

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

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ND Supreme Court Case No.:

Williams County Court No.: 53-2019-JV-00023

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In the Interest of M.M., a child

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State of North Dakota,

Petitioner and Appellee

v.

M.M., a Child;

M.M., Mother

Tracy Horob, Guardian ad Litem;

Executive Director ND DHS;

Respondents

and

J.J., Father

Respondent and Appellant

**IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA  
IN THE INTEREST OF M.M.**

**APPELLANT’S BRIEF**

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

Judgment entered February 7, 2020

By: Hon. Paul Jacobson, Judicial Referee, Williams County Juvenile Court

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ORAL ARGUMENT REQUESTED  
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**North Dakota Cases**

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In Interest of L. N., 319 N.W.2d 801, 803 (N.D. 1982)..... ¶30

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In the Interest of C.K.H., N.M.W., C.K.W., A.J.W., and J.W., 458 N.W.2d 303 (N.D. 1990)..... ¶36

In the Interest of R.M.B. 402 N.W.2d 912 (N.D. 1987)..... ¶36

Kleingartner v. D. P. A. B., [310 N.W.2d 575](#), 578 (N.D.1981)..... ¶38, ¶41

In the Interest of D.S., Jr., M.S., S.S., C.S., and H.S., 325 N.W.2d 654 (N.D. 1982)..... ¶41

In Interest of M.N., 294 N.W.2d 635, 637 (N.D. 1980)..... ¶41

Interest of R.W.B., 241 N.W.2d 546, 552 (N.D.1976)..... ¶41

McGurren v. S.T., 241 N.W.2d 690, 695 (N.D.1976)..... ¶41

**U.S. Cases**

Santosky v. Kramer, --- U.S. ----, ----, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599, 606 (1982).... ¶41

**N.D. Statutes**

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N.D.C.C., § 28-27-01.....¶1

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N.D.C.C., § 27-20-44.....¶31, ¶37, ¶38, ¶39, ¶40

N.D.C.C., § 27-20-02.....¶31

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N.D.C.C. Chapter 12.1-20-04.....¶31

N.D.C.C. Chapter 27-20-30.....¶31

ORAL ARGUMENT:

Oral argument has been requested to emphasize and clarify the Appellant's written arguments on their merits.

Abbreviations:

M.M – Respondent and mother of M. (child)

M. – Respondent, child

## JURISDICTIONAL STATEMENT

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

## STATEMENT OF THE ISSUES

[¶2] **ISSUE I.** During the trial was there clear and convincing evidence that established that there were causes and conditions of deprivation that would continue and/or occur in the future which required J.J.’s parental rights be terminated?

**ISSUE II.** Did J.J. receive effective assistance of counsel during the trial?

## NATURE OF THE CASE

[¶3] This is a case from the Juvenile Court of Williams County, North Dakota, involving a deprived child and the termination of parental rights.

[¶4] The Summons and Juvenile Petition for Termination of Parental Rights were filed on 02/02/2019.

[¶5] A demand for discovery was filed on 05/17/2019.

[¶6] Another demand for discovery was filed on 06/26/2019.

[¶7] A guardian ad litem report was filed on 07/08/2019.

[¶8] There was a Motion to continue filed on 07/08/2019 and it was granted on 07/11/2019.

[¶9] Another demand for discovery was filed on 10/21/2019.

[¶10] The states response to Respondents request was field on 10/29/2019.

[¶11] The Guardian ad Litem filed a report on 12/26/2019.

[¶12] A notice of rescheduling hearing was filed on 01/27/2020.

[¶13] Another demand for discovery was filed on 01/28/2020.

[¶14] A hearing was had on 02/03/2020.

[¶15] The Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment were filed on 02/07/2020.

[¶16] The Notice of Appeal was filed on 02/20/2020.

[¶17] The Amended Notice of Appeal was filed on 02/25/2020.

[¶18] This matter is now before the North Dakota Supreme Court.

