

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

INTEREST OF J.J.A.M., MINOR CHILD

State of North Dakota,	)	
Petitioner/Appellee,	)	Supreme Court No. 20170081
	)	Juvenile Court No. 30-2016-JV-84
vs.	)	
	)	
J.J.A.M. Child; M.M., Mother;	)	
J.W., Father; Executive Director of	)	
ND Department of Human Services,	)	
Respondents,	)	
	)	
J.W., Appellant.	)	

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**BRIEF OF APPELLANT**

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Appeal from the Findings of Fact and Order of the Judicial Referee, dated January 31, 2017, Honorable Pamela Nesvig, Presiding, South Central Judicial District

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3 Morton County Social Services failed to use reasonable efforts to reunite the child with J.W. and to maintain family connections.

4 The Court erred in finding that the child is currently adoptable because of his severe medical needs and his need to remain in a medical facility indefinitely.

5 The State failed to establish paternity of the child and failed to provide proper notice of the termination of parental rights proceedings to all possible fathers of the minor child.

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STATEMENT OF ISSUES

- 1 The State failed to prove by clear and convincing evidence that the child is deprived and the causes of the deprivation are likely to continue with resulting harm to the child.
- 2 The State failed to prove by clear and convincing evidence that there are the aggravated circumstances of abandonment or failure to make substantial, meaningful efforts to secure treatment of addiction, mental illness, or behavior disorder for a period equal to the lesser of one year or half of the child's lifetime.
- 3 Morton County Social Services failed to use reasonable efforts to reunite the child with J.W. and to maintain family connections.
- 4 The Court erred in finding that the child is currently adoptable because of his severe medical needs and his need to remain in a medical facility indefinitely.
- 5 The State failed to establish paternity of the child and failed to provide proper notice of the termination of parental rights proceedings to all possible fathers of the minor child.
- 6 The Court erred in proceeding as if the Indian Child Welfare Act did not apply when there was a question as to if it does apply.

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STATEMENT OF THE CASE

3 J.J.A.M. (child) was born in 2013, in extreme medical distress. He was transferred by air ambulance to a Fargo hospital, then to a Minneapolis hospital within the first 36 hours of his life. Because of his extreme and ongoing medical needs, Morton County Social Services obtained custody of the child, first by order dated November 18, 2013, then by continuing orders dated December 23, 2013, November 13, 2014, and November 5, 2015.

4 Morton County Social Services filed a petition to terminate the parental rights of M.M., the child's mother and J.W., the putative father. (App. P. 3). Paternity of the child has never been established. The Mother was not personally served. A request for Order

and Order for Publication dated September 29, 2016, was filed. (App. P. 16). Proof of publication on Mother was filed on November 1, 2016. (App. P. 18). No other possible fathers of J.J.A.M. were served, either personally or by publication.

5 Trial was held on January 30 and 31, 2017, before the Honorable Pamela Nesvig. (App. P. 20). The mother did not appear, either personally or through counsel. (App. P. 20). The putative father, J.W. was able to appear for part of the hearing telephonically and was represented by counsel. (App. P. 20). By Findings of Fact and Order of the Judicial Referee dated January 31, 2017, the parental rights of M.M. and J.W. were terminated. (App. P. 20). J.W. filed a Notice of Expedited Appeal on March 2, 2017. (App. P. 27).

6 STATEMENT OF FACTS

7 M.M. gave birth to J.J.A.M. in 2013. He was born with severe, life threatening problems and had to be taken by air ambulance to a Fargo hospital, then shortly after to a hospital in Minneapolis, Minnesota. Since his birth, the child has spent all of his life in hospitals, a medical foster home where his foster mother was a nurse, or other medical facilities. He has numerous, serious medical conditions, including needing daily dialysis until he was able to undergo a kidney transplant at the age of 2, a heart ailment, breathing difficulties, sleep apnea, bone density problems, an inability to eat, an inability to speak, cognitive problems, he has a port for medication and a G-J tube for feedings and medications, he currently has occupational therapy, physical therapy, and speech therapy, and he has a Developmental Disability case worker.

8 As the child's health stabilized somewhat after birth, he was placed into a medical foster home in Minnesota. His foster mother was a nurse, yet his health was so fragile

that he still needed numerous hospitalizations while in her care. She expressed to Social Services that she cared very much for the child and would be willing to consider adoption, if that became an option.

