

**IN THE SUPREME COURT
 STATE OF NORTH DAKOTA**

In the Interest of T.R.C., a Child)	Supreme Court No. 20140206
-----)	
State of North Dakota,)	Traill County Juvenile Court
)	Case No. 49-2013-JV-00012
Petitioner and Appellee,)	
)	
v.)	
)	
T.R.C., a child,)	
C.M.C., mother,)	
S.W.S., father, and)	
Maggie Anderson,)	
Interim Executive Director,)	
North Dakota Department of)	
Human Services)	
)	
Respondents.)	
-----)	
S.W.S., father)	
)	
Appellant.)	

**Appeal from Findings of Fact and Order for Disposition
 Terminating the Parental Rights of the Respondent, Skyler Wayne Seek,
 from the Juvenile Court, Traill County, North Dakota**

BRIEF OF APPELLANT

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

[¶ 1] Whether the State presented clear and convincing evidence that the causes and conditions of the child's deprivation, namely the father's (S.W.S.'s) chemical (alcohol) dependency issues, S.W.S.'s ability to provide and maintain a stable and safe home environment, S.M.S.'s ability to maintain stable employment and adequate income to maintain his household and support three children, and issues concerning the safety and well-being of the child, are likely to continue or will not be remedied if the child is placed with S.W.S.

[¶ 2] Whether the juvenile court erred in finding the State proved by clear and convincing evidence that the child will probably suffer serious harm absent termination of parental rights, based on allegations of father's (S.W.S.'s) ongoing chemical dependency issues, inability to provide and maintain a stable and safe home environment, inability to maintain stable employment and income, and inability to ensure the safety and well-being of the child.

[¶ 3] Whether the finding that reasonable efforts were made to prevent termination of parental rights and reunify the child with his father is supported by the evidence when Traill County Social Services provided insufficient financial support and alternatives for S.W.S. to meet the goals and objectives of the family reunification plan.

II. STATEMENT OF THE CASE

[¶ 4] S.W.S., the biological father of the minor child, T.R.C., appeals from the findings of fact and order of disposition terminating his parental rights to T.R.C.

[¶ 5] T.R.C. has been in foster care since November 13, 2012. On December 28, 2012, T.R.C. was adjudicated as a deprived child within the meaning of N.C.C.C. § 27-20-02, in that T.R.C. was without proper parental care, control, subsistence or education as required by law or other care or control necessary for the his physical, mental or emotional health or morals, the deprivation was not due primarily to the lack of financial means of his parents, the deprivation was likely to continue or would not be remedied, and that by reason thereof, T.R.C. was suffering or would probably suffer serious physical, mental, moral or emotional harm. T.R.C. was placed in the full custody of Traill County Social Services for a period of one year, with authorization to make out of home placement.

[¶ 6] A service plan was initially put in place to reunify T.R.C. with his mother, C.M.C., but shortly thereafter, it was determined that it would be appropriate to place the child with his biological father, S.W.S. A second reunification plan was developed by Traill County Social Services for S.W.S. and his wife, B.A.S., with the goal of permanently placing T.R.C. with his father, S.W.S.

[¶ 7] A permanency hearing was held on November 12, 2013. The juvenile court made a finding that T.R.C. continued to be a deprived child, and that the North Dakota Department of Human Services continue to have the care, custody, and control of T.R.C. for an additional period of time not to exceed one (1) year.

[¶ 8] On October 23, 2013, the State filed a Petition for Termination of Parental Rights against both parents. App. 004. At the initial hearing on the petition, C.M.C. stated on record in open court that it was her desire to voluntarily terminate her parental rights to T.R.C., pursuant to Section 27-20-44(1)(d) of the North Dakota Century Code. S.W.S. denied the allegations in the petition and requested a further hearing and court-appointed counsel.

[¶ 9] A contested termination hearing was held on April 28, 2014. On May 16, 2014, the juvenile court granted the State's petition and terminated C.M.C.'s and S.W.S.'s parental rights. With respect to S.W.S., the court found that the T.R.C. continued to be deprived and the deprivation was likely to continue for the foreseeable future, because S.W.S. had shown an inability to complete chemical dependency treatment or to provide a safe residence for the child and himself, and the services and treatment offered to the parents have not abated the causes of the deprivation. See App. 040 – 044 (Findings of Fact and Order of Disposition). The court also found reasonable efforts were made to prevent the removal of the child from the home, it was contrary to the child's welfare to return to either parent's homes, and termination was in the child's best interests. Id. The goal for T.R.C. is currently adoption.

[¶ 10] On June 13, 2014, S.W.S. filed a notice of expedited appeal under N.D. R. App. P. 2.2. S.W.S. argues that the juvenile court erred in concluding there was clear and convincing evidence to support a finding that deprivation was likely to continue, that T.R.C. would likely suffer harm without termination of S.W.S.'s parental rights, and that reasonable efforts were made to reunify T.R.C. with S.W.S. S.W.S. does not dispute that T.R.C. is a deprived child.

