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20060337

20060338

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
SUPREME COURT
APR 11 2007

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

Tamera Ressler, L.S.W.)
)
 Petitioner and Appellee.)
)
 vs.)
 K.C.,)
 Respondent and Appellant.)
)
 Director, Cass County Social Services.)
 J.B., John Doe, B.C.(n/k/a D.C.S.H.S),)
 Gene Doeling, Guardian ad Litem. and)
 Kathy Kassenborg, Lay Guardian ad Litem,)
 Respondents.)
)

Supreme Court Nos. 20060337 &
 20060338
 (Cass Co. Nos. 09-05-R-00183 &
 09-05-R-01055)

FILED
 IN THE OFFICE OF THE
 CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

APPELLEE'S BRIEF

APPEAL FROM THE MEMORANDUM OPINION AND ORDER ON REQUEST FOR REVIEW ENTERED NOVEMBER 2, 2006.

East Central Judicial District, The Honorable John C. Irby, District Judge.

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ISSUES PRESENTED

- I. WHETHER THE PETITIONER ESTABLISHED THROUGH CLEAR AND CONVINCING EVIDENCE TERMINATION OF PARENTAL RIGHTS IS JUSTIFIED UNDER N.D.C.C. 27-20-44.
 - a. WAS THE CHILD A "DEPRIVED CHILD"
 - b. IS THE DEPRIVATION LIKELY TO CONTINUE
 - c. WILL THERE BE HARM TO THE CHILD

- II. WHETHER THE DISTRICT COURT JUDGE ERRED IN THE REVIEW AND IN AFFIRMING THE JUVENILE REFEREE'S DECISION.

- III. WHETHER THE JUVENILE COURT REFEREE ERRED IN DENYING K.C.'S MOTION TO CONTINUE AT THE TIME OF THE TRIAL.

STATEMENT OF THE CASE

This is an appeal from the Memorandum Opinion and Order on the Request for Review dated April 21, 2006, filed by the Respondent Mother, K.C. (“Karen”)¹, which affirmed the Order issued by Judicial Referee Janice Benson Johnson, dated April 13, 2006. The Referee’s Order granted the Petitioner’s petition for termination of the parental rights of the mother, Karen and the possible fathers, J.B. (“Jack”), and John Doe to the child, Baby C. (n/k/a D.C.S.H.C) “Debbie.”

On October 25, 2005, a petition was filed by Tamera Ressler, a Social Worker with Cass County Social Services seeking termination of parental rights with regard to the child Debbie, who was born February 18, 2005. This matter was tried before the judicial referee on several dates, ending March 17, 2006. The matter was taken under advisement, and an order was issued April 13, 2006, terminating parental rights.

The mother requested a review by the District Court on April 21, 2006. The District Court, pursuant to North Dakota Supreme Court Administrative Rule 13, performed “a de novo review of the record.” As a result of that review, The Honorable John C. Irby, District Judge, determined that the burden under the statute for termination of parental rights had been met, that reasonable efforts were not required in the case based upon the prior findings of the Court, and that Karen was not denied her right to a full and fair hearing when the Judicial Referee denied her motion for continuance based upon her

¹The names of the parties are pseudonyms.

inability to attend the trial² and issued a Memorandum Opinion and Order on November 2, 2006.

The mother filed this appeal. No other respondent joined in the Request for Review, nor this appeal.

²Memorandum Opinion and Order. The Honorable John C. Irby, District Judge, dated November 2, 2006.

STATEMENT OF THE FACTS

The main theme of this case is that the mother of the child, Karen, is a highly intelligent individual, who is also a sociopath.

Karen has a lengthy criminal history, primarily being convicted of thefts due to deceptions or stealing identities, as well as a lengthy history of chemical usage, primarily cocaine.

When Karen's behaviors get her into situations that she finds unpleasant, she engages in manipulation, including suicide attempts, to obtain the results she desires, usually release from incarceration and placement in a medical facility.

Karen has spent the majority of her life in Minnesota, however in February 2005 was in Cass County, North Dakota, staying in a hotel in West Fargo. A drug raid was done of the hotel room, and Karen, then in late stages of pregnancy, was exhibiting classic signs of methamphetamine use. Over the next few weeks, Karen was jailed, repeatedly assessed for involuntary commitment, and bounced between jails and hospitals.

Karen's behaviors and statements regarding her unborn child reached a fever pitch when she was stating that she intended to hurt the child, and was causing bleeding and striking her stomach.

Cass County Social Services prepared a pre-emptory petition, and when notified that she was giving birth in Jamestown, filed the Petition and received an Emergency Placement Order for the child. The child was placed in foster care, and has struggled due to significant health issues.

