

IN THE SUPREME COURT OF NORTH DAKOTA

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In the Interest of K.S.D. & J.S.D., children

Jacqueline A. Gaddie,	)	<b>Supreme Court File Nos.</b>
Assistant State’s Attorney,	)	<b>20180260 and 20180261</b>
	)	
Petitioner & Appellee,	)	
	)	<b>Grand Forks County Nos.</b>
	)	<b>18-2017-JV-00093 and</b>
v.	)	<b>18-2017-JV-00094</b>
	)	
K.S.D., a child & J.S.D., a child; )	)	
H.L.K. n/k/a H.G., mother; )	)	
R.W.D., father; )	)	
Christopher D. Jones, )	)	
Executive Director, North Dakota )	)	<b>APPELLANT’S BRIEF</b>
Dept. of Human Services. )	)	
	)	
Respondents, )	)	
	)	
H.L.K. n/k/a H.G., mother. )	)	
	)	
Appellant. )	)	

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**Appeal from the Findings of Fact and Order denying motion to  
withdraw consent to termination of parental rights in Grand  
Forks County district court, northeast central judicial district,  
Grand Forks, North Dakota, June 21, 2018, the Honorable  
Lolita Hartl Romanick, presiding.**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

JURISDICTION..... ¶ 1

STATEMENT OF ISSUES ..... ¶ 2

STATEMENT OF CASE..... ¶ 3

STATEMENT OF FACTS..... ¶ 4

LAW AND ARGUMENT..... ¶ 8

I. Whether the juvenile court erred by finding the consent to terminate was statutorily sufficient..... ¶ 9

II. Whether the May 18, 2018 motion to withdraw consent for termination of parental rights was untimely..... ¶ 16

III. Whether the juvenile court erred by finding the consent to terminate was not obtained by fraud or coercion..... ¶ 18

CONCLUSION..... ¶ 21

TABLE OF AUTHORITIES

Cases

*In re Adoption of S.R.F.*, 2004 ND 150, 683 N.W.2d 913 (N.D. 2004) ..... ¶ 9

*In re B.B.I.*, 2008 ND 51, 746 N.W.2d 411 (N.D. 2008) ..... ¶ 9

*Interest of J.A.H.*, 2014 ND 196, 855 N.W. 2d 394 (N.D. 2014) ..... ¶ 9

*Interest of K.H.*, 2006 ND 56, 718 N.W.2d 575 (N.D. 2006) ..... ¶¶ 9, 16, 18

*Interest of T.R.C.*, 2014 ND 172 ¶9, 852 N.W.2d 408 (N.D. 2014) ..... ¶ 9

*State v. Lange*, 318 N.W.2d 748, 751 (N.D. 1982)..... ¶ 20

Statutes, Rules, Codes

N.D. Const. art. VI § 6 ..... ¶¶1, 10

N.D.R.Civ.P 52(a)..... ¶ 9

N.D.C.C. §14-15..... ¶ 12

N.D.C.C. §27-20..... ¶¶ 12, 13, 15

N.D.C.C. 27-20-44(d) ..... ¶ 15

N.D.C.C. §27-20-45 ..... ¶¶ 17, 18

N.D.C.C. §27-20-56 ..... ¶¶ 1, 9, 10

Transcript References:

The Motion Hearing for this matter was conducted on June 5, 2018. The transcript of the hearing is referred to as “Tr.” in this brief.

## **JURISDICTION**

[¶ 1] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions and the North Dakota Century Code this Court has jurisdiction over this appeal under N.D. Const. art. VI § 6 and N.D.C.C. § 27-20-56. North Dakota Century Code provides, “An aggrieved party, including the state or a subdivision of the state, may appeal from a final order, judgment, or decree of the juvenile court to the Supreme Court by filing written notice of appeal within thirty days after entry of the order, judgment, or decree...” Id.

## **STATEMENT OF THE ISSUES**

[¶ 2] **I. Whether the juvenile court erred by finding the consent to terminate was statutorily sufficient.**

**II. Whether the May 18, 2018 motion to withdraw consent for termination of parental rights was untimely.**

**III. Whether the juvenile court erred by finding the consent to terminate was not obtained by fraud or coercion.**

## **STATEMENT OF CASE**

[¶ 3] This is an appeal from the Grand Forks County District Court Order denying H.K.L. n/k/a H.G.’s (hereinafter referred to as “Helen Gray”), the children’s mother, motion to withdraw her consent to terminate her parental rights. (Appendix p. 28). The Notice of Appeal in this matter was filed on June 27, 2018 (A p. 91).

