

**IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA
IN THE INTEREST OF D.M.D., A CHILD**

State of North Dakota,)	20190299
)	Supreme Court No. 20190144
Petitioner,)	
)	Grand Forks County Case No. 18-
-v-)	2019-JV-00172
)	
J.D., K.D., and J.A,)	APPELLANT’S BRIEF
)	
Respondents.)	

**ON APPEAL FROM JUVENILE FINDINGS OF FACT AND ORDER FOR DISPOSITION (IN CUSTODY), DATED JULY 8, 2019, FROM THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT, GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JASON MCCARTHY, PRESIDING**

AND

**ON APPEAL FROM JUVENILE ORDER AFFIRMING AGGRAVATED CIRCUMSTANCES (IN CUSTODY), DATED AUGUST 21, 2019, FROM THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT, GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE LOLITA HARTL ROMANICK, PRESIDING**

BRIEF OF APPELLANT

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[¶1] STATEMENT OF THE ISSUE

[¶2] Whether the trial courts findings of aggravated circumstances and a subsequent termination of visitation for a mother and a termination of services for a mother were clearly erroneous?

[¶3] STATEMENT OF THE CASE

[¶4] This is an appeal arising from two (2) orders in a juvenile deprivation case involving a finding of aggravated circumstances pursuant to § 27-20-32.2, N.D.C.C.:

(1) Juvenile Findings of Fact and Order for Disposition (In Custody), dated July 8, 2019; and

(2) Juvenile Order Affirming Aggravated Circumstances (In Custody), dated August 21, 2019.

[¶5] This action was commenced on May 9, 2019, with the filing of a Notice, Juvenile Temporary Custody Order, Affidavit in Support of Juvenile Temporary Custody Order, and Appointment of Guardian ad Litem on that same date. Register of Actions, Index #1-4. A Juvenile Shelter Care Hearing was held on May 10, 2019. A Juvenile Petition (Shelter Care), Summons, Scheduling Order, and Proposed Order for Shelter Care were filed on May 22, 2019. Register of Actions, Index #10, 11, 12, 13. The Juvenile Order for Shelter Care was filed on May 23, 2019. Register of Actions, Index #15. This Order included a finding of Aggravated Circumstances on the mother and Respondent/Appellant herein (hereinafter referred to as “J.D.”). A Juvenile Trial was held on July 3, 2019, Juvenile Findings of Fact and Order for Disposition (In Custody) were filed on July 9, 2019. Register of Actions, Index # 30.

[¶6] J.D. was not present for the Juvenile Trial on July 3, 2019. J.D.’s counsel advised the trial court that J.D. had been taken into custody on a child support warrant.

J.D.'s counsel then requested a continuance. Tr. 3:18-21. This was denied by the trial court, citing the need to proceed and the burden which would be placed on law enforcement to transport J.D. without any notice. Tr. 4:2-12.

[¶7] The Juvenile Findings of Fact and Order for Disposition (In Custody) filed on July 9, 2019, stated:

That the Court makes a finding of aggravated circumstances with respect to this child based upon the prior Involuntary Termination of Parental Rights with respect to [J.D.]

Id. ¶11. This finding was also included within the Order for Disposition. Register of Actions, Index #30.

[¶8] An Affidavit for Permanency/Review, requesting a Finding of Aggravated Circumstances, was filed on July 26, 2019. Register of Actions, Index #33. A Juvenile Permanency Hearing was held on August 1, 2019, and a Juvenile Order Affirming Aggravated Circumstances (In Custody) was filed on August 22, 2019. Register of Actions, Index #38.

[¶9] The Juvenile Order Affirming Aggravated Circumstances (In Custody), citing § 27-20-36, N.D.C.C., affirmed the previous finding of aggravated circumstances and supported “the decision by Social Services to end visits between the child, D.D. and J.D., and forego any further services to J.D.” Id. ¶ 6.

[¶10] J.D. filed a notice of appeal from these orders on August 25, 2019; August 28, 2019; and October 1, 2019.

