STATE OF NORTH DAKOTA IN JUVENILE COURT

COUNTY OF CASS EAST CENTRAL JUDICIAL DISTRICT

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 12, 2019
STATE OF NORTH DAKOTA

IN THE INTEREST OF G.T., A CHILD; YOB 2008
IN THE INTEREST OF E.T., A CHILD; YOB 2011
IN THE INTEREST OF C.T., A CHILD; YOB 2013
IN THE INTEREST OF I.T., A CHILD; YOB 2015

Lyndsey Tungsesth, L.S.W., Cass County Social Services, Petitioner/Appellee, vs. S.T., Respondent/Appellant.	**SUPREME COURT NO. 20190265; 20190266; 20190267; 20190268** Civil No. 09-2019-JV-00019 09-2019-JV-00020 09-2019-JV-00021 09-2019-JV-00022

ON APPEAL FROM JUVENILE FINDINGS OF FACT AND ORDER TERMINATING PARENTAL RIGHTS (IN CUSTODY), DATED JULY 24, 2019
HONORABLE SCOTT GRIFFETH, JUVENILE REFEREE
CASS COUNTY
STATE OF NORTH DAKOTA

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the trial Court err when it terminated ST's parental rights?

   A. Are the Court's findings clearly erroneous?

   B. Are the Court's conclusions of law clearly erroneous?

II. Did the trial Court err when it failed to provide ST with an opportunity to be heard in violation of ST's right to procedural due process?

STATEMENT OF THE CASE

A. INTRODUCTION

[¶1] This case involves the termination of the parental rights of ST (dad) and CJ (mom) severing their relationships with GT (2008); ET (2011); CT (2013); and IT (2015). (A at 62.)

[¶2] This appeal presents two primary questions. First, whether the State must prove the contested facts underlying its therapeutic service plans for the children by clear and convincing evidence. At the time the service plans were created and at the time the State petitioned to terminate ST's parental rights, the State alleged ST had sexually abused one or more of his children. At all times the State's allegations have been contested by ST and CJ.

[¶3] Cass County Social Services (CCSS) communicated the contested facts to the children's caregivers and counselors as being true. Although independent assessments of the children were completed, none of these assessments produced any competent, admissible evidence establishing the truthfulness of the contested facts. The therapists nonetheless accepted the contested facts as being true and accurate as presented and none conducted any independent investigation. At the same time, CCSS actively attempted to develop sufficient evidence against ST to charge and convict him of multiple counts of gross sexual imposition against his children. CCSS enlisted the therapists and caregivers to help find proof to support its criminal case against ST. CCSS also worked closely with the therapists, who were all hired by CCSS and directed by CCSS, to develop therapeutic counseling plans for the children based on the contested facts and CCSS's belief that ST was guilty of multiple felonies against his children.

[¶4] The State then wrongly charged ST with three felonies, all of which were subsequently dismissed. Nonetheless, the contested facts underlying the felony charges were used to develop service plans for the parents and underly the therapists' opinions as to the proper treatment plans for the children. Neither the service plans nor the therapy plans changed over time after the State abandoned the felony criminal charges against ST.

[¶5] ST and CJ expressed their unwillingness to accept treatment plans based on the contested facts. The State used this unwillingness to terminate each's parental rights based on the State's contention that if ST and CJ did not accept the contested facts and comply with the therapeutic plans further deprivation of the children was likely to occur and that deprivation would cause harm to the children.

[¶6] ST contends the Court erred when it presumed the validity of the service plans and therapeutic plans without first requiring the State to prove the contested facts by clear and convincing evidence. No specific, competent evidence was offered at trial establishing the validity of the contested facts. Instead, the Court allowed the State to present non-specific, hearsay evidence, that the children allegedly suffered "trauma" in the home. The State presented no first-hand evidence to when the alleged trauma occurred or the person or persons responsible for creating the "trauma".

[¶7] If the contested facts concerning the alleged "trauma" are not true, then the therapeutic plans are not valid. If the plans are not valid then the State cannot meet its burden of proving by clear and convincing evidence that further deprivation is likely based on ST's alleged failure to comply with the service and therapeutic plans.

[¶8] The second issue is whether ST's constitutional right to due process was violated when the Court refused to grant a continuance so ST could attend the termination hearing,

or whether the Court erred when it failed to make other arrangements so that ST could participate in the hearing.

[¶9] After the felony charges against ST were dismissed, ST pleaded guilty to a single Class A misdemeanor. Based on ST's guilty plea to a Class A misdemeanor, Immigration and Customs Enforcement detained ST. ST is a foreign national. Because he was detained awaiting a detention hearing, he was not able to attend termination hearing. Counsel for ST requested a continuance and indicated it was unlikely ST would be able to appear telephonically and in fact ST did not appear telephonically. As part of the motion, ST informed the Court that he was being detained until the immigration court could hold a detention hearing. ST informed the Court that the detention hearing would be held within a couple of weeks and that it was likely ST would be released from custody at that time. St was in fact released after his detention hearing. ST only requested a continuance until after the scheduled detention hearing. The motion was not contested by any of the other parties. The Court refused to reschedule the hearing or otherwise make arrangements for ST to appear telephonically or through deposition. He was not allowed to participate in the hearing except through counsel. The only evidence introduced in ST's defense to the State permanently taking away his children were ST's statements introduced as part of his parenting evaluation. Those statements clearly show that ST was doing his best to comply with the State's demands, but that those demands were confusing and difficult for ST to understand.[1] (Index No. 100, Exhibit 18.)

