

IN THE SUPREME COURT

20100109

STATE OF NORTH DAKOTA

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April 7, 2010
STATE OF NORTH DAKOTA

In the Interest of D.H., a Child)	
)	
Heather Pautz, Barnes County)	
Director of Social Services,)	
)	
Petitioner/Appellee,)	Supreme Court No. _____
)	
vs.)	District Court No. 02-09-R-72
)	
D.H., T.H., Mother,)	
)	
Respondents,)	
)	
E.H., Father of the above-named)	
Child,)	
)	
Respondent/Appellant.)	
_____)	

Brief of Respondent/Appellant E.H.

**Appeal from Findings of Fact, Conclusions of Law and Order and
Disposition entered March 9, 2010, in Juvenile Court, County of
Barnes, State of North Dakota, The Honorable Daniel D. Narum**

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¶3 Statement of the Issues

- I. Whether the trial court erred by finding that the conditions and causes of the deprivation are likely to continue?**
- II. Whether the trial court erred by finding that a termination of E.H.'s parental rights is necessary to avoid serious physical, mental or emotional harm to the child?**

¶4 Statement of the Case

¶5 This is an appeal by E.H. who is the father of the child, D.H., from the Findings of Fact, Conclusions of Law and Order and Disposition entered March 9, 2010, in Juvenile Court, County of Barnes, State of North D., The Honorable Daniel D. Narum, which terminated his parental rights to D.H. (Appendix 11; Docket No. 47).¹ On May 8, 2008 the Juvenile Court adjudicated D.H. as deprived and placed D.H. in the full custody of Barnes County Social Services for a period of one year. (D.23, App.21). On October 8, 2008, Notice of a Permanency hearing was issued. (D. 25, App. 25). On December 11, 2008, Findings of Fact and Oder for Disposition was entered, continuing custody of D.H. with Barnes County Social Services for one more year. (D. 24, App.30). On October 6, 2009, a Petition for Termination of Parental Rights, supported by an Affidavit by Sheila Oye, LSW, of Barnes County Social Services, was filed in the Juvenile Court, seeking to terminate the parental rights of E.H. and of the children's mother, T.H. (D. 1, 2, 3, App. 3-10). Trial on the petition was commenced before the Juvenile Court, on December 17, 2009, and

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In the brief, the Docket will be abbreviated D, the Appendix App, and the Trial Transcript of December 17, 2009 as T1, and the Trial Transcript of February 2, 2010 as T2.

continued on February 2, 2010. On March 9, 2010, Findings of Fact, Conclusions of Law and Order and Disposition were docketed and which ordered the termination of parental rights of D.H. and T.H. (D.47; App. 11-20). On April 7, 2010, counsel for E.H. filed in the District Court a Notice of Expedited Appeal pursuant to N.D.R.App. P. 2.2. together with an Order for Transcripts (App.34-36)

¶6 Statement of the Facts

¶7 E.H. is the father of D.H. who was born in 1998. E.H. is thirty-one years old, and was born in Valley City. Both of his parents are alive, and he has two sisters and one brother. Another brother died when E.H. was eleven years old. (T2:5-7). His parents separated when he was five years old, and he and the other children spent time in foster care. E.H. was adjudicated delinquent at age fifteen and was a ward of the state until age eighteen. (T2:7-8). E.H. has a G.E.D. and other education and training received while incarcerated at various times. (T2:9). E.H. met D.H.'s mother when he was nineteen, and they dated for about a year. He did not know T.H. became pregnant by him until he received papers in a paternity action initiated by D.H.'s guardian at the time. E.H. was adjudged the father of D.H. in June, 2006, after D.N.A. tests established paternity. (T1:99; T2:11,12). The guardian was the grandmother of the half-sibling of D.H. (T1:98, L20-25). About a year and a half passed between his adjudication as D.H.'s father and the removal D.H. from the guardian's home in December, 2007. (T1:99, L17-21). D.H. was placed in a foster home in January, 2008. (D1:12).

¶8 Proceedings for removal of D.H. and his half-sibling started as a result of events in the home of the guardian. The children were removed from the guardian's home,

and the guardianship was terminated. D.H. was found to be a Deprived Child on May 8, 2008, in Barnes County file 02-08-R-23, of which file the trial court took judicial notice. (D. 23; App. 21). The child has remained in the custody of Barnes County Social Services since May 8, 2008, and in foster care in excess of 450 of 660 consecutive nights. (T1:15, L14,19,22).