III. STATEMENT OF FACTS

[¶ 11] T.R.C. is a male child who was born in 2011. The child is a resident of Traill County, North Dakota. As of the date of the hearing on the petition for termination of parental rights, T.R.C. had been in foster care for 532 days (i.e., one year, five months, and sixteen days). Digital Audio Recording of Termination of Parental Rights Hearing (hereinafter referred to as "Hearing") at 10:16 (April 28, 2014).

[¶ 12] C.M.C. is T.R.C.'s biological mother. C.M.C. has not been able to maintain a permanent address, and she mostly has been residing with friends since T.R.C.'s birth. C.M.C. did not contest the termination proceedings.

[¶ 13] S.W.S. is T.R.C.'s biological father. S.W.S. currently resides in a three-bedroom apartment home in West Fargo with his wife, B.A.S. and their two young children. S.W.S. and his wife are currently employed, and S.W.S. is a member of the National Guard/Reserve. He will be deployed for service in August 2014 for approximately thirteen months.

[¶ 14] On November 13, 2012, T.R.C. was placed into the temporary custody of Traill County Social Services on an emergency basis by the Traill County Sheriff's Department because it was determined that T.R.C. was abandoned by his mother, C.M.C.. C.M.C. was unable to maintain stable or adequate housing or to provide financially for T.R.C.'s basic needs. She would leave T.R.C. with friends for extended periods of time without returning or maintaining contact with T.R.C. or the friends who were providing care for him. A reunification plan was developed for C.M.C. by Traill County Social Services and was to be in effect for a year from the time T.R.C. was taken into custody.

[¶ 15] On December 18, 2012, it was discovered and confirmed through a paternity test, that S.W.S. was the child's biological father, and the plan shifted to placing T.R.C. with S.W.S. Traill County Social Services developed a reunification plan for S.W.S. and his wife, to be in effect for up to one year. The ultimate goal was to place T.R.C. with S.W.S. and his wife and T.R.C.'s two half-siblings. On December 19, 2012, Cass County Social Services was notified to proceed with a home-study and background check to verify S.W.S.'s ability to care for the child. S.W.S. was granted weekly supervised visitation with T.R.C., However, the home study was quickly put on hold when S.W.S. received a DUI charge in Minnesota on December 31, 2012. In addition, S.W.S. had informed Traill County Social Services that a roommate, who had been living in the apartment with S.W.S. and his family, had a significant criminal history.

[¶ 16] In the ensuing months, there were additional concerns raised by Traill County Social Services:

- S.M.S.'s unaddressed chemical (alcohol) dependency issues and failure to complete evaluations and recommended treatment;
- S.M.S.'s ability to provide and maintain a stable and safe home environment for T.R.C.;
- S.M.S.'s ability to maintain stable employment and adequate income to maintain the household and support three children; and
- The safety and well-being of the child, if T.R.C. was placed with S.M.S.

Trail County Social Services subsequently determined that S.W.S. was no longer a placement option for T.R.C., and the focus returned to reuniting T.R.C. and his mother, C.M.C.

[¶ 17] In October 2013, it was determined that neither C.M.C. nor S.W.S. and his wife would be able to successfully complete several of the goals outlined in their respective reunification plans. The State then filed a petition to terminate parental rights of C.M.C. and S.W.S.

IV. LAW AND ARGUMENT

[¶ 18] The juvenile court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-20-03(1)(b). This Court has appellate jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 27-20-56(1).

[¶ 19] This Court has described the standard for reviewing an order terminating parental rights as follows:

On appeal, we will not overturn a juvenile court's findings of fact unless the findings are clearly erroneous. In re C.N., 2013 ND 205, ¶ 7, 839 N.W.2d 841[, 844]. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or if we are left with a definite and firm conviction a mistake has been made. Id.

In re G.R., 2014 ND 32, ¶ 6, 842 N.W.2d, 882, 885. The decision of the juvenile court is given “due regard because the juvenile court has the opportunity to assess the credibility of the witnesses.” In re T.H., 2012 ND 38, ¶ 27, 812 N.W.2d 373, 379.

[¶ 20] “[T]he termination of parental rights is a subject of gravest importance.” In re Adoption of A.M.M., 529 N.W.2d 864, 866 (N.D. 1995). “Few forms of state action are both so severe and so irreversible.” Santosky v. Kramer, 455 U.S. 745, 759 (1982). The North Dakota Supreme Court “recognizes the seriousness of severing the strong,

fundamental relationship between a parent and a child.” Pritchett v. Executive Dir. of Soc. Serv. Bd., 325 N.W.2d 217, 220 (N.D. 1982). “Severing this relationship by the State requires careful action by the State, mindful of the consequences in light of all the circumstances.” In the Matter of the Adoption of Gotvaslee, 312 N.W.2d 308, 312 (N.D. 1981). “When an alternative exists in the best interests of children, this Court prefers the alternative over termination of parental rights.” In re W.E., 2000 ND 208, ¶ 30, 619 N.W.2d 494, 499.

