

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

APPELLEE’S BRIEF

Supreme Court No. 20230040
Cass Co. Court No. 09-2022-JV-00299

In the Interest of C.V., minor child)	
)	
Ethan Hinze, L.B.S.W.,)	Petitioner and Appellee
v.)	
C.V., child; C.B., Jr., father;)	
John Doe, father;)	Respondents and Appellees
and)	
K.V., mother)	Respondent and Appellant

Supreme Court No. 20230041
Cass Co. Court No. 09-2022-JV-00300

In the Interest of J.V., minor child)	
)	
Ethan Hinze, L.B.S.W.,)	Petitioner and Appellee
v.)	
J.V., child; D.N., father;)	Respondents and Appellees
John Doe, father;)	
and)	
K.V., mother)	Respondent and Appellant

Appeal from the Juvenile Findings of Fact and Order Terminating Parental Rights (In Custody), Daniel Gast, Judicial Referee, Presiding, East Central Judicial District, Dated: January 6, 2023 and Corrected Juvenile Findings of Fact and Order Terminating Parental Rights (In Custody), Daniel Gast, Judicial Referee, Presiding, East Central Judicial District, Dated: January 9, 2023.

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ISSUES PRESENTED

- I. 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. WERE THE CHILDREN SUBJECTED TO AGGRAVATED CIRCUMSTANCES
 - B. WERE THE CHILDREN “CHILDREN IN NEED OF PROTECTION”
 - C. WERE THE CONDITIONS AND CAUSES OF THE NEED FOR PROTECTION LIKELY TO CONTINUE
 - D. WILL THERE BE HARM TO THE CHILDREN
- II. WHETHER A GUARDIANSHIP SHOULD HAVE BEEN ESTABLISHED RATHER THAN A TERMINATION OF PARENTAL RIGHTS.

[¶1] STATEMENT OF THE CASE

[¶2] This is an appeal from the Juvenile Findings of Fact and Order Terminating Parental Rights (In Custody), Daniel Gast, Judicial Referee, Presiding, East Central Judicial District, dated: January 6, 2023, and Corrected Juvenile Findings of Fact and Order Terminating Parental Rights (In Custody), Daniel Gast, Judicial Referee, Presiding, East Central Judicial District, dated: January 9, 2023. The appeal was filed by the Respondent Mother, K.V. (“Karen”). The Referee’s Order granted the Petitioner’s Petition for Termination of the Parental Rights of the mother, Karen, and the father, J.S. (“Jim”) to the children C.V. (“Cora”); J.V. (“Jacob”); and J.S. (“Joseph”).

[¶3] On August 2, 2022, a Petition was filed by Ethan Hinze, L.B.S.W, a social worker with Cass Human Service Zone seeking termination of the parental rights with regard to the children Cora, who was born in 2019; Jacob, who was born in 2020; and Joseph, who was born in 2021. On October 25, 2022, Petitioner amended the

Petition as it relates to D.N., Respondent father of Jacob, to remove aggravated circumstances and to recommend disposition other than termination. The same amendment was made by the Petitioner relating to C.B. after Trial had begun. Trial was held on the Petition on November 3, 4, and 7, 2022. The matters were taken under advisement, and an Order was issued on January 6, 2023, and a Corrected Order was issued on January 9, 2023, terminating parental rights. Respondent father, Jim, filed a Request for Review with the District Court on January 13, 2023, and the Honorable Nicholas Chase, District Judge, adopted the Findings of the Judicial Referee by issuing an Order on February 17, 2023. The mother filed this appeal on February 8, 2023. No other Respondent has joined in this appeal.

[¶4] STATEMENT OF THE FACTS

[¶5] The testimony of Kari Kosidowski and Megan Dahl established that Cora was born in 2019. (09-2019-JV-00536 R6). (04-11-2022_08-07-43 at 2:27:46 and 4:40). Cora was placed into shelter care on November 14, 2019, when Karen had been beaten up by her roommate “Jim” and was admitting to methamphetamine use. (09-2019-JV-00536 R6). As a result, Karen was placed at Centre, Inc. and there was no other care provider for Cora. Cora was adjudicated Deprived (now known as Child in Need of Protection) on March 13, 2020. (00536 R47). The findings at that time included a finding that Cora had prenatal exposure to controlled substance including marijuana, amphetamines and methamphetamine, and that Karen had mental health and chemical dependency issues which she had failed to address for a period of one year. Id. A case plan was put in place to address mental health and chemical use of Karen. (00536 R44). The issues were not

resolved, and in 2020, Jacob was born. (09-2020-JV-00401 R7). Karen and Jim identified Jim as the father of Jacob. Id. Jacob was adjudicated deprived, with aggravated circumstances on February 5, 2021. (00401 R47). On March 2, 2021, Cora was continued in care as the result of a review of custody. (00536 R74).