9 He was such a difficult child to care for that when he was in the home he needed additional round the clock nursing care. They had a very difficult time keeping nurses to care for him as his needs were so great. The foster mother requested that Morton County Social Services change the child's primary care from the hospital in Minneapolis to Mayo as she thought he was not getting appropriate care. During his numerous hospitalizations while under her care, she would monitor to be sure he was getting the best care he could.

10 J.J.A.M. was able to have a kidney transplant when he was approximately 2 years old. He again had many medical difficulties and had a long hospital stay. During this time, the foster mother felt that the child still needed very extensive care and she thought the child might be developing reactive detachment disorder. She evaluated her family's needs and determined that she was not able to care for the child any longer. When he was finally ready for discharge, he was sent to the Anne Carlson Center, where he remains. Shortly after arriving at Anne Carlson, he needed a month long hospitalization at Mayo. The Anne Carlson Center thought J.J.A.M.'s medical needs were too extensive for their abilities, so an alternate placement in a facility in South Dakota was sought. Because that was an out of State facility, there were bureaucratic difficulties in making the placement. Before all the arrangements could be completed, the child's medical situation had stabilized a bit and Anne Carlson agreed to keep him. While at Anne Carlson he has had to be returned to Mayo for hospitalizations and treatment a total of three times. His last hospitalization was in Fargo for an infection in his medication port. It is expected that he

will need to remain at Anne Carlson or another medical facility for the foreseeable future. The Morton County Social worker, Deb Noyes testified that she hopes that the child can transition to a medical foster home within the next year, but the medical professionals have not given her any timeframe as to when the child may be healthy enough to make that transition. Ms. Noyes, is in contact with his former foster mother, who she believes may be willing to take the child back into her home when he is ready. They have not discussed the possibility of adoption at this time. While at Anne Carlson, the child has been able to go on short outings with one of the employees, as his health allows. He has not been healthy enough for any overnight visits.

11 The mother, M.M. has seven children with six different fathers. She has lost custody of all of her children except the youngest. She has an untreated addiction to methamphetamine, heroin and prescription narcotics. Social Services assisted the mother with transportation to visit the child while hospitalized in Minnesota. The mother was offered training from hospital staff to learn to care of the child, but she did not complete any of the training. The mother has a lengthy history with Social Services, including reports of drug usage while pregnant with J.J.A.M. The mother has had minimal contacts with the child.

12 The putative father, J.W. has been incarcerated the majority of the child's life. At first he was incarcerated in North Dakota and was able to write and have contact with the social workers assigned to the case. He was released for a short time in 2014 and met with Burleigh/Morton County social worker Kathy Nelson. They discussed visitation with the child, but he was not allowed to leave the State and the child was not healthy enough to travel to North Dakota. He was re-incarcerated for a time. He again was able to

contact the next social worker assigned to the child, Deb Noyes. He wrote to her asking about the child and wanting to have information about the doctors who were caring for him. He and was released in 2015 and set up an appointment with Ms. Noyes to find out what he could do for the child. He was not able to make it to that appointment as he was picked up on an outstanding warrant out of Louisiana. He has been incarcerated in Louisiana through the termination of parental rights trial, but was released shortly after.

13 Ms. Noyes testified that she offered no services to the putative father except to send him invitations to attend Family Team Decision Making Meetings. Ms. Noyes took no other action to contact J.W. during his incarceration in Louisiana until she called the prison he was in shortly before trial. At that time, she was informed by his caseworker that J.W. did not have any funds to send letters or make phone calls. Ms. Noyes never informed J.W. of any services they could provide to him to assist him in learning how to care for his son or to be able to reunify with him in the future. She made no attempts to call him while incarcerated in Louisiana to find out if he needed assistance in calling or writing to her. Ms. Noyes made no inquiries about J.W.'s other children to set up contact between them and J.J.A.M. Ms. Noyes did not inform J.W. of any requirements Morton County Social Services had for him to complete so that he could either reunite or at least have visitation and contact with J.J.A.M.

14 J.W. testified that the mother told him the she was Native American. He believed that she was a member of a Sioux Tribe. He did not know if the child would be eligible for membership in a Tribe.

15 Since his kidney transplant, J.J.A.M. has made great strides, but as a three year old he is only now learning to walk, he is non-verbal, but can use limited sign language,

he does not eat and must be fed through a feeding tube, although they are starting to teach him to eat some baby food, he gets daily medication through a port, his intellectual capacity is not known as this time, but he is severely behind where he should be for a child his age.

