

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota)	
)	
Petitioner/Appellee,)	
	)	Supreme Court No.
vs.)	
)	
DD,	)	District Case Nos. 51-2019-JV-00191
	)	51-2019-JV-00192
Respondent/Appellant.)	

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
Appellant’s Brief
ORAL ARGUMENT REQUESTED

Katie J. Miller
ND Bar ID #08695
ND Public Defenders’ Office--Minot
Attorney for Respondent/Appellant
11 First Ave. S.W.
Minot, ND 58701
(701) 857-7750
minotpublicdefender@nd.gov

Table of Contents

<u>Section</u>	<u>Page or Paragraph #'s</u>
Table of Authorities	p. 3
Jurisdictional Statement	¶ 1
Statement of Issues	¶ 3
Statement of the Case	¶ 5
Statement of Facts	¶ 7
Statement of Jurisdiction	¶ 10
Law and Argument	¶ 12
I. The Juvenile Court Erred in Proceeding With the Termination Proceeding In DD's Absence	¶ 13
Conclusion	¶ 24
Certificate of Compliance	¶ 27

Table of Authorities

<u>Cases:</u>	<u>Paragraph #'s</u>
<i>In Interest of F.H.</i> , 283 N.W.2d 202, 209 (N.D.1979)	16
<i>In re Adoption of J.M.H.</i> , 1997 ND 99, 564 N.W.2d 623	16, 21
<i>In re Adoption of J.W.M.</i> , 532 N.W.2d 372, 377 (N.D.1995)	16
<i>In re D.C.S.H.C.</i> , 2007 ND 102, 733 N.W.2d 902, 910	20, 22
<i>Lassiter v. Department of Social Services</i> , 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)	20
<i>Matter of Adoption of A.M.B.</i> , 514 N.W.2d 670 (N.D.1994).....	20
<i>Matter of Adoption of K.A.S.</i> , 499 N.W.2d 558 (N.D.1993).....	20
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599	20
<i>Walbert v. Walbert</i> , 1997 ND 164, ¶ 8, 567 N.W.2d 829, 832	16, 18
<i>Wall v. Pennsylvania Life Insurance Co.</i> , 274 N.W.2d 208 (N.D. 1979)...	15
 <u>Statutes:</u>	
N.D.C.C. § 28-27-01.....	2
N.D.C.C. § 28-27-02(2).....	2
N.D.C.C. § 27-20-03(1)(a).....	11
N.D.C.C. § 27-20-56(1).....	11
 <u>Rules:</u>	
N.D.R.App.P. 4(a).....	11

[¶1]

Jurisdictional Statement

[¶2] “Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law.” N.D. Const. art. VI, § 6. “A judgment or order in a civil action may be removed to the Supreme Court by appeal as provided in this chapter.” N.D.C.C. § 28-27-01. A final judgment terminating parental rights is appealable. N.D.C.C. § 28-27-02(2).

[¶3]

Statement of Issues

[¶4] Whether the District Court Erred in Proceeding with the Termination of Parental Rights Trial in D.D.’s absence.

[¶5]

Statement of the Case

[¶6] DD is the biological mother of LD and ND. The minor children were adjudicated deprived on November 13, 2017, and were placed in the care, custody, and control of Ward County Social Services. (App. 17). The State of North Dakota filed a petition to terminate the parental rights of DD; maintaining that the minor children were deprived and that the conditions and causes of the deprivation are likely to continue, and that the children had been in foster care for 730 days, which accounted for 15% of LD’s lifetime and 27% of ND’s lifetime. (App. 11). A Juvenile Adjudication Hearing was held in Ward County, North Dakota, on January 4, 2021. (App. 4). Subsequent to said hearing, the Court ordered that the minor children are deprived, that causes of the deprivation are likely to continue, and will not be remedied, as well as that the minor children have been in foster care, under the care and control of Ward County Social

Services for 1148 days; thus, ordered the termination of DD's parental rights. (App. 30). DD appeals from the final order of the juvenile court and seeks reversal.

[¶7] **Statement of Facts**

[¶8] LD and ND were found to be deprived children on November 13, 2017, and were placed in the care, custody, and control of Ward County Social Services. (App. 17). Permanency hearings were held on November 8, 2018, November 7, 2019, and November 4, 2020, wherein the Court ordered that the children continued to be deprived. (App. 23). The children were ordered to remain under the care and control of Ward County Social Services for a period of time not to exceed November 4, 2021. (App. 23). On December 6, 2019, the State of North Dakota filed a petition to terminate the parental rights of DD. (App. 1).

[¶9] A hearing on the termination of parental rights took place on January 4, 2021. (App. 4). At said hearing, DD appeared telephonically from the Ward County Correctional Center because she was ill; however, prior to the commencement of the hearing, DD terminated her appearance by telephone due to her feeling ill. (App. 23). The Court determined that the matter would proceed in DD's absence, with defense counsel appearing on her behalf. (App. 23).

