

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Interest of C.N., A CHILD.

Barbara L. Whelan,
Petitioner,

vs.

C.G.,
Respondent/Appellant.Supreme Court No.
Walsh Co. No. 50-2012-JV-0053

APPELLANT'S BRIEF

Appeal from the Findings of Fact and Order for Judgment, entered on June 21, 2013, in the District Court of Walsh County, and from the Judgment of Termination entered on June 28, 2013, in the District Court of Walsh County, Honorable M. Richard Geiger presiding.

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STATEMENT OF THE ISSUES

- I. The District Court erred in finding that C.N. is a deprived child.
- II. Even if the Court were correct to find C.N. was a deprived child, the Court did not make the required findings necessary, nor could it make such findings, in order to terminate parental rights.
- III. The District Court erred in finding that C.N. was subjected to aggravating circumstances that allow the Court to terminate parental rights.
- IV. The District Court erred in ordering that C.G.'s parental rights be terminated under N.D.C.C. ch. 27-20 while ordering C.G. to continue to pay child support under N.D.C.C. § 14-09-08.21.

STATEMENT OF THE CASE

¶1 This is an appeal from the Findings of Fact, Conclusions of Law, and Order for Judgment, and the Judgment to Terminate Parental Rights, entered by the Walsh County District Court, terminating the parental rights of C.G. (Register of Actions, Docket 77, 79; Appendix (“App.”) 60-66). On November 14, 2012, a Summons (Docket 8; App. 4) and a Petition for Termination of Parental Rights was filed in the Juvenile Court, asking the court to terminate the parental rights of C.G. (Docket 2, App. 5-31).

¶2 The petition to terminate was tried on May 24, 2013, before the Honorable M. Richard Geiger, Judge of the District Court. (See Trial Recording (“Tr.”)). The Court requested closing arguments to be submitted by June 7, 2013. (Tr. 1:14:30). The Court’s Findings of Fact, Conclusions of Law, and Order for Judgment were entered on June 21, 2013 (Docket 76; App.60-64) and the Court’s Judgment of Termination of Parental Rights filed on June 28, 2013. (Docket 79, App. 65-66). C.G. timely filed his appeal. (App. 68).

STATEMENT OF FACTS

¶3 C.G. is the biological father of the minor child C.N. (App. 61). In January 2009, C.G. was convicted of Continuous Sexual Abuse of a Child. (App. 61). Since that time he has been in custody of the Walsh County jail or the North Dakota Department of Corrections. (App. 61). C.G. was sentenced to a term of imprisonment for the duration of his natural life, with the balance suspended after first serving thirty years. (App. 61).

¶4 C.N. is a well adjusted child with no physical, mental, or emotional issues. (Tr. 32:50, 45:30). He lives with his mother and half-siblings. (App. 61). He is well cared for, and his mother provides proper parental care and control. (Tr. 32:50, 45:04).

¶5 C.G. has filed motions for parenting time with his child C.N. (Tr. 34:51, 55:50). In addition, C.G. has sent to C.N. letters, birthday cards, and other items. (Tr. 31:31). None of these actions are in violation of the terms of his criminal judgment. (Tr. 58:14, 1:00:50). Any attempt at communication made by C.G. has been for the purpose of forming a relationship with his child, (Tr. 48:51) and not to harm C.N. by his attempts at communicating with his child. (Tr. 32:18). Further, C.G.'s motions for parenting time are not detrimental to C.N. (Tr. 33:30) despite C.N.'s biological mother's anxiety with receiving such items and Court documents from C.G. (Tr. 25:47, 32:37). C.G. has been making regular child support payments to C.N.'s mother, albeit at times below the Court ordered amount. (Tr. 35:22). There is no other father type figure to step in to adopt C.N. (Tr. 33:59).

¶6 The Court made a finding by clear and convincing evidence that the child comes within the provisions of N.D.C.C. § 27-20-44, that C.N. is a deprived child due to the incarceration of C.G. (App. 63). The Court did not make any finding in regard to

C.N.'s biological mother. (App. 60-64). The Court made a finding that, C.N. has also been subjected to aggravated circumstances (App. 63) and terminate[d] the parental rights and the relationship of parent and child between C.G. and C.N., either by law or by fact. (App. 63). The Court further ordered that C.G. be required to continue to provide child support for C.N. under N.D.C.C. § 14-09-08.21. (App. 64).

¶7 The trial court issued its Findings of Fact, Conclusions of Law, and Order for Judgment, and Judgment for Termination of Parental Rights. (App. 60-66). C.G. timely filed his appeal. (App. 68).

JURISDICTIONAL STATEMENT

¶8 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.

