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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 23, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE INTEREST OF B.B.P., J.R.P., AND A.D.P., MINOR CHILDREN
Grand Forks County Case No. 18-2013-JV-00314/00315/00316
Supreme Court No. 20140374/75/76

STATE OF NORTH DAKOTA,

Petitioner and Appellee,

v.

J.P., Father, and C.B., Mother,

Respondents,

J.P., Father,

Appellant.

ON APPEAL FROM JUDGMENT TERMINATING PARENTAL RIGHTS ENTERED BY THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT ON SEPTEMBER 23, 2014

BRIEF FOR RESPONDENT/APPELLANT

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[¶1] WHETHER THE DISTRICT COURT ERRED IN FINDING THE STATE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT B.B.P, J.R.P., AND A.F.P. ARE DEPRIVED CHILDREN, THAT THE CONDITIONS AND CAUSES OF THEIR DEPRIVATION ARE LIKELY TO CONTINUE, AND THUS, WILL PROBABLY SUFFER SERIOUS PHYSICAL, MENTAL, AND EMOTIONAL HARM.

STATEMENT OF THE CASE

[¶2] J.P., the natural father of the minor children, B.B.P., J.R.P., and A.D.P., appeals from the Judgment Terminating Parental Rights dated September 23, 2014 entered in the Northeast Central Judicial District, Grand Forks County, North Dakota by the Honorable Debbie Kleven. App. at 190-91.

[¶3] Prior to the trial in this matter, the Juvenile Court in the Northeast Central Judicial District held deprivation proceedings regarding the minor children, B.B.P., J.R.P., and A.D.P., in Case No. 18-2011-JV-00291; 18-2011-JV-00292; and 18-2013-JV-00032. The permanency hearing in the deprivation proceedings was held before Referee John Thelen on December 6, 2013; January 3, 2014; and February 3, 2014; which included the taking of testimony and exhibits. App. at 171.

[¶4] The Petition for Involuntary Termination of Parental Rights ("the Petition") was filed with the district court on October 25, 2013. App. at 22-42. The trial was held on June 17, 2014 and June 19, 2014. App. at 171. On the first day of trial, the parties stipulated to allowing the district court to review and consider the testimony and exhibits received at the permanency hearing held in the deprivation proceedings on December 6, 2013; January 3, 2014; and February 3, 2014. *Id.* The district court also heard and accepted additional testimony and exhibits at the trial, on top of the content from the permanency hearing. *Id.* The Corrected Order for Termination of Parental Rights ("the

Order"), which consisted of the district court's Findings of Fact, Conclusions of Law, and Order for Termination, was entered by district court on September 19, 2014. App. at 170-89. The Order was implemented and effectuated by the filing of the Judgment Terminating Parental Rights (the Judgment") by the district court on September 23, 2014. App. at 190-91. J.P. now timely appeals the Judgment within the requisite thirty (30) days. N.D.C.C. § 27-20-56; N.D.R.App.P. 2.2; *In re R.A.S.*, 321 N.W.2d 468, 469-70 (1982).

STATEMENT OF THE FACTS

[¶5] J.P., Appellant, and C.B. are the biological parents of B.B.P., born in 2010, J.R.P., born in 2011, and A.D.P., born in 2013. App. at 172. Beginning in 2010, J.P. and C.B. were involved in various domestic disputes, prompting the involvement of the Grand Forks Police Department ("GFPD") and the Grand Forks County Sheriff's Department ("GFCSD") as well as Grand Forks County Social Service Center ("GFCSSC") through reports of potential child abuse and neglect of the parties' minor children, but did not result in any formal charges of child abuse or neglect. App. at 173. Another incident occurred in December of 2011, and B.B.P. and J.R.P. were removed from the home by GFCSSC. App. at 174. On December 27, 2011, the juvenile court found that B.B.P. and J.R.P. were deprived children for reasons of domestic violence between J.P. and C.B. in the home, and placed them in the care, custody, and control of GFCSSC for twelve (12) months beginning December 6, 2011. Exhibit 9, Doc. ID #89 (Due to the fact that each child is associated with a separate case number by the juvenile court and documents filed therein may have been assigned different docket numbers, for the ease of accessibility, all subsequent documents from the record will be referenced by the document name and its

associated docket number from 18-2013-JV-00314, and can be assumed to be present in all three cases, unless otherwise noted).

