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**Statement of the Issues**

- I. **Whether the Juvenile Court was clearly erroneous when it found that the child was a deprived child, the conditions causing the deprivation were likely to continue, and the child will probably suffer serious physical, mental, moral, or emotional harm\_\_\_\_\_11**
  
- II. **Whether the Juvenile Court was clearly erroneous when it found that the child was an abandoned child?\_\_\_\_\_21**

**Statement of the Facts**

J.W. (the child) was born in June 2008 with large amounts of methamphetamine in her system. (Transcript (Tr.) pg. 52 lines 4-10). Morton County Social Services took emergency custody of her at birth and she has remained in placement ever since. (Tr. pg. 52 lines 11-12). A.W. (the mother) and C.W (the father) are the parents of the child. (Tr. pg. 89 lines 1-4). They are married and live in a house in Morton County that is owned by a relative. (Tr. pg. 89 lines 1-4; Tr. pg. 83 line 9).

The mother has four other children. (Tr. pg. 18 line 23). All of these children were taken from her custody prior to the age of four. (Tr. pg. 19 line 1). Two children, who are now adults, were raised by parental relatives. (Tr. pg. 53 lines 22-25). One child was removed by Social Services in the State of Colorado and her parental rights were terminated. (Tr. pg. 54 lines 2-3). In 2006 Morton County Social Services took custody of the fourth child at birth because of the mother's mental instability. Her parental rights to this child were terminated. (Tr. pg. 54 lines 3-5)

The father also has four other children that are not in his care. (Tr. pg. 53 lines 15-16). The children live in Devils Lake, North Dakota, with their mother. (Id.) Two of these children were temporarily removed by Ramsey County Social Services. (Id.) At best the

father attempts to see these children twice a year and will not go to Devils Lake, North Dakota, to see them. (Tr. pg. 89 lines 20-23).

A Petition alleging that the child was deprived was filed in June 2008. (Appendix (App.) of A.W. at 14) While the Petition was pending the parents requested that the child be sent to the State of Kentucky to live with the mother's brother and his family. (Tr. pg 52 lines 17-22). Morton County Social Services was opposed to placing the child in Kentucky and repeatedly attempted to explain to the parents that placing the child outside of North Dakota would make contact difficult. (Tr. pg 52 lines 17-22). But, the parents insisted on placing the child in Kentucky because they did not want Morton County Social Services involved and wanted the brother's family to provide permanency for the child. (Id.) Because of the parents' insistence the child was sent to Kentucky in September 2008. (Tr. pg. 41 lines 3-4). Judicial Referee Julie M. Buechler Boschee found that the child was deprived in January 2009. (App. of A.W. at 14). Judicial Referee John Grinsteiner found that she was still deprived in July 2009. (App. of A.W. at 15).

Eventually, a Petition for Termination of Parental Rights was filed. (App. of A.W. at 10). The Petition alleged that the child had been in placement since June 2008 and was a deprived and/or abandoned child. (Id.) A hearing was held before Judicial Referee Wayne Goter on April 8, 2010. (Id. at 13). Numerous breaks were taken during the hearing because of the parents' disruptive behavior. (Tr. pg. 19 line 25) (Referee Goter to Mr. McCabe: "Do you need some time there Mr. McCabe") (Tr. pg. 20 lines 16-19) (Referee Goter to the mother: "You ok ma'am then?" "You need medications or anything? You going to be ok?")(Tr. pg. 61 lines 20-23)(Referee Goter to the mother: Hold on...you going to be ok?" "I need you to keep calm. Your attorney is trying to listen

and we're trying to hear the witness.") (Tr. pg. 65 line 20)(Mr. McCabe: "Your Honor, may we take a moment at this time?") (Tr. pg. 66 lines 3-9) (Referee Goter to both parents: "Your attorneys have a hard job today, and they need to concentrate on what's going on. To the extent that you guys are talking back and forth and passing notes, I think its highly disturbing to them and its hurting your case." "Try to keep it to a minimum, its disruptive to your attorneys.")

Brenda Fetting, a licensed addiction counselor with West Central Human Services, testified that the mother had been diagnosed with amphetamine dependence with physiological dependence, alcohol dependence with physiological dependence, and cocaine dependence with physiological dependence that was in remission. (Tr. pg. 5 lines 23-25; Tr. pg. 6 lines 2-5). She had completed primary treatment and aftercare. (Tr. pg. 7 lines 20-22; Tr. pg. 8 lines 23-24). However, she admitted during aftercare that she had been drinking. (Tr. pg. 9 lines 1-3).