STANDARD OF REVIEW

¶9 Section 27-20-44(1)(b)(1) of the North Dakota Century Code requires a petitioner for the termination of parental rights to prove by clear and convincing evidence that the child is deprived, the deprivation is likely to continue, and that, absent a termination, the child will suffer, or probably suffer, “serious physical, mental, moral, or emotional harm”. E.g., Interest of T.J.L., 2004 ND 142 ¶ 2, 682 N.W.2d 735. A Court may also terminate the parental rights of a parent with respect to the parent’s child if “aggravated circumstances” exist. N.D.C.C. § 27-20-02(3).

¶10 The North Dakota Supreme Court will not reverse a juvenile court's findings of fact in a termination case unless they are clearly erroneous. In re M.G., 2010 ND 157, ¶ 10, 786 N.W.2d 710. “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).

ARGUMENT

I. The District Court erred in finding that C.N. is a deprived child.

¶11 N.D.C.C. § 27-20-02(8)(a) defines a deprived child as a child who 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.

¶12 In the petition to terminate the parental rights of C.G., the State alleged that C.N. is a deprived child. During the trial N.N. testified that the child is a well adjusted child with no physical, mental, or emotional issues. N.N. is the mother of C.N. C.N. lives with N.N. and his half-siblings and is a well cared for by N.N., who is able to provide the proper parental care and control over C.N.

¶13 The guardian ad litem in this case testified and corroborated N.N. stating that that C.N. does not suffer from any physical, mental, or emotional hard as a result of any conduct of C.G. or as a result of the fact that C.G. is incarcerated. She further testified that, in her opinion, C.N. was not a deprived child.

¶14 The District Court made a finding that, "C.N. is a deprived child insofar as C.G. is unable to provide proper parental care or control, subsistence, education as required by law..." (App. 62). The District Court did not make any finding regarding C.N.'s mother, N.N.

¶15 However, the evidence submitted in this case indicated that N.N. is a capable mother for her children. This Court has confirmed that the parent must be able to demonstrate present capability, or capability within the near future, to be an adequate parent. McBeth v. M.D.K., 447 N.W.2d 318, 322 (N.D.1989). N.N. has demonstrated a

capability to parent her children. Under these circumstances, there was insufficient evidence to support a finding by clear and convincing evidence that C.N. is a deprived child.

II. Even if the Court were correct to find C.N. was a deprived child, the Court did not make the required findings necessary, nor could it make such findings, in order to terminate parental rights.

¶16 N.D.C.C. § 27-20-44(c) states that “The court may terminate the parental rights of a parent with respect to the child if [t]he child is a deprived child and the court finds 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 emotion harm; or the child has been in foster care, in the care, custody and control of the department, or a county social service board...” N.D.C.C. § 27-20-44(c).

¶17 The Court in this case did make a finding that C.N. was deprived. (App. 62). The Court did not make a finding that the conditions and causes of the deprivation are likely to continue or will not be remedied. The Court did not make a finding that by reason of the deprivation the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm. The Court did not make a finding that C.N. has been in foster care or in the care custody, and control of the department or any county social service board. Furthermore, based on the evidence presented, it could not have made any such finding. The testimony presented at trial was that C.N. is a well adjusted child with no physical, mental, or emotional issues. (Tr. 32:50, 45:30). He is well cared for, and his mother provides proper parental care and control. (Tr. 32:50, 45:04). The District Court erred by making a finding that C.G.’s parental rights should be terminated based on a finding of deprivation.

III. The District Court erred in finding that C.N. was subjected to aggravating circumstances that allow the Court to terminate parental rights.

¶18 The State alleged aggravated circumstances existed in this case under N.D.C.C. § 27-20-02(3)(c) and § 27-20-02(3)(f). The statute defines aggravated circumstances as “circumstances in which a parent engages in conduct prohibited under sections 12.1-20-01 through 12.1-20-08 or chapter 12.1-27.2, in which a child is the victim or intended victim” N.D.C.C. § 27-20-02(3)(c), or “circumstances in which a parent has been incarcerated under a sentence for which the latest release date is:(1) In the case of a child age nine or older, after the child's majority; or (2) In the case of a child, after the child is twice the child's current age, measured in days” N.D.C.C. § 27-20-02(3)(f).

¶19 Significantly, this statute states that the Court may terminate parental rights if it finds aggravating circumstances. There is no mandate, however, to do so. This leaves the Court with some discretion in reaching its decision. In this case, none of the evidence presented at trial indicates that C.N. is harmed physically, mentally, or emotionally because C.G. is his father. There was no expert testimony, or any evidence presented at all that C.N. is harmed in any way by having a father who is in jail. C.N.'s mother and the guardian ad litem both agreed that C.N. scarcely understands what is happening. C.N. would not have been harmed in any way if the Court did not terminate the parental rights of C.G.

