

ORIGINAL (e-filed)

20070233

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Interest of B.B., a child.)
)
Carmell F. Mattison, Grand Forks)
Assistant State's Attorney,)
Petitioner/Appellee,)
)
vs.)
)
B.B. (child), B.J.F. (mother), Respondents,)
)
and)
S.L.B.,)
Respondent/Appellant.)

Supreme Court No. 20070233

Grand Forks Co. No. 06-R-327

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

DEC -7 2007

STATE OF NORTH DAKOTA

**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 APPELLEE

Deborah L. Garner
ND Bar ID #06828
Assistant State's Attorney
PO Box 5607
Grand Forks, ND 58206-5607
Ph: 701-780-8281

Stephanie Weis
Senior Legal Intern
PO Box 5607
Grand Forks, ND 58206-5607
Ph: 701-780-8281

TABLE OF CONTENTS

Table of Authorities 1

Statement of the Case 2

Facts 3

Law and Argument5

 I. The District Court Correctly Found That The Minor Child
 Continued To Be A Deprived Child5

 II. The District Court Properly Found That Reasonable Efforts
 Have Been Made to Finalize A Permanent Plan.11

Conclusion13

TABLE OF AUTHORITIES

North Dakota State Cases

<u>Eastburn v. B.E.</u> , 545 N.W.2d 767 (ND 1996)	5
<u>In re A.K.</u> , 2005 ND APP 3, 696 N.W.2d 160	5
<u>Interest of E.R.</u> , 2004 ND 202, 688 N.W.2d 384	11
<u>In Interest of L.F.</u> , 1998 ND 129, 580 N.W.2d 573	7, 8
<u>In Interest of L.J.</u> , 436 N.W.2d 558 (ND 1989)	10
<u>Interest of T.F.</u> , 2004 ND 126, 681 N.W.2d 786	5
<u>In Interest of T.J.L.</u> , 2004 ND 142, 682 N.W.2d 735	7, 8
<u>Interest of T.T.</u> , 2004 ND 138, 681 N.W.2d 779	5
<u>McBeth v. MDK</u> , 447 N.W.2d 318 (ND 1989)	10
<u>Striefel v. Striefel</u> , 2004 ND 210, 689 N.W.2d 415	5

Other State Cases

<u>In re S.H.</u> , 337 N.W.2d 179 (SD 1983)	10
--	----

Statutes

N.D.C.C. § 27-20-02	5
N.D.C.C. § 27-20-32.2	11, 12

Rules

N.D.R.Civ.P. Rule 52	5
----------------------------	---

STATEMENT OF THE CASE

[¶1] This is an appeal from a judgment of the District Court in Grand Forks County finding that the minor child, B.B., continued to be deprived. The father of B.B. is S.L.B.. The mother of B.B. is B.F.. B.F. did not appeal the District Court Order.

[¶2] A Petition for Permanency and Affidavit were filed on June 15, 2007. (App. of the Appellant at page 17-27). On August 2, 2007 a Permanency Hearing was held in Grand Forks District Court, the Honorable Lawrence E. Jahnke presiding. (App. of the Appellant pages 36-99.) An Order extending placement was entered on August 6, 2007 finding that B.B. continued to be a deprived child. (App. of the Appellant pages 33-34.) Notice of Appeal was entered on August 15, 2007. (App. of the Appellant at page 35.)

FACTS

[¶3] This appeal relates to the parent and child relationship of B.B., a juvenile child, and S.L.B., B.B.'s father. B.B. was removed from the custody of both S.L.B. and B.F. in July 2006 due to a finding of deprivation by S.L.B.. (App. of the Appellant pages 15-16.) B.B. was initially placed in foster care in Grand Forks, North Dakota but was ultimately placed with relatives in Washington where he currently resides. (App. of the Appellant pages 43-44.)

[¶4] Ann Tollefsrud of Grand Forks County Social Services was assigned as the Social Worker for the family in July of 2006. (App. of the Appellant at page 8.) In response to the finding, she made recommendations of services for S.L.B. to complete. (App. of the Appellant at page 10.) Those services included: maintain contact with B.B.; maintain contact with Social Services; completion of an alcohol and drug evaluation; parenting/psychological assessments; maintain a stable home; completion of random UA testing; and the completion of a Domestic Violence Offender Treatment Program. (App. of the Appellant at page 12, lines 3-16.)

