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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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Gloria Maragos,)
Petitioner/Appellee,)
)
vs.)
)
R.E., Child; and B.E., Mother,)
Respondents/Appellants.)

STATE OF NORTH DAKOTA
CASE NO. 980357

APPEAL FROM THE FINDINGS AND FACT AND ORDER OF DISPOSITION
OF OCTOBER 13, 1998 FOLLOWING REVIEW HEARING
CIVIL NO. 97-R-0148
THE HONORABLE GERALD RUSTAD, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is the respondent prohibited under the doctrine of res judicata from attacking the propriety of the court's original Order adjudicating R.E. a delinquent and unruly child and his placement with the Division of Juvenile Services?
2. Did the lower court err in determining that R.E. was in need of continued treatment and rehabilitation?

STATEMENT OF THE CASE

(A) PROCEEDINGS BELOW

On April 16, 1997, a hearing was held in Juvenile Court on a Petition alleging R.E. to be a delinquent and unruly child. At the hearing R.E. admitted a delinquent act relating to criminal mischief and unruly conduct, including truancy predicated upon excessive absences from school as well as refusal to attend school and unruly behavior in the form of being a runaway from his mother's home on at least 12 occasions. (Appendix at page 6). The Court predicated it's findings of delinquency and unruly conduct on the admissions of R.E., as well as testimony presented at the hearing. (Appendix at 6). At the hearing of April 16, 1997, R.E. was represented by legal counsel, Carl O. Flagstad, and his mother, B.E., was personally present and represented by Attorney Robert Thomas. (Appendix at 5). The referee hearing the case on April 16, 1997, specifically found by clear and convincing evidence that the child, R.E., comes within the provisions of the Uniform Juvenile Court Act and that the child was in need of treatment or rehabilitation as a delinquent and unruly child. (Appendix at 7). The referee further found that the parent was unable to control and discipline the child and provide for the treatment and rehabilitation of R.E., and that continuing the child in his parental home would be contrary to his welfare. (Appendix at 6 and 7). Based upon her findings, the referee submitted

recommendations to the District Court, including that R.E. be removed from the care, custody and control of his parents and placed in the care, custody and control of the Division of Juvenile Services for a period of time not to exceed 18 months for placement in any duly licensed foster home, group home, residential treatment facility, or at the Youth Correctional Center. (Appendix at 7). No request for review of the findings and recommendations of the judicial referee was filed and those findings and recommendations were confirmed by Order of the Hon. Everett Nels Olson, Judge of the District Court on April 25, 1997. (Appendix at 9). No appeal was taken from either the findings and recommendations of the judicial referee of April 18, 1997, nor the Order confirming of Judge Olson of April 25, 1997.

On October 9, 1998, a review hearing was held on the request of the Division of Juvenile Services for a 12 month extension of the original 18 month Order granting custody to Division of Juvenile Services. After the hearing, which was held before the Hon. Gerald Rustad, Judge of the District Court, the Juvenile Court found, based upon a review of the file, the testimony presented and pursuant to statute, R.E. remained in need of continued treatment and rehabilitation and the care, custody and control of Division of Juvenile Services was extended for a period of time not to exceed 12 months. (Appendix at 11).

On November 17, 1998, the Respondents B.E. and R.E.

filed, through their legal counsel, a Notice of Expedited Appeal of the Finding of Fact and Order of Disposition ordered on the 13th day of October, 1998 by Judge Rustad.

(B) STATEMENT OF FACTS

On March 18, 1997, a Petition was filed in the Ward County Juvenile Court alleging delinquency and unruly conduct by the child, R.E. R.E. and his mother, B.E., both appeared personally at the hearing and with separate lawyers representing each respondent. At the hearing R.E. admitted to one delinquent act involving criminal mischief committed on or about February 9, 1997, a class A Misdemeanor. R.E. further admitted unruly conduct related to school truancy issues as well as being out of the control of his parent and having run away from home on approximately 12 occasions. (Tr. at 6). Following receiving a factual basis for and supportive testimony to the child's admissions, the referee entered recommendations, including the child being placed under the care, custody and control of the Division of Juvenile Services for a period of time not to exceed 18 months. The referees findings and recommendation were confirmed by Order of Hon. Everett Nels Olson, Judge of the District Court on April 25, 1997. Significantly, although R.E. was not in favor of the initial placement with Division of Juvenile Services as a result of the April 16, 1997 hearing, he did acknowledge at the review hearing of October 9, 1998, that his placement outside of the home was necessary at the time of the April 16,

1997 hearing and that he was failing miserably at home at that point. (Tr. at p. 132).