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[1] ST encourages this Court to review carefully ST's Parental Capacity Evaluation which demonstrates that ST had difficulty understanding these proceedings, that the State subjected ST to a labyrinth of requirements – shuffling him from one agency to another, and that ST is a foreign national with a limited understanding of written English. (See

B. PROCEEDINGS

[¶10] On February 2, 2018, GT, ran away from home and sought refuge at his school. Law enforcement was informed and after a discussion with GT's parents, law enforcement arrested GT based on suspicion that GT had engaged in sexual contact with his siblings. ST did not witness any sexual contact between GT and the other children. The State claimed CJ told law enforcement she witnessed the contact, but at the hearing CJ denied that she had witnessed it. This is the only specific evidence which could be used to establish any "trauma" in the home.

[¶11] At the time that law enforcement arrested GT, it also took the other children into custody for medical exams. There was disputed testimony whether CJ was unwilling to provide medical care to the children, or whether she was unwilling to voluntarily allow the police to take the children. Nonetheless, the children were medically examined, and the exams were normal.

[¶12] Subsequently, the parents acknowledged the State likely had sufficient information to prove the children were deprived and so did not challenge the State's request to take custody of the children. The termination hearing was the first evidentiary hearing involving this family.

[¶13] From February 2018 until December 2018, Cass County subjected the children to multiple examinations and interviews attempting to gather evidence to use against ST as part of a subsequently filed criminal action. Those examinations did not disclose any credible, admissible, evidence of abuse by ST against the children. During this time, ST attempted to comply with the State's demands for what he needed to do to unify with his

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Index No. 100.)

children. (Index No. 100.) ST's Parental Capacity Evaluation, which was offered into evidence by the State, conclusively establishes that ST attempted to cooperate with the State's service plan for reunification up to the time that the State filed criminal charges against him. ST clearly and unambiguously expressed as part of the evaluation that he wished to cooperate, that he would change his behavior concerning the physical discipline of his children if the State would clearly explain what it expected of him, and that he would participate in the counseling necessary for his children's well-being. He disagreed, however, with the State's allegations against him and CJ – the contested facts alleged by the State of "trauma". (Index No. 100 at pp. 2-10.)

[¶14] During the entire time that the State was forcing ST to jump through its hoops concerning his children, the State was actively seeking evidence to place ST in prison. On December 31, 2018, the State issued an Information against ST in Cass County Case Number 09-2018-CR00153.[2] The Information charged ST with three felonies: 1) Gross Sexual Imposition in violation of Section 12.1-20-03 against ET; 2) Gross Sexual Imposition in violation of Section 12.1-20-03 against GT; and Gross Sexual Imposition in violation of Section 12.1.-20-03 against CT. ST pleaded not guilty to all charges. (See 09-2018-CR-00153 at Index No 1.)

[¶15] The Court in the criminal case ordered that ST have "no contact directly or indirectly, in person or by telephone, or come within 300 yards of ET, CT, or GT. That order has been in effect from January 15, 2019, until the present.[3] (See 09-2018-CR-00153

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[2] The Juvenile Court took judicial notice of the contents of this criminal file, and specifically reviewed the contents of the Court's Order denying the State's motion to admit hearsay statements.

[3] Although one body of the State threatened to revoke ST's pre-trial release if he had any

at Index Nos. 9, 15, and 70.) Further, Cass County, who has had custody of the children for this entire time, refused to allow ST to have any contact with the children. Despite the pending criminal charges and the no-contact Order the Court terminated ST's parental rights for his alleged refusal to communicate with the children. (A at 67.)

[¶16] On January 11, 2019, the State brought its Petition for Termination of Parental Rights, relying primarily on its allegations of sexual abuse allegedly perpetrated by ST.[4] (A at 19.)

[¶17] On February 26, 2019, the State in the criminal case moved to admit statements about sexual abuse allegedly made by the children under N.D.R.Evid. 803(24). (See 09-2018-CR00153 at Index No 19.)

[¶18] On May 16, 2019, the Court in the criminal case denied the State's motion to admit the alleged statements about sexual abuse. The Court was unable to find that "GT made spontaneous and consistent statements regarding the sexual abuse so as to render the statements trustworthy"; the Court was unable to "find that GT lacked a motive to fabricate the statements in this case to render them trustworthy"; and that the Court was also

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contact with his children, a different body of the State used his lack of contact, in compliance with the criminal court's order, as proof that he would not follow the State's service plan, thereby justifying the termination of his parental rights.

