

SUPREME COURT OF THE STATE OF NORTH DAKOTA

INTEREST OF W.C., I.C., M.C., AND W.C., MINOR CHILDREN

Marlene Sorum, L.S.W., Cass County)	
Social Services,)	Cass Cnty. Ct. Nos.:
)	
Petitioner and)	
Appellee,)	
)	09-2016-JV-326
v.)	09-2016-JV-327
)	09-2016-JV-328
W.C., I.C., M.C., AND W.C., children;)	09-2016-JV-329
J.C., father; M.M., mother;)	
)	
Respondents,)	Supreme Ct. No.:
)	
J.C., father,)	
)	
Respondent and)	
Appellant.)	
)	

APPELLANT'S BRIEF

APPEAL FROM THE MEMORANDUM OPINION AND ORDER ON REQUEST
FOR REVIEW ENTERED ON MAY 5, 2017.

CASE NOS.: 09-2016-JV-329; 09-2016-JV-327; 09-2016-JV-326; 09-2016-JV-328

COUNTY OF CASS
EAST-CENTRAL JUDICIAL DISTRICT

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STATEMENT OF THE ISSUES

- I. Whether there was clear and convincing evidence to support a finding of deprivation that was likely to continue.
- II. Whether there was clear and convincing evidence that the child would likely suffer harm absent a termination of parental rights.
- III. Whether there was clear and convincing evidence that reasonable efforts were made to prevent the continued placement of the child outside of the parental home.

STATEMENT OF THE CASE

[¶1] This is an appeal from an order of the juvenile court, Cass County, terminating the parental rights of J.C. to W.C., I.C., M.C., and W.C. On July 6, 2016, a petition was filed by Cass County Social Services asking the court to terminate the parental rights of J.C. to the children W.C., I.C., M.C., and W.C. (File Nos.: 09-2016-JV-329; 09-2016-JV-327; 09-2016-JV-326; and 09-2016-JV-328. docket # 1 App. at 1). The petition to terminate was tried on March 8 and 9, 2017, before the juvenile court. On April 4, 2017, the Court issued Findings and Order Terminating Parental Rights of J.C., (File Nos.: 09-2016-JV-329; 09-2016-JV-327; 09-2016-JV-326; and 09-2016-JV-328. docket # 114 App. at 4). J.C. requested review of the judicial referee's order, and the order was affirmed on May 5, 2017. Respondent, J.C., hereby files this timely Notice of Appeal and associated brief.

STATEMENT OF FACTS

[¶2] W.C. (DOB: XX/XX/2003), I.C. (DOB: XX/XX/2006), M.C. (DOB: XX/XX/2010), and W.C. (DOB: XX/XX/2013) are the children at issue in this matter (Findings of Fact and Order Terminating Parental Rights at I; App. at 4). Appellant J.C. is the father of W.C., I.C., M.C., and W.C. (Findings of Fact and Order Terminating Parental Rights at ¶II; App. at 6).

[¶3] W.C., I.C., M.C., and W.C. were adjudicated deprived on August 12, 2015 and were placed in the custody of Cass County Social Services for a period of one year. (Findings of Fact and Order Terminating Parental Rights at ¶II.3; App. at 6) Following the finding of deprivation, a care plan was established to facilitate reunification of W.C., I.C., M.C., and W.C. with their parents (Findings of Fact and Order Terminating Parental Rights at ¶II.4; App. at 6). On July 6, 2016, a petition for termination of parental rights was filed. (File Nos.: 09-2016-JV-329; 09-2016-JV-327; 09-2016-JV-326; and 09-2016-JV-328. docket # 1; App. at 1.) A trial was held on March 8 and 9, 2017. At trial, numerous witnesses testified. The Findings and Order Terminating Parental Rights was filed April 4, 2017, which terminated J.C. and M.M.'s parental rights to their children, W.C., I.C., M.C., and W.C. (File Nos.: 09-2016-JV-329; 09-2016-JV-327; 09-2016-JV-326; and 09-2016-JV-328. docket # 114; App. at 4)

