ORIGINAL

20060063

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

IN THE INTEREST OF T.A., S.A., D.J., AND J.A., MINOR CHILDREN.

DON BOEHMER, Petitioner & Appellee	)	Supreme Court No. 20060063
v.	)	Stutsman County No. 04-R-061
T.A., S.A., D.J., J.A., K.A., B.J. and J.P., Respondents	)	
B.J., Respondent & Appellant	)	

APPELLEE'S BRIEF

Appeal from the Order for
Termination of Parental Rights
Entered January 3, 2005,
by the Honorable John E. Greenwood
Judge of the Southeast Juvenile Court

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ISSUES PRESENTED

1. Whether the juvenile court's order of termination of parental rights was supported by clear and convincing evidence that S.A.. D.J. and J.A. were deprived children, that the deprivation was likely to continue and the continued deprivation would likely cause the children to suffer serious physical, mental, moral or emotional harm?

STATEMENT OF THE CASE

1. Petitioner and Appellee Don Boehmer of Stutsman County Social Services joins the Respondent and Appellant, B.J., in the statement of the case as contained in the Appellant's brief.

STATEMENT OF FACTS

1. K.A. and B.J. are the biological parents of S.A., D.J. and J.A. (hereinafter referred to by the pseudonyms "Sarah", "Doug" and "Jenny"). (Tr. pp. 5-6). K.A. is the biological mother of T.A. (hereinafter referred to as "Tom"). (Tr. pp. 5-6). That Tom, Sarah, Doug and Jenny were removed from the home of K.A. in October, 2004, on an order for temporary shelter care after numerous allegations of deprivation and safety concerns were reported to Stutsman County Social Services. (Tr. p. 8). At the time of the removal Tom, Sarah, Doug and Jenny were ages seven, five, three and one years, respectively. (Appendix p. 19).

2. The removal of the children from the home of K.A. occurred on October 20, 2004, and was handled by Don Boehmer, a Child Protection Team worker from Stutsman County Social Services. (Appendix p. 3-7). Mr. Boehmer reports that during the removal the home was in filthy living conditions with little or no evidence that there were children living at the residence. (Tr. p. 9). There were few if any toys for the children, dirty clothes were in piles and strewn about the home, ashtrays full of cigarette butts all over, very little food, and the children's beds consisted of mattresses on the floor with blankets. (Tr. pp. 8-9). Jenny, the youngest child, was lying naked in her crib without diapers. (Tr. pp. 8, 32-33).

3. Mr. Boehmer initially noted that neither B.J. nor K.A. was present in the residence and the children were being watched by an unidentified young man of sixteen or seventeen years of age. (Tr. pp. 8, 23). B.J. did return to the residence approximately

ten minutes after Mr. Boehmer' arrival. (Tr. pp. 8-9, 23-24). Apparently, B.J. had left the residence to purchase cigarettes shortly before Mr. Boehmer arrived. (Tr. p. 23).

4. Mr. Boehmer testified that the day of removal was the first time he was aware that B.J. was residing in North Dakota. (Tr. pp. 8-10). B.J. reported to Mr. Boehmer that he had recently come to North Dakota at the request of K.A. to help with the children. (Tr. pp. 9, 19). Further testimony indicated that B.J. appeared to have been in North Dakota for over a period of one month before the children were removed from the home. (Tr. pp. 41, 45).

5. At the hearing the evidence showed that during the one month period that B.J. resided in North Dakota prior to removal, he was arrested and or charged with three separate crimes: Two separate disorderly conduct charges and a felony theft of property charge. (Tr. pp.40-41).

6. B.J. was incarcerated for the felony charge of theft of property shortly after the removal of the children, and had no contact with Social Services until December 15, 2004, at which time Mr. Boehmer met with B.J. at the County Correctional Center to discuss what B.J. needed to do in order to work with the agency towards family reunification. (Tr. pp. 10-11). At that time B.J. signed some releases for social services and indicated that upon release from jail sometime in January, 2005, he was interested in completing the evaluations that Mr. Boehmer requested. (Tr. pp. 10-11).

