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SEPTEMBER 16, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee	)	
v.	)	
A.P., child; S.P., mother; B.P., father, Respondents	)	
and	)	Supreme Court No. 20220201 Williams County No. 53-2018-JV-00084
D.L.W., grandmother; M.W., grandfather Interested Parties and Appellees	)	
and	)	
Karena Jensen, foster mother, and Keith Jensen, foster father, Interested Parties and Appellants	)	

Appeal from the

Order Denying Motion to Modify and Order Approving Transition Plan dated June 24, 2022

District Court, Williams, North Dakota
The Honorable Joshua B. Rustad, Presiding

BRIEF OF INTERESTED PARTIES-APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

[¶7] This case concerns the welfare of an eight year old girl, A.P. She was born on November 24, 2013. She was placed out of the home on July 30, 2018, but that placement was not able to keep her due to her high needs. A.P. is autistic, and in 2018, she was completely nonverbal and unable to communicate. On August 6, 2018 she was taken into protective custody and placed in temporary care with Williams County Social Services n/k/a North Star Human Service Zone. A.P. was placed with the Jensens on August 6, 2018 and has been in their care at all times since then.

[¶8] As of the date of the Court's entry of Order in this matter, A.P. has been in the custody of the North Star Human Service Zone for 1418 nights. On August 24, 2021, the relevant portion of this action began. After learning that the State of North Dakota intended to transfer A.P. from their home, where she has resided since her placement began, to her maternal grandparents home, the foster parents, Keith and Karena Jensen, brought a motion to prevent the transfer of A.P. without a reasonable transition period.

[¶9] On August 26, 2021 a hearing was held on the Jensens Motion. An Emergency Order Granting Protective Custody was entered on August 27, 2021 granting the minor child to remain in the custody of her foster parents until further Order of the Court. North Star was specifically ordered not to attempt to change the placement of A.P. without an Order from the Court.

[¶10] October 8, 2021 the Jensens filed a Motion to Modify Order requesting the Court amend the current Amended Juvenile Permanency Hearing Order from the care, custody and control from North Star to Keith and Karena Jensen on the basis that North Star has failed to act in the best interests of the minor child.

[¶11] On December 22, 2021, a hearing was held on determining a reasonable period of time to facilitate a beneficial transition for the child and on the Jensens Motion to Modify Order. This

hearing was not completed in the time allotted on December 22, 2021. The second portion of the hearing was finally held on April 11, 2022.

[¶12] After the hearing on April 11, 2022, the District Court entered it's Order on June 24, 2022, denying the Jensens Motion. This appeal followed.

STANDARD OF REVIEW

[¶13] Under N.D.R.Civ.P. 52(a), this Court reviews a juvenile court's factual findings under a clearly erroneous standard of review, with due regard given to the opportunity of the juvenile court to judge the credibility of the witnesses. A finding of fact is clearly erroneous if there is no evidence to support it, if the reviewing court is left with a definite and firm conviction that a mistake has been made, or if the finding was induced by an erroneous view of the law. This Court reviews questions of law de novo.

Interest of D.O., 2013 ND 247, ¶ 6, 840 N.W.2d 641.

STATEMENT OF THE FACTS

[¶14] A.P. has been in the care of the North Star Human Service Zone ("North Star") since August 5, 2018. (R31:1). At the age of 3, A.P. was non-verbal, unable to express her needs verbally or through gestures, non potty trained, did not engage in social or imaginative play, and was uninterested in those around her. (R113:¶3). A.P. has autism spectrum disorder level 2 (R320:11:22). A.P. has five other siblings, who were removed from their parents care on November 7, 2018 (R31:1).

[¶15] Three of these siblings were the subject of a prior North Dakota Supreme Court decision, 20220129, 20220130, and 20220131. Two of her siblings, J.P. and B.P. reside with her maternal grandparents, the W. family, in Florida, two of her siblings, A.P.2 and E.P. reside with her paternal grandparents, the Philips, also in Florida. Her youngest sibling, K.P. was adopted by a foster family that K.P. was placed with.