Shortly after the birth of the baby girl, Debbie, Karen was released from the North

Dakota State hospital. She was out of jail for less than one month, and beginning in March of 2005, has been incarcerated in a series of jails and institutions due to wide spread criminal activity in North Dakota and Minnesota.

Karen manipulates the judicial system, the corrections system and the mental health system by malingering, suicide attempts and outright threats. Her behaviors are unlikely to change, and she is incarcerated for a significant period of time, so that the child needs permanency.

This appeal follows a successful trial before a Judicial Referee and a de novo review by the District Court granting termination of parental rights.

The child's father, Jack, was incarcerated at the time of trial, and offered an affidavit to voluntarily terminate his parental rights. (Transcript I, Pg. 10)³ Jack testified that he did not believe the problems he and the mother would be resolved for an extended period of time.(Transcript I, Pg. 15)

In addition, Jack testified that Karen had called him while she was incarcerated, and approximately three weeks prior to trial (Transcript I, Pg. 16) and told Jack that she had a "dirty UA" (Transcript I, Pg. 17) during a recent shakedown at the jail, and that the substances causing the "dirty UA" were methamphetamine and marijuana. (Transcript I, Pg. 17)

Thus, the remainder of the trial focused on the mother, Karen.

³There were four trial transcripts prepared, and only Volume I was numbered. As used in this brief, Volume I refers to the transcript from March 15, 2006; Volume II refers to the transcript prepared of the morning of March 16, 2006; Volume III refers to the transcript prepared of the afternoon of March 16, 2006; And Volume IV refers to the transcript prepared of the transcript of March 17, 2006.

At the outset of the trial, Mr. Nesheim noted that he had presented, and the Court had signed, a writ on February 17, 2006, for Karen's presence at trial. However, due to Karen's incarceration in Shakopee, Minnesota, she was not transported to the Court in Fargo for the proceeding. (Transcript I, Pg. 20)

The Court denied the request for a continuance. (Transcript I, Pg. 24) noting that the Court had done what it could to assure Karen's presence.

Karen then personally requested a continuance, as she noted she was planning to hire a new attorney with some money she anticipated receiving due to the recent death of a distant relative.

The Court also denied that request, noting that her appointed legal counsel was "very conscientious" and that the trial date had been known for a long time. (Transcript I, Pg. 26) Karen participated in the trial via phone, testified on her own behalf, and was represented by counsel throughout the trial.

The Petitioner, Tamera Ressler, an assessment worker with Cass County Social Services, testified that she received a Report of Suspected Abuse or Neglect of a Child regarding "Baby C" about eight days prior to the birth of Debbie. (Transcript I, Pg. 30) The report identified that the unborn child had been exposed to drugs prenatally. (Transcript I, Pg. 30)

As a result of that receiving that report, and the information gathered from other counties that had dealt with Karen, Ms. Ressler prepared an affidavit in anticipation of the "Baby C's" birth. (Transcript I, Pg. 30)

When the birth of "Baby C" was imminent, Ms. Ressler presented her affidavit to

the Court and requested an emergency placement due to Karen's drug use, criminal activity, homelessness, transience, living arrangements, prior child protection history and mental health concerns. That Emergency Order was granted. (Transcript I, Pg. 32), and within hours Debbie was born in Jamestown, ND.(Transcript I, Pg. 33) Karen was at the North Dakota State Hospital at the time of the birth, where she had been sent from the Cass County Jail.

Amy Haag, a Social Worker from Stearns County, Minnesota, testified that she had worked with Karen beginning June 2, 2004, with regard to Karen's older child, B.L. (DOB:7/20/1995). Stearns County had removed B.L. from Karen's custody due to Karen's chemical use, mental health and safety concerns (of the child) surrounding drug issues.(Transcript I, Pg. 40)

Efforts to reunify B.L. with Karen, because Karen did not comply with any aspect of her reunification/treatment plan. (Transcript I, Pg. 41)

A petition for termination of parental rights was filed regarding B.L. (Transcript I, Pg. 43) . and on September 25, 2005, a permanent transfer of physical and legal custody was granted to paternal relatives.(Transcript I, Pg. 44)

Tracy Leingang, the case manager for Debbie at Cass County Social Services, testified that Debbie has never been out of foster care. (Transcript I, Pg. 47)

Leingang also testified that Karen was released from the North Dakota State Hospital shortly after Debbie's birth, and was provided expanded visitation (Transcript I, Pg. 51) with Debbie until Karen was incarcerated on March 11, 2005, less than a month later. Karen had been incarcerated continuously ever since. (Transcript I, Pg. 47)

During Ms. Leingang's involvement, Karen's criminal activities had resulted in

incarceration in Stearns County, Kandiyohi County, Sherburne County, and at the state facility in Shakopee, Minnesota. In North Dakota, Karen had been in Cass County Jail, Stutsman County Jail, and also at Meritcare Hospital in Fargo, and the North Dakota State Hospital. (Transcript I, Pg. 47)

Ms. Leingang testified that during the initial period following Debbie's birth, a treatment plan was developed. (Transcript I, Pg. 48) This treatment plan was not successfully completed.