7. On Friday, February 4, 2005, B.J. was released from jail and contacted Mr. Boehmer requesting a supervised visit with Sarah, Doug and Jenny. (Tr. pp. 10-11). Mr. Boehmer made the necessary arrangements for a supervised visit for the following

Monday morning at 10:30 a.m. with the intent of scheduling the necessary evaluations after the visit. (Tr. p. 11). He had the children brought to the agency for the visit and informed them that their daddy would be along shortly for a visit, but B.J. never appeared. (Tr. p. 11). There simply was no contact or forwarding information from B.J. once so ever after the February 4, 2005, visitation request. (Tr. p. 11).

8. On February 15, 2005, Mr. Boehmer was informed that B.J. left the State of North Dakota against the restrictions he had for release on the pending criminal charges. (Tr. p. 11). Mr. Boehmer did have telephonic contact six months later in July, 2005, with B.J.'s seventy year old grandmother, in Oklahoma. (Tr. pp. 11, 28). That contact was initiated by Mr. Boehmer after he was able to get a telephone number for B.J.'s next of kin and the utilization of an internet search. (Tr. pp. 28-31). Mr. Boehmer was informed that B.J. was incarcerated in Oklahoma City, Oklahoma, but B.J. did want custody of his children and that she would be willing to take them into her home. (Tr. p. 11, 28). Mr. Boehmer informed B.J.'s grandmother of the status of the children and the petition for termination pending in North Dakota. (Tr. p. 11, 28-29).

9. There was no further contact between social services and B.J. until he was returned to North Dakota on extradition. (Tr. p. 11). Similarly, B.J. made no attempt to contact the children for any other reason, such as birthdays or Christmas. (Tr. pp. 11, 42).

10. On November 28, 2005, this matter came on before the Honorable Judge John E. Greenwood on petition for termination of parental rights of B.J. insofar as Sarah, Doug and Jenny were concerned. (Tr. pp. 4-6). K.A. had earlier in the day voluntarily

terminated her parental rights to Tom, Sarah, Doug and Jenny and did not actively participate in the trial for B.J.'s parental rights. (Tr. p. 5).

11. During the hearing, testimony indicated that: B.J. would be incarcerated until July 2006, in North Dakota; that some four-hundred (400) plus days had already accumulated of the children being placed in foster care; that B.J. did not have a steady income or home by choice; that even when he had custody of his children they spent the majority of their time living with relatives; finally, he failed to have any contact with the children since their removal in October of 2004. (Tr. pp. 43-44, 75-77).

12. Upon closing statements of parties the court found by clear and convincing evidence that Sarah, Doug and Jenny were deprived children. (Tr. p. 96-97). That the testimony indicated that the deprivation would continue if the children were returned to B.J. (Tr. p. 97-98). That the deprivation resulted in the children suffering and that continued deprivation would likely cause the children to suffer serious physical, mental, moral or emotional harm. (Appendix pp. 98-103).

LAW AND ARGUMENT

13. THE JUVENILE COURT'S FINDING, BY CLEAR AND CONVINCING EVIDENCE, THAT "SARAH", "DOUG" AND "JENNY" WERE DEPRIVED CHILDREN, THAT THE CONDITIONS AND CAUSE OF THE DEPRIVATION WAS LIKELY TO CONTINUE AND THAT THE CHILDREN WERE SUFFERING AND/OR LIKELY TO CONTINUE TO SUFFER SERIOUS PHYSICAL, MENTAL, MORAL OR EMOTIONAL HARM WAS NOT CLEARLY ERRONEOUS

14. A juvenile court may terminate a person's parental rights if it finds by clear and convincing evidence: (1) that the child was deprived, (2) that "the conditions and causes of the deprivation are likely to continue or will not be remedied," and (3) "that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm." N.D.C.C.§ 27-20-44 (1)(b) and (1)(b)(1).