16 J.J.A.M. has had very little consistency in his life. He has been in different hospitals, often for months at a time, he was in a medical foster home, but that time was interrupted by his numerous hospitalizations, then he was moved to the Anne Carlson Center, but again that time has been interrupted by numerous hospitalizations. When the child was first placed under the custody of Social Services, Burleigh and Morton County had a joint office and his social worker was Korrine Sailer. A few months later, a new caseworker was assigned, Kathy Nelson. Morton County Social Services decided to set up an independent office and his case was transferred to Deb Noyes. Prior to shelter care placement, a Guardian ad Litem was appointed to represent J.J.A.M.'s best interests. When she left the GAL program, a different Guardian ad Litem was appointed to represent him. The GAL program has also undergone recent changes. When the child was first placed in custody, the GAL would follow the child through the court proceedings and continue to monitor the services that were being provided to the child and family by Social Services. Under the new policy, a GAL will remain assigned to a child while the legal matters are pending, but will not continuously monitor the case. Only in very rare circumstances will a GAL remain assigned to a case between legal proceedings.

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### **LAW AND ARGUMENT**

18 This court can reverse the juvenile court's findings and order in a termination of parental rights case if those findings are clearly erroneous. Interest of R.L.-P., 2014 ND

287, 842 N.W.2d 889. “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, this Court is left with a definite and firm conviction a mistake has been made. Id. At ¶12, quoting In re M.G., 210 ND 157, 786 N.W.2d 710.

19 The party seeking to terminate parental rights must prove all elements by clear and convincing evidence. In re: D.R., 2001 ND 183, 636 N.W.2d 412. Clear and convincing evidence means evidence that leads to a firm belief or conviction the allegations are true. In the Matter of A.M.W., 2010 ND 154 N.W.2d 727, quoting In the Adoption of H.G.C., 2009 ND 19, 761 N.W.2d 565.

20 The State alleges that J.J.A.M. is a deprived child; the conditions and causes of 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)(b)(1). The child has been in foster care the majority of his life. The State also alleges aggravated circumstances as defined by North Dakota Century Code §27-20-02-(3), specifically abandonment and that the parents have failed to make substantial, meaningful efforts to secure treatment for the parents’ addictions, mental illness, behavior disorders, or any combination of those conditions for a period equal to the lesser of one year or half of the child’s lifetime.

21 **DEPRIVATION**

22 § 27-20-44(1), N.D.C.C., authorizes a juvenile court to terminate a person’s parental rights if “[t]he child is a deprived child and the court finds . . . [t]he conditions and causes of the deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental,

moral, or emotional harm[.]” Interest of G.R., 2014 ND 32, 842 N.W.2d 882, ¶5.

23 A 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).

24 In this case J.J.A.M. has been in either medical facilities or a medical foster home his entire life. He is not able to live a regular home and may not be able to for quite some time. The putative father has been incarcerated most of the child’s life, so has not been able to directly provide care for him. The child’s mother, M.M. has chosen not to be involved in the child’s life.

25 **DEPRIVATION LIKELY TO CONTINUE**

26 The putative father was incarcerated until a short time after the termination of parental rights trial. This Court has held that imprisonment alone does not justify parental termination and the mere fact that one has a history of difficulties with the law, by itself, does not clearly and convincingly establish continuing deprivation. In Interest of J.L.D., 539 N.W.2d 73 (N.D. 1995). This Court has further held that "incarceration by itself does not establish abandonment of a child for purposes of terminating parental rights." In re: C.R., 1999 ND 221, 602 N.W.2d 520, 524.

27 When determining if the deprivation is likely to continue, the court may look to evidence of a parent’s background, including previous incidents of deprivation. In re: D.R., 2001 ND 183, 636 N.W.2d 412, 416. “Evidence of past or present deprivation, however, is not alone sufficient to terminate parental rights, and there must be prognostic

evidence that deprivation will continue or be un remedied.” Id., at 416. “This Court has defined prognostic evidence as evidence that forms the basis of reasonable predication as to future behavior.” Id., “A parent must be able to demonstrate present capability, or capability within the near future, to be an adequate parent.” Interest of G.R., 2014 ND 32, 842 N.W.2d 882, at ¶8.

28 The putative father is now out of jail. He has expressed an interest to each of the social workers assigned to the case, in learning how to care for J.J.A.M., when the time comes that the child is able to be released from a medical facility. While in jail, the putative father completed various programs. Social Services has never required the putative father complete any services, not have they offered any assistance to him to obtain services that may be helpful for him.