[¶6] Jim never took steps to establish paternity concerning Jacob, and did not engage in treatment, indicating that he was establishing his own residence and was not providing care for the children. (04-11-2022_08-07-43 at 4:40).

[¶7] Ms. Dahl worked with Karen, who represented that she was successful with her efforts to establish and maintain employment, treatment recommendations, and stability, and that she was discontinuing her relationship with Jim and was able to protect the children from his usage and violence Id. As a result, Ms. Dahl recommended that the children be returned to Karen's custody in the late summer of 2021, and that took place. Id.

[¶8] Joseph was born in 2021, and tested positive for controlled substances at birth, according to the testimony of Valerie Hanson and review of medical records documented by Dr. Ingalls and Dr. Newman. (03-11-2022_13-31-52 at :50, 03-11-2022_13-49-09 at 38:03 and 04-11-2022_08-07-43 at 2:47:12).

[¶9] Despite the new baby, Joseph, testing positive for controlled substances at birth, the children remained in the care of Karen and Jim, who were living together, unbeknownst to Cass County. (04-11-2022_08-07-43 at 4:40). Karen discontinued the developmental services for Cora and did not assure that the children had regular medical care. Id.

[¶10] On June 25, 2022, there was a physical altercation at the home of Jim and Karen which resulted in criminal charges against Jim (R120) and Karen (R125). The event on June 25, 2022, resulted in injury to Joseph. (See R120).

[¶11] On June 26, 2022, there was another event at the residence of Karen and Jim, which resulted in the placement of all three children due to the arrest of Jim and transport for mental health evaluation of Karen. (R117). Fargo Police officers Lykken, Simonson, Ranum, and Miller testified about their observations on June 26, 2022, which resulted in the placement of the children. Id. Officer Lykken testified that around noon on June 26, 2002, Jim was outside of the apartment he shared with Karen and the three children. (03-11-2022_08-38-13 at 49:30). Jim stated that there were relationship issues which resulted in a physical altercation. Jim was holding the youngest child (Joseph) and Karen attacked with a knife stating she would kill herself. Id. During the investigation, Karen displayed a cut on her lip that she attributed to Jim. Id. Two knives consistent with the statements were located at the scene. There was broken glass on the floor of the kitchen in the apartment. Id. Additionally, the Court observed the video of the events, including Karen stating that she had been in an abusive relationship (with Jim) for three years, resisting going to the hospital for an assessment based upon her statements and actions indicating she was intending to commit suicide. (07-11-2022_15-29-31 at :30). Her responses to the efforts to get her to go to the hospital for an assessment included: “Why? Because I get beat up by my boyfriend and I don’t want to fucking live anymore?” Id. When the police officers suggested that in addition to an assessment, there could be resources to assist Karen, Karen

responds: “What kind of fucking resources? I’ve been waiting for three years for fucking resources. Id. Three years I’ve been dealing with this shit - ain’t no resources going to help me.” Id.

[¶12] Following the placement of the children on June 26, 2022, due to the arrest of Jim and Karen, the children had physical examinations. Dr. Brennan Forward first examined the children and described what he observed. Dr. Ingalls had access to that information including photos and documentation. (03-11-2022_13-49-09 at 38:03). Dr. Ingalls provided additional insights and opinions about the injuries observed on the children, which included: non-accidental trauma on the trunk of Joseph, multiple bruising, petechia suggestive of (or: highly specific for) strangling, and hair missing from Jacob which was “highly concerning for physical abuse and neglect.” Id. During additional testing following removal, Jacob’s urine drug screen tested positive for amphetamines, and a follow-up confirmation tested positive for amphetamines and methamphetamine, according to Dr. Ingalls. Id. Joseph had an extreme diaper rash, which required prescription medication, and bruising which was not consistent with his level of mobility. Cora had multiple bruises, including a bruise to her lower lip. Id. On July 8, 2022, Cora had a hair follicle sample tested for drug exposure, which revealed positive results for exposure to methamphetamine (R131).