[¶11] **STATEMENT OF THE FACTS**

[¶12] This is a child deprivation case involving a finding of aggravated

circumstances. The specific grounds in two (2) hearings which were held required that aggravated circumstances were found to be present and that “reasonable efforts” for reunification of the family were not required are set forth by statute:

Reasonable efforts of the type described in subsection 2 are not required if:

- a. A court of competent jurisdiction has determined that a parent has subjected a child to aggravated circumstances; or
- b. The parental rights of the parent, with respect to another child of the parent, have been involuntarily terminated.

N.D.C.C. § 27-20-32.2(4).

[¶13] At the hearing held on July 3, 2019, Sonja Olson, a child protection worker and licensed social worker for the State of North Dakota, was qualified as an expert witness. Olson testified that she was assigned a case for J.D. in March of 2018 for a pregnant woman assessment. Olson met with J.D. in November of 2018, when a report concerning a fight between her and a live-in boyfriend. Olson made an unannounced home visit and completed a safety plan for J.D. No further services were required at that time. The child, D.M.D. (hereinafter referred to as “D.D.”), was born that summer. The next contact occurred in January of 2019 in response to reports of domestic abuse committed against her. Again, no further services were required at that time. Olson testified that there were six reports from November of 2018 until March of 2019. (For purposes of clarity, references to the transcript of this trial will be cited as “Trial Tr.”) Trial Tr. 4-7. Olson contacted J.D. after the March report. On March 19, 2019, shortly after 1:00 p.m., D.D. informed Olson in a telephone call that she was ready to leave the abusive relationship, asked for a placement at the Community Violence Intervention Center (CVIC), and asked for transportation assistance. When Olson called J.D. around 1:25 p.m., Olson heard J.D. screaming for help and heard the baby crying. She also heard

the live-in boyfriend screaming in the background but could not make out his words. Olson called 9-1-1. After the fact, J.D. told Olson that the live-in boyfriend had gotten angry that J.D. had talked to Social Services. She had the baby in her arms when the live-in boyfriend grabbed the telephone away from her when it rang. J.D. told the boyfriend that if she did not answer the phone, Social Services would call 9-1-1, and he threw the phone back at her. J.D. also told Olson that the boyfriend had his hands around her throat, was choking her, and told her ‘I’m going to kill you....’ The boyfriend was arrested for terrorizing and aggravated assault. A No Contact Order was entered as a result of these criminal charges upon the boyfriend. Trial Tr. 8-9.

[¶14] Because J.D. followed the safety plan and had moved out to the CVIC shelter, no services were required of her. However, a referral was made for J.D. to work with wraparound case management and to engage in counseling as a victim of domestic abuse. J.D. did not follow through on this referral. Trial Tr. 9:1-3.

[¶15] On May 7, 2019, there was a violation of the No Contact Order, and Social Services obtained a temporary custody order for D.D. due to the continued failure to protect the child and the continued exposure to domestic violence. Tr. 10:8-16. Olson testified the concerns were that J.D. “did not follow through with [her] safety plan despite knowing exactly what was required.” Trial Tr. 10:17-19. The live-in boyfriend and J.D. had contact prior to May 7 in violation of the No Contact Order. J. D. also reported to Olson that she had used methamphetamines on June 3-5, 2019. J.D. was also present at an apartment in Larimore when there was an assault or stabbing of the live-in boyfriend by J.A., the Respondent in the above-entitled action. J.A. is the natural father of D.D.

Trial Tr. 11. On June 18, 2019, the Child Protection Team found that services were required upon the failure to protect the child. Trial Tr. 12:3-13.

[¶16] Olson testified that in her expert opinion, D.D. was deprived, based upon a failure to protect D.D.'s emotional and physical safety. Olson testified she was concerned about J.D. relapsing. She asked for a 12-month order for custody, care, and control of D.D. to Grand Forks Social Services from the date of removal. Trial Tr. 12:17-25, 13:1-6.

[¶17] On cross-examination, Olson testified that until June 21, 2019, Social Services had not determined that services were required for J.D., although a temporary custody order was obtained on May 8, 2019. She testified that no physical injuries occurred to D.D. Trial Tr. 13:11-25. Olson testified that she was unaware of any incidents other than the incident in March, 2019, in which D.D. had been present when there was domestic abuse occurring. Trial Tr. 14.