[¶ 21] Section 27-20-44(1)(c)(1), N.D.C.C., authorizes a juvenile court to terminate the parental rights of a parent if “[t]he child is a deprived child and the court finds . . . [t]he conditions and causes of the deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm[.]” The court may also terminate parental rights if the child is found to be deprived and “[t]he child has been in foster care, in the care, custody, and control of the [Department of Human Services], or a county social service board . . . for at least four hundred fifty out of the previous six hundred sixty nights. . . .” N.D.C.C. § 27-20-44(1)(c)(2). Recently, this Court has stated that a finding that a child has been in foster care more than four hundred fifty out the previous six hundred sixty nights, along with a finding of deprivation, is sufficient to terminate parental rights under N.D.C.C. § 27-20-44(1)(c)(2), and it is unnecessary to address a parent’s challenge to the finding that the conditions and causes of deprivation will likely continue. In re R.L.-P., 2014 ND 28, ¶ 23, 842 N.W.2d 889, 895.

[¶ 22] “The State must establish all the elements for termination by clear and convincing evidence.” In re A.L., 2011 ND 189, ¶ 8, 803 N.W.2d 597, 600. “Clear and

convincing evidence means evidence that leads to a firm belief or conviction the allegations are true.” In re C.N., 2013 ND 205, ¶ 6, 839 N.W.2d at 843. “[T]he court’s decision to terminate parental rights is a question of fact.” In re A.W., 2012 ND 153, ¶ 9, 820 N.W.2d 128, 131.

[¶ 23] Under North Dakota law, a child is deprived if the child:

Is 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(8)(a). “The definition of a deprived child is broad enough to encompass a child whose parent, while never having had the opportunity to care for the child, is shown to be presently incapable of proving proper parental care for the child.” In re K.B., 2011 ND 152, ¶ 11, 801 N.W.2d 416, 422. “ ‘Proper parental care’ means the minimum standard of care the community will tolerate.” In re A.B., 2010 ND 249, ¶ 16, 792 N.W.2d 539, 546. “A parent must be able to demonstrate present capability, or capability within the near future, to be an adequate parent.” In re C.N., 2013 ND 205, ¶ 9, 839 N.W.2d at 844.

Prognostic evidence may be relied upon to find that a child is a deprived child if it shows that the parent, although not having custody of the child, would be presently unable to supply physical and emotional care for the child, with the aid of available social agencies, if necessary, and that the inability would continue for sufficient time to render improbable the successful assimilation of the child into a family if that parent’s rights were not presently terminated. In Interest of J.A.L., 432 N.W.2d 876[, 878] (N.D. 1988).

In re K.B., ¶ 11, 801 N.W.2d at 422; Interest of T.J.O., 462 N.W.2d 631, 633 (N.D. 1990) (emphasis added).

- A. The State did not present clear and convincing evidence that the causes and conditions of the child's deprivation are likely to continue or will not be remedied if the child is placed with S.W.S.

[¶ 24] The juvenile court erred by terminating the parental rights of S.W.S. based on the state's finding that T.R.C. is a deprived child and will continue to be deprived under N.D.C.C. § 27-20-02(8)(a). The finding that T.R.C. will continue to be deprived was based solely on past deprivation and not supported by clear and convincing evidence, therefore a mistake has been made and the findings are clearly erroneous and must be re-evaluated.

[¶ 25]

Evidence of past deprivation is not enough to determine whether the causes and conditions of deprivation will continue; rather, there must also be prognostic evidence. In re A.B., 2010 ND 249, ¶ 22, 792 N.W.2d 539[, 547]. Prognostic evidence is that which "forms the basis for a reasonable prediction as to future behavior." . In re A.S., 2007 ND 83, ¶ 19, 733 N.W.2d 232[, 239] (quoting . In re L.F., 1998 ND 129, ¶ [16], 580 N.W.2d 573[, 577]. Evidence of a parent's background or history may be considered in determining whether the deprivation is likely to continue. [In re] K.B., at ¶ 12. "A parent's past conduct can form the basis for a reasonable prediction of a parent's future behavior." A.B., at ¶ 16. The court may also consider the amount of contact the parent has had with the child. Id. at ¶ 22. A parent's lack of cooperation with social service agencies is pertinent and indicates the causes and conditions of deprivation are likely to continue. In re T.H., 2012 ND. 38, ¶ 29, 812 N.W.2d 373[, 379]; A.B., at ¶ 22. Prognostic evidence also includes reports and opinions of the professionals involved in the case. A.S., at ¶ 19.

In re G.R., 2014 ND 32, ¶ 9, 842 N.W.2d at 885-86.

[¶ 26] Here, the State alleges that S.W.S's chemical dependency, employment, and safety of the home environment, are contributing causes and conditions of continued child deprivation.

(1) Chemical Dependency

[¶ 27] S.W.S. was charged with a DUI in Minnesota on December 31, 2012. App. 031; Hearing at 10:23. As a part of the reunification plan, Traill County Social Services ordered S.W.S. to complete a chemical dependency evaluation, a follow-up evaluation, and to follow through with all recommendations from the evaluations. App. 018.