[¶10] **Statement of Jurisdiction**

[¶11] The juvenile court had jurisdiction under N.D.C.C. § 27-20-03(1)(a) because this matter concerned allegations of deprived children. A review was not requested by a district court judge; thus, the juvenile court's Order became a final order. This Notice of Appeal was timely filed within 30 days of notice of entry of the juvenile court's final

order under N.D.C.C. § 27-20-56(1) and N.D.R.App.P. 4(a). The North Dakota Supreme Court has jurisdiction under N.D. Const. art. VI, §§ 2, 6, and N.D.C.C. § 27-20-56(1).

[¶12]

Law and Argument

[¶13] I. The Juvenile Court Erred in Proceeding with the Termination Proceeding in DD's absence.

[¶14] The juvenile court abused its discretion in proceeding with the termination proceeding in DD's absence after DD became too ill to appear by telephone.

Accordingly, the Supreme Court should reverse and remand.

[¶15] The juvenile court's discretion regarding an incarcerated parent's right to appear in a civil action will not be overturned by this court in the absence of an abuse of that discretion. "A trial court 'abuses its discretion' when it acts in an arbitrary, unreasonable or unconscionable manner." *Wall v. Pennsylvania Life Insurance Co.*, 274 N.W.2d 208 (N.D. 1979).

[¶16] "Prisoners have no absolute constitutional right to personally appear at parental termination or adoption proceedings. *In re Adoption of J.M.H.*, 1997 ND 99, ¶ 18, 564 N.W.2d 623 (quoting *Walbert v. Walbert*, 1997 ND 164, ¶ 8, 567 N.W.2d 829, 832).

"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." *In Interest of F.H.*, 283 N.W.2d 202, 209 (N.D.1979) (quoting *Walbert v. Walbert*, 1997 ND 164, ¶ 8, 567 N.W.2d 829, 832). Further, "Prisoners' due process rights generally are satisfied if they are represented by counsel and have an opportunity to appear by deposition or other

discovery technique.” *In re Adoption of J.M.H.*, 1997 ND 99, ¶ 18, 564 N.W.2d 623.

“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.” *In re Adoption of J.W.M.*, 532 N.W.2d 372, 377 (N.D.1995).

[¶17] At the time of the termination proceeding on January 4, 2021, DD appeared telephonically from the Ward County Correctional Center for the termination proceeding due to illness; however, prior to the commencement of the proceeding, DD terminated her appearance by telephone as she felt too ill to participate. (App. 23). The Court determined that the matter would proceed in DD’s absence, with defense counsel appearing on her behalf. (App. 23).

[¶18] DD was represented by defense counsel at the termination proceeding; however, due to illness, DD was not able to appear at the proceeding in person or by telephone. Analogous to *Walbert v. Walbert*, 1997 ND 164, ¶ 8, 567 N.W.2d 829, 832, the juvenile court abused its discretion in proceeding with the termination proceeding in DD’s absence, and ultimately denying DD’s “due process right to reasonable access to the courts.” *Id.* at ¶ 10. In *Walbert*, an incarcerated father, who was unrepresented in a parental rights termination matter, had requested to appear at the proceeding telephonically. *Id.* at ¶ 6. However, the trial court denied the request to appear telephonically without justification. *Id.* In that case, this Court found that the trial court’s denial of the father’s request to appear telephonically violated due process because the father ultimately had no reasonable access to the courts. *Id.*

[¶19] In the present case, DD attempted to appear telephonically, but was too ill to participate by telephone, and while represented by counsel at the termination proceeding, DD was not able to participate in the proceeding. The juvenile court should have postponed the matter.

[¶20] Additionally, while a prisoner does not have a constitutional right to appear in person at a termination of parental rights hearing *In re D.C.S.H.C.*, 2007 ND 102, ¶ 27, 733 N.W.2d 902, 910, “[t]he due process clause affords parents certain procedural protections before their relationship with a biological child can be irrevocably severed. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Matter of Adoption of A.M.B.*, 514 N.W.2d 670 (N.D.1994); *Matter of Adoption of K.A.S.*, 499 N.W.2d 558 (N.D.1993).

[¶21] In *In re J.M.H.*, the father contended that his due process rights had been violated because he could have testified by deposition or by written interrogatories, and because he was unable to communicate with his counsel during the proceeding. *Matter of Adoption of J.M.H.*, 1997 ND 99, ¶ 17, 564 N.W.2d 623, 627. This Court found that the father’s due process rights were not violated because the father had the opportunity to testify by telephone, the father was represented by counsel, and because the father had the ability to answer a question from his counsel during the proceeding. *Id.* at ¶ 19.

