

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE INTEREST OF L.S., A CHILD

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STATE OF NORTH DAKOTA,	)	
	)	
PETITIONER/APPELLEE ,	)	Cass Co. Case No.: 09-2017-JV-456
	)	
vs.	)	Supreme Ct. No.: 20180090
	)	
C.C.,	)	
	)	
RESPONDENT/APPELLANT.	)	

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**BRIEF OF APPELLANT**

Appeal from the Juvenile Findings of Fact and Order Terminating Parental Rights entered February 6, 2018.

By: Hon. Susan Solheim, Judicial Referee, Cass County Juvenile Court

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## JURISDICTIONAL STATEMENT

[¶1] "Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law." North Dakota Constitution, Article VI, Section 6. "A judgment or order in a civil action may be removed to the Supreme Court by appeal as provided in this chapter." N.D.C.C., § 28-27-01. A final Judgment terminating parental rights is appealable. N.D.C.C. § 28-27-02(2).

## STATEMENT OF THE ISSUES

[¶2] Whether there was clear and convincing evidence to support a finding that the child is deprived, and that the conditions and causes of 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.

## STATEMENT OF THE CASE

[¶3] Cass County Social Services filed a Petition for Deprivation on November 30, 2015. The Court filed a ruling holding that R.C. was deprived on February 29, 2016. R.C. was placed in the custody of Cass County social services for a period of one year from that date. R.C. was returned to her parental home prior to March 1, 2017.

[¶4] On June 20, 2017 a shelter care hearing was held. At that hearing R.C. was placed into the custody of Cass County Social Services again.

[¶5] A petition to terminate parental rights was filed in this case on August, 22, 2017. Trial was held on December 20 and 21, 2017. The Court issued its order terminating parental rights on February 6, 2018. This appeal follows.

## STATEMENT OF THE FACTS

[¶6] Prior to December, 2014, R.C. lived with her parents C.C. and T.V. In December of 2014 a search of the home was conducted. App. at 10. Methamphetamine, heroin, hydromorphone and marijuana were seized from the home. Id. T.V. was charged with possession of marijuana and pled guilty to that offense. Id. C.C. was facing numerous charges and fled the jurisdiction. Id. T.V.

represented that she was no longer involved with C.C. and that he would not return home. Id. R.C. was returned to the care of T.V. and no legal actions concerning the welfare of R.C. were commenced. Id.

[¶7] The home was searched again in June of 2015. Id. C.C. and T.V. were both present at the home during this search. Id. No arrests were made and no child was removed from the house as a result of this search. Id.

[¶8] The home was searched again in November of 2015. Id. At 11. Evidence of drug activity was found during the search. Id. As a result of this search R.C. was placed into the Custody of Social Services and C.C. was placed under arrest. Id. R.C. ultimately plead guilty to charges related to the search. He remained incarcerated until February of 2017.

[¶9] On February 23, C.C. and T.V. entered admissions at an amended petition for Deprivation. R.C. was placed in the custody of Social Services for one year. Id. A care plan was filed on February 26, 2016. Id. Both T.V. and C.C. substantially complied with the care plan. Id. At 12-13. R.C. was returned to her parental home December 1, 2016. Id. Social Services closed their file on this family on or about February 26, 2017 as the family was in compliance with the care plan and everything had been going well. Id.

[¶10] On June 17, 2017 law enforcement received a report of an individual requiring medical care due to a drug overdose. Id. This individual informed law enforcement that she had purchased heroin from C.C. and that she had used heroin while in the home that C.C. shared with T.V. Id. Testimony was also provided that on the evening of June 17, 2017 law enforcement used a confidential informant to purchase heroin from C.C. There was also testimony that the confidential informant was the same person who overdosed several hours earlier. The confidential informant did not testify at the trial.

[¶11] As a result of the controlled buy and statements by the confidential informant, a search warrant was executed on the house shared by C.C. and T.V. on June 19. Id. At 14. No contraband was found during that search. Id. R.C. was removed from the home anyway. Id. The petition for termination in this case then followed. Id. On September 25, 2017 C.C. was indicted federally in relation to allegations

related to the activities of June 17. C.C. is currently in Federal Custody pending the resolution of those charges.

### STANDARD OF REVIEW

[¶12] Rule 52(a) N.D.R.Civ.P provides that finds of fact in juvenile matters shall not be set aside by this Court unless they are clearly erroneous. In the Interest of T.F., 2004 ND 126, ¶ 8, 681 N.W.2d 786. The juvenile court's conclusions of law are fully reviewable by this court. Id.

### ARGUMENT

[¶13] In order for the State to be successful in terminating parental rights to children, N.D.C.C. 27-20-44 creates a three part test. First, the petitioner must prove the child is deprived. Second, the petitioner must show that the conditions and causes of deprivation are likely to continue. Third, the petitioner must prove that the child is suffering or will in the future, probably suffer serious physical, mental, moral, or emotional harm. These factors must be proven 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 to the lack of financial means of the child's parents, guardian or other custodian. N.D.C.C. 27-20-02(8).