#### STATEMENT OF FACTS

[¶19] This is a termination of parental rights case. It began in 2014. When this case began the mother of the child, M.M., and the child, M., were living in Williston, North Dakota. The father of the child was living in Las Vegas, Nevada.

[¶20] The mother, M.M. and the child, M. on 09/18/2014 were found in a hotel in Williston. The mother of M.M. was under the influence of drugs. The child M. was taken from the mother M.M. and found to be deprived and was placed in the care, custody, and control of the Williams County Social Services.

[¶21] Six permanency hearings were held between September 14, 2015 and December 2018 to determine if the custody order should continue. Each permanency hearing ended with the care, custody, and control of M. with the Williams County Social Services.

[¶22] The Williams County Social Services, while they had care, custody, and control of M., made reasonable efforts to return M. to both his parents, M.M. and J.J. M.M. was unable and/or not willing to take advantage of the services offered by the Williams County Social Services for her reunification with M. J.J at first was unwilling to take

advantage of the services offered by the Williams County Social Services for reunification with his child M. However, by trial time the judge admitted in his oral ruling that J.J. hadn't made a mistake in the last month.

[¶23] The things J.J. had done at or just prior to trial were:

1. Moved from Las Vegas, Nevada to Minot, North Dakota, and renting an apartment at 2 S. Main Street #209 Minot, North Dakota, that was a suitable place to bring his child M.
2. Working two jobs at the Dollar Tree in Minot, North Dakota and the other at K.F.C. in Minot, North Dakota.
3. Seeing M. and making phone calls to his child, M.
4. Not using controlled substances.
5. Doing volunteer work at the Men's Winter Refuge.

[¶24] At the start of the trial M.M., the mother, agreed to sign a paper giving up all rights to the child M.

[¶25] J.J. refused to give up his rights to the child M. and demanded a hearing.

[¶26] The State was represented by Williams County States Attorney Marlyce A.

Wilder and at the hearing called three witnesses:

1. Shelly Sikes – Licensed Social Worker at North Star Zone (F.K.A. Williams County Social Services)
2. Sarah Anderson – Children's Mental Health Therapist, Kaleidoscope Mental Health, M.'s therapist
3. Alysha Thiessen – M.'s foster mother



[¶27] Respondent J.J. was represented by Attorney Chanara C. Allen who called only one witness, J.J.

[¶28] J.J.'s attorney Chanara Allen at the hearing cross examined one of the three states witnesses. The witness she cross examined was Shelly Sikes.

[¶29] When the trial ended the trial judge found clear and convincing evidence to terminate all of J.J.'s rights to his child, M. The trial judge at a later time had a judgment filed terminating all of J.J.'s rights to his child M. J.J. is now appealing that judgment and this matter is before the North Dakota Supreme Court.

**Issue I.** During the trial was there clear and convincing evidence that established that there were causes and conditions of deprivation that would continue and/or occur in the future which required J.J.'s parental rights be terminated?

#### ARGUMENT

[¶30] The standard of review in a juvenile court judgment is set out in In the Interest of J.N.R. and D.L.C. 322 N.W.2d 465 (N.D. 1982):

“Our scope of review of decisions under the Uniform Juvenile Court Act, Chapter 27-20, N.D.C.C., is governed by 27-20-56(1), N.D.C.C., which provides that review is based upon the files, records, and minutes or transcript of the evidence of the juvenile court. Our review is not limited to a determination of whether or not the juvenile court's findings are clearly erroneous; rather, we are allowed to reexamine the evidence in a manner similar to the former procedure of trial de novo, giving appreciable weight to the findings of the juvenile court. § 27-20-56(1), N.D.C.C.; In Interest of L. N., 319 N.W.2d 801, 803 (N.D. 1982); In Interest of S. W., 290 N.W.2d 675.”

[¶31] This case involves the termination of parental rights. The North Dakota Statute that deals with parental rights is North Dakota Century Code 27-20-44:

“27-20-44. Termination of parental rights.

