

ORIGINAL

980099

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUL 2 1998

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

Gloria J. Maragos,)
Petitioner/Appellee,)
)
vs.)
)
A.S., Child,)
R.S., Mother, and)
D.S. Father,)
Respondents/Appellants.)

CASE NO. 980099

APPEAL FROM THE MEMORANDUM OPINION OF THE DISTRICT COURT,
CONFIRMING THOSE CERTAIN "FINDINGS OF FACT, RECOMMENDATION
TO TERMINATE PARENTAL RIGHTS AND RIGHT OF REVIEW" ISSUED IN
JUVENILE COURT FOR WARD COUNTY, NORTHWEST JUDICIAL DISTRICT
CIVIL NO. 95-R-0177
THE HONORABLE EVERETT NELS OLSON, JUDGE

APPELLEE'S BRIEF

Timothy Wilhelm #03935
Assistant State's Attorney
Ward County Courthouse
Minot, ND 58701
(701)857-6480
Attorney for Petitioner/Appellee

Todd L. Cresap #04414
Kenner, Sturdevant, Peterson & Cresap P.C.
P.O. Box 970
Minot, ND 58701
(701)852-4116
Attorney for Respondents/Appellants

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gloria J. Maragos,)
Petitioner/Appellee,)
) CASE NO. 980099
vs.)
)
A.S., Child,)
R.S., Mother, and)
D.S. Father,)
Respondents/Appellants.)

APPEAL FROM THE MEMORANDUM OPINION OF THE DISTRICT COURT,
CONFIRMING THOSE CERTAIN "FINDINGS OF FACT, RECOMMENDATION
TO TERMINATE PARENTAL RIGHTS AND RIGHT OF REVIEW" ISSUED IN
JUVENILE COURT FOR WARD COUNTY, NORTHWEST JUDICIAL DISTRICT
CIVIL NO. 95-R-0177

THE HONORABLE EVERETT NELS OLSON, JUDGE

APPELLEE'S BRIEF

Timothy Wilhelm #03935
Assistant State's Attorney
Ward County Courthouse
Minot, ND 58701
(701)857-6480
Attorney for Petitioner/Appellee

Todd L. Cresap #04414
Kenner, Sturdevant, Peterson & Cresap P.C.
P.O. Box 970
Minot, ND 58701
(701)852-4118
Attorney for Respondents/Appellants

TABLE OF CONTENTS

Table of Authorities..... ii

Cases..... ii

Statutes, Rules or Other Authorities.....iii

Statement of Issues Presented For Review..... iv

Statement of Case:

 A. Proceedings Below..... 1

 B. Statement of Facts..... 3

Argument:

 1. DID THE PETITIONER PROVE ALL ESSENTIAL ELEMENTS
 NECESSARY FOR TERMINATION OF PARENTAL RIGHTS
 UNDER NDCC 27-20-44 BY CLEAR AND CONVINCING
 EVIDENCE?..... 9

 A. HAS THE PETITIONER SHOWN THAT AMY IS A
 DEPRIVED CHILD?..... 11

 B. DID THE PETITIONER ESTABLISH BY CLEAR AND
 CONVINCING EVIDENCE THAT THE CAUSES OF THE
 DEPRIVATION ARE LIKELY TO CONTINUE OR WILL NOT
 BE REMEDIED?..... 12

 C. DID THE EVIDENCE ESTABLISH THAT AMY WAS
 SUFFERING OR WOULD PROBABLY SUFFER SERIOUS
 PHYSICAL, MENTAL, MORAL, OR EMOTIONAL HARM
 DUE TO THE CONTINUOUS DEPRIVATION?..... 19

