20060063

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20060063

Don Boehmer,

Petitioner-Appellee,

- vs -

TA, SA, DJ, JA,
KA, BJ, and JP,

Respondents-Appellants.

APPEAL FROM THE JUVENILE COURT JUDGMENT
SOUTHEAST JUDICIAL DISTRICT
STUTSMAN COUNTY CRIMINAL NO. 04-R-061
THE HONORABLE JOHN GREENWOOD, PRESIDING

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

STATUTES

North Dakota Century Code:

OTHER AUTHORITIES

STATEMENT OF THE ISSUE

I. **DURING THE TRIAL, DID THE PETITIONER PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE CONDITIONS AND CAUSES OF SA, DJ AND JA'S DEPRIVATION WERE LIKELY TO CONTINUE AND WOULD NOT BE REMEDIED?**

NATURE OF THE CASE

This case involved the termination of the parental rights of BJ, who is the father of SA, DJ and JA ("The Children").

BJ's parental rights were terminated because The Children were found to be deprived children and the cause of the deprivation were likely to continue or will not be remedied.

The dates and the legal proceedings prior to the termination of parental rights were:

1. On October 21, 2004, The Children were adjudicated deprived children and placed under the care custody and control of the Stutsman County Social Services Board for a period of three months.

2. On December 7, 2004, a dispositional hearing was held and The Children were placed under the care, custody and control of the Stutsman County Social Services Board for a period of one year or until October 20, 2005 pursuant to N.D.C.C. § 27-20-30(1)(b)(1).

3. On August 18, 2005, a hearing seeking permanency an extension of jurisdiction resulted in the continuing of the removal of The Children from the care, custody and control of their mother and subject to further order of the court. Care, custody and control of said children was extended with the Stutsman County Social Service Board.

4. On September 12, 2005, the Summons and Petition for Termination of Parental Rights were signed and filed.

On November 28, 2005, this matter came on for trial before the juvenile Court of Stutsman County. At the conclusion of that trial, the Court terminated BJ's parental rights of The Children.

From the Judgment terminating BJ's parental rights, he timely filed his Notice of Appeal.

STATEMENT OF THE FACTS ACCORDING TO RESPONDENT-APPELLANT

BJ is a 22 year old male and he was 16 years old when he and KA had their first child. Tr. P. 50, L. 17 - 20. The three children BJ and KA have had together, and who are all involved in this case are, SA who was born on 06/08/99, DJ who was born on 08/06/01 and JA who was born on 11/16/02 ("The Children").

BJ has taken an active role in his children's lives. Tr. P. 42, L. 3 - 11. During 2002, BJ had The Children with him in Oklahoma most of the year. Tr. P. 52, L. 14 - 21. While The Children were with BJ, he provided them with food and clothing. Tr. P. 53, L. 21 - 25, P. 54, L. 1 - 4. Also, during that time, BJ was employed by Dan's Custom Canvas and while he was at work, his grandmother, NM, and cousin's watched the girls and Amanda watched the boy. Tr. P. 53, L. 6 - 20.

When BJ wasn't working, he took the children to the park and played with them in the back yard, and helped the children celebrate their birthdays. Tr. P. 55, L. 2 -17. NM says BJ was a good parent and father. Tr. P. 85, L. 4 - 15.

BJ has an extended family in Oklahoma. Tr. P. 55, L. 18- 22. This extended family will help him take care of the children. Tr. P. 84, L. 13 - 20.

BJ has housing prospects in Oklahoma. Tr. P. 56, L. 13 - 21.

BJ has job prospects in Oklahoma. Tr. P. 56, L. 22 - 25 and P. 57, L. 1 - 11.

BJ hasn't had contact with is children while he was in jail because a prosecutor told him he couldn't. Tr. P. 57, L. 12 - 25 and P. 58, L. 1 - 11. BJ was also told by his attorney that he couldn't contact his children when he was locked up. Tr. P. 74, L. 1 - 8.

BJ's explanation as to why he missed an appointment to see his children is he was

looking for work, had gone to Fargo looking for work and got the dates mixed up. Tr. P. 59, L. 4 - 8.

