20140456
20140457
20140465
20140466

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 22, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Interest of D.D. and H.D.,

McKenzie County Social Services Petitioner and Appellee, vs. D.D., Child, H.D. Child, C.R., Mother, D.D., Father, Respondents and Appellants.	)	Supreme Court No. 20140456 20140457 Juvenile Court No. 27-2014-JV-00009 27-2014-JV-00010

BRIEF OF PETITIONER-APPELLEE

APPEAL FROM AMENDED ORDER TERMINATING PARENTAL RIGHTS

MCKENZIE COUNTY JUVENILE COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE ROBIN A. SCHMIDT, PRESIDING

Charles B. Neff Jr. (ND # 06406)
McKenzie County Assistant State's Attorney
201 5th St NW, Ste 550
Watford City, ND 58854
(701) 444-3733
mcsa@co.mckenzie.nd.us

Attorney for Petitioner-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUES

[¶1] Did the Juvenile Court find that the Children were deprived by clear and convincing evidence?

[¶2] Were the Children in the care, custody, and control of the Petitioner for at least four hundred fifty out of the previous six hundred sixty nights?

[¶3] Did the Juvenile Court find by clear and convincing evidence that the Children would be harmed if the parental rights were not terminated?

STATEMENT OF THE CASE

[¶4] The Petitioner would agree with the Statement of the Case as laid out by Mother and Father.

STATEMENT OF THE FACTS

[¶5] On [redacted], the Children were born in Williston to Mother and Father, where Mother tested positive for methamphetamines. (T. p. 7, l. 22-23). A test was run shortly afterward and the Children came back positive for methamphetamines. (Exhibit 2). Upon speaking with Mother the day she was discharged from the hospital, the Guardian Ad Litem noted that Mother was twitching and very uncontrollable, to the point of nearly falling. (T. p. 120, l. 1-10). This is behavior the Guardian Ad Litem has never seen in Mother since (T. p. 120, lines 11-12). The Children entered foster care at that time. (T. p. 7, l. 18-19). Visitation was started at twice a week for two hours, which Mother initially started attending. (T. p. 26, l. 3-12). Visits were reduced due to lack of attendance by the parents. (T. p. 26, l. 15-22). Various letters were sent reminding Mother and Father about visits. (T. p. 27, l. 4-21; Exhibit 11).

[¶6] A case plan was created that laid out the steps for Mother and Father to take to get custody of the Children. (T. p. 17, l. 5-12; p. 19, l. 2-9; Exhibit 8). Mother and Father have yet to complete the plan. (T. p. 22, l. 5-7; p. 25, l. 5-7). Mother and Father have not seen the Children since September of 2013 due to missed visits. (T. p. 37, l. 25; p. 38, l. 1-2). Visits were attempted to be set up at the

request of the parents, but they never showed. (T. p. 39, l. 2-9). Child and Family Team Meetings were set up to inform the parents of the progress of the Children and Case Plan, but the parents missed most of them. (T. p. 53, l. 1-23; p. 58, l. 7-14; Exhibit 7; Exhibit 17). While the Children were in foster care, both parents have tested positive for methamphetamines. (Exhibits 13-15). Father posted a video to YouTube entitled "Death To CPS" that includes pictures of the Children, Mother, and Father and depicts a truck of explosives blowing up a building. (Exhibit 21). Overall, Mother has had 16 visits over 808 days; Father has had 7 visits over 808 days. (T. p. 37, l. 20-24; Exhibit 7).

STANDARD OF REVIEW

[¶7] The Petitioner, who petitioned for parental termination, "must prove all elements by clear and convincing evidence In re K.B., 2011 ND 152, ¶ 7, 801 N.W.2d 416 (citing to Interest of E.R., 2004 ND 202, ¶ 5, 688 N.W.2d 384). "Clear and convincing evidence is evidence that leads to a firm belief or conviction the allegations are true." K.B. at ¶ 7 (citing to Interest of A.B., 2009 ND 116, ¶ 16, 767 N.W.2d 817).