[4] Not surprisingly, the parents believed that Cass County and its representatives and therapists were hostile to their interests and they expressed that belief throughout these proceedings. The parents' beliefs were well grounded. At all times from when this matter started until now, Cass County has been openly hostile to ST, first by trying to imprison him, wrongly, based on felony charges of sexual abuse, and then based on its efforts to terminate his parental rights. There has not been a single moment from February 2018 to present where Cass County has not been actively trying to either imprison ST or to terminate his relationship with his children. Cass County has not in good faith attempted to reunify ST with his children despite the fact that all felony charges against him were dismissed.

provided no evidence to corroborate GT's statements. The record discloses that the process used by the State to assess and interview GT likely produced the alleged incriminating statements. (See 09-2018-CR-00153 at Index No 57.)

[¶19] On May 31, 2019, after the Court denied the State's motion in the criminal case, the State amended the information against ST, dismissing all of the felony charges and alleging a single Class A misdemeanor, contributing to the deprivation or delinquency of a minor. (See 09-2018-CR00153 at Index No 69.) ST pleaded guilty to this charge. The criminal judgment was entered on June 3, 2019. (See 09-2018-CR-00153 at Index No 71.) The record does not establish the factual basis for ST's guilty plea. The Court entered a no contact order for two years but indicated the order could be released if ST completed a domestic violence assessment inventory and if he followed through on any recommended treatment. (See 09-2018-CR-00153 at Index No 70.)

[¶20] ST is a foreign national refugee from Liberia. (Index No 100, p.p. 8-10.) Based on the misdemeanor conviction, ST was detained by Immigration Customs Enforcement, facing potential deportation. On June 20, 2019, while in custody, ST requested that the hearing in the termination case be continued. ST explained that he was scheduled for a July 2, 2019, detainment hearing. ST explained that he likely would be released immediately following the hearing. ST requested the hearing be continued to a time after July 2, 2019, so that he could attend, if he were released following his detention hearing. (Index No. 66.) That request was denied without any explanation by the Court.[5] (Index No. 80.)

[5] The Court's denial of this request is especially egregious given that on May 22, 2019, the Court granted the State a continuance because the Petitioner did not want to miss a planned

[¶21] The Court conducted a hearing in this matter on June 26 and June 27, 2019. ST was not present in person but did appear through counsel. The State did not offer any testimony from the children. The Court indicated it was excluding all alleged hearsay statements of alleged sexual abuse by the children based on the Court's review of the order in the criminal case. The State did not present any evidence based on any first-hand knowledge of any acts of abuse by either of the parents. The State did not establish as true the contested facts. Instead, the Court allowed the State's witnesses to testify, over objection, that the children allegedly disclosed they were subject to "trauma" in the home and that based on the "trauma" therapy plans were developed. The State indicated the hearsay statements were not being offered to prove the truth of the matter asserted but instead to show that the statements were made. The State did not believe it was necessary for it to prove by clear and convincing evidence the contested facts.

[¶22] On July 24, 2019, the Court terminated ST's parental rights. (A at 62.)

[¶23] ST timely appealed to this Court. (Index No. 124.)

STATEMENT OF THE FACTS

[¶24] ST is a 46-year-old African from Liberia. He lived in Liberia until he moved to Ghana when he was 11 or 12 years old. He attended boarding school in Ghana due to a civil war in his country. The civil war caused ST hardship including becoming separated from his siblings and losing communication with his father. ST lived in a refugee camp until the United Nations arranged for him to come to the United State. He relocated to the United States in 1999 at age 26. (Index No. 100 at p.p. 8-11.)

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vacation. (Index No. 57.)

[¶25] ST grew up in a cultural environment very different from the cultural norms in the United States. His father had four wives and they all lived together. ST has 18 siblings, all but one is older than he is. Because of their accents, both ST and CJ are difficult to understand. ST has difficulty reading and understanding written English. During his Parental Capacity Evaluation, which was completed during multiple sessions between December 19, 2018 and January 4, 2019, ST was initially unable to finish several of the diagnostic tests because he needed help understanding the meaning of several words or clarifying what was being requested of him. (Id.) Several of ST's diagnostic tests were deemed not valid due to his answers. The State, without foundation, contended the invalidity of the tests was due to ST's intentional non-cooperation with the evaluation. The State, however, presented no evidence establishing that these tests were appropriate for a foreign national with limited understanding of written English. (Id.)

[¶26] The State also attempted to cast ST as being an unreasonable, hostile person, not open to accepting direction from counselors and not being willing to follow through with what was recommended. This portrayal of ST is not accurate or fair. ST participated in counseling based on his understanding of what he was supposed to do, including the Parental Capacity Evaluation. He cooperated until the State (assisted by CCSS) indicated its intention to put him in prison. The Parental Capacity Evaluation demonstrates clearly ST's complete cooperation up the point when he was wrongly charged with three felonies. That Evaluation provides key information that was ignored by the Court.