BJ went to Oklahoma in February of 2005 because he couldn't find a job in North Dakota and had no money. In Oklahoma, he found a job and sent money to KA. Tr. P. 59, L. 18 - 25 and P. 60, L. 1 - 6.

In the fall of 2004, BJ came to North Dakota to help KA take care of their children. Tr. P. 61, L. 10 - 22. BJ also did some house cleaning of KA's house. Tr. P. 62, L. 11 - 22. BJ's description of the house and the condition it was in on the day the children were removed. Tr. P. 62, L. 23 - 25 and P. 63, L. 1 - 22.

At the present time, BJ is incarcerated at the Stutsman County Jail. His release date is July 30, 2006. When BJ is released, he is willing to take classes in anger management, drug, alcohol and parenting. BJ"s wish is to get his children back. Tr. P. 66, L. 14 - 25 and P. 67, L. 1 - 15.

BJ believes that the conditions and the cause of deprivation of his children will not continue and will be remedied. Therefore, the court erred when it ruled that there is clear and convincing proof that the conditions and causes of deprivation will continue and can't be remedied. Tr. P. 98, L. 9 - 23.

STATEMENT OF FACTS ACCORDING TO PETITIONER- APPELLEE

Don Boehmer ("Boehmer") is a child protection worker for the Stutsman County Social Services. Tr. P. 71, L. 7 - 9. Boehmer is the Petitioner in this case.

In October of 2004, Boehmer received information about KA's children that caused him to get an emergency removal order for The Children from KA's home. Tr. P.

8, L. 1 - 16. When Boehmer served this emergency removal order he went to KA's home with another social worker and Jamestown Police Officers. Tr. P. 9, L. 1 - 5. When they arrived at the home, they found a young man was babysitting the children. Until that time, Boehmer didn't know that BJ had been living in the home for a couple of weeks. BJ was not there when Boehmer arrived. BJ had left the home to buy cigarettes and left the young man in charge. Tr. P. 9, L. 5 - 8 and L. 23 - 25.

The condition that Boehmer found the home. Tr. P. 9, L. 9 - 20.

Prior to going to remove the children, Boehmer didn't know BJ was in Jamestown. Tr. P. 10, L. 5 - 8.

On December 15, 2004, Boehmer contacted BJ and had him sign releases parenting capacity and addiction evals and find out if he should be setting them up. Tr. P. 10, L. 14 - 18.

BJ came to Boehmer's office on February 4, 2005 and wanted to have a visit with The Children. A visit couldn't be scheduled on that day, but one was scheduled for the following Monday. Tr. P. 10, L. 19 - 25. On Monday, BJ didn't show up for the visitation with The Children. Tr. P. 11, L. 3 - 5.

Boehmer learned from a contact with BJ's grandmother NM that BJ was in jail in Oklahoma. BJ was then extradited to North Dakota and a hearing was held because he left the State of North Dakota while on parole. Tr. P. 11, L 6 - 12.

The Children after they were removed from KA's home were placed in foster care. Tr. P. 12, L. 18 - 19.

The Children's development since being placed in a foster home is set out in the

transcript. Tr. P. 12, L. 23 - 24 and P. 13, L. 1 - 3.

The Court concluded that there is clear and convincing evidence that the causes of deprivation will continue. Tr. P. 98, L. 9 - 23.

ARGUMENT

ISSUE I. DURING THE TRIAL, DID THE PETITIONER PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE CONDITIONS AND CAUSES OF SA, DJ, AND JA'S DEPRIVATION WERE LIKELY TO CONTINUE AND WOULD NOT BE REMEDIED?

Before discussing the above issue, the standard of review for juvenile cases appealed to the North Dakota Supreme Court must be determined.

In the 2006 Replacement 5 of Titles 27 to 29, the following appears on page 197:

"27-20-56. Appeals.

1. An aggrieved party, including the state or a subdivision of the state, may appeal from a final order, judgment, or decree of the juvenile court to the supreme court by filing written notice of appeal withing thirty days after entry of the order, judgment, or decree, or within any further time the supreme court grants, after entry of the order, judgment, or decree. The appeal must be heard by the supreme court upon the files, records, and minutes or transcript of the evidence of the juvenile court, giving appreciable weight to the findings of the juvenile court. The name of the child may not appear on the record on appeal."