In addition to being unavailable due to successive incarcerations, Karen did not engage in the anticipated assessments and evaluations. This was due in part to her rapidly changing location, but also due to her refusal to release information to evaluators. (Transcript I, Pg. 49)

At the time of trial, Karen was not available, and the end date of her current sentence was July of 2006. Karen had an additional two year sentence from Stutsman County, and there were additional pending criminal matters. (Transcript I, Pg. 53)

While visitations had been expansive at the outset, by December of 2005, Ms. Leingang was advised by prison officials that Karen's behaviors were manipulative, impulsive and very extreme, and there was concern about the risk posed by visitations with the young child. (Transcript I, Pg. 53)

Ms. Leingang also testified that when Debbie was born, she tested positive for cocaine. Additionally, she has a heart murmur, her eyes do not track, she is unable to bear weight on her legs and is walking on her tiptoes, and doctors feel that she had a stroke in utero and possibly has cerebral palsy. (Transcript I, Pg. 59)

The Petitioner offered numerous exhibits establishing a pattern of criminal

behavior over a significant period of time leading up to and after the birth of, Debbie.

Detective Tim Runcorn, West Fargo Police Department, testified that he had contact with Karen on February 8, 2005. at Meritcare Emergency Room. (Transcript III. Pg. 12)

Detective Runcorn, identified that he is trained as a "Drug Recognition Expert", trained to identify individuals who are under the influence of controlled substances. (Transcript III, Pg. 9)

Runcorn described Karen as "pregnant, but also under the influence or using some type of drugs that evening." (Transcript III, Pg. 12) Runcorn noted that during his observations of Karen, she was perpetually scratching her arms. (Transcript III, Pg. 15) her emotions were "up and down", she appeared unkempt. (Transcript III. Pg. 14). her toes were twitching and fluttering, her arms were doing quick movements. (Transcript III, Pg. 17) and when Runcorn asked her a question, "she would possibly give you a 15. you know 10, 15 minute answer; but the first 10 minutes of it were about something totally different." (Transcript III, Pg. 17) Karen admitted to drinking Canadian Mist (whiskey) that evening. (Transcript III. Pg. 16) and to being present when methamphetamine was smoked. (Transcript III, Pg. 17) While Karen refused a blood test and DRE screening tools. Runcorn was of the opinion that her behaviors were consistent with someone under the influence of methamphetamine. (Transcript III. Pg. 26)

Elizabeth Gravalin ,L.P.N. from Southeast Human Services testified that she had encountered Karen through the Emergency Services Unit of Southeast Human Services on February 14, 2005. following Karen`s arrest.

Following Karen`s arrest for credit card fraud, while en route to the jail. Karen had complained of vaginal bleeding. so she was taken to local Hospital and to the Emergency

Room. (Transcript I, Pg. 89)

Karen was medically cleared at the hospital. however, then stated that she was going to “harm her unborn child” by beating on her stomach, and was observed by medical staff to be digitally penetrating her vagina to induce bleeding. (Transcript I, Pg. 90)

Ms. Gravalin determined that Karen was not medically stable enough to be transported to the North Dakota State Hospital, and so Karen was transferred to the Psychiatric Unit at Meritcare, which is in Fargo. (Transcript I, Pg. 92)

The next day, February 15, 2005, Gravalin was again contacted and asked by Dr. Holm to do a screening for the North Dakota State Hospital. Gravalin met with Karen as a result of that second contact. Karen was at Innovis Hospital again, and under arrest, so a guard was posted outside her door.

During this face to face meeting, Karen stated to Gravalin that she had “schizo affective disorder” and a “poly substance dependence disorder,” with her drug of choice being cocaine.(Transcript I, Pg. 93) Karen also stated that she had consumed alcohol a “couple of days prior,” and her last cocaine use had been “a couple of months prior to that.”

Karen stated to Gravalin that she had “no feelings for her child.” Additionally, Karen stated that “her goal was to escape incarceration at any cost, even if that mean harming her unborn child.” Karen referred to her unborn child as a “heifer” and a “fat ass.”

While Gravalin authorized Karen for placement at the North Dakota State Hospital, that facility was full. Innovis Hospital was unable to keep the unborn child safe, because Karen was going into the bathroom and digitally penetrating her vagina to induce

bleeding.