Following R.E. being placed in the care, custody and control of the Division of Juvenile Services, his case management was taken over by Sydney Hove of that agency. (Tr. at 33). Hove indicated that subsequent to receiving custody of R.E., he initially accumulated information from other agency's involvement with R.E. to aid in determining an appropriate placement, including possible continuation in the parental home. (Tr. at 33, lines 21-24). Hove indicated R.E. remained in the parental home until July 23, 1997, although under the legal custody of Division of Juvenile Services. (Tr. at page 35). During that time period Hove indicated R.E. remained at the Dakota Memorial High School Day Treatment Program where he had significant behavioral problems and was subsequently admitted to the Child Adolescent Partial Hospitalization Program of UniMed Hospital on May 27, 1997. (Tr. pages 35-37). The CAPH Program noted that family issues continued to be debilitating and R.E. continued to have difficulty following the directives of his mother and the communication between them was limited and she has had difficulty managing his behavior. (Tr. at 38-39).

On July 23, 1997, R.E. was placed by Division of Juvenile Services at Luther Hall, a residential treatment center, based upon identified treatment issues for R.E., including history of gang involvement, shoplifting, lying and not following

rules, threatening, intimidating others, unstable mood, impulsively refusing to go to school, being unable to maintain positive relationships, abandonment by biological father, alcohol issues and enmeshed relationship with his mother. (Tr. page 44). R.E. remained at Luther Hall from July 23, 1997 to September 12, 1997, culminating with a runaway incident from Luther Hall followed by a refusal to go to school. (Tr. page 45-47). On September 12th, R.E. was transported to the Youth Correctional Center to participate in a time out program in an attempt to salvage his placement at Luther Hall and redirect his behavior to completing the program there. (Tr. at page 47). Following the time out period, R.E. refused to return to Luther Hall and remained at the Youth Correctional Center. (Tr. page 47-48).

On October 27, 1997, on the request of respondent, B.E., a placement review hearing was held. Following the hearing a decision was rendered by the reviewers, that the Youth Correctional Center placement should be maintained. (Tr. page 50).

During his placement at the Youth Correctional Center, on November 19, 1997, R.E. committed simple assault on another student, which was handled through informal adjustment in the Bismarck Juvenile Court. (Tr. at 51 and 52). Thereafter, between November 23rd of 1997 and January 23rd of 1998, R.E. was placed in the special management program at the Youth Correctional Center, which represents placement at the most

secure cottage at the Youth Correctional Center. Mr. Hove indicated in testimony at the hearing of October 9, 1998 that R.E. did very well under the intense supervision of that program. (Tr. page 53 and 54).

On February 23, 1998, R.E. was discharged to Southwest Keyes Treatment Facility in Mandan in an attempt to establish a less restrictive placement. R.E.'s placement at Southwest Keyes lasted only from February 23, 1998 to March 9, 1998. (Tr. at 56). R.E. did not succeed at Southwest Keyes Residential Treatment Program and was discharged for severe aggressive behavior, difficulty following the program rules, as well as explicit sexual threats made towards a female staff member. (Tr. page 57 and 58). Southwest Keyes determined R.E. was unamenable to treatment at that point due to the behaviors. (Tr. page 58).

Following placement back at the Youth Correctional Center on June 24, 1998, R.E. was involved in an incident where he broke metal trim in his dorm room and actually carved a swastika on his own body. (Tr. page 60). Other behavioral incidents included R.E. admitting to giving his medication to another resident so the other resident could inject the same intravenously. (Tr. page 62).

Subsequent to these incidents, Mr. Hove indicated there was an improvement in behavior by R.E. and that he was looking to continue R.E.'s placement with Division of Juvenile Services, and provide a transition from the Youth Correction

Center to the Dakota Boys Ranch in Minot and thereafter through a step-down process work to transition R.E. into his mother's home at the earliest appropriate time. R.E. acknowledged at the hearing his behavior had improved significantly and attributed it to the influence of a staff member at the Youth Correctional Center. (Tr. page 63). Hove indicated he did feel a return of R.E. to his mother's home prematurely would be merely setting him up for failure. (Tr. page 64). Hove indicated he felt it was important that following a less restrictive placement, such as the Dakota Boys Ranch, that it may be appropriate for Division of Juvenile Services to maintain legal care, custody and control of R.E. for an initial period while he was in his parental home. (Tr. page 67).

At the hearing of October 9, 1998, following hearing the testimony of Mr. Hove, as well as B.E. and R.E., the Court specifically found by clear and convincing evidence that it was in the best interest of the child to extend the original Court Order for a period of time up to 12 months with the Division of Juvenile Services required to use it's best efforts to reunite the parent and child. (Tr. page 155).

