

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Interest of J.W., a child

Kendra Cassavant,)

)

Petitioner and Appellee,)

Supreme Court No. 20100376

)

v.)

District Court No. 30-08-R-0195

)

J.W., a child; A.W., Mother;)

C.W., Father; Vicky Altringer,)

Guardian Ad Litem; Executive)

Director, ND Department of)

Human Services,)

)

Respondents,)

)

C.W., Father, and)

A.W., Mother,)

)

Appellants,)

BRIEF OF RESPONDENT/APPELLANT C.W.

APPEAL FROM ORDER ENTERED OCTOBER 19, 2010
IN JUVENILE COURT
MORTON COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE DAVID E. REICH, DISTRICT JUDGE

Carey A. Goetz
N.D. Lic. No. 05958
ZUGER KIRMIS & SMITH
316 North Fifth Street
P.O. Box 1695
Bismarck, North Dakota 58502
Telephone: (701) 223-2711

Attorney for Respondent/Appellant C.W.

TABLE OF CONTENTS

	Page/¶ No.
Table of Authorities	P. 3
Statement of the Issue.....	¶ 1
Statement of the Case.....	¶ 2
Statement of Facts.....	¶ 13
Law & Argument.....	¶ 24
A. Jurisdictional Statement.....	¶ 24
B. Statement of the Standard of Review.....	¶ 25
C. Argument.....	¶ 26
Conclusion.....	¶ 39

Table of Authorities

North Dakota Constitution

N. D. Const. art. VI, §§ 2 and 6.....¶ 24

North Dakota Cases

Boening v. Dir., Cass County Soc. Servs. (In the Interest of J.H.), 484 N.W.2d 482, 484 (N.D. 1992).....¶ 33

Cleveland v. T.V. (In re Z.R.), 1999 ND 214, ¶ 10, 602 N.W.2d 723.....¶ 26, ¶ 33

Dvorak v. S.H. (In re M.S.), 2001 ND 68, ¶ 4, 624 N.W.2d 678.....¶ 30

Helfenstein v. Schutt, 2007 ND 106, ¶ 14, 735 N.W.2d 410.....¶ 25

In Interest of J.K.S., 356 N.W.2d 88, 93 (N.D. 1984).....¶ 28, ¶ 32

In re M.S., 2001 ND 68, ¶ 4, 624 N.W.2d 678.....¶ 30

In The Interest of B.N and K.K., 2003 ND 68, ¶ 22, 660 N.W.2d 610.....¶ 30

Interest of T.A., 2006 ND 210, ¶ 10, 722 N.W. 2d 548.....¶ 28

S.M.G. L.G. v. N.D. Dep't of Human Servs., 2010 ND 173, ¶ 5, 788 N.W.2d 582.....¶ 29

North Dakota Statutes

N.D.C.C. § 27-20-02(8).....¶ 29

N.D.C.C. § 27-20-56(1).....¶ 24

N.D.C.C. § 27-20-44(1) (c) (1)¶ 27

N.D.C.C. § 27-20-44(1) (c) (2)¶ 27

North Dakota Rules

N.D.R.App.P. 22.....¶ 24

N.D.Civ.P. 52(a),.....¶ 24

STATEMENT OF THE ISSUE

¶ 1 The District Court erred in terminating C.W.'s rights to J.W., his minor child.

STATEMENT OF THE CASE

¶ 2 This is an appeal from an Order whereby C.W. (Chris) had his parental rights to J.W. (Jenny) terminated, issued by the Honorable David E. Reich, Judge of the District Court for the South Central Judicial District, and entered in Morton County District Court on October 19, 2010. (App. 19-20).

¶ 3 Jenny was born to Chris and A.W. (Alice) was born in 2008. (App. 9). Chris and Alice were married at the time of birth and remained married at the time of the termination hearing held on April 8, 2010. (Tr. 82:1-4). Jenny was born with methamphetamine in her system, and Alice also had methamphetamine in her system. (App. 9).