¶9 From the beginning of the deprivation proceedings the stated goal of the permanency planning was to place D.H. with his birth mother, T.H. (T1:94; L21-24; T1:124, L3-8). All of the documents listed reunification with the mother as the plan. (T1:95). Substantial efforts were made to establish T.H. as an appropriate placement for D.H. but for a variety of reasons placement with her was not appropriate. (See Petition, App. 5).

¶10 Although E.H. had an intimate relationship with T.H. in 1997, she left the state of North Dakota without telling him she was pregnant. E.H. did not know he was the father of D.H. until 2006, after the guardian pursued a paternity action against him. Consequently, E.H. has had very little contact with D.H. (T2:11-12). He first met D.H. at a restaurant, with the guardian. He was not awarded any visitation rights in the paternity action. (T2:12). The guardian allowed contact between D.H. and E.H.'s family, but she didn't like E.H. (T2:13, L16-19).

¶11 The facts and circumstances resulting in the deprivation of D.H. cannot be attributed to anything E.H. either did or did not do, as properly found by the trial court. (Findings of Fact, para 5; App. 12). As stated, D.H. was under a guardianship until the Court Order dated May 3, 2008. Since that time, the permanency plan was focused on placement with T.H. The reality is that E.H. has

never been seriously considered as a placement option for D.H. (T1:104; L21-24).

¶12. There was substantial significant disputed testimony during the trial. The primary witness for petitioner was Ms. Oye, the case worker, and E.H. testified. E.H. maintains that it was never made clear to him what he was expected to do to obtain custody of D.H. Ms. Oye testified that she did tell E.H. what the permanency plan was and what was expected of him. There were several Permanency Planning Meetings, and Ms. Oye indicated that the documentation reflected that E.H. received notice of each such meeting. However, Ms. Oye had to concede that she did not send the notices personally, she had no copies of any letters, or proof of mailing, and did not know what address had been used in any case. (T1:25, L10-13; T1:28, L11-15). E.H. maintained that he did not get all of the notices they claimed to have sent and that he kept them informed of his addresses. Other Barnes County officials knew how to find him. (T2: 15-16).

¶13. Ms. Oye was adamant that E.H. knew what was expected of him, and that he was told multiple times. Yet, there was never any document provided to him during the critical time frame spelling out what he was required to do to obtain custody of D.H. (T1-89, L17-20). E.H. was told he should get a psychological examination and a chemical dependency evaluation. E.H. got a chemical dependency evaluation at an agency in Valley City, but Ms. Oye told him she would not accept that, and scheduled another one for him, which he did not attend. (T2:18, L 13-15; T1:47-48). Ms. Oye at first denied E.H. got a chemical dependency evaluation, but then admitted he mentioned it but claimed she never saw a copy. (T2:67, L18-24).

¶14. Ms. Oye maintained that E.H. was "ordered" to complete a parental capacity

evaluation. However, none of the prior orders contain any such provision. (T1:91, L24-25; T1:93-93; App. 21-33). No document was provided to him setting forth the requirement that he get a parental capacity evaluation. (T1:97, L14-19).

¶15. Another significant dispute between Ms. Oye and E.H. was his stability, including whether he had a place to live or a job. (T:79-82). Certainly E.H. has had a somewhat turbulent life. He has been arrested a number of times and has spent various periods of time in jail and prison, dating back to when he was a juvenile. (T2:52; T2:37&44). He has struggled on and off with alcohol and marijuana abuse. He is currently incarcerated and will be released on May 17, 2010. (T2:27, L21-23). Contrary to Ms. Oye's testimony, E.H. detailed where he had lived and worked during the relevant time frames. (T2:20-21). Further, during relevant periods, E.H. did not have a driver's license, making compliance with any program more challenging. When he gets out of prison, he will have a valid driver's license. (T2:40).

¶16. Another significant dispute between Ms. Oye and E.H. was the nature of the incident resulting in the arrest of E.H. and an initial charge of Aggravated Assault in 2009. E.H. pleaded guilty to an amended charge of misdemeanor assault and entered an Alford Plea and explained the factual basis for his decision to plead guilty. He got a time-served sentence for that incident and was sent to prison for a probation violation. He assured D.H. that he had not hurt the woman. (T2:59-60; T2:26-27). However, Ms. Oye inappropriately relied on the police report from the incident, and evidently took it at face value. She misunderstood what he was convicted of or what he had admitted to. (T1:51-53; T1:112).

