

IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court Nos. 20210034
Petitioner/Appellee,	)	20210035
	)	
	)	
vs.	)	
	)	District Case Nos. 51-2019-JV-00191
	)	51-2019-JV-00192
DD,	)	
Respondent/Appellant.	)	

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APPELLEE’S BRIEF

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Appeal from the District Court of Ward County  
North Central Judicial District  
District Court No. 51-2019-JV-00191  
From Order filed on January 5, 2021  
The Honorable Connie Portscheller, Presiding

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ORAL ARGUMENT REQUESTED

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### **Statement of the Issue**

**[¶1] I. The Court did not err in proceeding with the Termination of Parental Rights Trial in D.D.'s absence.**

### **Statement of the Case**

[¶2] L.D. and N.D. had been residing with their mother, D.D. until they were placed in care on November 13, 2017. The children were found deprived January 11, 2018 and placed under the custody of Ward County Social Services. Permanency hearings were held November 8, 2018, November 7, 2019 and November 4, 2020. A petition to terminate parental rights was filed December 6, 2019.

Hearings on the petition were set for:

December 26, 2019 – Continued due lack of service on all parties

March 5, 2020 – Continued by Court (unknown reason)

May 4, 2020 – Stipulation to continue by parties due to COVID

July 10, 2020 - D.D. claimed to have a medical emergency

October 5, 2020 – Lack of service on parties

January 4, 2021 – Hearing held.

### **Statement of the Facts**

[¶3] On January 4, 2021 D.D. was incarcerated in the Ward County Jail. Arrangements were made to bring her over to court. D.D. did not want to come over to court. The court was advised by Deputy Whitehead, D.D. stated she did not want to attend. D.D. was advised that she had to attend unless excused by the court. D.D. claimed to not be feeling well and did not want to appear. Arrangements were made for D.D. to appear by phone. D.D. was brought out to the phone. D.D. continued to say she wanted to go back to her cell. D.D. was taken back to her cell. The Court advised all the parties that she was going

proceed with hearing, as the matter had been continued several times, and the court had advised D.D. several times to turn herself in on the warrants so that they could be cleared prior to these proceedings being heard.

[¶4] The court addressed D.D. attorney asking if there had been contact and how she wished to proceed. Counsel advised the court D.D. was contesting the termination. The Court told counsel that when it came time, if her client wished to testify arrangements could be made to get her back on the telephone. Counsel for D.D. advised the court it was not the intent of D.D. to testify at the hearing. D.D.'s attorney did not request a continuance or object to the termination proceeding in D.D.'s absence. The Court further told D.D.'s attorney that she could reach out to D.D. throughout the trial in the event D.D. changed her mind about participating.

[¶5] Testimony was received from the case worker, foster parent, guardian ad litem and LR., father of L. D. The court found by clear and convincing evidence the children were deprived, the conditions and caused for the deprivation was likely to continue, and the children suffered or will probably suffer, serious physical, mental, moral or emotional harm. Specific findings by the court included, but not limited to: the children being in foster care for 1148 continuous days, both parents were incarcerated, parents had failed to complete services, parents lacked stability including housing and employment.

### **Law and Argument**

**[¶6] I. The Court did not err in proceeding with the Termination of Parental Rights Trial in D.D.'s absence.**

#### **Failure to Object**

[¶7] Neither D.D. or her attorney objected to the court proceeding with the hearing on the petition to terminate parental rights. "To take advantage of irregularities during trial, a

party must object at the time they occur, so that the trial court may take appropriate action if possible to remedy any prejudice that may have resulted. A party's failure to object to an irregularity at trial acts as a waiver." Piatz v. Austin Mut. Ins. Co., 2002 ND 115, ¶ 7, 646 N. W.2d 681 EVI Columbus, LLC v. Lamb, 2012 ND 141, ¶ 14, 818 N.W.2d 724. There was no objection, the issue was not preserved for appeal. The court did not abuse its discretion in proceeding with the trial in this matter.

#### Failure to request continuance

[¶8] Neither D.D. or her attorney asked for a continuance of the hearing on January 4, 2021, D.D. is implicitly, through this appeal, asserting the court erred by not continuing the hearing due to her absence. A motion for a continuance "will be granted only for good cause shown, either by affidavit or otherwise." N.D.R.Ct. 6.1(b). "We will not reverse a trial court's decision to deny a continuance absent an abuse of discretion." State v. Hilgers, 2004 ND 160, P38, 685 N.W.2d 109 (citation omitted). "A trial court abuses its discretion only when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law." State v. Stoppeworth, 2003 ND 137, P6, 667 N.W.2d 586. In the Interest of D.C.S.H.C., 2007 ND 102, ¶ 6, 733 N.W.2d 902. The court in this matter did not abuse its discretion or act arbitrarily by conducting the hearing as scheduled. The court specifically found on the record this case had been continued multiple times. There was no request or motion for a continuance, therefore this issue was not preserved for appeal. The Court also found D.D. was provided the opportunity to appear, and would continue to have that opportunity.