[¶ 28] S.W.S. completed his first chemical dependency evaluation on March 12, 2013, at Share House. App. 018, 032. At this time it was recommended that he participate in sixteen hours of risk reduction seminar classes, which he completed by May of 2013. Id. On June 11, 2013 S.W.S. completed a follow-up evaluation at which time it was determined that he had an issue with alcohol dependency and was recommended to participate in intensive outpatient treatment. App. 015, Hearing at 10:28. In January of 2014 S.W.S. completed a third evaluation, which resulted in the same recommendation that he participate in intensive outpatient treatment. Hearing at 12:17. S.W.S. has yet to enroll in an outpatient treatment program due to the fact that the expense of enrolling would further exacerbate an already strained family budget and therefore would inhibit his ability to provide for his family and the child. Id.

[¶ 29] Based on the valid financial constraints and conflicts with the required treatment program, Traill County Social Services should have exercised their due diligence and made reasonable efforts, as required by N.D.C.C. § 27-20-32.2(2), to meet the needs of the child and the child's family, which under these circumstances would include finding alternative treatment or assisting in the financing of the required program in order to eliminate the need for removal of the child from his father and inhibiting

S.W.S.'s ability to provide for his family and the child. Furthermore, S.W.S. has demonstrated personal efforts to address and resolve his chemical dependency issues, and there is cause to believe that he will have the opportunity to complete a treatment program while he is deployed in the near future. Therefore, there is prognostic evidence to demonstrate that S.W.S. is still addressing and will continue to address his issues with chemical dependency, but that this should not be a basis for terminating his parental rights.

[¶ 30] In terms of his ability to afford a chemical dependency treatment program, S.W.S. does not deny his finances are very limited. He has stated that not only can he not afford the required program, but that it also conflicts with his work schedule, and that he has not enrolled for these reasons, not because of disinterest or indifference, which is confirmed by his wife, B.A.S., in the Lay Guardian Ad Litem's Report. See App. 033.

[¶ 31] B.A.S. works during the day and makes less than \$10 per hour. Id. She also pays to attend college. App. 034. Although S.W.S. has been promoted four times within this past year, he still only earns \$10 per hour and is scheduled to work in the evening so he can watch the children while B.A.S. is at work. Hearing at 11:37. The couple together manages their monthly budget to provide for their family and they agree that even with tax returns and loans the treatment program is more than they can afford. App. 033. In the Lay Guardian Ad Litem's Report, B.A.S. is quoted as saying, "There is no way that we can afford the program he is required to take." App. 033. S.W.S. does not want to enroll in a program that will further exacerbate their already strained budget, if doing so will result in the inability to provide for his family.

[¶ 32] Based on his inability to afford the required chemical dependency treatment program, S.W.S. was told by Traill County Social Services that he would be given some assistance. Hearing at 12:18. However, when S.W.S. did find a program as instructed by the social worker, Traill County Social Services refused to provide needed financial assistance; instead Social Services offered to provide daycare services on weekday mornings so S.W.S. could attend a program that would not conflict with work. Hearing at 12:25. However, because of the couple's work schedule, daycare services have never been necessary and have never been an expense incorporated into the family's monthly budget. Therefore, free daycare services offered by Social Services do not offset the cost of the treatment program, and the program would still be an additional expense the family has not budgeted for and currently cannot afford. Under these circumstances, Traill County Social Services has not exercised their due diligence to make reasonable efforts to, "[After removal] use appropriate and available services to eliminate the need for removal" N.D.C.C. § 27-20-32.2(1).

[¶ 33] Furthermore, S.W.S. has testified to addressing the chemical dependency issue personally. Hearing at 12:16 to 12:18. He and B.A.S. both stated that S.W.S. rarely drinks and works as much as possible in order to stay away from negative influences and focus on providing for his family. Hearing at 11:53 and 12:19. S.W.S. will be deployed in August 2014, which should allow him the financial flexibility to pursue opportunities to address his chemical dependency at that time without creating a financial hardship for the family. Therefore, addressing the issues of chemical dependency during his deployment is ideal for S.W.S., his family, and T.R.C. and will be possible in the near future.

[¶ 34] For these reasons S.W.S. asks this Court to reconsider the juvenile court's stance on S.W.S.'s chemical dependency issues. In readdressing these issues, the Court should be reminded that in determining deprivation, the state cannot rely on past deprivation alone, and must also rely on prognostic evidence that the deprivation will continue. Therefore, based on S.W.S.'s present and future finances, work schedule, efforts made to quit drinking and provide for his family, future opportunities to participate in treatment, and the lack of reasonable efforts made by Traill County Social Services to provide him the necessary services to prevent removal, it is highly unlikely the issue of chemical dependency will continue to be an issue and should not be a future concern in regards to the deprivation of the child.

(2) Employment and Economic Stability

[¶ 35] Although deprivation cannot be determined by the lack of financial means of the parents, the state has deceptively argued for terminating S.W.S.'s parental rights based on the reasoning that S.W.S. and B.A.S.'s finances have caused instability in their home. Not only is it deceptive to manipulate their financial constraints as a cause of instability in the home thus allowing their finances to be a factor in the courts decision, but it is simply untrue and unsubstantiated. There is no evidence of instability due to employment or economic status and there is certainly no prognostic evidence to support that this would ever be a cause for future deprivation.

