

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

In the Interest of D.H.H., a child

Jacqueline A. Gaddie,)	Supreme Court No. 20210238
Assistant State's Attorney,)	
)	
Petitioner and Appellee,)	
)	
vs.)	
)	
D.H.H., a child; S.H. father,)	Grand Forks County Juvenile
)	Court Case No.
)	18-2021-JV-00057
Respondents,)	
)	
and)	
E.L.H., mother,)	
)	
Respondent and Appellant.)	

APPEAL FROM JUDGMENT DATED AUGUST 4, 2021, IN JUVENILE COURT
FOR GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JAY DENNIS KNUDSON

BRIEF FOR APPELLEE

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STATEMENT OF THE ISSUES

- I. Whether there was clear and convincing evidence that D.H.H. was likely to experience continued deprivation resulting in serious harm.

- II. Whether the court was required to consider how denial of a termination would seriously effect D.H.H.'s welfare.

STATEMENT OF THE CASE

[¶1] The mother, E.H., appeals from a judgment terminating her parental rights and the rights of father, S.H., to child, D.H.H. Appellant’s Brief, at ¶18. A Petition for Termination of Parental Rights was filed by Grand Forks County Human Services Zone on February 25, 2021. Id. ¶6 (See Index 2, Court No. 18-2021-JV-00057). On July 14, 2021, a Juvenile Trial was held before the Honorable Jay Knudson. Id. ¶16. On August 5, 2021, the Juvenile Court issued its Juvenile Findings of Fact and Order Terminating Parental Rights. Id. ¶17 (See Index 74-75, Court No. 18-2021-JV-00057). E.H. filed her Notice of Appeal on August 26, 2021. Id. ¶18 (See Index 81, Court No. 18-2021-JV-00057).

STATEMENT OF THE FACTS

[¶2] Grand Forks County Human Services Zone (GFCHSZ) first had contact with D.H.H., currently age four, during a Child Protective Services Assessment stemming from a report received September 10, 2018. Audio Trial Transcript at 28:29. D.H.H. was being cared for at the time by his mother, E.H. (“Petitioner”). Id. The report alleged lack of supervision and serious concerns about the condition of the family’s home. Id. at 28:40-50. Tammy Knudson, Child Protection Supervisor for GFCHSZ, testified that on September 19, 2018, D.H.H. was removed from the home. Id. at 25:40-26:30, 35:23. She confirmed that he remained in the custody of GFCHSZ for a period of 1,030 days, 980 consecutively, spending over 60% of his life in foster care. Id. at 35:39-36:00. Knudson also explained that another report was received on August 1, 2019, when D.H.H. was in the care of Petitioner during a trial home placement. Id. at 31:10-25. This report led to his removal and termination of the trial home placement. Id. at 31:36-55.

[¶3] Knudson, who was qualified without objection as an expert in child welfare, testified that deprivation was likely to continue because Petitioner showed she could not provide a stable environment, had not addressed her mental health and chemical dependency issues, and faced additional legal troubles—all resulting in an inability to rectify caregiving concerns. Id. at 36:20-37:10. Knudson further testified that D.H.H. was likely to continue suffering serious harm because he lacked the stability of a permanent home. Id. at 37:10-29. Knudson discussed the detrimental effect that long-term foster placement has on children who become at risk for decreased academic and emotional development. Id. at 37:29-43 and 38:00-39:00. The State asked directly if a denial of termination would negatively affect D.H.H.’s welfare, to which Knudson responded that it

would. Id. at 38:00-51. Finally, Knudson recommended termination of Petitioner and S.H.'s parental rights because a termination would provide D.H.H. with permanency, knowledge of who will be raising him, and the opportunity to deal with the trauma of his changing living situation. Id. at 37:43-39:35.