[¶16] A.P. struggles whenever there is a major change in her environment, and she's had anxiety and an increase in stimming behaviors after visiting her grandparents, the W. family (R320:21:6). Stimming behavior is a behavior that is common in children with autism like A.P. It is evidenced by some part of the child's sensory or nervous system becoming overwhelmed and the child engages in a behavior that is meant to be self-soothing (R320:21:11).

[¶17] A.P. has lived with the Jensens since August 6, 2018. The Jensens sought a lot of education and supports outside of working with A.P.'s therapist in order to parent a child with autism (R:320:18:7). A.P. has a very good and close relationship with her foster parents and foster siblings, and is calmed by being in their presence and seeks them out whenever she is looking for reassurance (R320:22:11-14). According to her therapist, A.P. views the Jensens as her "safe people" (R320:22:6-14).

[¶18] The initial plan for permanency for A.P. was for her biological parents' parental rights be terminated and that she be adopted by the Jensens. This was sworn to in an affidavit by Karena Jensen (R62:¶9). This was the recommendation of her first Guardian Ad Litem, Tracy Horob, prior to a permanency hearing on July 15, 2021 (R31:9). This position was supported by internal documents produced by North Star and reviewed by the current Guardian Ad Litem, Misty Nehring (R242:¶5). One such internal document, notes created after a file review between two North Star Human Service Zone employees, Rebecca Kruit and former case manager Nicole Bryant. These notes indicate that the W. family had been eliminated as placement options and that the Jensens were planned as the permanency placement for A.P. (R274:1). At the initial hearing on the Jensens motion to modify, A.P.'s therapist, Sarah Anderson, also testified that she had participated in team meetings with North Star were the plan for permanency with the Jensens was discussed and appeared to come from North Star (R320:38:11-15). The adoption of A.P. by the Jensens was consented to by A.P.'s biological father in a letter sent to the Court on July 8, 2021. (R32:1) On that same date, Sarah Anderson, submitted a letter to the Court indicating that it was her recommendation that A.P. remain with the Jensens, due to the progress she had made with them and her attachment to them. (R33:1) In this 2021 letter, Anderson wrote that "a major change like a move would be severely detrimental to her, and I strongly recommend that she remain in her current foster home and that permanency through adoption be established for her as soon as possible. A.P. and all of her siblings have been in foster care for an extremely long time, it is imperative for all the children that permanency through guardianship or adoption be established for them quicky" (R33:1). Throughout this case, no party has ever raised any issue with the conduct of the Jensens, with North Star testifying that, "The foster family has done very well at bringing A.P. to where she is today. They have been able to help provide wrap around services

for her. Get to know her and her specific behaviors associated with her autism. And be able to meet those needs (R320:93:3-15).

[¶19] In July of 2021, North Star sent an email to the Jensens requesting that they provide information via email about what permanency for A.P. would look like in the Jensens home (R276:1). No written request for information was made to the W. family (R320:128:6). Instead, North Star case manager Valery Kirby testified that she had had ongoing conversations with the W. family about what permanency would look like in the W. family home (R320:129). At the first hearing in this case, Valery Kirby, case manager for North Star, testified that it was not the case that there had ever been a plan for permanency with the Jensens and that placement was always going to be with the relatives. (R320:118). A meeting was held on August 9, 2021 to discuss the permanency for A.P. This meeting involved four North Star employees (R320:123:21-24). This meeting did not include the G.A.L. or the child's therapist, who was not asked to consult on the plan (R320:24-25). The results of this meeting were the following decision:

> In looking at the situation, D.L.W. and M.W. requested placement in 2018 of all 6 children, *this placement option was not adequately explored at that tim*e. [Emphasis original] The steps of an ICPC, home study, ongoing contact with the family in Florida that would have followed policy should have been completed for proper relative placement or elimination due to safety.
>
> D.L.W. and M.W. are a relative, there are no safety concerns for the children in the home, A.P. will be in close contact with her other siblings who are placed with paternal grandparents. It is recommended that A.P. be moved to Florida and permanency achieved with her maternal grandparents, D.L.W. and M.W. Ward. (R59:1)

[¶20] Upon learning this on July 20, 2021, the Jensens filed a motion to prevent this transfer (R56-R63). On August 27, 2021, the Court entered an order preventing the transfer of A.P. to the W. family in Florida until further order of the Court (R71).