Gravalin then called Psychiatrist Dr. Burd at Meritcare, and “basically begged and pleaded for him to admit her to Meritcare services with the understanding that as soon as a bed became available at the North Dakota State Hospital that I would have her transported there.”(Transcript I, Pg. 95) In order to secure this transfer, Gravalin also secured the release of Karen from custody after contacting Assistant Cass County State’s Attorney Aaron Birst, as Meritcare would not accept someone who was under arrest. (Transcript I, Pg. 95) Karen was escorted to Meritcare via ambulance with a police escort. (Transcript I, Pg. 96)

On February 16, 2005, Gravalin continued to work on this case, including reading Karen’s records, and meeting with her. Karen was transferred to the Emergency Room due to possible contractions, and then back to the Psychiatric Unit at South University. During this time, she continued to attempt to induce bleeding by digital penetration, prompting one-on-one monitoring.(Transcript I, Pg. 97)

It was clear to an observer that Karen was in the late stages of pregnancy. (Transcript I, Pg. 98)

When the N.D. State Hospital had a bed available on the 16th, Meritcare Hospital paid for the FM Ambulance to transport Karen because the Cass County Sheriff was unable to provide transportation. Karen was involuntarily committed to the North Dakota State Hospital.(Transcript I, Pg. 98)

Gravalin testified that she later learned, through her supervisory status at Southeast Human Services, that Karen was living at the Fargo YWCA on March 3, 2005, and was seeking a chemical dependency evaluation and a psychiatric evaluation in order to regain

custody of her child. While she did not follow through with those services, she did state in the process that she had “faked a schizo affective disorder in order to stay out of jail.”(Transcript I, Pg. 101)

Gravalin also testified that Karen again had contact with Gravalin’s unit at Southeast Human Services on March 3, 2006. Gravalin testified that Karen was at the Cass County Jail and had a “near fatal suicide attempt” when she “wrapped her bra around her neck, and was found by one of the jailers bleeding from the eyes and nose and foaming at the mouth” and was transported to the Emergency Room at Meritcare.(Transcript I, Pg. 101) As a result of that event, Gravalin was again in the process of screening Karen for involuntary commitment at the North Dakota State Hospital, when Cass County Jail notified Gravalin that Karen was being transferred to Shakopee correctional facility.(Transcript I, Pg. 102)

Michelle Forseman, C.N.A. at the Cass County Jail, testified that she had met Karen when Karen was incarcerated at the Cass County Jail first in February of 2005. (Transcript I, Pg. 107) During that first contact, on February 11, 2005, Karen was “complaining of labor pains, fluid leakage,” and was sent to Meritcare Hospital. Karen was returned to the jail, as she was not in labor, and the bleeding had been caused by Karen’s digital penetration of her vagina.

On February 13, 2005, Karen was again sent to the ER because she had inserted the “jail issued toothpaste tube up in her vagina trying to cause harm.”(Transcript I, Pg. 108)

Additionally, jail staff tried to monitor Karen during this period, as she was trying to “ram herself into the doors and walls,” apparently trying to harm the baby. (Transcript I, Pg. 108)

Ms. Forseman again had contact with Karen on March 1, 2006, at that Cass County Jail. Karen had been transferred from Stutsman county jail to attend this hearing. According to the admitting records, Karen had "a history of suicide attempts time three in the past six months."(Transcript I, Pg. 110)

Due to the information received from Stutsman County, Karen was placed in the Booking Area for Observation, which made her "very upset and angry."(Transcript I, Pg. 111) She remained in direct observation until the next day when she engaged in a suicide attempt.(Transcript I, Pg. 112)

Kimberly Zurn, Correctional Officer with the Cass County Jail, testified that she had contact with Karen on two occasions: February 12, 2005, and again on March 2, 2006.

During her first contact, Ms. Zurn was dispatched to "Charlie Pod" in the Cass County Jail, and arrived to find Karen squatting "over a pool of blood."(Transcript I, Pg. 116) During this contact, Ms. Zurn assisted Karen, then seven or eight months pregnant, into a bunk, while an ambulance was called. Karen stated to Zurn, "she had never meant to hurt the baby, she just wants out of jail."(Transcript I, Pg. 117)

While keeping Karen calm, Zurn noticed that Karen had dried blood in her nail beds. When they cleaned the cell, they noted that the toothpaste container had blood on the cap, indicating that it had been used to induce the bleeding. (Transcript I, Pg. 117)

Zurn also testified that during Karen's more recent stay at the Cass County Jail, on March 2, 2006, Karen had been moved from "Charlie Pod" down to booking for observation due to suicide watch. Because Karen's mail had been delivered to the Charlie Pod, Zurn brought it to the Booking area, and when she was going to slide the mail under the door at 6:15 p.m., she noticed that Karen's face was "very swollen." and that she was

