ORIGINAL (e-filed)

20070233

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

IN THE SUPREME COURT

OCT 17 2007

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

In the Interest of B.B., a child.

Carmell Mattison, Grand Forks Assistant State's Attorney, Petitioner/Appellee,	)	Supreme Court No. 20070233
vs.	)	Grand Forks Co. No. 06-R-327
B.B. (child). B.J.F. (mother), Respondents, and S.L.B., Respondent/Appellant.	)	

APPEAL FROM THE EXTENSION OF PLACEMENT ORDER ENTERED BY THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT THE HONORABLE LAWRENCE E. JAHNKE PRESIDING ON AUGUST 2nd, 2007.

BRIEF OF THE APPELLANT

Rebecca Heigaard McGurran
Grand Forks Public Defender Office
405 Bruce Avenue, Suite 101
Grand Forks, ND 58201
(701) 795-3910
ND ID #05429
Attorney for Respondent/Appellant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. DID THE TRIAL COURT MAKE A CLEARLY ERRONEOUS FINDING THAT B.B. CONTINUES TO BE DEPRIVED BASED ON REPEATED DOMESTIC VIOLENCE, SUBSTANCE ABUSE ISSUES AND FAILING TO FOLLOW THROUGH WITH APPROPRIATE REHABILITATIVE TREATMENT/ COUNSELING REGIMENS?

II. DID THE TRIAL COURT MAKE A CLEARLY ERRONEOUS FINDING THAT REASONABLE EFFORTS HAVE BEEN EXPENDED TO PREVENT B.B. FROM BEING PERMANENTLY REMOVED FROM A PARENTAL HOME WHEN PRIOR TO THE CHANGE IN THE GOAL OF B.B. FROM RETURN TO PARENT TO GUARDIANSHIP SOCIAL SERVICES CEASED PROVIDING SERVICES TO S.L.B. TO ENABLE RETURNING B.B. TO S.L.B.'s HOME?

NATURE OF THE CASE AND PROCEDURAL HISTORY

¶1 Appellant has appealed an order of the juvenile court, Grand Forks County, extending the placement of B.B. with the North Dakota Department of Human Services for a period of twelve months from July 6, 2007 or further hearing of the court. Docket 125; App. at 22-23.

¶2 This matter began on April 25, 2006 when a Deprivation Petition was filed in Grand Forks District Case 18-06-R-327 alleging B.B. was a deprived child based upon exposure to domestic violence, parental alienation behaviors, and drug use of S.L.B. Docket 2. An Amended Deprivation Petition was subsequently filed on May 30, 2006. Docket 18: App. at 6-11. At the time of the initial proceedings S.B. had custody of B.B. and B.B.'s mother, B.F., had visitation with B.B. Id. Three minor half-siblings were in B.F.'s custody. Id. It was alleged that all of the children were deprived. Id. A dispositional hearing was held on July 13, 2006, before the Honorable Lawrence E. Jahnke, Judge of the District Court, at the conclusion of which the Court found B.B. and his half-siblings to be deprived based upon repeated domestic violence between the parties, substance abuse issues and failure to follow through with appropriate rehabilitative treatment/counseling regimens. Docket 53; App. at 15-16.

¶3 On June 15, 2007, a petition for permanency and affidavit were filed by Assistant State's Attorney Deborah L. Garner in Grand Forks County Case Number 18-06-R-327, asking the Court to extend the order placing B.B. in the care, custody, and control of the Grand Forks County Social Service Center for appropriate placement of B.B. for a period of twelve months. Docket 87; App. 17-27.

¶4 A Permanency Hearing was held on August 2, 2007, before the Juvenile Court, the Honorable Lawrence E. Jahnke. See, Transcript of Proceedings; App. 36-100. On August 6, 2007, an "Extension of Placement Order" was issued by the Court finding that B.B. continued to be deprived and ordered B.B. to remain in the care, custody and control of the Director of the Grand Forks County Social Service Center for appropriate placement for a period of up to twelve months. Docket 125; App. at 33-34. Respondent, S.L.B., timely filed a Notice of Appeal on August 15, 2007. Docket 127; App. at 35.

STATEMENT OF FACTS

¶5 Upon the initial placement of the children with Grand Forks County Social Services, there was an initial Children and Family Team meeting. At that July 26, 2006, meeting it was decided that the goal for the case was for B.B. to return to a parent. To accomplish this goal the Grand Forks Social Services assigned six tasks for S.L.B. to complete: 1) maintain visitation with B.B., 2) maintain contact with agency case manager, 3) complete an alcohol/drug evaluation and follow the recommendations, 4) complete parenting/psychological assessment and follow the recommendations, 5) participate in the Domestic Violence Offenders Treatment Program, 6) complete a sex offenders evaluation and follow recommendations. See. Petition for Permanency Hearing at App. 17-23. A seventh task of random UA testing was subsequently added. Id.

