

IN THE SUPREME COURT OF THE STATE 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
Petitioner/Appellee)	20200089
)	
v.)	Barnes Co. File Nos. 02-2019-JV-00047
)	02-2019-JV-00048
)	
J.F., mother,)	APPELLEE’S BRIEF
D.M., father,)	
J.O.F., a child, and)	
J.A.F., a child.)	
)	
Respondents/Appellant,)	

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM FINDINGS OF FACT AND ORDER FOR PERMANENCY
ENTERED MARCH 9th, 2020

BARNES COUNTY JUVENILE COURT
SOUTHEAST JUDICIAL DISTRICT
HONORABLE JAY A. SCHMITZ, PRESIDING

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STATEMENT OF THE ISSUE

[¶1] Whether the Juvenile Court erred by finding the children are deprived.

STATEMENT OF THE CASE

[¶2] 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. An adjudication hearing was held on these matters 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. The *Order* removes the children from the custody of their parents, J.F. and D.M. (hereinafter referred to as “J.F.” and “D.M.”, respectively). Notice of Appeal was filed by J.F.’s attorney, Mark Douglas, on March 20, 2020. (A21).

STATEMENT OF THE FACTS

[¶3] On October 23, 2019, the children were removed from J.F.'s care. A safety plan was established that J.F. would not allow R.G. near herself or her children. J.F. was given the opportunity to prove she could maintain her own safety and the children's. *Affidavit in Support of Continued Custody* (hereinafter Aff.) ¶ 5. On November 29, 2019, J.F. picked up R.G. and took him to her home where John Frank was at. *Transcript of Deprivation Hearing Held February 3, 2020* (hereinafter Tr.) (Tr. pp. 12, 31). She directly violated the safety plan and exposed John Frank to domestic violence as well as placed herself in a dangerous situation where her own safety was jeopardized. (Tr. pp. 10, 11). J.F. reported she picked up R.G. and brought him to her residence. (Tr. pp. 11, 12). While in the home, J.F. and R.G. began a "physical domestic" in the presence of John Frank. The CPS report goes on to state that R.G. threatened to harm John Frank during the incident. Police officers also report the apartment was in disarray from the incident. Officers noted the garbage was overflowing and very smelly. There were diapers left out on the floor and dirty dishes in the kitchen. James Frank was with his dad in Gackle ND during the time of the incident. (Aff. ¶ 5).

[¶4] A shelter care hearing was held on December 3, 2019. Judge Jay Schmitz found probable cause to believe that the children were being deprived and in need of shelter care under N.D.C.C. § 27-20-02, which granted Barnes County custody of the children for up to sixty days from the time of removal.

[¶5] A deprivation hearing was conducted on February 3, 2020 in which Judge Jay Schmitz found from clear and convincing evidence that the children were deprived.

STANDARD OF REVIEW

[¶6] A juvenile court's findings of fact should not be set aside, unless clearly erroneous. In re T.T., 2004 ND 138, ¶ 5, 681 N.W.2d 779. "A finding of fact is clearly erroneous under N.D.R.Civ.P. 52(a) if there is no evidence to support it, if it is clear to the reviewing court that a mistake has been made, or if the finding is induced by an erroneous view of the law." Akerlind v. Buck, 2003 ND 169, ¶ 7, 671 N.W.2d 256. "On appeal, we review the files, records, and minutes or the transcript of the evidence, and we give appreciable weight to the findings of the juvenile court." In re B.B., 2010 ND 9, ¶ 5, 777 N.W.2d 350 (citation and quotation marks omitted). Further, this Court gives due regard to the trial court's opportunity to judge the credibility of the witnesses. N.D.R.Civ.P. 52(a)(6). In re Interest of P.T.D., 2018 ND 97, 909 N.W.2d 692, (N.D. 2018).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND, BY CLEAR AND CONVINCING EVIDENCE, THAT THE CHILDREN ARE DEPRIVED AND THE DEPRIVATION WAS LIKELY TO CONTINUE.