“completely blue.”(Transcript I, Pg. 118)

Zurn radioed to open the door and went in to find Karen with a blanket pulled up to her neck, and under the blanket, had arranged the elastic from her waistband around her wrist, and also around her neck, and there was bloody fluid coming out of her eyes and a substance around her neck. Zurn testified that she thought Karen was dead from this self imposed stricture - a suicide attempt. (Transcript I, Pg. 120)

Katie Kuppich, Correctional Officer with the Cass County Jail, testified that she had contact with Karen on “several occasions” when Karen has been at Cass County jail.

On the most recent stay, Ms. Kuppich described Karen as “up and down” on March 2, 2006 - “at times lying down reading a book,” then “screaming and yelling about wanting to use the phone.” Kuppich described nurses talking with Karen that evening at about “quarter to six”, as she had been kicking the cell door, punching the cell door, yelling, and the nurses left after being unable to calm her down. Then at about 6:15, p.m. Kuppich was the officer responsible for calling the Ambulance when Zurn discovered Karen’s suicide attempt. (Transcript I, Pg. 124)

Kuppich then was with Karen on the transport to Shakopee the next day, March 3, 2006.

During this transport, Kuppich noted how the suicide attempt, and how close Karen had come to being successful. “[d]id not seem to phase her at all.” Kuppich noted that Karen stated: “Well, next time I want something, you better talk to me about it before it gets to that.” (Transcript I, Pg. 126)

Jeanne Weber, Stutsman County Jail Deputy Administrator testified that Karen had been at the Stutsman County Jail. Karen had arrived at the jail on October 23, 2005. Ms.

Weber's first contact was at Karen's request, because Karen wanted to make "numerous, numerous phone calls," and the jail had "cut her off" as she was not in a position to pay for them, which was the jail policy. (Transcript I. Pg. 135)

Weber described Karen as "extremely manipulative", and stated that she "really knows how to use people or abuse people." Additionally, Weber noted "when [Karen] couldn't get her way, then of course she would do the suicide thing" or threaten a law suit.(Transcript I. Pg. 135)

Weber described three suicide attempts that occurred at Stutsman County Jail, with the first on December 2, 2005. According to Weber, was prompted by a cell search, and Karen was found with a needle nose pliers inserted in her vagina, which was contrary to jail rules, as the pliers were contraband. (Transcript I. Pg. 136) Karen was being held in a suicide cell, and using the limited clothing she was given, fashioned a ligature, which resulted in "her face turning purple," and "blood coming out of her mouth and nose." Karen was transported to the Jamestown State Hospital.

This pattern was repeated on December 7, 2005, and again on December 20, 2005. With Karen using limited clothing to fashion a stricture for her neck, and being nearly successful in her attempted suicide, and going to the State Hospital. (Transcript I, Pg. 139) On the second attempt, she became physically violent to Stutsman jail staff and "threatened to kill one of our officers and her kids." (Transcript I. Pg. 139)

Mark Arneson, Security Case manager for Minnesota Department of Corrections testified that he was Karen's current case manager at Shakopee.(Transcript II, Pg. 47) Arneson related that Karen had "six [disciplinary] incidents since her incarceration at Shakopee.(Transcript II, Pg. 50) Thus, while Shakopee maintains a Parenting Unit, for

inmates with children, Karen is not eligible for that program due to her disciplinary actions, and she has not been eligible for programs. either.(Transcript II, Pg. 54)

Diane Hagen, Parent and Family Coordinator at Shakopee testified that she had contact with Karen during her initial stay at Shakopee, however. Karen has rescinded releases and has not engaged in services with Diane, thus. has not availed herself of the therapeutic opportunities afforded at Shakopee.(Transcript II, Pg. 62)

Dr. William Pryatel, psychiatrist with the North Dakota State Hospital. testified that he had contact with Karen at the North Dakota State Hospital.(Transcript II, Pg. 4)

The initial contact Dr. Pryatel had with Karen was in February of 2005.(Transcript II, Pg. 4) Dr. Pryatel had dealing with Karen repeatedly over the next year, following suicide attempts at the Stutsman County Jail.(Transcript II, Pg. 5)

Dr. Pryatel made an assessment of Karen based upon these repeat visits. his observations of her behaviors, as well as some formal testing, and the diagnosis made at the North Dakota State hospital was: Depressive Disorder, NOS, Anxiety Disorder, and malingering.(Transcript II, Pg. 7) as well as cocaine dependence by history, and Borderline Personality Disorder with "passive aggressive features", and antisocial.(Transcript II, Pg. 8)