[¶8] On appeal, this Court reviews "the files, records, and minutes or T. of the evidence of the juvenile court, giving appreciable weight to the findings of the juvenile court." K.B. at ¶ 8 (citing to N.D.C.C. § 27–20–56). The findings of fact will not be overturned unless they are clearly erroneous under N.D.R.Civ.P. 52(a). K.B. at ¶ 8. "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 to Interest of K.J., 2010 ND 46, ¶ 5, 779 N.W.2d 635) Based on N.D.R.Civ.P. 52(a), this Court does not re-weigh conflicting evidence, and the Court gives due regard to the trial court's opportunity to judge the credibility of witnesses. K.B. at ¶ 8. (See Interest of J.S.L., 2009 ND 43, ¶ 12, 763 N.W.2d 783; Brandt v. Somerville, 2005 ND 35, ¶ 12, 692 N.W.2d 144). "A trial court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because we may have viewed the evidence differently

does not entitle us to reverse the trial court." K.B. at ¶ 8 (citing to Brandt, at ¶ 12).

ARGUMENT

I. There is clear and convincing evidence to support a finding of deprivation.

[¶9] Under N.D.C.C. § 27-20-44(1)(c), a juvenile court may terminate parental rights by finding that there is clear and convincing evidence:

1) The child is a deprived child
2) The conditions and causes of the deprivation are likely to continue; and
3) The child is suffering, or will in the future suffer serious physical, mental, moral, or emotional harm.

[¶10] In the alternative, a court can terminate parental rights by finding the child is deprived and has been in the care, custody, and control of social services for at least four hundred fifty out of the previous six hundred sixty nights. N.D.C.C. § 27-20-44(1)(c)(2). As stated in the Standard of Review, this Court does not re-weigh conflicting evidence and gives due regard to the trial court's ability to assess credibility.

In the current case, the applicable definition of "deprived child" is 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 said that "proper parental care" means that the

parents must satisfy "the minimum standard of care which the community will tolerate." In re K.B., 2011 ND 152, ¶ 10, 801 N.W.2d 416 (citing to Interest of R.S., 2010 ND 147, ¶ 8, 787 N.W.2d 277; Interest of K.R.A.G., 420 N.W.2d 325, 327 (N.D.1988); Interest of D.S., 325 N.W.2d 654, 659 (N.D.1982)). This definition also includes parents that, while not having had the chance to care for a child, are "presently incapable of providing proper parental care for the child." K.B. at ¶ 11, citing to Interest of T.J.O., 462 N.W.2d 631, 633 (N.D.1990).

[¶11] Prognostic evidence is used by the courts to show future deprivation; as evidence of past deprivation alone is not sufficient. In re G.R., 2014 ND 32, ¶ 9, 842 N.W.2d 882. But a court doesn't operate in a vacuum and can take judicial notice of prior proceedings in the case. K.B. at ¶ 13. Prognostic evidence is "that which forms the basis for a reasonable prediction as to future behavior." G.R. at ¶ 9, (citing to In re A.S., 2007 ND 83, ¶ 19, 733 N.W.2d 232 (quoting In re L.F., 1998 ND 129, ¶ 17, 580 N.W.2d 573)). Past conduct of parents can help form this reasonable prediction under prognostic evidence. G.R. at ¶ 9. Other considerations to assess future behavior include: amount of contact parents have had with children, a lack of cooperation on the parents part with social services, and reports and opinions of professionals involved in the case. Id.

[¶12] In this case, the Petitioner has shown both evidence of deprivation and that the deprivation will continue unless the parental rights are terminated. The children tested positive for methamphetamines directly after child birth. (Exhibit

2). This was the reason for the initial removal. (Juvenile Findings of Fact and Order for Disposition, 27-2012-JV-00013, Doc #24, Nov. 16th, 2012). Upon speaking with Mother the day she was discharged from the hospital, the Guardian Ad Litem noted that Mother was twitching and very uncontrollable, to the point of nearly falling. (T. p. 120, l. 1-10). This is behavior the Guardian Ad Litem has never seen in Mother since (T. p. 120, l. 11-12). Taken all together, this is clear and convincing evidence of the initial deprivation.