[¶4] Jolene McEarchern, Foster Care Case Manager for GFCHSZ, testified that an initial investigation revealed extensive concerns about Petitioner's ability to supervise and keep D.H.H. safe. Id. at 50:20-33. Petitioner admitted to marijuana and alcohol use while providing care and displayed serious mental health concerns for which she was hospitalized shortly after D.H.H.'s removal. Id. at 50:33-46. McEarchern noted that Petitioner's mental health concerns included suicidal ideation, depressive symptoms that led to her habitual sleeping during the day while D.H.H. was awake and active, and the use of substances to cope with her situation. Id. at 56:00-35. McEarchern also expanded on the filthy conditions of Petitioner's home explaining that her landlord filed a report due the smell permeating from her apartment. Id. at 50:50-51:15. D.H.H. was also found without appropriate winter clothing. Id. at 50:46-50.

[¶5] GFCHSZ created a Services Agreement with Petitioner that included follow-through with a mental health and parenting evaluation, consistent visitation, and routine drug screening. Id. at 53:04-55:48. Petitioner struggled to follow through with all components of the service plan. McEarchern testified that Petitioner attended only three brief counseling sessions in May 2021 designed to address emergent mental health crises just prior to a scheduled termination trial. Id. 56:50-57:15, 57:40-58:35. During those appointments, Petitioner revealed ongoing suicidal ideation but never continued services. Id. at 57:15-22.

[¶6] The parenting evaluation recommended therapy and medication management and revealed that Petitioner had significant impairment in everyday functioning. Id. at 1:02:00-33, 1:11:30-50. Testimony also showed that Petitioner failed to take her medications regularly yet overmedicated herself on a Benzothiazine prescription and fell asleep in the bathtub—missing a scheduled visit with D.H.H. in October 2020. Id. at 58:50-59:37. She also attempted to commit suicide by using a Zoloft prescription in March 2011. Id. at 1:01:00-30.

[¶7] McEarchern testified that Petitioner attended only 33 of 43 visits prior to the first trial home placement and 34 of 47 after the trial home placement failed. Id. at 1:27:52-1:28:37. During visitation, Petitioner often fell asleep, and did so as recently as May 8, 2021. Id. Petitioner also missed 50% of her scheduled drug screens with testing being discontinued in March 2021 due to noncompliance. Id. at 1:02:52-1:03:10. In March 2021, Petitioner was charged with Inhalation of Vapors after law enforcement found her unconscious in her vehicle. Id. at 1:00:00-40. She admitted to huffing from a dusting can located nearby. Id. Petitioner also continued to have sporadic employment. While it appeared she was employed at Rodeway Inn, it was revealed by Petitioner herself that she was fired the previous week. Id. at 1:04:44-55. McEarchern also addressed concerns that Petitioner was currently living with her boyfriend who had an active warrant for his arrest. Id. at 1:25:06-20.

[¶8] While trial home placements were attempted twice—in May 2019 and July-August 2019—McEarchern explained that both times D.H.H. was removed from Petitioner’s care after home visits revealed dirty diapers and food on the floor, law enforcement calls responding to D.H.H. being found alone in a nearby park twice, and

Petitioner was discovered sleeping when supposed to be supervising her son. Id. at 1:05:35-1:10:50. It was also discovered that D.H.H.'s occupational, physical, and speech therapy sessions had been discontinued due to Petitioner's failure in bringing him to appointments. Id. at 1:10:50-1:11:10.

[¶9] McEarchern testified extensively about D.H.H.'s delays explaining that he was diagnosed with a phonological disorder, an expressive disorder, generalized muscle weakness, and motor-functioning disorder. Id. at 1:22:29-1:23:40 These disorders create problems in speech, expressing thoughts and feelings, ability to balance, and fine motor skills. Id. D.H.H. also struggles with transitions often resulting in extreme anxiety and distress. Id. at 1:24:00-20. McEarchern explained this anxiety and distress was compounded each time Petitioner failed to attend a scheduled visit with him. Id. at 1:26:10-27:00.