[¶ 36] As a part of the reunification plan Traill County Social Services ordered S.W.S. and B.A.S. to remain consistently employed for six months and submit a detailed budget of income and expenses. App. 024. Not only has S.W.S. and B.A.S. done this, but they have excelled at this task. B.A.S. has submitted updated monthly budgets for the

family and S.W.S. has worked at Pizza Ranch for over two years. Within the last five to six months, S.W.S. has received four promotions and four subsequent pay raises. Hearing at 11:37. B.A.S. also maintains her job, working 25 to 30 hours a week, to assist when she can with the family finances and pay for her college education.

[¶ 37] In addition to S.W.S.'s current success in his employment at Pizza Ranch, his August deployment will provide the family with an additional \$4,000 to \$6,000 a month. Hearing at 12:25. B.A.S. also projects that their car payment will soon be finished, decreasing their expenses by \$480 a month. Hearing at 12:12. This is prognostic evidence that the family's finances will increase and allow them even more opportunity to provide for their children.

[¶ 38] Furthermore, the State has never provided the court with evidence of financial hardship that would contribute to instability in the home nor has the State provided prognostic evidence to suggest that S.W.S.'s finances will continue to contribute to instability in the home. In fact, according to notations on the reunification plan, the family has always had an adequate food supply at their home. App. 024. This demonstrates that even at the most financially difficult times, S.W.S. has provided necessities for the children, including T.R.C., and will continue to provide them.

[¶ 39] At the termination hearing, the social worker did raise concerns over the couple's unnecessary spending, claiming they frivolously spent money on a cell phone and computer. Hearing at 11:02. However, the same social worker had previously complained in the reunification plan when the couple did not have a working cell phone and that when she was unable to contact them. App. 021. S.W.S. explained these purchases to the juvenile court. Hearing at 12:13. He explained the cell phone was free

when they signed up for phone services through Verizon Wireless, and in exchange for signing up they were given a \$100 gift card, which they used toward the children. Id. S.W.S also explained that the computer purchase was for the family to remain in contact during his deployment. Id. In the Lay Guardian Ad Litem's Report, it was explained that the computer was necessary for B.A.S. to participate in her college online courses and to complete various assignments for other classes. App. 034. Therefore these claims of financial instability and frivolous spending are without merit.

[¶ 40] Based on S.W.S.'s promotions at work, corresponding increases in rate of pay, and upcoming deployment, it is evident that S.W.S. has excelled at the task of maintaining employment and providing for his family in order to create and maintain stability in the home. Therefore not only has S.W.S. demonstrated an ability to currently provide for his family he has demonstrated the continued ability to provide for a growing family, including T.R.C., and has proven to the court that the children are not deprived and will not be deprived as the State suggests.

(3) Safety and Stability of the Home Environment

[¶ 41] The State raises various concerns in regards to S.W.S.'s ability to maintain a stable and safe home. Many of the concerns raised by were based on the parenting skills that the social worker witnessed during visitation and are unsubstantiated or have since been addressed and dealt with effectively and appropriately by S.W.S.

[¶ 42] The State presented no witnesses who actually observed unsafe conditions in S.W.S.'s household. The social worker raised concerns based on assumptions and drew conclusions in court based on past observations alone, without including prognostic evidence.

[¶ 43] First, the social worker raised an issue with S.W.S.'s and B.A.S.'s former roommate and his criminal history. Hearing at 10:31. There was testimony at the termination hearing indicating that the roommate has not lived with S.W.S. and B.A.S. since March 2014. Hearing at 12:09 and 12:22. Therefore, S.W.S. has addressed and remedied the concern in order to create a more stable home environment as directed by Social Services.

[¶ 44] Second, home stability concerns also stemmed from concerns that S.W.S. did not have a driver's license or insurance. Hearing at 10:37. Although S.W.S. currently does not have his driver's license, his wife testifies to having her license and valid auto insurance. B.A.S. also testified that she is more than willing and able to drive S.W.S. whenever and wherever. Hearing at 11:57. Furthermore, their residence is close enough to work that S.W.S. can walk, take the bus, or bike in the rare circumstance that B.A.S. cannot drive him. App. 034. Therefore, S.W.S.'s lack of a driver's license and insurance do not negatively affect the family to support the allegation that S.W.S.'s home is unstable.

[¶ 45] Third, Social Services claims to have issues with S.W.S.'s parenting skills and the level of supervision for the children in his home. Hearing at 10:24. The social worker claims that when she arrived for a particular visit, the parents had just woken up and the children were awake without supervision. Hearing at 10:26. The social worker cannot know this; she had just arrived at the home, and S.W.S. answered the door. There was no evidence presented of the couple sleeping while their children were awake on any particular date or time, and the social worker's claims remain unsubstantiated. In actuality S.W.S. and B.A.S. are able to provide constant supervision of their children

because of their alternating work schedules. As previously mentioned S.W.S. works evening shifts in order to watch the children in the morning, while B.A.S. is at work, thus providing constant supervision to assure their safety in the home.