[¶18] J.D.'s counsel advised the trial court that since J.D. was in custody, she did not know if J.D. had intended upon testifying. The trial court then closed the evidentiary hearing. Trial Tr. 15:1-9. It is noted that neither the State nor the respondent formally advised the trial court that they rested their respective cases.

[¶19] The State argued that based upon Olson's testimony; upon J.D.'s admissions of relapsing and using methamphetamines; upon J.D. being involved in numerous domestic violence situations with the child present in the home; and upon concerns that led to the removal of D.D., the State was requesting the trial court find that D.D. was deprived; that it was contrary to D.D.'s welfare to return her to the parental home; and that D.D. be continued to be in the custody of Grand Forks County for a

period of up to one (1) year from May 8, 2019. The State then stated that there were five (5) previous involuntary termination of parental rights proceedings against J.D., and based upon those factors, the State asked for a finding of aggravated circumstances. Trial Tr. 15.

[¶20] J.D.’s counsel argued that because J.D. was not present, she could not refute the alleged admissions of relapsing. J.D.’s counsel argued it was not “in the interest of the Court to control who [J.D.] is in a relationship with.” Counsel are argued that the testimony which was presented only verified one instance of D.D. crying due to an environmental circumstance, and there had been no physical violence done to D.D. Trial Tr. 16.

[¶21] The trial court made specific oral findings and orders on the record, which were then incorporated into the Juvenile Findings of Fact and Order for Disposition (In Custody) were filed on July 9, 2019. Trial Tr. 16-20; Register of Actions, Index # 30.

[¶22] A Permanency Review Hearing was held on August 1, 2019. (For purposes of clarity, references to the transcript of this hearing will be cited as “Hearing Tr.”)

[¶23] This hearing was held before a different trial judge. This hearing was held within thirty (30) days from the finding of aggravated circumstances in the Trial which was held on July 3, 2019.

[¶24] Amy Suedel, foster care case manager for Grand Forks County Social Services, was qualified as an expert witness. Hearing Tr. 5. Suedel testified that aggravated circumstances applied in this case because J.D. had five (5) prior involuntary terminations of parental rights. Hearing Tr. 6:5-21. Suedel testified that due to the

aggravated circumstances finding, it was necessary for Social Services to make decisions regarding reasonable efforts in regard to reunification of D.D. with J.D. She testified that the decision had been made not to provide case management services or to provide visitation to J.D., pending a review by the court. Hearing Tr. 7:4-25. She testified this was due to J.D.'s continued substance use and continuing to show up at events of her other children after her parental rights having been terminated and adopted. Hearing Tr. 8:14-22. Suedel read the definition of aggravated circumstances included in § 27-20-02(b), N.D.C.C. and testified as to matters which she believed would apply to J.D. These included engaging in a lifestyle that included substance usage and domestic violence. This included an admission to methamphetamine usage on June 3-5, and J.D. tested positive on a mouth swab for methamphetamines and marijuana on July 3. On July 11, J.D. signed an admission form with the probation office she had used methamphetamines and marijuana on July 10. On July 19, J.D. told Suedel that her last usage date was July 16. Suedel believed J.D. would continue her usage. Hearing Tr. 9:19-25, 10:1-5; 11:7-25, 12:1-5. Suedel testified that she was asking the trial court to allow Social Services to end case management services to J.D., including to end visitation. Hearing Tr. 12:6-10. Suedel testified that ending case management services would not affect the father. Hearing Tr. 12:11-14. Suedel testified she was very concerned for J.D. because she had lost a significant amount of weight over the previous two months. Suedel testified J.D. showed up for a visitation wearing a long-sleeved shirt when it was 90 degrees and was crying, distraught, with red circles around her eyes. Hearing Tr. 12:20-25, 13:1-5.