ARGUMENT

[¶4] Rule 52(a), N.D.R.Civ.P provides that findings of fact in juvenile matters shall not be set aside by this Court unless they are clearly erroneous. *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. *Id.*

[¶5] In order for the State to be successful in terminating Mr. Churchman's parental and legal rights to the children, N.D.C.C. § 27-20-44 creates a three-part test. First, the petitioner must prove the child is deprived, second, that the conditions and causes of the deprivation are likely to continue, and third, that the child is suffering or will in the future, probably suffer serious physical, mental, moral or emotional harm. These must be proved by clear and convincing evidence. A deprived child is one who is without proper parental care, 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).

[¶6] Natural parents have a fundamental right to their children, "which is of a constitutional dimension." *Interest of W.E.*, 2000 ND 208, ¶30, 616 N.W. 2d 494 (quoting *In the Interest of L.F.*, 1998 ND 129, ¶ 9, 580 N.W. 2d 573). The constitutional protections, although not absolute, require that "[a]ny doubts should be resolved in favor of the natural parent[,] and parental rights should be terminated only when necessary for the child's welfare or in the interest of public

safety.” Id. There is a presumption that parents are fit and the burden of disproving this presumption is on the person challenging it. In the Interest of K.R.A.G., 420 N.W. 2d 325 (N.D. 1988). “It is not reason enough to deprive parents of custody that their home is not the best, or even that they are not the best parents that could be offered to the child, so long as the child does not suffer physical or moral harm, or lack of food or clothing.” In the Interest of W.E., 2000 ND 208 ¶36 (quoting In the Interest of M.M.C., 277 N.W. 2d 281, 286 (N.D. 1979)(citations omitted). Proper parental care is defined as the minimum standard of care which the community will tolerate. Interest of R.S., 2010 ND 147, ¶8, 787 N.W. 2d 277. “Any doubts should be resolved in favor of the natural parent, and parental rights should be terminated only when necessary for the child’s welfare or in the interest of public safety.” In the Interest of Z.R. and J.V., 1999 N.D. 214, 602 N.W.2d 723 (ND 1999).

I. Whether there was clear and convincing evidence to support a finding of deprivation that was likely to continue.

[¶7] 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.* Further, the basis of the deprivation may not be due primarily to the lack of financial means of the child’s parents. N.D.C.C. § 27-20-02(8). Petitioner failed to prove that the deprivation is likely to continue.

[¶8] W.C., I.C., M.C., and W.C. were removed from their parents' care on April 29, 2015 due to concerns of unkempt living arrangements and conflict between the parents.

[¶9] As a result of the deprivation finding, J.C. and M.M. were expected to: participate in their children's therapy as requested; provide a safe and clean home for the children and to develop a financial plan to maintain housing payments; participate in a parenting screening tools inventory; drug screening; participate in parenting time and demonstrate healthy parenting skills; participate in parenting education; communicate in a safe and healthy manner and will complete a domestic violence evaluation. J.C. has taken numerous steps to meet the recommendations of the family plan.

a. Children's Therapy

[¶10] J.C. is willing to address any needs the children have regarding their mental health. He testified he will enroll them in any sort of therapy or appointments they require and will follow-up with any recommendations as necessary. J.C. is also committed to providing a safe, stable home for the children that will be conducive to their mental health. J.C. was never asked to participate in any of the children's therapy by the county or the children's therapists, so he was not given the opportunity to develop any strategies or assist in any of the children's therapeutic needs.

b. Housing

[¶11] J.C. has had a number of impediments to success throughout this process; all stemming from his lack of financial resources. The trailer where the family resided was clean within three days after the children were removed. However, J.C. was later evicted from that property for failure to pay taxes and lot rent.

