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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| IN THE INTEREST OF M.S, A CHILD) | | |
| Barb Dvorak, Petitioner | ) | Supreme Court No. 20000183 |
| vs. | ) | Burleigh Co. No. 97-R-1243 |
| S. H., Mother, C.S., Father, M.S., Child, and her Guardian ad Litem, William D. Schmidt, Respondents. | ) | |

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOV 20 2000
STATE OF NORTH DAKOTA

APPEAL FROM FINDINGS OF FACT AND ORDER TERMINATING PARENTAL RIGHTS BY THE ~~DISTRICT~~ JUDICIAL DISTRICT COURT COUNTY OF BURLEIGH SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BURT L. RISKEDAHL

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# BRIEF OF APPELLANT S.H.

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## I ISSUE PRESENTED FOR REVIEW

Whether the termination of S.H.'s parental rights to M.S. ordered by the District Court is supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of M.S. by S. H. is likely to result in serious emotional or physical damage to her.

## II STATEMENT OF THE CASE

### A. Nature of the Case.

This is an action for the termination of parental rights under N.D.C.C. § 27-20-44. The District Court ordered the termination of the parental rights of both parents. The mother of the child now appeals.

### B. Course of Proceedings

A petition was filed in Juvenile Court for the South Central Judicial District, Burleigh County, on August 12, 1997, alleging that M.S. (Child) was a deprived child. The Child was adjudicated a deprived child at a hearing held on September 2, 1997. The care, custody, and control of the Child was awarded to the Burleigh County Social Service Board (BCSSB) for a period of eighteen months.

Following a hearing held on April 13, 1999, the Judicial Referee ordered that BCSSB's legal custody of the Child was extended for an additional twelve months from March 2, 1999. Prior to this hearing, a motion to intervene by the Yankton Sioux Tribe had been granted.

The Petition For Termination Of Parental Rights (Petition) giving rise to the matter under review was filed on August 2, 1999. On September 10, 1999, the Juvenile Court continued the hearing on the Petition set for September 16, 1999. The Court also consolidated a petition for guardianship filed by the Child's paternal grandmother with a hearing on the Petition. It denied the grandmother's motion to intervene in the hearing on the Petition itself. Subsequent to that Order, the Mother's ex-husband, the Child's former stepfather, also filed a petition for guardianship.

Following another continuance of the hearing, the Petition was heard on March 30, 2000. The petitions for guardianship were heard on May 23, 2000. The Juvenile Court issued its Memorandum Opinion on the Petition on April 7, 2000. The Findings Of Fact And Order Terminating Parental Rights was signed by the Juvenile Court on May 16, 2000. The Mother filed her Notice Of Appeal on June 14, 2000. The Juvenile Court granted S. H.'s request for a stay pending the outcome of her appeal to this Court on August 14, 2000.

**C. Statement of the Facts**

The relevant facts of this matter are substantially undisputed. What is in dispute is the conclusions to be drawn from these facts.

C.S., the Father, agreed with the termination of his

parental rights. He took no position relative to the termination of the mother in this case, S.H.'s (Mother) parental rights. (Transcript of Hearing, March 30, 2000, "T." 4) He had only lived with the Child for the first six months of her life. (T. 5) He denied that the pending petition by his own mother for guardianship over the Child affected his decision. (T. 6)

Barb Dvorak Stegmiller, the Petitioner in this matter, is a foster care social worker with BCSSB. (T. 9) She has been involved with this case for about four years. (T. 10)

The Child was born on January 24, 1993, making her seven years old at the time of the hearing. The child first went into foster care on September 2, 1997. (T. 11)

Over objection, Stegmiller testified that the reasons that BCSSB received custody of the Child included a head lice problem, supervision issues, a failure to provide necessities, and a lack of money for transportation. (T. 12) By November 24, 1997, the Mother had provided verification that she no longer had head lice and she was allowed supervised visitation with the Child. Stegmiller maintained that the visits were supervised in order to support the Mother and help her discipline the Child. (T. 16-17) Visitation following that point was limited to about twice a month and continued to be supervised until April of 1998 when visits progressed to more frequent full day visits, working around the Mother's work schedule, while the Mother was working with a parent aide. (T.