[¶7] Under N.D.C.C. § 27-20-29(3), a proper or legitimate finding of deprivation must be supported by clear and convincing evidence. "Clear and convincing evidence means evidence that leads to a firm belief or conviction the allegations are true." In Re M.B., 2006 ND 19, ¶11, 709 N.W.2d 11. Under N.D.C.C. § 27-20-02(8)(a), "a child is found to be deprived if the child 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." Under N.D.C.C. § 27-20-

02(8)(g), “a child is found to be deprived if the child is present in an environment subjecting the child to exposure to a controlled substance, chemical substance, or drug paraphernalia as prohibited by section 19-03.1-22.2.”

I. Domestic Violence

[¶8] Judge Schmitz found that the domestic violence issue was one factor contributing to the deprivation of the children. (Tr. pp. 73, 74). There was testimony from Stephanie Morse that R.G. made threats towards J.F., as well as towards John Frank and James Frank. (Tr. pp. 10). Ms. Morse testified that R.G. has been in and out of J.F.’s home, that J.F. is around R.G., and per J.F.’s mother, that J.F. and R.G. still see each other. (Tr. pp. 11, 12, 22). There was further testimony from S.F., J.F.’s father, that J.F. was also in previous relationships in which domestic violence occurred, with John Frank’s father coming after J.F. with a bat. (Tr. pp. 55).

II. Chemical Dependency Issues

[¶9] Judge Schmitz found that J.F.’s chemical dependency issues was also a factor contributing to the deprivation of the children. (Tr. pp. 75, 76, 77, 79). There was testimony from Ms. Morse that J.F. tested positive for methamphetamine on January 21, 2020. (Tr. pp. 13, 14, 17). Ms. Morse testified that J.F. takes urinalysis (UA) tests with her treatment provider, Jeff Hunt, but that those tests are unsupervised. (Tr. pp. 15, 16). Ms. Morse also testified that J.F. would come in to meet with Ms. Morse and then state that she couldn’t do a UA, would claim she was going to come back to do a UA, and then wouldn’t show up. (Tr. pp. 20). This lack of cooperation has resulted in J.F. not being allowed visits with the children for the majority of the time that the children have been removed. (Tr. pp. 35).

Over the two and a half month, approximate time the children have been removed, J.F. has only had one (1) visit with James Frank and two (2) visits with John Frank. (Tr. pp. 20).

III. Lack of Permanent Residence

[¶10] Judge Schmitz found that J.F.'s lack of a permanent residence was also a factor contributing to the deprivation of the children. (Tr. pp. 74, 75, 76, 77, 79). There was testimony from Ms. Morse that J.F. says she's living with her parents, and also that Ms. Morse has heard J.F. is living with her aunt. (Tr. pp. 14, 15, 17, 23, 32, 33, 40). Ms. Morse further testified that J.F.'s mother, L.F., stated that J.F. does not live with her. (Tr. pp. 14, 15). J.F.'s father, S.F., also testified that J.F. has a room at his house but that "she ain't been there a lot." (Tr. pp. 40, 51). Ms. Morse testified that J.F. had her own apartment prior to the children being removed from J.F.'s care. (Tr. pp. 20). Ms. Morse noted that her office had received reports that J.F. had an incident where her door was knocked down by people who were trying to get money from J.F. (Tr. pp. 61). Due to a recurring problem of people knocking down J.F.'s door, Ms. Morse testified that J.F.'s landlord had told J.F. that J.F. had to leave. (Tr. pp. 61). Ms. Morse testified that J.F. has a housing voucher, but that Ms. Morse is not certain where J.F. is residing. (Tr. pp. 14).

IV. Positive Methamphetamine Test for John Frank

[¶11] Judge Schmitz found that John Frank was found to be deprived after testing positive for methamphetamine. (Tr. pp. 76). There was testimony from Ms. Morse that John Frank had a hair follicle test done; the results of that test showed that John Frank had a methamphetamine level of 2,344 picograms in his system and that John Frank also

showed THC in his system. (Tr. pp. 58, 59, 60, 62). Ms. Morse noted that John Frank was in the care of J.F. prior to this positive test for methamphetamine and that this test result is a level that active meth users have been seen at. (Tr. pp. 58, 62). Even J.F.'s father stated that John Frank's positive test for methamphetamine bothered him. (Tr. pp. 49).

