

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Interest of A.T., Minor Child

State of North Dakota,)	
)	Supreme Court No. 20200092
Petitioner and Appellee,)	
)	
vs.)	Case No. 51-2019-JV-00160
)	
)	
A.T., child, T.T., mother, Respondents)	
and)	
J.T., father,)	
Respondent and Appellant.)	

APPELLEE’S BRIEF

**APPEAL FROM ORDER DATED FEBRUARY 19, 2020
DISTRICT COURT, WARD, NORTH DAKOTA
THE HONORABLE CONNIE PORTSCHELLER, PRESIDING**

Nathan Wersal #09003
Assistant State’s Attorney
PO Box 5005
315 3rd St. SE
Minot, ND 58702
701-857-6480
51WardSA@wardnd.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF FACTS ¶1

LAW AND ARGUMENT ¶15

 I. The Court Did Not Err in Terminating J.T.’s Parental Rights ¶17

 a. A.T. is a deprived child. ¶23

 b. The conditions and causes of A.T.’s deprivation are likely
 to continue absent termination of J.T.’s parental rights. ¶27

 c. A.T. is suffering harm and will continue to suffer
 harm if J.T.’s parental rights are not terminated ¶33

 d. The Juvenile Court’s order is sufficiently specific to
 enable review ¶38

 II. An Independently Sufficient Alternative Ground for
 Termination Exists. ¶39

CONCLUSION..... ¶43

TABLE OF AUTHORITIES

Cases:

<u>Interest of A.L.E.</u> , 2018 ND 257, 920 N.W.2d 461	¶16, 29
<u>Interest of A.M.</u> , 1999 ND 195, 601 N.W.2d 253.....	¶15, 17
<u>Interest of A.S.</u> , 1998 ND 181, 584 N.W.2d 853	¶15, 17
<u>Interest of B.N.</u> , 2003 ND 68, 660 N.W.2d 610	¶30
<u>Interest of C.N.</u> , 2013 ND 205, 839 N.W.2d 841	¶26, 29
<u>Interest of D.D.</u> , 2006 ND 30, 708 N.W.2d 900	¶36
<u>Interest of D.F.G.</u> , 1999 ND 216, 602 N.W.2d 697	¶15
<u>Interest of D.H.</u> , 2010 ND 103, 783 N.W.2d 12	¶29, 30, 36
<u>Interest of D.M.</u> , 2007 ND 62, 730 N.W.2d 604.....	¶16
<u>Interest of D.R.</u> , 2001 ND 183, 636 N.W.2d 412	¶30
<u>Interest of F.F.</u> , 2006 ND 47, 711 N.W.2d 144.....	¶41
<u>Interest of J.N.R.</u> , 322 N.W.2d 465.....	¶30
<u>Interest of K.L.</u> , 2008 ND 131, 751 N.W.2d 677	¶29
<u>Interest of L.J.</u> , 2007 ND 74, 734 N.W.2d 342	¶41
<u>Interest of M.R.</u> , 334 N.W.2d 848	¶25
<u>Interest of T.A.</u> , 2006 ND 210, 722 N.W.2d 548.....	¶15, 19, 20, 28, 30, 36
<u>Interest of T.F.</u> , 2004 ND 126, 681 N.W.2d 786	¶20
<u>McBeth v. M.D.K.</u> , 447 N.W.2d 318.....	¶30
<u>Novak. v. J.L.D.</u> , 539 N.W.2d 73.....	¶31
<u>Striefel v. Striefel</u> , 2004 ND 210, 689 N.W.2d 415.....	¶16

Statutes

N.D.C.C. § 27-20-44.....¶15, 17, 22, 34, 39, 41, 42

N.D.C.C. § 27-20-20.1 ¶42

STATEMENT OF FACTS

[¶1] A.T. was born in February 2015 to biological mother T.T. and biological father J.T. (Appellant's Appendix [hereinafter "A.A."] at 13, ¶ 5.) A.T. has two older siblings she has lived with for her entire life. (A.A. at 16, ¶ 18.)

[¶2] In September 2016, before A.T. and her siblings entered care, J.T. committed an act of domestic violence against T.T. (Audio Transcript [hereinafter "Tr."] at File 2, 47:40.) T.T. testified that J.T. shattered her collarbone while A.T. and her two siblings were present in the home. (Tr. at File 2, 33:10.) T.T. stated that A.T. was asleep but her siblings were awake and witnessed what occurred. (Tr. at File 2, 33:30.) According to T.T., this was not the only incident of domestic violence that J.T. inflicted on her. (Tr. at File 2, 33:25.)