15. The juvenile court's findings of fact and order terminating parental rights will not be overturned unless clearly erroneous. N.D.R.Civ.P. 52(a); In the Interest of M.B., 2006 ND 19, ¶ 13, 709 N.W.2d 11, 17 (ND 2006). A finding is clearly erroneous if there is no evidence to support it, the finding was based upon an erroneous view of law or after full review of the record this Court firmly believes that the finding was based upon mistake. Adoption of S.R.F., 2004 ND 150, ¶ 8, 683 N.W.2d 913 (ND 2004).

16. A. The Children Are Deprived

17. A child is "deprived" if that child:

> 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[.]

N.D.C.C. § 27-20-02(8). Further, this Court has defined "proper parental care" as the minimum standard of care necessary for which the community will tolerate. In the Interest of J.R., 2002 ND 78, ¶ 9, 643 N.W.2d 699 (N.D. 2002).

18. B.J. does not dispute the fact that Sarah, Doug and Jenny were deprived children. Indeed the case history indicates that the children were found to be deprived initially on October 26, 2004, and subsequently on December 13, 2004. (Appendix p. 10-11, 19-22). The juvenile court's initial finding of deprivation was based upon evidence and admission that the children were left unattended on several occasions; that the children were not properly supervised in that they were allowed to wonder away from the family residence; that the hygiene of the children was alarming; that the children were improperly clothed; and that the mother, K.A., had generally refused to cooperate with social services in order to prevent removal. (Appendix p. 6, 10).

19. The record does indicate that B.J. is not merely an innocent bystander in the children's deprivation. By investigation of the Legal Guardian Ad Litem as well as testimony during trial B.J. admitted to having an on-again, off-again custodial parental status with the children. (Appendix p. 56-57). During the on-again status of his relationship he would rely on his aged grandmother, his cousin, a girl named Amanda, and the wife of a friend (whom B.J. claims is his supervisor in a "come and go as you please" type of employment relationship). (Tr. pp. 52-57). Moreover, his reliance on

these people was nearly total in that these friends and relatives apparently parented the children full-time, while B.J. would merely "pitch in" money from time-to-time for diapers and food. (Tr. pp. 52-55). Lastly, Mr. Boehmer testified at trial that the children's hygiene and the family residence was far below the minimum acceptable standard on the day of removal; B.J. testified that he had just cleaned the residence and the children shortly before the removal. (Tr. pp. 62-63).

20. The evidence, including B.J.'s own admissions is clearly sufficient to support a finding that Sarah, Doug and Jenny were deprived children.

21. B. The Deprivation Was Likely To Continue.

22. The State also must show that the deprivation is "likely to continue or will not be remedied". N.D.C.C. § 27-20-44(1)(b)(1). A finding that the deprivation is "likely to continue or will not be remedied" cannot be based solely upon evidence of past deprivation, but must include predictive or prognostic evidence. In the Interest of D.Q., 2002 ND 188, ¶ 21, 653 N.W.2d 713 (N.D. 2002). Such predictive or prognostic evidence may include some reflection of the past as well as a combination of many other factors including the parents background, past history of deprivation or abuse, lack of cooperation with social services and expert testimony or reports if available. In the Interest of A.K., 2005 ND 3, ¶ 8, 696 N.W.2d 160 (N.D. 2005). Accordingly, a court may also consider a parent's own voluntary actions in making themselves unavailable to parent. Id.

23. B.J. asserts that there was no evidence at trial to show that the deprivation was likely to continue or not be remedied. However, the evidence and testimony at the

hearing clearly showed that B.J. would not, in any acceptable time frame, remedy the deprivation and make himself available to properly parent Sarah, Doug and Jenny.

