

Ashley Lill, L.S.W.,
Petitioner and
Appellee,
vs.
N.B.,
Respondent and
Appellant,
Director, Cass County Social
Services, J.B., J.G.,
and Lisa Borseth,
Guardian ad Litem,
Respondents.

APPEAL FROM THE JUVENILE FINDINGS OF FACT AND ORDER FOR
DISPOSITION ENTERED DECEMBER 7, 2017.

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STATEMENT OF THE ISSUES

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

STATEMENT OF THE CASE

[1] This is an appeal from an order of the juvenile court, Cass County, adjudicating the minor child J.B. a "Deprived Child" as defined by North Dakota Century Code §27-20-02(8). On November 30, 2017, a petition and affidavit were filed by Cass County Social Services asking the court to find the minor child, J.B. to be a "Deprived Child" pursuant to -JV-N.D.C.C. §27-20-02(8). (File 09-2017-JV-00463 docket ## 18, 19; Appellant's Appendix [hereinafter App.] at 4). The matter was tried on November 29, 2017, before the juvenile court, with the Honorable Referee Scott Griffith presiding. On December 7, 2017, the referee issued "JV FINDINGS OF FACT AND ORDER FOR DISPOSITION" adjudicating J.B. as a "Deprived Child". (File 09-2017-JV-00463 docket # 50; App. at 24). Respondent father N.B. hereby files this timely Notice of Appeal and associated brief asking that the lower court finding J.B. to be a "deprived child", be overturned and the disposition granting legal custody to Cass County Social Services be terminated.

STATEMENT OF FACTS

[2] J.B. is a child born in 2017. (JV FINDINGS OF FACT AND ORDER FOR DISPOSITION at 1; App at 24.) J.G. is the mother of J.B. (Id.) N.B. is the father of J.B. (Id.) N.B. is the

primary care giver of both children. J.B. was initially removed from the care of his mother and father upon birth, due to the mother's extensive past child protection history. (Petition for Deprivation, 09-2017-JV-00463 docket # 19; App. at 4). No harm, mistreatment or neglect of any kind to J.B. was or has ever been alleged. Indeed, following a contested Shelter Care hearing, the Court released J.B. to his father, N.B. on September 22, 2017. (Id.)

[3] Following trial on November 29, 2017, J.B. was adjudicated deprived. (JV FINDINGS OF FACT AND ORDER FOR DISPOSITION at 1; App at 24.) The legal custody of J.B. was removed and placed with Cass County Social Services. The physical custody remained with the respondent father N.B. so long as respondent mother, J.G. is not residing in the home. (Id. at 4, App. At 27.) However, the Court's finding of deprivation is based entirely on facts relating to respondent mother's other children and the resulting criminal proceedings associated with them. Nowhere in the findings does the Court reference the care, control, subsistence or education with respect to J.B. Nowhere does the Court reference any impact or deterioration of the physical, mental or emotional health or morals of J.B. Nowhere does the Court allege any act by the respondent father, N.B. that would justify a finding of deprivation.

ARGUMENT

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

[5] Section 27-20-02(8) of the North Dakota Century Code requires a petitioner for deprivation to prove by clear and convincing evidence that the child is:

- a. 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;
- b. Has been placed for care or adoption in violation of law;
- c. Has been abandoned by the child's parents, guardian, or other custodian;
- d. Is without proper parental care, control, or education as required by law, or other care and control necessary for the child's well-being because of the physical, mental, emotional, or other illness or disability of the child's parent or parents, and that such lack of care is not due to a willful act of commission or act of omission by the child's parents, and care is requested by a parent;

- e. Is in need of treatment and whose parents, guardian, or other custodian have refused to participate in treatment as ordered by the juvenile court;
- f. Was subject to prenatal exposure to chronic or severe use of alcohol or any controlled substance as defined in chapter 19-03.1 in a manner not lawfully prescribed by a practitioner;
- g. Is present in an environment subjecting the child to exposure to a controlled substance, chemical substance, or drug paraphernalia as prohibited by section 19-03.1-22.2.
- h. Is a victim of human trafficking as defined in title 12.1. N.D.C.C. §27-20-02(8).