In other words, Dr. Pryatel noted. Karen was "like a sociopath."(Transcript II, Pg. 8) Dr. Pryatel noted that we "don't really have very much – good treatment for–" these conditions.(Transcript II, Pg. 9) Dr. Pryatel noted that Karen's prognosis for change is "guarded."(Transcript II, Pg. 17)

Dr. Lincoln Coombs, psychologist at the North Dakota State hospital. testified that he had performed evaluations of Karen for the court, and noted that according to the

testing instruments he used. Karen had “a rather high degree of antisocial personality disorder.”(Transcript II, Pg. 23) Dr. Coombs noted that the prognosis for change for Karen, with regard to this disorder is “generally poor.”(Transcript II, Pg. 27)

Dr. Gulkin, a psychologist who evaluated Karen. Dr. Gulkin noted that as a result of his testing of Karen, there were notable results, including indicators that she was antisocial or paranoid (Transcript IV, Pg. 59)

Dr. Gulkin noted that individuals with the diagnosis he has given Karen benefit from chronological aging, as they become less impulsive, however, her own “history is not positive for the kinds of change in self control that is being looked for.” Dr. Gulkin continued, “I would have to say that clinically and statistically her ability to - - to make 180 degree change is unlikely.”(Transcript IV, Pg. 61)

Dr. Gulkin also noted that “a decision needs to be made quickly and I don’t believe we can take a child of the age that we’re talking about and drag this out for 3 to 4 years because there’s too much that happens psychologically during that time frame.”(Transcript IV, Pg. 63)

Dr. Joseph Belanger, psychologist also testified regarding his evaluation and contact with Karen. Dr. Belanger noted that in light of Karen’s diagnosis, his opinion was that “she would more likely than not do well during visitation.” But more importantly, he noted “I do not think she could stably (sic) look after the needs of a child on a day to day basis as a ... custodial parent.”(Transcript IV, Pg. 78)

ARGUMENT

I. WHETHER THE PETITIONER HAS PROVEN TERMINATION OF PARENTAL RIGHTS IS JUSTIFIED UNDER N.D.C.C. 27-20-44?

Termination of a parent's rights "must rest upon the attitude, conduct, ability, and such other matters relating to the parent's duties, responsibilities, and care for the child which ... are... collectively referred to as 'fitness.'" In the Interest of M.M.S., 449 N.W.2d 574. (citing McGurren v. S. T., 241 N.W.2d 690 (N.D.1976)).

N.D.C.C. 27-20-44(1)(b) creates a three-part test for termination of 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? Where clear and convincing evidence in the record affirmatively proves these elements, the juvenile court's decision terminating parental rights is affirmed. In the Interest of D.F.G. and E.K.B., 1999 ND 216, 602 N.W.2d 697 (citing In the Interest of A.M. and C.M., 1999 ND 195). The state must prove all three parts by clear and convincing evidence. In the Interest of A.S., 1988 ND 181, 584 N.W.2d 853 (citing In Interest of D.R., 525 N.W.2d 672, 673 (N.D.1994)).

A. WAS DEBBIE A "DEPRIVED CHILD"?

A "deprived child" is one who "[i]s 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(5)(a).

There is ample evidence in the record that Debbie is deprived, as set forth above.

Debbie was adjudicated a deprived child, and none of the events or circumstances that had prompted that finding had been successfully addressed. Both parents were incarcerated and unavailable, and would be for periods of time. Additionally, the mother had long standing and virtually un-treatable mental health issues which prevented her from engaging in a nurturing relationship with the child.

Karen engaged in active drug use and delivery to her fetus prior to birth, and as a result the child has special needs.

B. IS THE DEPRIVATION LIKELY TO CONTINUE?

While evidence of past or present deprivation alone is not sufficient to terminate parental rights, evidence of the parent's background, including previous abuse or deprivation, may be considered in determining whether deprivation is likely to continue. In the Interest of A.S., 1988 ND 181, 584 N.W.2d 853 (citing In Interest of L.F., 1998 ND 129). Because evidence of past deprivation alone is not enough, there must prognostic evidence forming the basis for reasonable prediction of continued or future deprivation. In re E.R., 2004 ND 202, ¶ 7, 688 N.W.2d 384; In re D.Q., 2002 ND 188, ¶ 21, 653 N.W.2d 713. Any prediction of the future requires some reflection upon the past conduct of the parties. In re T.F., 2004 ND 126, ¶ 19, 681 N.W.2d 786; In re D.Q., at ¶ 21. "When a parent, through voluntary actions, without reasonable justification, makes himself unavailable to care for and parent a young child, the child should not be expected to wait or assume the risk involved in waiting for permanency and stability in her life." In re A.K., 2005 ND App 3, ¶8.

