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SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE INTEREST OF J.S.L., A CHILD

Jacqueline A. Gaddie, Assistant State's Attorney, Grand Forks County Social Services, Petitioner and Appellee,	
vs.	Sup. Ct. No.: 20080227
W.M., father Respondent and Appellant, and	Grand Forks Cty. No.: 08-R-369
T.L., mother, Kristin Beck, Lay Guardian ad Litem, and North Dakota Department of Human Services, Respondents.	

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT TERMINATING PARENTAL RIGHTS ENTERED SEPTEMBER 2, 2008.

CASE NO.: 08-R-369
COUNTY OF GRAND FORKS
NORTHEAST CENTRAL JUDICIAL DISTRICT
HONORABLE JOEL D. MEDD

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III. Whether reasonable efforts were made to prevent removal of the child and to reunify the family once the child was removed.

STATEMENT OF THE CASE

This is an appeal from an order of the juvenile court, Grand Forks County, terminating the parental rights of mother, T.L., and father, W.M., to the child, J.S.L. On April 30, 2008, a petition was filed by Grand Forks County Social Services asking the court to terminate the parental rights of T.L. and W.M. to the child, J.S.L. (File 18-08-R-369 Docket # 2; Appellant's Appendix [hereinafter App.] at 3-11). The matter was tried on April 13, 2008, before the juvenile court, the Honorable Joel D. Medd, District Court Judge. (Transcript of Hearing, [hereinafter TR], 1-158). On August 18, 2008, the district court issued a "MEMORANDUM DECISION FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER TERMINATING PARENTAL RIGHTS".

(Docket # 50; App. at 23-28). On September 2, 2008, The court filed its "MEMORANDUM DECISION FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER TERMINATING PARENTAL RIGHTS", "FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER TERMINATING PARENTAL RIGHTS", and "JUDGMENT TERMINATING PARENTAL RIGHTS." (Docket Nos. 52, 53, and 54; App. at 29, 34). Respondent father, W.M., timely filed a notice of a appeal "from the termination of parental rights verdict entered on August 15, 2008. (Docket # 55; App. at 36). "NOTICE OF ENTRY OF JUDGMENT" was entered October 13, 2008. (Docket # 60; App. at 37).

STATEMENT OF DISPUTED FACTS

J.S.L. is a child born August 15, 2007. (Tr. at 16). On August 6, 2007, prior to the child's birth, Grand Forks County Social Services became involved with the family after a report of suspected child abuse or neglect. (Tr. at 16). On that date, W.M. made a 911 emergency call because T.L. had overdosed on her medications. (Tr. at 51-52). W.M. provided Grand Forks County Social Services with useful information. (Tr. at 52). T.L. was admitted to the psychiatric unit at Altru Hospital. (Tr. at 16). The child was removed from her parents from the hospital on August 17, 2007, and continued in foster care to the time of the trial in this matter. (Tr. at 30-31).

At the time the child was removed, the child protection team made a finding of services required based on concerns of psychological maltreatment. (Tr. at 28). The team "felt that the information that was presented supported the fact that the caregivers lacked the ability, knowledge, and overall . . . parenting management skills to be able to provide care and keep" the child safe. (Tr. at 28). Individuals interviewed "expressed concern about Ms. [L]'s and Mr. [M]'s ability because of their own mental health, chemical dependency concerns, their ability to provide safety and care for" the child. (Tr. at 29).

The indication was that T.L. had a number of suicide attempts. (Tr. at 29). There were also reports of police calls to the home on seven different occasions since 2000. (Tr. at 29). Allegations of domestic violence were included in the reports. (Tr. at 29). The calls involved charges against T.L., not W.M. (Tr. at 50).

The team recommended out-of-home placement and custody with Grand Forks County Social Services. (Tr. at 30). Services required related to foster care case management, mental health issues for both parents, a concern related to W.M.'s alleged alcohol dependency, and parenting and visitation issues. (Tr. at 30).