## STATEMENT OF FACTS

[¶ 4] On March 17, 2017, petitions for termination of parental rights were filed in the above captioned cases. In 2017 Ms. Gray gave birth to her youngest child “Erin.” Social Services in Cass County took Erin from Ms. Gray at the hospital soon after she’d given birth to her daughter. *See generally case # 09-2017-JV-00244.* Cass County Social Services were motivated to remove Erin due to a request from Kim Anderson of Grand Forks County Social Services. On May 22, 2017, Ms. Gray consented to the termination of her parental rights. Ms. Gray testified that she was coerced into agreeing to terminate her parental rights because Kim Anderson said she would take custody of Erin and Ms. Gray would lose parental rights for all three of her children. On May 31, 2017, an amended guardian ad litem report was filed. Index 46; Index 45. Paragraph 21 of that report indicates that Ms. Gray consented to terminate her parental rights for her two boys to avoid losing her newborn daughter. Furthermore, it was her understanding that her boys would be placed for adoption with the family of their father, R.W.D. *Id.*

[¶ 5] R.W.D. had a contested termination trial on June 8, 2017. The court subsequently made factual findings for termination based on that trial, noting that Ms. Gray had consented to termination and was not a participant in the trial, on June 19, 2017. Appendix p. 29. On June 28, 2017 the final juvenile Judgments terminating both parents’ parental rights were filed with

the court. Notice of Appeals were filed by R.W.D. on July 19, 2017. As a result of the appeal, both cases were remanded to the district court at the end of the year, so that testimony could be taken from a qualified ICWA expert witness. A corrected Opinion requiring remand was filed on January 25, 2018. The Supreme Court retained jurisdiction through the remand.

[¶ 6] On January 26, 2018 Judge McCarthy recused himself from the case citing Canon 2.11(A) of the Code of Judicial Conduct. Judge Hartl Romanick was then assigned the case. A status conference was held and Ms. Gray attended. At this hearing she was told to apply for court appointed counsel. Ms. Gray applied for counsel immediately and was approved by the court on January 31, 2018. Appendix p. 60. On February 9, 2018, Ms. Gray wrote a letter to the court requesting to withdraw her consent to terminate her parental rights. Appendix p. 44. On February 13, 2018 Ms. Gray was assigned the undersigned counsel.

[¶ 7] On March 29, 2018 the juvenile court once again terminated parental rights in the above-captioned cases. Ms. Gray, through her counsel submitted a motion to withdraw her consent to terminate her parental rights on April 20, 2018. Appendix p. 70. On May 4, 2018 a hearing was held and it was determined that no Final Judgment had been made by the Supreme Court in these two cases. Accordingly, on May 9, 2018, the Court dismissed the motion stating they lacked jurisdiction, as the case was still on appeal to the Supreme Court, to consider the motion.

[¶ 8] On May 18, 2018 Ms. Gray again filed a motion to withdraw her consent to terminate her parental rights citing coercion and fraud. Appendix p. 71. The Supreme Court Mandate affirming the termination was filed on May 30, 2018. Appendix p. 75. On June 5, 2018 a hearing on the motion to withdraw consent to terminate was held. The juvenile court issued an order denying Ms. Gray's motion. Ms. Gray now appeals the Order denying her motion to withdraw her consent to termination, entered June 21, 2018. Appendix p. 79. Ms. Gray now timely appeals the juvenile court's order.