1. The court by order may 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:
    - (1) 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
    - (2) The child has been in foster care, in the care, custody, and control of the department, a county social service board, or human service zone, 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;
  - d. The written consent of the parent acknowledged before the court has been given; or
  - e. The parent has pled guilty or nolo contendere to, or has been found guilty of engaging in a sexual act under section 12.1-20-03 or 12.1-20-04, the sexual act led to the birth of the parent's child, and termination of the parental rights of the parent is in the best interests of the child.
2. If the court does not make an order of termination of parental rights, it may grant an order under section 27-20-30 if the court finds from clear and convincing evidence that the child is a deprived child.”

[¶32] In the case now before the court, the father J.J. has never had custody of the child M. for one whole day. J.J. has only had phone conversations and visits with the child, M.

[¶33] The record and audio disc in this case makes it clear the child M. was and has been a deprived child.

[¶34] However there is little evidence or testimony to indicate how or what J.J. would do with M. if his parental rights weren't terminated. There is testimony about how M. had reacted and would react if J.J. parental rights weren't terminated.

[¶35] The trial judge in this case in his oral ruling at the end of the trial said that J.J. had been doing a good job as a parent for the last month (trial audio disc minute 1:50:16).

[¶36] According to *In the Interest of C.K.H., N.M.W., C.K.W., A.J.W., and J.W.*, 458 N.W.2d 303 (N.D. 1990) to terminate parental rights evidence of past deprivation is not enough but rather there must be prognostic evidence that causes and conditions of the

child deprivation are likely to continue. In the Interest of R.M.B. 402 N.W.2d 912 (N.D. 1987. In this case there isn't prognostic evidence that indicates that the causes and conditions of M.'s deprivation are likely to continue.

[¶37] The judge in the case now before the court states in his oral ruling at the end of the trial that J.J. had been a good parent for the last month (trial audio disc minute 1:50:16). At minute 1:48:23 States Attorney Marlyce Wilder admits that J.J. is doing well but states it is too little too late. According to States Attorney Wilder that means that there is a time and date before a termination of parental rights judgment when it is too late for a parent to change his ways. The trial judge's oral ruling and the statement made by States Attorney Wilder don't agree with the language of North Dakota Century Code 27-20-44 (c)(1):

“The child is a deprived child and the court finds:

- (1) 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;

[¶38] The trial judge's oral ruling and States Attorney Wilders statement are also contrary to the following language In the Interest of J.N.R. and D.L.C. 322 N.W.2d 465 (N.D. 1982) page 469:

“Before the juvenile court may terminate the parental rights of a parent pursuant to § 27-20-44(1)(b), N.D.C.C., the State must establish each of the following three factors by clear and convincing evidence:

- 1.) the child is a deprived child;
- 2.) the conditions and causes of deprivation are likely to continue or will not be remedied; and
- 3) by reason of the continuous or irremedial conditions and causes, the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm. *Kleingartner v. D. P. A. B.*, [310 N.W.2d 575](#), 578 (N.D.1981).”

[¶39] In this case the trial judge also considered N.D.C.C. 27-20-44 (c)(2) as a reason to terminate J.J.'s parental rights:

“The child has been in foster care, in the care, custody, and control of the department, a county social service board, or human service zone, 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;”

[¶40] The above language in N.D.C.C. 27-20-44(c)(2) is preceded by the word “may” in N.D.C.C. 27-20-44. Therefore, it is not mandatory that the court must to terminate a parent’s parental rights if 27-20-44(c)(2) is violated.

