

IN THE SUPREME COURT OF NORTH DAKOTA

IN THE INTEREST OF K.B., A CHILD
IN THE INTEREST OF K.B., A CHILD

Megan Dahl, L.B.S.W., Cass County)	
and the State of North Dakota,)	
	)	Cass Co. Case Nos.:
)	
	)	09-2020-JV-254
)	
Petitioner and Appellee,	)	09-2020-JV-268
)	
)	
vs.)	
)	
K.B., a child; K.B., a child; M.N.; John Doe;	)	Supreme Ct. No.:
Janette Olsen, Guardian ad Litem; and)	
Turtle Mountain Band of Chippewa, Tribe,	)	20210109
)	
Respondents,	)	20210110
and)	
)	
J.B., mother,)	
)	
)	
Respondent/Appellant.)	

BRIEF OF APPELLEE

Appeal from the Juvenile Findings of Fact and Order Terminating Parental Rights,

entered March 9, 2021

By: Hon. Scott Griffeth, Judicial Referee, Cass County Juvenile Court

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ISSUES PRESENTED

- I. THE PETITIONER ESTABLISHED THROUGH CLEAR AND CONVINCING EVIDENCE TERMINATION OF PARENTAL RIGHTS IS JUSTIFIED UNDER N.D.C.C. 27-20-44.
 - A. AGGRAVATED CIRCUMSTANCES
 - B. WHERE THE CHILDREN “DEPRIVED”
 - C. IS THE DEPRIVATION LIKELY TO CONTINUE
 - D. WILL THERE BE HARM TO THE CHILDREN
 - E. WHETHER ACTIVE EFFORTS WERE MADE
- II. ADDITIONAL REQUIREMENTS OF I.C.W.A.
- III. THE APPELLANT FAILED TO ESTABLISH THAT THE JUDICIAL REFEREE ERRED IN HIS DETERMINATION.

STATEMENT OF THE CASE

- [¶1] There are two children in this case, and they are asserted, although not legally established, to be full siblings. K.B. (hereinafter “Kim”)¹ is the eldest child and was one year old at the time of trial. K.B. (hereinafter “Kourtney”) was under one year of age at the time of trial.
- [¶2] The children’s mother, J.B. (hereinafter, “Jackie”), has one older child who was removed from her care by her tribe, and was placed in a permanent guardianship with a relative. Kim was briefly in the care of Jackie, and Kourtney was never in the home of a parent, as she was removed from the parents following birth.
- [¶3] Paternity was not established and there was no presumption of paternity. John Doe was subject to default following notice by publication. The possible father of the children, M.N. (hereinafter “Mike”), participated in trial, and has a relationship with Jackie, but never established a legal or emotional relationship with the children.
- [¶4] Jackie and Mike both have struggled with chemical use, instability, criminal conduct, and a dysfunctional relationship.
- [¶5] In 2015, Jackie was sentenced to imprisonment on a conviction of burglary, and a consecutive period of probation. Jackie was ordered to complete chemical dependency treatment as a part of that sentence. After serving three years, Jackie was released on parole in October of 2018, and she had successfully completed chemical dependency treatment at Tomkins Rehabilitation and Corrections Center,

¹ The names of the parties are pseudonyms to protect the identity of the children.

which is a clinically managed, high-intensity residential care program on the campus of the North Dakota State Hospital.

[¶6] Shortly after her release, Jackie became pregnant. Jackie's relapse regarding drug use was not clear, as she did not seek prenatal care; however, Kim's meconium was positive for methamphetamine at birth. Cass County Human Service Zone became involved due to several reports, and a safety plan was developed to support Jackie in her efforts to parent Kim, and intensive services were provided. The services were not successful, and when Kim was placed into shelter care in November of 2019, she again tested positive for exposure to methamphetamine from the two month period she was in Jackie's care. Kim was adjudicated a deprived child on February 11, 2020. A treatment plan was developed with Jackie to address her chemical dependency, mental health, comply with parole, and provide for Kim's safety and basic needs including medical care and safety. One of the barriers to success was the relationship with Mike, the man Jackie identified as the father of Kim who repeatedly abused Jackie. Mike could not be located, and Jackie asserted that they were not in a relationship. Mike was encouraged to establish a legal relationship with Kim and commence services to address his chemical use and abuse issues. Neither parent was successful in these efforts.