Testimony by several mental health professionals provided the support that the deprivation is likely to continue. The diagnosed mental illness and behavior disorders

found in this mother, are not readily treatable, and Karen has shown no propensity to address these problems therapeutically.

“That special needs of children are relevant to a determination of whether there will be continuing or unremedied deprivation is a clearly established principle.” Heitkamp v. L.J., 436 N.W.2d 558 (N.D.1989) (See Jacobson v. V.S., 271 N.W.2d 562 (N.D.1978); Bjerke v. D.T., 248 N.W.2d 808 (N.D. 1976)) The record demonstrates Karen’s lack of ability to act consistent with her stated desires of maintaining a relationship with Debbie sobriety in order to meet Debbie’s needs.

When there has been an extensive period in which efforts have been made to overcome a parent’s inability to effectively parent, the court cannot allow children “to remain in this indeterminate status midway between foster care and the obvious need for permanent placement.” In the Interest of T.K., 2001 ND 127, ¶15, 630 N.W.2d 38 (citing In the Interest of A.S., 1998 ND 18 ¶33, 584 N.W.2d 853).

C. WILL THERE BE HARM TO THE CHILD?

Past behavior is the best predictor of future behavior. In determining whether a child's deprivation is likely to continue or will not be remedied, the North Dakota Supreme Court notes that it looks to “prognostic evidence” as a basis for reasonable predictions about future behavior. In the Interest of D.R., 2001 ND 183, 636 N.W.2d 412; In the Interest of S.F., 2000 ND 161, ¶¶ 10, 615 N.W.2d 511. Prognostic evidence includes reports and opinions of professionals. In the Interest of D.F.G., 1999 ND 216, ¶¶ 20, 602 N.W.2d 697.

As succinctly stated by Dr. Belanger, in light of Karen’s diagnosis, “she would more likely than not do well during visitation.” But more importantly, he noted “I

do not think she could stably (sic) look after the needs of a child on a day to day basis as a ... custodial parent.”(Transcript IV, Pg. 78) .

II. WHETHER THE DISTRICT COURT JUDGE ERRED IN THE REVIEW AND AFFIRMATION OF THE REFEREE’S DECISION.

N.D. Sup. Ct. Admin. R. 13, §§ 10(a). provides that the "findings and order of the judicial referee are deemed to have the effect of an order of the district court until superseded by a written order of a district court judge." A review of the findings and order may be ordered at any time by a district court judge and must be ordered if a party files a written request for a review within five days after service of the notice. See N.D. Sup. Ct. Admin. R. 13. §§ 11(a).

Sup. Ct. Admin. R. 13, §§ 11(a) requires that the party seeking review must state the reasons for the review.

Effective March 1, 2004. Sup. Ct. Admin. R. 13, §§ 11(a) was amended to provide that the review by the District Court Judge of the Referee’s Findings must be a *de novo* review of the record, and set forth the options regarding the results of this review.

Effective March 1, 2004, N.D.R.Civ.P. 52(a) was amended to provide that findings of fact in juvenile matters shall not be set aside on appeal unless clearly erroneous. In re Adoption of S.R.F., 2004 ND 150 ¶ 7, 683 N.W.2d 913. “ A finding of fact is clearly erroneous under N.D.R.Civ.P. 52(a) if there is no evidence to support it, if it is clear to the reviewing court that a mistake has been made, or if the finding is induced by an erroneous view of the law. In re T.J.L., 2004 ND 142, ¶ 2. 682 N.W.2d 735. A finding of fact is clearly erroneous when, although there is some evidence to support it, the reviewing court is left with a

definite and firm conviction that a mistake has been made. Routledge v. Routledge, 377 N.W.2d 542 (ND 1985).

The State must prove the elements for termination of parental rights by clear and convincing evidence. In re A.K., 2005 NDApp 3.

On appeal, the complaining party has the burden of showing that findings of fact are clearly erroneous. Striefel v. Striefel, 2004 ND 210, ¶ 8, 689 N.W.2d 415.

A trial court's findings of fact are presumptively correct, and on appeal we view the evidence in the light most favorable to the findings, without re-weighing the evidence or reassessing credibility if there is evidence supporting the findings. In re A.K., 2005 NDApp 3, ¶7.

In the present case, the District Court Judge ordered the transcripts of the trial, and clearly reviewed this material as well as the files and records of the proceeding during the process of the review, as noted in the Order on Request for Review. In affirming the Referee's decision, the District Court adopted the findings of the Juvenile Referee, and made additional findings concerning the deficiencies of Karen as a parent.