[¶10] McEarchern, who was qualified as an expert in child welfare without objection, then testified that D.H.H. was a deprived child, that deprivation was likely to continue absent termination, and that serious harm would come to him. Id. at 1:38:04-35. She also expressed concern about Petitioner's inability to recognize how her behaviors affected her ability to care for son. McEarchern noted that Petitioner expressed on numerous occasions that she did not believe D.H.H. was deprived and that there was a personal "vendetta" against her. Id. at 1:33:55-1:35:14. McEarchern discussed concerns over Petitioner's ability to provide for D.H.H.'s extensive needs, handle everyday responsibilities, or respond emergency situations. Id. at 1:38:35-1:39. Finally, McEarchern noted that permanent options exist for D.H.H. including adoptive placement in his current foster care home or with his maternal grandmother. Id. at 1:37:20-25. McEarchern

recommended termination of parental rights so that adoption options could be sought and so that D.H.H. could continue to address his developmental, behavioral, and psychological needs. Id. at 1:39:39-45. The State asked directly if a denial of termination would negatively affect D.H.H.’s welfare, to which McEarchern responded that it would, and that great emotional damage would come to him absent termination. Id. at 1:39:45-1:40:45.

[¶11] Finally, testimony was received from Guardian ad Litem, AnneMarie Studer, regarding her recommendations in this case. Id. at 3:18:35-3:22:15. Studer recommended termination in respect to both Petitioner and S.H. due to her belief that D.H.H. is deprived, that deprivation is likely to continue, and that D.H.H. is suffering physical, mental, and emotional harm as result of that deprivation. Id. The parties stipulated to receiving Studer’s written recommendation and addendum report into evidence. Id.

[¶12] The court agreed with the recommendations of GFCHSZ providers and the Guardian ad Litem. Juvenile Findings of Fact and Order Terminating Parental Rights, ¶¶38-39, Index 74-75, Court No. 18-2021-JV-00057. The court found Petitioner’s on-going struggle with mental health, continued use of controlled substances, history of drug-related convictions, recent vapor inhalation charges, inconsistency in attending counseling appointments, noncompliance with requested drug screenings, failure to attend scheduled visits and falling asleep during visitation, and unsuccessful trial home placements all indicated that Petitioner “does not have the ability to care for her child” and “that inability will continue.” Id. ¶¶33-35. The court also determined that D.H.H. was in need of numerous therapy and intervention services due to his parents’ actions and had suffered “emotional and mental trauma” as a result of neglect and lack of permanency since his removal. Id. ¶34.

[¶13] The court explained that D.H.H. was a child in need of protection (deprived), and the conditions of that deprivation were likely to continue. Id. ¶38. The court also found D.H.H. was suffering serious harm and will probably suffer serious harm into the future due to that deprivation. Id. The court reiterated that D.H.H. has been in the care of GFCHSZ for at least 450 out of 660 nights, and that reasonable efforts were made to maintain family connections and find a permanent plan through adoption or reunification. Id. ¶¶39-41. Finally, the court noted “that it is contrary to the welfare of the above-named child to return to the parental home based upon the reasons set forth herein.” As a result of the court’s findings, both Petitioner and S.H.’s parental rights were terminated. Id. ¶46. See also Judgment Terminating Parental Rights, Index 75, Court No. 18-2021-JV-0057.

ARGUMENT

[¶14] The court’s decision to terminate the parental rights of Petitioner and father, S.H., should be affirmed. The decision was not clearly erroneous because D.H.H. is a deprived child, the conditions and causes of the deprivation are likely to continue, D.H.H. has suffered and will likely continue to suffer serious harm from that deprivation, and D.H.H. has been in foster care for at least 450 out of the previous 660 nights. North Dakota Century Code has established specific criteria before any court can terminate the rights of a parent.

The court may terminate the parental rights of a parent . . . if: . . . (c) The child is a deprived child and the court finds: (1) The conditions and causes of the deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm; *or* (2) The child has been in foster care . . . for at least four hundred fifty out of the previous six hundred sixty nights[.]

§ 27-20-44(1)(c)-(c)(2) (emphasis added). Even if the above criteria are met, a juvenile court has the discretion to deny termination and require that the State establish that a denial would seriously affect a child’s welfare. Matter of C.D.G.E., 2017 ND 13, ¶10, 889 N.W.2d 863.