[¶7] When Jackie gave birth to Kourtney, Kourtney tested positive for methamphetamine exposure. Jackie had again received minimal prenatal care, despite being aware of abnormalities in the fetal development warranting close monitoring. Kourtney was placed into shelter care following birth at the request of

Cass County Human Service Zone. Jackie was arrested on parole violation shortly thereafter and has been incarcerated since that arrest.

[¶8] A petition for Termination of Parental Rights was filed on June 29, 2020, concerning both children. The trial took place on January 14 and 22, 2021, and the Court granted Termination of Parental Rights concerning Kim and Kourtney on March 9, 2021. This appeal by Jackie followed. John Doe and Mike did not appeal.

STATEMENT OF FACTS

[¶9] Jackie had an older child who had been placed in the permanent guardianship of a relative after five years of involvement and placement through her tribe. During that involvement, Jackie had failed to accomplish the goal of reunification, and active efforts had been made toward that goal by her tribe. [Trial Record 1/14/2021@ 10:47:00]

[¶10] Jackie had been convicted of several crimes and had been sentenced to incarceration which (with good time) would end in May of 2022. After that sentence, Jackie also will have a period of probation, which was consecutive to her incarceration. Jackie completed treatment at Tomkins while an inmate [Trial Record 1/14/2021 @ 11:11:28] and on October 3, 2018, she was released on parole. [Trial Record 1/14/2021 @ 10:54:00]² Stacy Sanders was Jackie's parole officer.

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.

Jackie was released to the community on parole and was to maintain employment, establish housing, and engage in aftercare.

[¶11] Stacy Sanders, Jackie’s parole officer, testified that Jackie had access to, and Jackie reported that she attended, treatment at Southeast Human Services, First Step Recovery, and Prairie St. John’s, but Jackie didn’t engage in or successfully participate. [Trial Record 1/14/2021 @ 10:59:25] Ms. Sanders testified that Jackie had treatment while incarcerated, and initially had employment at a hotel and had supports and family to foster stability and support, but she was unable to maintain in the community. [Trial Record 1/14/2021 @ 11:04:12]

[¶12] By August of 2019, reports of suspected abuse or neglect of a child were received by Cass County Social Services (now known as Cass County Human Service Zone). The first report was received August 28, 2019 reporting that Jackie had given birth to a baby after “limited prenatal care” and the baby’s meconium was positive for methamphetamine. The second report was received on September 4, 2019 that Jackie’s baby had been born with a low birthweight and Jackie was not participating in follow-up care. [Trial Record 1/22/2021 @ 9:53:06]

[¶13] Libbi Koeppe, L.B.S.W., testified that when she had contact with Jackie, Jackie stated that she had recently gotten out of incarceration, and “was having a difficult time adjusting,” and admitted to relapse concerning drug use. [Trial Record 1/22/2021 @ 9:55:29] When Libbi Koeppe saw Jackie on September 12, 2019, she observed that Jackie had a black eye and bruising, and Jackie stated that she had been “attacked” by Mike. [Trial Record 1/22/2021 @ 9:59:00] Ms. Koeppe

testified that Jackie had a recovery coach, Free from Recovery support, the support of her brother, access to housing supports, so a safety plan was developed and in-home case management was provided to maintain Kim in Jackie's home. [Trial Record 1/22/2021 @ 9:57:48] Jackie appeared committed to sobriety and keeping her child safe, but never followed through with plans. [Trial Record 1/22/2021 @ 10:01:52] As an example, Ms. Koeppe noted that Jackie stated several times that she was going to Rape and Abuse to obtain a protection order regarding Mike, but "[Jackie] never followed through." [Trial Record 1/22/2021 @ 10:00:40] Additionally, Tammy Ressler, L.B.S.W., testified that she had provided short term case management to Jackie starting in September of 2019, [Trial Record 1/22/2021 @ 11:34:42] and the services were "potentially intensive" but those services were unsuccessful due to Jackie's lack of follow-through/lack of participation. [Trial Record 1/22/2021 @ 11:41:45] Jackie was "not honest" and her behaviors were not consistent with her representations. [Trial Record 1/22/2021 @ 11:42:25] Ultimately, Jackie was subject to a parole warrant for refusing to submit to drug screens, missed office visits, and drug usage [Trial Record 1/14/2021 @ 10:56:58] and Ms. Koeppe requested shelter care placement of Kim. When Kim was placed in care, a hair follicle test of Kim revealed additional exposure to methamphetamine, which would have occurred during the two months following birth while Kim was in Jackie's care. [Trial Record 1/22/2021 @ 11:38:42]