¶6 B.B. was initially placed in foster care in Grand Forks County. Tr. at 8-9; App. at 43-44. After considering members of both S.L.B.'s and B.F.'s families as placements for B.B., he was placed in Washington State with S.L.B.'s sister and her husband in March, 2007. Id. In her affidavit in support of the Petition for Permanency Hearing dated June 12, 2007, foster care worker Ann Tollefsrud stated "[t]hat the current goal for the children is legal guardianship by relatives with whom they are currently living." App. at 24-27. It was not until August 1, 2007, that the Children and Family Team adopted the goal of guardianship by relatives. App. at 55-56.

¶7 During the Permanency Hearing the Social Services' representative, foster care worker Ann Tollefsrud, was questioned about the status of S.L.B.'s assigned tasks. According to the testimony, S.L.B. completed the Domestic Violence Offender Treatment Program at CVIC on June 4, 2007, and completed a sex offender's evaluation

through Northeast Human Service Center on May 22, 2007. S.L.B. maintained regular visitation with B.B., and continues to have contact with B.B. by telephone since B.B.'s move to the State of Washington. S.L.B. has submitted to random UA's with without any positive results for the past 16 months and has not had any new domestic violence allegations for the past sixteen months. S.L.B. has maintained contact with Social Services by calling often and leaving messages regarding his situation. The only tasks that remain ongoing for S.L.B. are the random UA's and to continue psychological services through the VA.

¶8 Despite the completion of all tasks assigned, a Petition for Permanency Hearing was filed on June 15, 2007 in Grand Forks District Case 18-06-R-327 alleging continuing deprivation of B.B. based upon repeated domestic violence, substance abuse issues and failure to follow through with appropriate rehabilitative/counseling regimens. Docket 87; App. 17-27. After hearing the matter, the Court issued an Extension of Placement Order on August 6, 2007, concluding that B.B. continues to be deprived based upon repeated domestic violence, substance abuse issues and failure to follow through with appropriate rehabilitative treatment/counseling regimens by S.L.B. Docket 125; App.at 33-34. S.L.B. appeals. Docket 127; App. at 35.

LAW AND ARGUMENT

¶9 North Dakota Juvenile Court proceedings are governed by the Uniform Juvenile Court Act contained within N.D.C.C. § 27-20. In order to find a child is deprived within the meaning of the statute, the trial court must find evidence of deprivation by "clear and convincing" evidence. Interest of T.T., 2004 ND 138, ¶5, 681 N.W.2d 779, 781. Deprivation as it is alleged in this case is defined as 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.
>
> N.D.C.C. §27-20-01 (8)(a)

¶10 A juvenile court's finding of deprivation will not be set aside unless it is clearly erroneous. N.D.R.Civ.P. 52(a); Interest of T.F., 2004 N.D. 126, ¶ 8, 681 N.W.2d 786, 789. A finding of fact is clearly erroneous if there is no evidence to support it, if the reviewing court is left with a definite and firm conviction that a mistake has been made, or if the finding was induced by an erroneous view of the law. Interest of T.T., 2004 ND 138, ¶ 5, 681 N.W.2d 779, 781. The juvenile court's conclusions of law are fully reviewable by this court. Interest of A.B., 2003 ND 98, ¶4, 663 N.W.2d 625, 628.

I. THE DISTRICT COURT ERRED IN FINDING CONTINUING DEPRIVATION BASED ON REPEATED DOMESTIC VIOLENCE, SUBSTANCE ABUSE ISSUES AND FAILING TO FOLLOW THROUGH WITH APPROPRIATE REHABILITATIVE TREATMENT/ COUNSELING REGIMENS.

¶11 In its Extension of Placement Order, the Juvenile Court stated that it "reaffirms that the Petitioner has established the material facts as set forth in the Petition by clear and convincing evidence." App. at 33-34. Specific findings within the Order

included that the there was "conduct constituting the deprivation (repeated domestic violence. substance abuse issues and failure to follow through with appropriate rehabilitative treatment/counseling regimes by [S.L.B and B.F.]) [that] was not the result of [S.L.B. and B.F.'s] indigency." It is respectfully submitted that a review of the facts and circumstances found within the present matter do not support a finding of fact that B.B. continues to be deprived.