Conclusion..... 23

Affidavit of Mailing..... 25

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page:</u>
<u>Anderson v. K.S.,</u> 500 NW 2nd 603 (N.D. 1993).....	9
<u>Boening v. Director Cass County Social Services,</u> 484 NW 2nd 482 (N.D. 1992).....	13
<u>Eastburn v. B.E.,</u> 545 NW 2nd 767 (N.D. 1996).....	10
<u>Haugen v. C.S.,</u> 417 NW 2nd 846 (N.D. 1988).....	18
<u>Heitkamp v. L.J.,</u> 436 NW 2nd 558 (N.D. 1989).....	19
<u>In Interest of A.M.A.,</u> 439 NW 2nd 535 (N.D. 1989).....	11,20
<u>In Interest of F.H.,</u> 283 NW 2nd 202, 214 (N.D. 1979).....	19
<u>In Interest of J.L.D.,</u> 539 NW 2nd 73 (N.D. 1995).....	11
<u>In Interest of L.F & J.F., children,</u> (1998 N.D. 129).....	15,16
<u>In re J.A.,</u> 283 NW 2nd 83 (N.D. 1979).....	13,21
<u>In re K.P.,</u> 267 NW 2nd 1 (N.D. 1978).....	12
<u>McBeth v. M.D.K.,</u> 447 NW 2nd 318, 321 (N.D. 1989).....	16,17,20,21
<u>Myers v. C.K.H.,</u> 458 NW 2nd 303 (N.D. 1990).....	14
<u>W.J.M. v. J.B.,</u> 532 NW 2nd 372 (N.D. 1995).....	14

Statutes, Rules or Other Authorities:

NDCC 27-20-02.....	11
NDCC 27-20-44.....	9,10
NDCC 27-20-44(b).....	11,12,14
NDCC 27-20-56.....	9
42 U.S.C. 675(5)(E).....	22

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the petitioner prove all essential elements necessary for termination of parental rights under NDCC 27-20-44 by clear and convincing evidence?

A. Has the petitioner showed that Amy is a deprived child?

B. Did the petitioner establish by clear and convincing evidence that the causes of the deprivation are likely to continue or will not be remedied?

C. Did the evidence establish that Amy was suffering or would probably suffer serious physical, mental, moral or emotional harm due to the continuous deprivation?

STATEMENT OF THE CASE

(A) Proceedings Below

This is an appeal by R.S., mother, from the memorandum opinion of the District Court, Northwest Judicial District, Ward County, North Dakota, dated March 13, 1998, which confirmed the "Findings of Fact, Recommendation to Terminate Parental Rights and Right of Review" issued in Juvenile Court for the Northwest Judicial District, Ward County, North Dakota, by Connie S. Portschteller, Judicial Referee on February 5, 1998. These Orders acted to terminate R.S.'s parental rights to her natural child, A.S.

For purposes of the appeal, the appellee accepts the pseudonyms proposed by the appellant in her brief, with the pseudonym Rose for the birth mother R.S.; the pseudonym Dave for the birth father, D.S.; and the pseudonym Amy for the female child, A.S. (DOB 12/27/94), who was the subject of the termination proceedings. The proceedings below with relation to Amy and her parents, include as follows:

A Temporary Placement Order was issued on June 2, 1995 in which Amy and her sibling were placed under the temporary care, custody and control of the Ward County Social Service Board following an incident of June 1, 1995. Thereafter, Amy was returned to her parental home on the next day. On January 26, 1996, Amy was once again removed from Rose's residence following an incident in which

investigation revealed an individual had died at the residence following ongoing drug and alcohol usage. In this case, Rose agreed to a 30 day removal of the child. A formal Petition was filed on February 26, 1996, alleging deprivation of Amy. An Order was issued on February 29, 1996, wherein Amy was continued in the care, custody and control of the Ward County Social Service Board for a period of time not to exceed 12 months. That Order was based upon a stipulation in which Rose had agreed to the placement and to cooperate with recommendations of Ward County Social Services. A second stipulation to extend the foster care placement was presented by the parties to the Court in February of 1997. An Order to extend foster care for a period of time not to exceed February 28th of 1998 was entered by the Court on February 24, 1997. A Petition to Terminate Parental Rights was filed on October 3, 1997. A hearing was held on the Petition for Termination of Parental Rights on December 4, 1997. Following the hearing, the attorney for the petitioner and the attorney for Rose filed post hearing briefs. Additionally, the Court received the written recommendation of the guardian ad litem. On March 13, 1998, the Judicial Referee issued Findings of Fact, Recommendation to Terminate Parental Rights and the Right to Review, which terminated the parental rights of Rose and Dave with regard to Amy. By