A copy of page 197 is heretoaffixed, marked Exhibit 1 and made a part of this brief.

On March 1, 2004, the following language was added to N.D.R.Civ.P. 52(a)

"Findings of fact, including findings in juvenile matters, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

A copy of N.D.R.Civ.P. 52(a) is heretoaffixed, marked Exhibit 2 and made a part of this brief.

The Statutes affected by changes in N.D.R.Civ.P. 52(a) appears at page 172 of North Dakota Century Code Annotated Court Rules 2006 - 2007 Edition. A copy of page 172 is heretoaffixed, marked Exhibit 3 and made a part of this brief. According to Exhibit 3, N.D.C.C. § 27-20-56(1) was considered, but not superseded.

The following appears in *Interest of M.B.*, 2006 ND 19, 709 N.W.2d 11:

"A lower court's decision to terminate parental rights is a question of fact that will not be overturned unless the decision is clearly erroneous. N.D.R.CIV.P. 52(a); See also S.R.F., at ¶ 7 (the de nova standard of review from past caselaw was superseded by N.D.R.Civ.P. 52(a), and we overruled those cases relying on it)."

Therefore, because of the above language in *Interest of M.B.*, the standard of review on appeals to the North Dakota Supreme Court is clearly erroneous.

Evidence sufficient to terminate parental rights is set out in *Interest of M.B.*:

"To terminate parental rights, N.D.C.C. § 27-20-44(1)(b) requires the petitioner to prove three elements by clear and convincing evidence: (1) "The child is a deprived child,: (2) "The conditions and causes of the deprivation are likely to

continue or will not be remedied," and (3) "that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm."

The finding of deprivation for the children was made on December 7, 2004. this finding was made because of lack of supervision and general neglect. This lack of supervision and general neglect occurred while the children were living with KA, their mother's home. The time for appealing this deprivation has expired.

In North Dakota, parents rights to their children and the standard of care, a parent must provide for his child, is set out in *Heitkamp v. L.J.*, 436 N.W.2d 558 (N.D. 1989):

"It is also well established that parents have a fundamental right to their children which is of constitutional dimension. Kleingartner v. D.P.A.B., 310 N.W.2d 575, 578 (N.D. 1981). Because of their constitutional protection, parental rights may not be terminated merely because a parent lacks the skill to optimize a normal child's potential. (n Interest of L.M., 319 N.W.2d, 801, 805 (N.D. 1982). However, a parent's constitutional right is not absolute. Kleingartner, surpa. thus, a parent must provide care that satisfies the minimum community standards. Asendorf v. M.S.S., 342 N.W.2d 203, 206 (N.D. 1983)."

Therefore, one question that must be answered before BJ's parental rights can be terminated is, "Can BJ provide care for his children that will satisfy minimum community standards?"

The following in *Heitkamp* places the burden of proving BJ can't provide the minimum standard of care is on the petitioner:

"Prognostic evidence must show that a parent is presently unable to supply the physical and emotional care for the child, with the aid of available social available social agencies if necessary, and that this inability will continue for time enough to render improbable the successful assimilation of the child into a family if the parents' rights are not terminated. In Interest of J.A.L., supra; Interest of R.W.B., 241 N.W.2d 546, 552 (N.D. 1976)."

The fact that the burden of proof is on the petitioner is also set out in *Interest of M.B.*:

"Before parental rights may be terminated, the State must prove that the deprivation is "likely to continue or will not be remedied." N.D.C.C. § 27-20-44(1)(b)(1). To show this, the State cannot rely on past deprivation alone, but must provide prognostic evidence, demonstrating the deprivation will continue. Interest of T.K., 2001 ND 127, ¶ 14, 630 N.W.2d 38. A parent's lack of cooperation is probative. Id. The Juvenile court may also examine the parent's background. Interest of A.S., 1998 ND 181, ¶ 19, 584 N.W.2d 853. "Prognostic evidence, including reports and opinions of the professionals involved, that forms the basis for a reasonable prediction as to future behavior must be evaluated in determining if a child's deprivation is likely to continue." Interest of D.Q., 2002 ND 188, ¶ 21, 653 N.W.2d 713 (Citing Interest of D.F.G., 1999 ND 216, ¶ 20, 602 N.W.2d 697)."