¶12 This Court has indicated that "[c]lear and convincing evidence means evidence that leads to a firm belief or conviction the allegations are true." . In re Adoption of S.R.F., 2004 ND 150, ¶7, 683 N.W.2d 913, 916 (citing Adoption of J.M.H., 1997 ND 99, ¶7, 564 NW2d 623). When looking at a finding of fact, it will be clearly erroneous if it is "induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, the court is left with a definite and firm conviction a mistake has been made." Id. at ¶8 (citing Hogan v. Hogan, 2003 ND 105, ¶6, 665 NW2d 672).

¶13 Should the Juvenile Court's Order be affirmed, this Court would be required to find that the evidence presented leads to a firm belief or conviction that "repeated domestic violence, substance abuse issues and failure to follow through with appropriate rehabilitative treatment/counseling regimes" continue to be present in S.L.B. life. Extension of Placement Order, Docket 125, App at 33-34. If however, a review of the record in this appeal leads this Court to conclude that "no evidence exists to support the finding[s]" of continued domestic violence, substance abuse issues or the failure to follow through with appropriate rehabilitative treatment/counseling regimes, the Juvenile

Court's findings would be clearly erroneous. S.R.F., 2004 ND 150, ¶7, 683 N.W.2d 913, 916.

¶14 The first of the "conduct[s] constituting the deprivation" identified by the Juvenile Court is "repeated domestic violence". Extension of Placement Order, Docket 125, App at 33-34. There is nothing in the record that would indicate that there has been any evidence of domestic violence in S.L.B.'s life since the time that B.B. was removed from his care. What is in the record is testimony from the foster care worker Ms. Tollefsrud that S.L.B. has competed the twenty-six week Domestic Violence Offender Treatment Program. During the Permanency Hearing, the following exchange occurred:

Q. (Attorney Borgen) Have there been any domestic violence issues in the past 16 months that you know of?

A. (Ms. Tollefsrud) From rumors I have heard, yes. Can I prove those rumors? No.

Q. This is court. We are looking for evidence.

A. Yup.

Q. Clear and Convincing evidence. Is there any clear and convincing evidence of any abuse in the last 16 months?

A. No.

Tr. 28. App. at 73.

¶15 The second conduct identified by the Juvenile Court as a "conduct constituting the deprivation" was substance abuse issues. S.L.B. completed a chemical dependency evaluation in March, 2006 at the VA in Fargo. Tr. 12. App. at 47. There were no recommendations made as a result of that evaluation. Id. As a part of the tasks assigned to S.L.B. he was required to complete random UA's. All tests were negative.

Tr. 19 & 29. App. at 54 & 74. No other testimony or evidence relating to substance abuse by S.L.B. was presented at hearing.

¶16 Finally, it is alleged that S.L.B. has failed to appropriately follow through with treatment and counseling assigned. Initially, Northeast Human Services Center was contacted to determine if a re-evaluation of S.L.B. would be needed. Tr. 11-12. App. at 46-47. The treatment providers at Northeast Human Service Center indicated that another assessment would not be beneficial. Id. After discussion between Ms. Tollefsrud and S.L.B., it was agreed that S.L.B. would undergo a sex offender evaluation. Id. Consistent with previous assessments, and the sex offender evaluation it was indicated that therapy was appropriate. Id. According to the testimony of Ms. Tollefsrud, S.L.B. is following through with these recommendations by seeking services through the VA. Tr. 39-40. App. at 74-75.

¶17 This Court has confirmed that the parent must be able to demonstrate present capability, or capability within the near future, to be an adequate parent. McBeth v. M.D.K., 447 N.W.2d 318, 322 (N.D.1989). The evidence submitted in this case clearly shows that for over sixteen months S.L.B. has demonstrated a change in his lifestyle and has learned from the recommendations given. S.L.B. has learned from the classes he has taken and incorporated that learning into his lifestyle demonstrated by over sixteen months of clean UA's, sixteen months with no new instances of domestic violence, and completing all requested evaluations followed by following through with all recommendations.

¶18 The burden of clear and convincing evidence recognized that parents have a fundamental constitutional right to parent their children which is of the highest order. See

e.g., In Interest of L.J., 436 N.W.2d 558, 561 (N.D.1989); Kleingartner v. D.P.A.B., 310 N.W.2d 575, 578 (N.D.1981). Although a parent's constitutional right is not absolute, and must at least provide care that satisfies the minimum community standards, [Interest of L.J., 436 N.W.2d 558, 561 (N.D.1989)], "[a]ny doubts should be resolved in favor of the natural parent[,] and parental rights should be terminated only when necessary for the child's welfare or in the interest of public safety." Asendorf v. M.S.S., 342 N.W.2d 203, 207 (N.D.1983).