[¶12] Parental cooperation is pertinent to determining whether deprivation will continue. Interest of T.H., 2012 ND 38, ¶ 29, 812 N.W.2d 373. The juvenile court may consider a parent's pattern of behavior and whether a parent's conduct demonstrates a serious indifference towards parental responsibilities and obligations. Id. In this case, J.F. has made it clear that she is not overly interested in cooperating with the human service zone to work towards reunification with her children. When given the choice to give a UA, she either tests positive, does not do the UA, or says she will be back later to complete the UA, and fails to show up. She also is not cooperating with the protection order to keep herself and the children safe from R.G. This conduct is clear and convincing evidence of deprivation of the children. J.F. also does not have a permanent residence. Whether that is due to her work schedule or simply not following through with the human service zone, at the end of the day, she does not have a home for the children to reside in. This is another aspect of J.F.'s deprivation of the children.

[¶13] Children living in an environment in which they are simultaneously scared, feeling unsafe, physically harmed, required to assume parental responsibilities, living in unsanitary and unsafe conditions, and exposed to domestic violence, fall within the definition of deprivation provided by N.D.C.C. § 27-20-02(8)(a). In re Interest of P.T.D., 2018 ND 97, 909 N.W.2d 692, (N.D. 2018). Here, John Frank and James Frank are very young children.

They don't have the ability to say they are scared because their mother isn't keeping them safe. However, the Court is able to note some of the above factors, including living in unsanitary and unsafe conditions and being exposed to domestic violence. It can be safely assumed that the children feel unsafe if J.F. is actively engaged in physical violence in the presence of the children. J.F. has a history of relationships that involve domestic violence, and despite given the opportunity to show she can keep herself and her children safe, she continues to engage in conduct that puts her children in dangerous situations with R.G. Law enforcement also noted the unsanitary conditions while responding to her apartment. There is also an aspect of physical harm shown where John Frank was physically harmed by J.F.'s conduct when he tested positive for methamphetamine, at a level that regular users have been seen at. There is never a justification for such conduct and is a clear demonstration of deprivation.

[¶14] A juvenile court's findings of fact should not be set aside, unless clearly erroneous. In re T.T., 2004 ND 138, ¶ 5, 681 N.W.2d 779. " A finding of fact is clearly erroneous under N.D.R.Civ.P. 52(a) if there is no evidence to support it, if it is clear to the reviewing court that a mistake has been made, or if the finding is induced by an erroneous view of the law." Akerlind v. Buck, 2003 ND 169, ¶ 7, 671 N.W.2d 256. Here, the Court made the correct finding that the children were deprived. There was more than enough evidence to show that John Frank was deprived under both N.D.C.C. § 27-20-02(8)(a) and N.D.C.C. § 27-20-02(8)(g), and that James Frank was deprived under N.D.C.C. § 27-20-02(8)(a).

CONCLUSION

[¶15] The Court's findings of fact are supported by the evidence and are not clearly erroneous. The Court had sufficient evidence to determine that both John Frank and James Frank were deprived under N.D.C.C. § 27-20-02(8)(a), and that John Frank was deprived under N.D.C.C. § 27-20-02(8)(g).

[¶16] The State respectfully prays that the Court AFFIRM the juvenile court's findings of fact in this matter.

Dated the 18th day of June, 2020.

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D.M., father,)	COMPLIANCE
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)	
Respondents/Appellant,)	

Pursuant to North Dakota Rules of Appellant Procedure 32(e), I certify the Appellee's Brief is not in excess of thirty-eight (38) pages. The document consists of twelve (12) pages, including the cover page, table of contents, table of authorities, the written brief, the certificate of electronic service and the certificate of compliance.

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I hereby certify that on June 18th, 2020, I served an electronic copy of Appellee's Brief, Appellee's Appendix, and Certificate of Compliance, via e-mail through the Supreme Court File and Serve System upon:

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