[¶3] J.T. pled guilty to and was convicted of the crime of Aggravated Assault based on breaking T.T.'s collarbone, and stated to the Juvenile Court that he accepts responsibility for his conduct. (Tr. at File 1, 20:25; Tr. at File 2, 47:40.) J.T. received a sentence of five years incarceration, with a mandatory minimum of two years imprisonment. (Tr. at File 2, 51:00.) J.T. admitted that A.T. was present in the home during the altercation but insists she was sleeping in her crib. (Tr. at File 2, 48:00, 55:10.) When asked by his counsel about mental or emotional trauma suffered by A.T.'s siblings, J.T. stated that he was sure he played a part in it, but that he was not the sole source of any trauma. (Tr. at File 2, 49:05.) Both the foster care case manager and the guardian ad litem expressed concerns about the violent nature of the offense that led to J.T.'s incarceration. (Tr. at File 2, 4:45, 38:25; A.A. at 17, ¶ 21.)

[¶4] A.T. and her siblings were initially placed by T.T. with their maternal grandparents in April 2018. The children were formally adjudicated deprived on November 2, 2018, and placed under the custody of Ward County Social Services until July 26, 2019, with physical placement with the maternal grandparents. (A.A. at 13, ¶ 6.) A permanency hearing was held

and A.T. was continued in care until July 24, 2020. (Id.) The Petitioner filed a Petition to Terminate Parental Rights on October 3, 2019. (A.A. at 13, ¶ 7.)

[¶5] A Termination of Parental Rights hearing was held on January 21, 2020. (A.A. at 13, ¶ 8; Tr. at File 1, 00:16.) At the hearing, T.T., mother, agreed to have her parental rights terminated so that A.T. could be placed for adoption. (A.A. at 13, ¶ 10; Tr. at File 1, 6:29; File 2, 32:00.) J.T., father, contested the termination of his parental rights. Seven individuals testified at the hearing: a police officer with the Minot Police Department (Tr. at File 1, 19:25), the foster care case manager for A.T. (Tr. at File 2, 00:45), a counselor for one of A.T.'s siblings (Tr. at File 2, 22:00), the maternal grandmother of A.T. and one of her current caregivers (Tr. at File 2, 26:42), T.T., mother of A.T. (Tr. at File 2, 32:00), the guardian ad litem for A.T. and her siblings (Tr. at File 2, 37:20), and J.T. (Tr. at File 2, 42:50).

[¶6] Much of the testimony at the hearing focused on the unavailability of J.T. to parent A.T. due to his incarceration. J.T. has been incarcerated and therefore unable to be a caregiver for A.T. for the entire time that A.T. has been in foster care. (A.A. at 19, ¶ 24; Tr. at File 2, 2:45.) The Juvenile Court found that “in the best case scenario” J.T. might be released in January of 2021, but even if he were released before that time, A.T. could not be immediately placed with him. (A.A. at 19-21.) According to A.T.'s foster care case manager, upon release it would take a minimum of six months for J.T. to establish and maintain stability and transition A.T. back into his care, including dealing with any mental or emotional issues A.T. may experience. (Tr. at File 2, 10:14, 11:50.) The guardian ad litem for the child also testified about the need for J.T. to establish himself before reunification even if released early, that it would take a great deal of time to establish a bond between A.T. and J.T., and that this would not be soon enough to avoid harm to A.T. (Tr. at File 2, 38:00, 38:50.) J.T. himself agreed that a gradual transition would be required, and stated that he

believed the foster care case manager's estimate of an additional six months minimum after release from incarceration was a reasonable starting point. (Tr. at File 2, 46:45, 51:35.)

[¶7] The foster care case manager also testified to concerns about never having seen J.T. parent. (Tr. at File 2, 4:45, 11:00.) He testified that permanency is one of the most important things for a child, and that any delay in reunification and permanency causes harm to a child. (A.A. at 15-16, ¶ 18; Tr. at File 2, 12:40, 14:48.) He testified that A.T. should not have to wait for permanency any longer and recommended termination because it had been long enough. (A.A. at 16, ¶ 18; Tr. at File 2, 15:20.) He was also concerned about harm to A.T. if she were separated from her two siblings. (A.A. at 16, ¶ 18; Tr. at File 2, 10:14, 11:50.) When asked if the only issue with J.T. seemed to be his incarceration, the foster care case manager agreed, but added that the kids had been in care for a long period of time. (A.A. at 16, ¶ 18; Tr. at File 2, 18:36.)

[¶8] The guardian ad litem for A.T. and her two siblings testified that she believed it was in A.T.'s best interest to have permanency now, and that delaying permanency will cause harm to A.T. (A.A. at 17, ¶ 21; Tr. at File 2, 39:45.) The guardian ad litem further testified that A.T. could be harmed by a discrepancy with or removal from her siblings, or separation from the grandparents who she had lived half her life with. (A.A. at 17, ¶ 21; Tr. at File 2, 40:00.) The guardian ad litem testified that A.T. was at an age where attachment and belonging are very important, and that it would be very traumatic to A.T. to discard the relationships she had developed. (Tr. at File 2, 40:50.) When asked if her opinion in favor of termination was based on J.T.'s incarceration, the guardian ad litem stated that it was, in part. (Tr. at File 2, 41:00.)

