

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE INTEREST OF E.P., J.F., AND D.H., MINOR CHILDREN

State of North Dakota,

Petitioner and Appellee,

vs.

E.P., a child; J.F., a child, and D.H., a
child; M.H., their mother; T.P., father of
E.P.; C.F., father of J.F., and M.F., father
of D.H.; and the Executive Director of the
North Dakota Department of Human
Services,

Respondents; M.H., Appellant.

Supreme Court Nos.: 20160184
20160185
20160186

Trial Court Nos.: 45-2015-JV-84
45-2015-JV-85
45-2015-JV-86

BRIEF OF THE APPELLEE, THE STATE OF NORTH DAKOTA

Appeal from the Trial Court Order Terminating Parental Rights,
Entered April 14, 2016
In the County of Stark, State of North Dakota, Southwest Judicial District
Honorable James Gion, Presiding

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APPENDIX

The State of North Dakota concurs with the Appellant’s Appendix. Therefore, any references in this Brief to the “Appendix” or “App.” is a reference to the Appendix of the Appellant.

STATEMENT OF THE ISSUES

¶ 1 The State does not disagree with or object to Respondent M.H.'s Statement of the Issues. However, it should be noted that the Termination of Parental Rights of M.H., T.P., C.F., and M.F. to E.P., J.F., and D.H. was Granted and Ordered on two separate legal bases, and Respondent M.H.'s Appeal only addresses one of those bases. Specifically, the Court concluded by clear and convincing evidence both: (1) that (a) the children are deprived children; (b) the conditions and causes of the deprivation are likely to continue; and (c) the children are suffering, or will in the future probably suffer serious physical, mental, moral, or emotional harm **AND** (2) that (a) the children are deprived children; and (b) the children have been in foster care for over four hundred fifty out of the previous six hundred nights. See Docket Nos 61, 61, and 63; App. 20-26, 39-44, and 56-62; see also N.D.C.C. § 27-20-44(1). A court may terminate parental rights if clear and convincing evidence establishes **either** of the following: (1) that (a) the children are deprived children; (b) the conditions and causes of the deprivation are likely to continue; and (c) the children are suffering, or will in the future probably suffer serious physical, mental, moral, or emotional harm **OR** (2) that (a) the children are deprived children; and (b) the children have been in foster care for four hundred fifty out of the previous six hundred nights. In re K.J., 2010 ND 46, ¶4, 779 N.W.2d 635, 637-8; see also N.D.C.C. § 27-20-44(1); see also In the Interest of R.L.-P., 2014 ND 28, ¶¶ 20-23, 842 N.W.2d, 889 (emphasis added). Respondent M.H.'s Appellate Brief only addresses whether the conditions and causes of deprivation are likely to continue and whether the children are suffering or will in the future probably suffer serious physical, mental, moral, or emotional harm.

STATEMENT OF THE CASE

¶ 2 The State concurs with Respondent M.H.'s Statement of the Case.

STATEMENT OF THE FACTS

¶ 3 The State does not oppose or object to Respondent M.H.'s Statement of the Facts, but further facts are required regarding Respondent M.H. and the three minor children at issue.

¶ 4 At the time of trial, all three children had been in foster care for 909 uninterrupted days and E.P. had accumulated a total of 1101 nights in foster care. App. 20, 38, 56. M.H. admitted to battling an addiction to methamphetamine for an extended period of time as well as being in abusive relationships with men which impacted and affected her children. App. 22, 40, 58. M.H.'s youngest child was born with methamphetamine in her system which prompted the removal of the children from the parental home. App 23, 41, 58-59. M.H. did not comply or cooperate with the recommendations and requirements of Stark County Social Services. Id. M.H. did not consistently visit her children while in foster care. Id. M.H. admitted to tampering with drug tests requested by Social Services and continued to test positive for methamphetamine when hair follicle tests were conducted. Id. M.H. has a history of failing to complete programs to assist her in regaining sobriety and advancing her life skills. Id.

