

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 20, 2010
STATE OF NORTH DAKOTA

IN THE INTEREST OF J.W., A CHILD

Kendra Cassavant,
Petitioner and Appellee,
vs.
J. W., a child; A.W., Mother; C.W.,
Father; Vicky Altringer, Guardian
Ad Litem; Executive Director of the
ND Department of Human Services,
Respondents,
C.W., Father and
A.W., Mother,
Appellants.
Supreme Court No. 20100376
District Court No. 30-08R-00195

APPEAL FROM ORDER ENTERED OCTOBER 14, 2010
IN JUVENILE COURT
MORTON COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE DAVID E. REICH, DISTRICT JUDGE

BRIEF OF APPELLANT A.W.

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[¶2] TABLE OF CONTENTS

Table of Authorities	p. 1
Statement of the Issues	¶1
Statement of the Case	¶3
Statement of the Facts	¶6
Law and Argument	¶10
Conclusion	¶20
Certificate of Service	¶21

TABLE OF AUTHORITIES

CASES

Interest of D.M., 2007 ND 62,730 N.W. 2d 604 ¶11

In the Interest of I.B.A. and C.B.A., 2008 ND 89, 748 N.W. 2d 688 ¶11

Interest of T.A., 2006 ND 210, 722 N.W. 2d 548 ¶11

Interest of W.E., 2000 ND 208, 616 N.W. 2d 494 ¶11

In the Interest of L.F., 1998 ND 129, 580 N.W. 2d 573 ¶11

Adoption of K.S.H., 442 N.W. 2d 417 (N.D. 1989) ¶11

The Interest of B.N and K.K., 2003 ND 68, 660 NW2d 610 ¶12

The Interest of C.R. and J.V., 1999 ND 214, 602 NW2d 723 ¶12

STATUTES/CONSTITUTIONS

N.D.C.C. §27-20-44 ¶11, ¶19

N.D.C.C. §27-20-30 ¶11

N.D.C.C. §27-20-56 ¶11

N.D. Const. art. IV §2 & 6 ¶11

RULES

N.D.R.Civ.P. 52(a) ¶11

N.D.R.App. P. 2.2. ¶11

STATEMENT OF THE ISSUES

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

STATEMENT OF THE CASE

[¶3] This is an appeal by A.W. who is the mother of the child, J.W., from the Findings of Fact and Order dated April 13, 2010, in Juvenile Court, County of Morton, State of North Dakota, by Judicial Referee Wayne Goter, which terminated her parental rights to J.W. (Appendix 13; Register of Actions 112)¹ and affirmed by Order dated October 14, 2010 by the Honorable David E. Reich (App. 23, R. 119).

[¶4] On June 24, 2008, a Temporary Custody Order was issued pursuant to an Affidavit in Support of Temporary Custody Order. (R.1.) The Juvenile Court adjudicated J.W. as deprived and placed J.W. in the full custody of Morton County Social Services for a period of one year. (R.6.) J.W. has remained in the custody of Morton County Social Services ever since.

[¶5] On October 29, 2009, a Summons issued for Termination of Parental Rights, supported by an Affidavit by Kendra Casavant, was filed in the Juvenile Court,

1

In the brief, the Register of Actions will be abbreviated R, the Appendix App, and the Trial Transcript of April 8, 2010 as Tr.

seeking to terminate the parental rights of A.W. and of the child's father, C.W. (App. 5, R. 77) Trial on the petition was commenced before the Juvenile Court, on April 8, 2010. On April 16, 2010 a Notice of Findings of Fact and Order were docketed which ordered the termination of parental rights of A.W. and C.W. (App. 13, R. 112). On April 16, 2010, counsel filed a request of Judicial Review. On October, 14, 2010, Judge Reich issued an Order confirming the judicial referee's decision terminating parental rights. (App. 24, R. 133) This appeal follows.

STATEMENT OF THE FACTS

[¶6] A.W. is the mother of J.W. who was born in 2008. (App. 5) J.W. was removed from the custody of her parent's right after birth due to the mother's prenatal methamphetamine usage and was never allowed to go home. (Tr. 52) J.W. has been living in Kentucky since the age of two and a half months with Guy and Terina McKinney at the request of the parents, and against the advice of Social Services. (Tr. 45, 52, 53) Since the removal of the child, the parents have had minimal contact with the child. (Tr. 42) This was mainly due to the fact that the child was less than twenty-two months old and she could not carry on a conversation on the phone or write letters. (Tr. 42)

