

IN THE SUPREME COURT OF NORTH DAKOTA

IN THE INTEREST OF)	Supreme Court File No.
Z.T., A CHILD)	
)	
State of North Dakota,)	
)	Grand Forks County No.
Petitioners and Appellees,)	18-2017-JV-00317
)	
v.)	
)	
R.T., natural father, and;)	
The Department of Human Services)	APPELLANT’S BRIEF
Of North Dakota)	
)	
Respondents and Appellant.)	

**APPEAL FROM THE FINDINGS OF FACT AND ORDER TO
TERMINATE PARENTAL RIGHTS ENTERED APRIL 5, 2018
AND THE JUDGMENT TERMINATING PARENTAL RIGHTS
ENTERED APRIL 9, 2018 IN GRAND FORKS COUNTY,
NORTHEAST CENTRAL JUDICIAL DISTRICT, THE
HONORABLE JAY KNUDSON, PRESIDING**

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Audio References:

The Termination Hearing for this matter was conducted on March 21 and 22, 2018. The audio recording of that hearing is referred to as [TR] in this brief.

JURISDICTION

[¶ 1] 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.

STATEMENT OF THE ISSUES

- I. Whether the trial court erred by determining there was clear and convincing evidence to support the termination of R.T.'s parental rights.
- II. Whether the trial court erred by finding that Z.T. had been abandoned.

STATEMENT OF CASE

[¶ 2] This appeal is from a decision of the district court to terminate parental rights pursuant to N.D.C.C. § 27-20.

[¶ 3] The minor child is Z.T. He was born in 2016. He was two years old at the time of the termination hearing. His birth parents are R.S. and R.T.

[¶ 4] The petition for termination of parental rights was filed with the juvenile court on October 6, 2017.

[¶ 5] The termination trial was held over two days from March 21 - 22, 2018. The final Order Terminating Parental rights was entered on April 9, 2018. R.T. timely appeals that order.

STATEMENT OF FACTS

[¶ 6] On September 22, 2009, Grand Forks County Social Services (GFSS) first became involved with the family when they received a report of suspected child abuse involving R.S., C.R., and the older four children at issue. [Tr 1. 12:50. On May 24, 2017, all five of the children were placed into foster care under an emergency placement. [Tr 1. 1:07:09].

[¶ 7] On June 20, 2017, a child and family team meeting was held and adoption was made the goal for Z.T. less than a month after Z.T.'s removal. [Tr 2. 36:37]. The permanent plan for Z.T. is adoption. [3-22-18 Tr 2. 9:08]. Z.T. is not currently in an adoptive placement. [Tr 2. 12:25-16:16]. Tracy Van Beek, a supervisor for GFSS, testified that a goal of adoption can be changed. [Tr 1. 3:07:52].

[¶ 8] Amy Wesley, the family's foster care case manager, testified that reasonable efforts were provided to the family. [Tr 1. 3:10:20]. She testified that the community provided services for the family that included housing from Red River Community Action and CVIC, and help from churches, Grand Forks County, Northeast Human Service Center. Ms. Wesley testified that Z.T. is on track developmentally and does not have any issues. [Tr 1. 2:36:10].

[¶ 9] Tammy Knudson, the supervisor for the child and protection department, testified that Z.T. is deprived because of domestic violence, drug use, and neglect. [Tr 1. 1:15:15]. Ms. Wesley testified that R.T. is unavailable to parent Z.T. due to his incarceration. [Tr 2. 4:20]. R.S. denied that there was any possibility that C.R. was the father of Z.T. [Tr 1. 2:42:04].

[¶ 10] Ms. Wesley stated the main concern with Z.T. was maintaining connections with his brothers. [Tr 1. 2:26:26] Ms. Wesley stated she was uncertain what R.T. was in custody for, what his prior history was, and whether or not he could parent Z.T. The trial court stated in its order that no information about R.T. history or parenting ability was presented to the court. Order for Judgment Terminating Parental Rights, ¶ 98 Index # 127. However, R.S. testified to R.T.'s history with Z.T. and his parenting ability

with his daughter with a different woman. The public record states R.T. was sentenced to serve nineteen (19) months in prison starting in September 2017. Id.

[¶ 11] Z.T. went into foster care on May 24, 2017, which as of March 21, 2018 is 302 days. On that same date, March 21, 2018, Z.t. was 613 days old. The trial court's order incorrectly states Z.T. age as 604 days old as of March 21, 2018. Id. at ¶ 14, ¶ 107.

[¶ 12] The trial court had concerns about drugs found in R.S.'s home, the lack of information regarding R.T. and also found that Z.T. was abandoned because of R.T.'s incarceration. The court issued an order terminating R.T. parental rights because of those concerns. Id. at ¶ 31, ¶ 98, ¶ 113.

