

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 20, 2019
STATE OF NORTH DAKOTA

IN THE INTEREST OF G.T., A CHILD.
IN THE INTEREST OF E.T., A CHILD.
IN THE INTEREST OF C.T., A CHILD.
IN THE INTEREST OF I.T., A CHILD.

Lyndsey Tungseth, L.S.W.,)	
Cass County Social Services,)	
)	
Petitioner and Appellee,)	
)	Supreme Court Nos. 20190257;
vs.)	20190258; 20190259; 20190260;
)	20190265; 20190266; 20190267;
C.J., and S.T.,)	20190268
)	
Respondents and Appellants)	
)	
Jennifer Restemayer, Lay Guardian ad)	
Litem; and Christopher Jones,)	Cass County Nos. 09-2019-JV-00019
Executive Director of North Dakota)	09-2019-JV-00020
Department of Human Services;)	09-2019-JV-00021
)	09-2019-JV-00022
Respondents.)	

APPELLEE'S BRIEF

APPEAL FROM THE JUVENILE FINDINGS OF FACT AND ORDER
TERMINATING PARENTAL RIGHTS (IN CUSTODY), SCOTT GRIFFETH,
JUDICIAL REFEREE, PRESIDING, EAST CENTRAL JUDICIAL DISTRICT
DATED JULY 24, 2019 AND ENTERED JULY 25, 2019

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ISSUES PRESENTED

- I. WHETHER THE PETITIONER ESTABLISHED THROUGH CLEAR AND CONVINCING EVIDENCE TERMINATION OF PARENTAL RIGHTS IS JUSTIFIED UNDER N.D.C.C. 27-20-44.
 - A. WERE THE CHILDREN “DEPRIVED”
 - B. IS THE DEPRIVATION LIKELY TO CONTINUE
 - C. WILL THERE BE HARM TO THE CHILDREN
- II. WHETHER S.T. WAS AFFORDED DUE PROCESS.

STATEMENT OF THE CASE

[¶1] There are four children in this case and they are full siblings. At the time of trial, G.T., (“Greg”)1 male, was age 10; E.T., (“Peter”) a male, was age 8; C.T., (“Cindy”) a female, was age 5; and I.T., (“Bobby”) male, was age 4.

[¶2] The mother of Greg, Peter, Cindy and Bobby is C. J. (“Carol”).

[¶3] S.T. (“Mike”) the legal father of Greg, Cindy and Bobby and the asserted father of Peter.

[¶4] Carol and Mike are not married. There are no custody orders in place that pertain to Greg, Peter, Cindy and Bobby, as relates to the relative interests between the two parents. Carol and Mike resided together and were jointly responsible for the care of the children prior to the children being placed into protective custody.

[¶5] Greg, Peter, Cindy and Bobby were placed into protective custody on February 2, 2018 by law enforcement due to refusal of parents to provide appropriate medical care for the children in response to sexual abuse allegations involving the children. The children were adjudicated deprived children on May 9, 2018. A Petition to Terminate Parental Rights was filed January 14, 2019. (Appendix 21)

STATEMENT OF FACTS

[¶6] Greg, Peter, Cindy and Bobby were placed into protective custody on February 2, 2018, by law enforcement in response to sexual abuse allegations involving the children. Carol was unwilling to ensure the children were given an immediate medical exam regarding the allegations and law enforcement placed the children into custody and took

1The names of the parties are pseudonyms.

them to Sanford Hospital for medical exams. The children were placed into the custody of Cass County Social Services at Shelter care on February 5, 2018. Subsequently, a Deprivation Petition was filed and the children were adjudicated deprived children on May 9, 2018. Carol and Mike admitted to an Amended Deprivation Petition. (Appendix 49 and 55) The children were placed in the full custody of Cass County Social Services for a period of 9 months. A Service plan was put in place to address parental deficits. The plans required each parent to complete a parental capacity evaluation. (Appendix 75)

[¶7] The Greg, Peter and Cindy were assessed for mental health needs and significant diagnoses were identified for each child. Weekly therapy was prescribed to meet their needs. Bobby was deemed too young for mental health assessment. As Therapy progressed, each child disclosed significant trauma that was inflicted in the home ranging from sexual abuse to physical abuse. The children were also interviewed at the Red River Children's Advocacy Center and further disclosures of inflicted trauma sustained by the children while in the parental home were made.