[¶25] On cross-examination, Suedel testified she was basing her request for aggravated circumstances on five (5) involuntary terminations of parental rights;

continued drug usage; domestic violence; and a cycle of instability. Hearing Tr. 13:12-16. Although Suedel was not a case manager in the five (5) previous involuntary terminations, she testified she was aware that those terminations occurred as a result of J.D.'s continued drug usage, engaging in violent domestic relationships, instability in housing. Hearing Tr. 13:23-25, 14:1-2. Suedel testified that D.D. had a positive reaction when J.D. visited her and had a bond with her mother. Hearing Tr. 9:5-9, 14:12-15, 15:1-11. When asked whether ending visitations would have a negative effect on that mother-child bond, Suedel testified she was more concerned about J.D.' effect on D.D. coming to visitations the way she did. Hearing Tr. 15:12-25. Suedel testified there was a potential negative effect of the mother-child bond upon D.D. Hearing Tr. 16:5-15. Because D.D. was breast feeding when she was removed from J.D., Suedel testified that the foster parents commented that D.D. struggled to take a bottle for a few days, which was a negative impact on D.D. Hearing Tr. 17:1-7. The goal or requirements which were set for J.D. were to refrain from violent domestic relationships and to maintain sobriety. Hearing Tr. 17:22-25, 18:1.

[¶26] On redirect examination, Suedel testified that using methamphetamines while breastfeeding would negatively affect a child. Hearing Tr. 20:23-25. Suedel testified J.D. had engaged in multiple relationships, some of which included domestically violent relationships. Hearing Tr. 21:1-13.

[¶27] Kress Germandson, a foster care caseworker for Grand Forks County Social Services, was admitted as an expert witness. Hearing Tr. 22:1-20. Germandson testified she began working with J.D. and her older children in 2014. She testified the parental rights of both parents were terminated because neither J.D. nor her husband

made necessary changes in their lifestyles and did not follow the reunification plan. Germandson testified she had similar concerns in this case involving D.D. based upon J.D.'s continued pattern of behavior, going back to 2009, and her inability to parent children or maintain her sobriety, maintain a stable life, or follow through on recommendations. Hearing Tr. 23. Germandson testified that J.D. first became involved with Social Services in 2009. Her three (3) older children were placed in foster care in 2011 until they were adopted on July 2, 2019. Germandson testified that J.D.'s pattern of behavior was to become involved in domestically-violent situations with an intimate partner, but also with her mother. Of the three (3) relationships where J.D. produced children, all of them were domestically-violent. Germandson testified that J.D. had ongoing drug usage, with consistent relapses with very short-term sobriety; was unable to understand her children's needs; and caused mental anguish, especially for her three (3) oldest children. Hearing Tr. 24:12-23. Germandson testified J.D. has continued to have contact with those three (3) children, both in person and online, after her parental rights were terminated. Hearing Tr. 25. This has caused various emotional issues, including anger and acting out for the older children, including "suicidal" issues. Hearing Tr. 26, 27:1-2.

[¶28] On cross-examination, Suedel testified it had been about a year since she last had a conversation with J.D., and she had not been a caseworker on J.D.'s case with other children since that case terminated in 2016, and later on July 2, 2019. Hearing Tr. 28:1-16. She testified that the older children had reached out to J.D., but was not sure who initiated that contact. Hearing Tr. 29:10-25, 30:1-22.

[¶29] Traci Van Beek, supervisor for Grand Forks County Social Services, testified that she was the supervisor for the people who had handled the children of J.D. Van Beek was admitted as an expert witness. Hearing Tr. 34. Van Beek testified that she took the matter to a larger planning team, which included representatives from the regional office and administrators from the State, after the finding of aggravated circumstances which was made in the Juvenile Findings of Fact and Order for Disposition (In Custody). The decision whether to choose to enforce or not to enforce the aggravated circumstances provisions was given considerable conversation, but the final decision was that enforcing the aggravated circumstances finding was the right decision. This was based upon J.D.'s inability to commit to a lifestyle which would be in D.D.'s best interests. Van Beek cited J.D.'s failure to show a sober life free of domestic violence, as well as the pattern of chronic abuse and neglect of the older children, particularly the older three, which had caused them to experience significant trauma. Hearing Tr. 35, 36:1-11. Van Beek testified she believed that 12 years of intense services and case management was a sufficient amount of time to demonstrate an ability to parent. Hearing Tr. 36:20-23. Van Beek also testified she suspected J.D. was under the influence of methamphetamines during the court hearing, based upon her observations. She testified that the primary goal in this case had changed to adoption, with reunification as a secondary goal. Hearing Tr. 37.