ARGUMENT

1. IS THE RESPONDENT PROHIBITED UNDER THE DOCTRINE OF RES JUDICATA FROM ATTACKING THE PROPRIETY OF THE COURT'S ORIGINAL ORDER ADJUDICATING R.E. A DELINQUENT AND UNRULY CHILD AND HIS PLACEMENT WITH THE DIVISION OF JUVENILE SERVICES?

The respondents initially began their Brief with a statement indicating this appeal concerns the Juvenile Court's determination to extend the original Order placing R.E. with the Division of Juvenile Services for an additional 12 months. That is indeed the issue of the case. Unfortunately, the respondents go on in the next sentence to state "More importantly, this appeal concerns the proper role of the schools, our state Juvenile Courts, and the Department of Corrections, when it is determined that a child with emotional disabilities requires residential treatment in order to benefit from his educational opportunities." This statement is indicative of the fact the Appellant's Brief is primarily directed to parties and issues that are not properly before the Supreme Court pursuant to the appeal taken by the respondents of the Findings of Fact and Order of Disposition entered by the Hon. Gerald Rustad on October 13, 1998.

As was pointed out in the Brief of the Appellant at page 32, a doctrine of res judicata prohibits the relitigation of issues that were decided by the Court on April 16, 1997. As was stated by this Court in *Wetch vs. Wetch*, 539 NW 2nd 309, 311 (ND 1995), "Res adjudicata, or claim preclusion, prohibits the relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties or their privies, and which were resolved by final Judgement in a court of competent jurisdiction." No appeal was taken of the Order of the Juvenile Court of April 16, 1997. In fact,

as is alluded to above, the respondents actually agreed to the adjudication of R.E. as an unruly and delinquent child. Notwithstanding the respondent's acknowledgment of claim preclusion by res judicata, they now seek to allege in this appeal a challenge to the admitted finding of April 1997, that R.E. was a delinquent and unruly child. Attempting to raise these issues at this point is precluded by the doctrine of res judicata.

The respondents seek in their request for relief, broad declarations from this Court relating to alleged improprieties by the Minot Public School System which was never a party to this action. The respondent's request declarations by this Court as to interpretations of discriminatory practices relating to allegedly disabled children, another issue clearly not properly before the Court.

The respondents appear to be aware the doctrine of res judicata precludes their attempts at a broad indictment of the school system and therapeutic professionals who worked with R.E. two years ago. In an attempt to hurdle the res judicata barrier, the respondents claim child custody issues are not final in the sense that other Judgements might be considered final. *Fichter v. Kadmas*, 507 NW 2nd 72 (ND 1993). That citation has no bearing in this case in that *Fichter* dealt exclusively with a custody decree in a divorce situation and was construed under specific statutory considerations laid out in Title 14 of the North Dakota Century Code. Respondents go

on to state in their Brief "A Juvenile Court's disposition is subject to Order of the Court. The April 16, 1997 Order thus is not res judicata for the purpose of a review hearing when the State seeks to extend an Order that was scheduled to expire." (Appellant's Brief at page 33). This statement is not disputed to the extent that the Court at the review hearing clearly may make it's own determination as to whether or not R.E. is in continued need of treatment and rehabilitation. The April 16, 1997 Order is, however, res judicata for the attempts by respondent to challenge the initial determination of the Court that R.E. was an unruly and delinquent child.

The only legitimate issue before the Court for review is whether or not the determination by the Court below that R.E. was in need of continued treatment and rehabilitation was in error.

(2) DID THE LOWER COURT ERR IN DETERMINING THAT R.E. WAS IN NEED OF CONTINUED TREATMENT AND REHABILITATION?

The determination of the District Court to extend R.E.'s placement with the Division of Juvenile Services for a period of time not to exceed 12 months was appealed by the respondents. The Court had specifically indicated that it's Order was predicated upon the continued need of R.E. for treatment and rehabilitation. The review hearing and the extension of the Division of Juvenile Services placement was pursuant to NDCC 27-20-36.

Appeals taken from NDCC 27-20 are governed by the provisions of NDCC 27-20-56, which states in relevant part: "...The appeal 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..." Case law construing the scope of review of Juvenile appeals has indicated an appellate review of the Juvenile Court is equivalent or similar to the procedure of trial de novo in which the Appellate Court may independently review the evidence. *Anderson v. K.S.*, 500 NW 2nd 603 (ND 1993). Case law further indicates that the Supreme Court will review records and evidence on appeal and give appreciable weight to the findings of the Court below, 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 (ND 1996).