Dr. Lisa Hay, a psychologist with West Central Human Services, testified that Parental Capacity Evaluations had been performed on both parents. (Tr. pg. 13 lines 16-23; Tr. pg. 14 lines 9-10). Along with her addiction issues, the mother was diagnosed anxiety disorder not otherwise specified, dysthymic disorder, post-traumatic stress disorder, and borderline personality disorder. (Tr. pg 23-25; Tr. pg. 16 lines 1-4).

Dr. Hay testified that the anxiety disorder causes a person to be more anxious than normal to the point where it would creates impairment. (Tr. pg. 16 lines 5-8). The dysthymic disorder is a form of depression. (Id. at lines 12-13). The post traumatic stress disorder impairs a person's ability to carry out normal daily activities. (Id. at lines 14-18). Finally, the borderline personality disorder impacts the way a person interacts with the

world by causing the person to be very up and down and overly sensitive making life chaotic because of an inability to interpret situations. (Tr. pg. 17 lines 1-25).

Dr. Hay was also troubled by the fact that all four of the mother's other children had been taken from her custody before the age of four because it showed a long term inability to address problems. (Tr. pg. 19 lines 1-9). In Dr. Hay's opinion the mother would need counseling and continued psychiatric care. (Tr. pg. 19 lines 19-23). She recommended that the mother receive psychiatric care at the same time she receive addiction treatment and individual therapy, and that she practice with a computerized doll. (Tr. pg. 20 lines 24-25; Tr. pg. 21 lines 1-14). If the mother did not address her mental health problems it would be problematic and would affect her ability to parent the child. (Tr. pg. 21 lines 16-18).

In regards to the father, Dr. Hay testified that he had admitted that he was refusing to cooperate with Morton County Social Services. (Tr. pg 24 lines 19-21). In addition, he was diagnosed with a personality disorder not otherwise specified with narcissistic suspicions and antisocial traits. (Tr. pg. 25 lines 12-14). This meant that he focused only on himself, was suspicious that other people were against him, and did not care about others if they got in the way of what he wanted. (Tr. pg. 25 lines 21-25). This made it difficult for the father to deal with situations as they occurred. (Tr. pg. 26 lines 11-13).

In Dr. Hay's opinion it was problematic that both parents had mental health problems which made it difficult for them to interpret situations and understand how the world works. (Tr. pg. 27 lines 13-18). She testified "...both of them have issues with not cutting off their nose to spite their face..." (Id.) "...[N]either one of them is going to be real good at being able to say this may end up hurting us if we do it this way." (Id.) "They

both have strengths, and so they both at times do it but overall it's going to be hard for them." (Id.)

Probation officer Amanda Haff, testified that the mother had been on probation since May 2008 for Driving Under the Influence, Driving Under Revocation, Contact by Bodily Fluids, and Physical Obstruction of a Government Function. (Tr. pg. 29 lines 15-25; Tr. pg. 30 lines 1-3). The Contact by Bodily Fluids charge arose when the mother beat her head on a cop car and wiped the blood on arresting officers. (Tr. lines 21-22). Officer Haff indicated that the mother had completed addiction treatment at West Central Human Services but afterward had failed to complete the Teen Challenge program several times. (Tr. pg. 31 lines 20-24). The last time she left Teen Challenge was March 2010. (Tr. pg. 32 line 1-3). At the time of hearing there was a pending petition to revoke the mother's probation based on numerous probation violations. (Tr. pg. 32. at lines 7-8). She had tested positive for methamphetamine at the time of the child's birth in June 2008. (Tr. pg. 30 lines 1-6; Tr. pg. 32 at lines 19-20). She had consumed alcohol in violation of her probation in October 2008 and had provided a diluted urine specimen. (Tr. pg. 32 lines 19-23). In January 2010 the mother drank alcohol and possessed alcohol at her home in violation of her probation. (Tr. pg. 33 lines 1-7). She also tested positive for the controlled substance hydrocodone. (Id.; Tr. pg 36 lines5-8).

In regards to the condition of the parental home Officer Haff testified there were many different medications that were improperly stored. (Tr. pg. 36 lines18-24). Some medications were in the proper bottles as prescribed but many medications were in the wrong bottles. (Id.) Some bottles "... were just sort of filled with random pills." (Id.) In



addition, the bedroom furniture had draws that were full of syringes that would be accessible by a child. (Tr. pg. 37 lines 1-6).

The mother's sister-in-law who had been caring for the child since September 2008 testified. (Tr. pg. 41 lines 1-6). She stated that the child's behavior was different than that of her six other children. (Tr. pg. 41 lines 15-17). The child "...went through a period of her dropping to her knees and slamming her face into the floor. (Tr. pg. 41 lines 19-20). She has pulled her hair and banged the back of head." (Tr. pg. 41 lines 20-22). When she does this she sometimes injures herself "...and sometimes she's just angry." (Tr. pg. 42 lines 1-4).