[¶12] The schedule the County set for J.C. to participate in therapy and parenting time was also not conducive to holding a steady job as it requires him to miss on average two days of work per week to attend the required sessions. From May to October of 2016, J.C. had a steady job, working 12-hour shifts through Heartland Labor where he was placed with Nu-Tek, a salt bagging company. J.C. would have continued with that job if the requirements of his family did not force him to move out of the Fargo area. None of these jobs have been able to support J.C. in the manner the County requires. After child support is deducted from his checks, he has little left over to live on, secure suitable housing, or maintain his transportation. Additionally, J.C. knew that a 12-hour shift job would not be feasible when the children returned as he would not have the flexibility necessary to supervise and support the children. Therefore, he moved to Luverne, North Dakota at that time to find cheaper housing that would be appropriate for the children, as well as the possibility of receiving housing benefits sooner than staying in Cass County.

[¶13] He has been at the home in Luverne, North Dakota since October of 2016, but Cass County has never sent anyone to do a home study or view the home to determine if it is appropriate to have children there. J.C. pays \$100 per month rent at the home in Luverne, North Dakota, which is inexpensive enough that J.C. will be able to afford that rent indefinitely. It is much cheaper than any comparable property in Fargo. That addresses the concerns regarding the home and finances of J.C. that the county had before they would return the children.

c. Drug Screening

[¶14] Lisa Mastel testified to J.C.'s substance abuse treatment. Ms. Mastel is J.C.'s primary addiction counselor through Southeast Human Service Center. J.C. did a substance abuse evaluation in May of 2016, and he was recommended to have Level 2.1 treatment. This calls for nine hours of treatment per week. At that time, J.C. was employed full time so he could not participate in nine hours of therapy per week. They worked out a schedule where he would meet for therapy from 9:00 a.m. to 12:00 p.m. on Fridays, his day off. J.C. attended treatment throughout June and half of July. The last session on July 21 was canceled because J.C. had an opportunity to work overtime at his job and could not attend the meeting because of that. Ms. Mastel testified that she saw J.C. consistently during June and July, and no time-frames were suggested as far as how long J.C. needed to be in treatment. As part of the program with Southeast Human Service Center, J.C. underwent random urine analysis tests. The last one Ms. Mastel could recall was administered on July 15,

2016, which came back clean. Ms. Mastel testified that they were willing to work with J.C. around his schedule as necessary and that to her, a successful course of treatment means maintaining sobriety. It appears that J.C. was able to do so.

[¶15] William Jensen testified to J.C.'s time while on probation.

Mr. Jensen was J.C.'s probation officer stemming from a burglary charge. J.C.'s probation was revoked because he fell out of contact with Mr. Jensen, he failed to pay the remainder of the fines and fees totaling \$570, and for absconding. He was able to pay \$150, but not the balance. When J.C. was arrested for violating his probation, Mr. Jensen decided that he was not going to revoke his probation; instead, they were going to work with him. Mr. Jensen testified that he made that decision because J.C. took responsibility, was honest, was not gone for very long, and was a good guy to work with. This is not always the case with many of Mr. Jensen's supervisees in probation. Mr. Jensen also stated that J.C.'s risk for relapse either into criminal activity or drug use was because of some family members who were a negative influence. He stated that M.M. was not a risk factor for J.C. to relapse. Mr. Jensen also stated that J.C. was making progress in breaking away from his troublesome family members and to Mr. Jensen's knowledge, does not associate with them anymore.

d. Parenting time and parenting skills development

[¶16] J.C. moved to Luverne, North Dakota to try to find reasonably priced housing, but that increased his transportation difficulties. But even with the distance, he still maintained his parenting time schedule.

[¶17] J.C. claims he never had any problems during parenting time in regards to the children. He had activities with the children where he talked about their days or how school was going, he displayed physical affection with them and rough housed at times, creating that physical bond with the children. They also played games with the toys provided by Cass County Social Services in the parenting time room. J.C. brought a snack to the majority of parenting times with the children. J.C. completed a Nurtured Heart parenting class and received a certificate to show his attendance at that program. He attempted to implement strategies he learned at the class during parenting time, but by the time he finished the parenting class, his parenting time was reduced to one hour every two weeks. It was difficult for him to implement new parenting strategies when he had such limited contact with his children.