29 **HARM TO CHILD**

30 “Upon a showing that the child is deprived and the causes and conditions of deprivation are likely to continue, the petitioner must also prove 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).” Interest of G.R., 2014 ND 32, 842 N.W.2d 882, ¶16.

31 “In a termination case, the showing of parental misconduct without showing a resultant harm to the child is not sufficient.” In Interest of A.S., 1998 ND 181, 584 N.W.2d 853, 858. The evidence presented in this matter has not shown that the child will probably suffer serious physical, mental, moral, or emotional harm as required by N.D.C.C. § 27-20-44(1)(b)(1). In the Matter of C.D.G.E., 2017 ND 13, \_\_\_ N.W.2d \_\_\_, this Court upheld the Juvenile Court’s determination that the father’s parental rights cannot be terminated where it was not established that denying the petition would

seriously affect the child's welfare.

32 All evidence presented shows that J.J.A.M. needs to remain in a medical facility for the foreseeable future. He continues to have hospitalizations for various medical needs. No evidence was presented to show that there would be any harm to the child if the putative father visits him and learns about his medical needs. The putative father is very concerned that J.J.A.M. will get lost in the system. During the child's short lifetime, he has had three different social workers and two Guardian ad Litem. He has not had one person who can continuously monitor his health, determine if the services being provided are appropriate, make informed decisions based on a full knowledge of his history and needs. If the parents' rights are terminated, J.J.A.M. will be transferred from Morton County Social Services to the Department of Human Services, with yet another caseworker assigned to him. J.J.A.M. has lived in several different hospitals for much of his life, he was in a medical foster home with a foster mom who did a fantastic job caring for him and making sure he got the medical care he needed, and most recently J.J.A.M. lives at the Anne Carlson Center. He has had dozens, possibly hundreds of care providers during his life. J.J.A.M. has never had one person continuously responsible for any of his needs: he has numerous personnel tending to his normal daily living needs, he has had numerous medical professionals providing for his extensive and varied medical needs, he has had different agencies and caseworkers assigned to facilitate the services provided to him, he has even had more than one Guardian ad Litem monitoring his case. For a child with so many needs that are being provided by so many agencies, it would be extremely easy for him to fall through the cracks of the system and not be provided the necessary, essential services he needs. The putative father did not have the ability to be that stable

advocate for J.J.A.M. while he was incarcerated. He is now out of prison, and he wants to be that advocate for the child to make sure the child has the consistency and care he needs.

33     **REASONABLE EFFORTS**

34     Juvenile court findings regarding whether Social Serviced made reasonable efforts to reunify children with parents is reviewed under the clearly erroneous standard.

Interest of R.L.-P., 2014 ND 287, 842 N.W.2d 889, ¶25.

35     This Court has held that “when there has been an extensive period in which efforts have been made to overcome a parent’s inability to effectively parent, the court cannot allow the children ‘to remain in this indeterminate status midway between foster care and the obvious need for permanent placement’.” In re T.K., 2001 ND 127, 630 N.W.2d 38, 44.

36     Social Services has provided virtually no efforts to establish or maintain any relationship between the child and the putative father. No one at Social Services ever informed the putative father of any requirement they had for him to complete. He was not told that he needed any sort of parenting classes or treatment for any disorders or addictions. They did not offer or facilitate any training to assist him in understanding or properly caring for the child’s medical needs.

37     Ms. Noyes from Morton County Social Services testified that she didn’t offer any services to the putative father except to send invitations to the Family Team Decision Making meetings. No efforts were made by Social Services to find out if the putative father could appear by phone for these meetings or to assist him in setting up phone appearances. Social Services did not attempt to establish or foster a sibling relationship

between J.J.A.M. and J.W.'s other children.

38 In paragraph 14 of the Finding of Fact, the court found that Morton County Social Services had used reasonable efforts to maintain or return the child to the parental home. The list of reasonable efforts included efforts made on behalf of the mother, not efforts that were provided for the putative father. The first item listed by the court was child protective services and foster care placements. Those are the reason the child was placed outside the home, not efforts used by Social Services to keep him in the home. The addiction programing was offered to the mother. At no time did anyone from Social Services make a determination that the putative father may need or benefit from addition services. Visitation with the child was offered to the mother. No visitation was provided to the putative father. Transportation funding assistance for visitation was provided to the mother. Training for the proper care of J.J.A.M. was offered to the mother by hospital personnel. Nothing was offered or provided for the putative father. Attempts at familial placement were offered for the mother's family. Parenting/nurturing classes were offered to the mother, nothing was offered or required for the putative father. The court also lists family medical meeting invitations. The only medical meetings were conference calls with the doctors at Mayo that the mother was invited to, but the putative father was not.