[¶8] Both Parents were advised of the trauma reported by the children and were advised to participate in education and counseling to address trauma issues as well as improve their parenting methods. The parents attended Love and Logic, an educational program, but both parents continued to deny any traumatic events occurred in their home involving the children. As a result of the children's disclosures a criminal case was filed against Mike. Mike eventually pled guilty to an amended criminal charge of Contributing to the Deprivation of a Minor. File 09-2019-CR-153. (Appendix 79-89) A no contact order was issued prohibiting Mike from having contact with Greg, Peter, and Cindy for two years.

(Appendix 88) For reasons that were not clear, Mike was taken into custody by immigration officials and may have been incarcerated at the time of trial, other than an untimely request for a continuance, which was denied, no other attempt or request for accommodations, for Mike's appearance at trial was made. There were no attempts for telephonic appearance, to offer deposition in lieu of appearance or to secure arrangements to personally appear. At trial, Mike was represented zealously by attorney, Tracy Lyson.

[¶9] Despite Mike's admission resulting in conviction, Mike and Carol both continued to deny that the children had been exposed to trauma in the home.² (06/26 @ 4:44 and 4:56 Testimony of Lyndsey Tungseth) (06/27 @2:26 Testimony of Carol) Therapists (Mandy Bernardy 06/26 @ 2:24, Emily Jones 06/26 @ 14:38 and Stephany Mestery 06/26@ 1:36) for the children testified that to address the children's trauma, and thus be appropriate to participate in therapy with the children, the first step would be for the parent to be able to acknowledge that trauma to the children occurred. Only then can work begin to establish a safe and stable environment for subsequent therapy and recovery. Carol has been unwavering in her refusal to acknowledge the children suffered trauma. She cannot attain the first step needed to join in the recovery journey of her children.

[¶10] The parents have failed to engage with Cass County Social Services in following a reunification plan by failing to engage significantly in counseling and education to gain a better understanding and be able to verbalize and demonstrate appropriate and acceptable

² The Trial Record available at the time of the preparation of this brief included one disk with entries from several hearings, including the two dates of trial. References to the record will include the trial date and timestamp of the testimony or statements on that disk.

behavior when teaching and disciplining the children; and Mike has failed to comply with recommendations to communicate with the children despite being offered several options that comply with the No Contact Order arising from the criminal conviction as well as the children's therapists advice of no contact until parents have engaged in therapy on their own and later with the children.

ARGUMENT

[¶11] The party appealing a juvenile court decision has the burden of showing that the findings of fact are clearly erroneous. Striefel v. Striefel, 2004 ND 210, ¶8, 689 N.W.2d 415. On review, the evidence is viewed in the light most favorable to the findings without reweighing the evidence or reassessing the credibility if there is evidence supporting the findings in the record. Id.

[¶12] N.D.C.C. §27-20-44 provides that a Court may involuntarily terminate the parental rights of a parent with respect to the parent's child if:

- a. The parent has abandoned the child;
- b. The child is subjected to aggravated circumstances as defined under subsection 3 of section 27-20-02;
- c. The child is a deprived child and the court finds:
 - i. The conditions and causes of the 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; or

- ii. The child has been in foster care, in the care, custody, and control of the department, or a county social service board, or, in cases arising out of an adjudication by the juvenile court that a child is an unruly child, the division of juvenile services, for at least four hundred fifty out of the previous six hundred sixty nights.

[¶13] N.D.C.C. §27-20-44 provides options or alternatives, but does not require all options be met in order to terminate parental rights of a child, and “any one of the three findings provides adequate and independent grounds for termination.” In re: Z.B., 2018 ND 6, ¶1, 905 N.W.2d 561.

[¶14] Under N.D.C.C. §27-20-44, the trial court can terminate parental rights if clear and convincing evidence establishes that a child is deprived, that the causes of deprivation are likely to continue and that the child is suffering, or is likely to suffer, serious physical, mental, moral, or emotional harm. In the Interest of A.S., 1998 ND 181, 584 N.W.2d 853.

[¶15] In this case, the children had been in foster care for over four hundred and fifty of the previous six hundred and sixty nights at the time the petition was filed. The parents admitted to the Amended Deprivation Petition. These two facts alone are adequate and independent grounds for Termination.

