

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

In the Interest of C.G., a child
In the Interest of K.K., a child

State of North Dakota,)	
)	Supreme Court File Nos. 20210132
Petitioner/Appellee)	20210133
)	
v.)	Barnes Co. File Nos. 02-2020-JV-00026
)	02-2020-JV-00027
)	
B.G., mother,)	APPELLEE’S BRIEF
D.B., father, and)	
R.M., father,)	
)	
Respondents/Appellant,)	

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM FINDINGS OF FACT AND ORDER FOR TERMINATION
ENTERED APRIL 6th, 2021

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

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STATEMENT OF THE ISSUES

[¶ 1] Whether the Juvenile Court erred by finding the children are deprived and that the deprivation would continue, warranting a termination of parental rights.

[¶ 2] Whether the Juvenile Court erred by finding that R.M. abandoned his child.

[¶ 3] Whether the Juvenile Court erred by finding that termination of parental rights is in the children's best interests.

STATEMENT OF THE CASE

[¶ 4] This is an appeal from the Barnes County Order on a Petition for Termination of Parental Rights. *Juvenile Findings of Fact and Order for Termination of Parental Rights*, ¶¶ 7, 8. An adjudication hearing was held on these matters in Barnes County, case numbers 02-2020-JV-00026 (In the Interest of C.G., with C.G. hereinafter referred to through a pseudonym as “Cody”) and 02-2020-JV-00027 (In the Interest of K.K., with K.K. hereinafter referred to through a pseudonym as “Kal”) on February 5, 2021. The Court determined the children were deprived within the meaning of N.D.C.C. § 27-20, that the deprivation was likely to continue, and ordered termination of the parent’s parental rights, in the best interests of the children. Order ¶ 19. The *Order* removes the children from the custody of their parents, B.G., B.K. and R.M. (with B.G. hereinafter referred to through a pseudonym as “Barb”, with B.K. hereinafter referred to through a pseudonym as “Brady”, and with R.M. hereinafter referred to through a pseudonym as “Roy”) Notice of Appeal was filed by Barb’s attorney, Ashley Schell, on May 4, 2021. Notice of Appeal was filed by Roy’s attorney, Leah Carlson, on May 6, 2021.

STATEMENT OF THE FACTS

[¶ 5] On October 23, 2018, the children were removed from Barb and Brady's care after a search warrant was conducted at Barb and Brady's residence. During the search, drug paraphernalia was located in multiple areas of the house where the children could have access to it. The paraphernalia included needles, syringes, baggies with residue, smoking devices with residue, and a mirror with residue. Cody and Kal subsequently tested positive for THC, methamphetamine, and amphetamines. (A14)

[¶ 6] A shelter care hearing was held on August 6, 2018. 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. (A14)

[¶ 7] A deprivation hearing was conducted on October 22, 2018 in which Judge Jay Schmitz found from clear and convincing evidence that the children were deprived. (A14)

[¶ 8] Permanency/review hearings were held on January 15, 2019, September 24, 2019, December 17, 2019, September 15, 2020, and March 12, 2021. During all of the hearings, the Court continued to find the children were deprived. (A14)

STANDARD OF REVIEW

[¶ 9] 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). The appellant has the burden of showing the findings of fact are clearly erroneous. Striefel v. Striefel, 2004 ND 210, ¶ 8, 689 N.W.2d 415.

LAW AND ARGUMENT

I. THE JUVENILE COURT CORRECTLY DETERMINED, BY CLEAR AND CONVINCING EVIDENCE, THAT THE CHILDREN ARE DEPRIVED AND THE DEPRIVATION WAS LIKELY TO CONTINUE IN THE PARENTS CARE.

[¶ 10] 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."