¶17. Ms Oye also cast a negative light on the gifts E.H. gave to D.H. at a visit. (T1:64-65). She mischaracterized what happened. E.H. gave D.H. a wrist watch and a plaque; he told D.H. that plaque was from his grandfather. (T2:41). This is a prime example of the negative twist Ms. Oye placed on every aspect of her involvement with E.H. As indicated by the record, her credibility in several respects is not the best. She portrayed E.H. in the most negative light possible. (T2:83). E.H. has availed himself of opportunities for education and treatment while incarcerated. The Court received exhibits showing that E.H. attended parenting classes offered at the Cass County Jail, including Understanding Temperament, Complex Emotions in Children, Staying in Touch, Trust, Children's Anger, and Positive Discipline. While at the Heart of America Treatment Center in Rugby, E.H. has completed Anger Management Treatment and "Getting Motivated to Change" and was on track to shortly finish Addiction Treatment and Cognitive Restructuring. (T2:28-33; Exhibits 1-8, D.38-45).

¶18. From all accounts D.H. has enjoyed the limited contact he has had with his father, E.H. (T1:141). E.H. has not been the sole custodian of a child, but he has lived with his daughter in Montana and assisted with her care. (T2:37-39). E.H. has been able to support himself and provide an appropriate home for significant periods and he has held a variety of jobs and has marketable skills. (T2:20-21). E.H. recognizes that D.H. has certain needs due to past abuse and neglect and plans to seek resources to assist in addressing those needs. (T2:43). E.H. is physically and mentally healthy and feels he can remain drug and alcohol free when he is released. (T2:43-44). E.H. has done well in school when he has applied

himself and feels able to assist D.H. with his education. (T2:45). E.H. plans to live in Fargo upon release because more resources are available. (T2:46).

¶19. Although the stated plan is for D.H. to be adopted, there is no evidence that D.H. is presently adoptable or that there is an available adoptive home. If E.H.'s parental rights are terminated at this time, no real purpose would be served, and would not be in D.H.'s best interests. Given that D.H. will be twelve years old by the time E.H. is released from prison, and that any contemplated adoption would be an "open" adoption, termination of E.H.'s parental rights would serve no real purpose. By the time he is released from prison, E.H. will have had a substantial period of sobriety and will have completed substantial treatment programs. (T2:46).

¶20 Argument

¶21 The trial court erred by finding that the conditions and causes of the deprivation are likely to continue.

¶22 This court has jurisdiction to hear this appeal under **N. D. Const. art. VI, §§ 2 and 6**, under **N.D.C.C. §27-20-56(1)** and **N.D.R.App. P. 2.2**. A lower court's decision to terminate parental rights is a question of fact that will not be overturned unless the decision is clearly erroneous. **N.D.R.Civ.P. 52(a)**. "A finding of fact is 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 reviewing court is] left with a definite and firm conviction a mistake has been made." ***Interest of D.M., 2007 ND 62, ¶6, 730 N.W. 2d 604 (citations omitted)***. The Juvenile Court Act, as contained in Chapter 27-20 of the North Dakota Century Code, requires that an involuntary termination of a parental rights concerning a minor child must be based

upon clear and convincing evidence that shows: the child is a deprived child; the conditions and causes of the deprivation are likely to continue or will not be remedied and; that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral or emotional harm. **N.D.C.C. §27-20-44(1)(c)(1)**. ***In the Interest of I.B.A. and C.B.A.*, 2008 ND 89, ¶15, 748 N.W. 2d 688**. "The party seeking parental termination must prove all elements by clear and convincing evidence." ***Interest of T.A.*, 2006 ND 210, ¶ 10, 722 N.W. 2d 548**. "Clear and convincing evidence means evidence that leads to a firm belief or conviction the allegations are true." ***Interest of D. M.*, 2007 ND 62, ¶ 7, 730 N.W. 2d 604**. Natural parents have a fundamental right to their children, "which is of a constitutional dimension." ***Interest of W.E.*, 2000 ND 208, ¶30, 616 N.W. 2d 494 (quoting *In the Interest of L.F.*, 1998 ND 129, ¶ 9, 580 N.W. 2d 573)**. The constitutional protections, although not absolute, require that "[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." **Id.** Under **N.D.C.C. §27-20-44** a court's decision to terminate parental rights is discretionary, ***Adoption of K.S.H.*, 442 N.W.2d 417 (N.D. 1989)**. The court in its discretion can deny a petition for the termination of parental rights and make an order under **N.D.C.C. §27-20-30** permitting the child to reside with the child's parents, guardian or other custodian. **Id.**