#### Procedural Due Process

[¶9] Although this issue as not preserved at trial, by no objection to the proceeding, the State understands the Court can review based upon interest of justice. D.D. claims her

procedural due process rights were violated when the court continued the hearing on the petition in her absence. The Petitioner disagrees. North Dakota Legislature has provided for the retention of certain civil rights by convicts. Section 12.1-33-02, NDCC, in substance provides that:

"Except as otherwise provided by law, a person convicted of a crime does not suffer civil death or corruption of blood or sustain loss of civil rights or forfeiture of estate or property, but retains all of his rights, political, personal, civil, and otherwise, including the right to . . . sue and be sued. . . ."

This section, however, does not specifically provide that a convict is entitled to appear personally at a civil proceeding. In Interest of F.H., 283 N.W.2d 202, 208 (N.D. 1979) The Court had advised D.D. several times to contact the Sheriff's Department and take care of her warrants prior to hearing in this petition. This apparently was not done and D.D. was an inmate at the Ward County Jail at the time of the hearing. D.D. was not entitled to appear personally.

Appear personally

[¶10] D.D. does not have a constitutional right to appear personally. From our review of cases from the various jurisdictions and the principles of law involved, we are compelled to conclude that a convict does not have a constitutional right to personally appear in a civil suit where he has been permitted to appear through counsel and by deposition, if appropriate. In the Interest of F.H. at 209. Any right to appear personally would have to rest upon convincing reasons and would ultimately be left to the sound discretion of the trial court. Id. D.D. does not provide any convincing reasons why she should have been allowed to appear personally. It should be noted arrangements had made for D.D. to be brought over from the Ward County Jail to appear personally. D.D. declined to appear in

person. This change caused the jail staff to make other arrangements for her to appear telephonically. D.D. appeared through counsel at the hearing. Counsel for D.D. did not object to the hearing proceeding without D.D. present. The court advised counsel arrangements would be made for D.D. to appear and testify by telephone if she wanted. Counsel for D.D. told the court she had opportunity to discuss the case with her client and D.D. did not intend to testify.

Appear by telephone

[¶11] Whether a parent-prisoner's rights to procedural due process are satisfied by a limited appearance by telephone does not lend itself to a bright-line rule; instead, a case-by-case balancing of the *Eldridge* factors must be conducted to ensure that notice and a meaningful opportunity to be heard exist in every case in which a parent-prisoner's appearance is so limited. In the Interest of D.C.S.H.C., 2007 ND 102, ¶ 28, 733 N.W.2d 902.

[¶12] The Eldridge factors are satisfied in this case. A court must apply a three-part balancing test to analyze whether the procedures pass constitutional muster:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at ¶14.

In the Interest of D.C.S.H.C., 2007 ND 102, ¶ 14, 733 N.W.2d 902. First, D.D. does have a private interest that will be affected by the official action. Second, additional and substitute procedural safeguards were provided or offered. D.D. was given the meaningful



opportunity to appear in person or by telephone. D.D.'s attorney appear on her behalf at the hearing and cross examined the witnesses. The Court advised D.D.'s attorney arrangements could be made if D.D. wanted to testify. The Court provided D.D. a meaningful opportunity to be heard. The third factor, the Government's interests in this case were minimal in regard to fiscal and administrative burdens as arrangements were made for D.D. to appear by telephone. D.D. chose to voluntarily absent herself from the hearing both personally and by telephone. D.D.'s procedural due process rights were satisfied.

[¶13] "Procedural due process requires fundamental fairness, which, at a minimum, necessitates notice and a meaningful opportunity for a hearing appropriate to the nature of the case." Walbert v. Walbert, 1997 ND 164, ¶ 9, 567 N.W.2d 829 (citing In re Adoption of J.W.M., 532 N.W.2d 372, 377 (N.D. 1995). L.Z.N. v. Narvais, 2017 ND 137, ¶ 15, 895 N.W.2d 747. D.D. had notice of the hearing. Any limitation of D.D.'s telephonic appearance was done by D.D. herself. She refused to continue to participate in the proceedings after special accommodations had been made.

