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I. STATEMENT OF CASE

This is an action in which the State of North Dakota seeks to involuntarily terminate the parental rights of K.M. (Kris)¹ to her minor daughters, C.M. (Connie) and A.M. (Angel). The Juvenile Court determined that Connie and Angel are deprived and that such deprivation is not due primarily to the financial means of Kris, that the deprivation is likely to continue, and that Connie and Angel are suffering or will suffer serious physical, mental or emotional harm. The Juvenile Court recommended that the parental rights of Kris be forever terminated and that Connie and Angel be placed for adoption. The Findings and Recommendations of the Juvenile Court Referee were entered on November 30, 1998, and the District Court confirmed the Findings and Recommendations on January 5, 1999. Notice of Appeal was filed on January 22, 1999.

II. STATEMENT OF FACTS

Connie was first placed in foster care with Kris' mother, Patricia Bear, in Washington in February, 1992. (August 26, 1998 Tr.13 and App. 89) Around May, 1994 Connie was returned to Kris' custody in Minnesota and Washington

¹All party names are pseudonyms.

dismissed its case.² (August 26, 1998 Tr.13-14)

On September 1, 1994, a Minnesota court ordered that Connie, age 9, and Angel, age 1 month, receive protective services with physical custody remaining with Kris. Kris was ordered to undergo a chemical dependency evaluation and complete any recommendations.³ (August 26, 1998 Tr.14-15 and App.70)

Kris completed a chemical dependency assessment (App. 79,84) and enrolled in an outpatient day program and later in an inpatient treatment program. (App.83) Alcohol continued to be a problem in Kris' life. (App.74,80,81) Kris completed an alcohol treatment program, a 12 week aftercare program, attended AA (App.65) and attended six to eight months of parenting classes in South Dakota. (App.87) Kris also successfully completed a Parent Nurturing Program in Florida. (App.116)

On December 31, 1994, Kris and her daughters, M.W. (Monica), Connie and Angel moved from Minnesota to Devils Lake, North Dakota. (App.86)

In May, 1995, the North Dakota Juvenile Court dismissed a petition for deprivation of Angel finding that although Kris had a drinking problem, there

²Connie was originally placed with her grandmother, Patricia Bear, in February, 1992. Around October, 1993, Connie was removed from Ms. Bear's home and placed in a foster home due to bed wetting and other destructive behavior. Connie was returned to Ms. Bear's home in May, 1994, and Ms. Bear then sent Connie to live with Kris in New Ulm, Minnesota. (August 26, 1998 Tr.13)

³The Minnesota hearing also pertained to another of Kris' daughters, Monica. (App.70) However, Monica is not involved in this appeal.

was no evidence to indicate that Angel had been placed in danger or was not being cared for. (August 26, 1998 Tr.7; App.57)

In January, 1996, Connie and Angel were placed in foster care in North Dakota due to Kris' alcohol problems and absence from the home without providing proper supervision. (App.62) Connie and Angel were released from foster care around February 15, 1996, were returned to foster care about March 4, 1996 and have remained in foster care ever since. (August 26, 1998 Tr.7)

In the summer of 1996, Kris moved to Aberdeen, South Dakota. (App.17) In early January, 1998, Kris moved to Naples, Florida. (August 26, 1998 Tr.157) Kris relocated to Florida for better living and financial opportunities. (August 26, 1998 Tr.93) Social Services was prepared to begin reuniting Kris and Connie, but did not due to Kris' move to Florida. (August 26, 1998 Tr.58)

While in Florida, Kris was involved in two incidents of domestic violence. (App.97,103) Termination proceedings are also pending in Florida for Kris' child, H.W. (Henry). (September 30, 1998 Tr.19) Florida authorities are also investigating burns Henry suffered. (August 26, 1998 Tr.27-28)

Connie has been diagnosed with post-traumatic stress disorder (August 26, 1998 Tr.64), and has been physically abused, although not necessarily by Kris. (August 26, 1998 Tr.66,73)

Kris, Connie and Angel have maintained contact through personal visitations, letters and cards, phone calls and by exchanging presents. (App.93,111-114 & 117-121)

III. ATTORNEY'S COMPLIANCE WITH RULE 3.1.

NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

After review of the transcripts and applicable law, and after further research of possible appealable issues, appellant's attorney does not believe that the record reflects issues with merit for appeal. State v. Robertson, 502 NW2d 249, 250 (N.D. 1993). Nonetheless, Kris asks the Court to address her appeal independent of counsel's conclusions.