¶23 Although the Petitioner has shown D.H. was previously adjudicated as deprived, said adjudication, standing alone, is not enough to terminate parental

rights. ***In The Interest of B.N and K.K., 2003 ND 68, ¶ 22, 660 NW2d 610.*** In determining whether the causes and conditions of deprivation will continue there must be prognostic evidence that forms the basis for reasonable prediction of continued or future deprivation. ***In the Interest of C.R. and J.V., 1999 ND 214, 602 NW2d 723.*** "Prognostic evidence" is "evidence that forms the basis for a reasonable prediction as to future behavior." **Id.**

¶24 In this case, to show that the deprivation is likely to continue, Petitioner must clearly show that the circumstances for which the child had been adjudicated deprived will remain unabated. D.H. had been subject to a guardianship with the paternal grandmother of his half-sibling. Proceedings for removal of D.H. and his half-sibling started as a result of events in the home of the guardian. The children were removed from the guardian's home, and the guardianship was terminated. The child's mother, T.H., signed a relinquishment of her parental rights, which the court accepted. (T2:2). The circumstances resulting in the original removal of D.H. from T.H.'s custody and the creation of the guardianship cannot be repeated, and the reasons for terminating the guardianship and placement of D.H. in foster care and the deprivation action cannot be repeated.

¶25 From the beginning of the deprivation proceedings the stated goal of the permanency planning was to unify the children with their birth mother, T.H. Substantial efforts were made to establish her as an appropriate placement for D.H., but for a variety of reasons placement with her was not appropriate. E. H. had an intimate relationship with T.H. in 1997, but she left the state of North Dakota. without telling him she was pregnant. E.H. did not know he was the father of D. H.

until 2006, after the guardian pursued a paternity action against him. E.H. has had very little contact with D.H. The facts and circumstances resulting in the deprivation of D.H. cannot be attributed to anything E.H. either did or did not do. The record reflects that D.H. was under a guardianship until the Court Order dated May 3, 2008. Since that time, the permanency plan was focused on T. H.; E.H. has never been seriously considered as a placement option for D.H. (T1:104, L 21-24). The evidence does not show that the conditions and causes of the deprivation are likely to continue or not be remedied. It is conceded that E.H. had done nothing to contribute to E.H.'s deprivation. E.H.'s conduct since the start of these proceedings has not been ideal by any measure. However, looking forward, with the sole focus on placement of D.H. with him, E.H. has a colorable prospect of success.

¶26 The trial court erred by finding that termination of E.H's parental rights is necessary to avoid serious physical, mental or emotional harm to the child.

¶27 E.H. has had a somewhat turbulent life. He has been arrested a number of times and has spent various periods of time in jail and prison, dating back to when he was a juvenile. He has struggled on and off with alcohol and marijuana abuse. He is currently incarcerated and will be released on May 17, 2010, and will then be free from probation and any pending criminal charges. Witnesses for the Petitioner asserted that E.H. was informed of requirements for him to be considered as a placement for D.H. However, at the same time, every copy of the permanency plan indicates that the goal was to place D.H. with his mother, T.H. No evidence was presented that anything in writing was ever presented to E.H. as to what he was

expected to do, or what purpose anything he did would serve. Further, claims that notices were mailed to E.H. were not supported with any documentation. E.H. had other business with authorities in Barnes County who knew how to contact him during times when Barnes County Social Services claimed it did not know his whereabouts. Further, during relevant periods, E.H. did not have a driver's license, making compliance with any program more challenging.

¶28 E.H. disputes the claim and the Court's findings that Barnes County Social Services made reasonable efforts to work with him, and asserts that the Court's findings in that regard are clearly erroneous. One glaring erroneous finding which E.H. asks this Court to Order corrected is the Finding that he "has been convicted of a felony level violent crime." (See Findings, page 3, paragraph 8, App. 13). The record shows he was convicted of only a misdemeanor assault. (T2:59-60). Obviously E.H. may have been able to accomplish some tasks during the relevant period, but Ms. Oye's attitude toward him and her negative view of him and his situation made it obvious that she never viewed him as a viable placement option. However, the record does show that E.H. has availed himself of many opportunities for education and treatment while incarcerated. The Court received exhibits showing that E.H. attended parenting classes offered at the Cass County Jail, including Understanding Temperament, Complex Emotions in Children, Staying in Touch, Trust, Children's Anger, and Positive Discipline. While at the Heart of America Treatment Center in Rugby, E.H. has completed Anger Management Treatment and "Getting Motivated to Change" and is on track to shortly finish Addiction Treatment and Cognitive Restructuring. (D. 38-45).