[¶14] Megan Dahl, L.B.S.W., testified that she was the case manager for Jackie beginning in November of 2019. [Trial Record 1/22/2021 @ 2:17:40] Following the

deprivation adjudication concerning Kim, the court adopted the case plan with the goal of reunification. [Trial Exhibit # 2]

[¶15] Despite multiple systems providing support to Jackie, she was never able to demonstrate sobriety or stability, and she “repeatedly lied” to her parole officer [Trial Record 1/14/2021 @ 11:10:32] and case manager [Trial Record 1/22/2021 @ 2:21:15]. Jackie quickly became pregnant a second time, but denied that she was pregnant and denied that she was in a relationship with Mike. [Trial Record 1/22/2021 @ 2:20:14] After absconding, Jackie was placed at Center by her parole officer on March 5, 2020. [Trial Record 1/14/2021 @ 9:32:38] Jackie tested positive for methamphetamine upon admission to Center. [Trial Record 1/22/21 @ 2:28:04] Jackie was terminated from Center unsuccessfully after eleven days for failure to return to the facility. [Trial Record 1/14/21 @ 9:35:06] Jackie was aware she was pregnant when she was placed at Center. [Trial Record 1/14/2021 @ 9:37:40]

[¶16] Jackie had an initial prenatal appointment for her pregnancy with Kourtney on March 24, 2020, when she was at twenty-five weeks and one day gestation [Trial Record 1/14/21 @ 2:10:01] Dr. Gullicks, OBGYN, testified that an ultrasound detected “incomplete anatomy” of the fetus, which posed a concern. [Trial Record 1/14/21 @ 2:15:00] Dr. Gullicks testified that increased follow-up was needed [Trial Record 1/14/21 @ 2:15:30] and recommended an additional consult, and additional testing. Jackie did not indicate to Dr. Gullicks that she was using street drugs. [Trial Record 1/14/21 @ 2:18:18]

- [¶17] Because Jackie was pregnant, using and not engaging in treatment, on April 9, 2020, Megan Dahl sought to have her involuntarily committed. [Trial Exhibit #8]. Either Southeast Human Services could not locate Jackie or Jackie represented that she was engaging in services (when in fact she was not), and the petition was not pursued by the State’s Attorney. [Trial Record 1/22/21 @ 2:32:19]
- [¶18] Jackie had one more appointment with Dr. Gullicks on April 17, 2020, but did not complete the recommended lab work testing. [Trial Record 1/14/21 @ 2:21:04] Dr. Gullicks’ nurse made several contacts due to no additional appointment and Jackie’s failure to complete testing, but had no success at engaging Jackie in medical prenatal care for the fetus. [Trial Record 1/14/21 @ 2:23:19] Dr. Gullicks testified that use of methamphetamine can have “serious impact on a patient and a pregnancy.” [Trial Record 1/14/21 @ 2:25:05] Dr. Gullicks testified that no other provider had provided prenatal care according to his understanding, but a partner in his practice, Dr. Tomkins, attended the delivery of the baby.
- [¶19] When Kourtney was born, her meconium was collected due to concerns of use during pregnancy, and the meconium was positive for methamphetamine. [Trial Record 1/14/2021 @ 9:53:55 and Trial Exhibit #9] Kourtney’s first void was also positive for methamphetamines. [Trial Record 1/14/2021 @ 10:38:19 and Trial Exhibit #7]
- [¶20] Jackie also tested positive for methamphetamine at the time of Kourtney’s birth and she admitted to methamphetamine use. [Trial Record 1/14/2021 @ 11:01:34]. Jackie’s parole was revoked. [Trial Record 1/14/2021 @ 11:01:52].