[¶30] On cross-examination, Van Beek testified there was another supervisor in her department who had handled J.D.'s cases over the years. However, she testified she had perused all twenty-nine (29) child protection assessments in J.D.'s history. Hearing Tr. 38. Van Beek testified J.D. was not included in the decision-making team because

this was a custodial decision that needed to be made by professionals tasked with overseeing the best interests of D.D. Hearing Tr. 39. She testified that this was the first time her agency had ever enforced aggravated circumstances because of the chronic abuse and neglect, with the failure to make changes. Hearing Tr. 40. Van Beek testified that even though D.D. had only been in the care of Social Services for three (3) months, there was a pattern of behavior that extended back over twelve (12) years. Hearing Tr. 42:1-12.

[¶31] The State offered certified copies of the case which terminated J.D.'s parental rights for the four (4) oldest children, which were admitted without objection. Hearing Tr. 43-44. The State rested.

[¶32] J.D. testified on her own behalf. J.D. related her visitation schedule with D.D. while D.D. was in custody. J.D. admitted there were some times when she was late for a visitation due to a lack of transportation or a phone to call for transportation. She also admitted there was a time when she missed visitation when her ride did not pull through and another time when she was in Larimore. Hearing Tr. 46. There was a time when she missed a visitation when she was in jail. Hearing Tr. 47:7-9. J.D. said she was always in communication with Social Services when she was late or when she missed a visitation. Hearing Tr. 47:10-20. She testified that when she had visitations with D.D., they would play, dance, eat, cuddle, pray, change her diaper, do videos and take pictures. Hearing Tr. 47:25, 48:1-16. J.D. testified D.D. smiled and played peek-a-boo. Hearing Tr. 48. J.D. testified D.D. was colicky and would cry for a long, long time. Hearing Tr. 50:6-9. J.D. testified that while she tried to schedule two (2) appointments since D.D. was in the custody of Social Services, but she felt frustration because she felt that Social

Services was not supporting her. Hearing Tr. 50:16-25, 51:1-8. J.D. moved from Larimore to Grand Forks and made other attempts to facilitate reunification. However, while she attended a team meeting and established goals, she did not agree to sign the safety plan because she wanted to talk to her attorney. Hearing Tr. 51. Specifically, she did not promise to drug test twice a week and submit to random drug tests. She did not feel that the domestic violence and No Contact Order were minimal concerns because D.D. had been removed because of domestic violence. Hearing Tr. 52. She felt that certain requirements of the safety plan did not fit, such as doing a psychological parent evaluation, a mental health assessment, or a parenting class. J.D. testified she wanted to do these things differently. Hearing Tr. 53:10-25. J.D. testified she had a drug evaluation done at an alternative site, and the recommendation was for a low-intensity treatment, with group counseling. She also testified she had checked into parenting classes. Hearing Tr. 54. J.D. testified she had applied for housing and was on a waiting list. Hearing Tr. 55:6-9.

[¶33] On cross-examination, J.D. testified that she was not under the influence in court, and when she was asked when the last time she had used methamphetamines, she refused to testify, citing the Fifth Amendment to the United States Constitution. Hearing Tr. 56: 10-14. At that point, her trial counsel moved for permission to withdraw from representation of J.D., citing professional ethical reasons. There was no objection, including from J.D., and the trial judge granted the motion. Hearing Tr. 56: 16-25, 57:1-4. J.D. then testified that the last time she had used methamphetamines was the morning previous. Hearing Tr. 57:12-16. She testified she had been in treatment programs nine

(9) times in one year, completing treatment perhaps three (3) times. Hearing Tr. 57:17-25.