LAW AND ARGUMENT

I. Whether the trial court erred by determining there was clear and convincing evidence to support the termination of R.T.'s parental rights.

[¶ 13] This Court has recognized that severing the fundamental relationship between a parent and a child is serious business. Matter of Adoption of Gotvaslee, 312 N.W.2d 308, 312 (ND 1981). The Court has also found that, "A parent's relationship with a biological child is subject to constitutional protection, but that relationship is neither absolute nor unconditional. (citations omitted). The due process clause affords parents certain procedural protections before their relationship with a biological child can be irrevocably severed. (citations omitted)." In the Matter of the Adoption of J.W.M., a Minor, 532 NW 2d 372 (ND 1995). *See, In the Interest of F. H.*, 283 NW 2d 202 (ND 1979). The trial court erred by severing that parental relationship without the necessary clear and convincing evidence that: (1) the child is deprived; (2) the deprivation is likely to continue; and (3) absent a termination, the child will suffer, or probably suffer, serious

physical, mental, moral, or emotional harm. N.D.C.C. § 27-20-44(1)(b)(1). In the present case evidence indicated that Z.T. is healthy and is developmentally normal. Testimony from R.S. was that R.T. contacted her frequently about their son, that he wanted to be at the birth personally but was only able to call in, and that he has provided financially for their son. Ms. Wesley's testimony was that but for R.T.'s incarceration Z.T. would be living with him.

[¶ 14] Z.T.'s older brother's caring for him is not deprivation, R.T. status as a sex offender does not per se disqualify him as a parent to Z.T. GFSS placed the children with C.R. who is a registered sex offender, therefore that fact alone does not by a preponderance of the evidence create deprivation for Z.T. R.T.'s incarceration by itself does not create or constitute continued deprivation. And at the time of the termination hearing Z.T. had not spent half his life in GFSS custody. Z.T. is therefore not a deprived child. Even if this court were to agree that Z.T. had been deprived because of his exposure to his mother's drug use, there has been no presentation of evidence by the State that the deprivation is likely to continue. Because the State have failed to produce evidence to support their burden of proof, the court erred when it found there was clear and convincing evidence to support terminating R.T.'s parental rights.

[¶ 15] There is a presumption that a child's parents are fit and the burden of disproving this presumption is on the petitioner. In the Interest of K.R.A.G., 420 N.W. 2d 325 (N.D. 1988). "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 the Interest of W.E., 2000 ND 208 ¶36 (quoting In the Interest of M.M.C., 277 N.W. 2d

281, 286 (N.D. 1979)(additional citations omitted). In this case the testimony was that Z. T. is doing well and has no developmental issues. GFSS’s lack of efforts to determine if R.T. was an unsuitable or improper parent for Z.T. must not be a basis for termination. The default is that parents are suitable, if GFSS seeks to terminate R.T.’s parental rights they must provide affirmative proof that he is not suitable. Because GFSS did not provide that proof, nor does it appear that they even looked for it, the court erred when it found that there was clear and convincing evidence that Z.T. was deprived, that the deprivation was likely to continue, and that termination of R.T.’s parental rights was the only remedy to avoid Z.T. suffering serious physical, mental, moral, or emotional harm.

II. Whether the trial court erred by finding that R.T. had been abandoned.

[¶ 16] This Court has recognized that severing the fundamental relationship between a parent and a child is serious business. Matter of Adoption of Gotvaslee, 312 N.W.2d 308, 312 (ND 1981). In Kottsick v. Carlson, 241 N.W.2d 842, 850 (N.D.1976), this court quoted with approval from Beltran v. Heim, 248 Md. 397, 401, 236A.2d 723, 725 (1968), “The consequences of this drastic and permanent severing of the strongest and basic natural ties and relationships has led the Legislature and this Court to make sure, so far as possible, that adoption shall not be granted over parental objection unless the course clearly is justified.”

[¶ 17] The Court has also found that, “A parent’s relationship with a biological child is subject to constitutional protection, but that relationship is neither absolute nor unconditional. (citations omitted). The due process clause affords parents certain procedural protections before their relationship with a biological child can be irrevocably

severed. (citations omitted).” In the Matter of the Adoption of J.W.M., a Minor, 532 NW 2d 372 (ND 1995). *See*, In the Interest of F. H., 283 NW 2d 202 (ND 1979).

[¶ 18] The burden of proof is upon the Petitioner to prove by clear and convincing evidence all the required factors needed to terminate R.T.’s parental rights. In the Matter of the Adoption of Gotvaslee, supra at 312 (*quoting* from In Interest of F.H., supra at 211; Pritchett, supra at 220; In the Matter of J.W.M., supra. at 379. The Court, in that case stated: “...We have defined clear and convincing evidence as that which leads to a firm belief or conviction that the allegations are true...” Id.

