

**ORIGINAL** (*l-filed*)

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20060337

IN THE INTEREST OF D.C.S.H.C., A CHILD

20060338

TAMERA RESSLER, L.S.W., Petitioner & Appellee

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

V.

K.C., Respondent & Appellant

MAR 13 2007

J.B., J.D., B.C., AND DIXIE EVANS OR DESIGNEE,  
LAY GUARDIAN AD LITEM, Respondents

STATE OF NORTH DAKOTA

Supreme Court Nos. 20060337 & 20060338  
Cass County Nos. 05-R-0183 & 05-R-1055

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**APPELLANT'S BRIEF**

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APPEAL FROM THE JUVENILE COURT'S FINDING OF FACTS AND ORDER FOR TERMINATION DATED APRIL 13, 2006, AND THE DISTRICT COURTS MEMORANDUM OPINION AND ORDER DATED NOVEMBER 2, 2006, IN THE COUNTY OF CASS, STATE OF NORTH DAKOTA. THE HONORABLE JANICE JOHNSON PRESIDING IN JUVENILE COURT AND THE HONORABLE JOHN IRBY PRESIDING IN DISTRICT COURT.

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**[1]ISSUES**

[2]Whether the juvenile court advised its discretion in denying Kimberly's motion to continue termination proceeding.

### **[3]STATEMENT OF THE CASE**

[4]On April 13, 2006, the Juvenile Court of the East Central Judicial District, County of Cass, State of N.D., entered its Findings and Order terminating the parental rights of Appellant, Kimberly Cunningham with respect to her daughter, D. (A. 4). Kimberly requested the matter be reviewed by the District Court. (A. 3). The District Court's recitation of the procedural background in its Memorandum Opinion, dated November 2, 2006, and Order is accurate and adopted by Kimberly for purposes of this appeal.

[5]D. was born February 18, 2005, in Jamestown, North Dakota, while the Respondent was committed to the North Dakota State Hospital. On the same day, the State brought a petition pursuant to N.D.C.C. § 27-20-02, alleging D. was a deprived child. Also on February 18, 2005, the Judicial Referee issued an ex parte emergency order temporarily removing D. from her parents' custody and placing her in the custody of Cass County Social Services.

[6]On February 22, 2005, the Judicial Referee issued Findings of Fact, Conclusions of Law, and a Shelter Care Order. The Referee found probable cause to believe D. was deprived pursuant to N.D.C.C. § 27-20-02, reasoning:

[7]Mom is in the North Dakota State Hospital and Dad is in Cass County Jail and thus unavailable. Beyond the immediate circumstances, the parents are homeless and drug addicts with criminal activities and mental health issues, and both have prior histories of child protection, with the mother having two older children that are not in her care, and the father having five prior children and his parental rights to all five have been terminated.

[8]Further, the Referee found reasonable efforts to prevent the removal from the home were not required because the Respondent was in the State

Hospital and the Dad was in Cass County Jail. The Referee ordered D. to be under the temporary custody of Cass County Social Services for Foster placement. The Respondent objected.

[9]On March 16, 2005, the Referee issued an order continuing the foster care and Cass County Social Services' temporary custody. The Referee found probable cause to believe the child is deprived according to statute and found all reasonable efforts had been made to prevent the need for removing the child from her home and to make it possible to return the child to her home. On April 7, 2005, the Referee ordered genetic testing to determine if Jeffrey Ball was the father. The tests determined him to be the biological father.

[10]On June 22, 2005, the matter came on for trial before the Cass County Juvenile Court. The Referee signed an Order on August 12, 2005, finding, among other things, D. to be a deprived child and her parents have subjected her to "aggravated circumstances" as defined in N.D.C.C. § 27-20-02(3). On September 9, 2005, the Referee ordered review of custody for the purpose of making further recommendations to the Court concerning custody, including whether or not to terminate parental rights.

[11]The State thereupon filed a Petition to Terminate Parental Rights on October 26, 2006. The Petition for Termination came on for trial and was heard on March, 15, 16, and 17, 2006. On April 13, 2006, the Referee found clear and convincing evidence that D. comes within the provisions of the Uniform Juvenile Court Act N.D.C.C., N.D.C.C. § 27-20, and the Respondent's parental rights with reference to D. were terminated. (A. 5).