¶19 This Court has specifically recognized that the right to enjoy "the domestic relations and the privileges of the family and the home" is embraced by the liberty and pursuit of happiness guarantees contained in Article I, Section 1 of the North Dakota Constitution. State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914, 919 (1943) [quoting *Black's Constitutional Law*, section 145]. Without clear and convincing evidence that B.B. remains deprived, S.L.B.'s constitutional rights to parent B.B. are clearly violated.

¶20 On cross-examination the case worker was asked whether there was clear and convincing evidence to support deprivation based upon sixteen months of clean UA's, sixteen months of no new instances of domestic violence, and full cooperation in completing the treatment recommendations. Although it is the Court, not a witness, which determines whether there is enough evidence to support a Court's finding, the case worker conceded there was not enough evidence to prove these allegations by clear and convincing evidence. Tr. 37-39. App. at 72-74.

¶21 Rather than focus on S.L.B.'s progress with Social Services, Social Services has focused their attention on insignificant and irrelevant causes to find B.B. deprived. During the permanency hearing Social Services' case worker testified that part of the

reason for the permanency hearing was based upon S.L.B. not completing his tasks fast enough.

> A. Part of the issue is that we wouldn't be here if those things had been done initially and not waited until now and - - there were - - the issue also is that these could have been done much earlier. We have had a year to have them done. But they were not done until this year so we could have been doing them earlier.

Tr. 41.

¶22 The issue before this Court is not whether S.L.B. completed the tasks fast enough, it is whether S.L.B. has completed the necessary tasks in a reasonable time and demonstrated a change in lifestyle which would allow him to provide safety and stability for B.B. Now that S.L.B. has completed the services requested and is following through with the recommendations for further therapy, it could be expected that Social Services would be making arrangements to allow for a transition of the child back to S.L.B.'s home.

¶23 Based upon the lack of clear and convincing evidence that domestic violence, substance abuse issues or failure to follow through with counseling therapy issues continue, it is respectfully requested that the Juvenile Court's finding of deprivation is clearly erroneous and that B.B. should be returned to S.L.B.'s custody.

II. The District Court erred in finding that reasonable efforts have been expended to prevent B.B. from being permanently removed from a parental home by ceasing to provide services to return B.B. to S.L.B.'s home prior to changing the goal of B.B. from return to parent to guardianship.

¶24 Section 27-20-32.2(2) of the North Dakota Century Code requires that reasonable efforts must be made to preserve and reunify families. Interest of E.R., 2004 ND 202, ¶ 12, 688 N.W.2d 384, 389.

> 'Reasonable efforts' means the exercise of due diligence, by the agency granted the authority over the child under this chapter, to use appropriate and available

> services to meet the needs of the child and the child's family in order to prevent the removal of the child from the child's family or, after removal, to use appropriate and available services to eliminate the need for removal and to reunite the child and the child's family.

N.D.C.C. § 27-20-32.2(1).

¶25 B.B. was removed from S.L.B.'s home due to concerns regarding domestic violence. drug abuse issues. and evaluations/ recommendations regarding mental health and parenting. Given these concerns Social Services customized a plan to meet the family's needs and developed a plan to reunite B.B. with a parent. Social Services testified that S.L.B. has made steady progress on her reunification case plan throughout the period Social Services has had custody of B.B. and conceded S.L.B. has completed all of the seven tasks given to him.

¶ 26 "Reasonable efforts" requires that if a child is removed from his family, Social Services use appropriate and available services to eliminate the need for removal. In this case Social Services offered many different services to S.L.B. and S.L.B. took advantage of each of those services. Prior to the day before the hearing (or August 1, 2007), the case plan was to return the child to a parent. Reasonable efforts to reunite the family must continue until the case plan has been change or, in this case, until August 1, 2007.

¶27 Despite S.L.B.'s continued progress. the day before the permanency hearing a Team Meeting was held at which time Social Services changed the permanency plan from return to parent to guardianship. When asked, the case worker stated this was done "basically because we are still in the assessment phase". Tr. 35. App. at 70. If Social Services remains in the assessment phase, there is no basis for a change in B.B.'s plan from return to parent to guardianship. S.L.B. continues to work with Social Services and

has shown progress in completing his tasks within a reasonable time. If there are concerns with S.L.B.'s parenting, Social Services has the capability to continue to monitor S.L.B. and B.B. for a reasonable time after the child is returned to the parent.