[¶5] S.L.B. completed a Domestic Violence Offender Treatment Program through the Community Violence Intervention Center (hereinafter CVIC) on June 4, 2007. (App. of the Appellant at page 12, lines 16-18.) This was the third program of this kind that he has completed. (App. of the Appellant at page 26.) On May 22, 2007, almost 11 months after S.L.B. was ordered to complete services, S.L.B. completed a Sex Offender Focused Psychological Evaluation. The results of that evaluation revealed the

presence of a severe mental illness such as Paranoid Schizophrenia or Schizoaffective disorder. (App. of the Appellant at page 4.) The Evaluation made several recommendations including following through with services through the VA. (App. of the Appellant at page 5). S.L.B. did have an appointment scheduled for August 10, 2007, six days after the permanency hearing, making it impossible for Social Services to determine if S.L.B. would incorporate treatment for his mental health into his daily life.

[¶6] Efforts have been made by Social Services to help S.L.B. and B.F. become better parents and create a suitable home for their child. Services provided to them include: continued Foster Care Case Management; regular Children and Family Team Meetings; Psychological/Psychiatric Services; Alcohol/Drug Services; Family and Individual Therapy; Wishing Well; Interstate Compact Services; Probation Services; Domestic Violence Offenders Treatment Program and services through the CVIC. (App. of the Appellant at page 24.)

[¶7] An affidavit was prepared by Ms. Tollufsrud and a Petition for Permanency was filed on June 15, 2007. (App. of the Appellant pages 24-26 & 17-23.) S.L.B. has continuously been provided services in order to finalize the permanent plan for the child which was reunification. (App. of the Appellant pages 50-51.) On August 2, 2007 the plan was changed to legal guardianship. (App. of the Appellant at page 27.)

LAW AND ARGUMENT

[¶8] 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. "[T]he complaining party has the burden of showing that findings of fact are clearly erroneous. In re A.K., 2005 ND APP 3, ¶ 7, 696 N.W.2d 160, 162 (citing 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 reweighing the evidence or reassessing credibility if there is evidence supporting the findings. Id.

**I. The District Court Correctly Found That The Minor
Child Continued To Be A Deprived Child.**

[¶9] A deprived child is a child without the 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)(a). The deprivation must be proven by clear and convincing evidence. Eastburn v. B.E., 545 N.W.2d 767, 770 (ND 1996).

[¶10] Ann Tollefsrud testified that she is a licensed Social Worker with Grand Forks County Social Services. (App. of the Appellant at page 41.) She holds a bachelor's degree in social work and has been a social worker for 30 years and a licensed social worker for 15 years. (App. of the Appellant at page 41.) Ms. Tollufsrud testified as an expert in the area of Social Work at the permanency hearing on August 2, 2007. (App. of the Appellant at page 42.)

[¶11] Ms. Tollufsrud testified that she has been involved with B.B. and S.L.B. since July of 2006 after the Honorable Lawrence Jahnke made a finding of deprivation and placed B.B. with Grand Forks County Social Services (hereinafter "Social Services"). (App. of the Appellant at page 43.) As a result, S.L.B. was required to complete several tasks assigned by Social Services. Those tasks included: visitation with B.B.; maintain contact with agency case manager; complete random UAs; complete an alcohol and drug evaluation, complete parenting/ psychological assessments, maintain a stable home; and to complete a Domestic Violence Offender Treatment Program (hereinafter "DVOTP"). (App. of the Appellant at page 24 & 48.)

