

IN THE SUPREME COURT OF NORTH DAKOTA

In the Interest of J.F., a child
In the Interest of J.F., a child

State of North Dakota,)	Supreme Court File Nos.
)	20200088/20200089
)	
Petitioner and Appellee,)	Barnes County Nos.
)	02-2019-JV-47
v.)	02-2019-JV-48
)	
J.F, mother, and)	APPELLANT’S BRIEF
D.M., father,)	
)	
Respondent and Appellant.)	

**Appeal from the Findings of Fact and Order for
Permanency in Barnes County district court, Southeast
Judicial District, North Dakota, entered March 9, 2020,
the Honorable Jay Schmitz presiding.**

APPELLANT’S BRIEF

ORAL ARGUMENT REQUESTED

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Petitioner’s written arguments on their merits.

Transcript References:

The Adjudication Hearing for this matter was conducted on February 3, 2020. The transcript of that hearing date 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, the North Dakota legislature enacted 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 children are deprived.

STATEMENT OF CASE

¶ 3] This is an appeal from the Barnes County Order that the children are deprived. *Juvenile Findings of Fact and Order for Permanency (Order)*, ¶¶ 7, 8. The Order removes the children from the custody their parents, J.F. and D.M. (hereinafter referred to as “Jill Frank” and “David Miller”, respectively. Notice of Appeal was filed by Jill Frank’s attorney, Mark Douglas, on March 20, 2020 (A21). Attorney Kraus-Parr was assigned as Ms. Frank’s appellate attorney on the same day.

¶ 4] The adjudication hearing for these matters was held in Barnes County, case numbers 02-2019-JV-47 (In the Interest of J.O.F., hereinafter referred to as “John Frank”) and 02-2019-JV-48 (In the Interest of J.A.F.,

hereinafter referred to as “James Frank”), on February 3, 2020. The court determined the children were deprived within the meaning of N.D.C.C. §27-20 and ordered the children be placed into the care, custody, and control of Buffalo Bridges Human Service Zone for a period of twelve (12) months. *Order* ¶ 19. Jill Frank timely appeals the Barnes County District Court’s Order.

STATEMENT OF FACTS

[¶ 5] The children have been removed two times from Ms. Frank’s home since October of 2019. In the first instance, On October 1, 2019, the children were removed when Ms. Frank called for assistance because of threats made by her then boyfriend (R.G.). Tr. pp. 10, 19. A safety plan was put into place and the children were returned five days later. Tr. pp. 12, 19. On the second instance, November 29, 2019, reports were that John Frank was present during a physical domestic violence argument between Ms. Frank and her ex-boyfriend (R.G.). Tr. p. 10.

[¶ 6] At the time of removal social services was concerned that she was still dating R.G., because of a positive drug test, Ms. Frank needed a chemical dependency evaluation, intensive in-home management, John Frank was placed into daycare and James Frank continued with Head Start. Tr. p. 11, 68. After removal James Frank was placed with his father, David Miller, and John Frank was placed into foster care. Tr. p. 12.

¶ 7] At the time of the hearing, Ms. Frank has completed her chemical dependency evaluation, in November of 2019. Tr. p. 28. Ms. Frank has been participating in therapy with Jeff Hunt of St. Thomas Counseling Center, for three months. Tr. pp. 28-29. Ms. Frank has taken drug tests for Mr. Hunt and they have been clean. Tr. p. 15. Ms. Frank got a restraining order against R.G. and was living with her parents, until she started to look after her aunt who has medical issues. Tr. p. 40. James Frank was doing well at the time of the hearing although Social Services testimony was that both he and his brother continue to be deprived because they continue to be involved as witnesses to domestic violence. Tr. p. 65.

LAW AND ARGUMENT

I. Whether the juvenile court erred by finding the children are deprived.

Standard of Review

¶ 8] 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.

[¶ 9] 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). In this case the district court found there had been deprivation due to domestic violence with R.G. and positive drug tests of Jill Frank and John Frank, but those issues had been addressed prior to the February 3, 2020, hearing. Ms. Frank has moved from her old home, has lived with her parents, and is participating in counseling while testing negatively through her treatment program. Tr. pp. 15, 28-29. Additionally, there was no evidence presented that Ms. Frank is associating with R.G. The testimony from social services is that she may have been seen with R.G. brother. Tr. p. 22. This does not raise to the level of clear and convincing evidence.