[¶6] The minor children were placed back in the home on a trial placement in February, 2012, but were removed again on March 25, 2012 due to a domestic dispute between J.P. and C.B. App. at 175. The last allegation of a domestic incident between J.P. and C.B. was reported in June, 2012. See App. at 62-73. As a result, J.P. was charged with simple assault and a violation of order prohibiting contact, but both charges were subsequently dismissed. *Id.* However, the juvenile court extended the findings of deprivation for B.B.P. and J.R.P. and their continued care, custody, and control by GFCSSC upon stipulation of the parties on November 30, 2012 for twelve (12) months. Ex. 11, Doc. ID #91. After A.D.P.'s birth in 2013, the juvenile court also extended the findings of deprivation to include the minor child and placed her under the care, custody, and control of GFCSSC upon stipulation of the parties on April 5, 2013, commencing on February 3, 2013 for twelve (12) months. Ex. 15, Doc. ID #95. On March 24, 2014, the juvenile court again found the minor children to be deprived and required their continued placement under the care, custody, and control of GFCSSC for twelve (12) months beginning November 20, 2013. Ex. 1, Doc ID #81.

[¶7] Since the deprivation proceedings began and through the trial in this case, J.P. has fulfilled the majority of the tasks required by the court and GFCSSC. In addition, regarding many of the required tasks that must not be violated to be fulfilled, the State has failed to provide evidence of any such violations. At the time of trial, J.P. was living at the Select Inn, App. at 182; employed by Command Center, Ex. 18, Doc. ID #79; and completed the Love & Logic parenting course, App. at 43. J.P. has completed parenting

and psychological evaluations, participated in Child and Family Team Meetings, App. at 176, and has not had an allegation of domestic abuse made against him since June, 2012. See App. at 62-73. Further, J.P. has maintained mental health stability through regular treatment and medication use as recommended by his psychiatrist, Dr. Tevington at NEHSC. See App. at 74-91.

[¶8] Likewise, J.P. has attempted individual therapy at Northeast Human Service Center ("NEHSC"), New Choices Men's Program at the Community Violence Intervention Center ("CVIC"), couples counseling at the Village Family Service, and drug testing through Community Service. App. at 176-77.

[¶9] J.P. has worked with GFCSSC regarding supervised visitation of his minor children, transportation assistance, housing assistance, parent aide services, possible interstate placement of the minor children with C.B.'s father in West Virginia, and provided releases of information to GFCSSC for NEHSC, including Dr. Tevington, The Village Family Service, and CVIC. App. at 176, 44-46.

[¶10] The State filed the Petition on October 24, 2013, alleging that J.P. and C.B. had not consistently engaged in the services offered by GFCSSC and that reasonable efforts were being made by GFCSSC to finalize the permanent plan from reunification to adoption, despite the fact that J.P. had partaken respectively in the previously discussed variety of services. App. at 36.

ARGUMENT

[¶11] The district court had proper jurisdiction over this matter as provided by Article VI, § 8 of the North Dakota Constitution and § 27-20-03(1)(b) of the North Dakota Century Code. N.D. Const. art. VI, § 8; N.D.C.C. § 27-20-03(1)(b). The Supreme Court

of North Dakota has proper jurisdiction over this matter as provided by Article VI, § 6 of the North Dakota Constitution and § 27-20-56(1) of the North Dakota Century Code. N.D. Const. art. VI, § 6; N.D.C.C. § 27-20-56(1).