[¶ 46] Fourth, Social Services raised concerns over the amount of scheduled visits that were cancelled or unattended. Hearing at 10:20 and 11:06. These concerns are misleading. The social worker testified that 8 out of 15 visits were unattended. Hearing at 10:20. This claim is false. The Lay Guardian Ad Litem's Report indicates that 22 scheduled visits were cancelled due to weather, and 21 were cancelled due to S.W.S. cancelling or not calling to state he would be attending. App. 036 – 037. In fact, S.W.S. attended over 80% of the 104 scheduled visits. Hearing at 11:06, 11:18. The testimony at the hearing revealed that visitation was not missed because of a lack of want, but because of poor weather conditions or the illness of either T.R.C. or S.W.S.'s other children. Id. S.W.S. never missed a visit due to chemical dependency issues. In fact the decision to miss visitation seemed to have been made in the best interest of all the children, including T.R.C., so as to not put their health or safety at risk. Therefore, the concern in regards to missed visitation is based on inaccurate information that is unfounded and should not be a cause for present or future concern.

[¶ 47] Not only are many of the State's concerns non-existent, unsubstantiated, and without merit, but there is a great deal of positive attributes and testimony to support that S.W.S. is an actively involved parent who has provided and continues to provide for his family a safe and stable home. For example, S.W.S.'s immediate supervisor from work testified that she would trust S.W.S. with their own children. Hearing at 11:41.

[¶ 48] In regards to the positive attributes that S.W.S. has demonstrated in order to provide and continue to provide a safe and stable home, the Lay Guardian Ad Litem's Report stated that in April 2014 the couple signed another year lease on their three bedroom apartment, which is located in a safe neighborhood, and within a school district the couple wants their children to attend. App. 035. This not only demonstrates that they have maintained a stable home, but that they are considering the safety and future education of their children, and therefore will continue to provide a safe and stable home. It was also noted in the Lay Guardian Ad Litem's Report as well as the reunification plan that S.W.S. demonstrates concern, guidance, and appropriate parenting skills for T.R.C. and his two other children. App. 032, 036. If the concerns raised by Social Services were truly legitimate and significant, Social Services should have offered, recommended, or required S.W.S. to complete separate parenting classes; however, this never happened. The concerns with the safety and stability of the home environment are not supported by any credible evidence.

[¶ 49] Based on S.W.S. removing the problem roommate from the home, B.A.S.'s reliable transportation, the couple's constant supervision of their children and 80% attendance at visitation, there is no substantial concern or evidence that T.R.C. would continue to be a deprived child due to the home environment.

- B. The juvenile court erred in finding the State proved by clear and convincing evidence that the child will probably suffer serious harm absent termination of parental rights.

[¶ 50] The record does not support the juvenile court's finding the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm if placed in the father's care.

[¶ 51] “Similar to whether the causes and conditions of a child’s deprivation are likely to continue, whether a child is likely to suffer serious physical, mental, moral, or emotional harm may be demonstrated through prognostic evidence.” In re D.H., 2010 ND 103, ¶ 26, 783 N.W.2d 12, 20.

“Upon a showing that a child’s deprivation is likely to continue in an action to terminate parental rights, it must be shown that the child is suffering or will probably suffer some serious physical, mental, moral, or emotional harm.” Interest of A.B., 2009 ND 116, ¶ 21, 767 N.W.2d 817[, 823]. The probability of serious mental and emotional harm to a child may be established by prognostic evidence that a parent’s currently inability to properly care for the child will continue long enough to render improbable the successful assimilation of the child into a family if the parent’s rights are not terminated.” Id. “The risk of future harm may be based on evidence of previous harm.” Id.

Interest of A.B., 2010 ND 249, ¶ 31, 792 N.W.2d at 549.

[¶ 52] The lower court incorrectly found that the state presented clear and convincing evidence to support that S.W.S.’s chemical dependency, employment, and home environment, has caused and will cause T.R.C. to suffer serious harm absent the termination of parental rights.

(1) Chemical Dependency

[¶ 53] S.W.S. has demonstrated that he has been dealing with his chemical dependency issues and that he has made significant improvement in the past year. Not only has he completed multiple evaluations, but he has attended 16 hours of risk reduction seminars, and has dealt with the issue personally by substantially reducing the amount of alcohol he consumes. App. 032, 033; Hearing at 11:53. S.W.S. will likely have the opportunity to continue to address his chemical dependency issues through treatment he can afford once he is deployed in August 2014.

[¶ 54] Furthermore, there is no evidence that S.W.S. has ever allowed his issues with chemical dependency to cause physical, mental, moral, or emotional harm to his family. Also, his struggle with chemical dependency has never affected his work or his ability to provide for his family. No evidence was presented to the contrary.

[¶ 55] Therefore, through the progress S.W.S. has already made and the steps he will take in the future this issue should not be considered a continuing cause that will result in serious harm to the child.

(2) Employment and Economic Stability

[¶ 56] Again, although deprivation cannot be determined by the lack of financial means of the parents, the state has deceptively argued for terminating S.W.S.'s parental rights based on the reasoning that S.W.S. and B.A.S.'s finances have caused instability in their home. The loose correlation between employment and home stability made by Social Services remains untrue and unsubstantiated. Additionally, S.W.S.'s employment or economic stability has never caused serious harm to any of his children, including T.R.C., nor will it ever cause serious harm to them.