[¶21] On October 8, 2021, the Jensens made a second motion, which is the subject of this Appeal.

In this Motion, the Jensens request that the Court modify the original order granting custody to North Star in order to allow them to serve as the guardians of A.P. (R93-R99).

[¶22] An initial hearing was held on this motion on December 22, 2021. This hearing ended without the Jensens being able to call any witnesses, as the entirety of the hearing was taken up by the State's presentation of testimony related to its beneficial transition plan pursuant to the Court's first order (R71). At the conclusion of this hearing, the Court denied the State's request (R320:149:15-25).

[¶23] A second hearing was held on April 11, 2022. At this hearing, the Court allowed North Star to proceed first, on a second beneficial transition plan, despite the State having never filed any motion or request that this plan be considered. This course of conduct was objected to by the Jensens. (R321:7:3-6).

[¶24] At the second hearing testimony was offered by Valery Kirby, D.L.W., Melissa Voight, Misty Nehring, and Sarah Anderson. A second proposed beneficial transition plan was put forward by the State (R277:1).

[¶25] The first and second beneficial transition plans were prepared by North Star without consulting Sarah Andereson, A.P.'s therapist (R320:24, R323:10-11). Anderson testified that this was unusual, as in previous cases, plans were provided and there was extensive communication between herself and North Star (R323:30:21-25). At the second hearing, Anderson opposed the second plan presented by North Star, and continued to recommend that A.P. stay with the Jensens (R323:14:11). One reason for Anderson's opposition is that the second plan does not include any sort of education or training for the grandparents related to parenting a child with autism (R323:14:11). Anderson had concerns about the W. family' ability to understand A.P.'s autism, her needs, their ability to be able to communicate her needs to service providers, work with service

providers, and follow through on services and appointments for her. There were also concerns related to their functional abilities, specifically D.L.W.'s functional abilities (R323:6:1-6).

[¶26] During a meeting with D.L.W. on February 16, 2022, Anderson noted significant cognitive issues experienced by Ward, including an inability to recall a visit with A.P. two days prior, and an inability to recall what day it was. (R253:¶17, R323:6-7). She also exhibited an inability to recall details of her own marriages, or a meeting she had had with Anderson and A.P. the previous year. (Id.)

[¶27] This confusion was also evident at the second hearing, where Ward testified that she could hardly remember yesterday (R321:68:23), that she does not remember the year 2016 (Id. At 25), that remembering dates was something she struggled with, and had all her life (R321:71:16). She testified that, "I can put attention on what you say, but I will never remember how you are dressed or if you're wearing a tie, or dates, or nothing like that." (Id.) When asked about a previous husband who had abused her daughter during their marriage, Ward testified that this had happened 22 or 23 years ago, and when asked what year that was, she stated it was 2017 or 2018. (R321:73:6-7). She was also unable to remember reading or receiving any reports from the G.A.L. in this matter (R321:75:7-9).

[¶28] Anderson felt that this matter has carried on for a long time, and that, "A.P. is very bonded and attached to her foster parents. She views them as her parents, as her family. She views them as a relative. I think that it would be best for her to remain where she is at, where she is stable, has made a lot of progress" (323:15:21-25).

[¶29] Anderson believes that there will be regression if A.P. is moved to Florida regardless of what services are offered, but that proper services could lessen the regression (R323:18:4-11). In some cases, the movement of an autistic child from one home to another has resulted in a year or

more of regression (R323:24:6-9). A transition to the W. family in Florida could result in A.P. losing the communication skills she has developed during her time in placement. (R323:16:5-13). Anderson testified that it is more likely than not that things will be worse for A.P. in Florida than in North Dakota, which is the basis for her recommendation that A.P. stay with the Jensens (R323:31:6-12).