¶28 The goal of guardianship is especially troubling for three reasons. Firstly, if a guardianship is established, B.B. will not be deprived. He will be under the legal custody of individuals that have been determined to be able to meet his needs as required by statute. Without continuing deprivation, Social Services will have no basis to continue to provide services, no basis to continue monitoring of the child and no basis to assess.

¶29 Secondly, B.B. is currently placed in Washington State. It has not been indicated in which state the proposed guardianship would be completed. Completing the process in either North Dakota or Washington creates legal and logistical difficulties for any party not in the state where the guardianship was completed.

¶30 Finally, should a guardianship be established, S.L.B.'s parental rights will be temporarily suspended. He will lose the weight of parent's constitutional protections. A court granting, modifying or terminating a guardianship will undergo a "best interests of the child" analysis. This is vastly different than the presumption and protections that accompany a parent when a court is asked to determine deprivation.

¶31 S.L.B. has done more than just comply with Social Services, he has made a conscience decision to change his life and has demonstrated he has learned from the services offered. S.L.B. has accepted the services offered and has shown that he is able to adequately parent B.B. based upon what he has learned and incorporated into his lifestyle. It is submitted that S.L.B. has followed through with the recommendations in these areas causing the deprivation and that as a result B.B. is no longer deprived. The

evidence in this case clearly shows B.B. is no longer deprived based upon repeated domestic violence, substance abuse issues, and S.L.B.'s failure to follow through with counseling/treatment regimens. Without more and given S.L.B.'s progress, there is no basis for a change in Social Services plan to move forward with a guardianship given that S.L.B. has shown a capability to be an adequate parent.

¶32 The posture of Social Services' testimony reflects an underlying impression that Social Services has decided B.B.'s Aunt and Uncle are better equip to parent B.B. and that B.B. should, therefore, remain with his Aunt and Uncle. During closing argument. the State argued that since B.B. was placed with his Aunt and Uncle, B.B. has experienced many firsts and has adjusted well.

> ...Home study has been completed on the parents, on Mr. and Mrs. Davis in Washington and the home study is, shows this is in the best interest of B. to be in that home. He's doing well. He is experiencing many of his firsts he hasn't done prior to his.
>
> Tr. 58. App. at 93.

¶33 Although this would be important regarding B.B.'s time in foster care, the issue before the Court is not who Social Services thinks is a better parent – the issue is whether or not, B.B. is deprived. This Court has said that "[e]vidence which compares the child-rearing skills of the mother and of the foster parents cannot alone form the basis of a finding of harm to the child, provided the mother's efforts meet minimum standards of care." In Interest of J.A., 283 N.W.2d 83, 93 (N.D.1979) [quoting In Interest of R.D.S., 259 N.W.2d 636, 638 (N.D.1977)]. Especially instructive is this Court's instruction that "[i]t is not reason enough to deprive parents of custody that their home is not the best, or even that they are not the best parents that could be offered to the child, so long as the

child does not suffer physical or moral harm, or lack of food or clothing." In the Interest of M.M.C., 277 N.W.2d 281, 286 (N.D. 1979). [citations omitted].

¶34 Social Services decided B.B. is in a better home and, therefore, ceased to provide S.L.B. with further services geared toward reunification throughout the period that the Team goal was "return to parent". It is respectfully submitted that Social Services has not provided reasonable effort to prevent or eliminate the need to remove B.B. from his parental home and that the child should be allowed to return to that home.

CONCLUSION

¶35 Based upon the submission, pleadings, testimony, argument and authority contained herein, Appellant respectfully requests that this Court find that the District Court's finding that B.B. is a deprived child be found "clearly erroneous" and that Social Services failed to provide services to reunite B.B. with S.L.B. throughout the period that the Team goal was "return to parent".

¶36 A reading of the entire record reflects an attempt to show deprivation by implication, rather than concrete testimony and evidence. The findings did not show deprivation by "clear and convincing" evidence, and should be found "clearly erroneous" by this court. This falls short of showing deprivation by the required "clear and convincing" evidence. Accordingly, for the foregoing reasons, S.L.B. prays this court reverse the Extension of Placement Order.

Dated this 10th day of October, 2007.

Rebecca Heigaard McGurran
Grand Forks Public Defender Office
405 Bruce Avenue, Suite 101

Grand Forks, ND 58201
(701) 795-3910
Attorney ID No. 05429
Attorney for Appellant.