At the time the child was placed, services were focused on

T.L. (Tr. at 62). Although W.M. had been identified as the possible father, paternity had not been verified. (Tr. at 62). It was not until October 31, 2007, that paternity was verified and Grand Forks County Social Services shifted the focus to include W.M. as a parent to the child. (Tr. at 62). Up to that time, the only services offered W.M. were limited to issues arising from his relationship to T.L. (Tr. at 62).

T.L. has a guardian who makes medical and financial decisions for her. (Tr. at 33). At the time of trial, she was incarcerated, having been in since October 2007. (Tr. at 79). Her projected release date is not clear from the record, but is in 2010, or earlier. (Tr. at 79). Up until her incarceration, she was cooperative with Social Services and participated fully with her visitation and other services, including a psychological evaluation, psychiatric services, individual therapy, and parent aid services. (Tr. at 38, 43-44, 62-65). She was allowed visitation with the child two days a week for two hours each, all supervised. (Tr. at 65). During these visits, her case manager identified a concern that T.L. needed assistance in exploring ways to help calm and soothe the baby when she became fussy and cried. (Tr. at 66). Testimony also indicated that W.M. appeared sometimes to be sleeping during visits at which he accompanied T.L. (Tr. at 67).

W.M. has a schizoaffective disorder that he treats at

Stadter Center and the Center for Psychiatric Services. (Tr. at 50). He does not have a guardian. (Tr. at 50). He is able to care for himself and manage his finances. (Tr. at 50-51). W.M. has never had the opportunity to have the child with him in his care. (Tr. at 53).

After T.L. was incarcerated, W.M. began having visitation on his own with the child. (Tr. at 67). He was allowed one visit per week, two hours per visit. (Tr. at 67-68). Infant Development Services participated in his visitation to help W.M. work on developmental tasks. (Tr. at 68). W.M. was receptive to the Infant Development Services. (Tr. at 90).

The foster care case manager identified that she intervened to assist W.M. in exploring ways to help soothe the baby when she was fussy and crying. (Tr. at 68-69). Further, he once had to be shown how best to feed the baby to avoid the baby putting too much into her mouth. (Tr. at 113-114). When given direction, he complied. (Tr. at 114). With the exception of some visits in the cold months of January and February, W.M. consistently maintained the visitation schedule. (Tr. at 70).

The social worker who filled in for the case manager when she was on maternity leave testified that she had to intervene to assist W.M. in parenting during visitations. (Tr. at 113).

When she instructed him on what to do, he complied. (Tr. at 113-114). When she told W.M. to interact more with the child, he did. (Tr. at 114-115). She did not observe visits when the visits included a parent aid. (Tr. at 114). This case worker testified that on one visit, W.M. was told not to use a pacifier and when the baby became fussy he tried to tell her that the baby needed a bottle. (Tr. at 116). The case worker's testimony then faults him for not using a pacifier. (Tr. at 116). She testified that when there is no food, W.M. is at a loss to calm the baby down. (Tr. at 117). She testified that he allowed the baby to fall asleep on the floor before picking her up, (Tr. at 118), but she also testified there's nothing inherently wrong with that, (Tr. at 127).

The fill-in case worker testified that Mr. Moore "does not have the ability to learn and to transmit and to use the information to the safety of who's ever in his care." (Tr. at 122, lines 8-11). However, her testimony and the testimony of others merely indicates that they intervened and gave W.M. instructions. Nowhere in the testimony at trial is there evidence of attempts to teach W.M. how to apply those instructions to on-going parenting. No parent aid testified. The infant development worker did not testify. No expert on the teaching of parenting testified.