19-20)

During this period of time, a problem was reported by Stedmiller with other people taking the mother's food. (T. 20) There was also a problem with a missing window screen. (T. 21-22) During the following months other people were found to be living the Mother while the Child was present for visits. (T. 23) Stegmiller opined that the Mother has a very big heart and, having gone through a difficult time in her life, had a difficult time telling people no because she didn't want them to feel bad. (T. 25) In September a decision was made by BCSSB to give the Mother a chance to have the Child with her with the continuation of parent aide services. (T. 26)

On September 17, 1998, the Child was placed back with the Mother. She was removed on October 5, 1998. The reasons given by Stegmiller for this action was the presence of head lice, lack of food in the house, and the Mother not meeting with the parent aide. (T. 28) After the removal of the Child from her home, the Mother became upset with Stegmiller. The Mother would not talk to her until December 31, 1998, after she had been evicted from her apartment. (T. 31-32) In January of 1999, the Mother provided Stegmiller with verification that she not longer had head lice. (T. 32) She had also been working with the Dakota Center for Independent Living on help with budgeting her money. (T. 33)

Due to a breakdown in the relationship between the Mother

and Stegmiller, visitation after the extension of BCSSB's custody took place at the Family Safety Center. (T. 36) Stegmiller asserted that no services were offered to the Mother between April and November of 1999 because she did not know where she lived. However, in July of 1999, Stegmiller was informed by the Mother's therapist that the Mother was in Grafton, North Dakota, and that she wanted to be called there. (T. 38)

Stegmiller stated that in order to have the Child placed back with her, the Mother would have to have a permanent residence, be able to show she could say no to people, not allow people to live in her apartment, keep the child safe, be able to supervise her, make sure she was fed, and to provide transportation. (T. 40-41) She opined that the Child continued to be deprived because the Mother was unwilling to work with her. (T. 41-42) She could not cite any physical risk to the Child if she were returned to the Mother. The only other risk she cited was, "...people coming and going in her apartment," and an asserted lack of supervision. (T. 42)

Stegmiller agreed that the Child was a member of the Yankton Sioux Tribe and that the only service provided to the Mother since April was visitation through the Family Safety Center. (T. 44) She related that Mother and Child successfully completed a nurturing class in 1998. (T. 45) She not aware of the Mother having any problems handling her money

or with people getting money, food, or otherwise taking advantage of her since December, 1998. In February of 1999, the Mother did not have a permanent residence so that she could work with the parent aide program. (T. 47-48)

Stegmiller did not disagree that she had been informed on July 14, 1999, the date she signed the Petition alleging that the Mother had left for Grafton without providing a telephone number or address, the Mother's therapist informed her that the Mother had returned to Bismarck and provided her with her current address and telephone number. (T. 48-49) She conceded that she had never been to the Mother's current home and had no information about her living and employment situation. (T. 49-50) She also conceded that other persons, including the paternal grandmother and her ex-stepfather's family were allowed extended, unsupervised visitation with the child in 1999, while the mother was limited to supervised visitation. (T. 51-53) BCSSB had already determined that it going to petition for termination of parental rights when it sought the extension of its custody in April of 1999. (T. 54-55) The Child was suffering malnutrition while in the Mother's custody. (T. 60) Stegmiller did not tell the Mother after May of 1999, what she needed to do to have unsupervised visitation with the child. (T. 67)

Lisa Hay, a psychologist, worked with the Mother on getting better boundaries so she wouldn't be taken advantage of by

people and so she could feel better about herself. (T. 71) The Mother, according to her, did well in her parenting class. (T. 72) Dr. Hay's diagnosis of the mother is adjustment disorder with mixed anxiety and depressed mood, relational problems, and dependent personality disorder with schizotypal traits. (T. 76) She also reported fetal alcohol syndrome by self-report of the Mother. (T. 78) The Mother tested out with low average intelligence which did not seriously impede her ability to be an adequate parent. (T. 80-81) Dr. Hay's primary concern with the Mother problem with saying no to people who take advantage of her. (T. 86)

The only concern Lynette Wanner expressed about the visits she supervised at the Family Safety Center between the Mother and Child were some occasions in which the Child raised the issue of possibly moving to Montana to live with her paternal grandmother. (T. 92, 95-96)

D.S., the Mother's boyfriend, testified that he had lived with the Mother since May of 1999. (T. 99) At the time of the hearing, he stated they were saving to get married. (T. 100) Their apartment had an extra bedroom that the child could occupy. (T. 101) He stated that they moved back from Grafton so that the Mother could maintain contact with her children. (T. 102) People no longer got money out of the Mother since they lived together. (T. 104)