[¶27] ST arrived on time for his appointments well-groomed and appropriately dressed for age and weather. He presented as cooperative, patient, and generally tolerant of the

interview process. Not surprisingly, ST became somewhat defensive when talking about the concerns from CCSS and stated:

> "It is hard when people say you did things to your kids and it is not true." He stated he was frustrated with social services because he feels they misinterpret him, and they do not communicate well with him regarding appointments and what is recommended and expected of him."

(Index No. 100, p. 3.)

[¶28] ST recounted his frustrations with CCSS and the confusing and incorrect information it provided to him. The report notes that when ST presented for his appointment at SEHSC on December 19, 2018, the business office reported that he was upset because CCSS told him that there would be no charge for the evaluation. When they informed him that they needed financial information to determine his fee, ST showed them an email from CCSS that indeed suggested that there would be no charge for this evaluation. The business office then reported that he left the office, returned after placing a telephone call to CCSS, provided the necessary financial information, and presented for his evaluation. (Id.)

[¶29] ST acknowledged that he sometimes would spank his children, but he denied ever using a belt or other items. He was adamant that CCSS was wrong about him: "[ST] stated that CCSS had said the children did not receive proper care and he abused his children, but that was not the truth and they have it 'all wrong.' He indicated that his family is cared for and reported his partner has insurance, they have a home, food, shelter, and the children go to school." (Index No. 100, p. 3.)

[¶30] ST indicated that before the State separated the children from his home they were not on medications and that they did not have behavioral problems. He believed that this had changed based on the actions of CCSS removing the children. ST indicated he had

been unable to get information about his children despite his efforts. This is consistent with the State's wrongful view of ST being guilty of felony sexual abuse. Rather than work with ST to reunify him with his children, as required by law, the State focused all of its energy on gathering evidence to be used to permanently remove ST from the lives of his children after he was convicted criminally.

[¶31] ST explained that he was fearful of the police when they arrived at his home during the initial visit concerning GT– he did not believe the officers properly identified themselves. The State was unwilling to see this situation from ST's point of view based on his experiences with civil war and living in a refugee camp. (Id. At p. 4.)

[¶32] ST was adamant that the he wanted to see his kids and that he did not believe or trust CCSS. He indicated he tried to schedule a time to see his kids or even talk to them by telephone and that CCSS would not allow it. This was before the State brought criminal charges against ST. ST expressed confusion around what he must do to see his children and the always shifting schedule and the ever-shifting direction of who he was to see for counseling:

> Regarding meeting with the children's therapist, [ST] stated he wanted to meet with her and CCSS said they would arrange the appointment. [ST] reported they called him the day before an appointment was available and [ST] stated that he could not make the appointment because he had to work. [ST] stated that CCSS said he refused to talk to the therapist. [ST] expressed concerns that CCSS often changed appointments and would not tell him.
>
> Regarding concerns that he has not followed through with recommended therapy services, [ST] reported that he has followed through but that no therapy was recommended. He stated that he came to SEHSC twice and the evaluator told him he does not have any mental health issues and does not need therapy. **Records from SEHSC indicate that he presented for assessment on June 21, 2018. At that time, he indicated that he was required to attend therapy at**

CPS recommendations and that his only goal for therapy was to get his children back. The triage report indicated that [ST] did not present with any mental health or substance use issues and therefore did not meet SEHSC criteria for core population; thus, a referral was made to The Village Family Service Center. Records indicate that [ST] again presented to SEHSC seeking therapy services on July 11, 2018 after reporting that The Village referred him back to SEHSC after only one session with Darren Carter, Med, MS, LAPC, NCC. At that time, [ST] was again unable to identify any goals for therapy and voice messages were left for Lyndsey Tungseth at CCSS and Darren at The Village requesting collateral information regarding [ST's] needs.

SEHSC Records indicate [ST] presented to SEHSC again on July 27, 2018 as recommended by The Village. The evaluator at SEHSC reported receiving a copy of a Well-being Assessment completed at The Village which recommended individual therapy services to address increased distress tolerance and family therapy services to address trauma of children being removed from their care. The Well-being Assessment from the Village dated June 29, 2018 indicated the following recommended services:

> Family Stabilization/Crises Management: "Family or client is in need of immediate assistance to manage an unanticipated event creating distress within the family structure." Expected treatment duration 5-10 sessions.
>
> Coordination of Services: Client denied care coordination at this time.
>
> Other recommendations to promote the client's overall health and functioning: Individual therapy services are recommended to address increase distress tolerance skills; Family therapy services are recommended to address family trauma of children being removed from their care; Refer client for assessment if it is deemed necessary by Cass County Social Services.

Records indicated that voicemails were again left with Lindsay Tungseth at CCSS and Darren at The Village as [ST] continued to present to SEHSC stating he was

> **referred here. It was reported that contact with CCSS on July 31, 2018 confirmed that [ST] would be referred for parental capacity evaluation at SEHSC.** During this current evaluation, [ST] provided a copy of a letter from The Village Business Institute, a division of The Village Family Service Center, dated July 18, 2018 which confirmed that he attended two individual counseling sessions on June 29, 2018 and July 10, 2018 with Darren Carter, Employee Assistance Counselor. [ST] also provided a copy of a certificate of completion of a 6-week course of Love and logic Parenting from July 12, 2018 to August 16, 2018 from The Village Family Service Center. (Emphasis added.)