[¶22] Further, in *In re D.C.S.H.C.*, 2007 ND 102, 733 N.W.2d 902, 906, the mother argued that her procedural due process rights had been violated due to her limited appearance by telephone. *Id.* at ¶ 10. At the time of the proceeding, the mother was

incarcerated in the State of Minnesota, and her ability to participate over the telephone was restricted by the correctional staff at the Minnesota prison. *Id.* at ¶ 25. This Court concluded that, “the mother's “commanding” interest in the accuracy and justice of the decision to terminate her parental rights was outweighed by the procedural safeguards available and used as well as the State's interest in reducing the fiscal and administrative burdens of the proceeding.” *Id.* at ¶ 28. And that, “[w]hether 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.” *Id.*

[¶23] The present matter is distinguishable from the above cases. Specifically, in that in those cases, the incarcerated parents had the opportunity to appear by telephone, and the ability communicate with counsel. DD was represented by defense counsel at the termination proceeding; even so, DD was not granted the opportunity to appear at the proceeding telephonically, as she was too ill to do so on the day of the proceeding; DD did not get her day in court; and DD was not able to assist her counsel. Given the gravity of permanently losing the parental rights to one’s child, DD should be afforded the opportunity to be present at the termination of parental rights proceeding by telephone.

[¶24]

CONCLUSION

[¶25] Given the Juvenile Court’s error in proceeding in DD’s absence, it is respectfully requested that this matter be reversed and remanded for a new termination proceeding.

[¶26] Oral Argument is requested. Oral Argument would be helpful to the Court because it would aid in this Court’s understanding of the facts, issues, and arguments.

Dated the 4th day of February, 2021.

/s/ Katie J. Miller

Katie J. Miller (#08695)
Minot Public Defender's Office
11 1st Ave SW
Minot, North Dakota 58701
Telephone: 701-857-7750
Fax: 701-857-7610
Email: katmiller@nd.gov
minotpublicdefender@nd.gov

[¶27]

Certificate of Compliance

[¶28] I, Katie J. Miller, certify that this Brief contains 10 pages and complies with the page limitation for this Brief.

/s/ Katie J. Miller

Katie J. Miller (#08695)
Minot Public Defender's Office
11 1st Ave SW
Minot, North Dakota 58701
Telephone: 701-857-7750
Fax: 701-857-7610
Email: katmiller@nd.gov
minotpublicdefender@nd.gov

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
	)	AFFIDAVIT OF SERVICE
Petitioner/Appellee,)	
-vs-)	
	)	Supreme Court No.
)	
	)	District Court No. 51-2019-JV-00191
	)	District Court No. 51-2019-JV-00192
)	
DD,)	
)	
Respondent/Appellant.)	
STATE OF NORTH DAKOTA)	
	)	SS
COUNTY OF WARD)	

[¶1] I Brenda Hustad, being first duly sworn, deposes and says:

[¶2] 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; and this Affiant hereby certifies that on the 4th day of February 2021 the following documents:

1. Appellant’s Brief;
2. Appellant’s Appendix

[¶3] Were filed electronically with the Clerk of Court through the Odyssey® system for electronic service through Odyssey® on the following:

1. Ward County State’s Attorney
51wardsa@wardnd.com

[¶4] Were filed / served via email upon the following:

1. ND Supreme Court
supclerkofcourt@ndcourts.gov

[¶5] Were served via US Mail upon the following:

1. DD
Ward County Detention Center
PO Box 907
Minot, ND 58702-0907

Dated this 4th day of February 2021.

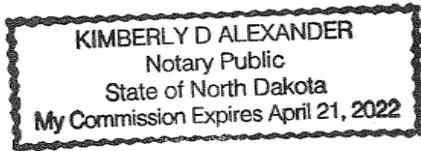
/S/ Brenda Hustad

Subscribed and sworn to before me this 4th day of February 2021.

/S/ Kimberly D. Alexander

Notary Public

My commission expires 04/21/2022



IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
	)	AFFIDAVIT OF SERVICE
Petitioner/Appellee,)	
-vs-)	
	)	Supreme Court No. 20210034
	)	Supreme Court No. 20210035
)	
	)	District Court No. 51-2019-JV-00191
	)	District Court No. 51-2019-JV-00192
)	
DD,)	
)	
Respondent/Appellant.)	
STATE OF NORTH DAKOTA)	
	)	SS
COUNTY OF WARD)	

[¶1] I Brenda Hustad, being first duly sworn, deposes and says:

[¶2] 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; and this Affiant hereby certifies that on the 9th day of February 2021 the following documents:

- 1. Appellant’s Brief;
- 2. Appellant’s Appendix

[¶3] Were filed electronically with the Clerk of Court through the Odyssey® system for electronic service through Odyssey® on the following:

- 1. Attorney Kyle Craig
kcraig@ackrelaw.com
- 2. Pamela Erickson
perickson@youthworksnd.org

[¶4] Were served via US Mail upon the following:

- 1. LJH
5110 Highway 2 E Lot D9
Minot, ND 58701

Dated this 9th day of February 2021.

/S/ Brenda Hustad

Subscribed and sworn to before me this 9th day of February 2021.

/S/ Kimberly D. Alexander

Notary Public

My commission expires 04/21/2022