correspondence of February 9, 1998, Rose's attorney requested to exercise the Right of Review with regard to the findings of the Judicial Referee and the matter was referred to the Honorable Everett Nels Olson, Judge of the District Court for review. On March 13, 1998, Judge Olson issued his memorandum opinion confirming the decision of the Judicial Referee to terminate the parental rights of Rose with regard to Amy. On March 30, 1998, a Notice of Appeal, dated March 27, 1998, was filed by Rose's attorney in the Office of the Ward County District Court.

(B) Statement of Facts

Rose and Dave were married to each other in 1986. Two children were born during the course of the marriage, the older child, a boy, at the time of the hearing was eight years old. He is not a party to this action. Amy was born on December 27, 1994, during a period of time when Rose and Dave were married to each other. Dave had indicated at the hearing he did not believe Amy was his biological daughter (T16), but Rose testified unequivocally that Amy was the biological daughter of Dave. (T267).

Following a separation in 1995, Rose had physical custody of both children and in June of 1995 was investigated on a report of child neglect in which she had left the children with a babysitter for a period of time and failed to return for approximately five hours. A

second investigation in June of 1995 further was predicated upon Rose leaving the infant Amy alone in a trailer. (T30-31).

In January of 1996, the children were removed from the custody of Rose following an incident in which Rose and a number of other people at her trailer were doing drugs. A male friend of her then boyfriend died at the party. Rose acknowledged having used heroin at the party, but claimed she was forced. Further concerns resulting from the investigation dealt with the filthy trailer, as well as concerns of the hygiene of the children and the lack of attendance of the older child at school. (T36-40). Amy was placed in foster care in January of 1996 and the older sibling was taken into the custody of Dave. Following a stipulation in February of 1996, Amy was adjudicated a deprived child and placed under the care, custody and control of Ward County Social Services for a period of time not to exceed one year. Rose agreed to complete a chemical dependency evaluation and follow through with recommendations, as well as a psychological recommendation and follow through with any recommendations resulting from that evaluation. (T49). In May of 1996, Rose left the state of North Dakota with a boyfriend. In the four months which preceded leaving North Dakota, Rose exercised visitation with Amy on only seven occasions. During that

same time period she missed at least eight scheduled visits, claiming difficulty with transportation.

On December 27th of 1996, Rose indicated she returned to Minot, North Dakota. (T246-247). Even though returning to Minot, North Dakota in late December of 1996, Rose did not have a visit with Amy until February 19, 1997. (T52). It is interesting to note that this visit only occurred in conjunction with Rose signing a second stipulation which sought to extend the care, custody and control of the Ward County Social Services over Amy for an additional one year period. It is instructive to note that during this "visitation" Rose merely signed the stipulation and left. Amy was actually present at the time and Rose never exchanged a word with the child, nor looked at the child, nor engaged in any interaction at all with the child. (T106). Rose acknowledges that at this meeting she was told if there was not substantial progress towards reintegration in the following six months a Petition for Termination of Parental Rights would be filed. A second visitation with Rose and Amy occurred on March 19, 1997 in conjunction with Rose taking a chemical addiction evaluation. Rose did not complete the recommended intensive out patient treatment at that time, nor did she take steps to fulfill the Court's Order regarding psychological evaluation and followthrough.