[¶18] Wendy Hell, a parent aide through Cass County Social Services, testified to her observations of the family. Ms. Hell has supervised parenting time from May 15, 2015 to the time of trial. According to her records, J.C. attended 55 out of 68 parenting times, which in Ms. Hell's opinion is a very high and admirable percentage. The only times he was not able to attend were when he was hospitalized, incarcerated, or when vehicle trouble made it impossible for him to attend the sessions. Ms. Hell testified to numerous issues regarding M.M., the children's mother, relating to emotional outbursts and threats made towards staff. J.C. did not exhibit any of those behaviors. The timing of the visits, which were 1 hour per week, were not conducive to J.C.'s work schedule as he worked

regular day-time hours and no parenting time was offered after the workday is over. Cass County Social Services never worked with J.C. to find a new schedule or a way to accommodate J.C.'s work schedule and other classes required by Cass County Social Services. Ms. Hell also stated that social services wanted to see J.C. intervene when M.M. started acting out or when her emotions became elevated and negative. However, there was never any clear discussion of what J.C. was supposed to do or to address the real possibility that any intervention on his part would only escalate the situation in front of the children. This would lead to further negative behaviors by M.M. In essence, the County expected J.C. to address situations with M.M. appropriately without any sort of coaching, preparation, or suggestions by social services. The County then deemed that he was not acting in a sufficiently appropriate way when those incidents would occur, all the while never giving J.C. any criteria as to what an appropriate reaction would be. This put J.C. in a no-win situation when M.M. acted out during parenting time.

e. Communication between J.C. and M.M.

[¶19] In regards to the domestic violence between J.C. and M.M., J.C. does not see it as remaining a problem in the future as they are no longer together, they live approximately an hour and twenty minutes apart, and should M.M.'s parental rights be terminated, there will be no further need for J.C. to have any contact with her.

f. Financial issues related to deprivation

[¶20] J.C.'s failures in the parenting plan are largely a result of financial difficulties. He had limited ability to receive housing assistance, so he needed income to secure housing. The County's requirements were not conducive to holding a regular, day-time job which prevented him from amassing enough income to secure housing. His probation violation was largely due to not paying his fines. In essence, J.C. was caught in a County mandated Catch-22. The County stated that he needed to secure housing to have the kids returned to him, so he needed to hold a job to pay for the housing. But, he couldn't hold a good job because the County required that he attend therapy and parenting time. This meant that he couldn't afford housing. It was a vicious cycle that J.C. only now has been able to begin to resolve.

[¶21] It appears that many of these issues related to J.C.'s apparent lack of progress on the County's recommendations are due to financial issues. Ms. Sorum stated that domestic violence, food, clothing, supervision of children, hygiene, and abuse were all the main issues that brought the county into this case. However, each of those issues generally has a basis in lack of financial stability and the stress that it causes in a family.

[¶22] Taken as a whole, the state has not met its burden of showing that the conditions and causes of the deprivation are likely to continue, and that the children are suffering or will in the future, probably suffer serious physical, mental, moral or emotional harm. "Any doubts should be resolved in favor of the natural

parent, and parental rights should be terminated only when necessary for the child's welfare or in the interest of public safety." In the Interest of Z.R. and J.V., 602 N.W.2d 723 (N.D. 1999).

[¶23] In short, Petitioner has failed to prove by clear and convincing evidence that there existed deprivation that would likely continue absent a termination of J.C.'s parental 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.

[¶24] 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.

[¶25] The evidence showed that W.C, I.C., M.C., and W.C. all have varying levels of mental health issues that need continuing therapy. J.C. stated he is willing to continue therapy with his children and support them in their treatment. Each of the children's mental health providers testified that the children need a safe, stable home environment to maintain their mental health. There was no evidence that J.C. is unable to provide for those needs. The evidence did not show that the children will suffer harm absent her father's rights being terminated. J.C. has taken a Nurtured Heart parenting class to develop better parenting skills. J.C. testified that he will follow any therapeutic

recommendations for his children's mental and emotional health once they are returned to the home. However, none of the therapists have reached out to J.C. to participate in therapy at this point. Some of the children are undergoing more specialized therapy that requires their caregiver to develop skills to reinforce the therapy at home. J.C. is willing to participate and learn the new skills required by the treatment, but he has not been given the opportunity to do so at this point.