[¶ 57] There is no evidence of previous harm due to economic instability, nor is there prognostic evidence to suggest there will be future economic instability. S.W.S. and B.A.S. have maintained their employment and a budget, as ordered by Traill County Social Services. They have provided for their family and made certain that their employment and limited finances in no way have harmed the children. As noted in the reunification plan the home always has an adequate food supply, and S.W.S. has demonstrated the ability to provide T.R.C. with lunches during visitation.

[¶ 58] Although finances are tight, S.W.S. is scheduled to be deployed with the National Guard/Reserve in August 2014, which will increase the family budget by \$4,000 to \$6,000 a month. This will allow S.W.S. to provide more than adequate finances for his family, including T.R.C., while he is deployed. Therefore, prognostic evidence demonstrates that S.W.S.'s future increase in income will allow him to provide for T.R.C. without much difficulty, and in no way does the prognostic evidence suggest that his income will ever cause harm to the child.

(3) Safety and Stability of the Home Environment

[¶ 59] The concerns raised by Social Services in regards to S.W.S.'s ability to maintain a stable and safe home were based on the parenting skills she allegedly witnessed during visitation and are unsubstantiated or have since been addressed and dealt with effectively and appropriately by S.W.S. The past issues raised by Social Services included concerns with a former roommate, S.W.S.'s transportation means, whether there was adequate supervision in the home, and unattended visitation dates. There is no prognostic evidence to suggest there will be issues with the safety and stability of the home that would cause harm to the child.

[¶ 60] The problem roommate is no longer residing in the apartment with S.W.S. and his family. App. 035. S.W.S. has addressed and resolved the issue so that it is no longer a cause of concern for the child's physical, mental, moral, or emotional well-being.

[¶ 61] Although S.W.S. does not have a driver's license, this is no evidence of a serious risk of harm to the children. B.A.S. has her driver's license and auto insurance. App. 035. She can provide the children with safe transportation. Also their residence is

close enough in proximity to work that S.W.S. can walk, bike, or take the bus, therefore allowing him to provide his family a safe and stable home necessary to their well-being.

Id.

[¶ 62] Social Services also had issues with the level of supervision in the home, claiming the parents were asleep while the children were awake. There is no direct evidence of these claims. The social worker reported that she had just arrived at the home and S.W.S. answered the door. In actuality S.W.S. and B.A.S. are able to provide constant supervision of their children because of their alternating work schedules. App. 035. As previously mentioned S.W.S. works evening shifts and watches the children in the morning while B.A.S. is at work. Therefore, their constant supervision insures stability and that the children are never at risk of physical, mental, moral, or emotional harm.

[¶ 63] In regards to the unattended scheduled visitations, these were all due to illness or poor weather conditions, and never because of S.W.S.'s issues with alcohol. App. 036 – 037. Not only does this not demonstrate a risk of harm, but it shows that S.W.S. canceled visitation for the safety and well-being of his children, including T.R.C. This also should be considered as prognostic evidence that, in the future, S.W.S. will continue to exercise good decision making skills to determine whether traveling will potentially put the children at risk.

[¶ 64] For these reasons Social Services' concerns in regards to the safety and stability of the home are not only false and unsubstantiated, but none of them give rise to the concern that any of S.W.S.'s children are at risk for physical, mental, moral, or emotional harm. In fact, S.W.S.'s supervisors from work have both said they would trust

S.W.S. with the well-being of their own children. Therefore, because of the false and unsubstantiated claims made in the past and the lack of prognostic evidence, it is highly unlikely that in the future the children will be ever be harmed due to safety and stability concerns in the home.

- C. The finding that reasonable efforts were made is not supported by the evidence.

[¶ 65] Section 27-20-32.2(2) provides that “reasonable efforts must be made to preserve families, reunify families, and maintain family connections.” Section 27-20-32.2(1), N.D.C.C. defines reasonable efforts as:

[T]he exercise of due diligence, by the agency granted 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 removal of the child from the child’s family or, after removal, to use appropriate and available services to eliminate the need for removal, to reunite the child and the child’s family, and to maintain family connections. In determining reasonable efforts to be made with respect to a child . . . , and in making reasonable efforts, the child’s health and safety must be the paramount concern.

“The State is not required to ‘exhaust every potential solution’ before seeking termination of parental rights.” Interest of A.B., 2009 ND. 116, ¶ 25, 767 N.W.2d 817, 825 (quoting In re J.S., 2008 ND 9, ¶ 19, 743 N.W.2d 808, 814.

[¶ 66] Here, the juvenile court unfairly terminated S.W.S.’s parental rights before S.W.S. had a full and fair opportunity to develop and nurture a relationship with T.R.C. and prove his commitment to providing T.R.C. with a satisfactory and permanent home environment. The juvenile court incorrectly found that reasonable efforts were made to preserve the family after the removal of the child. The State’s primary issues contributing to the juvenile court’s finding that T.R.C. will continue to be a deprived child involved S.W.S.’s chemical dependency and lack of stability of S.W.S. and his

home. The State failed to provide appropriate and available services that would have eliminated the issues of chemical dependency and instability, therefore eliminating the need for termination, and allowing T.R.C. to be permanently placed with his father after being removed from the custody of his mother, C.M.C.