(Index No. 100, p. 4-6.)

[¶33] The State contends that ST was unwilling to comply with its recommendations concerning counseling, yet the State's own exhibit indicates that ST was being shuffled back and forth between SEHSC and The Village with neither provider knowing exactly how to advise ST to proceed. Ultimately, the direction was for ST to complete an evaluation at SEHSC which he did. Nothing further occurred after the evaluation because on December 31, 2018, while ST was in the process of completing the evaluation, the State wrongly charged ST with three felony counts of gross sexual imposition and on January 11, 2019 the State filed its Petition to terminate his parental rights. At that time the State made it abundantly clear that it was not willing to unify ST with his children.

LAW AND ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT TERMINATED ST'S PARENTAL RIGHTS.

[¶34] To terminate parental rights, the petitioner must prove the child is deprived; the conditions and causes of the deprivation are likely to continue or will not be remedied; and the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm. N.D.C.C. § 27–20–44(1)(c)(1).

[¶35] Evidence of previous abuse and deprivation may be considered in determining whether deprivation is likely to continue. In Interest of M.R., 334 N.W.2d 848, 854 (N.D. 1983). Evidence of past abuse and deprivation alone is not enough to terminate parental rights. *Id.* Rather, there must be a showing of present abuse and deprivation, the conditions and causes of which are likely to continue. *Id.*

[¶36] The party seeking parental termination must prove all elements by clear and convincing evidence. *In re I.B.A.*, 2008 ND 89, ¶ 15, 748 N.W.2d 688 (citing *Interest of T.A.*, 2006 ND 210, ¶ 10, 722 N.W.2d 548). Clear and convincing evidence means evidence that leads to a firm belief or conviction the allegations are true. *Id.*

[¶37] Findings of fact by a juvenile court are not overturned unless clearly erroneous. 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, this Court is left with a definite and firm conviction a mistake has been made. *In re I.B.A.*, 2008 ND 89, at ¶ 15 (citing *Interest of T.A.*, at ¶ 11).

A. THE COURT'S FINDINGS ARE CLEARLY ERRONEOUS.

[¶38] The Court made several erroneous findings of fact as part of its order terminating ST's parental rights.

[¶39] The Court found significant that the parents were "advised of trauma" allegedly reported by the children to their therapists. (A at 64.) The Court notes that both parents were advised to participate in education and counseling to address the trauma issues as well as to improve their parenting methods. Both parents completed the Love and Logic parenting classes to improve their parenting skills. The Court, however, found that ST failed to significantly participate in the counseling of the children. This finding is clearly erroneous for two reasons. First, it is erroneous because ST was denied visitation with his

children prior to the State charging him criminally, and his efforts to participate were frustrated because of his work schedule and the lack of communication from CCSS. (Index No. 100.) Further, after the State charged ST with three felonies, he was not able to participate in the counseling because of the no contact order in the criminal case and because the therapists were active participants in gathering evidence to be used against him.

[¶40] The Court's findings are also erroneous because the Court committed an error of circular logic. It assumed there was trauma in the home because the service and therapeutic plans indicated there was trauma in the home. It then assumed the service and therapeutic plans were correct based on its finding that there was trauma in the home. (A at 64-66.) The only way to avoid the fallacy created in this case was for the Court to require the State to prove by clear and convincing evidence the underlying contested facts the State believed constitute trauma. The State did not do that in this case.

[¶41] When a parent is acquitted of criminal charges related to sexual abuse and the juvenile court does not find that the abuse occurred by clear and convincing evidence, the parent's failure to complete treatment premised on the parent's guilt is insufficient to support termination of parental rights. *People in Interest of L.M.*, 433 P.3d 114 (Colo. App. 2018). In *People in Interest of L.M.*, the department of human services petitioned to terminate a father's parental rights to his two children arising from allegations of sexual abuse to one of his children. *Id*. at 117. The father's treatment plan was premised on his guilt of sexual abuse toward one of his children. *Id.* At trial, the court did not find the sexual assault allegations had been established by clear and convincing evidence. *Id.* at 120-21. However, the trial court still found the children were experiencing trauma and the

"trauma is specific to [father]." *Id.* at 121. The trial court found that the father denied and failed to recognize the children's trauma and would not change his attitude. *Id.* The Court approved a treatment plan that was geared toward treating individuals who have been convicted of a sexual offense, even though the father had been acquitted of the criminal charges. *Id.* at 121-22. The father could not complete that program without admitting he was guilty of committing sexual assault, which he would not do. The Colorado Court of Appeals reversed and held that for sexual abuse to serve as a basis for determining that father was unfit, the State needed to prove the existence of the abuse by clear and convincing evidence. *Id.* at 122.