[¶ 19] In the present case, the court found one of the primary issues in regard to Z.T. was abandonment. The standard of review for this Court is determined by reviewing the facts of the case and concluding there is substantial evidence in the record to support a finding of abandonment.

[¶ 20] Further, the Court held in Adoption of J.W.M., supra, at 379, “Abandonment is a question of fact, which must be established by clear and convincing evidence. Id. The Court reviews factual determinations in parental termination proceedings in a manner similar to the former procedure of trial de novo; however, the court gives substantial weight to the trial court’s findings because of its superior position to decide questions of demeanor and credibility. Matter of Adoption of A.M.B., 514 NW 2d 670 (ND 1994); Pritchett v. Executive Director of the Social Service Board of the State of North Dakota, 325 NW 2d 217 (N.D. 1982).” Therefore, the Court reviews a termination of parental rights based on abandonment under a clearly erroneous standard of review. N.D.R.Civ.P. 52(a). “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). In this case, R.T. was found to have abandoned Z.T. by the trial court because he was in custody. This is a clear error because “incarceration does not alone constitute continued deprivation.” Interest of T.F., 2004 ND 126, ¶ 12, 681 N.W.2d 786. And because this court has articulated several factors a trial court should look at to determine if a child was abandoned. The trial court in this case did not consider those factors when it made its determination of abandonment.

[¶ 21] Natural parents have a fundamental right to their children, “which is of a constitutional dimension.” In the Interest of W.E., 2000 ND 208, ¶30, 616 N.W.2d 494 (*quoting* 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. Under N.D.C.C. §27-20-44 a court’s decision to terminate parental rights is discretionary. Because the default is for children to be in the care of their natural parents the court must look at the factors of abandonment before reaching an ultimate legal conclusion on that issue. That was not done in this case, therefore the trial court committed a reversible error when it found that Z.T. had been abandoned by R.T.

[¶ 22] “This Court has said: ‘In determining whether abandonment has taken place, we look to such factors as the parent’s contact and communication with the child, the parent’s love, care and affection toward the child, and the parent’s intent. Also relevant is the parent’s acceptance of parental obligations such as providing care,

protection, support, education, moral guidance, and a home for the child. A casual display of interest by a parent does not preclude a finding of abandonment, and a parent's negligent failure to perform parental duties is significant to the issue" B.L.L. v. W.D.C., 2008 ND 107, ¶ 6. In the present case testimony regarding R.T. contact and communication was that when GFSS called him he always accepted the calls, he participated in the family and team meeting GFSS included him on, and he contacted R.S. regarding Z.T. a couple times a week.

[¶ 23] Given Z.T. age communication directly with him is not feasible without the assistance of GFSS. GFSS testified that they did not take Z.T. to see R.T. but sent him pictures and letters regarding Z.T. R.S.'s testimony was that R.T. bought a crib and other items for Z.T. and that R.T. had been financially supporting Z.T. R.S. stated that R.T. was on the phone during Z.T.'s birth because he was not able to come in person. Furthermore, R.S. said that R.T. was a good parent to his daughter and thought he would make a good co-parent for Z.T. R.T. has kept in contact with Z.T. and it is clear through R.T.'s actions there was never an intention to abandon Z.T. If the court had gone through the appropriate factors it would be clear that R.T. has not abandoned Z.T. and has no intention of doing so in the future. Therefore, the trial court erred when it found by clear and convincing evidence that R.T. abandoned Z.T.

[¶ 23] While a parent's negligence can result in abandonment, it must still be shown by a preponderance of the evidence the parent possessed an intent to abandon their child. This intent could be inferred from a parent's conduct. Id. "Incarceration does not alone constitute continued deprivation." Interest of T.F., 2004 ND 126, ¶ 12, 681 N.W.2d 786. This Court's review of the testimony will show that the trial court's sole reliance on

R.T.'s incarceration to show abandonment is a clear error and inconsistent with prior decisions of this Court. The court's finding that Z.T. was abandoned was a clear error and this Court should reverse that legal conclusion.

CONCLUSION

[¶ 24] R.T. urges this Court to reverse the trial court and find that Z.T. was not deprived, that, even if there was deprivation, it was not likely to continue, and that termination of R.T.'s parental rights was not necessary to avoid Z.T. suffering serious physical, mental, moral, or emotional harm.

[¶ 25] WHEREFORE district court's Order for Termination of Parental Rights as to the natural father, Z.T., should be reversed.

Dated this 9th day of May, 2018

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The Department of Human Services)	CERTIFICATE OF
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)	
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The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant’s Brief
Appellant’s Appendix

And that said copies were served upon:

Jessica Ahrendt, Public Defender Office, gfpublicdefender@nd.gov
Lisa Larsen, Youthworks, llarsen@youthworks.org

by electronically filing said documents through the court’s electronic filing system.

Dated: May 10, 2018

/s/ Kiara Kraus-Parr
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