The sister-in-law described the parent's contact with the child as "...quite minimal." (Tr. pg. 42 line 10-12). There was no physical contact from September 2008 until the day before the termination of parental rights hearing in April 2010. (Tr. pg. 42 lines 5-7). When the child first went to Kentucky the parents would call once or twice a week but this only lasted for three or four weeks and then tapered off. (Tr. pg. 42 lines 12-14). Afterwards they would only call once a month if at all. (Tr. pg. 42 lines 19-21). Even when the parents did call "...pretty much all the conversations were in regards to the justice system and how bad Social Services was..." (Tr. pg. 43 lines 2-5). It was only within the last few weeks prior to the termination of parental rights hearing that the parents called to talk about the child. (Id.)

The father had told the sister-in-law that Morton County Social Services had provided phone cards for them to call the child. But claimed he and the mother kept losing them. (Tr. pg. 47 lines 7-11). Because of this he asked the sister-in-law to call them once a week on Wednesdays. (Id.) But, he wanted the sister-in-law to call at 10:00

p.m. which was after the child's bedtime. (Tr. pg. 47 lines 13-16). The sister-in-law attempted make the weekly phone calls but most of the time the parents would not answer the phone. (Tr. pg. 47 lines 17-20). They never sent the child a single present the whole time she was in Kentucky and only sent one card. (Tr. pg. 43 lines 14-17).

The final witness that testified on behalf of Morton County Social Services was Kendra Casavant, a licensed social worker. Ms. Casavant testified that numerous services had been offered to the parents. (Tr. pg. 51 lines 9-19). The mother had been offered chemical addiction and psychiatric services at West Central Human Services. (Id.) Both parents were provided with case management services including a parental aide and weekly updates from Social Services. (Id.) They were offered visitation with the child at the Family Safety Center prior to her being sent to Kentucky. (Id.) Both parents were offered participation in the nurturing program and were provided with phone cards so they could continue contact with the child after she had been sent to Kentucky. (Tr. pg. 53 lines 9-12).

Ms. Casavant stated that there were at least fourteen conversations in which Morton County Social Services had attempted to explain to the parents that if the child was sent to Kentucky it would be difficult to maintain visitation. (Tr. pg. 52 lines 17-22). But, they demanded that she go to Kentucky because they did not want Morton County Social Services involved and wanted the brother and his family to provide the child with permanency. (Id.) To help maintain contact Ms. Casavant gave the parents phone cards and gave phone cards to the parent aide assigned to help them. (Tr. pg. 53 lines 9-12).

Ms. Casavant testified that the mother had completed primary treatment and aftercare at West Central Human Services. (Tr. pg. 54 lines 16-20). However, she later

entered and failed to complete treatment at Teen Challenge. (Tr. pg. 23-25; Tr. pg. 55 line 1). In regards to her mental health problems she had not completed any treatment. (Tr. pg. 55 lines 10-15). She was referred for individual counseling by her psychiatrist at West Central Human Services but would not show up for treatment and would not participate. (Tr. pg. 55 lines 4-22). She was prescribed medications but refused to take them. (Id.) Because of this the mother was extremely erratic. Ms. Casavant recalled a meeting at her office in November 2009 in which the mother's brother and sister-in-law who were caring for the child were appearing by phone. (Tr. pg. 58 lines 1-16). Before the meeting started the mother began screaming and yelling at them about how they had betrayed her and stormed out of the room. (Id.) At the end of the meeting she came back into the room and began chanting and repeating nonsensical phrases over and over. (Id.) She also displayed this same behavior when Ms. Casavant visited her at home. (Tr. pg. 58 lines 18-21). She would pace back and forth and repeat nonsensical phrases and talk about suing people. (Id.) Ms. Casavant observed that the father had no ability to calm the mother down and instead often abided by her wishes. (Tr. pg. 58 lines 22-24). It was during these home visits that Ms. Casavant observed that the basement appeared to be full of stuff and the garage was also piled with this stuff. (Tr. pg. 62 lines 1-5). Also, the parent aide had reported that there were around fifteen lawnmowers in the back yard and during the winter there were four vehicles at the residence, three of which were parked on the front lawn. (Id.).

Ms. Casavant described the father as being very paranoid and felt that he had difficulty understanding situations. (Tr. pg. 60 lines 22-25). She indicated that she had spoken to him numerous times about the mother's drug usage and mental health issues

but he did not recognize the severity of her problems. (Tr. pg 67 lines 16-23). He did not see any danger in leaving her alone with the child. (Id.). Based on everything that she had observed Ms. Casavant stated that she was not comfortable with returning the child to the home and she did not feel that placing her with the parents would be safe. (Tr. pg 62 lines 6-8).

The mother testified on her own behalf. Her responses to questions illustrate her mental illness:

The Mother: And I'm homeless. I don't have a home.