[¶9] J.T. testified that after release from incarceration, he would have to find a job, a place to live, a vehicle, get on his feet, and establish stability. (Tr. at File 2, 42:50.) J.T. agreed

with the foster care case manager that these preparations for reunification with A.T. would take an estimated six months after release from incarceration, as a reasonable starting point. (Tr. at File 2, 51:35.) J.T. testified that A.T. should remain in her current placement with her siblings until he was released from incarceration and ready to parent, because it would do more harm than good to split the kids up arbitrarily. (Tr. at File 2, 59:15.) When asked whether removing A.T. from her siblings and current home would cause her harm, J.T. stated that he believed it would be better in the long term; that A.T. might be in a worse place when she is 5 years old, but that when she is 25 years old she would be better off for it. (Tr. at File 2, 59:38.)

[¶10] The Juvenile Court issued its written findings of fact and conclusions of law on February 14, 2020. (A.A. at 24, ¶ 36.) By the time of the Juvenile Court's decision, A.T. had been in foster care for 465 continuous days. (A.A. at 18, ¶ 24.)

[¶11] The Juvenile Court found by clear and convincing evidence that A.T. was deprived, based on (a) her presence in foster care for 465 continuous days; (b) the failure of reunification efforts with A.T.'s mother and her decision to voluntarily terminate her rights; (c) J.T.'s incarceration and consequent unavailability as a caregiver for the entire time A.T. has been in foster care; and (d) both parents' previous admissions to deprivation. (A.A. at 18, ¶ 24.)

[¶12] The Juvenile Court further found by clear and convincing evidence that the conditions and causes of deprivation were likely to continue or would not be remedied, based on (a) T.T.'s consent to termination; (b) the failure of A.T. or her siblings to be reunified despite all assistance offered by Ward County Social Services; (c) J.T.'s continuing incarceration and consequent inability to provide parental care or support, the nature of the offense of Aggravated Assault against T.T. demonstrating an indifference towards J.T.'s

responsibilities as a parent, the limited contact between J.T. and A.T., and the need for a further transition period after release to find suitable housing, employment, maintain stability, and transition A.T. into J.T.'s care; and (d) the opinions of the professionals that deprivation is likely to continue. (A.A. at 19, ¶ 24.)

[¶13] Finally, the Juvenile Court found that A.T. was suffering and would probably suffer serious physical, mental, moral, or emotional harm, based on testimony by the foster care worker and the guardian ad litem that A.T. needed permanency now and that lack of permanency had caused and could continue to cause A.T. insecurity, anxiety, confusion, and attachment and trust issues; J.T.'s continuing incarceration and the additional necessity of time to find housing, employment and show a period of stability to make it on his own after release before reunification; A.T.'s strong emotional attachments in her current home placing her at risk of trauma from future dislocation and continuing delay of permanency for A.T. being tantamount to serious mental health and emotional harm to her; that J.T.'s own choices and ultimately his ongoing incarceration made him an absent parent for most of A.T.'s life; and that J.T. did not have present capability, or capability within the near future, to be an adequate parent and take over the primary care of the child. (A.A. at 20-22, ¶ 24.)

[¶14] The Juvenile Court concluded that the totality of circumstances in the case forced the conclusion that the only solution was a termination of parental rights, and that the Petitioner had shown that termination of T.T.'s and J.T.'s parental rights to A.T. was justified by clear and convincing evidence. (A.A. at 22, ¶¶ 25-26.) This appeal followed.

LAW AND ARGUMENT

[¶15] Under N.D.C.C. § 27-20-44(1)(c)(1), a court may terminate parental rights if clear and convincing evidence establishes that the child is deprived, that 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. Interest of A.M., 1999 ND 195, ¶ 7, 601 N.W.2d 253; Interest of A.S., 1998 ND 181, ¶ 15, 584 N.W.2d 853. The party seeking termination must prove all elements by clear and convincing evidence. Interest of T.A., 2006 ND 210, ¶ 10, 722 N.W.2d 548. Where clear and convincing evidence in the record affirmatively proves these elements, the Juvenile Court's decision terminating parental rights is affirmed. Interest of D.F.G., 1999 ND 216, ¶ 32, 602 N.W.2d 697.

[¶16] “A lower court's decision to terminate parental rights is a question of fact that this Court will not overturn unless clearly erroneous.” Interest of D.M., 2007 ND 62, ¶ 6, 730 N.W.2d 604. “Under the clearly erroneous standard of review, we affirm the decision of the juvenile court unless it is induced by an erroneous view of the law, if there is no evidence to support it, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made. Interest of A.L.E., 2018 ND 257, ¶ 4, 920 N.W.2d 461. Under this standard of review, the evidence is viewed in the light most favorable to the findings without reweighing the evidence or reassessing credibility if there is evidence supporting the findings in the record. Striefel v. Striefel, 2004 ND 210, ¶ 8, 689 N.W.2d 415. The party appealing has the burden of showing that the findings of fact are clearly erroneous. Id.