[¶30] Both of the guardians ad litem in this case have recommended that A.P. stay with, and be adopted by, the Jensens. Guardian Ad Litem Misty Nehring has even presented extensive reporting to the Court related to this recommendation, including an extensive analysis of the best interest factors enumerated under N.D.C.C. 14-09-6.2.

[¶31] Nehring's report indicates that the statutory best interest factors are overwhelming in favor of the Jensens while none of the factors in are favor of the W. family (R242:¶37-47, 54-55).

[¶32] Nehring further investigated the issue of the change in plan extensively, writing that:

> The previous GAL, Tracy Horob filed a Guardian Ad Litem report on July 8, 2021 with the Court that clearly outlined the previous permanency plan for A.P.. Ms. Horob recommended that A.P. remain with Keith and Karena Jensen, that NSHSZ move forward with a petition to terminate the parental rights of B.P. and S.P., and that Keith and Karena Jensen be allowed to adopt A.P.. A review of the file from NSHSZ, collateral interviews of the individuals involved, A.P. service provider, her educators, and even communications demonstrate that the previous understanding of the plan was for the Jensens to adopt A.P.. For whatever reason, it has been represented to this Court and to this GAL by representatives from NSHSZ and their legal counsel, Attorney Jordan, that placement with the maternal grandparents has always been part of the plan. This GAL was present for the emergency protective hearing on August 26, 2021 and clearly recalls that Attorney Seymour Jordan stated to this honorable court that it had always been the intention of NSHSZ to place A.P. with the maternal grandparents, M.W. and D.L.W., and that the delay in placing her was due to COVID-19. The undersigned GAL finds it difficult to believe this assertion when there is an overwhelming amount of evidence presented to this GAL that demonstrates that the current desire to place A.P. with her maternal grandparents was a clear deviation from what was previously represented to the Court as the permanency plan for A.P. in July 2021. The position that the placement of A.P. was always intended to be with M.W. and D.L.W. is disputed by the key people involved in the case which include but is not

> limited to the following: 1) Keith and Karena Jensen, current placement; 2) Amanda and Joseph Evans, the current placement for K.P. and A.P. previous placement; 3) Tracy Horob, the previous GAL; 4) Sarah Anderson, A.P. therapist with Kaleidoscope Behavioral Health; 5) John and Sandra Phillips, the paternal grandparents; and 6) Nicole Bryant, her previous case manager through NSHSZ. In addition to the statements asserted by these individuals, internal documentation from NSHSZ shows that this was not the intended plan. Some examples include internal communications where D.L.W. is giving her blessing for the Jensens to adopt A.P., internal memorandum stating that D.L.W. was previously eliminated by NSHSZ due to non- compliance with the safety plan for the children and that the intention of NSHSZ moving forward was for Keith and Karena Jensen to adopt A.P., previous affidavits filed with the Court, and a preliminary draft of the petition for termination of parental rights for A.P. created by the Williams County State's Attorney that came as a result of the understanding that there was no family placement option available to A.P.. (R147:14).

[¶33] Prior to the removal of A.P., her biological parents were firm in their belief that D.L.W. was not a viable placement option for A.P. (R242:¶13). Both have reported at times that they regret the placement of the oldest two with the W. family. (Id.) After their relocation to Florida, A.P.'s eldest brother and sister were on a waiting list for approximately a year before receiving therapy services, whereas A.P. cannot go more than 90 days without services (R242:¶22).

[¶34] In July of 2019, D.L.W. intentionally violated a North Star safety plan by inviting J.P.'s father to a sibling visit with all of the P. children. At the time, due to his lack of cooperation and failure to complete a background check, he was not authorized to spend time with J.P. or any of the children. (R242:¶29) After this incident, D.L.W. allowed unauthorized individuals to spend time with the other children, which is a great concern to the Guardian Ad Litem, given the previous trauma suffered by these children. (R242:¶31-32) One of these authorized individuals also attended a hearing in this case, in by being in the room with D.L.W. when she was allowed to attend by phone (R242:¶31)

[¶35] Both the G.A.L and the therapist have consistently recommended a parental evaluation for the W. family, and this request has been consistently ignored by North Star. (R242:36).