[¶15] The statute requires these provisions be proven by clear and convincing evidence. Interest of K.L. and M.S., 2008 ND 131, ¶11, 751 N.W.2d 677. “Clear and convincing evidence means evidence that leads to a firm belief or conviction the allegations are true.” Id. A court’s decision to terminate parental rights is a question of fact that will only be overturned if it was clearly erroneous. Id. ¶12 (citing Interest of D.M., 2007 ND 62, ¶6, 730 N.W.2d 604). “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire

record, [the Court is] left with a definite and firm conviction a mistake has been made.”
Interest of D.M., 2007 ND 62, ¶6.

[¶16] Here, Petitioner does not appear to contest the finding that D.H.H. is a deprived child. Juvenile Findings of Fact and Order Terminating Parental Rights, ¶38, Index 74-75, Court No. 18-2021-JV-00057. Nor does she contest the finding that he has been in foster care at least 980 consecutive days, thus satisfying the requirement of 450 out of 660 nights. Id. ¶39. Rather, Petitioner states she has had no positive drug screens for one year, sees a psychiatrist monthly, is employed at Rodeway Inn, has stable housing, has a significant emotional bond with her son, and that D.H.H. graduated from therapy services. Appellant’s Brief at ¶28. Petitioner argues that for these reasons, the State has not met its burden of clear and convincing evidence that D.H.H.’s deprivation is likely to continue, and that he is likely to suffer serious harm. Id. ¶¶35, 38. She also argues the State could still “fall short if [the court] determined that the termination would seriously affect the child’s welfare.” Id. ¶40.

[¶17] The State asserts, and most importantly, the court found, there was clear and convincing evidence that D.H.H.’s deprivation was likely to continue, and he would continue to suffer serious harm from that deprivation. Additionally, the State was not required to prove that a denial of termination would seriously affect D.H.H.’s welfare but it did present evidence of this. Despite its discretionary power to require such proof, the court ruled on the matter, stating that it was “contrary to the welfare of [D.H.H.] to return to the parental home based upon the reasons set forth herein.” Juvenile Findings of Fact and Order Terminating Parental Rights, ¶44, Index 74-75, Court No. 18-2021-JV-00057. For these reasons, the court’s decision was not clearly erroneous and should be affirmed.

I. THERE WAS CLEAR AND CONVINCING EVIDENCE THAT DEPRIVATION WAS LIKELY TO CONTINUE AND THAT SERIOUS HARM WOULD COME TO D.H.H. FROM THAT DEPRIVATION.

[¶18] As the court noted, the deprivation of D.H.H. was likely to continue because Petitioner had achieved no improvement in her mental health, was charged with another drug crime just months prior to trial, did not comply with required drug screenings, failed to attend scheduled visits, and continued to endanger D.H.H. through an inability to supervise and provide a clean home during two trial home placements. Juvenile Findings of Fact and Order Terminating Parental Rights, ¶¶33, 34, 35, Index 74-75, Court No. 18-2021-JV-00057. Evidence of continued deprivation must be prognostic and be based on “reasonable prediction as to future behavior and includes reports and opinions of the professionals involved.” In re: K.J., 2010 ND 46, ¶8, 779 N.W.2d 635. In making deprivation determinations, courts consider whether parents demonstrate improvements in parenting skills. In re: K.B., 2011 ND 152, ¶5, 801 N.W.2d 416. A parent’s inability to remedy the concerns leading to social services involvement may similarly demonstrate continued deprivation. McBeth v. M.D.K., 477 N.W.2d 318, 321-22 (N.D. 1989). Courts also acknowledge that a child will suffer serious harm when a parent is unable to provide for a child’s extensive delays. Id. at 322.

[¶19] In In re: K.B., the Court found deprivation likely to continue despite the fact that parents had relieved themselves of the responsibility to care for special-needs twins, and therefore had more time to devote to the other children. 2011 ND 152, ¶37, 801 N.W.2d 416. The Court affirmed the juvenile court’s reasoning stating it had made “detailed findings . . . including [the parents’] inability to grasp and apply basic parenting skills . . .

[t]he court also found the parents' health concerns negatively contributed to the deprivation." Id. ¶28.