[¶26] The trial court's finding that W.C., I.C., M.C., and W.C. will likely be harmed absent a termination is clearly erroneous.

III. Whether there was clear and convincing evidence to support a finding that reasonable efforts were made to prevent the continued placement of the child outside of the parental home.

[¶27] 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 S.M.*, 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).

[¶28] It is clear that reasonable efforts were not made to reunite W.C., I.C., M.C., and W.C. with their family. J.C. followed the recommendations of

Cass County Social Services as part of his Family Plan. Unfortunately, J.C.'s problems were largely financial in nature.

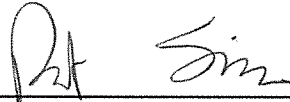
[¶29] As was mentioned above, J.C. was caught in a vicious cycle mandated by the County. The County stated that he needed to secure housing to have the kids returned to him, so he needed to hold a job to pay for the housing. But, he couldn't hold a good job because the County required that he attend therapy and parenting time. This meant that he couldn't afford housing. The County failed to tailor their plan accordingly to work around his work schedule to allow him to gather the necessary funds to support his family.

[¶30] Reasonable efforts were not made to reunify these children with their father.

CONCLUSION

[¶31] In conclusion, the state has not met its burden of proof for terminating J.C.'s parental rights. This Court should reverse the order of the juvenile court and remand for an order requiring Cass County Social Services to work on a plan to transition W.C, I.C., M.C., and W.C. to their father's home. In the alternative, the Court should order an appropriate treatment plan be performed by the parties, with an effort toward reunification. Cass County Social Services may be given temporary full custody of W.C, I.C., M.C., and W.C. to monitor the situation.

Respectfully submitted this 6 day of June, 2017.



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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE INTERESTS OF:

W.C., a Child, DOB XX-XX-2003
File Nos. 09-2015-JV-217 and 09-2016-JV-329
I.C., a Child, DOB XX-XX-2006
File Nos. 09-2015-JV-218 and 09-2016-JV-327
M.C., a Child, DOB XX-XX-2010
File Nos. 09-2015-JV-219 and 09-2016-JV-326
W.C., a Child, DOB XX-XX-2013
File Nos. 09-2015-JV-220 and 09-2016-JV-328

Supreme Ct. No.

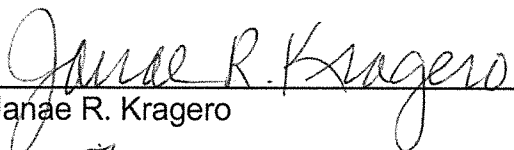
AFFIDAVIT OF SERVICE

I, Janae R. Kragero, being first duly sworn and under oath, depose and say: I am of legal age, a citizen of the United States and not a party to the action herein; that on the 5 day of June, 2017, I served the following documents:

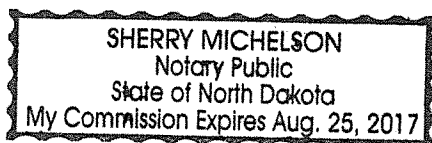
**NOTICE OF APPEAL
ORDER FOR TRANSCRIPTS
APPENDIX TO APPELLANT'S BRIEF
APPELLANT'S BRIEF**

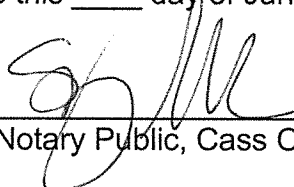
on the persons listed below by sending electronically to the email address given:

Constance Cleveland, Cass County States Attorney ClevelandC@casscountynd.gov
Jay Greenwood – jgreenwood@jrmlawfirm.com
Maggie Anderson, Director of Human Services – maggiedanderson@nd.gov
Lisa Borseth, Lay Guardian Ad Litem – lisaborsethndgal@gmail.com


Janae R. Kragero

Subscribed and sworn to before me this 5th day of June, 2017.