¶ 4 Jenny was placed in shelter care on June 26, 2008, and a deprivation case was filed shortly thereafter. Id. After the deprivation hearing, Jenny was found to be deprived on January 21, 2009, and legal custody, care and control were given to Morton County Social Services until June 20, 2009. (App. 9-10).

¶ 5 Jenny was placed into foster care with relatives, G.M (Gary) and T.M. (Trisha), who reside in Kentucky. (App. 10). Jenny remained in foster care with them at the time of the termination hearing. Id.

¶ 6 A hearing on a motion for permanency took place on July 10, 2009, during which the parties reached an agreement for disposition, and Jenny's placement out of home was continued for an additional six months. Id.

¶ 7 A Petition for Termination of Parental Rights was issued on October 29, 2009. (App. 5-7).

¶ 8 A hearing on the Petition for Termination of Parental Rights was held on April 8, 2010, with the Honorable Wayne Goter, Judicial Referee of the District Court, presiding. (App. 8).

¶ 9 The Honorable Wayne Goter issued Findings of Fact and Order on April 13, 2010, whereby Chris and Alice's parental rights to Jenny were terminated. (App. 8-17).

¶ 10 Chris requested Judicial Review by the District Court on April 16, 2010. (App. 18).

¶ 11 The Honorable David E. Reich, Judge of the District Court issued an Order on October 14, 2010, whereby he found the Findings and Order issued by Referee Goter were appropriate under the facts and applicable law. (App. 19-20)

¶ 12 Chris filed a notice of appeal of Judge Reich's October 19, 2010, Order on November 15, 2010. (App. 21).

STATEMENT OF THE FACTS

¶ 13 In 2008, Jenny was born with methamphetamine in her system, and her mother, Alice, tested positive for methamphetamine shortly after her birth. (Tr. 52:6-10).

¶ 14 Jenny has never been in the care of Chris and Alice. She was taken into shelter care, and then foster care, directly from the hospital. She was placed with relatives Gary and Trish in Kentucky at a two and half months of age. (Tr. 45:2). Jenny continued to reside with Gary and Trish at the time of the April 8, 2010, hearing. (Tr. 41:3-6).

¶ 15 Chris and Alice have been married since before Jenny's birth and were living together at the time of the hearing. (Tr. 82:1-4).

¶ 16 Chris has four other children from a previous marriage who reside with their mother in another town in North Dakota some distance from Morton County. (Tr. 89:6-11). (Tr. 68:11-13). He had approximately ten years of parenting experience when he divorced in 2003, as his oldest child was ten years old. (Tr. 89:12-14). He also maintains contact with his children. (Tr. 89:15-17).

¶ 17 With regard to his older children, at one point Social Services was asked to do a home study on Chris's home for placement of his children out of their mother's home. (Tr. 68:23-25). However, because Alice's parental rights to a previous child (which was not Chris's child) had just been terminated and Alice was living in Chris's home, Social Services refused to do a home study. (Tr. 68:23-25; 69:1-3).

¶ 18 Initially, Chris refused to work with Social Services because friends had told him not to comply and he believed he was competent enough to "figure out what need[ed] to be done." (Tr. 90:21-25; 92:1-4). However, within seven or eight months, he began to comply with social services. (Tr. 91:5-8).

¶ 19. Initially, Social Services ordered “services required” Chris because of an alleged failure to protect Jenny but this was later reversed, of Social Services. (Tr. 67:2-5).

¶ 20 Chris has completed a nurturing class and also continues to work with a parenting aide. (Tr. 69:11-15). He also completed anger management and counseling with his pastor. (Tr. 91:11-16).

¶ 21 Chris never missed visitation with Jenny at the Family Safety Center when she still resided in North Dakota. (Tr. 89:4-13).

¶ 22 When asked during the hearing what he would do if his rights weren’t terminated but Alice’s rights were, Chris testified he and Alice agreed she would move out of their home. (Tr. 95:17-20). He further testified that, if required to choose between Alice and Jenny, he would choose Jenny for safety purposes and he would not allow Jenny to see Alice if visitation was not allowed by the Court. (Tr. 96:2-4). See (Tr. 14-16). Chris’s ultimate goal is reunification with Jenny. (Tr. 97:9-10).