I. THE COURT DID NOT ERR IN TERMINATING J.T.'S PARENTAL RIGHTS

[¶17] As stated above, N.D.C.C. § 27-20-44(1)(c)(1) creates a three-part test for termination of parental rights: (1) Is the child deprived? (2) Are the conditions and causes of the deprivation likely to continue? (3) Is the child suffering, or will the child in the future probably suffer, some serious physical, mental, moral, or emotional harm? Interest of A.M., 1999 ND 195, ¶ 7, 601 N.W.2d 253; Interest of A.S., 1998 ND 181, ¶ 15, 584 N.W.2d 853.

[¶18] J.T. argues that the Juvenile Court had “no evidence” and “no adequate basis” to support findings on these factors. (Appellant’s Brief [hereinafter “App.”] at ¶¶ 13, 14. More specifically, J.T. argues that the Juvenile Court’s findings were based “exclusively” on J.T.’s incarceration, that the fact of J.T.’s incarceration was the “only evidence” supporting termination, and that the Juvenile Court therefore committed an “impermissible” error of law in making its findings of fact. (App. at ¶¶ 7, 11, 13, 14.)

[¶19] J.T.’s legal argument relies almost entirely on an overreading of this Court’s long-standing maxim that “[i]ncarceration does not alone constitute continued deprivation.” (App. at ¶ 13, quoting Interest of T.A., 2006 ND ¶ 16, 722 N.W.2d 548.) J.T. argues, in effect, that this precept should prevent a trial court from considering not only the fact of J.T.’s incarceration at all, but also any matter that is merely related to this fact, such as the causes of J.T.’s incarceration, the collateral consequences of such incarceration on J.T.’s ability to care for and parent A.T., the length of time J.T. has been unable to be a caregiver for A.T. in the past and will be continue to be unable in the future, the harm that A.T. has suffered without J.T. available to provide a permanent home, the harm that A.T. will continue to suffer if permanency is further delayed, and so on. Each of these causes and consequences of incarceration is a proper subject of consideration by the Juvenile Court.

[¶20] The fallacy in J.T.’s legal argument is most directly shown through the full context of the quote in question:

Incarceration does not alone constitute continued deprivation, but the harm a parent's incarceration may cause the children “may be established by prognostic evidence that a parent's current inability to properly care for the child will continue long enough to render improbable the successful assimilation of the child into a family if the parent's rights are not terminated.” Interest of T.F., 2004 ND 126, ¶ 12, 681 N.W.2d 786. When a parent, voluntarily and without reasonable justification, makes himself unavailable to care for and parent

young children, the children should not be expected to wait or assume the risk involved in waiting for permanency and stability in their lives. Interest of E.R., 2004 ND 202, ¶ 9, 688 N.W.2d 384.

Interest of T.A., 2006 ND 210, ¶ 16, 722 N.W.2d 548. In context, it is clear that a trial court is permitted to consider collateral matters related to or stemming from a parent's incarceration, such as the length of time that would be needed before reunification can occur, the harm to the minor child from the delay of reunification, and the voluntary cause(s) of the parent's incarceration and consequent separation from the child. What is prohibited is total reliance on the mere fact of incarceration, standing alone.

[¶21] J.T. mistakes a simple requirement that trial courts look beyond the mere fact of a parent's incarceration for a black hole that sucks in all facts even tangentially related to J.T.'s incarceration, placing all such facts off-limits for consideration by the Juvenile Court. Since J.T. has been incarcerated for the entire time that A.T. has been in foster care, J.T.'s interpretive theory neatly places all testimony related to J.T. out of bounds, and makes all of the Juvenile Court's factual findings error. This is not the law.

[¶22] As will be shown below, the Juvenile Court made explicit, detailed findings of fact supported by evidence in the record on each of the three factors supporting termination of parental rights under N.D.C.C. § 27-20-44(1)(c)(1). For each factor, the Juvenile Court had some factual basis for its findings beyond the mere fact of J.T.'s incarceration. Furthermore, where the Juvenile Court considered collateral matters related to J.T.'s incarceration, or even the fact of J.T.'s incarceration itself in conjunction with other facts, the Juvenile Court was supported by case law in doing so. Because J.T. cannot meet his burden to show that the Juvenile Court's findings of fact were clearly erroneous, this Court should affirm the Juvenile Court's decision.

- a. A.T. is a deprived child.

[¶23] The Juvenile Court found by clear and convincing evidence that A.T. was deprived, based on (a) A.T.'s presence in foster care for 465 continuous days; (b) the failure of reunification efforts with A.T.'s mother, T.T., and T.T.'s decision to voluntarily terminate her rights; (c) J.T.'s incarceration and consequent unavailability as a caregiver for the entire time A.T. has been in foster care; and (d) both parents' previous admissions to deprivation. (A.A. at 18, ¶ 24.)