- [¶21] At the time of trial, Jackie was at Dakota Women’s Correctional and Rehabilitation Center, and had a “good time” release date of May 2, 2022. [Trial Record 1/14/2021 @ 2:37:31] Jackie had completed Responsive Risk Reduction for Women, a Cognitive Behavior restructuring Group by successful completion of a minimum of 45 hours and was again a Free through recovery candidate. [Trial Record 1/14/2021 @ 2:36:19]
- [¶22] At the time of trial, Mike was subject to a Protection Order as a result of Domestic Violence perpetrated toward Jackie. During Ms. Koeppe’s involvement Mike could not be located. [Trial Record 1/22/21 @ 9:54:47] During Megan Dahl’s involvement, Jackie denied ongoing involvement with Mike. [Trial Record 1/22/21 @ 2:20:14] Mike had not engaged in any therapy or treatment, and had not established a legal relationship with the children.
- [¶23] The trial was conducted by Zoom, and during a break, while all other participants turned off microphones and cameras, Jackie and Mike maintained connection, and engaged in the use of written messages, which were visible to all others on the system. They exchanged contact information, acknowledged that they were aware of the no contact order, and engaged in sexually suggestive behaviors, and expressed a desire/intention to maintain their relationship. [Trial Record 1/22/2021 @ 2:40:50] Kendra Cox, the facilitator for Jackie’s behavior modification group, was present in the room with Jackie while Jackie was engaging in these behaviors, and testified that Jackie’s actions were inconsistent with the risk reduction anticipated. [Trial Record 1/14/2021 @ 2:46:04] As such, Ms. Cox noted that

Jackie may continue to engage in similar behaviors upon release. Marilyn Poitra, the ICWA worker from Jackie's tribe, testified that the agency had made active efforts, that the behaviors of the parents were not consistent with acceptable tribal or Native American parenting practices, and the children should not be with Jackie. Ms. Poitra stated that she didn't support Termination because Jackie told Ms. Poitra that she would be released in May of 2021, she was done with Mike, and she hoped that she would address her chemical dependency. This witness conceded that if Jackie continued her relationship with Mike, she believed "the domestic violence continue and the drug use would continue."

ARGUMENT

[¶24] 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.

[¶25] 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.

[¶26] 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.

[¶27] Further, under 25 U.S.C. § 1912(D), a petitioner must demonstrate, “by clear and convincing evidence that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and those efforts were unsuccessful.” In re M.S., 2001 ND 68, ¶ 18, 624 N.W.2d 678. Under 25 U.S.C. § 1912(f), a petitioner must prove continued custody of a child by a parent or Indian custodian is like to result in serious emotional or physical damage to the child by proof beyond a reasonable doubt. Because Kim and Kourtney are

enrollable in a Native American tribe, according to the testimony of the I.C.W.A. representative at trial, it is appropriate to apply the requisite standards.

- [¶28] The juvenile court specifically recognized this additional standard and concluded that the petitioner had met this burden.

TERMINATION BASED UPON AGGRAVATED CIRCUMSTANCES WAS
APPROPRIATE AND SUPPORTED BY THE EVIDENCE

- [¶29] The Court determined in the Findings of Fact and Order Terminating Parental Rights that John Doe and Mike had subjected the children to “Aggravated Circumstances,” and that finding is not clearly erroneous. This finding is supported in that both men abandoned the children by failing to communicate with them and failing to provide for the care and support of the children.

- [¶30] The Court also made the determination that Jackie subjected the children to “Aggravated Circumstances,” and that finding is not clearly erroneous. N.D.C.C. § 27-20-02(3)(h) provides that “Aggravated Circumstances,” includes exposure of a child to drugs. That section provides that a parent who: “allows the child to be 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” and/or “subjects the child to prenatal exposure to ...any controlled substance as defined in Chapter 19-03.1 in a manner not lawfully prescribed by a practitioner” has subjected the child to “Aggravated Circumstances.” Kim and Kourtney both tested positive for methamphetamine at birth and Kim also had a positive hair follicle test after she had been in the mother’s home for several months

following birth. Despite that finding, efforts toward reunification were made by the agency.

[¶31] 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).