(1) Chemical Dependency

[¶ 67] In regards to S.W.S.'s chemical dependency, the State has not provided the appropriate services that would allow S.W.S. to address this issue, and, therefore, has not made reasonable efforts to reunite the family.

[¶ 68] As previously mentioned, S.W.S. has not completed intensive outpatient treatment as recommended. This is mainly because the expense of enrolling would cause great financial hardship to the family and therefore would inhibit S.W.S.'s ability to otherwise provide for his family and the child. App. 033. The treatment programs also conflict with the schedules S.W.S. and B.A.S. maintain. In the evenings, S.W.S. works at Pizza Ranch, and in the mornings, he watches his children while B.A.S. works. Hearing at 11:49 – 11:50, 12:35. This schedule allows them to earn enough money to provide for their family, but it does not give S.W.S. the time necessary to commit to an intensive outpatient treatment program. Based on this inability to afford the required program S.W.S. was told by Traill County Social Services that he would be given some assistance. However, when S.W.S. did find a program, as instructed by the social worker, Social Services refused to assist in the payment, but instead offered to provide daycare services in the morning so S.W.S. could attend a morning program that would not conflict with work. Hearing at 12:25. Because of the couple's work schedule, daycare services have never been necessary and have never been an expense considered in the

family's monthly budget. Therefore, free daycare services offered by Social Services would not offset the cost of the treatment program, and the program would still be an additional expense the family has not budgeted for and currently cannot afford.

[¶ 69] Under these circumstances Traill County Social Services should have exercised their due diligence and made reasonable efforts, as required by N.D.C.C. § 27-20-32.2(2), to meet the needs of the child and the child's family, which in this case would include finding alternative treatment or assisting in the financing of the required program in order to eliminate the need for removal and prevent inhibiting S.W.S.'s ability to provide for his family and the child. By not providing alternatives to help S.W.S. address his chemical dependency issues, the State has not exercised their due diligence to make reasonable efforts to, "[After removal] use appropriate and available services to eliminate the need for removal" N.D.C.C. § 27-20-32.2(1).

[¶ 70] In regards to Social Services' concerns over the safety and stability in S.W.S.'s home, the State has not provided any services to S.W.S. or B.A.S., and therefore has not made reasonable efforts to secure safety and stability in the home in order reunite the family.

[¶ 71] The social worker raised various concerns over S.W.S.'s parenting skills, such as the parents being asleep while the children are awake, not only does that claim lack evidence, but there was no recommendation by the State to correct the suspected poor parenting skills. Social Services never offered, recommended, and required S.W.S. and his wife to attend parenting classes. App. 036, 038. Instead, to correct the alleged poor parenting skills that the social worker claims to have witnessed, she relied on a parent aide giving S.W.S. and B.A.S. tips during visitation. Id. If the safety and stability

of the home were a valid concern by the State, parenting classes should have been recommended. By not recommending the classes not only did the state purposefully put S.W.S. at a disadvantage, but they did not exercise their due diligence in making reasonable efforts to reunite the family after removal.

V. CONCLUSION

[¶ 72] The juvenile court erred in terminating S.W.S.'s parental rights because the State failed to prove by clear and convincing evidence that deprivation of T.R.C. was likely to continue, T.R.C. would likely suffer harm if S.W.S.'s parental rights were not terminated, and the State did not make reasonable efforts to reunify T.R.C. with his father, S.W.S. For these reasons, the judicial referee's findings of fact and order for disposition terminating S.W.S.'s parental rights should be vacated and reversed, and the case should be remanded to the juvenile court for further proceedings.

Respectfully submitted on June 20, 2014.



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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

In the Interest of T.R.C., a Child)	Supreme Court No. 20140206
-----)	
State of North Dakota,)	Trail County Juvenile Court
)	Case No. 49-2013-JV-00012
Petitioner and Appellee,)	
)	
v.)	
)	
T.R.C., a child,)	
C.M.C., mother,)	
S.W.S., father, and)	
Maggie Anderson,)	
Interim Executive Director,)	
North Dakota Department of)	
Human Services)	
)	
Respondents.)	
-----)	
S.W.S., father)	
)	
Appellant.)	
)	

**CERTIFICATE OF SERVICE
BY E-MAIL**

The undersigned, being of legal age and an officer of the court says that on January 30, 2013, he served true and correct copies of the following documents

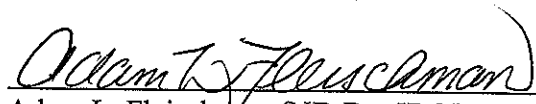
- 1. Brief of Appellant; and**
- 2. Appendix to Appellant's Brief.**

Electronically through e-mail from bhankeylaw@gmail.com to:

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Attorney's Certificate of Service by e-mail dated this 20th day of June, 2014.


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