NDCC 27-20-36 indicates the Juvenile Court may extend an Order placing an unruly and/or delinquent child with the Division of Juvenile Services if a hearing is held on the Motion of the Division prior to the expiration of the Order, reasonable notice of the hearing and an opportunity to be heard are afforded the child and the parent, and the Court finds that the extension is necessary for the treatment or rehabilitation of the child. It is the contention of the respondents that the Court is not correct in finding that the

extension of R.E.'s placement with Division of Juvenile Services was necessary for his treatment and rehabilitation. The Petitioner/Appellee strongly disagrees with this contention and indicates to the Court that the record developed at the hearing clearly establishes a need for continuing treatment and rehabilitation with regard to R.E.

The Court heard testimony as to the chaos of R.E.'s life prior his placement with the Division of Juvenile Services. As is mentioned above, R.E. himself acknowledged he was out of control and his placement out of the parental home was necessary at the time he was originally committed to the custody of the Division of Juvenile Services. (Tr. at 132).

The course of R.E.'s initial 18 month placement with the Division of Juvenile Services was characterized by continuing behavioral difficulties culminating with recent successes. Following R.E. being placed under the custody of Division of Juvenile Services, he was allowed to reside in his parental home for a period of time. Significant behavior problems continued while R.E. was at the day treatment program at the Dakota Boys Ranch, and he was thereafter admitted to the partial hospitalization program at UniMed. (Tr. at 37). Following continuous behavioral problems, the Division of Juvenile Services placed R.E. at Luther Hall, which culminated with a runaway incident of September 1997, followed by a refusal to go to school. (Tr. page 45-47). After a time out period at the Youth Correctional Center, R.E. actually refused

to return to Luther Hall and remained at the Youth Correctional Center. Reports from the Youth Correctional Center show alarming behavior continued on the part of R.E., including assaultive behavior. (Tr. at 51 and 52). A placement was attempted at Southwest Keyes Residential Treatment Center in February and March of 1998, which was not successful due to severe aggressive behaviors by R.E., as well as inappropriate sexual threats. (Tr. at 57 and 58). Upon his return to the Youth Correction Center, R.E. became involved in a self mutilation incident involving carving a swastika on his body. (Tr. page 60). He also acknowledged hoarding medication which he ultimately transferred to another resident for the purpose of grinding up and injecting intravenously. (Tr. page 62).

Notwithstanding the behaviors mentioned immediately above, Sydney Hove, the case manager, at the hearing of October 9, 1998, did indicate a dramatic improvement in R.E.'s behavior had commenced in the time period immediately preceding the hearing. (Tr. page 63). R.E. attributed his recent improvements in decision making and attitude to the influence of a specific counselor at the Youth Correctional Center. (Tr. page 138). Hove indicated his willingness to look to a less restrictive placement such as the Dakota Boys Ranch in Minot where R.E. could continue his programming, further his education, mainstream back into the public schools, participate in the EQUIP Program and transition back

into the family home with counseling. (Tr. page 63). Hove indicated it was his opinion that to abruptly return R.E. to the care, custody and control of his mother without a transition period would be setting him up for failure. (Tr. page 64).

As the record of the hearing of October 9, 1998 clearly demonstrates, changes in the recent past have developed a pattern where R.E. for the first time appeared amenable to treatment through the progress he had shown. (Tr. at page 68). The encouraging signs of behavioral improvement in the recent past warranted consideration by the Division of Juvenile Services of a less restrictive placement and a transition back into the parental home. The Court's finding by clear and convincing evidence that the respondent remained in need of continuing treatment and rehabilitation reflected the evidence gathered at the hearing, which indicated that although R.E. may have turned a corner in confronting ongoing issues in his life, there was an ongoing need for continued treatment and rehabilitation prior to a return to the custody of his mother. The Court's decision represents a pragmatic common sense approach to the evidence that was adduced at the hearing. It is supported by the testimony, not only of Mr. Hove, but also of the respondent, R.E. While the Court's obligation is to return R.E. to his parental home at the earliest possible date, the need for further treatment and rehabilitation under the Division of Juvenile Services was

established by the testimony and evidence presented at hearing. The lower court clearly recognized that the recent achievements of R.E. required further nurturing through continued treatment and supervision under the Division of Juvenile Services to enable R.E. to acquire the necessary skills to successfully reintegrate to his parental home.

CONCLUSION

For the above and foregoing reasons stated herein, the Petitioner/Appellee respectfully prays that this Court affirm in all respects the Findings of Fact and Order of Disposition entered in this matter by the Honorable Gerald Rustad, District Judge on the 13th day of October 1998.

Respectfully submitted this 30 day of March, 1999.



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