

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE INTEREST of A.C., a Child

Leslie Johnson, L.B.S.W.,)	
Cass County Human Service Zone,)	
)	Cass Co. No.: 09-2021-JV-383
Petitioner and Appellee,)	
)	
vs.)	
)	
A.C., a child; L.C., mother; Jennifer)	Supreme Ct. No.: 20220081
Restemayer, Lay Guardian ad Litem; and)	
Turtle Mountain Band of Chippewa)	
Indians Tribe,)	
)	
and)	
)	
A.L., father,)	
)	
Respondent and Appellant.)	

Appellee's Brief

Appeal from The Juvenile Findings of Fact and Order Terminating Parental Rights (In Custody), Stephanie Hayden, Judicial Referee, Presiding, East Central Judicial District
Dated and Entered February 7, 2022.

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[¶1] **Issues Presented for Review**

[¶2] Whether the petitioner established through clear and convincing evidence termination of parental rights is justified under N.D.C.C. §27-20.3-20.

- a. Has the parent abandoned the child?
- b. May a finding of aggravated circumstances stand alone as a basis for terminating parental rights?
- c. Is the child in need of protection?
 - i. Are the conditions and causes of the need for protection:
 - 1. Likely to continue or will not be remedied; and
 - 2. For that reason, is the child suffering or will suffer serious physical mental moral or emotional harm?
 - ii. Has the child been in foster care, in the care custody and control of the department of human service zone for at least four hundred fifty out of the previous six hundred sixty Nights?

[¶3] Has the appellant established that the judicial referee erred in his determination?

[¶4] **Statement of Facts**

[¶5] This is an appeal on the Judgment terminating the parental rights of A.L. (hereinafter “Andy”) to the child A.C (hereinafter “Amber”). The child’s half-brother, K.C. (hereinafter “Kevin”) was also a subject of the proceedings, as well as mother of both children L.C. (hereinafter “Lauren”). Kevin and Lauren are only mentioned as necessary to give context. Lauren and the other possible fathers of the children were found to be in default. Trial proceeded on termination of Andy’s

parental rights and the Court subsequently issued its order terminating the rights of all parents with regard to Amber and Kevin. Only Andy appeals.

[¶6] Amber and Kevin were placed in emergency foster care on April 15, 2020, after their temporary caregivers were unable to continue providing care and were unable to reach the parents of the children. (R2:3:14). The mother of Amber and Kevin is Lauren. The father of Amber was believed to be Andy. A shelter care was held on April 17, 2020, and the children were placed in the temporary custody of the Director of the Cass County Human Service Zone. (R2:3:15). Subsequently a Petition for Deprivation was filed, and on August 5, 2020, the children were adjudicated deprived and placed in the custody of CCHSZ for up to Nine months. (R2:3:16). See District Court File No.: 09-2020-JV-00184. In the underlying Deprivation, the Court found that Andy subjected Amber to Aggravated Circumstances as defined in N.D.C.C. §27-20-02 in that he: 1) abandoned the child by failing to provide the care and support of the children as required by law, has left the child for indefinite periods of time without making firm and agreed plans, with the child's immediate caregiver, for the parent's resumption of physical custody, and willfully failed to furnish food, shelter, clothing, or medical attentions reasonably sufficient to meet the child's needs; 2) has failed to make substantial, meaningful efforts to secure treatment for addiction, mental illness, behavior disorder, or any combination of those conditions for one year; and 3) has allowed the child to be present in an environment subjecting the children to exposure to a controlled substance, chemical substance, or drug paraphernalia as prohibited by

N.D.C.C. §19-03.1-22 (R54:4:18).

- [¶7] A treatment plan was developed with Lauren to address the barriers to parenting the children. (R2:5:18). Andy never met with Ms. Johnson to create and participate in a treatment plan (Audio 13:40) despite her having written to him and telephoned him in attempts to get him to engage with CCHSZ. (R2:7:26 and 27). Andy admitted at Trial that he did not want to meet with Ms. Johnson and questioned what he would talk with her about. (Audio 50:50).
- [¶8] The parents were unable to complete the treatment plan and the children continued in out of home placement. A Termination of Parental Rights was filed on March 3, 2021. District Court File 09-2021-JV-78 The parties reached a pretrial resolution with the resulting Court Order granting an additional nine (9) months of care control and custody with CCHSZ.
- [¶9] Andy and Lauren failed to engage meaningfully with CCHSZ to address the barriers to reunification with Amber and another Petition to Terminate Parental Rights with supporting Affidavit from Leslie Johnson was filed in this case, District Court File No. 09-2021-JV-383, on August 17, 2021. Trial on the matter was held on January 3, 2022. The Court issued its findings and order terminating parental rights on February 7, 2022. This appeal follows.
- [¶10] In the TPR under appeal the Court finds Paternity has not been established, there is no presumption of paternity as it relates to Amber. and notes Andy took a paternity test but has not legally acknowledged nor established paternity. (R54:2: ¶9:3). The Court finds for the first time in these proceedings that Amber is an Indian Child