On September 9, 1997, Juvenile Supervisor Maragos sent a letter to Rose indicating a Petition was going to be filed seeking the termination of her parental rights. The document was sent by certified mail and the indication was it was received by Rose on September 11, 1997. (T108). Rose denies receiving the letter on September 11th, claiming that she only received a Financial Affidavit for Appointment of Attorney. (T273). Rose claims to have contacted Northwest Human Services to follow through with the recommendations prior to knowing there was a Petition for Termination of Parental Rights to be filed. (T274). Rose's assertion is contradicted by the testimony of her chemical addiction counsellor, Chris Montgomery, who indicates Rose had received a letter on September 11, 1997 from Ms. Maragos prior to commencing her treatment on October 6, 1997 (T193) and prior to her initial reporting to Northwest Human Services on or about September 24, 1997. (T215).

On October 2, 1997, a Petition for Termination of Parental Rights was filed with respect to Amy. Between the October 2, 1997 filing of the Petition and the hearing with respect to the Petition on December 4, 1997, Rose only availed herself of one visitation with Amy which occurred on November 26, 1997, at which time she was brought to Minot by her addiction counsellor. (T114).

There appears to be no dispute that in the time period between January 26, 1996 and December 4, 1997, a period in excess of 22 months, Rose had only engaged in visitation with Amy for approximately 11 hours (see Judicial Referee's Finding of Fact number 11). At the hearing of December 4, 1997, the Court received recommendations relating to the termination of Rose's parental rights from several parties. Specifically, Donna Hegstad, the foster care worker involved with Amy, on behalf of Ward County Social Services, recommended the termination of parental rights. Gloria Maragos, Juvenile Supervisor, further recommended termination of parental rights based upon several factors, including the lack of progress in the case, her feeling based upon the history of the case that the causes of deprivation will continue, the respondent only exercising 11 hours of visitation in approximately 24 months, the respondent only making contact with Northwest Human Services to begin treatment following the notification of intent to terminate, and Rose and Amy having absolutely no parent/child relationship and her feeling it was not possible to rebuild that relationship. (T109-115). Additionally, Ms. Maragos indicated that she feels recent changes were "too little too late" and merely because the pressure is on. (T122-125). Dave, the father of the child, also recommended termination of parental rights with

regard to Rose. Selma Backmeier, the guardian ad litem, recommended termination indicating she could see nothing indicating Rose really wanted the child and she realized Amy was in a critical period in terms of the necessity of her bonding with a parental figure. (T95 and 97).

Dr. Patrick Mills, a doctor of education in counselling and psychology, had performed a psychological parenting evaluations on Rose on October 20, 21 and 22 of 1997. Dr. Mills was clear that Rose had not placed Amy at the top of her priorities in the past and that he was disappointed by the lack of contact she had with the child. He further acknowledged that Amy was at a critical time for bonding with regard to parental figures. (T154). Mills indicated an estimate of one to two years, assuming things progress normally before Amy could be returned to Rose's custody. (T159-160). Mills also indicated, from his testing, it was clear Rose was "running out of time" and that based on his testing he couldn't offer an opinion prognostically. (T156). Dr. Mercato, a child adolescent psychiatrist, offered testimony that the time period in a child's life up to four years of age is very significant for establishing "object permanency" in relationships to a nurturing figure. (T204). She further offered testimony as to the lack of involvement by Rose and contrasted it to her (Mercato's) experience working with families in which

children are removed and the parents immediately attempted to take steps to reintegrate with the child. (T206). Dr. Mercato alluded to Rose's prior history as a deprived child, indicating that often times mothers who had very little mothering themselves do not develop an ability to parent and come to feel the child is a possession rather than an individual who has full rights of their own. (T210).

ARGUMENT

1. DID THE PETITIONER PROVE ALL ESSENTIAL ELEMENTS NECESSARY FOR TERMINATION OF PARENTAL RIGHTS UNDER NDCC 27-20-44 BY CLEAR AND CONVINCING EVIDENCE?