[¶32] It is relevant to note that N.D.C.C. § 27-20-02(3)(b) provides that “Aggravated Circumstances,” includes a parent who fails to make substantial, meaningful efforts to secure *treatment* for the parent's addiction, mental illness, behavior disorder, or any combination of those conditions for a periodof *one year*.” Here Mike had repeatedly engaged in criminal and abusive behavior but testimony established he did not engage in any services throughout the children’s lives. Additionally, Jackie had successfully completed treatment while incarcerated prior to her release on parole in 2018, but after that time it was established and she acknowledged returning to chemical use after the conception of Kim and throughout the remaining approximately twenty month period, prompting deterioration of relationships and involvement of Social Services.

TERMINATION BASED UPON DEPRIVATION WHICH IS LIKELY TO
CONTINUE WAS APPROPRIATE AND SUPPORTED BY THE EVIDENCE

[¶33] The second basis for termination which is supported by the record is deprivation of the children which is likely to continue. 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.

[¶34] While evidence of past deprivation is not sufficient to support prognosis, failure to follow the recommendations for addiction recovery "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. Here, despite having an older child removed from her care, and despite having successfully completed chemical dependency treatment, immediately up release from incarceration, Jackie failed to comply with parole requirements to engage in aftercare, commenced use of alcohol and drugs while pregnant, knowing that it would adversely affect her availability to parent. Additionally, she maintained a relationship with an individual who she acknowledged was toxic and refused to participate in holding him accountable for his behaviors.

[¶35] A parent's fundamental and natural right to their children is of constitutional dimension, but it is not absolute, and parents must at least provide care to their children that satisfies the minimum community standards. In Interest of L.F., 1998 ND 129, ¶ 9, 580 N.W.2d 573.

DEPRIVATION

[¶36] Both children were exposed to drugs by Jackie. Despite that, Kim was left in Jackie's care following birth as there were supports in place to assist Kim in sobriety and providing care for Kim. Kim continued to use drugs and expose Kim

to methamphetamine, failed to obtain medical care for Kim which was needed due to Kim's low birth weight, and failed to abide by her parole conditions. Kim has been adjudicated deprived and was in out of home custody. Kourtney was never in the care of Jackie, due to Kourtney's placement in shelter care upon release from the hospital. Jackie's reports indicate that following Kourtney's birth, she was "held hostage" at Mike's home for several days and repeatedly sexually assaulted. When she reported these events following her own arrest on the day she left Mike's residence, she refused to provide physical evidence or participate in prosecution as she did not want to adversely affect Mike's ability to have the children. This demonstrates a lack of ability to ensure the safety of her children. Additionally, when Kim was left in Jackie's home following birth, Jackie continued to use controlled substances, avoid her parole officer and avoid support services. Jackie failed to obtain recommended prenatal care when with pregnant with Kourtney, even after concerns were raised during her pregnancy with Kourtney due to abnormal fetal development. These are all strong indicators of lack of parental fitness to care for the children. Jackie's declining appearances for visitation with her children are also indicative of her lack of commitment to the children.

[¶37] These events satisfy and support a finding of deprivation.

LIKELY TO CONTINUE

[¶38] 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.

[¶39] Jackie developed her behaviors and addictions before the children arrived, as evidenced by the Criminal conviction which required her to engage in chemical dependency treatment and the prior removal of her older child. Jackie has continued the depriving behaviors without abatement. Even with extensive supports, Jackie has not successfully engaged in establishing stability or sobriety. The parenting deficits she had demonstrated at the time of placement have not been addressed, and at the time of trial, Jackie was incarcerated with a release date in 2022. Additionally, the "toxic relationship" that had developed with Mike was clearly ongoing based upon the behaviors of Mike and Jackie during trial. All of those factors are detrimental to the children and her ability to care for the children. Jackie failed to comply with the safety plan developed with Ms. Koeppe, and never engaged in any services with Ms. Ressler or Ms. Dahl. She repeatedly violated

conditions of parole and repeatedly lied to case managers, and her parole officer, placing the children in danger. Jackie has been unable or unwilling to protect the children, and as a result the children have suffered deprivation. In re: D.N., 2001 ND 71, 624 N.W.2d 686.