24. Testimony at the hearing showed that B.J. had not seen or contacted Sarah, Doug or Jenny since October 20, 2004, and in fact that he had not even attempted to contact the children at any time while they were in foster care. When asked about his failure to contact the children, he claimed that some "District Attorney" had told him he could not have contact with the children while he was incarcerated. (Tr. pp. 57-58). B.J. could not explain why he failed to keep the scheduled supervised visit he arranged with Mr. Boehmer or why he failed to contact the children or social services in the six weeks he spent in Oklahoma before being incarcerated there for burglary. (Tr. p. 60). Sarah, Doug and Jenny "should not be expected to wait or assume the risk involved in waiting for permanency and stability" because B.J. unreasonably failed to make himself available to the children and social services. In the Interest of A.K., 2005 ND 3, ¶ 8, 696 N.W.2d 160 (N.D. 2005).

25. The evidence shows that whenever possible, B.J. "cuts and runs" from the responsibility of being a parent. B.J.'s own testimony indicates that he left the children to others if at all possible. Evidence indicated in 2002, B.J. had custody of the children and during that time he could not provide a stable environment for them. His own testimony indicated that he generally had Sarah and Jenny living with his seventy year old grandmother and his twenty two year old cousin: Doug lived with a lady who B.J. could only recall as "Amanda", and when that did not work he had the wife of a friend watching them. (Tr. pp. 52-56). K.A., herself, reported to the Guardian Ad Litem that when B.J.

had the kids he would generally leave them with his grandmother and run "around, doing drugs and getting into trouble." (Appendix p. 80).

26. Additionally, B.J.'s own criminal background and incarceration's are indicative of continuing deprivation. Within the four to five weeks that B.J. resided in North Dakota before the removal of the children he committed two misdemeanor disorderly conducts and a felony theft crime. (Appendix p. 56). He was incarcerated on the theft charge until February, 2005; after his release, B.J. immediately fled the state for Oklahoma while on supervised probation. (Tr. p. 73). Within six weeks of relocating to Oklahoma, B.J. was once again incarcerated. (Tr. p. 60). After completing his incarceration in Oklahoma he was extradited back to Stutsman County, North Dakota, where his probation was revoked. He has since been incarcerated in the Stutsman County Correctional Center and will be until July 20, 2006. (Tr. p. 66). B.J.'s perpetual incarcerations indicate that his "inability to properly care for the child[ren] will continue long enough to render improbable the successful assimilation of the child[ren] into a family." In the Interest of T.F., 2004 ND 126, ¶ 12, 681 N.W.2d 786 (N.D. 2004).

27. The juvenile court clearly had sufficient evidence and testimony to find that the deprivation of Sarah, Doug and Jenny was likely to continue and not be remedied by B.J.

28. C. The Children Were Suffering Harm.

29. Finally, a termination of parental rights requires the court to find that the children are "suffering or will probably suffer serious physical, mental, moral, or emotional harm." N.D.C.C.§ 27-20-44 (1)(b)(1).

30. It is clear in this case that the children were suffering at the time of the shelter care removal. They were filthy, without proper supervision, living in an unsafe environment and were left to the care of people who were incapable of providing proper care or who were hardly even known to the parents, and had improperly fitted clothes and no toys.

31. It is also clear from the evidence and testimony that the children would probably continue to suffer from the lack of stability and proper parenting. B.J.'s own incarceration and lack of contact, as well as K.A.'s disengagement, have left the children to rely entirely upon the love and affection of foster parents. In fact testimony shows that in foster placement the children have "blossomed" quite well, to the point of overcoming some developmental issues in a short period of time. (Tr. pp. 12-14).

CONCLUSION

32. For the foregoing reasons, petitioner and appellee, Don Boehmer, respectfully requests that the Court affirm the juvenile court's findings and its order terminating the parental rights of B.J.

RESPECTFULLY SUBMITTED this 29th day of June, 2006.

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