[¶7] Subsequent to the time the child was placed in foster care, and prior to the April 8, 2010 hearing, A.W. was evaluated twice for continued drug usage. (Tr. 4, 6) She was diagnosed as having a chemical addiction and was placed in primary treatment at West Central Human Services, which she successfully completed. (Tr. 4) Once she completed her primary treatment program, she was then placed in aftercare treatment

which she also successfully completed. (Tr. 4) The aftercare treatment program lasted twelve weeks, and at no time did A.W. ever test positive for drug usage during her treatment programs. (Tr. 8, 9) A.W. successfully completed all of the treatment programs that West Central Human Services required of her. (Tr. 10)

[¶8] At the same time that A.W. was being evaluated for chemical addictions, she was also being evaluated for psychological disorders. (Tr. 15) A.W. was diagnosed with Anxiety Disorder, Dysthymic Disorder, Post-Traumatic Stress Disorder, the chemical dependences and Neglect of Child and Physical Abuse of Adults (Tr. 15, 16) as well as Borderline Personality Disorder. (Tr. 17) However, in diagnosing A.W. with these psychological ailments, none of the tests used were one hundred percent accurate. (Tr. 22) Additionally, A.W. was given recommendations to help her cope with these disorders, and to the best recollection of the psychologist who was treating her, she was in the midst of completing the requirements. (Tr. 24)

[¶9] A.W. was on supervised probation, and at the time of the April 8, 2010 hearing. She was waiting to have a revocation hearing due to the fact that her probation officer filed a petition to have her probation revoked. (Tr. 32) The petition contained eight allegations, some of which went back all the way to her giving birth in June, 2008. (Tr. 32, 33) Additionally, her probation officer reported A.W. completed all of here treatment and evaluations successfully through West Central Human Service Center. (Tr. 31).

LAW AND ARGUMENT

[¶10] **The trial court erred by finding that the conditions and causes of the deprivation are likely to continue.**

[¶11] 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[s] 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.*

[¶12] Although the Petitioner has shown J.W. 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.*

[¶13] 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. Proceedings for removal of J.W. were due to the mother's use of methamphetamines during her pregnancy. The child was removed from the parents immediately following her birth due to her mother's prenatal

methamphetamine use. Since that time, A.W. has been evaluated twice, successfully completed primary and aftercare treatment programs through West Central Human Services and at no time during her treatment programs did A.W. ever test positive for drug usage.

[¶14] From the beginning of the deprivation proceedings the stated goal of the permanency planning was to unify the child with her parents. However, A.W. believed that she would never be allowed to be with her child. (Tr. 83)

[¶15] The trial court erred by finding that termination of A.W.'s parental rights is necessary to avoid serious physical, mental or emotional harm to the child.

[¶16] A.W. has had a somewhat turbulent life. She has been arrested a number of times and has spent various periods of time in addiction treatment and in psychological counseling. She has struggled on and off with alcohol and drug abuse. She is currently on supervised probation. However, at the same time, A.W. did everything in her power to comply with the requirements placed upon her by social services. She completed primary and aftercare treatment for her addictions without ever testing positive and she was in the process of completing her psychological treatment requirements when the April hearing was conducted.

[¶17] A.W. disputes the claim and the Court's findings that Morton County Social Services made reasonable efforts to work with her, and asserts that the Court's findings in that regard are clearly erroneous. At no time did A.W. admit or was A.W. convicted of using illegal drugs since June 2008. She completed the treatment programs

that were asked of her. Therefore, she must have progressed from where she started in June 2008, which is contrary to the judicial referee's findings. (App. 17)

[¶18] At the time of the hearing, the child was less than twenty-two months old. A child that young cannot talk on the phone, write letters or communicate with anybody. Calling to talk to her would have been fruitless.

[¶19] **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 A.W.'s parental rights in this case, but termination at this time is not justified. A.W. asks the Court to focus on the best interests of the child. From A.W.'s perspective, it seems social services only went through the motions as far as she 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. A.W. simply has not been provided a fair chance to be considered a nurturing parent for J.W.

CONCLUSION

[¶20] The decision to terminate A.W.'s parental rights to J.W. on this record is clearly erroneous, and the Order of the juvenile court should be reversed. This Court should order that the parental rights of A.W. with respect to J.W. shall not be terminated. However, J.W. continues to be a Deprived Child. Subject to further order of the Court, J.W. should continue under the care, custody and control of Morton County Social Services. Morton County Social Services shall have the authority to make appropriate placement, and is responsible for the care and expenses for the child. Morton County

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

Respectfully submitted this 20th day of December, 2010.

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CERTIFICATE OF SERVICE

[¶21] I hereby certify that the foregoing BRIEF OF APPELLANT was on December 21, 2010 electronically transmitted to the following:

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