[¶40] 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. Novak v. J.L.D., 539 N.W.2d 73 (N.D.1995)(citations omitted). Jackie had previously completed alcohol treatment, but had failed to maintain sobriety when released from incarceration. As of the date of trial, she had not successfully engaged in treatment. Additionally, Jackie had successfully completed therapy for behavior modification to support decision making that would reduce risk. Her observed behaviors while engaging with Mike during trial established that she had not modified her behaviors. Mike's behaviors and Jackie's behaviors, as observed by Ms. Dahl and Ms. Cox were consistent with the behaviors engaged in which resulted in drug usage and physical abuse. As to the length of time needed to address Jackie's established methamphetamine use, inability to maintain sobriety when not incarcerated and establish safe relationships and protection, a time line is purely speculation. Numerous witnesses established that Jackie's statements of commitment to sobriety and safety are not consistent with her behaviors.

[¶41] "[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). In this case, Jackie has consistently express commitment to treatment and the children, yet her behaviors are entirely inconsistent with those statements. She has failed to demonstrate that she has the skills attachment to the children. Her behaviors have compromised the safety and stability of the children. Even with consistent compliance with treatment recommendations, change in behavior would be needed, and no change had been observed. Even though there may be evidence that a parent, 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).

HARM TO THE CHILDREN

[¶42] 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).

[¶43] In determining whether a child's deprivation is likely to continue or will not be remedied, the North Dakota Supreme Court notes that it looks to “prognostic evidence” as a basis for reasonable predictions about future behavior. In the Interest of D.R., 2001 ND 183, 636 N.W.2d 412; In the Interest of S.F., 2000 ND 161, ¶¶ 10, 615 N.W.2d 511. 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, two children have tested positive for methamphetamine. 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.

[¶44] 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)

ACTIVE EFFORTS WERE MADE

[¶45] N.D.C.C. § 27-20-32.2(2) requires that reasonable efforts be made to preserve and reunify families. In re: E.R., 2004 ND 202, ¶ 12, 688 N.W.2d 384, 389. It is not a lack of services that was pertinent here, but rather lack of result or lack of change on the part of the parent. Jackie has been inconsistent with treatment and sobriety. Marilyn Poitra was qualified as an expert witness and affirmed that the tribe was satisfied that active efforts to reunify have been made and placement priorities respected.

ICWA REQUIREMENTS

[¶46] The combination of state and federal provisions creates a dual burden of proof for the party seeking termination of parental rights of an Indian Child, whereby the elements of the state law must be proven by clear and convincing evidence and the federal requirement, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child must be satisfied with proof beyond a reasonable doubt. See Matter of Bluebird, 105 N.C.App 411 S.E.2d 820, 823 (1992) While Jackie has alleged that the requirements of the federal Act have not been met, she has not asserted that the petitioner failed to provide the elements of the statute for terminating her parental rights, rather that the expert who was designated as a qualified expert witness as it relates to native American parenting practices and tribal norms did not support termination of parental rights.

[¶47] While the federal law requires legitimate efforts to prevent the breakup of the Indian family, it does not impose upon an agency a duty to persist in effort that are likely to fail. In re M.S., 2001 ND 68, ¶20, 624 N.W.2d 678. The specific language imposes a higher burden of proof but does not require that the information be only obtained from the Qualified Expert Witness (hereinafter Q.E.W.) or that the opinion of the Q.E.W. be determinative. Rather, the federal law requires that the petitioner meet the higher burden and establish beyond a reasonable doubt that continued custody of the child is likely to result in serious emotional or physical damage to the child. Racial traditions are not implicated in allegations that a parent has subjected a child to abandonment or exposure to methamphetamine. The Indian Child Welfare Act was not intended “as a shield to permit abusive treatment of Indian Children by their parents,” or to allow Indian children to “be abused, neglected, or forlorned under the guise of cultural identity.” In re M.S., 2001 ND 68, ¶23, 624 N.W.2d 678, citing Matter of S.D., 402 N.W.2d 346, 351 (S.D. 1987). Here, numerous witnesses with extensive expertise in child welfare, child development, chemical dependency treatment, and criminal conduct testified regarding efforts made to permit return of the children to Jackie, and the impact of Jackie’s behaviors on the children. There was no testimony that the conduct of Jackie or Mike were acceptable parenting practices. In fact, the mother’s tribe also concluded that she was not able to remedy her parenting abilities and placed an older child in a permanent placement. Further, Ms. Poitra, while stating that she didn’t support Termination of Parental Rights or assert that the child would sustain

harm, also testified that her statements were based upon the representations Jackie made to her. In the event that Jackie and Mike maintained a relationship, Ms. Poitra was of the opinion that the drug use and domestic violence “would continued.” This clearly satisfies the requirements of state and federal law as it relates to the elements to establish termination of parental rights.