[¶41] The following appears in *In the Interest of D.S., Jr., M.S., S.S., C.S., and H.S.*, 325 N.W.2d 654 (N.D. 1982)

“Cases involving the termination of parental rights are always difficult, especially when there has been no claim of intentional deprivation. It is axiomatic that “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.” *Santosky v. Kramer*, --- U.S. ----, ----, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599, 606 (1982). Although we have repeatedly recognized that parents have a fundamental, natural right to their children which is of constitutional dimensions, that right is not absolute. *Kleingartner v. D.P.A.B.*, supra; *In Interest of M.N.*, 294 N.W.2d 635, 637 (N.D. 1980); *Interest of R.W.B.*, 241 N.W.2d 546, 552 (N.D.1976); *McGurren v. S.T.*, 241 N.W.2d 690, 695 (N.D.1976). The primary purpose of the Uniform Juvenile Court Act is to protect the welfare of the child and, thus, the best interest of the child is one factor to be considered in determining the necessity of terminating parental rights. *Kleingartner v. D.P.A.B.*, supra, 310 N.W.2d at 578-579.”

[¶42] In the case now before the court the judge should have considered the fact that J.J. had made the necessary changes to be a parent prior to trial and there was no evidence to prove the danger of future deprivation.

[¶43] In this case it has taken about five years to get this termination of parental rights case before the court. About a month before trial began J.J. had changed his ways and

was doing things a responsible parent should do and there was no clear and convincing proof at trial that shows the deprivation of M. will continue. Therefore J.J.'s parental rights to M. should not have been terminated.

**Issue II.** Did J.J. receive effective assistance of counsel during the trial?

[¶44] The third state's witness was A.T. and she had been and at the time of trial was the foster mother of M. She wanted J.J.'s parental rights terminated so she could adopt M.

[¶45] A.T. should have been cross examined about how her testimony was directly related to her adopting M. Also, since A.T. was present at J.J.'s visits with M. she should have been cross examined regarding about how her presence interfered with J.J.'s visits with M.

#### CONCLUSION

[¶46] As to Issue I in this case, it should be remanded to the District Court with an order to reinstate J.J.'s parental rights to M.

[¶47] As to Issue II that issue should be remanded to the District Court and a hearing held where J.J. is allowed to establish the reasons why his counsel was ineffective at the trial.

Respectfully submitted this 25<sup>th</sup> day of February, 2020.

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IN THE SUPREME COURT OF NORTH DAKOTA

In the Interest of M.M., a child

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State of North Dakota,	)	Supreme Court File No.
	)	
Petitioner and Appellee,	)	
	)	Williams County No.
v.	)	53-2019-JV-00023
	)	
M.M., Child, M.M.,Mother, and	)	CERTIFICATE OF COMPLIANCE
J.J.,Father.	)	
Respondent and Appellant.	)	

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[¶1] This Appellant’s Brief and Appendix complies with the pages limit of 38 for the Brief and 100 pages for the Appendix set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, as the Brief consists of 13 pages and Appendix consists of 58 pages.

Dated this 25<sup>th</sup> day of February, 2020

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IN THE SUPREME COURT OF NORTH DAKOTA

In the Interest of M.M., a child

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State of North Dakota,	)	Supreme Court File No.
	)	
Petitioner and Appellee,	)	
	)	Williams County No.
v.	)	53-2019-JV-00023
	)	
M.M., Child, M.M.,Mother, and	)	CERTIFICATE OF SERVICE
J.J.,Father.	)	
Respondent and Appellant.	)	

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[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Notice of Appeal  
Appellant's Appendix  
Appellant's Brief

By efilng at the below address upon:

Marlyce Ann Wilder  
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And by placing a true and correct copy of said items in a sealed envelope with USPS mail to:

J.J.  
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Dated this 25<sup>th</sup> day of February, 2020

/S/ Cassy Larson  
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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota, by and through	)	
Williams County Social Services	)	
Petitioner/Appellee,	)	Supreme Court No.: 20200054
	)	District Case No.: 53-2019-JV-00023
v.	)	
	)	
M. M., child	)	CERTIFICATE OF SERVICE
M.M., mother, and J.J., father	)	
Respondents/Appellant.	)	

[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that on 02/26/2020 she served true copies of the following documents:

1. Notice of Appeal
2. Appeal Brief
3. Appeal Appendix

By email at the below address upon:

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Christopher D. Jones  
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Dated this 26<sup>th</sup> day of February, 2020.

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