During the trial there was no testimony from the Petitioner about BJ being unable to supply physical and emotional care for his children if he had the aid and availability of

social services.

The Guardian Ad Litem's Report at page 50 of the Appendix states that BJ, while incarcerated in Oklahoma, completed his GED and started parenting classes, but he didn't complete the parenting class because he was transferred to North Dakota. Therefore, it appears that BJ has taken a parenting class and is ready to accept help from social services.

In this case, the petitioner knows that BJ is in the Stutsman County Jail. Since the burden of proof is on the petitioner to prove that BJ can't provide the minimum standard of care for his children, all it would have required before trial was to send a social worker to the Stutsman County Jail and ask BJ if he would be willing to be involved in Social Service programs to improve his parenting skills.

The following is found in the Guardian Ad Litem's Report in the Appendix at page 59:

> "At this time I do not make any recommendation concerning JP. Based on the information I have, he would be able to care for TA in a proper manner with the assistance of his mother and father. Pending information from a home study, there is no evidence that TA would continue to be a deprived child or suffer harm if he was in his father's care. I am troubled that JP did not make more of an effort to get involved when he was notified of TA's placement in foster care last fall, but since JP lives far away, has very little money, and was facing a juvenile system that can be intimidating, his slow response to this situation is perhaps understandable. I am more troubled by his failure to set up telephone contact with

his son, by his failure to send his son Christmas or birthday greetings, and by his failure to financially support his child."

TA is the first child involved in this case. His father is JP and his mother is KA When the facts stated in "3" above for JP are compared to the facts in BJ, it appears that both JP and BJ have many of the same parenting problems. Therefore, shouldn't BJ have the same opportunities as JP before BJ's parental rights are terminated?

One problem that BJ has that JP doesn't is that BJ's behavior doesn't conform to the requirements of law.

The manner in which a trial court is to deal with a parent whose conduct fails to conform with the requirements of law is set out in *Interest of J.N.R.*, 322 N.W.2d 465 (N.D. 1982):

> "Although we deplore Gregory's constant failure to conform his conduct to the requirements of the law, we do not believe that the mere fact that one has a history of difficulties with the law, by itself, clearly and convincingly establishes continuing deprivation. See *In Interest of R. D. S.*, 259 N.W.2d 636, 638-639 (N.D. 1977). The State has failed to present any evidence which is prognostic in nature. We especially note that there has been no evidence presented whatsoever to indicate that Gregory has committed these offenses in the presence of the children. Furthermore, there is no evidence that Gregory has ever physically or verbally abused the children."

The above language is applicable to BJ because:

1. None of BJ's offenses were committed in the presents of his children.

2. There is no evidence BJ was ever physically or verbally abusive around his children.

CONCLUSION

The evidence and testimony presented by the Petitioner during the trial fails to:

1. Prove by clear and convincing evidence that the deprivation of BJ's children is likely to continue and won't be remedied; and
2. That BJ can't provide care for his children that will satisfy minimum community standard.

DATED at Mandan, North Dakota, this 13 day of June, 2006.

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CERTIFICATE OF SERVICE BY MAIL

Don Boehmer,

Petitioner-Appellee,

- vs -

TA, DA, SA, JA,
KA, BJ, and JP,

Respondents-Appellants.

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on June 13th, 2006, she served, by mail, a copy of the following:

APPELLANT'S BRIEF

by placing a true and correct copy thereof in an envelope and depositing the same, with postage prepaid, in the U.S. mail at Mandan, North Dakota, addressed as follows:

Gary L. Delorme
Attorney at Law
511 2nd Avenue SE
Jamestown, ND 58401

The undersigned further certifies that on June 13th, 2006, she dispatched to the Clerk, North Dakota Supreme Court, an original and seven copies of the APPELLANT'S BRIEF and a 3½" computer diskette containing the full text of the Brief.

Jacqueline Haag

Jacqueline Haag, Legal Assistant to
Benjamin C. Pulkrabek