under the Act and ICWA does apply. (R54:6: ¶12). Ms. Poitra, the qualified expert Witness offered testimony by Affidavit, which was accepted by the Court, (R29) without objection, after the State specifically inquired if Andy was willing to waive cross examination, and Andy's counsel indicated they would waive cross examination (Audio 37:30). The matter was not brought up again at Trial. Ms. Poitra's testimony was that Amber is an Indian Child under the Act through her biological father, who has not established a legal relationship with the child, she had reviewed the case, found the conduct of the parents "voluntary homelessness, no contact with the child and failure to engage in chemical addiction treatment have resulted in child rearing practices which are unacceptable in the Native American Community, the continued custody of the child by the parent is likely to cause serious emotional and or physical damage to the child, that she reviewed the efforts made by CCHSAZ to prevent removal and permit return of the child to the home and those efforts have been active and consistent with the demonstrated needs and barriers to parenting of these parents. Ms. Poitra is a Qualified Expert witness whose testimony by Affidavit was accepted by the Court without objection.

[¶11] The State provided un rebutted testimony that Andy failed to establish and maintain contact with his daughter during her 629 days in foster care, with the exception of two visits, during which Amber appeared nervous and standoffish. (Audio 18:38-58).

[¶12] **Argument**

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

[¶14] N.D.C.C. §27-20.3-20 provides that a Court may involuntarily terminate the parental rights of a parent with respect to the parent's child if:

- a. The parent has abandoned the child;
- b. The child is subjected to aggravated circumstances as defined under subsection 3 of section 27-20.3(3);
- c. The child is in need of protection and the court finds:
 - i. The conditions and causes of the deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm;
or
 - ii. The child has been in foster care, in the care, custody, and control of the department, or a county social service board, or, in cases arising out of an adjudication by the juvenile court that a child is an unruly child, the division of juvenile services, for at least four hundred fifty out of the previous six hundred sixty nights.

[¶15] N.D.C.C. §27-20.3-20 provides options or alternatives but does not require all options be met in order to terminate parental rights of a child, and “any one of the three findings provides adequate and independent grounds for termination.” In re: Z.B., 2018 ND 6, ¶1, 905 N.W.2d 561.

[¶16] **The Parent has Abandoned the Child**

[¶17] The Court may terminate the parental rights to a child of a parent with respect to the parent’s child if: a. The parent has abandoned the child. N.D.C.C. §27-20.3-20(1)(a) Andy was found to have abandoned the child (R54:4:18.1.); is incarcerated and unavailable to parent (R54:4:13); failed to establish paternity (R54:4:14); failed to establish, maintain or prioritize a relationship with the child since she has been in custody of CCHSZ (R54:4:15: and 15); and visited Amber only two times in the 629 days the child had been in custody at the time of Trial. (Audio 19). This is prima facia evidence that Andy has not established a relationship with Amber and the finding that he has abandoned her is still valid. There was no evidence that Andy attempted or sought further visitation with the child. These findings are more than sufficient to terminate Andy’s parental rights on the basis of having abandoned the child. The Appellant does not challenge the finding that the parent has abandoned the child.

[¶18] **Aggravated Circumstances**

[¶19] The Findings of Fact and Conclusions of Law in the underlying Deprivation case included an adjudication that Andy had subjected A.C. to aggravated circumstances and the Court incorporates that finding in the current order under appeal. (R54:4:18).

[¶20] The burden of proof regarding termination is met as the Aggravated Circumstances finding is itself an “...adequate and independent ground for termination.” In re: Z.B., 2018 ND 6, ¶1, 905 N.W.2d 56.

[¶21] The appellant does not challenge the finding of aggravated circumstances regarding Andy.