[¶13] But beyond that, Mother and Father failed to meet the minimum standard of parenting that our community would accept. Both tested positive for methamphetamines during the course of the Children's life. (Exhibits 13-15). Petitioner was unable to continue testing Father due to lack of body hair. (Exhibit 16). While visits started twice a week, they were eventually scaled back as Mother and Father stopped appearing. (T. p. 26, l. 3-22). Letters were sent to the addresses of Mother and Father informing them of upcoming visits. (T. p. 27-30, l. 12-15; Exhibit 7, 11). Mother and Father admit to receiving some of these letters. (T. p. 92, l. 5-10; p. 103, l. 13-25). Both parents had a case plan that lays out what needed to happen to have their children returned. (T. p. 18, l. 23-25; p. 19, l. 1-14; Exhibit 8). This included evaluations and follow through for both Mother and Father. Neither Mother or Father followed through or plans to follow through with that portion of the case plan (T. p. 89, l. 4-5; p. 106, l. 1-15). Father also created a video, which features pictures of the Children in it, which implies harm

to Social Services. (Exhibit 21). Overall, Mother has had 16 visits with the Children since July 30, 2012 and Father has had 7 over the same time frame. (T. p. 37, l. 20-24; Exhibit 7). The last visit that either Mother or Father had with the Children was on September 13th, 2013. (T. p. 37, l. 25; p. 38, l. 1-2; Exhibit 7). All of this is prognostic evidence that Mother and Father are presently incapable of providing parental care to these Children. They refuse to follow the case plan. They refuse to work with social services. They continue to test positive for drugs. They abandoned visitation with the Children since September of 2013. Mother has visited the Children 15 out of 808 days, or .18%. Father has had 7 visits out of 808 days, or .008%. Exhibit 7, the Case Time Line, shows by clear and convincing evidence that Mother and Father have shown little indication of intending to parent the Children.

II. There is clear and convincing evidence that the Children will likely suffer harm absent a termination of parental rights.

[¶14] Under N.D.C.C. § 27-20-44(c)(2), if the court finds the Children are deprived, the court can terminate parental rights simply based on the fact that the Children have been in the care, custody, and control of social services for "at least four hundred fifty out of the previous six hundred sixty nights." In this case, the Children have been in the custody of the Petitioner for 808 days at the time of the trial. So that is reason enough to terminate the parental rights. But if this Court were use N.D.C.C. § 27-20-44(c)(1), there is clear and convincing

evidence that the Children will be harmed absent a termination of parental rights. The harm can be in the form of physical, mental, moral, or emotional. In re D.R., 2001 ND 183, ¶ 18, 636 N.W.2d 412 (citing to In Interest of L.F., 1998 ND 129, ¶ 27, 580 N.W.2d 573). This Court has held that "long term and intensive treatment is not mandated if it cannot be successfully undertaken in a time frame that would enable the child[ ] to return to the parental home without causing severe dislocation from emotional attachments formed during long-term foster care." In Interest of J.L.D., 539 N.W.2d 73, 77 (N.D. 1995) (citing to In re D.R., 525 N.W.2d at 675 (quoting In Interest of C.K.H., 458 N.W.2d 303, 307 (N.D.1990)); see also In Interest of J.K.S., 356 N.W.2d 88, 92 (N.D.1984)).

[¶15] This case is very similar to In re C.R., 1999 ND 221, 602 N.W.2d 520, which recognized that the 2 year old child had made a strong attachment to the foster family and continuing foster care until the father was able to successfully parent again would only solidify that bond. Id at ¶¶ 11-12. This Court realized that there would be great harm by tearing the child away from the only people that she knew in order to place her with her father at some point in the future. Id. This Court looked at the bonding that had already occurred between the child and foster family. Id. In this case, neither Father nor Mother has bonded with the Children. Reasonable efforts were made by the Petitioner to maintain these bonds (T. p. 62, l. 11-25; p. 63, l. 1-7; Exhibit 7). The fault of maintaining these bonds lies with the parents. (Addendum to Report to the Court of Guardian Ad

Litem dated May 2, 2014, filed October 6, 2014, page 4). As the Guardian Ad Litem stated, the Children have clearly bonded with their foster parents. (T. p. 119, l. 8-17). And there would be harm if the Children were removed from foster care at this time. (T. p. 120, l. 13-25).

[¶16] This can also be shown by an attempted visit in July of 2014, which Mother and Father requested. (T. p. 32, l. 16-21). Neither Mother nor Father appeared, but the Children were brought from the foster home and waited 30 minutes before sending them back. (T. p. 32, l. 10-15). The Children cried the entire time and were under extreme distress, which the Guardian Ad Litem attributed to being away from those the Children consider parents. (T. p. 32, l. 12-13; Addendum to Report to the Court of Guardian Ad Litem dated May 2, 2014, filed October 6, 2014, page 1). This is exactly the type of harm that the professionals in this case fear will occur if parental rights are not terminated. The evidence entered in this case is clear and convincing; Mother and Father have abdicated their role as parents and placing the children in long term foster care until Mother and Father can complete their plan would cause the exact harm this Court is trying to prevent.