When the Mother moved to Grafton, her employment situation

was not good and she intended to come back to visit her children but car trouble prevented her from doing so. (T. 110-111)

The Mother reported one of the persons who had advantage of her in the past to tribal authorities for child neglect. (T. 114) It was her impression since the April 1999 hearing that parent aide services were no longer available to her. (T. 116) Of five goals she had set for herself in 1997, the Mother had obtained her drivers license, maintained employment, worked on getting her GED, and gotten a vehicle. The one remaining goal was to get her daughter back. (T. 117-118)

She found Stegmiller to be aggressive, and said she was acting like she was punishing her for not taking care of the Child. (T. 142)

Dr. Richard Athey agreed that low average intellectual functioning would not disqualify an individual from becoming an effective parent. (T. 124) He felt it was beneficial for the Child to maintain an ongoing relationship with the Mother. (T. 124-125) He agreed it would be difficult for the Child if her Mother were to be removed from the picture completely, and that the loss of that relationship would be a significant loss to her. (T. 135-136)

Following final argument by counsel, the Juvenile Court took this matter under advisement. In its Memorandum Opinion, the Court found that, "The evidence does indicate beyond a reasonable doubt that [the Child] will suffer significant harm

in the future if she is placed back into the home of her mother." The Court's Order followed this Opinion's finding.

## III SUMMARY OF ARGUMENT

The review of the decision in this matter is similar to a trial de novo. The Juvenile Court's Order terminating the Mother's parental rights is required be supported by evidence beyond a reasonable doubt by the Indian Child Welfare Act (ICWA). It has not been shown by evidence beyond a reasonable doubt that active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the mother and the child have been made and that these efforts have proved unsuccessful as required by the Indian Child Welfare Rights Act. The order for the termination of the Mother's parental rights is not supported by evidence beyond a reasonable right. The order is also not supported by the testimony of qualified experts.

## IV ARGUMENT

### A. The Review Of A Juvenile Court Decision Regarding Termination Of Parental Rights Is Similar To A Trial De Novo.

On appeal, this Court reviews a juvenile court decision regarding termination of parental rights and examines the evidence in a manner similar to a trial de novo. The Court reviews the record, giving appreciable weight to the finding of the juvenile court as required by N.D.C.C. § 27-20-56(1). In Re C.R. v. C.R., 1999 ND 221, ¶ 4, 602 N.D.2d 520. This review is not limited to a determination of whether the juvenile court's findings are clearly erroneous. Dawson v. Esparza, 1997 ND 9, ¶3, 559 N.W.2d 215.

Given the absence of significant factual disputes in this case, the trial de novo standard is particularly appropriate in this case. This is not a case where the juvenile court's ability hear the testimony and to observe the demeanor of the witnesses is a controlling factor. See, Dellwo v. R.D.B., 1998 ND 15, ¶ 9, 575 N.W.2d 420. The critical factor in the this case is what conclusions should be drawn from the evidence presented at the hearing.

### B. The Juvenile Court's Order Terminating S.H.'s Parental Rights Must Be Supported By Evidence Beyond A Reasonable Doubt.

The petition filed in this matter alleged that grounds for termination existed in language taken from N.D.C.C. 27-20-44(1.)(b.)(1.). However, all parties to this proceeding agree that M.S. is an "Indian Child" within the meaning of U.S.C. § 1903(4), and, therefore, this proceeding is subject to the applicable provisions of the Indian Child Welfare Act, 25 U.S.C. Chapter 21. The Act provides that:

> No termination of parental rights may be ordered in such proceeding [involuntary state court proceeding] in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f)

This preemptive federal standard significantly raises the evidentiary burden on the petitioner in this matter, raising it above the "clear and convincing evidence" imposed by North Dakota law. In Re C.R. v. C.R., 1999 ND at ¶ 4. For the reasonable doubt standard to have any meaning, The evidence presented in this matter must be scrutinized very closely and the Court must reverse the juvenile court if it is found wanting. Simply inserting the magic works "beyond a reasonable doubt" into the court's opinion is not enough.