[¶13] At Trial, Dr. Tracie Newman, the children’s primary physician, testified that all three children were exposed prenatally to controlled substances. (04-11-2022_08-07-43 at 2:47:10). Dr. Newman testified that Cora was born at thirty-three weeks’ gestation and had been in the NICU. Id. Cora, age three, had low weight and

needed extra calorie formula to grow and at nine months was displaying developmental delays and abnormal head growth. Id. Cora made gains but in September of 2022 there were global developmental delays noted. Id. Dr. Newman noted that Jacob, age two, was born at term, and there were well child visits which included Karen. Id. She noted that Jacob was delayed in speech and was recommended for early intervention services. Id. Finally, Dr. Newman noted that Joseph was thirteen months old and had not been brought into his follow up checkups – which was a concern due to poor weight gain. Id.

[¶14] In additional to Ms. Dahl, various service providers testified about services which had been offered to Karen and Jim, including Amanda Ochert’s testimony regarding Karen’s substance abuse and mental health referrals, probation. (3-11-2022_10-51-51 at :12). Probation services for Jim provided by Sarah Lavell, Lisa Mastel services for both Karen and Jim at Southeast Human Service Center, David Collins from Centre, Inc. providing services to Karen, and Marni Sundeen, case manager at Southeast Human Services for Karen. (03-11-2022_13-49 at :30, at 18:40 3-11-2022_10-51-51 at :12, and 04-11-2022_08-07 at 1:27:08 at 1:52:04).

[¶15] Ethan Hinze testified that he had placed the children in June of 2022 and obtained medical evaluations of the children due to the concerns for injuries and exposure, which were confirmed. (R115). When he interviewed Karen and Jim, they had no insight into the impact of the behaviors on the children and denied needing to change behaviors. (R115 at ¶27, 29, 30). Karen’s statements to Mr. Hinze confirmed that Jim was using methamphetamine and that they had physical altercations, but she did not have any concerns for Jim watching the children.

(R115 at ¶27u, v, x and aa). Later when speaking with Mr. Hinze, Karen asserted that a neighbor made a false report about domestic violence and denied that any of the children could have tested positive for any substance unless it was due to cough syrup. (R115 at ¶2d and g).

[¶16] In light of the prior services that had been provided and the ongoing drug use, violence and lack of insight, it was unlikely that there could be change. Mr. Hinze filed a Petition for Termination of Parental Rights. (R13). After the removal of the children, Jim and Karen were evicted from the apartment that had been secured during the prior involvement (R138), Karen lost her employment, and Jim was again convicted of possession of methamphetamine. (R123). Karen was subject to various arrest warrants and avoided court in order to assure that she was not arrested. (07-11-2022_14:02:35 at 52:25).

[¶17] During Trial, Karen again asserted that the children could not have been subjected to any controlled substances, despite the test results. (07-11-2022_14:02:35 at 50:00). She asserted that there was no violence in her relationship with Jim and claimed the children were abusive to each other or claimed injuries were from police brutality. Id. at 13:30. These assertions were made despite Jim's convictions (R119 and 120), and Karen's statements captured on body camera and shown at Trial. Karen simply asserted when confronted with this contradiction that she "lied." (07-11-2022_15-29-31).

[¶18] **ARGUMENT**

I. WHETHER THE PETITIONER HAS PROVEN TERMINATION OF PARENTAL RIGHTS IS JUSTIFIED UNDER N.D.C.C. § 27-20.3-20?

[¶19] Termination of a parent’s rights “must rest upon the attitude, conduct, ability, and such other matters relating to the parent’s duties, responsibilities, and care for the child which ... are... collectively referred to as ‘fitness.’ ” In the Interest of M.M.S., 449 N.W.2d 574, (citing McGurren v. S. T., 241 N.W.2d 690 (N.D.1976)).