CONCLUSION

[¶17] The Petitioner does not take the task of terminating parental rights lightly, but feels it is necessary in cases where the parents have failed to meet even the basic standard that our community acknowledges. In this case, there is clear and

convincing evidence that the Children are deprived and will continue to be deprived. These parents have been given ample opportunity to bond with the Children, but have not. The professionals in this case feel that said deprivation will continue unless these rights are terminated. And because the Children have been in the care of the Petitioner for 808 days, that is sufficient under the statute to terminate. There is clear and convincing evidence of harm that will occur if the rights aren't terminated by seeing the bond they have with their foster parents and the harm when taken from them. For all these reasons, the amended order of the Juvenile Court terminating the rights of Mother and Father in this case should be affirmed.

[¶18] Dated this 22nd day of January, 2015.

/s/ Charles B. Neff Jr.
Charles B. Neff Jr. (ND # 06406)
McKenzie County Asst. State's Attorney
201 5th St NW, Ste 550
Watford City, ND 58854
(701) 444-3733
mcsa@co.mckenzie.nd.us

Attorney for Petitioner-Appellee

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Interest of D.D. and H.D., McKenzie County Social Services	)	
	)	**CERTIFICATE OF SERVICE**
Petitioner and Appellee,	)	
	)	Supreme Court No. 20140456
vs.	)	20140457
	)	
D.D., Child,	)	Juvenile Court No. 27-2014-JV-00009
H.D. Child,	)	27-2014-JV-00010
C.R., Mother,	)	
D.D., Father,	)	
	)	
Respondents and Appellants.	)	

I certify that a true and correct copy of the **Brief of Petitioner-Appellee** was emailed to the following parties via electronic mail on the 22nd of January, 2015:

Rick Sand
Attorney for Respondent-Father
Rick.Sand@SandlawND.com

Kelsey Aman
Petitioner, MCSS
Kaman@co.mckenzie.nd.us

Ashley Gulke
Attorney for Respondent-Mother
AshleyGulke@gmail.com

Tammy Booke
Guardian Ad Litem
tbookeGAL@gmail.com

North Dakota Supreme Court
Clerk of ND Supreme Court
supclerkofcourt@ndcourts.gov

Maggie Anderson
Direction of ND Human Services
maggiedanderson@nd.gov

/s/ Charles B. Neff Jr.
Charles B. Neff Jr. (ND # 06406)
McKenzie County Asst. State's Attorney
201 5th St NW, Ste 550
Watford City, ND 58854
(701) 444-3733
mcsa@co.mckenzie.nd.us

20140456
20140457
20140465
20140466

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 23, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Interest of D.D. and H.D., McKenzie County Social Services Petitioner and Appellee, vs. D.D., Child, H.D. Child, C.R., Mother, D.D., Father, Respondents and Appellants.	)	**CERTIFICATE OF SERVICE** Supreme Court No. 20140456 20140457 Juvenile Court No. 27-2014-JV-00009 27-2014-JV-00010

I certify that a true and correct copy of the corrected **Brief of Petitioner-Appellee** was emailed to the following parties via electronic mail on the 23rd of January, 2015:

Rick Sand
Attorney for Respondent-Father
Rick.Sand@SandlawND.com

Kelsey Aman
Petitioner, MCSS
Kaman@co.mckenzie.nd.us

Ashley Gulke
Attorney for Respondent-Mother
AshleyGulke@gmail.com

Tammy Booke
Guardian Ad Litem
tbookeGAL@gmail.com

North Dakota Supreme Court
Clerk of ND Supreme Court
supclerkofcourt@ndcourts.gov

Maggie Anderson
Director of ND Human Services
maggiedanderson@nd.gov

/s/ Stephenie L. Davis
Stephenie L. Davis. (ND # 06866)
McKenzie County Asst. State's Attorney
201 5th St NW, Ste 550
Watford City, ND 58854

(701) 444-3733
mcsa@co.mckenzie.nd.us