The petitioner/appellee had sought the termination of Rose's parental rights pursuant to NDCC 27-20-44. Appeals under the Uniform Juvenile Court Act are governed by NDCC 27-20-56 which indicates that appeals must be heard by the Supreme Court upon the files, records, and minutes or transcript of the evidence of the Juvenile Court, giving appreciable weight to the findings of the Juvenile Court. It is clear pursuant to 27-20-56, that the appellate review of the actions of the Juvenile Court is equivalent to the former procedure of trial de novo; therefore the appellate court may independently review the evidence. Anderson v. K.S., 500 NW 2nd 603 (N.D. 1993). Significantly, however, under this standard of review, the Supreme Court gives

appreciable weight to the findings of the lower court, giving some deference to the Juvenile Court's decision, because it had the opportunity to observe the candor and demeanor of the witnesses. Eastburn v. B.E., 545 NW 2nd 767 (N.D. 1996).

NDCC 27-20-44 indicates in relevant part,

1. "The Court by Order may terminate the parental rights of the parent with respect to his child if:

a. the parent has abandoned the child;

b. the child is a deprived child and the Court finds 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; or

c. the written consent of the parent acknowledged before the Court has been given..."

It is obvious that Rose did not consent to the termination of her parental rights. The petitioner/appellee argued following the hearing that both the requirements of subsection (a) relating to abandonment and the three part test of subsection (b) had been met by the petitioner. The Court predicated it's decision terminating parental rights upon the three part criteria found in 27-

20-44(b). All three criteria under 27-20-44(b) must be proven by clear and convincing evidence. In the interest of J.L.D., 539 NW 2nd 73 (N.D. 1995). The petitioner/appellee now turns to an analysis of the three parts of the aforementioned test.

A. HAS THE PETITIONER SHOWN THAT AMY IS A DEPRIVED CHILD?

This first part of the three pronged test is conceded by Rose in which she indicates that she does not have the immediate present ability to care for her child Amy. (See Appellant's Brief page 17). Additionally, during the hearing of this matter, Amy's father indicated a willingness to terminate his parental rights as well as having no interest in the child. (T6-9). A deprived child pursuant to NDCC 27-20-02 is a child 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. The deprivation of the child has twice been stipulated and can not be disputed. In Interest of A.M.A., 439 NW 2nd 535 (N.D. 1989). In this case, by admission and obvious fact, the child is a deprived child and the fact that the child is currently in a safe environment in foster care does not negate the fact that Amy remains a deprived child where, as here, the parents are clearly incapable of providing for

proper parental care. In re K.P., 267 NW 2nd 1 (N.D. 1978).

B. DID THE PETITIONER ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT THE CAUSES OF THE DEPRIVATION ARE LIKELY TO CONTINUE OR WILL NOT BE REMEDIED?

The primary area of contention in the hearing on termination of parental rights related to the second criteria found in NDCC 27-20-44(b), which is "the conditions and causes of the deprivation are likely to continue or will not be remedied". The hearing produced abundant evidence that the causes and conditions of the deprivation are not likely to be remedied and are likely to continue. The evidence may be broadly categorized under several areas.

Initially, the evidence adduced at the hearing of past deprivation of the child is relevant evidence to the issue of the causes of deprivation continuing. Specifically, at the hearing the Court received evidence of several prior abuse and neglect investigations involving the child in which Rose had left Amy in situations where she was not properly supervised. In one instance leaving the child with a babysitter, claiming she would be gone 1/2 hour and thereafter not returning for several hours. (T27-29). In another instance she left Amy, while an infant, alone in a locked trailer while she left the residence. (T29-31).