¶ 23 Finally, Chris testified he loves Jenny and wants her back. (Tr. 96:7-10).

LAW & ARGUMENT

I. The District Court erred in terminating C.W.'s rights to J.W., his minor child.

A. Jurisdictional Statement

¶ 24 An appeal may be taken under N. D. Const. art. VI, §§ 2 and 6, Section 27-20-56(1), North Dakota Century Code, and Rule 22, North Dakota Rules of Appellate Procedure.

B. Standard of Review

¶ 25 The North Dakota Supreme Court reviews a district court's affirmation of an order terminating parental rights under the "clearly erroneous" standard. 52(a), N.D.Civ.P. "A finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after review of the entire record, we are left with a definite and firm conviction a mistake has been made." Helfenstein v. Schutt, 2007 ND 106, ¶ 14, 735 N.W.2d 410.

C. Argument

¶ 26 Parents have a fundamental, natural, and constitutional right to their children. Cleveland v. T.V. (In re Z.R.), 1999 ND 214, ¶ 10, 602 N.W.2d 723. "This constitutional protection ensures parental rights may not be terminated "merely because a parent lacks the skill to optimize a normal child's potential." Id. However, it is not an absolute right and "and a parent must at least provide care that satisfies the minimum community standards." Id. Despite this, "[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.

¶ 27 Under Chapter 27-20 of the North Dakota Century Code, involuntary termination of parental rights can only occur after, by clear and convincing evidence, it is shown:

c. The child is a deprived child and the court finds:

(1) 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; or

(2) The child has been in foster care, in the care, custody, and control of the department, or a county social service board, or, in cases arising out of an adjudication by the juvenile court that a child is an unruly child, the division of juvenile services, for at least four hundred fifty out of the previous six hundred sixty nights; or

N.D.C.C. § 27-20-44(1) (c) (1) and (c)(2).

¶ 28 "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. According to the North Dakota Supreme Court, "[c]lear and convincing evidence is evidence that leads to a firm belief or conviction the allegations are true." S.M.G. L.G. v. N.D. Dep't of Human Servs., 2010 ND 173, ¶ 5, 788 N.W.2d 582. Further, The "best interest of the child" is one factor to be considered even though it is not the primary question before the court in a deprivation or termination proceeding. In Interest of J.K.S., 356 N.W.2d 88, 93 (N.D. 1984).

¶ 29 A deprived child, according to the North Dakota Century Code, means a child who:

a. 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;'

....

d. Is without proper parental care, control, or education as required by law, or other care and control necessary for the child's well-being because of the physical, mental, emotional, or other illness or disability of the

child's parent or parents, and that such lack of care is not due to a willful act of commission or act of omission by the child's parents, and care is requested by a parent;

e. Is in need of treatment and whose parents, guardian, or other custodian have refused to participate in treatment as ordered by the juvenile court;

f. Was subject to prenatal exposure to chronic or severe use of alcohol or any controlled substance as defined in chapter 19-03.1 in a manner not lawfully prescribed by a practitioner; or

g. Is present in an environment subjecting the child to exposure to a controlled substance, chemical substance, or drug paraphernalia as prohibited by section 19-03.1-22.2.

N.D.C.C. ¶ 27-20-02(8).

¶ 30 A finding of deprivation is not sufficient to terminate parental rights. In re M.S., 2001 ND 68, ¶ 4, 624 N.W.2d 678. Petitioner must also prove by clear and convincing evidence that “[] the conditions and causes of the deprivation are likely to continue; and [] the child is suffering, or will in the future probably suffer serious physical, mental, moral, or emotional harm.” Dvorak v. S.H. (In re M.S.), 2001 ND 68, ¶ 4, 624 N.W.2d 678.