In addition to visitation, W.M. was asked to complete a chemical dependency evaluation and follow recommendations, as well as to complete a parenting psychological examination and follow recommendations. (Tr. at 70). W.M. completed his chemical dependency evaluation in September 2007. (Tr. at 71). Day treatment at Centre was recommended and he was to continue with his case manager at Northeast Human Services Center. (Tr. at 71). After refusing the day treatment in November and January, W.M. began the program in March and completed the treatment program in June 2008. (Tr. at 72). W.M. was maintaining sobriety when the foster care case manager went on maternity leave on May 23, 2008. (Tr. at 72). The only evidence of his drinking is his self-report that he drank in July 2008. (Tr. at 119). A breathalyzer on July 11, 2008, showed he was clean. (Tr. at 120).

W.M. participated in a parenting assessment, which resulted in recommendations that he stay away from substances, that he continue psychological/psychiatric services, and that he receive some parenting education. (Tr. at 75). He worked with a parent-aid, but the parenting skills training was not offered to him until July 25, 2008. (Tr. at 91, 111-112).

During a meeting in March or April 2008, W.M. got agitated

and indicated that he felt like hurting someone, so he left the meeting. (Tr. at 77-78). His caseworker felt that his anger was directed toward her. (Tr. at 78). His caseworker testified that when they would discuss the issues that needed resolution, W.M. made comments that included calling her names. (Tr. at 78). The caseworker acknowledged that these comments could have arisen out of the situation of having to work with social services and did not necessarily indicate that W.M. would be a bad parent or be unable to parent. (Tr. at 92).

The foster care case manager testified that her reasons for supporting the termination of W.M.'s parental rights are his chemical dependency, his mental health, and the instability of his relationship with T.L. (Tr. at 81). She stated that W.M. "has not demonstrated stability with mental health nor with his chemical dependency and his sobriety." (Tr. at 82). In addition, she testified that T.L. and W.M. do not have requisite parenting skills because of the inability to soothe the child without assistance. (Tr. at 83-84).

No psychologist, licensed or otherwise, testified at trial. No psychiatrist, licensed or otherwise, testified at trial. No addiction counselor, licensed or otherwise, testified at trial.

One of the caseworkers testified that even she and others

were unable sometimes to soothe the child when she was fussing and crying and that sometimes babies just cannot be soothed. (Tr. at 93). Further, testimony indicated it does not necessarily hurt a baby to cry. (Tr. at 94). Testimony indicated that if W.M. maintained stability, could provide a safe home environment, he could possibly be an appropriate parent if the relationship with T.L. was no longer an issue. (Tr. at 95).

The lay guardian ad litem testified that W.M. tries to do well and has always been appropriate in interactions with her. (Tr. at 135). She testified that parenting cannot be taught. (Tr. at 135-136). She verified that the W.M.'s parental assessment had been completed just a few weeks before trial. Tr. at 138).

Counsel for respondents consistently objected to social workers testifying to matters for which they were not qualified. (Tr. at 60, 81, 83, 108). The court reserved ruling indicating whether the witness is an expert depends on the question, that the witness may be expert on some things but not others. (Tr. at 60, 109). At other times the court indicated the objection went more to the weight than to admissibility. (Tr. at 81-82, 83). Further, counsel objected to improper hearsay evidence presented by the supervisor of the

Grand Forks County Child Protection Program. (Tr. at 21). The court admitted the hearsay, citing rule 807 of the North Dakota Rules of Evidence. (Tr. at 23, 24).

ARGUMENT

This court may set aside the findings of fact by the juvenile court when they are clearly erroneous. N.D.R.Civ.P. 52(a); *Interest of T.F.*, 2004 N.D. 126, ¶ 8, 681 N.W.2d 786, 789. The juvenile court's conclusions of law are fully reviewable by this court. *Interest of A.B.*, 2003 ND 98, ¶4, 663 N.W.2d 625, 628.

Section 27-20-44(1)(c)(1) of the North Dakota Century Code requires a petitioner for the termination of parental rights to prove by clear and convincing evidence that the child is deprived, the deprivation is likely to continue, and that, absent a termination, the child will suffer, or probably suffer, "serious physical, mental, moral, or emotional harm. *E.g.*, *Interest of T.J.L.*, 2004 ND 142, ¶ 2, 682 N.W.2d 735 (citing statute as formerly numbered).