[¶24] J.T. argues that "no evidence supports the Juvenile [C]ourt's finding of deprivation" because all evidence considered by the Juvenile Court somehow related back to J.T.'s incarceration. (App. at ¶ 12.) This is incorrect, not only because the Juvenile Court considered evidence unrelated to J.T.'s incarceration, but also because the Juvenile Court properly considered J.T.'s incarceration not as a fact in itself, but as an ongoing barrier to J.T.'s provision of proper parental care for A.T.

[¶25] Multiple factual bases support the Juvenile Court's finding of deprivation that have no direct relationship with J.T.'s incarceration. These include the extreme length of time A.T. had spent in foster care of 465 continuous days, the failed attempts at reunification with T.T. and the testimony of T.T. regarding her decision to voluntarily terminate her rights, and the history of the underlying deprivation case that included previous admissions by J.T. that A.T. was deprived. (A.A. at 18, ¶ 24.) "[W]e do not believe the juvenile court need operate in a vacuum concerning the results of the previous proceedings and the events emanating from an order issued after that hearing." Interest of M.R., 334 N.W.2d 848, 853 (N.D. 1983).

[¶26] The Juvenile Court also properly considered J.T.'s incarceration not as a fact in itself, but as an obstacle preventing him from providing proper parental care for A.T., and therefore causing deprivation. These were proper findings because this Court has explicitly approved of consideration of a parent's incarceration in this way: "The relevant inquiry is whether

[J.T.] can provide proper parental care for the child, which [J.T.] cannot do while incarcerated.” Interest of C.N., 2013 ND 205, ¶ 11, 839 N.W.2d 841. The Juvenile Court’s finding that A.T. was deprived was not clearly erroneous.

- b. The conditions and causes of A.T.’s deprivation are likely to continue absent termination of J.T.’s parental rights.

[¶27] The Juvenile Court found by clear and convincing evidence that the conditions and causes of A.T.’s deprivation were likely to continue or would not be remedied, based on (a) T.T.’s consent to termination; (b) the failure of A.T. or her siblings to be reunified despite all assistance offered by Ward County Social Services; (c) J.T.’s continuing incarceration and consequent inability to provide parental care or support, the nature of the offense of Aggravated Assault against T.T. demonstrating an indifference towards J.T.’s responsibilities as a parent, the limited contact between J.T. and A.T., and the need for a further transition period after release to find suitable housing, employment, maintain stability, and transition A.T. into J.T.’s care; and (d) the opinions of the professionals who testified that deprivation was likely to continue. (A.A. at 19, ¶ 24.)

[¶28] Again, J.T. relies on a misreading of this Court’s statement that “[i]ncarceration does not alone constitute continued deprivation” to argue that the Juvenile Court’s conclusion was wholly unsupported by any evidence. (App. at ¶ 13, citing Interest of T.A., 2006 ND 210, ¶ 16, 722 N.W.2d 548.) J.T.’s argument misconstrues both the law and the facts, since J.T. fails to account for case law that explicitly authorizes the Juvenile Court to consider the causes and ramifications of J.T.’s incarceration in making its findings, and fails to account for evidence the Juvenile Court considered that was not directly related to J.T.’s incarceration.

[¶29] The Juvenile Court was fully justified by case law in taking the causes and collateral consequences of J.T.’s incarceration into account in making its findings. This includes J.T.’s

continuing physical unavailability to provide proper parenting for A.T. “Incarceration also may be considered in determining whether the deprivation is likely to continue.” Interest of A.L.E., 2018 ND 257, ¶ 7, 920 N.W.2d 461 (citing Interest of D.H., 2010 ND 103, ¶ 20, 783 N.W.2d 12). The Juvenile Court’s consideration of J.T.’s inability to provide parental care or support as a collateral consequence of his incarceration was therefore proper. “A parent must be able to demonstrate present capability, or capability within the near future, to be an adequate parent.” Interest of K.L., 2008 ND 131, ¶ 23, 751 N.W.2d 677 (citation omitted). “The relevant inquiry is whether [J.T.] can provide proper parental care for the child, which [J.T.] cannot do while incarcerated.” Interest of C.N., 2013 ND 205, ¶ 11, 839 N.W.2d 841.

[¶30] The Juvenile Court also properly took note of the nature of the offense which led to J.T.’s ongoing incarceration, namely a brutal domestic Aggravated Assault against T.T. that shattered her collarbone in a home containing three young children under their care, two of whom witnessed the assault. (Tr. at File 2, 33:10-33:30.) “Evidence of the parent’s background, including previous incidents of abuse and deprivation, may be considered in determining whether deprivation is likely to continue.” McBeth v. M.D.K., 447 N.W.2d 318, 321 (N.D. 1989) (citing Interest of J.N.R., 322 N.W.2d 465, 468 (N.D. 1982)). “Prognostic evidence may include [...] the parent’s background.” Interest of T.A., 2006 ND 210, ¶ 16, 722 N.W.2d 548. The finder of fact can review a parent’s criminal history to determine the likelihood of future incarceration or future behavior. See Interest of B.N., 2003 ND 68, ¶ 27, 660 N.W.2d 610. “[A] juvenile court need not operate in a vacuum in termination proceedings. It can give substantial credence to evidence indicating a pattern of conduct by a parent that forms a basis for reasonable prediction of the parent’s future behavior.” Interest of D.R., 2001 ND 183, ¶ 15, 636 N.W.2d 412 (citations omitted). This Court has approved a finding that the causes and conditions of deprivation were likely to continue “based in part”