[¶12] Ms. Tollufsrud testified that S.L.B. completed the DVOTP in June of 2007, one month prior to the expiration of the Order Finding Deprivation. (App. of the Appellant at page 26.) The DVOTP program is a lengthy program consisting of approximately 26 weeks of classes one night a week. S.L.B. had the opportunity to begin the DVOTP program immediately after the court entered its Findings. Completing the program earlier would have given

Social Services the opportunity to assess whether S.L.B. internalized what he had learned in that program. Ms. Tollufsrud in her affidavit indicated that this is the third time that S.L.B. has completed a program of this type. (App. of the Appellant at page 26.) As evidenced by S.L.B.'s history, he appears to have difficulty implementing what he learned during these programs in his life.

[¶13] S.L.B. argues that there have been no reports of domestic violence within the last 16 months. Ms. Tollufsrud testified that there had been rumors of domestic violence issues regarding S.L.B. (App. of the Appellant page 73.) As the Court is fully aware, instances of domestic violence often times go unreported. The National Coalition Against Domestic Violence reports that “[o]nly approximately one-quarter of all physical assaults, one-fifth of all rapes, and one-half of all stalkings perpetrated against females by intimate partners are reported to the police. (Citing the National Institute of Justice and the Centers of Disease Control and Prevention, “Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey (2000).) Additionally, the Coalition reports that “[d]omestic violence is one of the most chronically underreported crimes”. (Citing U.S. Department of Justice, Bureau of Justice Statistics, “Criminal Victimization” (2003).) Although the rumors are unsubstantiated, it would be irresponsible of Social Services to ignore these rumors when the family has a history of domestic violence, regardless of whether they are reported to the police. See, In Interest of T.J.L., 2004 ND 142, ¶ 4, 682 N.W.2d 735, 736 (citing In Interest of L.F., 1998

ND 129, ¶ 16, 580 N.W.2d 573) (stating that “[e]vidence of a parent’s background, including previous incidents of abuse and deprivation, may be considered in determining whether deprivation is likely to continue.”).

[¶14] S.L.B. was also required to complete a sex offender focused psychological evaluation. (App. of the Appellant at page 46.) This recommendation was based upon allegations of S.L.B. masturbating in his stepdaughter’s room while she and a friend were sleeping. S.L.B. did complete the evaluation but what is most notable for the Court’s consideration is that S.L.B. was given the entire twelve (12) month period to complete the tasks proscribed to him and it was not until May 22, 2007 that S.L.B. completed it. Upon completion of the Evaluation, a report was generated and a copy was provided to Social Services on June 11, 2007. (App. of the Appellee at page 6.)

[¶15] During the Evaluation process, S.L.B. showed up to the interview wearing ripped pants and disheveled hair as well as using profanity throughout the evaluation. (App. of the Appellee at page 1.) The evaluation consisted of an interview and the completion of a number of tests. The report indicated that S.L.B. believes his hands to have a “healing energy” and that he has been able to “heal” children and adults while placing his hands on their head and praying”. (See App. of the Appellee at page 2.) It was learned that S.L.B. tends to react to stressful situations with physical or verbal aggression. He also tends to externalize blame and exhibits paranoid thinking patterns. (App. of the Appellee at page 4.) The results also indicate

a presence of numerous symptoms of depression, such as sadness, feelings of guilt, crying spells, and hopelessness as well as difficulty with reality testing, organization of thought, and delusional beliefs. (App. of the Appellee at page 4.)

[¶16] Finally, during the interview, interpersonal relationships were discussed. (App. of the Appellee at page 4.) It was found that S.L.B. tends to interact with others in a manipulative and self-centered fashion that causes others to avoid him. (Id.) S.L.B. feels the world is a hostile and unsafe place and feels others are out to get him and that he "feels safest by [himself]". (Id.) Ultimately, the evaluation determined that there was a presence of severe mental illness such as Paranoid Schizophrenia or Schizoaffective disorder. (Id.)

[¶17] At the conclusion of the report, S.L.B. was given six (6) recommendations and observations. (App. of the Appellee at page 5.) These include obtaining psychiatric and therapy intervention, obtain a more precise diagnosis of his condition to establish if psychotic symptomatology was present before his head injury, avoid contact with B.F., start associating with healthy people to develop a support system and avoid the company of people he knows to be using alcohol or drugs. (Id.) It is clear through these recommendations and observations that S.L.B. has many things to work on in his life. Because he failed to obtain this evaluation in a timely fashion during the original twelve (12) month period, he had yet to show any improvements in his conduct or conformity to these recommendations.