I. Whether the trial court erred in finding there was clear and convincing evidence to support a finding of deprivation that was likely to continue.

In order to terminate a parent's rights, a finding of deprivation is not enough. *E.g.*, *In re M.S.*, 2001 ND 68, ¶ 4,

624 N.W.2d 678, 681. Petitioner must also prove by clear and convincing evidence that the deprivation is likely to continue. *Id.* Petitioner failed to prove that the deprivation is likely to continue.

The parties agreed to work with social services to address the identified concerns. (Petitioner's Exhibit #4: FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR DISPOSITION, AND NOTICE OF RIGHT OF REVIEW; App. at 18-22). The concerns they had with W.M. were his mental health, his alleged chemical dependency, and his relationship to T.L.

The evidence at trial is not sufficient to assess W.M.'s mental health. No one qualified to address that issue was called as a witness. In fact, there is no competent evidence on which to even make a finding as to a mental health diagnosis. The court had no evidence as to W.M.'s treatment for mental health and whether it was being treated successfully. No mental health professional testified as to how W.M.'s mental health and treatment would affect his ability to parent.

No licensed addiction counselor testified as to whether W.M. had a chemical dependency. Even the hearsay evidence relating to his chemical dependency was not complete enough to make a finding as to whether W.M. was successfully treating the

dependency. No qualified expert testified as to how the chemical dependency would affect W.M.'s ability to parent.

W.M.'s relationship with the abusive T.L. was no longer an issue at trial. T.L. was incarcerated and likely to be for some months. Testimony indicated that W.M. had moved on and left the relationship behind. W.M. had actually been the person who sought help to protect the baby and got social services involved with the family.

The testimony involving W.M.'s ability to parent is also deficient. Testimony indicated that social workers and parent aid workers intervened on occasion to assist W.M. with his fussy baby, to tell him how not to feed the child, and to not use a pacifier. However, there was no competent testimony relating to what types of parenting education was provided and how he responded to that education. The evidence indicated that W.M.'s parenting education did not start until just a matter of weeks prior to trial. The parent aid did not testify. The infant development worker did not testify. W.M. simply was not given the opportunity to show that he could learn parenting by being taught in an appropriate manner.

The court's finding of deprivation and the likelihood of it continuing is based in part on wrongful reliance on the hearsay testimony of the supervising social worker. (App. at

24-26, 30). The court admitted the hearsay based on rule 807 of the North Dakota Rules of Evidence. However, the court did not make the appropriate findings required by that rule and the record does not support the making of such findings. That rule requires that the court determine the statements relate to a material fact, the statement is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts", and that the general purposes of the evidentiary rules and the "interests of justice will best be served by" admitting the statements into evidence. N.D.R. Evid. 807. There was no evidence that the testimony of the quoted care givers and social workers could not be procured through reasonable efforts. There was no evidence that the licensed addiction counselor or mental health professionals could not be procured through reasonable efforts. Furthermore, justice was not served by the admission of this evidence. The fundamental rights of the parents of the child were at issue. Courts should not be allowed to rely on the hearsay testimony of of social workers who are basically the petitioners in the proceedings to prove the elements of a termination of parental rights.

In short, Petitioner has failed to prove by clear and convincing evidence that there existed deprivation that would

likely continue absent a termination of W.M.'s paternal rights.

II. Whether the trial court erred in finding there was clear and convincing evidence that the child would likely suffer harm absent a termination of parental rights.

In order to terminate, Petitioner must prove by clear and convincing evidence that the child will likely suffer harm absent a termination of parental rights. *Interest of T.J.L.*, 2004 ND 142, ¶ 2, 682 N.W.2d 735. Petitioner failed to meet that burden.