Mr. McCabe: Ok, when you say you're homeless, what do you mean by that?

The Mother: I just live under the grace of [the father's] dad. I pay rent but I'm-

Mr. McCabe: So you do have a place to go to? You do sleep in a house?

The Mother: In a man's house. (Tr. pg. 83 lines 6-11).

When asked if she wanted the child back in her care she stated "...I do not want to fight my brother. He's my friend. I leave that responsibility to my husband. I do not want to fight my brother." (Tr. pg. 87 lines 21-22). On cross examination when asked about her mental health counselor at West Central Human Services the mother only vaguely recalled going to see her once when Morton County Social Services took her there. (Tr. pg. 88 lines 5-11).

The father also testified. He admitted that he had not cooperated at all with Morton County Social Services for eight months of the child's life. (Tr. pg. 90 lines 21-25; Tr. pg. 91 lines 1-8). He did not want someone telling him what do. (Id.) He admitted he had no personal contact with the child after she was sent to Kentucky and stated "[w]ell the distance...never dawned on me I guess, you know, to ask about that I guess."

(Tr. pg. 93 lines 17-22). When asked about alcohol that the probation officer had found in the house the father stated “I’m pleading the Fifth on that.” (Tr. pg. 99 lines 10-14). He also testified that he and the mother had come up with a plan if the child were returned to them. (Tr. pg. 97 lines 16-19). He would live in the house with the child and the mother would move to a truck stop three miles from the house. (Tr. pg. 97 lines 20-25; Tr. pg. 98 lines 1-4). She would live at a campsite at the truck stop year round even though he did not understand why it would be relevant if the campsite even had electricity. (Tr. pg. 98 lines 5-9). However, he assumed that there might be situations where the mother would be left alone with the child. (Tr. pg. 99 lines 2-6)

#### **Standard of Review**

This Court reviews a Juvenile Court’s finding of deprivation by review of “the files, records, and minutes or transcript of the evidence,” giving “appreciable weight to the findings of the juvenile court.” In re A.B., 2010 ND 249, ¶ 16 (quoting N.D.C.C. §27-20-56(1)). “On review, this court will not overturn a juvenile court’s finding... unless the finding is clearly erroneous.” In re R.S., 2010 ND 147 ¶9, 787 N.W.2d 277 (citing In re B.B., 2008 ND 51, ¶ 4, 746 N.W.2d 411.). “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, we are left with a definite and firm conviction a mistake has been made.” Id. (citing In re T.A., 2006 ND 210, ¶ 11, 722 N.W.2d 548).

#### **Argument**

The Juvenile Court may terminate parental rights if it finds the child is deprived, the conditions causing the deprivation are likely to continue or will not be remedied, and 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). However, if the child has been in foster care or the care of a county social service board for at least four hundred fifty out of the previous six hundred sixty nights the Juvenile Court is merely required to find that the child is deprived to terminate parental rights. N.D.C.C. §27-20-44(1)(c)(2). The Juvenile Court may also terminate parental rights if it finds that the parents have abandoned the child. N.D.C.C. §27-20-44(1)(a). “The evidence must clearly and convincingly establish abandonment or the elements of deprivation before the juvenile court may terminate parental rights on either of those basis.” In re R.M.B., 402 N.W.2d 912, 915 (N.D. 1987) “The State, however, is not required to exhaust every potential solution before seeking termination of parental rights.” In re A.B., 2010 ND 249, ¶26 (quoting Interest of A.B., 2009 ND 116, ¶25, 767 N .W.2d 81).

**I. The Juvenile Court was not clearly erroneous when it found that the child was a deprived child, the conditions causing the deprivation were likely to continue, and the child will probably suffer serious physical, mental, moral, or emotional harm.**

**A. The child is deprived.**

“A deprived child is a child ‘without proper parental care or control, subsistence, education as required by law, or other care of 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.’” In re A.B., 2010 ND 249, ¶16 (quoting N.D.C.C. §27-20-02(8)(a). “The phrase proper parental care refers to the minimum standard of care which the community will tolerate.” Interest of R.S., 2010 ND 147 ¶8, 787 N.W.2d 277 (citing Interest of K.R.A.G., 420 N.W.2d 325, 327 (N.D.1988)). “The definition of a deprived child is broad enough to encompass a child

whose parent is shown to be presently incapable of providing proper parental care for the child.” Interest of T.F., 2004 ND 126 ¶11, 681 N.W.2d 786. Deprivation also exists when a child that has been abandoned by its parents. N.D.C.C. §27-20-02(8)(c). A child may be deprived even though the child has been receiving adequate care from a source other than the parent. In re T.J.O., 462 N.W.2d 631, 633 (N.D. 1990).