[¶42] Before the Court in this case could make any findings about whether ST's alleged non-participation in children's treatment plans was significant to issues of deprivation, the Court necessarily needed to determine that the plans were valid. This determination required the Court to decide whether the State proved by clear and convincing evidence that facts existed to support the plans. The Court needed to resolve the factual dispute between the State and the parents concerning the alleged "trauma." *See In re A.J., 877 N.E.2d 805, 811 (Ind. Ct. App. 2007)*(Trial court must first find, by clear and convincing evidence, sexual abuse occurred. Based on that finding, the court can consider whether or not the parents completed the treatment plan predicated on the finding of sexual abuse with regard to whether termination of parental rights is appropriate.); See also *In re Lockwood*, 260 Cal.App.2d 725, 726 (1968)(Hearsay statements admitted for reasons other than the truth of the matter asserted cannot be used to establish deprivation).

[¶43] The Court further erred with it concluded ST's misdemeanor conviction established "trauma" in the home involving the children. (A at 64-65.) Although it is undisputed that

ST pleaded guilty, there is no evidence in the record to establish the factual basis for the plea or which of the children was the "minor" referenced in the plea. There is no evidence to establish the facts underlying the plea and therefore no basis to conclude those facts support a finding of "trauma." It was error for the Court to rely on the conviction to establish any specific facts related to this family.

[¶44] The Court erred with it founded valid the diagnostic findings of the therapeutic providers. (A at 65.) As is noted above, those diagnostic findings are based on each of the therapists assuming the information provided by CCSS is true. All of the statements of the children to the therapists, which were used to diagnose the children, were evaluated based on the information provided by CCSS, which was assumed to be true by the therapists. The State failed to establish that the contested facts, which had been communicated to the therapists, were in fact valid.

[¶45] The Court concluded that CJ (and by extension ST) is unable to properly supervise the children because the Court concluded "the first necessary step for a parent is to acknowledge the trauma and establish a safe and stable environment for subsequent therapy and recovery . . . [CJ] is not able to see the children's situation from their point of view. In the seventeen months since these children were removed from their parental home, [CJ] has not been able or willing to obtain a point of view defined by the children's therapists as the starting point for a long mental health recovery. Nothing in the record indicates when or if [CJ] will get to what all of the therapists describe as the necessary starting point for the children's mental health recovery." (A at 65-66.)

[¶46] This finding is clearly erroneous. The therapists testified the parents must accept the "children's truth." The Court adopted this approach as part of its findings. There is

not, however, such a thing as a separate "children's truth" in a court of law. There is only the truth as found by the court based on the evidence. Here the state did not prove the disputed facts by clear and convincing evidence at trial and the Court did not make a finding as to the disputed facts. The State cannot terminate ST's the parental rights based on alleged hearsay statements about the children's "truth" or based on care plans rooted in such jargon.

[¶47] The Court erred when it concluded ST was unavailable to parent based on his immigration detention, which was temporary, or based on the no contact order from his misdemeanor conviction. (A at 66.) The no contact order is a temporary bar to ST's ability to parent. It certainly does not justify termination of ST's parental rights – based on a misdemeanor conviction.

[¶48] The Court erred when it concluded that ST had failed to engage in counseling and education to gain a better understanding and be able to verbalize and demonstrate appropriate and acceptable behavior when teaching and disciplining. (A at 66-67.) ST attempted to comply with this requirement, and he was shuffled back and forth between two providers, neither one knowing how to help him. (Index No. 100.) Ultimately, CCSS indicated he should complete an evaluation which he did. His willingness to work with CCSS was suspended after CCSS wrongly charged him with three felony counts. Under these circumstances, it was error for the Court to conclude that ST was unwilling to pursue personal counseling.

[¶49] Finally, the Court erred when it concluded ST failed to comply with recommendations to communicate with the children. Up until the time he was charged criminally, ST attempted to comply with the requirements put in place by CCSS and

actively attempted to communicate with his children. (Index No. 100.) After he was charged, ST was not able to have contact with his children based on the order in the criminal file.

B. THE COURT'S CONCLUSIONS OF LAW ARE CLEARLY ERRONEOUS.

[¶50] Based on its findings of fact, the Court concluded that ST's parental rights should be terminated. This conclusion of law is clearly erroneous.

[¶51] The Court found that a service plan was put into place requiring ST to complete a parental capacity evaluation and the Court found that ST completed an evaluation. There was no evidence introduced establishing that CCSS ever made any efforts to follow up with ST concerning the results of his evaluation.

[¶52] The Court found that ST failed to "significantly" participate in counseling with any of the children. The Court, however, failed to make any findings demonstrating why ST did not participate. Was his refusal willful? Was it based on actions of CCSS? Absent such a determination, this finding does not support the Court's conclusion.

[¶53] The Court found that ST pleaded guilty to a misdemeanor related to the children. This fact, standing alone does not support the Court's conclusion that termination is appropriate. The Court failed to make any finding as to the factual basis for the plea and the Court failed to make any finding that the behavior underlying the plea is likely to continue. Absent such a determination, this finding does not support the Court's conclusion.