¶29 From all accounts D.H. has enjoyed the limited contact he has had with his father, E.H. He has not been the sole custodian of a child, but he has lived with his daughter in Montana and assisted with her care. E.H. has been able to support himself and provide an appropriate home for significant periods and he has held a variety of jobs and has marketable skills.

¶30 There is no evidence that D.H. is presently adoptable or that there is an available adoptive home. If E.H.'s parental rights were terminated at this time, no real purpose would be served, and would not be in D.H.'s best interests. Given that D.H. will be twelve years old by the time E.H. is released from prison, and that any contemplated adoption would be an "open" adoption, termination of E.H.'s parental rights would serve no purpose.

¶31 By the time he is released from prison, E.H. will have had a substantial period of sobriety and will have completed substantial treatment programs. It is appropriate to Order Barnes County Social Services to focus services solely upon E.H. to enable him to establish himself and be considered as a permanent placement for D.H.

¶32 N.D.C.C. §27-20-44 provides that the court may terminate parental rights if certain conditions are met. Obviously just the length of foster care placement would support termination of E.H.'s parental rights in this case, but termination at this time is not justified. E.H. asks the Court to focus on the best interests of D.H. He has had a turbulent life, but no one can credibly fault E.H. for anything that happened in D.H.'s life prior to May 8, 2008, when the guardianship was dissolved. E.H. has had no legal right or opportunity to parent D.H. Despite what the petitioner has claimed,

E.H. was never considered as a viable placement option and the only focus was on placement with T.H. From E.H.'s perspective, it seems social services only went through the motions as far as he was concerned. It seems since the law changed to allow termination based upon length of foster care placement alone, social workers can drag things out for appearances while not applying true effort. E.H. simply has not been provided a fair chance to be considered as a permanent home for D.H. Certainly his incarceration in 2009 was a serious setback, but he has made significant progress while incarcerated. E.H. may well soon be in the best position in his adult life to not only lead a productive life, but provide a safe and secure home for his children. No constructive purpose would be served by terminating E.H.'s parental rights at this time. The Petitioner does not have a concrete plan other than attempted adoption, and there is no one waiting in the wings to adopt D.H. Termination now would not change D.H.'s situation for the better. This record does not establish that termination of E.H.'s parental rights is necessary to protect D.H. from serious physical, mental, moral or emotional harm.

¶33 Conclusion

¶34 The decision to terminate E.H.'s parental rights to D.H. on this record is clearly erroneous, and the order of the juvenile court should be reversed, and this Court should order: That the parental rights of E.H. with respect to D.H. shall not be terminated. However, D.H. continues to be a Deprived Child. Subject to further order of the Court, D.H. should continue under the care, custody and control of Barnes County Social Services. Barnes County Social Services shall have the authority to make appropriate placement, and is responsible for the care and

expenses for the child. Barnes County Social Services shall arrange visitation for E.H. with his child D.H. Barnes County Social Services shall enter into a written plan with E.H., subject to the Juvenile Court's approval, which sets forth appropriate conditions E.H. must meet to gain physical care of D.H. and eventually become his legal custodian. This Order should remain in effect for no longer than twelve (12) months from the date it is entered.

Respectfully submitted this 7th day of April, 2010.



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IN RE

In the Interests of D.H., a child.
Supreme Court No. _____
Barnes County No. 02-09-R-72

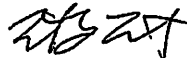
**CERTIFICATE OF SERVICE
BY ELECTRONIC MEANS**

I, Monty G. Mertz, do hereby certify that, on the 7th day of April, 2010, I served the **Brief of Respondent/Appellant E.H.** and the **Appellant's Appendix** upon the following:

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by sending an E mail to fkelly@drtel.net with the brief and appendix attached in PDF format. To the best of my knowledge, this is the E mail address for Mr. Kelly.

Dated this 7th day of April, 2010.



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