[12]Kimberly filed her Notice of Appeal on November 20, 2006. (A. 14)

### [13]STANDARD OF REVIEW

[14]The exercise of the trial court's discretion concerning a prisoner's right to appear personally in a civil action will not be overturned by this court in the absence of an abuse of that discretion which [this Court] has defined as an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court.

[15]Wall v. Pennsylvania Life Insurance Co., 274 N.W.2d 208 (N.D. 1979).

## [16]RELEVANT FACTS

[17]The trial on petition to terminate the parental rights of Kimberly commenced on March 15, 2006. (T.5, Vol. I).

[18]Prior to commencement of trial, Kimberly was transferred to a correctional facility in Shakopee, Minnesota. (T.20, Vol. I). As a result of Kimberly residing in a Minnesota prison, she would not be able to participate and assist in cross examination or other aspects of the trial. (T.21, Vol. I). Kimberly was only allowed to be present at the trial when her case worker at the Shakopee prison was available. (T55, 85, Vol. I). (T1, March 16, Morning), (T.5, March 16, afternoon), (T.50, March 17). With the exception of a short session on March 15, Kimberly was only allowed to participate in the trial for approximately one hour on March 17, when she testified. (T87, March 17). Kimberly's trial counsel objected to the trial commencing without his client's ability to participate based upon fundamental due process issues. (T21, Vol. I). The trial court ruled to go forward with the termination hearing. (T24, Vol. I).



## [19]ARGUMENT

[20]The established method of analysis of Due Process issues in termination of parental rights cases is the balancing test of Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct 893 (1976). This test balances the private interests at stake, the risk of erroneous deprivation created by the procedure used and the countervailing government interest in avoiding the financial and administration burden of lengthy litigation Lassiter v. Dept. of Social Services, 452 U.S. 18, 101 S. Ct. 2153 (1981).

[21]Kimberly has a right to due process of law in parental termination proceedings. The United States Supreme Court has continued its long tradition of finding parent/child relationships within the protection of the due process rights of the Fourteenth Amendment. at least when the termination of parental rights is at stake. In M.L.B. v. S.L.B., 117 S. Ct. 555 (1996), the high court characterized deference to be granted cases involving the termination of parental rights. Although M.L.B. concerned the right of indigent parents to a free transcript, the High Courts' holding regarding due process is relevant here. Choices about marriage, family life, and the upbringing of children are among associational rights this court has characterized as "of basic importance in our society, rights sheltered by the "Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." Id. "We approach M.L.B.'s petition mindful of the gravity of the sanction imposed on her in light of two prior decisions most immediately in point: Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981), and Santosky v. Kramer, 455 U.S. 745 (1982)." Id.

[22]The Lassiter Court considered it "plain that a parent's desire for and the right to the companionship, care, custody, and management of his or her

children is an important interest.” one that “undeniably warrants deference and, absent a powerful countervailing interest, protection.” Lassiter at 27. The purpose of the proceeding is “not simply to infringe upon the parent’s interest, but to end it.” Id. For that reason, “a parent’s interest in the accuracy and justice of the decision is a commanding one.” Id. at 39.

[23]Although both Lassiter and Santosky resulted in divided opinions, the Court was unanimously of the opinion that “the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment. Santosky, at 774. It was also the Court’s unanimous view that “few consequences of judicial action are so grave as the severance of natural family ties.” Id. at 787.

[24]Under North Dakota law, a person convicted of a crime retains the civil right to sue and be sued. In re J.S.P.L., 532 N.W.2d 653, 658 (N.D. 1995) (citing N.D. Cent. Code § 12.1-23-02). However, “[t]he sixth amendment right to confront and cross examine witnesses applies to criminal prosecutions, not to civil proceedings for termination of parental rights.” Id. at 660. Thus, this Court held in In re F.H., 283 N.W.2d 202, 209 (N.D. 1979), that an incarcerated person does not have a constitutional right to personally appear at a proceeding for the termination of parental rights. Rather, a prisoner’s due process rights are satisfied when he or she has been represented through counsel and has appeared by deposition or other method, where appropriate. Id.