Here, Referee Goter made specific findings regarding the child’s deprivation. (App. of A.W. 14-17). He noted that she had been out of her parents’ care since she was born with methamphetamine in her system in June 2008. (Id. at 14-15). Since that time two hearings had been held and she was found deprived both times. (Id.) Referee Goter found that the deprivation continued to exist despite the intervention and extensive efforts of Social Services and Parole and Probation. (Id. at 15-18)

In regards to the mother Referee Goter found “that despite all efforts of Social Services to reunify this family, [she] is exactly where she was when this case began in June of 2008. She has made absolutely no progress as a potential custodial parent.” (App. of A.W. 17) He further found by clear and convincing evidence that the child remains deprived with regard to the mother “because [she] cannot provide proper parental care or control, subsistence, or other care or control necessary for [the child’s] physical, mental, or emotional health or morals.” (Id. at 17-18).

These findings were supported by the evidence presented and the mother’s behavior at the termination of parental rights hearing. Addiction counselor Brenda Fetting testified the mother had been diagnosed with amphetamine dependence with physiological dependence, alcohol dependence with physiological dependence, and cocaine dependence with physiological dependence that was in remission. (Tr. pg. 5 lines

23-25; Tr. pg. 6 lines 2-5). She had completed primary treatment and aftercare at West Central Human Services but admitted that she had been drinking during aftercare. (Tr. pg. 8 lines 23-24; Tr. pg. 9 lines 1-3). Afterwards she had failed to complete several attempts at treatment and had been caught using and possessing alcohol and controlled substances in violation of her probation shortly before the termination of parental rights hearing. (Tr. pg. 31 lines 20-24; Tr. pg. 32 lines 19-25; Tr. pg. 33 lines 1-7).

Even more troubling was the mother's mental health. She was diagnosed with anxiety disorder not otherwise specified, dysthymic disorder, post-traumatic stress disorder, and borderline personality disorder. (Tr. pg 23-25; Tr. pg. 16 lines 1-4). Dr. Hay recommended that the mother receive psychiatric care at the same time she receive addiction treatment and individual therapy. (Id.; Tr. pg. 21 lines 11-14). However, the mother did not receive any treatment for her mental health. (Tr. pg. 55 lines 10-15). She refused to attend and participate in counseling and refused to take any medications. (Tr. pg. 55 lines 4-22). At the hearing the mother could only vaguely recall seeing a counselor. (Tr. pg. 88 lines 5-11). Because she would not address her mental health problems she continued to act erratically. She disrupted meetings relating to the child and during meetings and home visits was observed pacing and chanting nonsensical phrases. (Tr. pg. 58 lines 1-16; Tr. pg. 58 lines 18-21). During the termination of parental rights hearing numerous breaks were required because of her uncontrollable behavior. (Tr. pg. 19 line 25; Tr. pg. 61 lines 20-23; Tr. pg. 65 line 20; Tr. pg. 66 lines 3-9). As such, Referee Goter was not clearly erroneous when he found that the child was deprived because the evidence overwhelmingly established the mother was chemically dependent



and continued to relapse and was mentally ill and refused treatment and was therefore unable to care for the child.

With regards to the father Referee Goter found that "...by clear and convincing evidence that [the child] is deprived because [the father] cannot or will not provide proper parental care or control, subsistence, or other care or control necessary for [her] physical, mental, or emotional health or morals. He has on more than one occasion, allowed [the mother] to use illegal controlled substances." (App. of A.W. 19). "[The father] has consistently aligned himself with [the mother] and has chosen loyalty to [her] over application to reunification efforts with [the child]."

These findings are supported by the father's psychological evaluation which diagnosed him with a personality disorder not otherwise specified with narcissistic suspicions and antisocial traits. (Tr. pg. 25 lines 12-14). Probation Officer Haff testified there were many different medications that were improperly stored in the home and syringes that could be accessed by a child. (Tr. pg. 36 lines 18-24; Tr. pg 37 lines 1-6). Social worker, Kendra Casavant, testified that he and the mother had engaged in hoarding activities causing their basement and garage to be full of stuff. (Tr. pg. 62 lines 1-5). In addition the back yard was filled with over a dozen lawn mowers and there were numerous vehicles parked on the front lawn. (Id.).

She further described the father as being very paranoid and felt that he had difficulty understanding situations. (Tr. pg. 60 lines 22-25). This is evidenced by the "plan" that he conceived with the mother in which she would move to a campsite at the truck stop near their home where she would live year round.. (Tr. pg. 97 lines 20-25; Tr. pg. 98 lines 1-4)., Ms. Casavant also testified that she had spoken with the father

numerous times about the mother's chemical addiction and mental health problems and he did not recognize the severity of these issues. (Tr. pg 67 lines 16-23). He did not see any danger in leaving the mother alone with the child. (Tr. pg 67 lines 16-23; Tr. pg 62 lines 6-8). Instead, he often followed the mother's commands and allowed her to use controlled substances and use and possess alcohol. (Tr. pg. 58 lines 22-24). When asked about it all he could say was he was "pleading the Fifth." (Tr. pg. 99 lines 10-14). This evidence establishes that the father was unable to care for the child because he would not or could not provide the proper parental care necessary to protect the child. Rather, he placed the mother's satisfaction above the child's safety. Referee Goter's finding that the child was deprived was therefore not clearly erroneous.