THE CHILDREN ARE DEPRIVED

[¶16] Mike and Carol admitted to the Amended Deprivation Petition.

THE DEPRIVATION IS LIKELY TO CONTINUE

[¶17] The termination is supported by the record illustrating the deprivation of the children is likely to continue.

[¶18] While evidence of past deprivation is not sufficient to support prognosis, failure to follow the recommendations of the treatment plan "demonstrates a serious indifference toward [one's] responsibilities and obligations as a parent." Interest of D.D., 2006 ND 30, ¶20, 708 N.W.2d 900, citing Interest of S.F., 2000 ND 161, ¶ 11, 615 N.W.2d 511.

[¶19] In determining whether the causes and conditions will continue or will not be remedied, there must be prognostic evidence forming the basis for reasonable prediction of continued or future deprivation. In re: A.K., 2005 ND App. 3, 696 N.W.2d 160. While evidence of past or present deprivation alone is not sufficient to terminate parental rights, evidence of the parent's background, including previous abuse or deprivation, may be considered in determining whether deprivation is likely to continue. In the Interest of A.S., 1998 ND 181, 584 N.W.2d 853 (citing In Interest of L.F., 1998 ND 129). Because evidence of past deprivation alone is not enough, there must be prognostic evidence forming the basis for reasonable prediction of continued or future deprivation. In re E.R., 2004 ND 202, ¶ 7, 688 N.W.2d 384; In re D.Q., 2002 ND 188, ¶ 21, 653 N.W.2d 713. Any prediction of the future requires some reflection upon the past conduct of the parties. In re T.F., 2004 ND 126, ¶ 19, 681 N.W.2d 786; In re D.Q., at ¶ 21.

[¶20] Carol has been unable or unwilling to protect and support the children, and as a result the children have suffered continued deprivation. Mike has been unwilling to

cooperate. (06/26 @58:17 and 59:13 Testimony of Larissa Marsh) Mike will be unavailable due to the restraining order arising from his conviction in his criminal case.

[¶21] Carol has been unable or unwilling to admit that her children suffered trauma. She has stalwartly denied the children suffered trauma and thus can't even begin to arrive at a place where she could begin therapy with the children. While she has complied with some of the treatment plan requirements, she has failed to indicate or demonstrate even a desire to improve her understanding of the trauma the children suffered, let alone demonstrate present capability or capability within the future to become an adequate parent. "[I]t is not enough that a parent indicated a desire to improve. A parent must be able to demonstrate present capability, or capability within the near future, to be an adequate parent." McBeth v. M.D.K., 447 N.W.2d 318, 322 (ND 1989)

[¶22] Carol and Mike are unlikely to engage in any services to improve the skills and behaviors that have compromised the safety and stability of the children. An unwillingness to understand the children's point of view regarding trauma, prevents the growth and change in behavior that would be needed to provide for the safety and stability of the children, and no change had been observed. Even though there may be evidence that a parent, Carol, in this case, who had barely begun to exhibit a willingness to participate in therapy, with long and intensive therapy and assistance, "might be able to learn and apply proper parenting skills, their children cannot be expected to wait and assume the risks involved." In Interest of C.K.H., 458 N.W.2d 303, 307 (N.D. 1990). The North Dakota Supreme Court "has recognized the importance of a stable environment for the health and happiness of a child." McBeth v. J.J.H., 343 N.W.2d 355, 360 (ND 1984). While evidence

of past deprivation is not sufficient to support prognosis, failure to follow the recommendations of the treatment plan, as Carol and Mike have done, "demonstrates a serious indifference toward [one's] responsibilities and obligations as a parent." Interest of D.D., 2006 ND 30, ¶20, 708 N.W.2d 900, citing Interest of S.F., 2000 ND 161, ¶ 11, 615 N.W.2d 511.