[¶34] J.D. requested to recall Van Beek, which was objected to by the State and denied by the trial judge. Hearing Tr. 58:18-25, 59:1-8. J.D. also requested to recall Suedel or another person not previously called, which was also denied. Hearing Tr. 59:10-17. J.D. was allowed to present her own further testimony about her apparent diagnosis for post-traumatic stress disorder (PTSD), but this testimony was objected to and was sustained. Hearing Tr. 62-63. J.D. stated that she did not feel that Social Services has ever worked with her or provided her services. Hearing Tr. 63:18-25. J.D. requested that she be given ninety (90) days with visitation, then have a review. Hearing Tr. 65:25, 66:1-8.

[¶35] The trial judge ruled against J.D. on the record and orally upheld the termination of services and visitation, which was later reduced to an order. Hearing Tr. 68:13-25, 69-70.

[¶36] J.D. filed a timely Notice of Appeal on October 1, 2019. Register of Actions, Index # 48.

[¶37] **JURISDICTION**

[¶38] Appeals are allowed from lower district courts to the Supreme Court as provided by law. N.D. Const. art. VI, § 6. Appeals from juvenile proceedings are allowed by statute:

1. An aggrieved party, including the state or a subdivision of the state, may appeal from a final order, judgment, or decree of the juvenile court to the supreme court by filing written notice of appeal within thirty days after entry of the order, judgment, or decree, or within any further time the supreme court grants, after entry of the order, judgment, or decree. The appeal must be heard by the supreme court upon the files, records, and minutes or transcript of the evidence of the

juvenile court, giving appreciable weight to the findings of the juvenile court. The name of the child may not appear on the record on appeal.

2. The appeal does not stay the order, judgment, or decree appealed from, but the supreme court may otherwise order on application and hearing consistent with this chapter if suitable provision is made for the care and custody of the child. If the order, judgment, or decree appealed from grants the custody of the child to, or withholds it from, one or more of the parties to the appeal, it must be heard at the earliest practicable time.

N.D.C.C. § 27-20-56.

[¶39] **STANDARD OF REVIEW**

[¶40] The standard of review of a juvenile court’s decision is a clearly erroneous standard of review:

In Interest of A.R., 2010 ND 84, ¶ 5, 781 N.W.2d 644 (quoting Interest of R.W.S., 2007 ND 37, ¶ 8, 728 N.W.2d 326), we recently described our standard of review of a juvenile court’s decision:

Under N.D.R.Civ.P. 52(a), this Court reviews a juvenile court’s factual findings under a clearly erroneous standard of review, with due regard given to the opportunity of the juvenile court to judge the credibility of the witnesses. A finding of fact is clearly erroneous if there is no evidence to support it, if the reviewing court is left with a definite and firm conviction that a mistake has been made, or if the finding was induced by an erroneous view of the law. This Court reviews questions of law de novo.

Interest of D.J., 2011 ND 142 ¶ 8, 800 N.W.2d 333 (2011). See also N.D.R.Civ.P. 52(a).

[¶41] **ARGUMENT**

[¶42] This case involves a two-pronged set of hearings in which the respondent, J.D., who was the natural mother defendant of D.D., was found to have committed “aggravating circumstances” in the first hearing, and in the second hearing, the trial court found it was appropriate to terminate services to J.D. and to halt visitation with D.D.

[¶43] The term “aggravating circumstances” is defined by statute:

"Aggravated circumstances" means circumstances in which a parent:

a. Abandons, tortures, chronically abuses, or sexually abuses a child;