upon “a pattern of criminal behavior and incarceration that continued after” a father knew about the existence of his child. Interest of D.H., 2010 ND 103, ¶ 24, 783 N.W.2d 12. J.T. obviously knew about A.T. at the time of his criminal act; he testified that A.T. was present in the home at the time. (Tr. at File 2, 47:40, 48:00, 55:10.) The Juvenile Court was therefore legally and factually justified in finding that the nature of the crime that led to J.T.’s incarceration demonstrated an indifference towards J.T.’s responsibilities as a parent. (A.A. at 19, ¶ 24.)

[¶31] The Juvenile Court also correctly considered the limited contact between J.T. and A.T., and the need for a further transition period after release to find suitable housing, employment, maintain stability, and transition A.T. into J.T.’s care. (A.A. at 19, ¶ 24.) J.T. himself testified that after release he would have to find a job, a place to live, a vehicle, get on his feet, and establish stability. (Tr. at File 2, 42:50.) J.T. furthermore agreed with the foster care case manager that preparations for reunification with A.T. would take an estimated six months after release from incarceration, as a reasonable starting point. (Tr. at File 2, 11:50, 51:35.) In other words, J.T. agreed that even if he were immediately released from incarceration, he would not be fully able to parent A.T. for at least another six months. The foster care case manager testified that visits between A.T. and J.T. had been occurring only every three months due to his incarceration, and that A.T. might need therapy if issues arose with transitioning into her father’s care, thereby lengthening the date of reunification even further. (Tr. at File 2, 10:14, 11:50.) To write off consideration of these practical issues as off-limits due to the fact that they arise as a consequence of J.T.’s incarceration is to be “blind to the problems of long-term foster care,” and to ignore the salient fact that “[e]ven after [J.T.’s] release, it is unclear how soon [A.T.] could be successfully assimilated into [J.T.’s] life.” Novak v. J.L.D., 539 N.W.2d 73, 77 (N.D. 1995).

[¶32] Finally, the Juvenile Court identified multiple factual bases for its findings that were not related to J.T.'s incarceration. These include T.T.'s consent to termination, the provision of services by the custodial agency having failed to achieve reunification over A.T.'s 465 days in foster care, and the opinions of the professionals who testified. (A.A. at 19, ¶ 24.) J.T.'s incarceration has nothing to do with T.T.'s consent to termination or her testimony about termination being the best and only solution to provide A.T. with stability (Tr. at File 2, 32:00, 35:30), or with the simple fact that A.T. has spent 465 days in foster care without yet being reunified with either parent. With regard to the professionals, J.T. makes much of the foster care case worker's concession on cross-examination that it seemed the only issue with J.T. was incarceration, but ignores that the foster care case worker immediately added by way of explanation that the children had been in care a very long time. (App. at ¶ 12; A.A. at 16, ¶ 18; Tr. at File 2, 18:36.) The foster care case worker also noted that he had never seen J.T. parent, and that he was concerned about the violent nature of the crime that led to J.T.'s present incarceration. (Tr. at File 2, 4:45, 11:00.) The guardian ad litem noted similar concerns about the violent nature of J.T.'s crime, as well as the time and work still needed for J.T. to establish a parenting bond with A.T. considering the length of their separation, and allowed only that her opinion in favor of termination was based on J.T.'s incarceration in part, not in full. (Tr. at File 2, 38:25, 38:50, 41:00; A.A. at 17, ¶ 21.) Neither of these professional opinions was based solely upon J.T.'s incarceration, and to the extent the professionals took the causes or consequences of J.T.'s incarceration into account, doing so was acceptable for the same reasons discussed previously. Juvenile Court's consideration of these opinions, the failure to achieve reunification after 465 days in foster care, and T.T.'s consent to termination all support the Juvenile Court's finding that A.T.'s deprivation would continue absent a termination of parental rights.

- c. A.T. is suffering harm and will continue to suffer harm if J.T.'s parental rights are not terminated.