[¶54] The Court found that CJ reported a "traumatic" event involving the children in her home on February 2, 2018. The Court does not indicate what the "traumatic" event consisted of. Regardless of what event is referenced, the fact that an undescribed traumatic

event occurred in February of 2018 is not probative on whether ST's parental rights should be terminated. This finding does not support the Court's conclusion.

[¶55] The Court found that the children had been diagnosed with various psychological diagnoses. The Court makes no finding as to the causes of these psychological issues. This finding does not support the Court's conclusion.

[¶56] The Court found that the parents deny "trauma" in the home. This finding is meaningless because no evidence was presented as to what specific events were alleged to have taken place or which events the parents were denying. There was no evidence presented as to how the State defined "trauma" or how the parents defined "trauma." There is no explanation as to what the Court means by its use of the word "trauma." This finding does not support the Court's conclusion.

[¶57] The Court found that ST was subject to immigration detention at the time of the hearing. Subsequently, the Court was informed that ST was released. (Index No. 117.) This finding does not support the Court's conclusion that his parental rights should be terminated. Although ST was not deported, even if he had been deported, that fact would not support termination of his parental rights.

[¶58] The Court found that ST was subject to a no contact order based on a misdemeanor conviction. The no contact order, however, is subject to ST completing a domestic violence evaluation. As a matter of law, a conviction of a Class A misdemeanor, without any finding as to the underlying actions, cannot be the basis of the termination of ST's parental rights.

[¶59] The Court found that the parents failed to engage in significant counseling and education. But the Court also found that ST had completed parenting classes. This finding does not support termination without evidence that absent more counseling ST's

involvement with the children will result in deprivation. Stated a different way, the Court erred in concluding that the lack of more personal counseling supported termination, without first making a finding that additional counseling was still necessary. At the time the service plan was created, the State believed ST was guilty of felony gross sexual imposition. The State subsequently dismissed those charges. Yet the State did not change its service plan for ST. For the additional counseling requirement to be probative, the Court must also have found that without more counseling ST would not be able to adequately parent his children. There are no findings as to this essential element.

[¶60] Taken as a whole, the Court's findings of fact do not support the Court's Conclusion of law that termination is appropriate in this case.

II. THE TRIAL COURT ERRED WHEN IT FAILED TO PROVIDE ST WITH AN OPPORTUNITY TO BE HEARD IN VIOLATION OF ST'S RIGHT TO PROCEDURAL DUE PROCESS

[¶61] The United States Supreme Court has recognized the unique nature of proceedings to terminate parental rights, stating that "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S.Ct. 555, 565 (1996) (quoting *Santosky*, 455 U.S. at 787, 102 S.Ct. at 1412 (Rehnquist, J., dissenting)). As a result, "[t]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Id.* In comparing parental termination cases to criminal cases, this Court has noted that the serious threat to a fundamental interest of a parent is not so different from the serious threat to the physical liberty of a criminal defendant. *In re Adoption of S.A.L.*, 2002 ND 178, ¶ 16, 652 N.W.2d 912.

> Under the Fourteenth Amendment, no State may "deprive any person of life, liberty or property, without due process

> of law....” U.S. Const. amend. XIV, § 1. Article I, section 12 of the North Dakota Constitution also provides: “No person shall ... be deprived of life, liberty or property without due process of law.” “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.” *In re D.C.S.H.C.*, 2007 ND 102, ¶ 11, 733 N.W.2d 902, 906 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

[¶62] The established method of analysis of procedural due process issues in termination of parental rights cases is the balancing test of *Mathews v. Eldridge*. 424 U.S. 319 (1976). This test balances the private interests at stake, the risk of erroneous deprivation created by the procedure used and the countervailing government interest in avoiding the financial and administration burden of lengthy litigation. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 19 (1981). This Court has applied the *Eldridge* three-part balancing test to analyze whether the procedures utilized in termination cases pass constitutional muster:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In re D.C.S.H.C., 2007 ND 102, ¶ 14, 733 N.W.2d 902, 906 (internal citations omitted).

[¶63] This Court has stated that “parents do not have a constitutional due process right to appear at proceedings to terminate their parental rights if they are “represented by counsel and have an opportunity to appear by deposition or other discovery technique.” *In re I.B.A.*, 2008 ND 89, ¶ 8, 748 N.W.2d 688. (Emphasis added.) An individual's right to appear may be satisfied by allowing an appearance via telephone. *In re M.R.*, 2015 ND 233, ¶ 11, 870 N.W.2d 175. *Also see In re D.C.S.H.C.*, 2007 ND 102, ¶ 27, 733 N.W.2d 902, 910 (holding sporadic, rather than full, participation by telephone in termination hearing of mother, who

was incarcerated in a neighboring state, did not violate mother's right to procedural due process).