Additionally, another incident of past deprivation was testified to in which concerns of the conditions of Rose's home and ongoing drug use within the residence were filed with Ward County Social Services. Investigation revealed that there had been ongoing drug use in the home and a person had actually died on the floor of the home following an incident of drug related partying. In that respect, concerns of drug use by Rose and other people in the home, concerns of drugs being sold out of the home, concerns of lack of food in the home and ongoing parties being detrimental to Amy and her sibling were substantiated. (T36-38). These incidents of deprivation occurred between the time period when Amy was six months of age to one year of age. The latter culminated in her being removed from the care, custody and control of Rose and placed in foster care where she has been to this date. This Court has previously held that evidence of previous deprivation may be considered in determining whether deprivation is likely to continue and whether the children will probably suffer therefrom. In re J.A., 283 NW 2nd 83 (N.D. 1979) and Boening v. Director Cass County Social Services, 484 NW 2nd 482 (N.D. 1992). In this case the deprivation of the child continued over the course of 1/2 year prior to the child being removed from the custody of Rose. This prior deprivation taken in conjunction with the almost total lack

of contact between Rose and Amy during the 2/3 of her life she has been outside of Rose's custody show persuasively that the causes of deprivation are likely to continue.

In the context of the lack of contact Rose has had with Amy, it is clear what has happened in this case is the virtual abandonment of the child. Although the Court below decided the case based on the three part test of subsection (b) of 27-20-44, the abandonment of the child by Rose is also demonstrated by the facts at hearing and is persuasive evidence of the causes of the deprivation being likely to continue. In that regard, this Court has held that irregular contacts with the child and failure to support the child are highly indicative of an intent by the parent to abandon the child. W.J.M. v. J.B., 532 NW 2nd 372 (N.D. 1995).

The lack of cooperation by Rose with the Ward County Social Service Board and Juvenile Court during the course of the foster care placement is also indicative that the causes of deprivation are likely to continue. Although a lack of parental cooperation with social workers in and of itself may be insufficient to demonstrate a child is deprived, once deprivation is established, a lack of parental cooperation is pertinent to the issue of whether deprivation will continue. Myers v. C.K.H., 458 NW 2nd 303 (N.D. 1990). In this case, because of the absolutely

minimal contacts by Rose with social services and Amy, the track record is perhaps the best gauge to evaluate whether the causes of deprivation are likely to continue in the future. The child's foster care worker testified that Rose had seen Amy a total of 11 hours in approximately 23 months. (T58). Ms. Hegstad further indicated that throughout the course of the placement Rose has not sent birthday gifts, correspondence, Christmas gifts or any personal items to Amy during the course of the placement. (T56). Additionally, the lack of cooperation of Rose with complying with the Court's Order with relation to getting a chemical addiction evaluation and treatment, if appropriate, as well as psychological evaluation and treatment is apparent in that she frequently canceled scheduled evaluations. (T57). Rose further, following the first permanency planning meeting, thereafter missed seven permanency planning meetings relating to Amy. (T59).

On June 30, 1998, the Court filed an opinion In the Interest of L.F and J.F., children. (1998 N.D. 129). This case is strikingly similar to the factual scenario before the Court in this appeal. In L.F. and J.F., the Court, in discussing the likelihood of deprivation being continuing or unremedied, look specifically to factors such as not following the recommendations of social agencies, minimal visitation, missing scheduled appointments, not attending

Permanency Planning Meetings, as well as offering a myriad of excuses for a failure to follow through with the same while leading a nomadic lifestyle as factors indicative of the deprivation of the children continuing or remaining unremedied. The above recited factors considered by the Court in L.F. and J.F. are virtually identical to the behaviors exhibited by Rose in this case.

Prognostic evidence further supports the determination of the Court that the causes of the deprivation are likely to continue and are not being remedied. This Court has defined prognostic evidence as:

"evidence that forms the basis for a reasonable prediction as to future behavior." McBeth v. M.D.K., 447 NW 2nd 318, 321 (N.D. 1989).