HARM TO THE CHILDREN

[¶23] To terminate a parent's rights, there must also be evidence that continued deprivation has led to the children suffering or will in the future probably result in physical, mental, moral, or emotional harm to the children. In the Interest of D.D., 2006 ND 30, ¶23, 708 N.W.2d 900. "Assisting a parent to establish an adequate environment for the child by offering long term and intensive treatment is not mandated if it cannot be successfully undertaken in a time frame that would enable the child to return to the parental home without causing severe dislocation from emotional attachments formed during long-term foster care. In the Interest of E.R., 2004 ND 202, ¶11, 688 N.W.2d 384. The risk of harm may also be proven by prognostic evidence. In the Interest of T.A., 2006 ND 210, ¶19, 722 N.W.2d 548, (citing In the Interest of E.G., 2006 ND 126, ¶15, 716 N.W.2d 469). Prognostic evidence includes reports and opinions of professionals. In the Interest of D.F.G., 1999 ND 216, ¶¶ 20, 602 N.W.2d 697. When making determinations and predictions, it is necessary to consider the past conduct of the parents. See T.F., 2004 ND 126, 681 N.W.2d 786. Previously, this Court has held that "[t]he fact that all [of the

children] did not display the same symptoms of ailments and maladjustments does not preclude a finding of deprivation as to all.” In re: R.H., 262 N.W.2d 719, 725 (N.D.1978). Here, three of the four children have made disclosures of trauma. All children were in the same home. Three children have significant mental health diagnoses. Based upon those facts, returning the children to the same environment would reasonably subject them to the same situations that prompted the harms already displayed.

[¶24] Greg, Peter and to a lesser extent Cindy, will have ongoing treatment and medication needs due to the mental health diagnoses they have received, and they all need stability and predictability. The minimum standard of care must take into consideration the needs of the child. The testimony at trial established that Greg, Peter and Cindy will have ongoing needs, and as a special needs children the requirements for parenting skills are higher. In re: L.J., 436 N.W.2d 558 (N.D.1989). Neither Carol nor Mike have demonstrated the ability to meet the needs of non-special needs children, and it is reasonable for the Court to conclude that Carol and Mike, either together or individually, will be unable to meet the needs of Greg, Peter and Cindy as well as Bobby.

[¶25] The child’s need for a safe stable environment must be recognized without further delay, and continued foster care would not be good for the child’s emotional or mental health. Novak v. J.L.D., 539 N.W.2d 73 (N.D.1995).

THE APPELLANT MIKE WAS AFFORDED DUE PROCESS

[¶26] Mike argues that the trial court erred by failing to provide him with an opportunity to be heard in violation of his Right to procedural due process. Mike has had sufficient notice and opportunity to prepare for trial and to secure his participation at trial. Mike was

properly served both by publication, completed February 19, 2019, and in person, by Sheriff on February 6, 2019. (Appendix 90,91) The trial to hear the Petition for Termination was initially scheduled for April 10-12, 2019.

[¶27] Mike first made a Motion to Continue on March 18, 2019, (Appendix 92) based on his pending criminal trial, requesting the Termination proceeding be continued until after the conclusion of the criminal proceedings then expected to proceed to Jury trial in June 2019 or July 2019. The motion was Denied per ND Admin Rule 12 on March 21, 2019. (Appendix 93) At an interim hearing on April 2, 2019, Ms. Lyson, Mike's attorney, renewed her request for continuance citing extensive discovery. The oral motion was granted and trial was rescheduled for May 22-24, 2019. (Appendix 94-97)

[¶28] May 13, 2019, Carol's attorney, Ms. Sundby, filed a Motion to Continue based upon the attorney's required attention to a family emergency rendering her unavailable to prepare for and attend trial as scheduled. The Motion was granted and the trial was rescheduled for June 19. (Appendix 98-100)

[¶29] On May 17, 2019, Petitioner filed a motion to continue the trial based on preexisting out of state travel plans. Motion was granted and trial was rescheduled for June 26, 27, and 28, 2019. (Appendix 101-102)

[¶30] Mike made a final motion, on June 20, 2019, for a continuance based on his unavailability due having been detained in Immigration and Customs Enforcement. (Appendix 101-105) Once his motion was denied he made no other attempts to secure his appearance, but he was represented by counsel.

[¶31] A motion for continuance “will be granted only for good cause shown, either by affidavit or otherwise.” N.D.R. CT 67.1(b). “We will not reverse a trial court’s decision to deny a continuance absent an abuse of discretion.” State v. Hilgers, 2004 ND160, ¶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, 6678 n.W.2d 586.