[¶ 10] The district court must first find that a child is deprived to order placement with a state agency. A deprived child is defined as, a child 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).

[¶11] Testimony was that James Frank was not attending school yet because he was not old enough. Tr. p. 63. And John Frank is under two years old. Tr. p. 21. James Frank Goes to daycare while his father is at work. Tr. p. 64. James Frank has never tested positive for any controlled substances. The State's witness testified that John Frank had tested positive for methamphetamine in the past and that was why he was still deprived in February of 2020. The State's witness testified she was concerned that Ms. Frank may not believing with her parents, concerned that Ms. Frank may still be around R.G. and concerned she is not taking enough drug tests. However, the state does not provide evidence that Ms. Frank was not living with her parent, that she was with R.G., or that her drug levels have increased from the time of her children being removal. Based on the testimony it is clear that neither child at the time of the hearing lacked proper parental care or control, subsistence, and/or education. Because of this testimony the district court should not have found them to be deprived children.

[¶12] “[A] pattern of parental conduct can form a basis for a reasonable prediction of future behavior.” *Interest of B.B.I.*, 2008 ND 51, ¶9, 746 N.W.2d 411. “[E]vidence of the parent's background, including previous incidents of abuse and deprivation, may be considered in determining whether

deprivation is likely to continue.” *Id.* There is not clear and convincing evidence that supports the court’s factual findings. The condition of Ms. Frank’s home was not an issue at the February 3, 2020 hearing. The court indicated that drug use and violence in the home were reason the children were and would continue to be deprived, however Ms. Frank had completed drug tests through her treatment provider that were negative. Tr. p. 15. She also had taken chemical dependency evaluation and Ms. Frank was participating with her therapy, which was going fine. Tr. p. 29. Because these issues had already been addressed before the February 3, 2020 hearing the children were not deprived nor was any deprivation likely to continue.

[¶ 13] The phrase “proper parental care” refers to the minimum standard of care which the community will accept. *Interest of K.R.A.G.*, 420 N.W.2d 325, 327 (N.D. 1988). A child may be deprived even though the child has been receiving adequate care from a source other than the parent. *Interest of T.J.O.*, 462 N.W.2d 631, 633 (N.D. 1990). The juvenile court erred by finding clear and convincing evidence established Ms. Frank’s children are deprived, because the findings are unsupported by evidence. The only testimony regarding domestic violence was from John Foster’s deceased father and the two instances with R.G. that lead to the children’s removal. Social services testimony was they were uncertain if R.G. and Ms. Frank were still involved with each other. However, uncertainty or the absence of evidence is not clear and convincing that a fact is true. The weight of the

testimony supports that the children were not deprived at the February 3, 2020 hearing and that deprivation would not be likely in the future.

[¶14] There is not clear and convincing evidence that supports Ms. Frank's behavior had an adverse effect on the children's physical, mental, or emotional health creating deprivation of her children. There was no evidence presented that Ms. Frank used drugs around her children. Based on all this testimony the court should not have found that the children were deprived. The court's finding that Ms. Frank's children are deprived is clearly erroneous because it is unsupported by evidence, and this Court should reverse the district court's Order.

[¶ 15] The record does not contain any evidence of negative impacts on the children due to Ms. Frank's actions. Therefore, the juvenile court erred by finding they were deprived. Although the juvenile court has considerable latitude when ordering a disposition under N.D.C.C. § 27-20-30, the court must make its disposition in accordance with the facts before them at the time not issues that have already been addressed and resolved as is the case here. Therefore, the court should not have found that Ms. Frank's children were deprived.

CONCLUSION

[¶ 16] WHEREFORE this Court should reverse the court's order finding the children to be deprived and terminate the order for permanency.

Dated this 19th day of May 2020

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)	
J.F, mother, and)	CERTIFICATE OF
D.M., father,)	COMPLIANCE
)	
Respondent and Appellant.)	

[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: May 19, 2020.

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D.M., father,)	SERVICE
)	
Respondent and Appellant.)	

¶1] 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 with Certificate of Compliance
Appellant’s Appendix

¶2] And that said copies were served upon:

Tonya Duffy, State’s Attorney, states_attorney@barnescounty.us

by electronically filing said documents through the court’s electronic filing system and upon:

J.F., 648 11 Ave SW #1, Valley City, ND 58072

by placing a copy of said documents in a sealed envelope with USPS.

Dated: May 19, 2020.

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