[¶14] One way a prisoner's right to appear can be satisfied is by allowing his or her appearance via telephone. St. Claire v. St. Claire, 2004 ND 39, ¶ 6, 675 N.W.2d 175. Id. D.D. was provided a meaningful opportunity to appear either personally or by telephone for a hearing.

[¶15] [t]he district court does not have a duty to ensure a party's presence at the trial, telephonically or otherwise." Curtiss v. Curtiss, 2016 ND 197, ¶ 8, 886 N.W.2d 565 (quoting St. Claire, 2004 ND 39, ¶ 8, 675 N.W.2d 175). Id. Due process only requires the district court to give a prisoner an avenue to appear for the proceeding; it has no duty to ensure the prisoner's presence. Id. In this matter the Court gave D.D. an avenue to

appear in person and then by telephone. D.D. chose to not appear. Furthermore, the Court instructed counsel for D.D. that when it came time and D.D. wanted to testify arrangements would be made, again, for her to appear. Counsel for D.D. advised the court D.D. did not intend to testify. D.D. was afforded a meaningful opportunity to be heard. D.D.'s procedural due process rights were not violated.

Ultimate findings of court not challenged

[¶16] D. D. is seeking reversal of the termination and requesting a new termination proceeding. However, D.D.'s sole issue in this appeal is that the Court erred in proceeding with the termination of parental rights in her absence. She does not challenge the ultimate findings of the court.

[¶17] The ultimate finding of the court was by clear and convincing evidence the children were deprived, the deprivation was likely to continue and the children suffered or will suffer physical, mental or emotional harm. Effective March 1, 2004, N.D.R.Civ.P. 52(a) was amended to provide that findings of fact in juvenile matters shall not be set aside unless clearly erroneous. Johnson v. Cass Cty. Soc. Servs. (In re E.R.), 2004 ND 202, ¶ 4, 688 N.W.2d 384. Furthermore, the court was advised by counsel D.D. did not intend to testify. D.D. has not made any showing how a new trial with her present would change the court's findings. The trial courts findings in this matter are not clearly erroneous. It is the State's position D.D. is now estopped from challenging the ultimate findings and termination as she failed to raise the issue when she had the opportunity. Reversal and new trial is not the appropriate remedy.

### Conclusion

[¶18] Based upon the above arguments, the Petitioner in this matter requests the court deny D.D.'s request for reversal and a new termination proceeding. It is the Petitioner's position D.D. failed to meet her burden of proof that the trial court abused its discretion in proceeding with the trial in her voluntary absence.

Dated this 10<sup>th</sup> day of February, 2021.

/s/Rozanna C. Larson  
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DD,	)	
	)	
Respondent/Appellant.	)	

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REQUEST FOR ORAL ARGUMENT

[1] The State requests oral argument. It would be helpful for the Court to understand the facts, issues and arguments in this matter.

Dated this 10<sup>th</sup> day of February, 2021.

          /s/Rozanna C. Larson            
Rozanna C. Larson (05294)

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	)	
Respondent/Appellant.	)	

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CERTIFICATE OF COMPLIANCE

[1] The undersigned hereby certifies that the Brief of Plaintiff/Appellant, is in compliance with Rule 32 of North Dakota Rules of Appellate Procedure and the brief contains 11 pages.

        Dated this 10<sup>th</sup> day of February, 2021.

        /s/Rozanna C. Larson          
Rozanna C. Larson (05294)

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**AFFIDAVIT OF SERVICE**

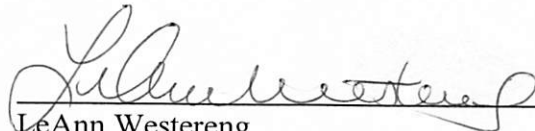
LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 10<sup>th</sup> day of February, 2021, this Affiant provided a true and correct copy of the following documents in the above entitled action:

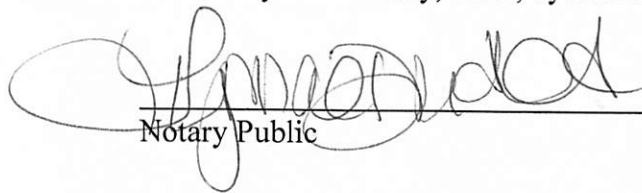
**APPELLEE'S BRIEF**

By electronic service to the following:

**KATIE J. MILLER**  
**MINOT PUBLIC DEFENDERS OFFICE**  
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\_\_\_\_\_  
LeAnn Westereng

Subscribed and sworn to before me this 10<sup>th</sup> day of February, 2021, by LeAnn Westereng

  
\_\_\_\_\_  
Notary Public

LYNNAE RUDLAND  
Notary Public  
State of North Dakota  
My Commission Expires April 26, 2022