[¶ 11] Deprivation

[¶ 12] Judge Schmitz found that the children were deprived for numerous reasons under Barb's care. (A60-64) The Court explained that since the removal in August of 2018, Barb has never maintained consistent sobriety, has never maintained a stable home, has never found stable employment. (A61). This type of behavior was talked about in a prior Court's holdings when the Court noted "...she rejected the aftercare program with the service center, designed to change the behavior that led her to chemical dependency. He testified that without aftercare there is less chance of recovery. Failure to follow the recommendations for addiction recovery demonstrates an indifference toward one's obligations and responsibilities as a parent." In re S.F., 2000 ND 161, ¶ 11, 615 N.W.2d 511. Barb's conduct in this case, as well as Roy's, is very similar to the opinion in S.F. At some point, a parent needs to take accountability for not only their children, but their sobriety as a parent, and the lack thereof needs to be recognized for what it is – an indifference toward one's obligations and responsibilities as a parent.

[¶ 13] The Court explained that Barb's continuous choice to engage in a relationship and continuous choice to put Brady on her housing applications, Barb was denied housing assistance in other counties. (A60).

[¶ 14] In explaining the deprivation of Cody under Barb's care, the Court noted the significant behavioral, emotional, and physical health needs that Cody requires. In Barb's care, the Court noted that Cody would be deprived under Barb's care due to Barb's inability to remain sober, Barb's inconsistent willingness to get into treatment and make use of that treatment, Barb's inability to maintain a stable home, Barb's inability to maintain a stable job, Barb's repeated failures to heed advice that she needed to eliminate the conflict with

Brady due to the domestic violence between Barb and Brady, and Barb's inability to find her own home. (A60).

[¶ 15] We have said "proper parental care" means the parents' conduct in raising their children must satisfy "the minimum standard of care which the community will tolerate." See Interest of R.S., 2010 ND 147, ¶ 8, 787 N.W.2d 277; [801 N.W.2d 422] Interest of K.R.A.G., 420 N.W.2d 325, 327 (N.D.1988); Interest of D.S., 325 N.W.2d 654, 659 (N.D.1982). All of these inability are more than sufficient to find deprivation for Cody under Barb's care. A lack of a home for Cody, a lack of employment for Barb to provide for Cody's basic needs is deprivation. All of these issues are a clear demonstration that had Cody been returned to Barb's care, he would not even be given the care required under the basic standard of care requirement that children are entitled to.

[¶ 16] 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, the Court described this perfectly by noting that Barb had a very consistent pattern of behavior with struggling with chemical dependency and "an inability or unwillingness to modify her own behavior to recognize that her children need a better form of care than they are getting." (A64).

[¶ 17] 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). In this case, the Court noted numerous times in its findings that Barb's choice to not discontinue her relationship with Brady, despite the ongoing domestic violence, despite the inability to gain housing due to Brady's name being included, is strong evidence of the seriousness of the violence in the home. Cody and Kal also continued to have serious ongoing mental health needs due to the violence that occurred in the home. As the Court held in P.T.D., children are not supposed to be in environments that have domestic violence, and when they are, those children are deprived. That is also the case here.

II. THE JUVENILE COURT CORRECTLY DETERMINED THAT ROY HAD ABANDONED CODY.

[¶ 18] In explaining the deprivation of Cody under Roy's care, the Court explained how Roy has not had contact with Cody since Cody was 3 years old. Cody is now 7 years old and still has no relationship with Roy, despite the involvement with social services since August of 2018. Cody does not have a relationship with Roy and likely would not even know him. (A63) The Court further explained that Roy's home circumstances are not suitable to Cody to live in, nor has Roy demonstrated that he has maintained sobriety or has the ability to meet Cody's needs. (A63) Further, the Court also found that Roy had abandoned Cody with Roy's lack of communication with Roy for a year prior to Cody's removal. (A56) Once Cody was removed and placed into foster care, Roy did not make any attempts to return to the state to further his relationship with Cody and did not make any meaningful efforts to communicate with Cody. (A56)

[¶ 19] The secondary portion of deprivation, specifically whether the deprivation is likely to continue, was found and explained by the Court. (A64) The Court noted that this portion was clearly established as having exceeding the 450 of the last 660 days, with Cody and Kal having been in care for approximately 919 continuous days as of the day of the termination hearing. (A64).