### **LAW AND ARGUMENT**

#### **I. Whether the juvenile court erred by finding the consent to terminate was statutorily sufficient.**

##### **Standard of Review**

[¶ 9] The standard of review on questions of law in juvenile court is de novo, whereas questions of fact are reviewed under the clearly erroneous standard. *Interest of K.H.* 2006 ND 56, ¶ 7, 718 N.W.2d 575, 577-578. When a matter is tried before a court, without a jury, N.D.R.Civ.P 52(a) requires that a court makes its finding of facts and conclusions of law specifically, so as to provide a "clear understanding of the court's decision." *Interest of J.A.H.*, 2014 ND 196, ¶12, 855 N.W. 2d 394, 398 *citing Interest of T.R.C.* 2014 ND 172 ¶9, 852 N.W.2d 408. This Court has indicated that "[c]lear and convincing evidence means evidence that leads to a firm belief or conviction the allegations are true." *In re Adoption of S.R.F.*, 2004 ND 150, ¶7, 683 N.W.2d 913, 916. A finding of fact is clearly erroneous if it is induced by an

erroneous view of the law, there is no evidence to support the finding, or the Court is convinced, on the basis of the entire record, that a mistake has been made. *In re B.B.I.*, 2008 ND 51, ¶ 4, 746 N.W.2d 411. When a party appeals a juvenile court order, this Court reviews “the files, records, and minutes or transcript of the evidence,” and gives “appreciable weight to the findings of the juvenile court.” N.D.C.C. § 27-20-56(1).

[¶ 10] This is an appeal of an order denying a motion to withdraw consent for termination. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6 and N.D.C.C. § 27-20-56. North Dakota Century Code provides, “An aggrieved party, including the state or a subdivision of the state, may appeal from a final order, judgment, or decree of the juvenile court to the supreme court by filing written notice of appeal within thirty days after entry of the order, judgment, or decree...” *Id.*

[¶ 11] The court in its order indicated that the initial petition in these cases are statutorily sufficient. Ms. Gray never suggested that the petition was statutorily deficient. The court in its order denying the motion also wrote, “H.G. now asserts she had no way to know that her consent to terminate parental rights to the children applied to deprivation, neglect, and abandonment rather than to a guardianship or adoption, and she never agreed that the children were deprived, neglected or abandoned.” *Order Denying Motion to Withdraw Consent* (Order Denying) ¶23. While the juvenile court wrote regarding Ms. Gray’s testimony with perhaps a skeptical



view, Ms. Gray invites this Court to look at the actual documents in these files.

[¶ 12] The consent to terminate Ms. Gray's parental rights in these cases are an identical one sentence paragraph. The sentence is, "I, [Helen Gray], being the Respondent and natural mother to K.S.D. and J.S.D., do hereby consent to the termination of all my rights and obligations with respect to the children, to and through me arising from the parental relationship." The sentence makes no admissions for any of the allegations found in the State's petition for termination. This is a generic consent to terminate parental rights that could be used either in N.D.C.C. chapter 27-20 or in 14-15.

[¶ 13] The juvenile court also indicates that the prior court's factual findings after a trial was held support that Ms. Gray agreed to a termination of her rights under N.D.C.C. 27-20. However, that is not a finding made anywhere in the court's June 19, 2018 Factual Findings and Order to Terminate. In the court's June Order paragraph two (2) explains that Ms. Gray was represented by counsel and gave her consent to terminate her parental rights. The court also noted that after her consent was given she had no further participation in the proceedings. Paragraph 11 of the June Order declares the petitioner has met their burden of proof with regard to the petition as it relates to R.W.D., the children's father.

[¶ 14] In paragraph 12 the court recognizes that Ms. Gray consented to terminate her rights, however, it makes no other factual findings about Ms. Gray or her consent. At no time does this order indicate Ms. Gray admitted or agreed to any allegation in the petition. The courts factual findings are in relation to R.W.D. Therefore, there is nothing other than Ms. Gray's coerced consent to justify the termination of her parental rights.

[¶ 15] The juvenile court in its order denying Ms. Gray's motion states that nothing in N.D.C.C. Chapter 27-20 requires that a consent to terminate parental rights include the statutory language necessary for a petition or for an order terminating parental rights. The court is correct that no specific requirement is in the statute, however, an order is clearly erroneous if it is unsupported by evidence. The juvenile court's finding that the consent to terminate was given by Ms. Gray as a consent under N.D.C.C. 27-20-44(d) was not supported by any evidence.