- b. 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 period equal to the lesser of:
 - (1) One year; or
 - (2) One-half of the child's lifetime, measured in days, as of the date a petition alleging aggravated circumstances is filed;
- c. Engages in conduct prohibited under sections 12.1-20-01 through 12.1-20-08 or chapter 12.1-27.2, in which a child is the victim or intended victim;
- d. Engages in conduct that constitutes one of the following crimes, or of an offense under the laws of another jurisdiction which requires proof of substantially similar elements:
 - (1) A violation of section 12.1-16-01, 12.1-16-02, 12.1-16-03, or 14-09-22 in which the victim is another child of the parent;
 - (2) Aiding, abetting, attempting, conspiring, or soliciting a violation of section 12.1-16-01, 12.1-16-02, or 12.1-16-03 in which the victim is a child of the parent; or
 - (3) A violation of section 12.1-17-02 in which the victim is a child of the parent and has suffered serious bodily injury;
- e. Engages or attempts to engage in conduct, prohibited under sections 12.1-17-01 through 12.1-17-04, in which a child is the victim or intended victim;
- f. Has been incarcerated under a sentence for which the latest release date is:
 - (1) In the case of a child age nine or older, after the child's majority; or
 - (2) In the case of a child, after the child is twice the child's current age, measured in days;
- g. Subjects the child to prenatal exposure to chronic or severe use of alcohol or any controlled substance as defined in chapter 19-03.1 in a manner not lawfully prescribed by a practitioner; or
- h. 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.

N.D.C.C. § 27-20-02(3) (Effective through December 31, 2019).

[¶44] If a finding of aggravated circumstances has been found, a permanency hearing must be held within thirty (30) days of the hearing in which aggravated circumstances was found:

A permanency hearing must be conducted within thirty days after a court determines that aggravated circumstances of the type described in subdivision a, c, d, or e of subsection 3 of section 27-20-02 exist, or within twelve months after a child, subject to an order of disposition under this subsection, is considered to

have entered foster care, or is continued in foster care following a previous permanency hearing, including a hearing conducted on a petition filed under section 27-20-30.1. The permanency hearing may be conducted:

(1) By the division of juvenile services as a placement hearing under chapter 27-21; or

(2) By the court, if the court requires, or if it appears that an appropriate permanency plan could not be carried out without exceeding the authority of the division of juvenile services.

N.D.C.C. § 27-20-36(2)(b).

[¶45] Reasonable efforts for reunification of the family are presumed, but there is a statutory exception to this presumption:

Reasonable efforts of the type described in subsection 2 are not required if:

a. A court of competent jurisdiction has determined that a parent has subjected a child to aggravated circumstances; or

b. The parental rights of the parent, with respect to another child of the parent, have been involuntarily terminated.

N.D.C.C. § 27-20-32.2(4).

[¶46] The Respondent contends that the finding of aggravated circumstances in the trial court's specific oral findings and orders on the record and the subsequent written Juvenile Findings of Fact and Order for Disposition (In Custody) from the trial held on July 3, 2019, were clearly erroneous. Trial Tr. 16-20; Register of Actions, Index # 30.

[¶47] J.D. was not present for the Juvenile Trial on July 3, 2019. Although J.D.'s counsel advised the trial court that J.D. had been taken into custody on a child support warrant and requested a continuance, this request was denied by the trial court, citing the need to proceed and the burden which would be placed on law enforcement to transport J.D. without any notice. Tr. 3:18-214:2-12.

[¶48] While generally the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution have been held apply only to criminal

trials, and not to civil trials, certain constitutional rights have been extended in juvenile proceedings, which are regarded as distinct from adult criminal proceedings. See generally In re Gault, 387 U.S. 1 (1967); *see also* Jean Whitaker Sutton, “Parent's Right to Counsel in Dependency and Neglect Proceedings”, 49 Indiana Law Journal 167 (1973).

[¶49] Here, J.D. argues that her right to be present at the trial on July 3, 2019, was violated. As more fully set forth in Paragraph 6, above, J.D. was arrested on a child support warrant prior to the trial and was in the custody of the Grand Forks Sheriff. Although trial counsel requested a continuance due to J.D.’s absence, the trial court denied this request and proceeded to trial. This request was denied by the trial court, citing the need to proceed and the burden which would be placed on law enforcement to transport J.D. without any notice. Tr. 4:2-12. After the State had presumably presented its case, J.D.’s trial counsel advised the trial court that since J.D. was in custody, she did not know if J.D. had intended upon testifying. The trial court then closed the evidentiary hearing without hearing additional testimony. Trial Tr. 15:1-9. It is noted that neither the State nor the respondent formally advised the trial court that they rested their respective cases.