[¶12] The North Dakota Supreme Court reviews a district court's termination of parental rights under the "clearly erroneous" standard. N.D.R.Civ.P. 52(a)(6). "A finding is clearly erroneous when it is induced by an erroneous view of the law, there is no evidence to support the finding, or, on the basis of the entire record, [the reviewing court] is left with a definite and firm conviction a mistake has been made." *In re R.L.-P.*, 2014 ND 28, ¶ 12, 842 N.W.2d 889 (quoting *In re A.W.*, 2012 ND 153, ¶¶ 9-10, 820 N.W.2d 128). Due to the fact that the district court's findings discussed below with regard to J.P. are not supported by the evidence on the record, these findings are clearly erroneous and must be overturned.

I. THE DISTRICT COURT ERRED IN FINDING THE STATE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT B.B.P, J.R.P., AND A.F.P. ARE DEPRIVED CHILDREN, THAT THE CONDITIONS AND CAUSES OF THEIR DEPRIVATION ARE LIKELY TO CONTINUE, AND THUS, WILL PROBABLY SUFFER SERIOUS PHYSICAL, MENTAL, AND EMOTIONAL HARM.

[¶13] The Uniform Juvenile Court Act governs the involuntary termination of parental rights in North Dakota. N.D.C.C. § 27-20-44. The court may terminate parental rights if there is "clear and convincing evidence" that the child is a deprived child, the conditions and causes of the deprivation are likely to continue, 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 re K.B.*, 2011 ND 152, ¶ 7, 801 N.W.2d 416. The court may also terminate parental rights if the child is a deprived child and the court finds that "the child has been in foster care . . . for at least four hundred fifty (450) out of the

previous six hundred sixty (660) nights." N.D.C.C. § 27-20-44(1)(c)(2). However, in this case, the district court terminated J.P.'s parental rights only on the basis of the first grounds:

> Based upon these Findings of Fact, this Court concludes [the State] has established by clear and convincing evidence that [B.B.P., J.R.P., Jr., and A.D.P.] are deprived children; the conditions and causes of the deprivation are likely to continue or will not be remedied in the near future; and by reason thereof, [B.B.P., J.R.P., Jr., and A.D.P.] will probably suffer serious physical, mental, and emotional harm.

App. at 187. While the district court discussed the amount of nights the children have been in the care, custody, and control of Grand Forks Social Service Center as a Finding of Fact, the court does not state this fact as the legal basis upon which termination can be granted. App. at 186. Therefore, the second grounds for terminating parental rights is not at issue on appeal.

[¶14] The party seeking the termination of parental rights has the burden of proving the elements by clear and convincing evidence. *In re K.B.*, 2011 ND 152, ¶ 7, 801 N.W.2d 416. "Clear and convincing evidence is evidence that leads to a firm belief or conviction the allegations are true." *Id.* Thus, if there is not a firm belief that the allegations supporting termination of parental rights are true, then such termination cannot be granted.

> North Dakota law 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, and the deprivation is not due primarily to the lack of financial means of the child's parents, guardian, or other custodian.

N.D.C.C. § 27-20-02(8)(a). This Court has found that "proper parental care" means "the minimum standard of care which the community will tolerate." *In re R.S.*, 2010 ND 147,

¶ 8, 787 N.W.2d 277 (citing *In re K.R.A.G.*, 420 N.W.2d 325, 327 (N.D.1988)). "There is a presumption that parents are fit and the burden of disproving this presumption of parental fitness is on the person challenging it." *In re K.R.A.G.*, 420 N.W.2d at 327. In addition, "it is not reason enough to deprive parents of custody that their home is not the best, or even that they are not the best parents that could be offered to the child, so long as the child does not suffer physical or moral harm, or lack of food or clothing." *In re M.M.C.*, 277 N.W.2d 281, 286 (N.D. 1979).

[¶15] With regard to the scope of the deprivation allegations and supporting evidence, this Court has consistently held that "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 – Prognostic evidence is evidence that forms the basis of reasonable prediction as to future behavior." *In re A.B.*, 2010 ND 249, ¶ 22, 792 N.W.2d 539 (quoting *In re A.B.*, 2009 ND 116, ¶ 18, 767 N.W.2d 817). Therefore, previous findings of deprivation are not alone sufficient to contend that the causes and conditions of deprivation will continue.