[6] The phrase "proper parental care" refers to the minimum standard of care which the community will tolerate. Interest of K.R.A.G., 420 N.W.2d 325, 327 (N.D. 1988). The petitioner must establish deprivation by clear and convincing evidence. In re B.B., 2008 ND 51, ¶ 6, 746 N.W.2d 411. "Clear and convincing evidence means evidence that leads to a firm belief or conviction the allegations are true." In re A.B., 2009 ND 116, ¶ 16, 767 N.W.2d 817 (quoting Interest of M.B., 2006 ND 19, ¶ 13, 709 N.W.2d 11). On review, this Court will not overturn a juvenile court's finding that a child is deprived unless the finding is clearly erroneous. B.B., at ¶ 4. A finding of fact is clearly erroneous "if it is induced

by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made." In re T.A., 2006 ND 210, ¶ 11, 722 N.W.2d 548 (citation omitted). When a party appeals a juvenile court order, we review "the files, records, and minutes or transcript of the evidence," and we give "appreciable weight to the findings of the juvenile court." N.D.C.C. § 27-20-56(1).

I. Whether the trial court erred in finding there was clear and convincing evidence to support a finding of deprivation when none of the allegations of the petition or findings of the Court were in reference to the child at issue.

[7] The North Dakota Supreme Court has overturned a finding of Deprivation when the petitioner and lower Court findings neither indicated that the child at issue went without proper parental care and control nor delineated whether the parents' actions had any attributable effect on the child's mental, physical or emotional health. In the Interest of R.S., 2010 ND 147, ¶11, 787 N.W.2d 277.

[8] Here, like In the Interest of R.S., the oral record, findings and petition are devoid of any actual allegation or proof of harm to this child. Instead, the State

and Court rely on the past actions of the mother with reference to her other children and the effect her decision-making and lack of understanding *may* have on J.B. This is wholly insufficient. As stated by this Supreme Court in the previously referenced case, "N.D.C.C. §27-20-02(8)(a) does not provide a child is deprived based upon a future possibility of harm where the child has not actually lacked proper parental care or control." Id. at ¶16. Here, the possibility of harm from a parent, due to the treatment of her other children in the past, is the only referenced allegation. Therefore, the finding of the lower Court cannot stand.

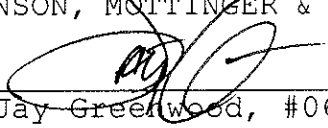
CONCLUSION

[9] In conclusion, the state has not met its burden in showing that J.B. was deprived. The lower court's ruling must be overturned.

[10] Respectfully submitted this 29th day of March, 2018

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SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE INTEREST OF J.B.

Ashley Lill, L.S.W.,)

Petitioner and)
Appellee,)

v.)

N.B.,)

Respondents and)
Appellant,)

Director, Cass Count Social)
Services, J.B., J.G.,)
and Lisa Borseth,)
Guardian ad litem,)
Respondents.)

**AFFIDAVIT OF SERVICE VIA EMAIL
AND MAIL**

Cass Cty. Nos. 09-2017-JV-00463

Sup. Ct. No.: 20170460

STATE OF NORTH DAKOTA)

COUNTY OF CASS)

) ss.

Jessica Jackson, being first duly sworn, deposes and says that she is over the age of 18 years and is not a party to nor interested in the above-entitled matter,

On April 11, 2018, she served the following:

- **AMENDED APPELLANT'S BRIEF**
- **AMENDED APPELLANT'S APPENDIX**

by emailing a true and correct copy thereof addressed as follows:

Pam Ormand Ormandp@casscountynynd.gov

Daniel E. Gast GastLawOffice@gmail.com

Lisa Borseth Lborseth@youthworksnd.org

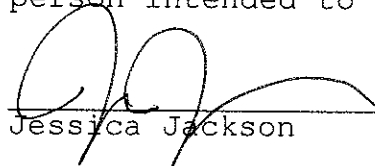
and by placing a true and correct copy thereof in an envelope addressed as follows:

Spirit Lake Tribe
c/o Marie martin, ICWA Director
PO Box 356
Fort Totten, ND 58335

and depositing the same, with postage prepaid, in the United States

mail at Fargo, North Dakota. To the best of affiant's knowledge the email address and address above-given were the actual email address and post office address of the person(s) intended to be so served.

To the best of affiant's knowledge, the email address above-given was the actual address of the person intended to be so served.



Jessica Jackson

Subscribed and sworn to before me on April 11, 2018



Notary Public

(SEAL)