[¶20] N.D.C.C. § 27-20.3-20(1)(c) enumerates the circumstances in which a Court may terminate parental rights. The Code creates a three-part test for termination of parental rights: (1) Is the child or children in need of protection? (2) Are the conditions and causes of the need for protection likely to continue? (3) Is the child suffering, or will the child in the future probably suffer serious physical, mental, moral, or emotional harm? N.D.C.C. § 27-20.3-20(1)(b) allows for termination of parental rights if the children are subjected to aggravated circumstances. Aggravated circumstances include but are not limited to failing to make substantial, meaningful efforts to secure treatment for addiction for a period of one year, prenatal exposure of the child or children to controlled substances and/or exposure of a child to controlled substances. Where clear and convincing evidence in the record affirmatively proves these elements or aggravated circumstances, the juvenile court’s decision terminating parental rights is affirmed. In the Interest of D.F.G. and E.K.B., 1999 ND 216, 602 N.W.2d 697 (citing In the Interest of A.M. and C.M., 1999 ND 195). The state must prove all three parts by clear and convincing evidence. In the Interest of A.S., 1988 ND 181, 584 N.W.2d 853

(citing In Interest of D.R., 525 N.W.2d 672, 673 (N.D.1994).

A. WERE CORA AND JACOB SUBJECTED TO AGGRAVATED
CIRCUMSTANCES?

[¶21] “Aggravated circumstances” are circumstances in which a parent fails to make substantial, meaningful efforts to secure treatment for addiction, prenatally exposes a child to controlled substances or allows a child to be in an environment that exposes the child to a controlled substance. N.D.C.C. § 27-20.3-01(3)(b), (g) and (h). Reasonable efforts to reunify are not required if a court has determined a parent has subjected the child to aggravated circumstances. N.D.C.C. § 27-20.3-18(4)(a).

[¶22] Karen was found to have subjected the children each to aggravated circumstances in 2020, relating to Cora, Cass File No.: 09-2019-JV-356, Index 47, in 2021, relating to Cora and Jacob, Cass File No.: 09-2020-JV-401, Index 47, and in 2022, in the underlying case before this Court. Karen was found to have not been addressing her chemical dependency issues, as evidenced by her failure to maintain sobriety and the children all testing positive for controlled substances at birth. Further, the children continued to test positive due to exposure after birth, including one child ingesting methamphetamine. There is abundant evidence in the record and in previous judgments to find that the children were subjected to aggravated circumstances.

B. WERE CORA AND JACOB “CHILDREN IN NEED OF PROTECTION?”

[¶23] A “child in need of protection” is one who “[i]s without proper parental care or control, subsistence, education as required by law or other care or control

necessary for the child’s physical, mental, or emotional health, or morals, and the need for protection is not due primarily to the lack of financial means of the child’s parents, guardian or other custodian.” N.D.C.C. § 27-20.3-01(5)(a).

[¶24] There is ample evidence in the record that Cora and Jacob were children in need of protection, as set forth above. Specifically, the children have been exposed to domestic violence in the home, with Joseph sustaining injuries from that exposure. Cora also showed injuries that were concerning for abuse. There was extensive testimony about the children suffering injuries that were highly concerning for physical abuse or neglect. Additionally, the children all have been exposed prenatally to controlled substances and also exposed after birth.

C. WERE THE CONDITIONS AND CAUSES OF THE NEED FOR PROTECTION
LIKELY TO CONTINUE?

[¶25] While evidence of past or present deprivation alone is not sufficient to terminate parental rights, evidence of the parent’s background, including previous abuse or deprivation, may be considered in determining whether deprivation is likely to continue. In the Interest of A.S., 1988 ND 181, 584 N.W.2d 853 (citing In Interest of L.F., 1998 ND 129). Because evidence of past deprivation alone is not enough, there must be prognostic evidence forming the basis for reasonable prediction of continued or future deprivation. In re E.R., 2004 ND 202, ¶7, 688 N.W.2d 384; In re D.Q., 2002 ND 188, ¶21, 653 N.W.2d 713. Any prediction of the future requires some reflection upon the past conduct of the parties. In re T.F., 2004 ND 126, ¶19, 681 N.W.2d 786; In re D.Q., at ¶21. “When a parent, through voluntary actions, without reasonable justification, makes himself unavailable to care for and parent a

young child, the child should not be expected to wait or assume the risk involved in waiting for permanency and stability in her life.” In re A.K., 2005 ND App 3, ¶8.