Because the child had been in custody of Morton County Social Services since the time of her birth which was well over four hundred fifty days Referee Goter's finding of deprivation alone was sufficient to terminate the parental rights and no additional findings were necessary. N.D.C.C. §27-20-44(1)(c)(2).

**B. The conditions causing the deprivation are likely to continue.**

"In determining whether the causes and conditions of deprivation will continue or will not be remedied, evidence of past deprivation alone is not enough, and there must be prognostic evidence." In re A.B., 2010 ND 249 (quoting In re A.B., 2009 ND 116, ¶18, 767 N.W.2d 817). "Prognostic evidence is evidence that 'forms the basis of reasonable prediction as to future behavior.'" Id. "Evidence of the parent's background, including previous incidents of abuse and deprivation, may be considered in determining whether deprivation is likely to continue." Id. "Prognostic evidence also includes the opinions of the professionals involved." Id. (citing Interest of K.J., 2010 ND 46, ¶ 8, 779

N.W.2d 635). “Further, a parent’s lack of cooperation with social service agencies indicates the causes and conditions of deprivation are likely to continue or will not be remedied.” *Id.* (citing Interest of T.A., 2006 ND 210, ¶ 16, 722 N.W.2d 548). “Lastly, in determining whether deprivation is likely to continue, a juvenile court may consider the amount of contact the parent has had with the child.” *Id.* (citing Interest of A.S., 2007 ND 83, ¶ 19, 733 N.W.2d 232).

In regards to the mother Referee Goter found “...that despite all efforts of Social Services to reunify this family, [she] is exactly where she was when this case began in June of 2008. She has made absolutely no progress as a potential custodial parent.” (App. of A.W. 17-18). Because of this Referee Goter found that by clear and convincing evidence the deprivation of the child was likely to continue and would not be remedied. (*Id.* at 19).

This finding was supported by the mother’s background, previous instances of deprivation, and lack of contact with the child. The mother had a long history of chemical addiction problems and mental health problems. She had a Driving Under the Influence conviction from 2008 and was using methamphetamine at the time of the child’s birth. (Tr. pg. 30 lines 1-6; Tr. pg. 32 at lines 19-20). While she had completed some treatment she had failed at her most recent attempts at treatment and was still be drinking and using controlled substances in 2010. (Tr. pg. 31 lines 20-24; Tr. pg. 33 lines 1-7; Tr. pg 36 lines5-8). In regards to her mental health she had not completed any treatment. (Tr. pg. 55 lines 10-15). She fully refused to participate the counseling recommended by Dr. Hay and refused to take medication. (Tr. pg. 20 lines 24-25; Tr. pg. 21 lines 1-4). Without this treatment Dr. Hay’s believed that the mother’s ability to parent the child would be

negatively affected. (Tr. pg. 21 lines 16-18). The mother's history with her other children showed that these problems were long term and likely would not be remedied. (Tr. pg. 19 lines 1-9). She had four other children including some that were adult age. (Id.). All of these children were taken from her custody prior to the age of four. (Id.). Her parental rights to two of these children were terminated by the State of Colorado and the State of North Dakota. (Tr. pg 54 lines 1-11).

In regards to the father Referee Goter found that he had a long history of anger outbursts and a lack of self control. (App. of A.W. 17-18). He had fully refused to cooperate with Morton County Social Services since the child's birth in June 2008. (Id.) During this same period of time he did nothing to stop the mother from using alcohol and drugs. (App. of A.W. 19). He also did "... almost nothing to maintain contacts with [the child]." (App. of A.W. 18). Because of this Referee Goter found by clear and convincing evidence that the child's deprivation was likely to continue and would not be remedied.

This finding is supported by the father's history, willful refusal to cooperate with Morton County Social Services, and lack of contact with the child. Like the mother he had four other children who were not in his care. (Tr. pg. 53 lines 15-16). Despite the fact that these children lived in North Dakota he only attempted to see them twice a year and would not travel to visit them. (Tr. pg. 89 lines 20-23). Two of these children were temporarily removed by Ramsey County Social Services. (Tr. pg. 53 lines 15-16). He did nothing to stop the mother from using and possessing alcohol and using controlled substance prior to the child's birth in 2008 and continued to do nothing to prevent it in 2010. He refused to acknowledge there were any problems. He openly admitted that he was refusing to cooperate with Morton County Social Services. (Tr. pg 24 lines 19-21).