¶ 31 Despite previous findings of deprivation, such adjudications, by themselves, are not enough to terminate parental rights. In The Interest of B.N and K.K., 2003 ND 68, ¶ 22, 660 N.W.2d 610.

¶ 32 “Where there has been a reasonable likelihood that the [natural parent] may be capable of providing for the necessary care and support of [the] child we have not allowed the child to remain in foster care.” J.K.S., 356 N.W.2d at 93.

¶ 33 “[T]here must be prognostic evidence that forms the basis for reasonable prediction of continued or future deprivation.” Cleveland, at ¶ 10.

Prognostic evidence must show that the parent is presently unable to supply physical and emotional care for the child, with the aid of available social agencies if necessary, and that this inability of a parent will continue for time enough to render improbable the successful assimilation of the child into a family if the parents' rights are not terminated.

Boening v. Dir., Cass County Soc. Servs. (In the Interest of J.H.), 484 N.W.2d

482, 484 (N.D. 1992). Indeed, past evidence alone cannot be the basis for termination of parental rights. Cleveland at ¶ 18.

¶ 34 In this case, the risk of harm to Jenny comes solely from Alice. Chris did nothing to harm Jenny and, at the time of the hearing, he had been working with a parenting aide, completed a nurturing class, completed anger management, attended counseling with his pastor and continued to work with Social Services in an effort to be reunified with his daughter. The distance between Kentucky and North Dakota proved to be a great impediment. However, at twenty-two (22) months of age, Jenny could establish a bond with Chris. There is no evidence the child would be deprived while in Chris's care, certainly not to the point of clear and convincing evidence.

¶ 35 Chris is capable of providing the necessary support and care for Jenny, even if Alice is not. Ultimately, the goal was to have Chris, Alice and Jenny together. However, Chris recognized Alice's problems could, in all likelihood, result in termination of her parental rights. He was prepared to parent Jenny as a single parent and remove Alice from his home, despite their five year marriage.

¶ 36 Chris's relationship with Alice appears to be his primary sin. Social Services wouldn't even consider placing his older children in his home solely because Alice lived there. However, the District Court failed to properly consider the prognostic evidence set forth in Chris's testimony. He vowed to separate from Alice if it meant getting his child

back. Jenny would not be allowed to see Alice unless a court allowed it. Doubt should have been resolved in his favor, as the law requires, and it was not. His past cooperation should be considered as evidence of his future cooperation with Social Services.

¶ 37 There is no prior conduct by Chris to show he contributed to or caused the deprivation of Jenny. Even Social Services removed Chris's "services required" requirement after Jenny's birth for allegedly failing to protect her. By considering his past conduct, along with prognostic evidence, it is evident Chris's parental rights should not have been terminated, despite the fact that Alice's rights were terminated. Simply put, Chris's rights were terminated because Alice's rights were terminated. These are two separate parents and they should be treated as such, instead of being treated as one unit where the weakest link in the chain has caused both of them to lose their child.

¶ 38 Additionally, under section 27-20-44, Chris's parental rights can be terminated based upon the fact that Jenny has been out of the home for the requisite period of time. However, this ignores the best interests of the child and a parent's constitutional right to parent their children. To terminate based upon length of time, alone, when Chris is ready, able and willing to be a parent to his own child would be a tragedy, regardless of the law.

CONCLUSION

¶ 39 The District Court erred in terminating Chris's parental rights to Jenny. Therefore, this matter should be reversed and remanded, with the Court instructing the District Court to reinstate Chris's parental rights and further issue an order requiring Morton County Social Services to bring Jenny back to North Dakota, work on a plan to

transition Jenny into Chris's care as soon as possible, and work with Chris in achieving this goal.

Dated this 27th day of December, 2010

Carey A. Goetz
N.D. License No. 05958
ZUGER KIRMIS & SMITH
316 North Fifth Street
P.O. Box 1695
Bismarck, North Dakota 58502
Telephone: (701) 223-2711
Facsimile: (701) 223-9619
Attorney for Respondent/Appellant