[¶14] Natural parents have a fundamental right to their children, "which is of a constitutional dimension." In the Interest of W.E., 2000 N.D. 208, ¶ 30, 616 N.W.2d 494. 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 the 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.

Proper parental case is defined as the minimum standard of care which the community will tolerate. In the 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 (N.D. 1999).

[¶15] “Reasonable efforts must be made to preserve families, reunify families and maintain family connections, [p]rior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home”; and/or “[t]o make it possible for a child to return safely to the child’s home.” N.D.C.C. 27-20-32.2(2)(b). “[R]easonable efforts’ means 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 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.” N.D.C.C. 27-20-32.2(1) “In determining reasonable efforts to be made with respect to a child under this section, and in making reasonable efforts, the child’s health and safety must be the paramount concern. Id.

[¶16] In the instant case, in February of 2017 C.C. was released from jail and returned to the family house with T.V. and R.C. At that time Social Services deemed that the family was in compliance with all requirements and closed their file on this family.

[¶17] R.C. was removed from the house June 19, following an execution of a search warrant that did not uncover any controlled substances. The petition for termination was in fact predicated on the accusation that C.C. sold controlled substances to the confidential informant/overdose victim.

However, in its ruling the Court did not base its findings on Clear and Convincing Evidence that C.C. did sell controlled substances. It based its findings on the fact that since C.C. was incarcerated pending the outcome of his charges, he had made himself unavailable to parent R.C. In its ruling as it relates to C.C. the Court explained, “At the present time, [C.C.] is again unavailable to provide care and support

for [R.C.] in light of pending criminal matters. The record herein supports the conclusion that [C.C.] has a long history of engaging in conduct that has rendered him inaccessible to [R.C.]” App. at 15.

[¶18] However, C.C. was “unavailable” due to being detained while awaiting trial. The Federal Court has every right to hold C.C. pending the resolution of his charges upon a finding of only probable cause. A probable cause standard is significantly lower than the clear and convincing standard required to terminate parental rights. It is completely possible that C.C. will ultimately have the federal case against him dismissed, or that he might win if it goes to a trial. By basing the termination of C.C.’s parental rights on his unavailability, which in turn is based on the probable cause finding of the Federal Court, the Juvenile Court impermissibly alters the standard required to terminate parental rights. “Any doubts should be resolved in favor of the natural parent.” In the Interest of Z.R. and J.V., 1999 N.D. 214, 602 N.W.2d 723 (N.D. 1999).

[¶19] The Court in its ruling did not find clear and convincing evidence that C.C. committed the charges for which awaits trial. The State did not provide any direct evidence to prove that fact. The only person to testify in relation to the alleged controlled buys was Detective Sarah Joyce. Joyce had no personal knowledge of either sale alleged to take place on July 17. Joyce only presented statements of her belief of what had happened, however she did not have any direct evidence of what actually happened. Joyce did not offer testimony that she organized or witness either sale. She did not testify that she was present in anyway regarding these sales. No other witness testified regarding narcotics sales involving C.C. after his release from incarceration in February of 2017.

[¶20] If the State wanted to offer proof that C.C. in fact did commit the offense of sale of a controlled substance, they should have offered evidence from direct witnesses. The State could have called the Officer that organized the controlled sale, or the confidential informant to attempt to elicit testimony regarding the incident. Ultimately, it seems that the Juvenile Court agreed that the testimony involving the sale was unconvincing. But by basing the Termination of Parental rights only on C.C.’s

unavailability, which in turn was based only on a finding of probable cause, the Juvenile Court commits reversible error.

CONCLUSION

[¶21] For the preceding reasons the Appellant requests that this Court reverse the Order Terminating Parental rights as it relates to the Appellant, C.C.

Respectfully submitted this 8<sup>th</sup> Day of March, 2018

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STATE OF NORTH DAKOTA

IN JUVENILE COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

IN THE INTEREST OF R.C., A CHILD

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STATE OF NORTH DAKOTA,	)	
	)	
PETITIONER/APPELLEE,	)	Cass Co. Case No. 09-2017-JV-456
	)	
vs.	)	
	)	Supreme Ct. No.
C.C,	)	
	)	<b>CERTIFICATE OF SERVICE</b>
RESPONDENT/APPELLANT.	)	

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[¶ 1] Daniel Gast hereby certifies that he is the Attorney for the Appellant/Respondent in the above entitled matter.

On March 6, 2018 the following documents

Notice of Appeal, Order for Transcripts, Brief of Appellant, and Appendix to Brief of Appellant

were served via e-mail upon the following individuals:

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Dated this 8<sup>th</sup> Day of March, 2018

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