He admitted that he had not cooperated at all with Morton County Social Services for eight months of the child's life. (Tr. pg. 90 lines 21-25; Tr. pg. 91 lines 1-8). He did not want someone telling him what do. (Id.)

Finally, as described by the mother's own sister-in-law, the parent's contact with the child from September 2008 until the termination of parental rights hearing in April 2010, the majority of her life, was "quite minimal." (Tr. pg. 42 line 10-12). During that entire period of time their only physical contact with the child occurred the day before the hearing. (Tr. pg. 42 lines 5-7). When the child went to the Kentucky at the parent's insistence they called once or twice a week for the first few weeks using phone cards provided by Morton County Social Services. (Tr. pg. 42 lines 12-14). Afterwards they only called once a month, if at all, and usually only right before an upcoming juvenile hearing. (Tr. pg. 42 lines 19-21). Even when they did call the purpose of the call was to complain about the judicial system and Social Services. (Tr. pg. 43 lines 2-5). It was only within the weeks immediately before the termination of parental rights hearing that they inquired about the child. (Id.) The whole time the child was in the State of Kentucky she did not receive a single present from her parents and only received one card. (Tr. pg. 43 lines 14-17).

The mother's significant addiction and mental health history, refusal to participate in treatment, four instances of previous deprivation spanning nearly twenty years, and lack of contact with the child provided prognostic evidence that the child's deprivation was likely to continue and would not be remedied. Similarly, the father's history of non-involvement with his other children, history of ignoring the mother's addiction and mental health problems, complete refusal to cooperate with Morton County Social

Services, and lack of contact with the child provided prognostic evidence that the child's deprivation was likely to continue and would not be remedied. Referee Goter's finding that clear and convincing evidence showed the child's deprivation was likely to continue and would not be remedied was therefore not clearly erroneous.

However, because the child had been in custody of Morton County Social Services for well over four hundred fifty days this finding was not necessary to terminate parental rights. N.D.C.C. §27-20-44(1)(c)(2).

C. **The child will probably suffer serious physical, mental, moral or emotional harm.**

“Upon a showing that a child's deprivation is likely to continue in an action to terminate parental rights, it must be shown that the child is suffering or will probably suffer some serious physical, mental, moral, or emotional harm.” Interest of A.B., 2009 ND 116 ¶21, 767 N.W.2d 817 (quoting Interest of J.S.L., 2009 ND 43, ¶ 33, 763 N.W.2d 783) “The probability of serious mental and emotional harm to a child may be established by prognostic evidence that a parent's current inability to properly care for the child will continue long enough to render improbable the successful assimilation of the child into a family if the parent's rights are not terminated.” Id. “The risk of future harm may be based on evidence of previous harm.” (Id. quoting In re J.S., 2008 ND 9, ¶ 17, 743 N.W.2d 808). “...[T]here are ‘grave problems implicit in making a deprived child assume the risks of waiting to see if a parent can turn his or her life around to become adequate for the parental role.’” Interest of J.S.L., 2009 ND at ¶33 (quoting In re C.R., 1999 ND 221 ¶ 11, 602 N.W.2d 520). Expert testimony is not required to prove the elements necessary to terminate parental rights. Id. at ¶34.

Referee Goter found that the mother had a long history of substance abuse and mental health problems and “that despite all efforts of Social Services to reunify this family, [she] is exactly where she was when this case began in June of 2008. She has made absolutely no progress as a potential custodial parent.” (App. of A.W. at 17). Similarly, the father “...cannot or will not provide proper parental care or control, subsistence, or other care or control necessary for [the child]...” (Id. at 19). Neither parent has “... demonstrated they have any parental skills or ability, and they have not developed any parental skills since June of 2008. They have resented and resisted all attempts by Social Services to help them develop parental skills.” (Id. at 20). As such, Referee Goter found that by clear and convincing evidence that the child “...will probably suffer serious physical, mental, moral or emotional harm.”

This finding was supported by the lengthy history of the parent’s problems and lack of effort to correct those problems. It was also supported by the testimony of the mother’s sister-in-law who provided insight into the harm caused to the child. She testified that the child behaved differently than her other five children. (Tr. pg. 41 lines 15-17). The child “...went through a period of her dropping to her knees and slamming her fact into the floor. (Id. at lines 19-20). She has pulled her hair and banged the back of head.” (Id. at lines 20-22). When she does this she sometimes injures herself “...and sometimes she’s just angry.” (Tr. pg. 42 lines 1-4). Because of this and the length of time that the child was outside of home the Guardian Ad Litem assigned to the child supported the termination stating “...the time has come for a permanent plan for [the child].” (App. of A.W. at 20-21). Therefore, Referee Goter’s finding that by clear and convincing

evidence that the child "...will probably suffer serious physical, mental, moral or emotional harm" was not clearly erroneous.