Dr. Mills did not offer an opinion as to whether or not he felt parental rights should be terminated, indicating he did not feel based on his testing he could say prognostically what she would do in the future. (T156). He did indicate that even if Rose continues attempting to learn necessary skills she currently lacks, reintegration into her home should not take place at anytime soon and he estimated it would take a period of one to two years. (T159). This Court has indicated that it is not enough for a parent to indicate a desire to improve, but that parent must be able to demonstrate present capability or

capability within the near future to be an adequate parent. McBeth, supra. In this case, it is not reasonable to expect a three year old child who has been out of the parental home for over 2/3 of her life to wait an additional one to two years to achieve any permanency in living situation or bonding to a parental figure. Dr. Mercato offered evidence consistent with the deprivation not being remedied in that in her experience individuals who have lost their children because of abuse or neglect usually responded by immediately seeking to do whatever it takes to get the children back and she questioned whether the mother had an attachment to Amy. (T206). Based on the information she had available, Dr. Mercato indicated further that mothers such as Rose, who have little mothering themselves, may come to look at the child (Amy) as part of their body or a possession rather than an individual who has full rights of their own. (T210). In that regard it is apparent that Rose has only taken action in a limited manner when it became apparent the Juvenile Court was seeking to terminate her parental rights. Even then, when minimally complying with the terms of the Court Order, she failed to avail herself of having contact with her child, save for one instance when she was taken to Minot by her addiction counsellor.

The most meaningful prognostic evidence developed in

the case came through Donna Hegstad, the foster care worker; Gloria Maragos, the juvenile supervisor and Selma Backmeier, the guardian ad litem. These three individuals, of all witnesses testifying, had the most contact with Rose and the most contact with the child. These were the individuals who had a chance to view the lack of interaction or affection between Rose and Amy. These were the individuals that attempted to get Rose to comply with the Court's Order and these were the individuals who chronicled the virtual abandonment of the child by her mother. In each case, these individuals recommended termination of parental rights. (T75, 115 & 94).

At best, Rose could show a brief improvement in terms of moving towards trying to reintegrate with Amy. That was predicated solely upon the fact after being aware a Petition for Termination of Parental Rights was to be filed, she got into counselling, both for chemical addiction and psychological problems. This Court has indicated, however, that a brief period of improvement in the parent's lifestyle could not forestall termination when the evidence showed clearly that the causes and conditions of the deprivation were likely to continue. Haugen v. C.S., 417 NW 2nd 846 (N.D. 1988). In this case, even after the alleged improvement in behavior occurred with Rose, it was followed by a subsequent substantial period of time

where Rose did not even visit Amy and only did so when transported to Minot by her addiction counsellor in November of 1997. (T114).

C. DID THE EVIDENCE ESTABLISH THAT AMY WAS SUFFERING OR WOULD PROBABLY SUFFER SERIOUS PHYSICAL, MENTAL, MORAL, OR EMOTIONAL HARM DUE TO THE CONTINUOUS DEPRIVATION?

It is the contention of the petitioner/appellee that Amy is suffering by the continued foster care status she has been living in for more than 2/3 of her life. It is important to note that Amy is not like an item of clothing that Rose can put on layaway with a merchant and make periodic minimal payment to ensure the item stays in storage. We are dealing with a human being who has her own hopes, aspirations and rights. Rose talks of the parent's right with regard to their children which is recognized as being of a constitutional dimension. While this is true, this Court has clearly recognized that this is not an absolute right. Heitkamp v. L.J., 436 NW 2nd 558 (N.D. 1989). This Court has recognized in In Interest of F.H., 283 NW 2nd 202, 214 (N.D. 1979):

"The relationship of parent and child consists of a bundle of rights which are necessary for the preservation of society and must be carefully balanced and jealously guarded. (citation omitted). The rights of parents are not

propriety rights, but rather are in the nature of a trust reposed in them, subject to their correlative duty to care for and protect the child. The law secures their rights only so long as they shall discharge their obligations. They are not to be enforced to the detriment or destruction of the happiness and well being of the child."

To ask a child who has been left by her mother for 2/3 of her life in foster care with minimal contact to spend an additional period of up to two years in foster care while the parent "gets her act together" is patently unfair to the child. This Court has indicated, in some cases:

"the needs of the child must be recognized without further delay if the child is to have a reasonable opportunity to enjoy a normal life where love and care are provided on consistent basis." McBeth, supra.

