2d 853 (citing In Interest of D.R., 525 N.W.2d 672, 673 (N.D.1994)).

A. Was D.G. a "Deprived Child"?

A "deprived child" is one who "[i]s without proper parental care or control, subsistence, education as required by law or other care or control necessary for the child's physical, mental, or emotional

health, or morals, and the deprivation is not due primarily to the lack of financial means of the child's parents, guardian or other custodian." N.D.C.C. 27-20-02(5)(a).

In April of 1996, R.G. invited state intervention by requesting that Cass County Social Services take custody of D.G. so that R.G. could tend to her own personal concerns, as she stated she couldn't cope with the children. She requested that D.G. be placed in foster care as she was unable to provide the necessary care or control for her children's physical, mental, or emotional needs. Previous cases have noted that voluntary invitation for state intervention lessens the necessary "triggering circumstances" for application of the Juvenile Code. See In the Interest of L.F., 1998 N.D.129, 580 N.W.2d 573 (citing In Interest of J.S., 351 N.W.2d 440, 442 (N.D.1984)). There is ample evidence in the record, including testimony by R.G. that at the time D.G. was placed into case, he was a deprived child.

B. Is the Deprivation Likely to Continue?

While evidence of past or present deprivation alone is not sufficient to terminate parental rights, evidence of the parent's background, including previous abuse or deprivation, may be considered in determining whether deprivation is likely to continue. In the Interest of A.S., 1988 ND 181, 584 N.W.2d 853 (citing In Interest of L.F., 1998 ND 129). Because evidence of past deprivation alone is not enough, prognostic evidence is evaluated to determine continued or future deprivation. Id. R.G. had a history of chemical and mental health issues which resulted in repeated treatment attempts, including hospitalizations. This history had also resulted in foster care placements of D.G. off and on, spanning D.G.'s entire life of twelve years. This coupled with the testimony of Dr. Faust, R.G.'s treating psychiatrist, that R.G. was unlikely to change, and that Dr. Faust did not believe R.G. was invested in trying to change. R.G.'s own testimony demonstrated

that R.G. believes herself to be an untreated chemically addicted individual, but she sees no need for treatment, and as of the date of trial, has not made the decision to stop drinking.

R.G.'s continued poor judgment was most clearly demonstrated through testimony regarding two events separated in time by well over a year. The first was testimony regarding R.G.'s decision to go out for the evening in 1997. The child, D.G., had been transitioning home, and his younger sibling, E.K.B. had just returned that day. R.G. opted to go to a local bar. While there was some dispute as to her alcohol consumption, even her own witness, Lisa Fritsell Anderson, testified that the decision to go out was made with Roger Watterud. (T.Vol. I, Pg. 121) This was the same Roger Watterud that R.G. has assured Social Services would not play a role in her life due to his abusive nature. That night R.G. was run over by Watterud while D.G. and his younger sibling were left at home.

The second telling circumstance was that on November 29th, 1998, after the first days of this trial, which had included testimony regarding the untreated nature of R.G.'s mental illness and chemical addiction and the impact of those on her children, R.G. was cited for No Insurance on her vehicle. In the opinion of the officer who stopped the car, R.G. was intoxicated.

As Dr. Faust testified, bipolar disorder and chemical dependency are both disorders of insight (T. Vol.I, pg.165), and R.G.'s insight into the issues that adversely affect her ability to parent has not changed.

C. Will there be harm to D.G.?

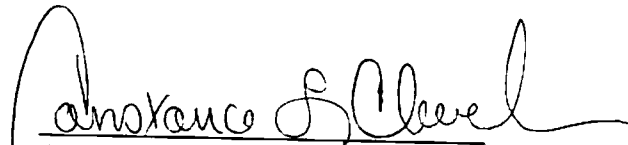
The instability and inconsistency demonstrated by D.G. would be damaging to any child, but Dr. Schumacher and Roger Flynn testified that continued instability would be very harmful to D.G..

R.G. had been unable to maintain stability in residence or employment for the majority of her contact with Social Services, these are simply symptoms of the large problems looming in R.G.'s life. R.G. refuses to deal with chemical dependency and mental health, and thus her life will continue to be chaotic, and she will remain unable to provide the stability her child needs.

CONCLUSION

The Petitioner produced clear and convincing evidence to satisfy the three part test for termination. The determination of the juvenile court to terminate parental rights of R.G. should be affirmed.

Respectfully submitted this 23rd day of August, 1999.

A handwritten signature in cursive script, reading "Constance L. Cleveland", written over a horizontal line.

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