[¶18] S.L.B. argues that he did follow through with this task because he completed the evaluation and because he had an appointment seeking services through the VA scheduled for August 10, 2007. The mere scheduling of an appointment cannot be viewed by the Court in the same way as the completion of that appointment. S.L.B. cites McBeth v. MDK, where this Court confirmed that a parent must be able to demonstrate present capability or capability within the near future to be an adequate parent. 447 N.W.2d 318, 322 (ND 1989). By not completing the evaluation until May 22 and by merely scheduling an appointment, S.L.B. has not demonstrated that he has internalized and implemented the recommendations from the psychological evaluation into his daily life and in his ability to parent adequately now or in the near future. (See id.)

[¶19] S.L.B. argues that Social Services has focused their attention on irrelevant and insignificant causes to find B.B. deprived. Thus, there is insufficient evidence to find continued derivation resulting in a violation of S.L.B.'s constitutional right to parent his child. A parent does have a constitutional right to parent his child. In Interest of L.J., 436 N.W.2d 558, 561 (ND 1989). However, the right is not absolute and must be balanced with the best interests of the child and public. In re S.H., 337 N.W.2d 179 (SD 1983). There have been 18 CPS reports on S.L.B. in the last 10 years, he has completed three domestic violence treatment programs, he has a history of alcohol and substance abuse, including inpatient treatment on two occasions, and the results of his psychological evaluation indicate serious psychological

issues that had not been resolved or treated at the time of the permanency hearing. (See Generally, App. of the Appellee pages 1-6.)

[¶20] Ms. Tollufsrud testified that the same issues with this family keep coming up in the evaluations despite the numerous services offered to this family over the years. (App. of the Appellant at page 70.) Until S.L.B. can demonstrate that he can incorporate all that he has learned, particularly with regards to his mental health, into his daily life it is in the best interest of B.B. to remain under the care, custody and control of Grand Forks County Social Services. Therefore, S.L.B.'s constitutional rights were not violated.

[¶21] Finally, in addition to the above evidence of continued deprivation, the Guardian ad Litem submitted a report to the court recommending that B.B. remain in the custody of Social Services. (App. of the Appellant pages 28-32.) Thus, there was clear and convincing evidence presented and the court properly found deprivation.

II. The District Court Properly Found That Reasonable Efforts Have Been Made to Finalize A Permanent Plan.

[¶22] 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. If it has been determined that is not possible to return a child safely to the child's home, reasonable efforts must be made to finalize the permanent plan for the child. N.D.C.C. § 27-20-32.2(3). N.D.C.C. § 27-20-32.2(1) states that:

'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.

[¶23] Here, it was determined that it is not appropriate for B.B. to return to the parental home but to obtain legal guardianship with the relatives with whom he is living. Therefore, Social Services was required to provide reasonable efforts in order to finalize the permanent plan. In her Affidavit, Ms. Tollefusrud of Social Services stated that reasonable efforts had been provided to S.L.B. in order to finalize the permanent plan for B.B.. Those efforts include: Foster Care Case Management; regular Children and Family Team Meetings; Psychological/Psychiatric Services; Alcohol/Drug Services; Family and Individual Therapy; Wishing Well; Interstate Compact Services; Probation Services; Domestic Violence Offenders Treatment Program and other services through CVIC. (App. of the Appellant at page 27.)

[¶24] S.L.B. argues that Social Services failed to provide services to reunite B.B. with S.L.B. throughout the period that the goal was "return to parent". Clearly, Social Services did provide services to S.L.B., services that were geared toward helping S.L.B. deal with issues of domestic violence, chemical dependency, and issues with his mental health, and services that S.L.B. argues that he has completed. S.L.B.'s argument is inconsistent. First, S.L.B. argues that he has completed all tasks required of him by Social

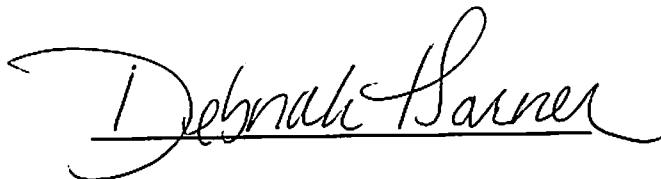
Services and then argues that Social Services did not provide services to S.L.B. in order to reunite him with B.B..