III. WHETHER THE JUVENILE COURT REFEREE ERRED IN DENYING K.C.'S MOTION TO CONTINUE AT THE TIME OF THE TRIAL.

The mother was incarcerated at Shakopee Facility in Minnesota due to criminal convictions in Minnesota. She had traveled to North Dakota facilities on disposition of detainers, and had also secured an order permitting her to serve time in the Cass County jail under the pretext of engaging in contact with her daughter, Debbie, and to participate in trial. Nonetheless, Karen also engaged in several suicide attempts and filed disposition of detainer documents for additional Minnesota charges. She had engaged in repeat actions

prompting disciplinary action at Shakopee.

Karen's unavailability was not controlled by the Petitioner, and the efforts that the Court made to secure her personal appearance was sabotaged by Karen.

The North Dakota Supreme Court has held that prisoners do not have a Constitutional due process right to personally appear at the proceeding for termination of parental rights, and their due process rights are satisfied if they are represented by counsel and have an opportunity to appear by deposition or other discovery technique. In re J.M.H., 1997 ND 99, ¶18. 564 N.W.2d 623.

Here the mother was represented by legal counsel, participated by phone during the trial, and testified extensively on her own behalf.

The mother's assertions that she should have been granted a continuance is without merit and further continue action of the matter would have been detrimental to the child.

Additionally, in reviewing the finding by the Judicial Referee, the District Court did not err. Even in the cases cited by Karen in this appeal would support the Court's decision to proceed.

In re: F.H., 283 N.W.2d 202 (N.D. 1979) anticipates that the Court can consider several factors, and all would point to maintaining the mother in her current incarceration. Even *if* a North Dakota Court were able to secure Karen's presence through some order, the cost of transporting her from Shakopee is significant. The danger she poses to her self and others is significant. Karen has threatened jail staff, engaged in at least five acts which were suicide attempts when she did not get what she wanted, and the possibility of delaying the trial until Karen is available is not consistent with the welfare of Debbie.

In re J.M.H., 1997 ND 99, ¶ 3. 564 N.W.2d 623 is similar to the present

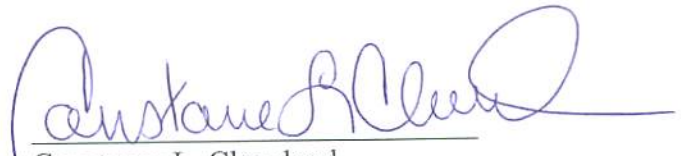
circumstances, and the Court rejected the assertions that there was a due process violation. While Karen asserts that the causes of her incarceration were not as severe as those cited in other cases, none the less, the sheer volume of criminal activity, the descriptions of her manipulation of systems, her volatility and her likelihood of engaging in a suicide attempt tip the scales in favor of rejecting her claim. Additionally, Karen's activity in assuring that she was not present for trial cannot be ignored. The Court in this case did not reject Karen's requests to participate by phone, but made extraordinary attempts to secure her participation. Her participation was limited by the facility where she was incarcerated. It is interesting to note, as the record reflects, that when Karen was on the phone, her primary concern appeared to be contacting and interacting with Jack.

CONCLUSION

The Petitioner introduced overwhelming evidence to satisfy the three part test for termination with regard to Debbie. The Court did not err when denying Karen's request for continuance, in light of the facts of this case, including that she was represented by legal counsel throughout the trial, appeared by phone for a portion of the trial, and testified on her own behalf.

The District Court's Decision should be Affirmed.

Respectfully submitted this 11th day of April, 2007.

A handwritten signature in blue ink, reading "Constance L. Cleveland", written over a horizontal line.

Constance L. Cleveland
N.D. Attorney No. 04585
Assistant State's Attorney
Cass County Courthouse
P.O. Box 3106
Fargo, North Dakota 58108

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

IN RE D.C.S.H.C., CHILD)
_____))
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))

CERTIFICATE OF ATTORNEY

Supreme Court File Nos. 20060337 &
20060338

Cass County File Nos. 09-05-R-00183 &
09-05-R-01055

I, Constance L. Cleveland, am an attorney licensed in the State of North Dakota and states that on this date I mailed a true and correct copy of the following documents in the above-entitled action:

- 1. Appellee's Brief

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

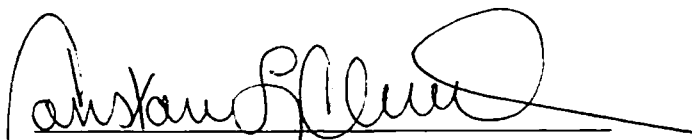
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To the best of the my knowledge, the address given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provision of the North Dakota Rules of Civil Procedure.

Dated this 11th day of April, 2007.


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