[¶22] **The Three-Prong Test**

[¶23] Under N.D.C.C. §27-20.3-20, the trial court can terminate parental rights if clear and convincing evidence establishes that a child is deprived, that the causes of deprivation are likely to continue and that the child is suffering, or is likely to suffer, serious physical, mental, moral, or emotional harm. In the Interest of A.S., 1998 ND 181, 584 N.W.2d 853.

[¶24] **Deprivation**

[¶25] The Appellants do not challenge the finding of deprivation, thus granting the first prong is satisfied.

[¶26] **The Deprivation is Likely to Continue and Harm to the Children**

[¶27] Ms. Poitra provided testimony that continued custody of the child by the parents is likely to cause serious emotional and/or physical damage to the child. (R29:2:10.) Ms. Poitra’s Affidavit was accepted without objection (Audio 37:30) foreclosing the Appellant’s argument that there was no evidence beyond a reasonable doubt that that continued custody by the respondent was likely to result in serious emotional or physical damage to the child. Ms. Poitra’s testimony through Affidavit and Ms. Johnson’s testimony illustrated where “deprivation has led to the children suffering or will in the future probably result in physical, mental, moral, or emotional harm to the children.” In the Interest of D.D., 2006 ND 30, ¶23, 708 N.W.2d 900.

[¶28] The Appellant has failed to indicate any areas where the Court gave improper weight to evidence at Trial. A trial court is well able to ascertain the physical, mental, moral and emotional harm that a child faces in having parents unavailable, as in Amber's case.

[¶29] The risk of harm may also be proven by prognostic evidence. In the Interest of T.A., 2006 ND 210, ¶19, 722 N.W.2d 548, (citing In the Interest of E.G., 2006 ND 126, ¶15, 716 N.W.2d 469). Prognostic evidence includes reports and opinions of professionals. In the Interest of D.F.G., 1999 ND 216, ¶¶ 20, 602 N.W.2d 697. When making determinations and predictions, it is necessary to consider the past conduct of the parents. See T.F., 2004 ND 126, 681 N.W.2d 786. The Court accepted the testimony of Marilyn Poitra, provided by Affidavit, which was accepted by the Court, without objection. Ms. Poitra clearly states that the continued custody of the child by the parents is likely to cause serious emotional and/physical damage to the child.

[¶30] The Court need not apply the three-prong analysis (though the test is met) and may terminate parental rights under N.D.C.C. §27-20.3-20(1)(c)(2) when a child has been in foster care in the care custody and control of the human service zone for at least four hundred fifty out of the previous six hundred nights. The Court found the child had been in care 629 days as of the date of Trial. (R54:3:8) This finding alone supports a termination of parental rights.

[¶31] **Active Efforts**

[¶32] The Appellant argues the Appellee did not meet active efforts yet accepted the testimony of Ms. Poitra without objection. The Qualified Expert Witness of the Turtle Mountain Band of Chippewa indicated she reviewed the efforts made by Cass County Human Service Zone

to prevent removal and permit return of the child to the home of the parents, and those efforts have been active and consistent with the demonstrated needs and barriers to parenting of these parents. (R29:2:11). The Appellant waived cross-examination of Ms. Poitra and the Court accepted the Affidavit of Ms. Poitra into the record. The efforts of Ms. Johnson are adequately documented in her brief and through her testimony at Trial. They are more than adequate to meet the burden of active efforts and Ms. Poitra agrees.

[¶33] **Conclusion**

[¶34] **The Appellant has Failed to Meet Burden on Appeal**

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

[¶36] The Appellant has failed to establish that the Juvenile Court's ruling is erroneous.

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

Respectfully submitted this 30th day of March, 2022.

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Certificate of Compliance

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 13 pages.

Dated this 30th day of March, 2022.

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Restemayer, Lay Guardian ad Litem; and)	
Turtle Mountain Band of Chippewa)	
Indians Tribe,)	
)	
and)	
)	AFFIDAVIT OF SERVICE
A.L., father,)	
)	
Respondent and Appellant.)	

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

1. APPELLEE’S BRIEF

[¶2] Upon the individuals listed below by sending electronically to the email address given:

Jay Greenwood	Kylie Oversen
Attorney at Law	Attorney at Law
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Jennifer Restemayer	Christopher Jones
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Marilyn Poitra	Cass County Human Service Zone
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[¶3] To the best of the affiant's knowledge, the electronic address given was the actual e-mail address of the party intended to be so served.

Dated this 30th day of March, 2022.

Allyson Lee