[¶26] “That special needs of children are relevant to a determination of whether there will be continuing or unremedied deprivation is a clearly established principle.” Heitkamp v. L.J., 436 N.W.2d 558 (N.D.1989); (See Jacobson v. V.S., 271 N.W.2d 562 (N.D.1978); Bjerke v. D.T., 248 N.W.2d 808 (N.D. 1976)). The record demonstrates Karen’s lack of ability to maintain sobriety in order to meet the needs of Cora and Jacob and her unwillingness to protect her children from Jim’s dangerous behaviors. The numerous attempts to provide services and support to Karen over the course of multiple years demonstrates the likelihood that the need for protection is going to continue.

[¶27] When there has been an extensive period in which efforts have been made to overcome a parent’s inability to effectively parent, the court cannot allow children “to remain in this indeterminate status midway between foster care and the obvious need for permanent placement.” In the Interest of T.K., 2001 ND 127, ¶15, 630 N.W.2d 38 (citing In the Interest of A.S., 1998 ND 18 ¶33, 584 N.W.2d 853).

D. WILL THERE BE HARM TO THE CHILDREN?

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

Prognostic evidence includes reports and opinions of professionals. In the Interest of D.F.G., 1999 ND 216, ¶20, 602 N.W.2d 697.

[¶29] As set forth above, the children are suffering from developmental delays due not only to their prenatal exposure but lack of overall care. There was significant lack of follow through on medical care for the children which was concerning due to all three children experiencing problems gaining appropriate weight during their development. Also as discussed above, the exposure to domestic violence led to physical injuries as well.

[¶30] Karen has been working with the Petitioner on the barriers to parenting her children on and off since 2019. The barriers that existed in 2019 included chemical dependency, mental health concerns, domestic violence and chemical exposure of the children. Those are the same issues that were presented at Trial. Karen is still with the same partner, Jim, and there is still significant controlled substance use. Karen argues that the chemical exposure came from either Jim or an unknown source, however, the responsibility was Karen's to ensure her children were in a safe environment. This argument is also undermined by the prenatal exposure experienced by all three children at birth. The barriers have not changed in almost four years. The harm to the children is evident and very likely to continue.

II. WHETHER TERMINATION OF PARENTAL RIGHTS WAS UNREASONABLE?

[¶31] Karen argues as it relates to Cora and Jacob that it is unreasonable to terminate one parent's rights and fail to terminate on others. If the parents in this case had been similarly situated, the argument may have more value. However, testimony at Trial and within the record of previous hearings provided that Karen and Jim's actions

were large contributing factors in the absence of both of the other fathers. Neither C.B., Jr or D.N., other Respondent fathers, had been given any opportunity to engage in parenting the children due to Jim's claim of paternity and stepping into the parenting role. Testimony further provided that both C.B. and D.N. are stable in their employment and housing and are engaging with Cass Human Service Zone to make progress towards reunification. Finally, it was not the Judicial Referee's discretion that led to termination of parental rights for Karen and left C.B. and D.N.'s parental rights intact. The Petitioner motioned to amend the Petition as it relates to D.N. prior to Trial and then made a similar amendment during Trial for C.B. It was not unreasonable for the Court to allow such amendment and to rely on the Petitioner's recommendation for resolution. Although not argued the same, the general principal that the Judicial Referee abused his discretion by terminating on some but not all parents was argued by Jim in a Request for District Court Review. Index 151. The District Court, on a de novo review, affirmed the Judicial Referee's decision.

[¶32] Karen argues that the decision to terminate parental rights was unreasonable when the children had previously been returned to Karen. Karen argues the returning of the children is evidence that she is capable of rehabilitation. However, the record shows this period of rehabilitation was short lived if it existed at all. The fact that Karen denies use of controlled substances but Joseph was born testing positive is clear evidence that Karen was unable to maintain sobriety. Karen admits that she had been in a relationship with Jim for three years, negating her prior statements that she had ended the relationship. Karen further admits to regularly lying when it

suits Karen. While the children were returned to her for a period of time, the fact that the children came back into care is evidence that the barriers Karen faced in 2019 were the same barriers at Trial and that no real or lasting progress has been made in three years.

[¶33] **CONCLUSION**

[¶34] The Petitioner introduced overwhelming evidence to satisfy the requirements for termination regarding Cora and Jacob. The Judicial Referee's decision should be Affirmed.

Respectfully submitted this 1st day of March, 2023.

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[¶35] **Certificate of Compliance**

[¶36] Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 17 pages.

Dated this 1st day of March, 2023.

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