[¶16] In this case, the district court erred by failing to state specific findings supported by the evidence on the record that the minor children are deprived and that the causes and condition of their deprivation are likely to continue justifying the termination of J.P.'s parental rights. Specifically, the district court's findings perpetuate numerous factual inaccuracies and mischaracterizations without verification of the evidence. Based upon the foregoing legal reasoning and the following analysis, the termination of J.P.'s parental rights should be overturned.

[¶17] The district court's Findings of Facts contain numerous statements that are clearly inaccurate based upon the evidence on the record. First, the district court stated that the juvenile court held on May 2, 2011 that B.B.P. was to be "placed in the care, custody, and control of Social Service [sic] for twelve months, commencing April 18, 2011." App. at 174. However, the juvenile court actually held that B.B.P. was to "remain under the care, custody and control of her parents" subject to court ordered services. App. at 60.

[¶18] Second, the district court erroneously stated that Wrap Around Case Management Services were terminated when discussing the events in December, 2011. App. at 174.There is not one place on the record that supports this fact, nor does the court point to where this information was derived.

[¶19] Third, the district court stated that couples counseling was "terminated when [J.P. and C.B.] got into a dispute during a counseling session." App. at 177. It is undisputed that couples counseling was terminated; however, the record does not support the contention that it was ended due to a dispute at counseling. Lay Guardian Ad Litem Report, Doc. ID #23 at 11. Asserting otherwise is also prejudicial to the parents. Furthermore, the most recent Child and Family Team Meeting Report and Service Plan from June 6, 2014 only requires the parents to participate in couples counseling if recommended. App. at 148.

[¶20] Fourth, the district court also states that the parents were "required to participate in parenting class," but that they "registered for the classes but never followed through." App. at 177. This fact is both untrue and prejudicial, as J.P. did register and complete the Love & Logic parenting course. App. at 43.

[¶21] Fifth, in reference to the Child and Family Team Meeting on May, 28, 2014, the district court stated that "neither parent attended the meeting." App. at 180. However, both parents were actually in attendance at the meeting as evidenced by GFCSS report and notes of the meeting. App. at 145.

[¶22] Sixth, the district court stated that during the spring of 2014, the visitation coordinator had to intervene "at least once every visit" during the parents' supervised visitation with the children. App. at 181. During the spring of 2014, the parents' supervised visitation was done at both Kids First and GFCSS. App. at 137; See App. at 93-132. If an intervention during a supervised visitation is done at Kids First, then it would be indicated in § VI(A) of the visit reports. See App. at 93-132. In all of the Kids First visit reports entered onto the record from spring of 2014 – eight (8) in total from January 31, 2014 to April 11, 2014 – there was not one indication of necessary intervention. App. at 93-128. However, in contrast, the visitation reports from GFCSSC by the State for spring of 2014 – five (5) in total from April 14, 2014 to May 28, 2014 – detail unnecessary intervention on three (3) occasions by the visitation coordinator. App. at 129-32. The GFCSSC visitation reports contain such statements as: "I did go into the room at this point, as I wanted to model what to say and how to parent the kids;" "I entered the room as [J.P.] was unable to calm and [C.B.] held him as he struggled to get out of her hold;" and "I entered the room to check in." App. at 129-32. Additionally, although the parents had supervised visitation at GFCSSC prior to the date of the reports, no other reports were provided by the State as evidence. This fact is significant, because on April 14, 2014 and April 23, 2014, the parents informed GFCSSC that they felt the visits were uncomfortable and more difficult on the children at GFCSSC and requested

for the visits to be moved back to Kids First. App. at 133-35. Therefore, GFCSSC was aware that the visits had been going well at Kids First and that the unnecessary intervention of the coordinator at GFCSSC was a significant source of tension they refused to accommodate. App. at 134.