[¶25] Finally S.L.B. argues that once the goal was changed to legal guardianship, Social Services ceased to provide services to S.L.B. in order to reunite him with B.B.. The goal of legal guardianship was changed on August 1, 2007, the day before the Permanency Hearing was held. Social Services has never made any indication that they would cease services to S.L.B.. Specifically, Ms. Tollufsrud testified that they were still in the assessment process and that once S.L.B. attends his appointment through the V.A. they would be able to better determine how his "personality psychotic issues impact his parenting ability. (App. of the Appellant at page 75). If Social Services anticipated ceasing services to S.L.B., the results of the VA evaluation would be irrelevant. Additionally, since the permanency goal was changed one day prior to the permanency hearing, it cannot be determined that in that one day, services were ceased and it cannot be assumed that Social Services will cease to provide services in the future.

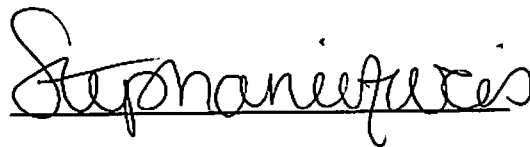
Conclusion

[¶26] Based on the foregoing argument, the testimony at the hearing, and the exhibits, the State of North Dakota respectfully requests this Court affirm the Judgment of the District Court finding that the minor child continued to be deprived, and find that reasonable efforts were provided in order to finalize the permanent plan.

DATED this 10th day of December, 2007.

A handwritten signature in cursive script that reads "Deborah L. Garner". The signature is written in black ink and is positioned above a horizontal line.

Deborah L. Garner
ND Bar ID # 05828
Assistant State's Attorney
PO Box 5607
Grand Forks, ND 58206-5607
Ph: 701-780-8281

A handwritten signature in cursive script that reads "Stephanie A. Weis". The signature is written in black ink and is positioned above a horizontal line.

Stephanie A. Weis
Senior Legal Intern
PO Box 5607
Grand Forks, ND 58206-5607
Ph: 701-780-8281

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20070233

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

Deborah Garner, 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,)

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

and)

DEC - 7 2007

S.L.B.,)
Respondent/Appellant.)

STATE OF NORTH DAKOTA

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.

AFFIDAVIT OF SERVICE BY E-MAIL

SA#000000096582

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 7th day of December, 2007, she served via e-mail true copies of the following documents:

BRIEF OF APPELLEE
APPENDIX OF APPELLEE

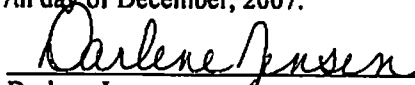
and that said email was served on **Rebecca Heigaard McGurran** as follows:

rmcgurran@nd.gov


Arlene Herzog
States Attorney's Office

Subscribed and sworn to before me this 7th day of December, 2007.

DARLENE JENSEN
Notary Public State of North Dakota
My Commission Expires December 19 2012


Darlene Jensen
Notary Public, Grand Forks County
North Dakota
My commission expires December 19, 2012

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Interest of B.B., a child.)
)
Carmell F. 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.

AFFIDAVIT OF SERVICE BY E-MAIL
SA#000000096582

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 10th day of December, 2007, she served via e-mail true copies of the following documents:

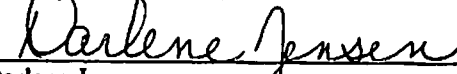
BRIEF OF APPELLEE (Corrected)
APPENDIX OF APPELLEE (Corrected)

and that said email was served on Rebecca Heigaard McGurran as follows:

rmcgurran@nd.gov


Arlene Herzog
States Attorney's Office

Subscribed and sworn to before me this 10th day of December, 2007.


Darlene Jensen
Notary Public, Grand Forks County
North Dakota
My commission expires December 19, 2012