[25]In F.H., the incarcerated father asked to appear personally at the termination of parental rights hearing. Id. at 206. According to the court in that case:

[26]In making its determination the trial court may take into account

the costs and inconvenience of transporting a prisoner from his place of incarceration to the courtroom, any potential danger or security risk which the presence of a particular inmate would pose to the court, the substantiality of the matter at issue, the need for an early determination of the matter, the possibility of delaying trial until the prisoner is released, the probability of success on the merits, the integrity of the correctional system, and the interests of the inmate in presenting his testimony in person rather than by deposition.

[27]Id. at 209 (citation omitted). The father, while not personally present, was represented by counsel and appeared by deposition. Id. at 209. This court also noted the interest of the child, especially an infant, to have a speedy resolution to the adoption proceeding. Id. at 210. Finally, this court rejected the father's claim that he was not able to refute the mother's testimony as to his fitness because he was not personally present. Id. The father and his counsel had opportunities throughout the process to rebut conflicting claims, so he could not claim a denial of due process rights after he stood by and failed to use means protecting those rights. Id.

[28]In In re J.M.H., the father testified by telephone and was represented by his court appointed counsel. 1997 ND 99, ¶ 3, 564 N.W.2d 623, 625. While conceding that he did not have a right to appear personally, he argued his due process rights were violated because he was unable to communicate with his attorney during the proceeding, and because he could have testified by deposition or by written interrogatories. Id. ¶ 17, 564 N.W.2d at 627. This Court rejected these contentions, however, because nothing in the record showed an inability to communicate with his counsel. Id. ¶ 19, 564 N.W.2d at 627. He was able to

testify by telephone, and responded to a question from his counsel regarding his relationship with his son. *Id.* Thus, his due process rights were not violated. *Id.*

[29] In *In re J.S.P.L.*, the father argued that his due process rights were violated when he was not able to personally confront and cross-examine the witnesses at the adoption hearing. 532 N.W.2d at 657. This case differed from previous cases because of the father's pro se status. *Id.*, at 658. First, this Court noted that, while not an express constitutional right in civil cases, the denial of the right to confront witnesses in a case affecting the parent child relationship may offend due process. *Id.* at 660. This court, in balancing the interests of the father and the State, found no due process violation because of the State's interests in the emotional and psychological well-being of the child, as well as the trial court's interest in managing security risks and potential danger. *Id.* at 662-63.

[30] The facts of the present case are distinguishable from the above cited cases. This Court in *F.H.*, noted, "[a]ny right to appear personally would have to rest upon convincing reasons and would ultimately be left to the sound discretion of the trial court." 283 N.W.2d at 209. For example, in *J.S.P.L.*, the father was incarcerated for murdering the children's mother in their presence, thus providing a strong interest for the state in maintaining the children's emotional and psychological well being by not allowing the father to personally appear. 532 N.W.2d at 662-63. The facts in the instant case certainly are not as severe, and thus the balancing of interests may shift. The risk of danger may also be less than in *J.M.H.*, where the father had made continual threats to the adoptive father. 1997 ND 99, ¶ 15, 564 N.W.2d at 627.

[31] In *Walbert v. Walbert*, 1997 ND 164, ¶ 9, 567 N.W.2d 829, 832, this Court recognized that "[p]rocedural due process requires fundamental fairness,

which, at a minimum, necessitates notice and a meaningful opportunity for a hearing appropriate to the nature of the case.” Walbert involved an incarcerated father who was not represented by counsel in a parental rights termination, nor was he allowed to appear at the proceeding by telephone or other means. *Id.* ¶ 10, 567 N.W.2d at 832. The trial court offered no justification for its ruling on the request to appear by telephone. *Id.* ¶ 6, 567 N.W.2d at 831. This court concluded this denial by the trial court violated due process, as the father had no reasonable access to the court. *Id.*

[32] In the instant case, while Kimberly was accorded court appointed counsel and the ability to testify by telephone during the proceeding, her telephonic appearance was allowed only for a few hours of the three day proceeding. She was left out of the remainder of the hearing. Thus, this case lies somewhere in between Walbert and the case law cited above. She was not completely excluded like the father in Walbert, as she had court appointed counsel and was given telephonic access to a part of the hearing. However, she also was not able to appear by telephone for the entire hearing, as the parent in J.M.H. was apparently permitted to do. The language from F.H. specifically states a “convict does not have a constitutional right to personally appear in a civil suit where he has been permitted to appear through counsel and by deposition, if appropriate.” 283 N.W.2d at 209 (emphasis added). Kimberly was not given proper access to the courts, as she was denied telephonic appearance for the majority of the hearing. To analogize, the court surely would not approve if she had the assistance of counsel for only a few hours of the three day hearing; thus, it should be no different if she was only able to appear telephonically for the same amount of time.