¶ 5 M.H. placed her children in physical jeopardy by failing to maintain and provide adequate housing for her children and engaging in recurrent relationships with abusive men, one of whom was alleged to have abused E.P. physically and possibly sexually. App. 25, 43, 61. M.H. admitted to choosing her addiction over her children, and had only achieved sobriety for a short period of time and only in the context of a controlled living

setting. App. 26, 44, 61. The patterns that M.H. exhibited are indicative of her not fully appreciating the risks of her behavior. App. 32-33, 50-51, 67.

JURISDICTIONAL STATEMENT

¶ 6 The State concurs with Respondent M.H.'s Jurisdictional Statement.

STANDARD OF REVIEW

¶ 7 Although the State does not oppose Respondent M.H.'s recitation of Rule 52(a) of the North Dakota Rules of Civil Procedure, the State also notes that the North Dakota Supreme Court's standard of review in a termination of parental rights case is similar to trial de novo. In Interest of C.S., 417 N.W.2d 846, 847 (N.D. 1988). The State concurs that the evidence must be established by clear and convincing evidence. However, as set forth above in the Statement of the Issues, Respondent M.H.'s Standard of Review statement only provides one of the two legal principles on which the trial court Granted and Ordered the termination of parental rights.

ARGUMENT

a. THE TRIAL COURT DETERMINED THAT TERMINATION OF PARENTAL RIGHTS WAS APPROPRIATE BASED ON TWO LEGAL BASES.

¶ 8 Respondent M.H. contends that the Court must prove by clear and convincing evidence that (a) the children are deprived children; (b) the conditions and causes of the deprivation are likely to continue; and (c) the children are suffering, or will in the future probably suffer serious physical, mental, moral, or emotional harm. See Appellant's Brief ¶¶ 22-23. The State does not disagree with this assessment. However, Respondent M.H. fails entirely to even mention that the Court may also terminate a parent's rights if the State **only** proves by clear and convincing evidence that (1) the child is deprived; and (2) that

the child has been in foster care, in the care, custody, and control of Social Services for at least four hundred fifty out of the previous six hundred sixty nights. N.D.C.C. § 27-20-44(1)(c); see also In the Interest of R.L.-P., at ¶¶ 20-23.

¶ 9 The trial court determined, based on clear and convincing evidence that the children were deprived children, and that the children had been in the care, custody, and control of Stark County Social Services for 909 uninterrupted nights as of the date of trial. App. 29-35, 47-53, 64-70. Respondent M.H.'s Appellant Brief is entirely silent on both of those elements and conclusions of law, and as such, M.H. must not be contesting that portion of the trial court's decision. Because the State is only required to prove these two elements in order for the Court to make a determination regarding termination of a parent's parental rights, and M.H. did not contest these elements, on this issue alone, the decision of the trial court should be affirmed.

b. THE TRIAL COURT DID NOT ERR, AND ITS FINDING THAT THE CONDITIONS AND CAUSES OF DEPRIVATION WERE LIKELY TO CONTINUE WAS BASED ON CLEAR AND CONVINCING EVIDENCE.

¶ 10 Although it is not clearly articulated, Respondent M.H. appears to assert that the trial court's decision was clearly erroneous and either (1) induced by an erroneous view of the law, (2) that no evidence existed to support the finding, or if (3) on the whole record, there is a firm and definite conviction that a mistake was made. Appellate Brief ¶20; see also Interest of D.M., 2007 ND 62 ¶6, 730 N.W.2d 604. However, the State herein asserts that (1) there is no evidence or argument that the trial court's decision was based on an erroneous view of the law, (2) evidence exists to support the trial court's findings, and (3) there is no indication that a mistake was made.