39 Social Services is also required to use reasonable efforts to establish and maintain family contacts, including sibling contact. No one from Social Services asked the putative father about his other children, or how to locate them to set up visitation or other contact with J.J.A.M. No sibling contacts have been attempted between the putative father's children and J.J.A.M.

40 **AGGRAVATED CIRCUMSTANCE**

41 The State alleged that there are aggravated circumstances under N.D.C.C. § 27-20-02(3), specifically abandonment or failure to make substantial, meaningful efforts to secure treatment of addiction, mental illness, or behavior disorder for a period equal to the lesser of one year or half of the child's lifetime.

42 Looking first at the allegation that J.W. failed to make substantial, meaningful efforts to secure treatment of addiction, mental illness, or behavior disorder; the State has made no allegations that J.W. has addictions, mental illness or behavior disorder issues. Social Services has not required him to get treatment for any of those issues, nor have they assisted him in obtaining treatment for any of those issues. J.W. has been incarcerated and received various treatments and programming while incarcerated. He has completed his sentence and is no longer incarcerated.

43 Abandonment is defined under N.D.C.C. § 27-20-02(1). There are provisions for a custodial parent and for the noncustodial parent. Because J.W. was incarcerated at the time of the child's birth, the provision for the noncustodial parent would apply:

“Abandon” means:

- a. As to a parent of a child not in the custody of that parent, failure by the noncustodial parent significantly without justifiable cause:
  - (1) To communicate with the child; or
  - (2) To provide for the care and support of the child as required by law.

44 The putative father has not sent letters or made phone calls to the child because of the child's young age and his verbal and cognitive limitations. Because of his incarceration and the child's medical needs, no in person visitation has been possible. The putative father did make attempts to arrange visitation when he was out of jail in 2014, but it was not possible at that time as his probation officer would not allow him to travel out of state. He also made an appointment with the new social worker when he

was released in 2015, but he was arrested prior to that meeting. The putative father met with and/or had phone conversations with Kathy Nelson from the combined Burleigh/Morton County Social Service office. He sent her letters regarding the child during the time he was incarcerated. After Morton County set up its own separate Social Services office, he called his new caseworker, Deb Noyes, and attempted to meet with her. He sent letters asking for information about the child while he was incarcerated in North Dakota, but Ms. Noyes did not believe he sent any letters or made any phone calls after he was transferred to Louisiana. Ms. Noyes did not ever contact the putative father or call his caseworker in Louisiana to determine if the putative father was able to make or receive phone calls or send letters. When she finally did contact his caseworker a week prior to the termination of parental rights hearing, she was told that he did not have funds, so would not have been able to write or call Social Services.

45 The evidence presented clearly established that the child could not have been cared for in a normal family home. He has spent his entire life in various medical facilities or a medical foster home with a nurse as the foster mother. The State presented no evidence that any child support obligation was ever established against the father. No evidence was presented that any of the child's medical expenses have not been covered by insurance or Medicaid.

46 **ADOPTABLE**

47 In paragraph 15 of the Findings of Fact and Order of the Judicial Referee, the Court found that the child is adoptable. At trial, no evidence was presented to support that finding, and virtually all of the evidence indicates that child is not currently adoptable. The court found that "[J.J.A.M.] is a very well-liked child by those who have provided

care of [J.J.A.M.].” Being well-liked is not the same as being adoptable. The court’s other finding regarding the issues of adoptability was that “at least two individual has (sic) been identified as potential adoptive parents, and J.J.A.M. has been making great progress.”

48 The testimony indicated that the nurse who cared for the child had considered adoption, if that was a possibility, when he was placed in her care. She became so overwhelmed with the extent of care he needed, that she determined it was not right for her family to continue to provide a foster home for the child. Ms. Noyes testified that this former foster mom remains interested in the child and when his health improves, they will consider asking the foster mom to be his medical foster care placement again, but that Ms. Noyes has not discussed with her the possibility of adoption of the child at this time. That foster mom went above and beyond what can be expected of anyone in providing care for this extremely ill child, she had the medical training to be able to understand the care he needed and the expertise to provide for him. Even though she clearly cares deeply for J.J.A.M., she had to stop providing care for him because it became too difficult for her and her family.