[¶33] J.T. does not directly dispute the Juvenile Court's finding of harm to A.T. in his brief (*see generally* App. at ¶¶ 7-14), but it will be covered here nonetheless. The Juvenile Court found by clear and convincing evidence that A.T. was suffering and would probably suffer serious harm if termination was not granted, based on testimony by the foster care worker and the guardian ad litem that A.T. needed permanency now and that lack of permanency had caused and could continue to cause A.T. insecurity, anxiety, confusion, and attachment and trust issues; J.T.'s continuing incarceration and the additional necessity of time to find housing, employment and show a period of stability to make it on his own after release before reunification; A.T.'s strong emotional attachments in her current home placing her at risk of trauma from future dislocation and continuing delay of permanency for A.T. being tantamount to serious mental health and emotional harm to her; that J.T.'s own choices and ultimately his ongoing incarceration made him an absent parent for most of A.T.'s life; and that J.T. did not have present capability, or capability within the near future, to be an adequate parent and take over the primary care of the child. (A.A. at 20-22, ¶ 24.)

[¶34] Like the Juvenile Court's findings on the first two prongs of the three-part test for termination of parental rights under N.D.C.C. § 27-20-44(1)(c)(1), the Juvenile Court's findings on this third prong fall under two categories: (1) those based on evidence wholly unrelated to J.T.'s incarceration, and (2) those based on the causes, consequences, or collateral effects of J.T.'s incarceration. Both were properly considered by the Juvenile Court.

[¶35] First, the Juvenile Court's findings about A.T.'s mental and emotional needs, her strong emotional attachments to her present caregivers and siblings, and the exposure to serious mental and emotional harm that would result from delaying her permanency further

are derived from testimony unrelated to J.T.'s incarceration. These findings were based upon the testimony of the foster care case manager and the guardian ad litem, individuals that came to know A.T. well in their professional roles and whose judgments on A.T.'s need for permanency, her strong and growing emotional attachments in her current home, and the harmful consequences of delayed permanency were in no manner related to J.T.'s incarceration. (Tr. at File 2, 3:00, 10:14, 12:40, 14:48, 15:20, 38:00, 40:00, 40:50.) Even J.T. admitted that removal of A.T. from her siblings and present caretakers would do more harm than good, and that the result of his plan for delayed reunification and permanency with him sometime in the future after his release might put A.T. in a worse place when she is five years old, even if she is better for it somehow when she is an adult. (Tr. at File 2, 59:15, 59:38.)

[¶36] Second, the Juvenile Court was correct to take the causes and consequences of J.T.'s ongoing incarceration into account in making its findings. “[T]he probability of serious mental and emotional harm to the child may be established by prognostic evidence that a parent’s current inability to properly care for the child will continue long enough to make the successful assimilation of the child into a family unlikely if the parent’s rights are not terminated.” Interest of D.D., 2006 ND 30, ¶ 20, 708 N.W.2d 900. “A parent’s incarceration may also qualify as prognostic evidence” for this purpose. Interest of D.H., 2010 ND 103, ¶ 20, 783 N.W.2d 12 (internal quotation omitted). “When a parent, voluntarily and without reasonable justification, makes himself unavailable to parent a child, the child should not be expected to wait for permanency and stability in [her] life.” Interest of T.A., 2006 ND 210, ¶ 16, 722 N.W.2d 548; accord Interest of E.R., 2004 ND 202, ¶ 9, 688 N.W.2d 384. In this case, the Juvenile Court properly determined that J.T.'s incarceration was a result of his own choices, and that his indeterminate release date and need for a further period of six months

or more after release to achieve reunification not only meant that J.T. did not have present capability, or capability within the near future, to be an adequate parent and take over the primary care of A.T., but also put A.T. at serious risk of trauma from future dislocations and the ongoing delay of permanency.

[¶37] In sum, the Juvenile Court had clear and convincing evidence to support a finding of harm to A.T. if termination was not granted, not only based upon the causes and consequences of J.T.'s incarceration, but also based upon the testimony of individuals familiar with A.T.'s mental and emotional needs.

d. The Juvenile Court's order is sufficiently specific to enable review.

[¶38] J.T. briefly argues that the Juvenile Court's findings were not explained with sufficient specificity to enable this Court to understand the basis for its decision. (App. at ¶ 8.) As noted above, the Juvenile Court made specific and detailed findings on each element of its findings in support of termination. Each finding can be traced to testimony in the record. The decision of the Juvenile Court was not clearly erroneous, was supported by clear and convincing evidence, and should be affirmed.

II. AN INDEPENDENTLY SUFFICIENT ALTERNATIVE GROUND FOR TERMINATION EXISTS

[¶39] J.T. asks this Court to reverse and remand findings of fact and conclusions of law that were explicitly made by the Juvenile Court under N.D.C.C. § 27-20-44(1)(c)(1). However, it is notable that an independently sufficient alternative ground for termination of J.T.'s parental rights exists under N.D.C.C. § 27-20-44(1)(c)(2), which allows a court to terminate parental rights if a child is deprived and if the child has been in foster care for 450 out of the previous 660 nights.