C. **It Has Not Been Shown By Evidence Beyond A Reasonable Doubt That Active Efforts To Provide Remedial Services And Rehabilitative Programs Designed To Prevent The Breakup Of The Mother And The Child Have Been Made And That These Efforts Have Proved Unsuccessful.**

Besides providing for an enhanced standard of proof, the Indian Child Welfare Act requires that:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. § 1912(d).

Although this subsection doesn't explicitly state a standard of proof, the beyond a reasonable doubt standard applies to findings relative to efforts to provide remedial services and rehabilitation programs under § 1912(d). People In Interest of E.M., 466 N.W.2d 168, 172 (S.D. 1991).

The Juvenile Court failed entirely to address this requirement. Nowhere did the Court make any findings relative to it. Evidence was presented relative to services provided to the Mother to which the Court makes reference to in its Opinion. However, diffuse testimony peppered throughout the record that indicated that some remedial efforts were made which were arguably unsuccessful does not amount to an affirmative showing

satisfying § 1912(e). State Ex Rel. Juvenile Department of Multhomah County, 688 R.2d 1354, 1359 (Or. App. 1984).

In any case, the Mother availed herself of services offered her in a reasonably consistent manner. She successfully completed the parenting program, dealt with the head lice problem eventually if not as fast as the BCSSB would have liked, worked with the parent aide program until she no longer had a home, and worked on a fairly consistent basis with her therapist. Where a mother substantially complied with the programs offered her, the evidence is insufficient to show remedial services and rehabilitation efforts have been unsuccessful. Doty-Jabbaar v. Dallas County Child Protective Services, 19 S.W.3d 870, 875 (Tex. App.-Dallas 2000).

In any case, the statutory standard is clear that the issue is whether the services were offered and whether the programs were successful, not whether the parent did everything social services ordered her to do.

It is noteworthy that the Mother was essentially not offered any services of a remedial and rehabilitative nature since December 1998, over a year before the hearing held in this matter. Granted, there were communication problems on her part at the beginning of the intervening period and the hearing was extended at the end, but the fact remains that the BCSSB lost interest in preventing the breakup of the family unit of this mother and child while the mother was making substantial efforts

to bring her life under control and to provide a home for the child.

**D. The Order To Terminate Parental Right In This Case Is Not Supported By Evidence Beyond A Reasonable Doubt.**

If a reasonable doubt evidentiary standard is to have any meaning, the evidence in favor of termination will have to be overwhelming. That is not the case here.

This mother is being punished, despite her best efforts to provide a home for her child, for her limitations which she has worked to overcome. There is no evidence or even claim or physical abuse of the child or chemical dependency on the part of the mother, common factors in cases of this sort. What the petitioner's case boils down to is a claim that the Mother has in the past let other people take advantage of her to the detriment of the child and that she has, at times, not cooperated with or keept in communication with BCSSB, with Stegmiller, in particular. The first claim focuses on the Mother's situation until December 1998, and ignores changes she made in her life and her way of dealing with that situation since then. The second matter is tied up with the apparent personality conflict between the Mother and Stegmiller, which is inflated by the latter. On the same day Stegmiller signed the petition alleging among other things, that the Mother had moved out of the area leaving no means of reaching her, she was

informed that the Mother was back in the area and of her address and telephone number. Why the Mother was only allowed supervised visitation while various other persons are allowed unrestricted visitation is never justified.

Reasonable doubt that continued custody of the Child by the Mother is likely to result in serious emotional or physical damage to her exists in this case.

**E. The Order For Termination Is Not Supported By The Testimony Of Qualified Experts.**

Qualified expert testimony is required to support an evidentiary finding beyond a reasonable doubt that termination of parental rights is justified. 25 U.S.C. § 1912(f). Although various professionals testified at the hearing, none were explicitly qualified by the Court as experts in proceedings related to Indian children. It is error for the trial court to fail to inquire of expert witnesses as to their specific qualifications related to the placement of Indian children. Matter of D.S. 572, 576 N.E.2d 572 (Ind. 1991). Aside from a question asked of Stegmiller on cross-examination by counsel for the Yankton Sioux Tribe (T. 59-60), none of these witnesses were examined on their familiarity with Indian customs, tradition, and culture. This is fatal defect in the evidence in this case.

## V. CONCLUSION

The Mother respectfully requests that this Court reverse the Order of Termination and remand this matter to the Juvenile Court for appropriate disposition.

Respectfully submitted this 20th day of November,2000.

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