49 Ms. Noyse testified that there was a caregiver at Anne Carlson who was developing a bond with the child and would take him on short outings, but that he was still so medically fragile that he could not stay overnight.

50 It is unreasonable to presume that this child could even be considered for adoption until he is medically stable enough to be discharged from a medical facility, and at that time, great care would have to be exercised to determine if a prospective adoptive family could and would be willing to provide the care he will continue to need throughout his

life. Ms. Noyes testified that the doctors have not given her a timeframe as to when, or if, J.J.A.M. will be ready to move to a medical foster home. She is hopeful it will be within the next year. When he is ready to make that move would be the appropriate time to start to consider if he could eventually be moved into an adoptive home. Even the court acknowledged in paragraph 10 of the findings that there were two potential adoptive placements for the child, once he was well enough to leave Anne Carlson. The child cannot leave a medical facility such as the Anne Carlson Center for the foreseeable future, and he will not be able to leave at all unless his health continues to improve.

51 The great progress the child has made is relative to how desperately ill he was at birth. He needs daily medications, some through a medication port, some through a G-J tube, he cannot eat and must be fed through the G-J tube, but they are starting to teach him to eat small amounts of baby food, he is non-verbal, but knows some sign language, he has had many, many hospitalizations, including a recent one for an infection in the medication port, he is just learning to walk with assistance, his health is so fragile that he has no date of discharge from Anne Carlson or any other medical facility. The hope is that in the next year he will improve to the point that he can be released to a medical foster home. No testimony was provided as to when, if ever, it may be possible for the child to go to a regular home, whether that is with family, foster care or an adoptive home.

52 An adoptive family would have to assume financial responsibility for this child. His medical expenses have been considerable and even as he improves, he will continue to incur great expenses. No testimony was provided to explain what criteria would be used to determine if an adoptive family could afford his care. There may be programs to

assist with the cost, but again, no testimony was provided to show that anyone but a very rich person could afford to take on the financial responsibility of this child.

53 It is possible that if the child's health stabilizes, he may be adoptable, but nothing indicates that anyone could or would adopt him now or in the near future. If parental rights are terminated, the child will remain in a medical facility for the foreseeable future and adoption will not be considered until he improves. If parental rights are not terminated, everything will remain exactly the same for the child except he will have the opportunity to develop a relationship with his putative father.

54 **PATERNITY**

55 Paternity has not been established for this child. J.W. has been listed as the father in this matter, but because of his incarcerations, he has not been able to appear at any of the prior court proceedings. No DNA tests have been performed, no Acknowledgment of Paternity signed and no paternity proceedings commenced to determine who is the father of J.J.A.M.

56 In a proceeding for termination of parental rights, N.D.C.C. §27-20-45(2) requires the court to make inquiry of the petitioner and other appropriate persons in an effort to identify an unnamed parent. Those inquiries include, whether any man is the presumed father under N.D.C.C. Chapter 14-20, whether the natural mother was cohabitating with a man at the time of conceptions or birth of the child, whether the mother has received support from any man with respect to the child or in connection with the pregnancy, whether any person has formerly or informally acknowledged or declared that person's possible parentage of the child, or whether any person claims any right to custody of the child. The mother did not appear or testify at trial. Ms. Noyes testified that she had asked

the mother if J.W. was the father and the mother said he was. No evidence was presented regarding any of the factors outlined in N.D.C.C. §27-20-45(2).

57 The mother of the child had four children prior to his birth and two more after. Six of her seven children have different fathers. Because of her untreated addictions to methamphetamines, heroin and prescription narcotics, she has lost custody of all but the youngest of her children. Based on the mother's history, it is quite possible that J.W. is not the father of this child. The Court relied upon the fact that J.W. had been listed as the father in the earlier deprivation proceedings to conclude he is the father of the child. If J.W. had testified that he was the father, that may have been sufficient under N.D.C.C. §27-20-45(2), but not only did he not testify at any of those earlier court hearings, he was not able to appear at all.