[¶32] “In the context of parental rights termination there is a statutory right to counsel under N.D.C.C. §27-20-26, and “[p]risoners’ due process rights generally are satisfied if they are represented by counsel and have an opportunity to appear by deposition or other discovery technique.” In re Adoption of J.M.H., 1997 ND99, ¶18, 564 N.W.2d 623.

[¶33] In this case, Mike was incarcerated, and represented by counsel but no attempt was made by Mike to secure telephonic appearance or any other means of appearing. No objection was made to his lack of telephonic or personal appearance at trial, nor to the denial of Mike’s motion for continuance issued prior to trial. Mike knew that he would be facing possible trial and incarceration issues in June as early as his first Motion to Continue from March 18, 2019. He had ample time to prepare alternate means of being heard, such as requesting telephonic appearance, deposition, or requesting that provisions be made or requested so he could attend in person. The record is silent as to any such attempts. The children in this case had been in foster care for over four hundred and fifty of the previous six hundred and sixty nights. The Referee had no way of knowing what action the Immigration Court would take and whether Mike would be further detained, released or

deported, and granting a continuance with such a void of knowledge would deny the children their right to permanency.

THE APPELLANT HAS FAILED TO MEET BURDEN ON APPEAL

[¶34] The party appealing a juvenile court decision has the burden of showing that the findings of fact are clearly erroneous. Striefel v. Striefel, 2004 ND 210, ¶8, 689 N.W.2d 415. On review, the evidence is viewed in the light most favorable to the findings without re-weighting the evidence or reassessing the credibility if there is evidence supporting the findings in the record. Id. A trial court's findings of fact are presumptively correct, and on appeal we view the evidence in the light most favorable to the findings, without re-weighting the evidence or reassessing credibility if there is evidence supporting the findings. In re A.K., 2005 ND App 3, ¶7.

[¶35] The Appellants have failed to establish that the Juvenile Court's ruling is erroneous or that Mike was not afforded Due Process.

CONCLUSION

[¶36] The Appellee respectfully requests that the Court affirm the decision of the Referee terminating parental rights concerning the children.

Respectfully submitted this 20th day of September, 2019.

/s/ *Diane K. Davies-Luger*

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 17 pages.

Dated this 24th day of September, 2019

/s/ *Diane K. Davies-Luger*

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IN THE SUPREME COURT

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)		09-2019-JV-00022
Respondents.)		
)		

AFFIDAVIT OF SERVICE

[¶1] Allyson Lee, being first duly sworn on oath, deposes and states that she is of legal age and that on this date I served the following document:

1. APPELLEE'S BRIEF
2. APPELLEE'S APPENDIX

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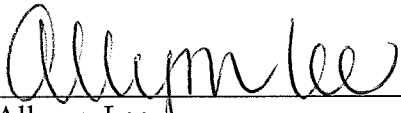
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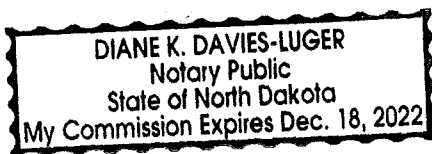
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[¶2] To the best of the affiant's knowledge, the electronic address given was the actual e-mail address of the party intended to be so served.

Dated this 24th day of September, 2019.


Allyson Lee

Subscribed and sworn to before me on this 24th day of September, 2019.




Notary Public

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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IN THE INTEREST OF C.T., A CHILD.
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Respondents.)			
)			

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1. APPELLEE'S BRIEF
2. APPELLEE'S APPENDIX

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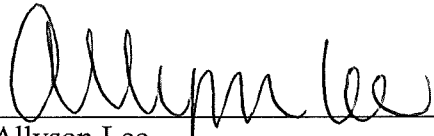
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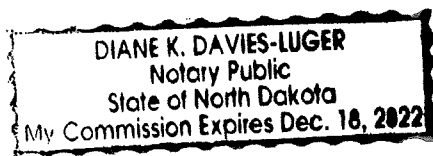
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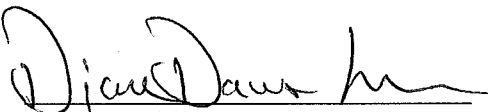
[¶2] To the best of the affiant's knowledge, the electronic address given was the actual e-mail address of the party intended to be so served.

Dated this 20th day of September, 2019.


Allyson Lee

Subscribed and sworn to before me on this 20th day of September, 2019.




Notary Public