No child psychologist or expert on child development testified at trial. The only testimony came from social workers not qualified as experts over the objection of counsel. Even these witnesses were not asked questions which would have laid a foundation for their testimony regarding the likelihood of harm to the child's development or safety. The testimony merely referred to the identified mental health, chemical dependency, and domestic abuse issues in a vague and conclusive way. The testimony did not show how these issues would affect the child.

There was no proper expert testimony on which the court could find by clear and convincing evidence that the child would likely be harmed. Further, the court partly relied on

inadmissable hearsay, mistakenly relying on rule 807 of the North Dakota Rules of Evidence, as addressed above.

The child should be allowed the chance that the family will be saved. It is possible that to give up so early is to do the child a disservice and to increase the likelihood of psychological and emotional harm, rather than to alleviate it. Petitioner provided no evidence that the long-term risks of termination were weighed against the alleged benefits of termination.

The trial court's finding that the child would likely be harmed absent a termination is not supported by clear and convincing evidence and is clearly erroneous.

III. Whether reasonable efforts were made to prevent removal of the child and to reunify the family once the child was removed.

Section 27-20-32.2(2) of the North Dakota Century Code requires that reasonable efforts must be made to preserve and reunify families. *Interest of E.R.*, 2004 ND 202, ¶ 12, 688 N.W.2d 384, 389.

> "reasonable efforts" means the exercise of due diligence, by the agency granted the authority over the child under this chapter, to use appropriate and available services to meet the needs of the child and

> the child's family in order to prevent the removal of the child from the child's family or, after removal, to use appropriate and available services to eliminate the need for removal and to reunite the child and the child's family.

N.D.C.C. § 27-20-32.2(1).

The trial court erred in finding that reasonable efforts were made to reunify the child with his father. More assistance was reasonably appropriate and not offered.

Once W.M. was found to be the father of the child he took an active role in addressing the issues identified by social services. It should be noted that he was not clearly shown to be the father until October 2007, about the time T.L. began her sentence and was no longer the focus of the reunification efforts. Although W.M.'s parenting skills seem to be the overriding factor in the decision to pursue the termination proceedings, his parental assessment was not completed until July 2008, just a couple of weeks prior to trial. He had very little time to work with a parent aid who had just started.

Although W.M. had missed some visits in January and February 2008, he had been otherwise steady in his visits from October 2007 up to the date of trial. Although the testimony indicated that W.M. needed intervention by social workers to

help him with parenting, there is no evidence that W.M. was provided with reasonable parenting education in order to make it possible for him to succeed over the long haul.

Furthermore, this child was only a year old on the date of trial. My client was offered one visit of less than two hours per week in which to try to form a bond with the child. Even had he had the proper parent aid to help him learn on the visits, it would have been impossible to form that bond, let alone learn parenting skills.

The failure to offer more than one short visit a week to the father of such a young child is grossly unreasonable. To expect him to learn to care for the baby during those visits without sufficient training and education is completely unfair to him and to his child.

The guardian ad litem's testimony that parenting cannot be taught is astonishing. There are many very capable parent aids and educators working in this state who have shown proof over the years such a statement is false.

The trial court erred in finding that reasonable efforts were made to reunify this family.

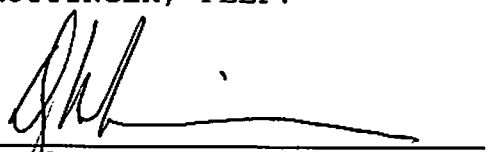
CONCLUSION

In conclusion, the petitioner did not meet its burden of proof for terminating W.M.'s parental rights. This court

should reverse the order of the juvenile court and order the child released to the custody of her father. In the alternative, the court should remand with instructions for the court to order an appropriate treatment plan be performed by W.M. with the appropriate reasonable efforts. Cass County Social Services may be given temporary legal custody of the child and continue out-of-home placement for an appropriate period of time.

Respectfully submitted this 2nd day of December, 2008.

JOHNSON, RAMSTAD
& MOTTINGER, PLLP.



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