58 N.D.C.C. §27-20-45(3) requires the court to "add as a respondent to the petition and cause to be served with a summons any person identified by the court as an unnamed parent" There are clearly unnamed putative fathers in this case. The court could have required the mother be subpoenaed into court to testify under oath regarding the paternity of the child, DNA tests could have been ordered, or a "John Doe" service by publication could have been completed to terminate the rights of any unnamed father. The surprising thing is that the mother could not be personally served, so she had to be served by publication. It would have been a simple thing at that time to amend the Summons and Petition to include any unnamed father, but for some reason that was not done.

59 There is an additional issue with the publication on the mother. Rule (4)(e) of the North Dakota Rules of Civil Procedure allow service by publication after the plaintiff or plaintiff's attorney executes an affidavit stating one of the reasons allowing the

publication. The affidavit in this case does not request publication against a “John Doe” putative or other unnamed father, nor does it request publication for the mother, M.M., what is listed is that the Respondent E. S. C. (an unknown man’s name) could not be found and his whereabouts could not be ascertained. There is a document in the Register of Actions identified at #30, as “Proof of Publication on Mom.” The record does not contain an affidavit properly requesting publication for the mother. It appears that the mother was not properly served and any unnamed fathers have not been served. If they have not been served, their rights cannot be terminated, leaving this child in an uncertain state of limbo.

60     **INDIAN CHILD WELFARE ACT (ICWA)**

61     If a child is Native American the Indian Child Welfare Act (ICWA) applies in a termination of parental rights case. ICWA provides the child, parents and Tribe additional safeguards and procedure to be followed during the proceedings. 25 U.S.C. §§ 1901-1963. The rules regarding implementation of ICWA have recently changed and the National Indian Child Welfare Association and Native American Rights Fund provided some guidance in “Indian Child Welfare Act Final Rule – 25 CFR Part 23 Summary of Key Provisions”, June 2016. “ICWA has been in place for many years, but on June 8, 2016, the Bureau of Indian Affairs (BIA) released the first comprehensive regulations for the substantive legal requirements of the Indian Child Welfare Act (ICWA). The regulations provide the first legally-binding federal guidance on how to implement ICWA.” These new regulations require the court to inquire of the participants of a proceeding as to if they know or have reason to know that a child is an Indian Child. If the court does not have sufficient information to confirm that child is an Indian child, the

court must work with the tribe(s) and proceed by applying ICWA until they have confirmation that the child is not an Indian child.

62 In this case, the mother did not testify, so could not be questioned under oath about any Native American blood the child might have. The putative father testified that he is not Native American, but the mother told him that she is and that she was a member of a Sioux Tribe. Deb Noyes testified that she did not ask the mother about the possibility that the child may be Native American, she relied on information contained in the file when the case was transferred to her. The court made a finding that ICWA does not apply because prior orders stated that ICWA did not apply. A Finding made in a juvenile court's original finding of deprivation is not res judicata when termination of parental rights is subsequently sought. Interest of J.N., 2012 ND 256, 825 N.W.2d 868, at ¶ 9. No evidence or testimony was presented at the termination of parental rights trial to indicate how the prior courts made any determination about ICWA.

63 There was sworn testimony that ICWA may apply. There has been no inquiry made of any tribe to assist in determining whether or not the child is Native American. Until there is a determination that ICWA does not apply, the court must proceed using the standards and requirement of the Indian Child Welfare Act. Those requirement have not been met, there has been no Tribal notification of the proceedings, no active efforts used to maintain the family, the wrong standard of proof was applied and no Qualified Expert Witness testified.

64 CONCLUSION

65 This court has held that parents have constitutional protections in the relationship with their biological children. In Interest of A.S., 1998 ND 181, 584 N.W.2d 853. "Due

process provides certain procedural protections before the relationship may be terminated.” Id., at 856.

66 “Any 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.” In Interest of L.F., 1998 ND 129, 580 N.W.2d 573, 576. There are many problems with this case. Paternity has not been established and an unknown father could claim a right to this child, preventing any certainty in the child’s future. There is a question as to if ICWA applies, so no order should have been entered until adequate inquiry had been made.

67 The petitioner has failed to prove by clear and convincing evidence that the child is deprived and the causes of the deprivation are likely to continue with resulting harm to the child. The State has further failed to prove that the putative father has abandoned the child. Morton County Social Serviced failed to use reasonable efforts (or any real efforts) to establish or maintain a family connection between the child and putative father and the putative father’s children, the child is not adoptable at this time and will not be in the foreseeable future. For all these reasons, it is not appropriate to terminate J.W.’s parental rights at this time.

Dated this 2<sup>nd</sup> day of March, 2017.

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