[¶ 20] As mentioned earlier in relation to Barb, the Courts have held that “parental cooperation is pertinent to determining whether deprivation will continue.” Interest of T.H. (citation omitted). 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. Again in relation to Roy, the lack of cooperation was very well explained when the Court held “...if the needs of the children are to be met, the parent has to become self-motivating and self-activating, and it cannot simply be that if we call you every day and we’ve called Social Services in Montana and they can get you into this evaluation, or they will set you up with this housing application or this mental health or chemical dependency evaluation that that is the reasonable effort required. It is a reasonable effort to point you in the direction. And then the parent, if they are intent on getting their children, must make the effort to get them. And there’s been no showing Roy made any effort to avail himself of the services that he had reason to know existed. He never asked for anyone to pay for it. He never said I’ve set up an appointment for this evaluation or that services and I need some financial help. There’s just been no effort made on the parents’ part, and I don’t believe that the effort made by Buffalo Bridges is deficient.” (A67-68)

[¶ 21] Occasionally in life and also even in the law, old life sayings are fitting. This is the case with Roy, here. As the old saying goes, ‘you can lead a horse to water, but you can’t force them to drink.’ Such is the case with Roy’s parenting, or lack thereof; you can lead a person to services, and options, and the ability to parent, but you cannot force that person to parent, you cannot force them to take what is being offered. The same analogy can be used for Barb. Barb can be lead to repeated treatments, numerous services of all types and measures, but at the end of the day, the only person who can make those options is effective, and here, Barb has chosen not to do that.

III. THE JUVENILE COURT CORRECTLY DETERMINED THAT TERMINATION WAS IN THE BEST INTERESTS OF THE CHILDREN.

[¶ 22] "[T]he primary purpose of N.D.C.C. Ch. 27-20 is to protect the welfare of children," Interest of A.M., 1999 ND 195, ¶ 6, 601 N.W.2d 253, and "[a] termination proceeding is preventive as well as remedial." Waagen v. R.J.B., 248 N.W.2d 815, 819 (N.D.1976).

[¶ 23] “When a parent, through voluntary actions, without reasonable justification, makes herself unavailable to care for and parent a young child, the child should not be expected to wait or assume the risk involved in waiting for permanency and stability in her life.” In re C.R., 1999 ND 221, ¶ 12, 602 N.W.2d 520.

[¶ 24] At the time of the termination trial, 919 days had passed since Cody had been taken into care. 919 days of Roy and Barb not putting in meaningful efforts. 919 days of Brady and Barb not putting in meaningful efforts. Barb, Brady, and Roy were given 469 days longer than what the statute allows in relation to being in care for 450 out of the last 660 days. At some point a line needs to be drawn, and Cody and Kal need to have permanency forever. They should not be expected to wait for the possibility for Barb, Brady, or Roy to

have some permanency and stability in their lives.

[¶ 25] It is not enough that a parent indicates a desire to improve behavior; rather, the parent must be able to demonstrate present capability, or capability within the near future, to be an adequate parent. McBeth v. M.D.K., 447 N.W.2d 318, 322 (N.D.1989). At the time of the hearing, Barb did not have her own residence or employment. (A61). Roy did not have a place that would be suitable for Cody to live, so much that Montana said they would not accept the jurisdiction of Cody and the Court noted that Roy's home circumstances were not suitable for a child. (A63) Again, both Roy and Barb lack not only the present capability to care for Cody and Kal, but the potential for the capability to be adequate parents in the near future.

[¶ 26] 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,

[¶ 27] 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 Cody and Kal were deprived under both N.D.C.C. § 27-20-44(1)(c)(2) and that Cody was also abandoned under N.D.C.C. § 27-20-02(1)(a)(2).

CONCLUSION

[¶ 28] 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 Cody and Kal were deprived under N.D.C.C. § 27-20-44(1)(c)(2), that Cody was also abandoned under N.D.C.C. § 27-20-02(1)(a)(2) and that termination of parental rights was in Cody and Kal's best interests.

[¶ 29] The State waives any oral argument on this matter.

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

Dated the 24th day of May, 2021.

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)	
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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 sixteen (16) 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 May 24th, 2021, I served an electronic copy of Appellee’s Brief and Appellee’s Appendix via e-mail through the Supreme Court File and Serve System upon:

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