[¶36] The W. family have previously failed to maintain consistent contact with their grandchildren, made negative comments about the other families in the presence of the children, and have hampered or restricted contact for the children in their care (R242:¶44).

[¶37] Due to the trauma inflicted on these children, and the refusal of the biological parents to participate in any kind of services (discussed at length in other case involving these children, In the Interest of A.P.) North Star directed that there be no visitation between the children and their biological mother. D.L.W. told the Guardian Ad Litem that there was no communication, but was in fact facilitating contact between the two eldest children and with the biological mother (R253:¶19-20).

[¶38] At the final hearing in this matter, S.P., the biological mother, testified that she intended to visit her children in Florida now that she was out of incarceration. (R321:54-55). Guardian Ad Litem Nehring testified that none of the safety concerns raised by herself and the therapist have been addressed by North Star. (R321:14:1-4).

[¶39] A.P.'s teacher, Melissa Voight, testified that she had been teaching A.P. for a year and a half (R323:34:9). She stated that A.P. came to her class non-verbal with a photo communication system but that she had improved and grown into being able to use sentences (R323:34:13-19). After a trip to Florida which was requested by North Star and approved by the Court, wherein A.P. stayed with the W. family, Voight noticed a lot of regression (R323:34:20-23). This included impacts to her speaking abilities, reading, and math. (R323:34:23-25). Voight testified that after the trip to Florida, the word "airplane" would cause a negative reaction in A.P.:

> And when she returned, every time we would get to the word airplane, she would start to stim, get upset, not want to move on. She would talk about the airplane and going to grandma's house or not going to grandma's house or not going away from mom. And it just became too much for her to the point where we were not progressing, and it didn't seem like it was worth continuing with (R323:35:19-25).

[¶40] Voight observed self injuring behavior by A.P. since December, including scratching herself, biting herself, and hitting her head against a wall (323:37:9-16). Voight also stated that she believed A.P. was making it clear, as clear as she could, that A.P. did not wish to move to Florida and leave the Jensens (R323:35:4-15). This was also conveyed by A.P. to her therapist (R320:34:20). As of April of 2022, A.P. has still not recovered from the regression caused by her trip to visit the W. family in Florida (R323:43:15).

[¶41] On June 24, 2022, the District Court entered an order denying the Jensens' Motion, writing that:

> Clearly, A.P. has been found to be in need of protection. Custody has previously been given to North Star Human Service Zone for that reason. Here, North Star has determined that the maternal grandparents are an appropriate family placement, who have satisfied all of their requirements. The Court is not in the practice of micromanaging the case plans of social services, and does not see a need to do so in this case. Further, regardless of whether the plan changed or not, the issue is whether that plan is best suited to protect the physical, mental, and moral welfare of the child.
>
> As to the Motion to Modify, while it is true that a Court may transfer temporary legal custody to a fit or willing relative or other appropriate individual as a legal guardian, it declines to do so in this case. As has been noted, the State has presented testimony that the maternal grandparents have met all relevant state protection standards.
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> (R:300: ¶16-17)

ARGUMENT

I. The District Court's Order is an Appealable Order

[¶42] The Supreme Court has requested that the Jensens' address whether the underlying order is one than can be appealed. "Generally, before the Supreme Court considers the merits of an appeal, we must determine whether this Court has jurisdiction." In re Estate of Hollingsworth, 2012 ND 16, ¶ 7, 809 N.W.2d 328. The Supreme Court applies a two-step analysis to decide whether it has jurisdiction:

First, the order appealed from must meet one of the statutory criteria of appealability set forth in N.D.C.C. § 28-27-02. If it does not, our inquiry need go no further and the appeal must be dismissed. If it does, then [N.D.R.Civ.P. 54(b), if applicable,] must be complied with. If it is not, we are without jurisdiction. Matter of Est. of Finch, 2021 ND 159, ¶ 4, 963 N.W.2d 754, 757

[¶43] The following orders when made by the court may be carried to the supreme court:

1. An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;

2. A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment;

3. An order which grants, refuses, continues, or modifies a provisional remedy, or grants, refuses, modifies, or dissolves an injunction or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of section 35-22-04, or which sets aside or dismisses a writ of attachment for irregularity;

4. An order which grants or refuses a new trial or which sustains a demurrer;

5. An order which involves the merits of an action or some part thereof;

6. An order for judgment on application therefor on account of the frivolousness of a demurrer, answer, or reply; or

7. An order made by the district court or judge thereof without notice is not appealable, but an order made by the district court after a hearing is had upon notice which vacates or refuses to set aside an order previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice.

N.D. Cent. Code Ann. § 28-27-02 (West)

1. An aggrieved party, including the state or a subdivision of the state, may appeal from a final order, judgment, or decree of the juvenile court to the supreme court by filing written notice of appeal within thirty days after entry of the order, judgment, or decree, or within any further time the supreme court grants, after entry of the order, judgment, or decree. The appeal must be heard by the supreme court upon the files, records, and minutes or transcript of the evidence of the juvenile court, giving appreciable weight to the findings of the juvenile court. The name of the child may not appear on the record on appeal.

N.D. Cent. Code Ann. § 27-20.2-26 (West)

[¶44] This case concerns the appeal of the District Court's Order denying the petition of the Jensens. The Jensens are a party to the action, with the right to appear in it pursuant to Rule 4 of the North Dakota Rules of Juvenile Procedure. Their motion addressed a substantial right, and is covered by categories 1 and 5 of N.D.C.C. 28-27-02. The order at issue is also a final order with regard to N.D.C.C. 27-20.2-26. The Supreme Court has considered similar issues related to the administration of Estates:

> This Court has previously held that an order denying a petition to remove a personal representative in an unsupervised estate is appealable under N.D.C.C. § 28-27-02 without a certification under N.D.R.Civ.P. 54(b). In re Estate of Huston, 2014 ND 29, ¶ 12, 843 N.W.2d 3; In re Estate of Shubert, 2013 ND 215, ¶ 25, 839 N.W.2d 811.
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> In Matter of Estate of Starcher, 447 N.W.2d 293, 295-96 (N.D. 1989), this Court discussed the applicability of N.D.R.Civ.P. 54(b) to supervised and unsupervised probates. We recognized each proceeding in an informal unsupervised probate was "independent of any other proceeding involving the same estate." Starcher, at 295, (quoting N.D.C.C. § 30.1-12-07). We said "[f]inality in an unsupervised administration requires a concluding order on each petition," and orders in an unsupervised probate are appealable without certification under N.D.R.Civ.P. 54(b), unless they determine some, but not all, of one creditor's claims against an estate. See Starcher, 447 N.W.2d at 295-96.
>
> In In re Estate of Eggl, 2010 ND 104, ¶¶ 6-9, 783 N.W.2d 36, we considered the appealability of an order interpreting a will in an unsupervised probate. We held the order was appealable without a certification under N.D.R.Civ.P. 54(b) because the order settled all the petitioner's existing claims and their speculation about future claims did not diminish the effect or appealability of the order. Eggl, at ¶ 9. Matter of Est. of Finch, 2021 ND 159, ¶ 4, 963 N.W.2d 754, 757

[¶45] This presents a similar situation to those set forth in each of the cases discussed above. In the present case, the Court's denial of the petition of the Jensens, and granting of that of the State, settled all of the claims of the Jensens and the State, such that there were no further issues to be addressed in the case. This situation can be easily distinguished from the fact pattern of In the Interest of C.L.L, a case in which the Supreme Court determined that an order adjudging a juvenile

to be delinquent is not appealable. In that case, the juvenile was adjudged delinquent, and the juvenile appealed. The Supreme Court determined that this was not a final order, because the second step of the adjudication was a dispositional hearing, and that hearing had not occurred. The Court cited a similar Georgia case, and wrote that, The appellate court held that an adjudication order entered before a dispositional hearing was not a final, appealable judgment, and therefore dismissed the appeal. The court reasoned that the order could not be a "final judgment" because if at the disposition hearing the child was discharged, the appeal would be moot. In Int. of C.L.L., 507 N.W.2d 900, 901 (N.D. 1993) (Internal citations omitted).