Notary Public, Cass County, ND

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE INTERESTS OF:

W.C., a Child, DOB XX-XX-2003, File No. 09-2016-JV-329
I.C., a Child, DOB XX-XX-2006, File No. 09-2016-JV-327
M.C., a Child, DOB XX-XX-2010, File No. 09-2016-JV-326
W.C., a Child, DOB XX-XX-2013, File No. 09-2016-JV-328

Supreme Ct. No.

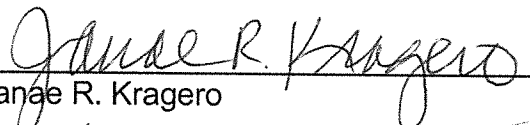
AFFIDAVIT OF SERVICE

I, Janae R. Kragero, being first duly sworn and under oath, depose and say: I am of legal age, a citizen of the United States and not a party to the action herein; that on the 6th day of June, 2017, I served the following documents:

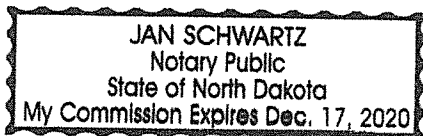
AMENDED NOTICE OF APPEAL
AMENDED ORDER FOR TRANSCRIPTS
APPENDIX TO APPELLANT'S BRIEF
APPELLANT'S BRIEF

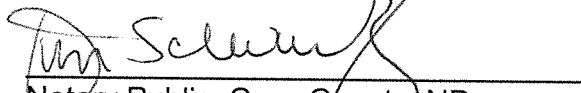
on the persons listed below by sending electronically to the email address given:

Constance Cleveland Cass County States Attorney ClevelandC@casscountynd.gov	Jay Greenwood jgreenwood@jrmlawfirm.com
Chris Jones Director of Human Services chrisdjones@nd.gov jealm@nd.gov	Lisa Borseth Lay Guardian Ad Litem lborsethndgal@gmail.com


Janae R. Kragero

Subscribed and sworn to before me this 6th day of June, 2017.




Notary Public, Cass County, ND

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE INTERESTS OF:

W.C., a Child, DOB XX-XX-2003, File No. 09-2016-JV-329

I.C., a Child, DOB XX-XX-2006, File No. 09-2016-JV-327

M.C., a Child, DOB XX-XX-2010, File No. 09-2016-JV-326

W.C., a Child, DOB XX-XX-2013, File No. 09-2016-JV-328

Supreme Ct. No.

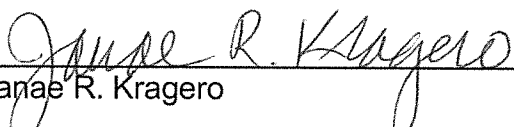
AFFIDAVIT OF SERVICE

I, Janae R. Kragero, being first duly sworn and under oath, depose and say: I am of legal age, a citizen of the United States and not a party to the action herein; that on the 7th day of June, 2017, I served the following documents:

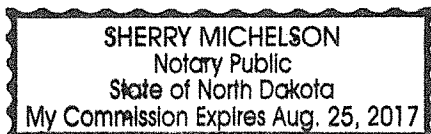
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SECOND AMENDED ORDER FOR TRANSCRIPTS

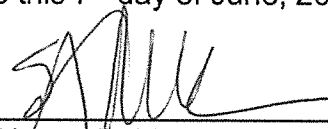
on the persons listed below by sending electronically to the email address given:

Constance Cleveland Cass County States Attorney ClevelandC@casscountynd.gov	Jay Greenwood jgreenwood@jrmlawfirm.com
Chris Jones Director of Human Services chrisdjones@nd.gov jealm@nd.gov	Lisa Borseth Lay Guardian Ad Litem lborsethndgal@gmail.com


Janae R. Kragero

Subscribed and sworn to before me this 7th day of June, 2017.




Notary Public, Cass County, ND