[¶20] In McBeth v. M.D.K., the Court affirmed a decision to terminate a mother's parental rights after evidence suggested she was still engaged in the same behaviors that led to intervention in the first place. 477 N.W.2d at 321-22. At trial, the mother acknowledged she continued to stay overnight with her ex-boyfriend after she claimed he was removed from the home, failed to attend Alcohol Anonymous meetings, and failed to show up for scheduled visitations with her daughter. Id. The Court explained that "[a] parent must demonstrate present capability, capability within the near future, to be an adequate parent." Id. at 322. The Court contrasted the mother's inability to remedy her issues against another case where parents were able to show the conditions of the home and their substance abuse addictions had improved. Id. (citing In Interest of J.N.R., 322 N.W.2d 465, 465 (N.D. 1982)).

[¶21] In McBeth v. M.D.K., the Court also noted that serious harm would come to the daughter because the mother was unlikely to provide the "nurturing" required for the daughter's extensive "emotional and verbal delays." Id. The Court noted that deprivation "must not be permitted to continue merely because [the] mother who [had] failed repeatedly in the past to properly care for her child might possibly do better in the future." Id.

[¶22] Here, the court found that Petitioner struggles with on-going suicidal ideation and failed to attend long-term therapy services. Juvenile Findings of Fact and Order Terminating Parental Rights, ¶¶16-17, Index 74-75, Court No. 18-2021-JV-00057. The court also found that Petitioner was unable to supervise D.H.H. or clean her home during

trial home placements. Id. ¶21. These findings are analogous to In re: K.B. because like the parents in that case, Petitioner has shown no improvement in the basic parenting skills of supervision and cleaning as evidenced by two failed trial home placements. Additionally, Petitioner did not attend, nor did she continue scheduling additional counseling appointments to address her extensive mental health needs. The court's reasoning is parallel to In re: KB when it states, "if [Petitioner] cannot care for her own needs, she is unable to care for the needs of her child." Id. ¶18.

[¶23] Additionally, the court found that Petitioner struggles with drug addiction as evidenced by a recent charge for Inhalation of Vapors and drug testing being discontinued by Community Service after missing nineteen (19) tests. Id. ¶¶18-19. The court also noted that Petitioner missed twenty-three (23) visits with D.H.H. and fell asleep during visitation. Id. ¶23. All three of these findings are consistent with the findings in McBeth v. M.D.K because Petitioner continues to struggle with the very same issues that brought social services intervention in the first place. There has been no real showing that Petitioner can remedy these concerns or has made any suitable progress. The court reasoned, "[Petitioner] has not improved in her situation, her ability to care for her child, or her cooperation with offered services." Id. ¶35. Thus, the history of her case establishes that these concerns will not be remedied, and the court's reasoning to terminate Petitioner's parental rights is consistent with the guideline established in McBeth v. M.D.K.

[¶24] Finally, the court noted that D.H.H. has serious medical diagnoses relating to developmental, emotional, and physical needs. Id. ¶22. The court also found that D.H.H.'s needs are compounded by missed visits with his mother illustrated by "tantrums" during transitions, "lashing out at others," and "periods of sadness[.]" Id. Additionally, D.H.H.'s

therapy services were terminated due to missed appointments while in Petitioner’s care. Id.

¶34. The court stated, “[Petitioner] does not seem to recognize the damage her inconsistent behavior is having on [D.H.H.]” Id. This reasoning is analogous to the reasoning of McBeth v. M.D.K. because the court similarly found that Petitioner, through her unreliable behavior, has demonstrated she is unable to nurture D.H.H.’s extensive emotional and developmental delays. Thus, Petitioner will continue to cause serious harm to D.H.H. if she is allowed to be his primary caregiver.

¶25] While Petitioner argues that termination should not be granted because of improvement in certain areas of her life—namely, a lack of positive drug screen tests, attendance at monthly psychiatric appointments, stable employment, and an emotional bond with D.H.H.—the evidence presented at trial points to the contrary. Petitioner missed nineteen (19) drug tests and as such, her sobriety cannot be accurately ascertained. Petitioner was also charged with illegal substance use as recently as March 2021. Petitioner admits she was fired from her job a week prior to trial. This negates her claim she has maintained stable employment. Petitioner’s emotional ties to her son have likely been eroded, rather than improved, by her inability to stay awake during visitation and missing scheduled visits. Finally, D.H.H. has graduated therapy services under the care of social services despite the fact those services were terminated while temporarily in Petitioner’s custody. Any improvements made to his overall health cannot be attributed to Petitioner’s care. As such, Petitioner has provided no proof of alleged improvements and her argument is without merit.