[¶46] That is not the case here. In this case, the Jensens petitioned the Court for a modification of the order granting custody and control of A.P. to the North Star Human Service Zone. Once the Court denied that order, there were no pending issues related to that motion that were left to be resolved by the Court, and thus, the order is appealable. This is the situation in Eggl, and it is also the situation present in In the Interest of J.K.M. 555 N.W. 2d 229. In that case, the Court's "decision to maintain jurisdiction over J.K.M. has permanently terminated the State's opportunity to criminally prosecute J.K.M., without a possibility to appeal or reverse the decision in the future. Therefore, we find the issue appealable as a final order under N.D.C.C. § 27–20–56(1). In Int. of J.K.M., 557 N.W.2d 229, 230 (N.D. 1996).

[¶47] This is just like J.K.M and Eggl, and accordingly, the order is appealable. If the Supreme Court were to determine that the order in this case was not a final order, and therefore not appealable, because no final disposition of A.P. had taken place, then when would the Jensens otherwise be able to appeal? Like the State in J.K.M., the answer is never. Thus, the order must be appealable.

II. The District Court has failed to make sufficiently specific findings as to the best interests of A.P.

[¶48] The Court's decision in this case is missing sufficient information necessary to allow Supreme Court to actually review its decision.

> Under N.D.R.Juv.P. 14(d), when factual issues are involved in deciding a motion, the court must state its essential findings on the record…When the juvenile court makes findings, it must do so with sufficient specificity to afford a clear understanding of its decision.
>
> Rule 52(a), N.D.R.Civ.P., requires a court to find facts specially and state its conclusions of law separately when an action is tried on the facts without a jury. The court must make findings of fact and conclusions of law which provide sufficient specificity to enable a reviewing court to understand the factual determinations made by the trial court and the basis for its conclusions of law and decision. The court's findings of fact ... should be stated with sufficient specificity to assist the appellate court's review and to afford a clear understanding of the court's decision. [W]e cannot properly review a decision if the [trial] court does not provide an explanation of the basis for its decision because we would be left to speculate whether the court properly applied the law. Findings that are conclusory and general do not comply with N.D.R.Civ.P. 52(a).
>
> Int. of K.V., 2020 ND 169, ¶ 7, 946 N.W.2d 518, 520–21 (internal citations omitted).

[¶49] In this case, the Court begins its Order by summarizing the testimony of the witnesses at the second hearing (R300:¶4-10). In the next paragraph, ¶11, the Court then summarizes the arguments made by the Jensens in their Pre-Hearing Brief (R261) and the Jensens written closing argument (R268). Next, the Court states that "The State asserted that placement with the maternal grandparents was appropriate and that its plan would see to A.P.'s needs and that the proposed parenting plan was beneficial and allowed for a smooth transition" (R300:¶12). This finding by the Court is interesting, because the State did not file a Pre-Hearing Brief, or a written closing argument, or any brief at all in support of the plan at issue.

[¶50] The remainder of the Court's Order does not contain sufficient specificity to explain the ultimate decision.

[¶51] After reciting the state law at issue, the Court then writes that, "42 U.S.C.A. 671 requires that preferences be considered to an adult relative over a non-relative caregiver, when determining placement for a child, providing that relative caregiver meets all relevant state child protection standards" (R300:¶14). As is discussed more in the next argument, North Star placed A.P.'s sister, K.P., with the foster family that had taken care of K.P. North Star actually argued to the Supreme Court that it was necessary to preserve the continuity of K.P.'s life that she be placed with her foster family, making this federal statute a red herring. In fact, North Star's own witness testified that it did control their decision making in this case. (R320:119:12-14.)