¶ 11 In determining whether the causes and conditions of deprivation will continue,

evidence of past deprivation is not enough, and there must exist prognostic evidence. In re. A.B., 2010 ND 249, ¶22; 792 N.W.2d 539. Prognostic evidence is evidence that “forms the basis of reasonable prediction as to future behavior.” Id., quoting Interest of A.B., 2009 ND 116, ¶18; 767 N.W.2d 817. A parent’s past conduct can form the basis for a reasonable prediction of a parent’s future behavior, and evidence of the parent’s background, including previous incidents of abuse and deprivation, may be considered in determining whether deprivation is likely to continue. In re. A.B., 2010 ND 249, at ¶¶16, 22. Prognostic evidence also includes the opinions of the professionals involved. Id. at ¶22, citing Interest of K.J., 2010 ND 46, ¶8; 779 N.W.2d 635. A parent’s lack of cooperation with social service agencies indicates the causes and conditions of deprivation are likely to continue or will not be remedied. In re. A.B., 2010 ND 249, at ¶16, citing Interest of T.A., 2006 ND 210, ¶16; 722 N.W.2d 548. Also, in determining whether deprivation is likely to continue, a juvenile court may consider the amount of contact the parent has had with the child. In re. A.B., at ¶22, citing Interest of A.S., 2007 ND 83, ¶19; 733 N.W.2d 232.

¶ 12 In the present case, M.H. has failed to maintain steady employment, failed to maintain sobriety, failed to follow through with treatment, failed to follow through with individual therapy, failed to demonstrate consistency, failed to demonstrate reliability, and failed to maintain visits with her children regularly. App. 23, 26, 41, 44, 50-51, 58-59; 25, 43, 61, 67; see also Testimony of Rachel Anderson, Dr. Chris Hertler, Jan Kuhn, and Eric Jung. Furthermore, the children suffered from neglect and were exposed to drugs, violence, and abuse while in the care of their mother prior to removal from the home. See Testimony of Melissa Slomenski and Dr. Renee Boomgaarden. The testimony of Jan Kuhn, a licensed addiction counselor, and the testimony of Jaime Sickler, the children’s guardian ad litem,

is that two or three months of sobriety is not sufficient to demonstrate an ability to stay clean and that AA is not an appropriate treatment program for a methamphetamine addict. (Citation Omitted).

¶ 13 In a similar case, where a father showed little effort in developing a positive parent relationship with the child and did not cooperate with Social Services, the Court determined termination of the parent's rights was appropriate and best for the child. In re. A.B., 2010 ND 249, at ¶¶13, 23-24. While lack of parental cooperation is insufficient by itself to establish deprivation, it is pertinent to the issue of whether deprivation will continue. In re S.F., 2000 ND 161, ¶10, 651 N.W.2d 511. In another similar case, the North Dakota Supreme Court affirmed termination in a case where the parent had a history with addiction issues. Interest of R.L.-P., 2014 ND 28, ¶17, 842 N.W.2d, 889. In In re. R.L.-P., much like in this case, where the children had been in foster care for 863 days, the parent had remained sober for a few months, and had begun to make progress, but the Court determined that any progress made was made too late. Id. at ¶¶17, 22.

¶ 14 When a parent, through voluntary actions, without reasonable justification, makes herself unavailable to care for and parent a young child, the child should not be expected to wait or assume the risk involved in waiting for permanency and stability in his life. In re K.J., at ¶8, quoting Interest of E.R., 2004 ND 202 ¶9, 688 N.W.2d 384. M.H.'s documented voluntary actions from 2011 to present show that she exposed her children to drugs, neglect, and violence, and she then chose her addiction over her children. App. 23, 26, 41, 44, 50-51, 58-59; 25, 43, 61, 67. She was not available to parent her children, and, as articulated by Dr. Boomgaarden, it is too late.

¶ 15 Respondent M.H. contends that the Court failed to take into consideration all of the

testimony, but provides no actual support for this contention. See Appellant's Brief ¶25. The Respondent M.H. had only maintained sobriety for three months and in the context of a controlled sober living house environment, and based on that, it appears Respondent M.H. asserts that this fact should have been given more weight. App. 26, 44, 61. However, the Supreme Court has found many times that it is not enough that a parent indicate a desire to improve. A parent must be able to demonstrate present capability, or capability within the near future to be an adequate parent. McBeth v. MDK, 447 N.W.2d 318, 322 (N.D. 1989). The Court found that a short time in sobriety was not enough to overcome the years of drug use and prior actions of M.H. The Court properly determined, based on clear and convincing evidence, and not based on any erroneous view of the law, that the conditions and causes of deprivation are likely to continue. The decision of the trial court should be affirmed.

c. THE TRIAL COURT DID NOT ERR, AND ITS FINDING THAT THE CHILDREN WERE SUFFERING AND WOULD CONTINUE TO SUFFER SERIOUS PHYSICAL, MENTAL, MORAL, OR EMOTIONAL HARM WAS BASED ON CLEAR AND CONVINCING EVIDENCE.