[¶64] In *In re M.R.*, a parent was served with proper notice of the trial date and was represented by counsel at the trial. *Id*. In addition, when the juvenile court realized the parent was not present, it took a recess to allow the parent's attorney to notify him he could appear telephonically. *Id.* The attorney advised the court he had previously discussed the parent's preferences regarding telephonic appearances with him. *Id.* Consequently, this Court concluded the juvenile court took sufficient measures to afford the parent due process. *Id.*

[¶65] In this case, ST was not present, was not offered an opportunity to appear via telephone, and did not have an opportunity to appear by deposition or other discovery technique. The Court denied ST's request for a short continuance without explanation and then took no action to protect his right to participate.

[¶66] The Court abused its discretion when it denied ST's request for a brief continuance. (Index No. 35.) With regard to a motion to continue, this Court has stated:

> A motion for a continuance "will be granted only for good cause shown, either by affidavit or otherwise." N.D.R.Ct. 6.1(b). "We will not reverse a trial court's decision to deny a continuance absent an abuse of discretion." *State v. Hilgers*, 2004 ND 160, ¶ 38, 685 N.W.2d 109 (citation omitted). "A trial court abuses its discretion only when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law." *State v. Stoppleworth*, 2003 ND 137, ¶ 6, 667 N.W.2d 586.

In re D.C.S.H.C., 2007 ND 102, ¶ 6, 733 N.W.2d 902.

[¶67] This Court looks to the particular facts and circumstances of each case when reviewing a juvenile court's decision on a motion for continuance because there is not a mechanical test to determine whether the juvenile court abused its discretion. *In re A.S.*, 2007 ND 83, ¶ 6, 733 N.W.2d 232, 236 (citing *State v. Kunkel*, 452 N.W.2d 337, 339

(N.D.1990)). A party requesting a continuance must show substantial justice will more nearly be obtained by granting the continuance. *State v. Miller*, 480 N.W.2d 894, 895 (Iowa 1992).

[¶68] Here there were four requests for continuances. First, ST requested a continuance because trial counsel needed more time to prepare due to the delayed disclosure of extensive discovery. (Index No. 35.) The second and third continuances were due to a family emergency and due to the Petitioner's planned vacation. (Index Nos. 50 and 57.) Both were granted by the Court. ST's second request for a short continuance was based entirely on the fact that he was being detained by ICE and based on the fact that his counsel did not believe it would be possible for him to appear by telephone. (Index No. 68.) The Court denied this request without explanation. (Index No. 80.)

[¶69] The Court abused its discretion when it denied ST's request for a continuance. Given that the Court granted the Petitioner a continuance so she could take a planned vacation, it was arbitrary, unreasonable and capricious for the Court to deny ST's request. Additionally, because the Court provided no reasoning for its decision, it is impossible for this Court to undertake a meaningful review of the Court's decision, making the decision completely arbitrary.

[¶70] Even if this Court concludes the lower Court did not abuse its discretion in denying the request for a continuance, the Court denied ST's right to due process by not ensuring that he had the ability to participate in the hearing via telephone or deposition. This denial of ST's constitutional rights protected by both the Federal and State Constitutions justifies the reversal of the Court's Order and a remand for a new trial.

CONCLUSION

[¶71] The State failed to prove sufficient grounds to justify termination of ST's parental rights by clear and convincing evidence. The Court made erroneous findings of fact and conclusions of law. This Court should reverse the Order and dismiss the Petition.

[¶72] In the alternative, this Court should remand this matter back to the juvenile court for a new trial allowing ST to fully participate.

Dated this 12 day of September, 2019.

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Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 30 pages.

Dated this 12 day of September, 2019.

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STATE OF NORTH DAKOTA | IN JUVENILE COURT

COUNTY OF CASS | EAST CENTRAL JUDICIAL DISTRICT

IN THE INTEREST OF G.T., A CHILD; YOB 2008
IN THE INTEREST OF E.T., A CHILD; YOB 2011
IN THE INTEREST OF C.T., A CHILD; YOB 2013
IN THE INTEREST OF I.T., A CHILD; YOB 2015

Lyndsey Tungsesth, L.S.W., Cass County Social Services, Petitioner/Appellee, vs. S.T., Respondent/Appellant.	**SUPREME COURT NO. 20190265; 20190266; 20190267;20190268** Civil No. 09-2019-JV-00019 09-2019-JV-00020 09-2019-JV-00021 09-2019-JV-00022

ON APPEAL FROM JUVENILE FINDINGS OF FACT AND ORDER TERMINATING PARENTAL RIGHTS (IN CUSTODY), DATED JULY 24, 2019
HONORABLE SCOTT GRIFFETH, JUVENILE REFEREE
CASS COUNTY
STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA)
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Chelsey Ternes, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on September 12, 2019, **Appellant's Brief** were filed electronically with the Clerk of Court of the North Dakota Supreme Court through the Supreme Court E-Filing Portal, and that the same documents were electronically served through the portal:

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Subscribed and sworn to before me this 12 day of September, 2019.

Notary Public

(SEAL)
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Notary Public
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My Commission Expires Dec 12, 2021