[¶23] In addition, the overall tone of these reports are negative, as the coordinator describes positive or uncontrollable events as though they are negative and the parents are at fault. For example on April 14, 2014, when J.R.P is playing a game with B.B.P. and the coordinator "intervenes," she tells B.B.P. that the game she is playing with her father, J.P., "isn't for little kids [and] that I really should have taken it out of the room. I told [B.B.P.] that I need to tell you why we took the game away so you can understand why *and I was looking her mom in the eye as I told her that*." App. at 129. (emphasis added). On April 28, 2014 and May 5, 2014, even though C.B. has a physical disability affecting her mobility, the coordinator states that "[C.B.] was sedentary on the couch" and with A.D.P. asleep in her arms, "[C.B.] did stand up but then *ordered* J.P. to take her from her." App. at 129-30. (emphasis added). Also, instead of merely detailing what occurred during the visit, the coordinator states what the parents are not doing and what they should be doing in her opinion. For example, in criticizing the comments C.B. makes to the children during the visits, the coordinator states "she seldom says 'please do this' or 'thank you.'" App. at 129.

[¶24] Seventh, the district court found that J.P. "has delayed any participation in individual therapy." App. at 182. However, while it may be accurate to characterize J.P. as not participating in separate individual therapy, J.P. has been seeing his psychiatrist Dr. Tevington at NEHSC at least once every few months from February, 2013 to the date

of trial. See App. at 74-91. During this time, it is also important to note that J.P. had no other recommendations for treatment other than medication. *Id.*

[¶25] Eighth, the district court stated that J.P. was "suspected of being under the influence of a controlled substance while participating in a visitation with his children" as recently as July, 2013. App. at 182. This contention is not supported by the evidence on the record because his drug testing, while sporadic, does not show any non-prescribed substance use from both 2013 and 2014. See App. at 92. Furthermore, J.P.'s Psychiatric Progress Note with Dr. Tevington from as recently as April 11, 2014, state that he is in "full sustained remission" for alcohol and amphetamine abuse for his Axis I diagnosis. App. at 87-88.

[¶26] Ninth, the district court found that J.P. has "failed to maintain a stable residence." Order at 13. While J.P. has been residing in hotels as the court states, there is no evidence on the record that J.P. has been actually homeless in the last year. In addition, the parents have been unable to secure housing assistance because they do not have the children in their care. Respondent's Ex. 9, Doc. ID #109, 18-2011-JV-00291.

[¶27] Tenth, the district court stated that J.P. was requested to sign releases of information between GFCSSC and his service providers, including Dr. Tevington, The Village Family Service, CVIC, NEHSC, and Job Service, but refused to do so. App. at 182. This assertion is completely false on its face, as the record includes releases of information signed by J.P. between GFCSSC and NEHSC (including Dr. Tevington), The Village Family Service, and CVIC. App. at 44-46. The only release not completed by J.P. was for Job Service. However, the most recent Child and Family Team Meeting Report

and Service Plan from June 6, 2014 do not require J.P. to provide a release of information for Job Service to GFCSSC. App. at 147.

[¶28] Eleventh, the district court further asserts that J.P. has not demonstrated his ability to maintain sobriety or mental health stability. App. at 182. J.P.'s ability to maintain sobriety is evidenced above in part eight, so this finding is clearly erroneous. Also, J.P.'s mental health stability is evidenced by the frequency he sees his psychiatrist, Dr. Tevington, and the current control and treatment he has for his ADD and anxiety, which are minimal mental health problems. See App. at 74-91. As previously discussed, J.P. sees Dr. Tevington at least once every few months as requested. *Id.* Further, there is no evidence in the record that J.P. does not have his mental health conditions under control; on the contrary, J.P.'s mental health record displays his ability to follow his treatment recommendations and appears to be continually improving. *Id.*

[¶29] Twelfth, in finding that the parents do not have the current ability or ability in the near future to provide an adequate environment for the children, the district court stated that "since March of 2012, they have failed to provide the children with a safe living environment as evidence by the reports filed with Grand Forks County Social Service." App. at 185. This conclusion is problematic because the basis for the initial as well as ongoing deprivation in the case was based upon domestic violence. See App. at 47-54. The State failed to provide any evidence on the record that there has been domestic violence, or even allegations of domestic violence, between the parents since June, 2012. See App. at 62-73. Therefore, this finding is inadequate and unsupported by the record.