¶20 N.N. testified that there is not any father type figure who might step in to adopt C.N. at this time. C.G. is ordered to pay child support for C.N. and C.G. is paying child support as much as he is able. It is a greater benefit for C.N. and his mother to receive child support at a reduced rate than no child support at all.

¶21 C.G. loves his son. He sends him birthday cards and letters because he cares for C.N. In every other situations we expect and encourage communication and bonding between a father and his son. A termination of parental rights should be done only when necessary. At this time, and under the circumstances of this case, the Court erred in this case in terminating C.G.'s parental rights based upon a finding of aggravated circumstances.

IV. The District Court erred in ordering that C.G.'s parental rights be terminated under N.D.C.C. ch. 27-20 while ordering C.G. to continue to pay child support under N.D.C.C. § 14-09-08.21.

¶22 In the State of North Dakota there are two avenues available to terminate the rights of a parent. Termination of parental rights under N.D.C.C. § 27-20-44 of the North Dakota Century Code is under the Uniform Juvenile Court Act which gives Juvenile Court jurisdiction to hear termination cases except when the termination is part of an adoption proceeding. N.D.C.C. § 27-20-03. Chapter 14-15 terminates parental rights within an adoption proceeding. N.D.C.C. § 14-15-19.

¶23 In the present case, the Court terminated C.G.'s parental rights under N.D.C.C. § 27-20-44. The effects of a termination of parental rights are clearly defined in N.D.C.C. § 27-20-46(1), which provides, "An order terminating parental rights of a parent terminates all the parent's rights and obligations with respect to the child and of the child to or through the parent arising from the parental relationship..." The Court's order

dated June 21st confirms that fact, as the order itself clearly states that “this order shall terminate all of C.G.’s rights with respect to C.N., and all of the rights and obligations of C.N. to C.G. arising from the parental relationship.” (App. 64).

¶24 The statute and the order clearly state that all rights and obligations with respect to the child are terminated. Further, this Court has held that, “[u]nder N.D.C.C. § 27-20-46, a decree terminating parental rights severs all legal ties between the natural parent and the child. There is no provision for conditional parental termination under the statute.” In re C.R.H., 620 N.W.2d 175, 2000 ND 222 ¶ 12.

¶25 Despite the Court Order terminating C.G.’s parental right under N.D.C.C. § 27-20-44, the Court also ordered that C.G. be required to continue to provide child support under N.D.C.C. § 14-09-08.21, which provides:

A termination of parental rights does not terminate the duty of either parent to support the child before the child's adoption unless that duty is specially terminated by order of the court after notice of a proposed termination or relinquishment is given to the department of human services in the manner appropriate for the service of process in a civil action in this state. A termination of a child support obligation under this section does not relieve a parent of the duty to pay any unpaid child support.

¶26 This statute addresses the duty of a parent to support the child under the domestic relations chapter and not a termination of parental rights under N.D.C.C. § 27-20-44. Neither the State nor the Court should not be able pick and choose which sections of the century code apply to craft an order to its liking. Under N.D.C.C. § 27-20-44, the law clearly states that a “An order terminating parental rights of a parent terminates all the parent's rights and obligations with respect to the child and of the child to or through the parent arising from the parental relationship...” While N.D.C.C. § 14-09-08.21 provides that a parent may still be ordered to pay child support, that section is to be

applied to a case in which an adoption is pursued, not to a case in which the State itself is seeking an involuntary termination of parental rights under N.D.C.C. § 27-20-44.

¶27 The effect of a termination of parental rights under N.D.C.C. § 27-20-44, is to terminate forever a parent's rights and sever all ties and obligations, including an obligation to pay child support. The District Court clearly erred in ordering that C.G.'s parental rights be terminated under N.D.C.C. § 27-20-44 while ordering C.G. to continue to pay child support under N.D.C.C. § 14-09-08.21.

CONCLUSION

¶28 While the District Court has considerable discretion in termination cases, the law provides that natural parents have a fundamental right to their children, "which is of a constitutional dimension." 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.* When an alternative exists in the best interests of the children, this Court prefers the alternative over termination of parental rights. In the Interest of M.N., 294 N.W.2d 635, 638 (N.D.1980). In this case it error to terminate the parental rights of C.G.

¶29 For all the foregoing reasons, C.G. respectfully requests this Court to reverse the District Court's Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment of Termination of Parental Rights.

Submitted this 24th day of July, 2013.

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