IV. ISSUES

1. DID THE STATE OF NORTH DAKOTA PROVE THAT TERMINATION OF KRIS' PARENTAL RIGHTS IS JUSTIFIED UNDER NORTH DAKOTA CENTURY CODE SECTION 27-20-44 AS INTERPRETED BY THE NORTH DAKOTA SUPREME COURT?

V. LAW AND ARGUMENT

1. THE STATE OF NORTH DAKOTA FAILED TO PROVE THAT TERMINATION OF KRIS' PARENTAL RIGHTS IS JUSTIFIED UNDER NORTH DAKOTA CENTURY CODE SECTION 27-20-44 AS INTERPRETED BY THE NORTH DAKOTA SUPREME COURT.

"Parents have a fundamental, natural right to their children which is of constitutional dimension," Matter of Adoption of K.S.H., 442 NW2d 417, 419 (N.D. 1989). Although this right is not absolute, Kris is "entitled to a presumption that [she is a] fit parent and entitled to the custody of [her] daughter[s]." Bjerke v. D.T., 248 NW2d 808, 811 (N.D. 1976). Kris' right to her children is worthy of

constitutional protection, and as such, her parental rights should not be terminated until all possible avenues of reunification have been exhausted.

The best interests of Connie require continuing contact with Kris, not terminating parental rights. (August 26, 1998 Tr.80) Granted, reunification may not occur even if more time is allowed, but reunification certainly will not occur if Kris' parental rights are terminated, and severing all ties between Kris and Connie will detrimentally affect any progress Connie has made.

North Dakota Century Code Section 27-20-44(1)(b) creates a three-part test to be applied when terminating parental rights: 1. Is the child deprived? 2. Are the conditions and causes of the deprivation likely to continue? 3. Is the child suffering, or will the child in the future probably suffer, serious physical, mental, moral, or emotional harm? In Interest of A.S., 1998 ND 181, ¶15, 584 NW2d 853.

1. Connie and Angel are not deprived.

A "deprived child" is a child who

Is 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 deprivation is not due primarily to the lack of financial means of the child's parents, guardian, or other custodian.

North Dakota Century Code §27-20-02 (Supp. 1997). Connie and Angel were originally found to be deprived children due to Kris' use of alcohol and her failure to provide adequate supervision when away from the home.

The Juvenile Court found that deprivation continues due to Kris' still unresolved

chemical addition issues and the fact that Kris had moved first to South Dakota and then to Florida.

Alcohol has been a negative factor in Kris' lifestyle, but Kris has taken great steps to overcome her chemical dependency problems. Kris has done everything possible from having an initial alcohol evaluation to completing an alcohol treatment program, attending 12 weeks of aftercare, and attending AA. Although Kris has "slipped" and used alcohol twice since receiving treatment, she attended AA in South Dakota and upon moving to Florida, she found a sponsor and resumed attending AA. Kris may relocate more than what is beneficial to reunification with her children, but the important thing is that Kris continues to seek and obtain help in managing her problems when she does move.

In January, 1998, a reunification plan for Kris and Connie was contemplated and social services wanted Kris and Connie to begin joint therapy sessions, then personal visits, then more extended visits and finally overnight visits. (August 26, 1998 Tr.57) This was the plan even though Kris was in South Dakota and the children were in North Dakota. Kris' past use of alcohol was not a concern anymore. However, Kris moved to Florida and social services changed the reunification plan. (August 26, 1998 Tr.58,79-80)

Social Services viewed Kris' move to Florida as an indication that Kris was not willing to cooperate and that she was not "sincere in her efforts to be reunified with her children." (August 26, 1998 Tr.58) However, the opposite is

true. Kris moved to Florida in an attempt to improve her lifestyle and finances in the hope that she could provide a home environment suitable for Connie and Angel. In South Dakota Kris was not able to make ends meet financially and had trouble finding a job, and she would not have been able to provide for her children. In Florida, Kris was able to obtain an apartment and find a job which allowed her to make ends meet. Kris' move to Florida improved both her lifestyle and her outlook on life. Of great significance is that Kris continued in AA and completed a parenting program while in Florida, thereby reaffirming her commitment to take the steps necessary for reunification with her children.