[¶30] Thirteenth, the district court stated that both parents have refused to "fully participate in services." App. at 186. However, in the first order for deprivation on May,

2, 2011, the juvenile court required J.P. to complete an intake at the New Choices Men's Program, continue psychiatric and mental health services and take medication as prescribed, continue to address his alcohol concerns and provide alcohol and drug free parenting, follow through with individual therapy services if deemed appropriate by his chemical dependency treatment providers, and will sign releases of information between service providers to GFCSSC to allow for coordination of services. App. at 55-61. State has only provided evidence that J.P. has not followed through with individual therapy under GFCSSC definition, but as detailed above, his regular contact and reports of his psychiatrist likely meet this requirement. The other requirements listed by the State and the district court have been added even though the causes of deprivation, domestic violence, have not.

[¶31] In conclusion, the record does not provide the evidence to support the above findings of the district court, and on the basis of the entire record, it is evident that a mistake has been made in finding that B.B.P., J.R.P., and A.D.P. are deprived, the conditions and causes of the deprivation are likely to continue, and that they will probably suffer serious physical, mental, and emotional harm. Thus, the decision of the district court to terminate J.P.'s parental rights is clearly erroneous and should be overturned.

CONCLUSION

[¶32] For the reasons stated, J.P. respectfully requests that the Judgment Terminating Parental Rights be reversed and the State's Petition for Involuntary Termination of Parental Rights be dismissed.

Respectfully Submitted this 28th day of October, 2014,

_____/s/_____

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IN THE SUPREME COURT OF

THE STATE OF NORTH DAKOTA

IN THE INTEREST OF B.B.P., J.R.P., AND A.D.P., MINOR CHILDREN

STATE OF NORTH DAKOTA,	)	
	)	Case No. 18-2013-JV-00314
Petitioner/Appellee,	)	18-2013-JV-00315
	)	18-2013-JV-00316
v.	)	
	)	Supreme Court No. _____
J.P., FATHER,	)	
	)	
Respondent/Appellant,	)	**AFFIDAVIT OF ELECTRONIC SERVICE**
	)	
C.B., MOTHER,	)	
	)	
Respondent.	)	

STATE OF NORTH DAKOTA)
)SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on this 23 day of October, 2014, served a true and correct copy of the following documents:

NOTICE OF APPEAL
ORDER FOR TRANSCRIPT
BRIEF FOR APPELLANT
APPENDIX FOR APPELLANT

Via electronic mail to:

Nancy D. Yon
Grand Forks County Assistant State's Attorney
sasupportstaff@gfcounty.org

Ted Sandberg
Attorney for Respondent
tsandberg@rrv.net

Sarah Kuntz

Subscribed and sworn to before me this 23 day of October, 2014.

Notary Public

DANIELLE HILLHOUSE
Notary Public
State of North Dakota
My Commission Expires December 1, 2016

20140374
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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 28, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF

THE STATE OF NORTH DAKOTA

IN THE INTEREST OF B.B.P., J.R.P., AND A.D.P., MINOR CHILDREN

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	)	Case No. 18-2013-JV-00314
Petitioner/Appellee,	)	18-2013-JV-00315
	)	18-2013-JV-00316
v.	)	
	)	Supreme Court No. 20140374/75/76
J.P., FATHER,	)	
	)	
Respondent/Appellant,	)	**AFFIDAVIT OF ELECTRONIC SERVICE**
	)	
C.B., MOTHER,	)	
	)	
Respondent.	)	

STATE OF NORTH DAKOTA)
)SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on this 28 day of October, 2014, served a true and correct copy of the following documents:

BRIEF FOR APPELLANT (AMENDED)

Via electronic mail to:

Nancy D. Yon
Grand Forks County Assistant State's Attorney
sasupportstaff@gfcounty.org

Ted Sandberg
Attorney for Respondent
tsandberg@rrv.net

Sarah Kuntz

Subscribed and sworn to before me this 28 day of October, 2014.

MCKENZIE RUDOLPH
Notary Public
State of North Dakota
My Commission Expires July 2, 2020

Notary Public