[¶50] J.D. argues that since she was in the custody of the Grand Forks Sheriff—and by implication, of the State—J.D.’s right to be present at the trial on July 3, 2019, was frustrated by the State and was not of her own volition. J.D. also argues that her right to testify and present evidence at this trial was inherently prevented by the State. J.D. argues that the trial court’s reasoning for denying the request for a continuance was clearly erroneous in light of the fact that the trial court’s rationale for denying the request

for a continuance was that her rights, as the parent of D.D., were more compelling than the burden which would be placed on law enforcement to transport J.D. without any notice to the Sheriff. Tr. 4:2-12. J.D. argues that her right to present testimony and evidence to refute the State's claims were prevented by the State and that her absence from this trial was not voluntary on her part.

[¶51] J.D. did attend the hearing on August 1, 2019, in which the aggravated circumstances found on July 3, 2019, were affirmed. However, this hearing was not very favorable for her. The trial court found that J.D. admitted she had used methamphetamines on the day prior to the trial:

The Court finds [J.D.] was under the influence at the time of the hearing and that her testimony was not credible. Additionally, the Court finds that the pattern of chemical abuse and chronic neglect of her children will likely continue into the future. Also, the Court acknowledges the prior Involuntary Termination of Parental Rights of [J.D.'s] five (5) other children.

Juvenile Order Affirming Aggravated Circumstances (In Custody), Register of Actions, Index #38.

[¶52] J.D.'s ability to be represented at this hearing was additionally impacted when J.D.'s trial counsel moved to withdraw after J.D. was asked if she was under the influence of methamphetamines and when the last time she had used methamphetamine was. Hearing Tr. 56:10-15. J.D. attempted to plead the Fifth Amendment to the United States Constitution, but before a ruling could be made on this issue, J.D.'s trial counsel moved for permission to withdraw from further representation of J.D., citing the North Dakota Rules of Professional Conduct. The trial judge was apparently surprised and responded, "In the middle of a hearing?" Hearing Tr. 56:18. However, when J.D. and the State did not object to this withdrawal, it was granted. Hearing Tr. 56:20-25, 57:1-5.

[¶53] J.D. argues that the trial court’s decision at the August 1, 2019, hearing was clearly erroneous because the trial court ignored the testimony of Suedel, the foster care case manager for Grand Forks Social Services, which indicated that D.D. looks for J.D. at supervised visitations and has thrown up after visitations. Hearing Tr. 9:1-18. J.D. testified there was a mother-child bond with D.D. that had been established, that she had engaged in positive interactions with D.D., and that the impacts of termination would not be in D.D.’s best interests. Hearing Tr. 47-51.

[¶54] **CONCLUSION**

[¶55] Here, J.D. argues that the finding of aggravated circumstances at a trial on July 3, 2019, was clearly erroneous because she was prevented by the State from appearing, testifying on her own behalf, or presenting evidence to challenge the claims of the State. J.D. was not voluntarily absent from these proceedings. Rather she was in the custody of the Grand Forks Sheriff, and by extension, the State. The denial of her right to be present at this hearing was clearly erroneous, and the denial of the request for a continuance was an abuse of the trial judge’s discretion.

[¶56] J.D. argues that the finding of the trial judge in the hearing on August 1, 2019, was clearly erroneous because the trial judge did not consider the impacts upon D.D. to the termination of visitation and the provision of services to J.D.

[¶57] J.D. respectfully prays this Court reverse and remand this case for further proceedings.

Dated this 7th day of January, 2020.

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CERTIFICATE OF COMPLIANCE

[¶1] COMES NOW Russell J. Myhre of Enderlin, North Dakota, and hereby certifies that the attached Brief of Appellant is in compliance with Rule 32(a)(8)(A), North Dakota Rules of Appellate Procedure.

[¶2] The number of pages in the principal Brief, excluding any addenda, is twenty-three (23) pages, according to the page count of the filed electronic document. This page count includes this Certificate of Compliance and excludes the Certificate of Service.

Dated this 7th day of January, 2020.

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