Although Kris did not maintain significant contact with Connie and Angel during the first year they were in foster care, Kris has since kept in regular contact even though her financial situation has not always allowed her the luxury of a telephone. When Kris was in South Dakota, she called the girls from the South Dakota Social workers office, and at Christmas she sent the Connie and Angel letters and presents. Connie has written four letters to Kris, all which were signed "Love, Connie" or "I Love You." Kris has written two letters to Connie and Angel and another separate letter to Connie and Angel in which she expresses her love for the children. A loving bond still exists between Kris and her daughters despite the length of time they have been separated, and every effort must be made to reunite the family.

2. Deprivation will not continue.

Evidence of past deprivation is not enough and the court must evaluate

prognostic evidence to determine whether deprivation will continue. In Interest of A.S., 1998 ND 181, ¶19, 584 NW2d 853. "Prognostic evidence" is "evidence that forms the basis for a reasonable prediction as to future behavior." Id. quoting McBeth v. M.D.K., 447 NW2d 318, 321 (N.D. 1989).

The Juvenile Court found that Kris' move to Florida had frustrated the reunification plan due to the distance it imposed between Kris and the children. Furthermore, the Juvenile Court relied heavily on Kris' past nomadic lifestyle as prognostic evidence that Kris' conduct will not change in the future. However, lack of parental cooperation is not enough by itself to establish that deprivation will continue. In Interest of A.M.A., 439 NW2d 535, 538 (N.D. 1989)

While Kris' move to Florida may have increased the distance between herself and her children, the record does not indicate that reunification cannot still be accomplished. Such a reunification effort would place a burden upon Kris to occasionally return to North Dakota to be involved in therapy and counseling with Connie and Angel. A long distance reunification effort would also place a burden upon Kris to return to North Dakota for extended visitations and eventually for overnight visits with her children. Finally, it would require that Kris seek and obtain a counselor in Florida and continue preparing herself for joint family counseling sessions. If Kris is sincere in her desire to be reunited with Connie and Angel, she will be able to meet these requirements notwithstanding the fact that she has moved to Florida; however, Kris must be given the chance to meet these requirements rather than immediately

terminating her parental rights.

The Juvenile Court found that Kris had been placed on probation in Florida for a criminal offense, and noted that her youngest child, Henry, had been placed in foster care by Florida authorities. There is no evidence to indicate that the criminal offense which resulted Kris' probation occurred in front of any of her children, and "the mere fact that one has a history of difficulties with the law" does not by itself establish continuing deprivation. In Interest of J.N.R., 322 NW2d 465, 469 (N.D. 1982). In fact, there is no evidence that Kris herself ever inflicted physical or verbal abuse on any of her children.

Kris' youngest child was placed in foster care by Florida authorities but such placement is not related to Kris' criminal offense. Rather, Kris' ten-month-old baby, Henry, was placed in foster care due to his having been burned by hot water. The testimony of both Kris and Brendon Sullivan, the protective investigator, is consistent with an accidental injury caused by Henry's childish curiosity. According to Kris' testimony, Henry had been napping and awoke, crawled into the bathroom and into the bathtub, and turned on the hot water, thereby burning himself. Henry was placed in protective foster care as a precautionary measure while Florida authorities investigate the circumstances surrounding his being burned. The investigation is apparently continuing, and the Court must not summarily conclude that Henry's placement in foster care is related to Kris' criminal conduct.

Florida authorities opine that Henry received a "dip" type burn by being

purposefully placed in hot water. However, Kris' actions immediately after Henry was burned were appropriate for an accidental burning: Kris held Henry under cold water, Kris then immediately took Henry to the hospital for treatment, and Kris has been straightforward in answering investigator's questions relating to the accident and her account of the accident has not varied.