THE APPELLANT HAS FAILED TO MEET BURDEN ON APPEAL

[¶48] 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-weighing 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-weighing the evidence or reassessing credibility if there is evidence supporting the findings. In re A.K., 2005 NDApp 3, ¶7.

[¶49] The Appellant has failed to establish that the Juvenile Court’s ruling is erroneous. In the “Statement of Facts,” contained in the Appellant’s Brief, the Appellant ignores important and relevant facts that were not disputed, including the positive meconium tests of the children, the ongoing drug usage of Jackie, the lack of treatment by Mike or Jackie, the toxic relationship of Jackie and Mike, and Jackie incarceration.

CONCLUSION

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

Respectfully submitted this 29th day of April, 2021.

/s/ *Constance L. Cleveland*

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IN THE SUPREME COURT OF NORTH DAKOTA

IN THE INTEREST OF K.B., A CHILD
IN THE INTEREST OF K.B., A CHILD

Megan Dahl, L.B.S.W., Cass County and the State of North Dakota,)	
)	
	)	Cass Co. Case Nos.: 09-2020-JV-254
Petitioner and Appellee,	)	09-2020-JV-268
)	
vs.	)	Supreme Ct. No.: 20210109
	)	20210110
)	
K.B., a child; K.B., a child; M.N., John Doe; Janette Olsen, Guardian ad Litem; and Turtle Mountain Band of Chippewa, Tribe, Respondents,)	
)	
and)	
)	
J.B., mother,)	
)	
Respondent/Appellant.	)	CERTIFICATE OF COMPLIANCE

[¶ 1] Constance L. Cleveland hereby certifies that she is the Attorney for the Appellee/Petitioner in the above entitled matter. And certifies that the Brief of the Appellee complies with the page limitation rules. The Brief contains 25 pages.

Dated this 29th Day of April 2021

/s/ Constance L. Cleveland
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IN THE SUPREME COURT OF NORTH DAKOTA

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Petitioner and Appellee,

vs.

K.B., a child; K.B., a child; M.N., John
Doe; Janette Olsen, Guardian ad Litem;
and Turtle Mountain Band of Chippewa,
Tribe,
Respondents,

and

J.B., mother,

Respondent/Appellant.

Cass Co. Case Nos.: 09-2020-JV-254
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Supreme Ct. No.: 20210109
20210110

AFFIDAVIT OF SERVICE

[¶ 1] Constance L. Cleveland hereby certifies that she is the Attorney for the Appellee/Petitioner in the above entitled matter.

On April 29, 2021 the following documents

Brief of Appellee

were served electronically on the following:

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Dated this 29th Day of April, 2021

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE INTEREST OF K.B., A CHILD
 IN THE INTEREST OF K.B., A CHILD

Megan Dahl, L.B.S.W., Cass County and the State of North Dakota,)	
)	
Petitioner and Appellee,	)	Cass Co. Case Nos.: 09-2020-JV-00254
	)	09-2020-JV-00268
vs.)	
)	
K.B., a child; K.B., a child; John Doe; Janette Olsen, Lay G.A.L.; and Turtle Mountain Band of Chippewa Tribe,	)	Supreme Ct. No.: 20210109
	)	20210110
Respondents,)	
and)	
)	
J.B., Mother,)	
)	
Respondent/Appellant.)	

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 (Updated)

Upon the individuals listed below by sending electronically to the email address given:

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Marilyn Poitra
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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 30th day of April, 2021.

Allyson Lee

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE INTEREST OF K.B., A CHILD
 IN THE INTEREST OF K.B., A CHILD

Megan Dahl, L.B.S.W., Cass County and the State of North Dakota,)	
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1. APPELLEE'S TABLE OF CONTENTS (Updated)

Upon the individuals listed below by sending electronically to the email address given:

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Dated this 30th day of April, 2021.

Allyson Lee