## **II. Whether the May 18, 2018 motion to withdraw consent for termination of parental rights was untimely.**

[¶ 16] The standard of review on questions of law in juvenile court is de novo. *Interest of K.H.* 2006 ND 56, ¶ 7, 718 N.W.2d 575, 577-578. The State's only argument against the withdrawal of Ms. Gray's consent to terminate was that it was time bared under N.D.C.C. 27-20-45(6). They offered no witnesses and provided no contrary evidence as to the merits of Ms. Gray's request to withdraw. Tr. p. 17, 18, 22. The final Judgment terminating parental rights in these cases were filed on June 28, 2017. Notice

of appeal in these cases was filed on July 19, 2017. Appendix #41. Under 27-20-45(6) the, “**Subject to the disposition of an appeal**, upon the expiration of thirty days after an order terminating parental rights is issued under this section, the order cannot be questioned.” N.D.C.C. 27-20-45(6) *emphasis added*. At this time the juvenile court lost jurisdiction over both of these cases. The juvenile court recognized their lack of jurisdiction when Ms. Gray’s first motion to withdraw her consent was dismissed for that reason. *Order Denying Motion to Withdraw dated May 8, 2018*, ¶ 4. When the case was remanded to the lower court the Supreme Court retained jurisdiction.

[¶ 17] After the case was narrowly remanded a status conference was held and Ms. Gray attended. Ms. Gray applied for counsel immediately after that hearing and was approved by the court on January 31, 2018. On February 9, 2018 Ms. Gray wrote a letter to the court requesting to withdraw her consent to terminate her parental rights. Appendix p. 44. On February 13, 2018, Ms. Gray was assigned the undersigned counsel who filed the necessary motion for withdraw of her consent to terminate. All time calculations for a filing in the lower court must stop while this Court has jurisdiction. As was clearly shown by Ms. Gray’s first attempt to file a motion to the juvenile court, no motion could be heard on the subject while the court lacked jurisdiction. Once the lower court received jurisdiction back from the Supreme Court the motion was considered and a hearing was properly and timely held on June 5, 2018. Therefore Ms. Gray was not untimely in her

motion to withdraw her consent under 27-20-45(6) and N.D.R.Juv. P. 16 (Rule 16) would apply.

**III. Whether the juvenile court erred by finding the consent to terminate was not obtained by fraud or coercion.**

[¶ 18] The standard of review on questions of law in juvenile court is de novo, whereas questions of fact are reviewed under the clearly erroneous standard. *Interest of K.H.* 2006 ND 56, ¶ 7, 718 N.W.2d 575, 577-578. The court found that Ms. Gray failed to establish that her consent was coerced even if all her testimony was true. *Order Denying*, ¶ 26. The court by taking this position invites this Court to review their decision as a purely legal conclusion, or de novo.

[¶ 19] A de novo review of the court's conclusion that Ms. Gray's consent was not coerced cannot succeed. Ms. Gray indicated that Erin was removed from her custody in Cass County because of a false allegation that she admitted to drug use while pregnant. Tr. p. 9. Additionally, Kim Anderson of Grand Forks County Social Services told her that because she had an open case, "if I did not sign over [my boys], that they would move Erin into Grand Forks County's care, they would petition the court and I would lose her too." In this same conversation with Ms. Anderson, Ms. Gray was threatened with removal of her unborn child from the hospital if she did not relinquish her parental rights to her two sons.

[¶ 20] Ms. Gray did not consent to terminate her parental rights directly after that meeting and so Ms. Anderson made good on her threat and

removed Erin at the hospital after her birth. Ms. Gray testified both she and her daughter were not even scheduled to be discharged from the hospital for another two days at the time of removal. Tr. p. 13. Ms. Gray also testified that in response to her pleading with Ms. Anderson to leave her unborn child alone Ms. Anderson laughed and stated “Well, I can’t promise you anything.” Tr. p. 12. If this Court looks at these statements as true and the timing of Erin’s removal and subsequent return in Case #09-2017-JV-00244 it is clear that Ms. Gray was coerced into signing her consent to terminate. Coercion is convincing someone to do something by using force or threats. Threats were clearly used in this circumstance, but in a legal context coercion can be the implication that one has the legal authority to take certain actions when they do not. A subtle method of coercion to obtain consent would consist of “the arresting officer asserted that he possessed a warrant when in fact he did not, which would serve to vitiate the consent.” *State v. Lange*, 255 N.W.2d 59, 64 (N.D. 1977).

### **CONCLUSION**

[¶ 21] WHEREFORE this Court should reverse the juvenile court’s order and allow Ms. Gray to withdraw her consent to termination of parental rights.

Dated this 3<sup>th</sup> day of October, 2018

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