[33] At least one case from another jurisdiction addressed due process issues when, as in the instant case, the inmate was incarcerated in a state other than the one conducting the proceeding. In *re Baby Doe* involved a due process claim from an inmate father, incarcerated in a federal prison in Texas, who was denied a personal appearance at a termination proceeding in Idaho, 936 P.2d 690 (Idaho Ct. App. 1997). The father's attorney had filed a motion for writ of habeas corpus ad testificandum requiring the state to transport the father to the Idaho hearing. *Id.* at 692. Authorities had declined to provide transportation because of the nature of the proceeding, the cost, and security issues. *Id.* at 692 & n.l. 693 (quoting then current version of 28 C.F.R. § 527.31(g) ("Transfers in civil cases pursuant to a writ of habeas corpus ad testificandum must be cleared through both the Regional Counsel and the Warden. Transfer ordinarily shall be recommended only if the case is substantial, where testimony cannot be obtained through alternative means such as depositions or interrogatories, and where security arrangements permit.... There is no presumption that an inmate must be released in state civil cases.")).

[34] The magistrate denied the writ, and provided detailed rationale for doing so. 936 P.2d at 693. The father was, however, permitted to give his testimony by telephone deposition. *Id.* The appellate court upheld the denial of the writ, noting the majority rule that "appointment of counsel for an indigent out of state prisoner assures effective access to the courts, and the opportunity to present the prisoner's testimony by way of deposition affords the prisoner the ability to meet issues raised in a termination proceeding so that he is not denied due process when rendered unable to appear and testify in person." *Id.* at

694. The Idaho Court located only one contrary ruling, where the Kansas Supreme Court held that an in state prisoner must be given the opportunity to personally appear even though represented by counsel in the termination proceeding. *Id.* at 695 (citing *In re S.M.*, 738 P.2d 883 (Kan. Ct. App. 1987)).

[35]As noted by the Idaho Court, the Kansas Supreme Court's opinion does not consider the constitutional sufficiency of appearance by deposition. *Id.* at 695. Instead, the Kansas court spoke of the importance of the interest in family and stated:

[36]Although the appellant was represented by counsel at the severance hearing, appellant was denied the opportunity to be heard; he could not present any of his testimony in defense of the allegations of unfitness. The appellant was neither given a "day in court" nor a "full and ample opportunity to be heard." Furthermore, a recognized benefit of an interested party's presence in court is his ability to assist his counsel. This too, arguably, inured to appellant's disadvantage. The right to custody of one's children being of constitutional gravity, a parent must be afforded the opportunity to be present at a severance hearing. Because appellant was denied this opportunity, he was denied one of the "essential elements" of fundamental due process. *In re Reed*, 8 Kan.App.2d 602, 608, 663 P.2d 675 (1983). For this reason, the case must be reversed and remanded.

[37]*S.M.*, 738 P.2d at 885.

[38]CONCLUSION

[39]As a result of the Juvenile Court's denial of Kimberly's Motion for Continuance due to her inability to participate in the termination proceedings, as well as the District Court's affirmation of said denial, Kimberly was deprived of her due process rights and is entitled to a new trial.

[40]Dated this 13th day of March, 2007.

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AFFIDAVIT OF SERVICE

The undersigned, first being duly sworn and upon oath, deposes and states that she is of legal age and that on the 15<sup>th</sup> day of March, 2007, she served the following document(s):

- APPELLANT'S BRIEF AND APPENDIX

On the following person or persons:

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By serving a true and correct copy thereof to the above named person(s).

FURTHER THIS AFFIANT SAYETH NOT.

\_\_\_\_\_  
Diane Beaton

Subscribed and sworn to before me this 15<sup>th</sup> day of March, 2007.

\_\_\_\_\_  
Notary Public