This Court has further stated in A.M.A., at 539 supra:

"Even though long-term and intensive treatment may assist the parents, it is not mandated if it cannot be successfully undertaken in a time frame which would enable the child to return to the parental home without causing severe dislocation from emotional attachments formed during the long

term foster care."

The testimony of the experts in this case is unequivocal. The child is in a critical period for forming bonding relationships, she views the foster parents as her parents, has no recognition of Rose, would be severely traumatized by a removal by the foster home and that any possibility of reintegration into Rose's home would be in the area of one to two years.

Although the best interest of the child is not necessarily controlling in a termination of parental rights action, it is clearly a significant factor to be considered and has been acknowledged as such by this Court. J.A., supra; McBeth, supra. Current federal legislation shows the trend toward not allowing children to languish in foster care and seeking an earlier permanency in the children's lives through termination of parental rights when appropriate. On November 19, 1997, President Clinton signed into law (P.L. 105-89), the Adoption and Safe Families Act of 1997, to improve the safety of children, to promote adoption and other permanent homes for children who need them and to support families. This new law makes changes and clarifications in a wide range of policies established under the Adoption Assistance and Child Welfare Act (P.L. 96-272), the major federal law enacted in 1980 to assist the states in protecting and caring for abused and

neglected children. The prior law did not require states to initiate termination of parental rights proceedings based on a child's length of stay in foster care. Under the new law, to ensure compliance for matching federal funds, states must file a petition to terminate parental rights and concurrently identify, recruit, process and approve a qualified adoptive family on behalf of any child, regardless of age, that has been in foster care for 15 out of the most recent 22 months. A child would be considered as having entered foster care on either the date of the first judicial finding of abuse or neglect or 60 days after the child is removed from the home. This has been codified at 42 U.S.C. 675(5)(E). This new requirement applies to children entering foster care in the future and to children already in care. This mandate of the federal government is clearly indicative of the fact society has become increasingly intolerant of parents stringing along their children in foster care with minimal contact and with the parent being oblivious to the obvious detrimental effects on the child.

The fact that Amy is suffering by being in "limbo" with regard to a permanent parental figure was established by both Dr. Mills and Dr. Mercato, who testified the child is in a critical period in her development where there is a definite necessity of establishing a permanent parental

figure in the child's life to enable parental bonding to occur. (T154-156 and 204-205). Dr. Mills described a window of bonding akin to imprinting, that the child at this stage of development has a need for a feeling of security, and it is critical to bond and form an attachment that is stable. Dr. Mills further indicated that we are running out of time with this child and it is necessary that a permanent parental figure must bond with the child in the near future. (T154-156). Dr. Mercato further indicated the child's need for permanency and the need for a permanent parental figure must be met for the child to blossom in terms of developing trust, emotional stability and social skills, and that absent this bonding the children may well run into problems in later life in forming relationships.

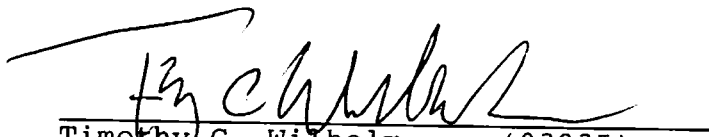
In this case, it is undisputed the child views her foster mother as her mother and has little or no recognition of Rose as a figure in her life. Testimony further indicated no affection during visits between Rose and Amy.

CONCLUSION

FOR THE ABOVE AND FOREGOING REASONS STATED HEREIN, the petitioner/appellee respectfully prays that this Court affirm in all respects the memorandum opinion of the District Court confirming those certain "Findings of Fact,

Recommendation to Terminate Parental Rights and Right of Review", issued in Juvenile Court for Ward County, Northwest Judicial District which formed the subject matter of this appeal.

Respectfully submitted this 2nd day of July, 1998.



Timothy C. Wilhelm (03935)
Assistant State's Attorney
Attorney for Petitioner/Appellee
Ward County Courthouse
Minot, North Dakota
857-6480