[¶40] A.T. was formally adjudicated deprived and placed in foster care on November 2, 2018, and has been in continuous foster care since then. At the termination hearing on

January 21, 2020, the Petitioner conceded that the statutory figure of 450 nights in foster care had not quite been met at that time. The Juvenile Court took the matter under consideration, and by the time it issued its written findings of fact and conclusions of law on February 14, 2020, the Juvenile Court found that A.T. had been in foster care for 465 continuous days. (A.A. at 18, ¶ 24.) This would be the equivalent of more than 450 nights in foster care. J.T. does not appear to dispute this finding in his brief.

[¶41] “Section 27-20-44, N.D.C.C., gives the juvenile court discretion, when the burden of proof has been met, to decide whether termination is appropriate under any provision of the statute.” Interest of F.F., 2006 ND 47, ¶ 16, 711 N.W.2d 144. J.T.’s brief tacitly acknowledges that the Petition for Termination of Parental Rights in this case placed the parties on notice that the number of days spent in foster care would be at issue at the hearing. (App. at ¶ 3, citing A.A. at 4.) This Court has affirmed an order terminating parental rights where a child was deprived because a father could not presently care for them while he was incarcerated and the child had been in foster care for 673 consecutive days on the date of the termination hearing. Interest of L.J., 2007 ND 74, ¶ 2, 734 N.W.2d 342. Although the Juvenile Court did not explicitly address termination under N.D.C.C. § 27-20-44(1)(c)(2) in its findings of fact and conclusions of law, it did make the necessary findings of deprivation and length of time spent in foster care.

[¶42] Even if this Court does not agree that termination under N.D.C.C. § 27-20-44(1)(c)(2) is an independently sufficient alternative ground for termination of J.T.’s parental rights on the present facts before the Court in this appeal, the fact that A.T. has now been in foster care for more than 450 nights would determine how this matter would proceed if it is remanded as J.T. requests. On a remand, the Petitioner would have no choice but to refile a Petition for Termination of Parental Rights; this refiling would be mandatory due to the fact

that A.T. has now been present in foster care for at least 450 of the previous 660 nights. *See* N.D.C.C. § 27-20-20.1(2)(a). The parties would be forced to have another hearing, taking the same testimony from the same witnesses, in order to derive the two crucial findings for termination under N.D.C.C. § 27-20-44(1)(c)(2) that the Juvenile Court already made here.

CONCLUSION

[¶43] Appellee requests that the Court affirm the order of the juvenile court terminating the parental rights of J.T. The voluntary conduct of J.T. has made A.T. a deprived child whose deprivation is likely to continue, and who will continue to suffer for an indefinite period if expected to wait to have permanency and stability in her life until J.T. is released from incarceration and then establishes stability in his own life on some indeterminate future date. On review, J.T. had the burden of showing that the Juvenile Court's findings of fact were clearly erroneous. The decision of the Juvenile Court was not clearly erroneous, was supported by clear and convincing evidence, and should be affirmed.

Dated this 8th day of April, 2020.

/s/Nathan Wersal
Nathan Wersal #09003
Assistant State's Attorney
PO Box 5005
Minot, ND 58702
701-857-6480
51WardSA@wardnd.com

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Interest of A.T., Minor Child

State of North Dakota,)	
)	Supreme Court No. 20200092
Petitioner and Appellee,)	
)	
vs.)	Case No. 51-2019-JV-00160
)	
)	
A.T., child, T.T., mother, Respondents)	
and)	
J.T., father,)	
Respondent and Appellant.)	

CERTIFICATE OF COMPLIANCE

[1] The undersigned hereby certifies that the Brief of Petitioner and Appellee, is in compliance with Rule 32 of North Dakota Rules of Appellate Procedure and the brief contains 23 pages.

Dated this 8th day of April, 2020.

/s/Nathan Wersal
Nathan Wersal #09003

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Interest of A.T., Minor Child

State of North Dakota,)	
)	Supreme Court No. 20200092
Petitioner and Appellee,)	
)	
vs.)	Case No. 51-2019-JV-00160
)	
)	
A.T., child, T.T., mother, Respondents)	
and)	
J.T., father,)	
Respondent and Appellant.)	

AFFIDAVIT OF SERVICE

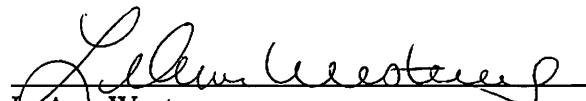
LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 8th day of April, 2020, this Affiant provided a true and correct copy of the following documents in the above entitled action:

APPELLEE'S BRIEF

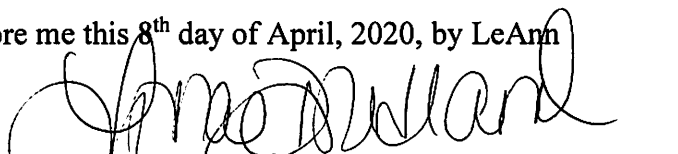
By electronic service to the following:

KYLE CRAIG
kcraig@ackrelaw.com



LeAnn Westereng

Subscribed and sworn to before me this 8th day of April, 2020, by LeAnn Westereng



Notary Public