II. THE COURT WAS NOT REQUIRED TO CONSIDER IF A DENIAL OF TERMINATION WOULD SERIOUSLY AFFECT D.H.H.'S WELFARE.

[¶26] Petitioner's assertion that a court may still deny a termination if it believes that doing so would seriously affect a child's welfare is correct. However, a court's decision to consider this issue is discretionary when at least one criteria of N.D.C.C. § 27-20-44 is met. Matter of C.D.G.E., 2017 ND 13, ¶¶4, 10, 889 N.W.2d 863. A court's decision to terminate parental rights under N.D.C.C. § 27-20-44 is also discretionary in most circumstances but denying a termination would be erroneous if a petitioner established that the denial would seriously affect the emotional well-being of a child. Matter of Adoption of K.S.H., 442 N.W.2d 417, 420, 423 (N.D. 1989) (VandeWalle concurring).

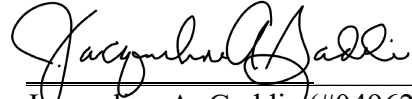
[¶27] The Court in Matter of C.D.G.E. clarifies this reasoning further by explaining that if one of the criteria in N.D.C.C. § 27-20-44 is met, then a court has "*discretion* under the statute to consider whether termination of parental rights would promote the child's welfare." 2017 ND 13, ¶4, 889 N.W.2d 863 (emphasis added). The Court reasoned that the primary purpose of the act itself is to protect the welfare of a child, and thus consideration of this point was not prohibited. Id. The discretionary nature of the consideration is reiterated in In Interest of B.H. when the Court explained that the court in that case "did not abuse its discretion" in considering the child's welfare despite the fact that the petitioner did not directly argue how a denial of termination would seriously affect the child's welfare. 2018 ND 178, ¶7, 915 N.W.2d 668. Even though the Court acknowledged that at least one of the statutory criteria for termination was met, it still affirmed the court's decision to consider how a termination would affect the child's welfare. Id. ¶6. However, nothing about the Court's opinion made it mandatory.

[¶28] Here, the State did present evidence that denial of a termination would seriously affect D.H.H.'s welfare. The State solicited and received affirmation from both expert witnesses—Knudson and McEarchern—that a denial would negatively impact the wellbeing of D.H.H. The court was not required to determine if denial of a petition would seriously affect D.H.H.'s welfare, yet it heard testimony on the issue, and made a finding anyway. The court found that all three statutory criteria of N.D.C.C. § 27-20-44 were met—D.H.H. was deprived, that deprivation was likely to continue and result in serious harm, and he was in the care, custody, and control of GFCHSZ for at least 450 out of 660 nights. Juvenile Findings of Fact and Order Terminating Parental Rights, ¶¶38-41, Index 74-75, Court No. 18-2021-JV-00057. The court then went on to determine that a denial of termination would be contrary to D.H.H.'s welfare. *Id.* ¶43. While the court was not required to make this determination, it was certainly not outside its discretionary authority to do so. Petitioner's assertion that this case be remanded is erroneous because she did not prove the State failed to present evidence on the issue, that a finding on the issue was required by the court, or that the court did not consider the issue when making its decision. Because Petitioner failed to establish any of these three points, her argument is without merit.

CONCLUSION

[¶29] For all the foregoing reasons, the State respectfully requests that this Court affirm the termination of Petitioner's parental rights.

DATED this 16th day of September, 2021.



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vs.)	
)	Grand Forks County Juvenile Court
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Respondents,)	
)	
and)	
E.L.H., mother,)	
)	
Respondent and Appellant.)	

CERTIFICATE OF COMPLIANCE
SA#157961

[¶1] The State of North Dakota, by and through Assistant State's Attorney Jacqueline A. Gaddie hereby certifies that the attached brief complies with the page limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The electronically filed brief contains 20 number of pages.

Dated this 16th day of September, 2021.

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