The facts surrounding the Henry's burns are also consistent with an accident. Kris had previously complained that the water was too hot, and investigator Sullivan noted that while the actual temperature of the water was between 149 - 151 degrees, he reset the water heater from a 160 degree setting to a more appropriate 120 degrees. The bathtub water faucet was extremely easy to turn on and did not require much force. There was a step actually molded into the side of the bathtub, Henry is quite mobile and curious, and Henry could have crawled into the tub and turned the water on. Investigator Sullivan agreed that the following statement taken from Henry's medical records was a reasonable assessment of Henry's physical development:

Child engages in feverish activity. He cannot sit still an instant. The ability to walk on all fours enables him to discover his surroundings. He wants to touch everything in his overwhelming curiosity, and this is the time when parents should study potential dangers in the home.

(September 30, 1998 Tr.31-32) Finally, investigator Sullivan did not see any burn marks on Kris' hands immediately after the burn accident. (September 30, 1998) Certainly if Kris had "dipped" Henry in hot water some water would

have splashed onto her hands and left burn marks.

3. Connie and Angel are not suffering and will not suffer serious physical, mental, moral or emotional harm in the future.

The juvenile court determined that Kris cannot provide the stable home environment needed by Connie and Angel and that continuing reunification efforts will cause Connie and Angel emotional harm.

Kris does not dispute that she presently is unable to provide a safe and stable home. It is her hope and contention that through continued counseling, parenting classes and visitations with her children that she will be able to provide such a home in the future. There is never any guarantee that reunification efforts will be completely successful in any family situation. However, given the alcohol treatment, AA attendance, counseling and parenting classes that Kris has involved herself in, it is premature to terminate her parental rights simply because reunification is not guaranteed. Reunification was not guaranteed from the start. Should reunification have therefore been abandoned and Kris' parental rights terminated at the very beginning? Certainly not.

Reunification takes time. Connie will suffer certain emotional harm if Kris' parental rights are terminated and Connie is not allowed any contact with Kris. (August 26, 1998 Tr.80) Connie is best protected from emotional harm by allowing additional time for Kris to continue reunification efforts. (August 26, 1998 Tr.80-81) A loving bond still exists between Connie and Kris which must

be protected by allowing additional time for reunification; it should not be destroyed by terminating Kris' parental rights.

As the juvenile court correctly pointed out, Angel has not been subjected to emotional abuse due to her young age. It is not reasonable to expect that Angel will suffer emotional abuse if further reunification efforts are attempted. Kris has already taken some of the steps necessary for reunification and it is not necessary that she start over. Angel has been involved in the reunification process, has received phone calls, letters and presents from Kris and it is a natural progression for reunification to continue. The longer reunification efforts are continued, the better acquainted Angel will become with Kris. Every day that reunification efforts continue is one day closer to actual reunification of Kris and Angel. If the reunification process was just beginning, Angel might suffer emotional harm due to the length of time required to complete the process. However, that is not the case. Reunification efforts involving Kris and Angel have already occurred, and Angel is likely to only remember only further reunification efforts.

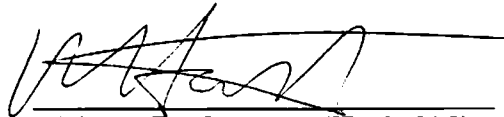
VI. CONCLUSION

The only reason set forth by social services for terminating reunification efforts was Kris' move from South Dakota to Florida, alcohol usage was not a factor. While Kris' move to Florida puts a burden on Kris if reunification efforts are continued, the move does not constitute sufficient reason for terminating reunification efforts and parental rights.

Connie will be adversely affected if Kris' parental rights are terminated and Connie is thereby cut off from contact with her mother. Angel has not been affected by the reunification efforts attempted to date, and the benefit that can be obtained by successfully reuniting this family outweighs any emotional harm either Connie or Angel are likely to suffer.

Kris submits that the State has not proven by clear and convincing evidence that the termination of her parental rights is justified under North Dakota law and respectfully requests that the Findings and Recommendations of the Juvenile Court be vacated and remanded for entry of Findings and Recommendations that further reunification efforts occur.

Respectfully submitted this 30th day of April, 1999.



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