However, because the child had been in custody of Morton County Social Services for well over four hundred fifty days this finding was not necessary to terminate parental rights. N.D.C.C. §27-20-44(1)(c)(2).

**II. The Juvenile Court was not clearly erroneous when it found that the child was an abandoned child?**

The Juvenile Court may terminate parental rights if it finds the parents have abandoned the child. N.D.C.C. §27-20-44(1)(a). Abandonment is a question of fact. Interest of R.M.B., 402 N.W.2d 912, 915 (N.D. 1987). Intent to abandon may be inferred from a parent's conduct. Id. Abandonment of a child not in the custody of its parents exists when the parents significantly without justifiable cause fail to communicate with the child or provide for the care and support of the child as required by law. N.D.C.C. §27-20-02(1).

Here, in addition to his other findings Referee Goter found by clear and convincing evidence that the parents had abandoned the child. (App. of A.W. at 20). He found that they had demanded that the child be Kentucky even though they were strongly advised against it. (Id.) He found "[t]hey were given opportunities to communicate with [the child] by telephone, but they did not avail themselves of these opportunities. (Id.) They rarely communicated with [the child's foster parents] even though [they] are close relatives. [The parents] never made any arrangements to see the child in person. There was no evidence that they have provided any support whatsoever for the support and care of [the child]." (Id.) Further he found that "In the time that has passed since [the child's]



birth neither [parent] has demonstrated any love or affection for [the child], and they insisted [she] be placed with relatives who were far from them, which made it highly improbable that they would ever develop parent-child relations with [the child.] They have demonstrated no commitment to the parent-child relationship with [the child].” (Id.)

The record is replete with testimony to support the finding of abandonment. Social worker Kendra Casavant stated that there were at least fourteen conversations in which Morton County Social Services had attempted to explain to the parents that if the child was sent to Kentucky it would be difficult to maintain visitation. (Tr. pg. 52 lines 17-22). But, they demanded that she go to Kentucky because they did not want Morton County Social Services involved and wanted the brother and his family to provide the child with permanency. (Id.) The father testified he did not even consider that the distance might make contact difficult. (Tr. pg. 93 lines 17-22).

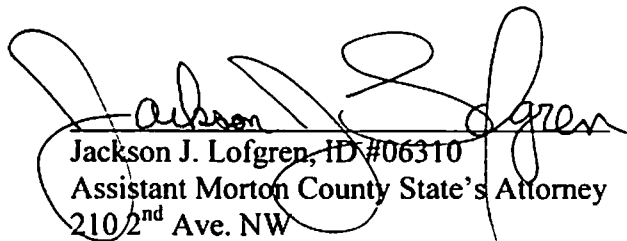
To help maintain contact Ms. Casavant gave the parents phone cards and gave phone cards to the parent aide assigned to help them. (Tr. pg. 53 lines 9-12). Despite this, the parents’ contact with the child was minimal to nonexistent. There was no physical contact from September 2008 until the day before the termination of parental rights hearing in April 2010 which was the majority of the child’s life. (Tr. pg. 42 lines 5-7). When she first went to Kentucky the parents called once or twice a week but this only lasted for three or four weeks. (Tr. pg. 42 lines 12-14). Afterwards they would only call once a month if at all and the purpose of their call was not to inquire about the child but to vent about the judicial system and Social Services. (Tr. pg. 42 lines 19-21; Tr. pg. 43 lines 2-5). The mother’s sister-in-law made efforts to call the parents as requested but when she called at the appointed time they would not answer the telephone. (Tr. pg. 47

lines 17-20). They never sent the child a single present the whole time she was in Kentucky and only sent one card. (Tr. pg. 43 lines 14-17). This evidence supports Referee Goter's finding that the parents had abandoned the child and therefore his finding was not clearly erroneous.

### Conclusion

The Juvenile Court found by clear and convincing evidence that the child was deprived, the conditions causing the deprivation were likely to continue, and the child will probably suffer serious physical, mental, moral or emotional harm. However, because the child had been in the custody of Morton County Social Services her entire life which was over 450 days only the finding of deprivation was needed to terminate parental rights. Similarly, the Juvenile Court found by clear and convincing evidence that the child was abandoned. These findings were supported by the testimony of an addiction counselor, a psychologist, a probation officer, a foster parent, and a social worker. They were also supported by the testimony and behavior of the parents themselves. These findings were therefore not clearly erroneous and the Order terminating parental rights should be affirmed.

Dated the 4<sup>th</sup> day of January, 2011.



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