¶ 16 With respect to the trial court's finding that the children were suffering and would continue to suffer serious physical, mental, moral, or emotional harm was not erroneous, was based on clear and convincing evidence, and was not based on an erroneous view of the law.

¶ 17 The evidence at trial was that E.P. was suffering and that permanency for the children has priority. App 24; see also Testimony of Dr. Renee Boomgaarden, Rachel Andersen, and Jamie Sickler. Jaime Sickler and Renee Boomgaarden testified that the children cannot wait any longer for their mother to be ready for reunification – the children

deserve and need permanency now. (Citation Omitted). At the time of trial, M.H. testified that she currently lives in a sober living home – not an appropriate living environment for three small girls. (Citation Omitted). M.H. also testified that she wanted to maintain sobriety for at least nine more months before even she deemed it appropriate to begin caring for her children. (Citation Omitted). In the opinion of M.H. and that of her sister C.T., M.H. should get more time to prove her sobriety despite the negative impact of over 900 days in foster care on children. (Citation Omitted). Based on the testimony of M.H., her focus and priorities are on what she wants, instead of what is best for the children. (Citation Omitted).

¶ 18 The testimony of Rachel Anderson and Dr. Renee Boomgaarden illustrated that E.P. exhibited aggressive behaviors and wet and soiled herself when she had to endure visits with her mother. (Citation Omitted). Throughout the almost three years that the children had been in the care, custody, and control of Stark County Social Services, M.H. had not successfully followed the recommendations of Social Services, did not consistently attend scheduled visits, did not maintain sobriety, and has not proven that she is ready, willing, and able to care for the children. App. 23, 26, 41, 44, 50-51, 58-59; 25, 43, 61, 67. The evidence provided is simply that M.H. chose her addiction over her children, and they deserve and need permanency and stability now, not later after M.H. has had time to prove herself. Id.

¶ 19 A parent's relationship with a biological child is entitled to constitutional protection, but that relationship is neither absolute nor unconditional. In re K.J., at ¶17, quoting Interest of D.C.S.H.C., 2007 ND 102 ¶13, 733 N.W.2d 902. The trial court determined that the children deserved permanency now, not later. The trial court's

determination was based on the testimony of Dr. Renee Boomgaarden and the children's guardian ad litem, Jaime Sickler.

¶ 20 In a case when a service plan was put in place to reunify the children with their mother, including provisions for a number of service plan goals and treatment, the mother failed to complete the treatment plan, and the children remained in out-of-home placements, the Court found that the children would be harmed absent termination of the mother's rights. In re K.J., at ¶6. The Court in K.J. found that the parent was unsuccessful in addressing her chemical addiction, unsuccessful in establishing stable and secure housing, and that her prognosis for sobriety was not sufficiently proven. Id. The Court found that the children needed consistency, predictability, and stability in their environments with caretakers to progress in healthy development. Id. Absent termination, the children would likely suffer mental and emotional harm. Id.

¶ 21 Similarly, the children at issue in this case need consistency, predictability, and stability, which M.H. has not proven she can provide. The Court properly determined, based on clear and convincing evidence, and not based on any erroneous view of the law, that the children were suffering and would continue to suffer serious physical, mental, moral, or emotional harm. The decision of the trial court should be affirmed.

CONCLUSION

¶ 22 The trial court did not err, and its decisions in this case were based on clear and convincing evidence and not on any erroneous view of the law. The decision of the trial court should be affirmed.

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Respectfully submitted this 27th day of May, 2016.



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