[¶52] The Court states that "this Court is comfortable that the request of the State is appropriate, complies with statutory and federal authority, and is in the best interests of A.P. going forward" (R300:15). This is the only time the Court mentions A.P.'s best interest, and no factors are considered or addressed in the Order. Instead, the District Court writes that, "Here, North Star has determined that the maternal grandparents are an appropriate family placement, who have satisfied all their requirements. The Court is not in the practice of micromanaging the case plans of social services, and does not see the need to do so in this case" (R300:16). So, is the State's plan in the best interests of A.P., or is it just that the District Court does not want to micromanage North Star?

[¶53] To be clear, this is not a case where the District Court chose between two options, each of which was supported evidence and valid arguments. Instead, the District Court noted that, "In looking at how long A.P. has lived with the Jensens, and the obvious bond that exists, it is clear that there will be regression. However, that cannot be the only factor for the Court to consider" (R300:18). This is a concerning statement, given the testimony of A.P.'s therapist that regression can constitute harm to A.P. (R323:12:16), and that potential long term implications of regression include that she might not be able to establish a new attachment or relationship with a future

caregiver, an inability to communicate to her caregivers, an inability to engage in age-appropriate independent living skills (R320:28:19). Nevertheless, if the District Court is willing to accept the certainty of regression, it must be the case that there is some compelling reason to risk that regression, but the District Court did not articulate one.

[¶54] Given all of this, the Supreme Court cannot possibly understand the factual determinations of the District Court and the basis for this decision. Accordingly, the Supreme Court cannot review this decision, and it must be reversed.

III. The District Court failed to analyze the best interest factors, and those factors require the Court to prioritize continuity in A.P.'s life.

[¶55] As mentioned above, the District Court's Order holds that the best interest factors favor the transition plan of the State, but does not address or analyze them.

[¶56] The Jensen's Motion in this case was a request to modify the custody of A.P. pursuant to N.D. Cent. Code Ann. § 27-20.3-15, which states that:

> 1. If a child is found to be a child in need of protection, the court may make any of the following orders of disposition best suited to the protection and physical, mental, and moral welfare of the child:
>
>   a. Permit the child to reside with the child's parents, guardian, or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child.
>
>   b. Subject to conditions and limitations as the court prescribes, transfer temporary legal custody to any of the following:
>
>   (1) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child.
>
>   (2) The director of the human service zone or other public agency authorized by law to receive and provide care for the child.
>
>   c. Require the parents, guardian, or other custodian to participate in treatment.

d. Appoint a fit and willing relative or other appropriate individual as the child's legal guardian under section 27-20.1-11.

e. In cases in which a compelling reason has been shown that it would not be in the child's best interests to return home, to have parental rights terminated, to be placed for adoption, to be placed with a fit and willing relative, or to be placed with a legal guardian, establish, by order, some other planned permanent living arrangement.

2. Without a compelling reason to the contrary, a court order that transfers the child from the current protective placement to a parent or other biological family must provide a reasonable period of time to facilitate a beneficial transition for the child and other parties involved.

[¶57] In North Dakota, the best interest factors for child placement in divorce actions are also applied to juvenile custody determinations. *See* In re R.K., 2002 ND 111, ¶ 6, 646 N.W.2d 699, 702. In addressing an incredibly similar case, the North Dakota Supreme Court has stated that:

> Whatever the language, the concept of 'best interests' means that the court will look primarily to the child's welfare and place the child where his or her welfare will be best promoted. Once the child has been in the custody of a party, that custody will be changed Only upon a showing that such a change is Necessary to protect and promote the child's welfare.
>
> In Int. Custody of D.G., 246 N.W.2d 892, 895 (N.D. 1976)

[¶58] The Court's holding in D.G. sets out that there is some necessity to protect and promote the child's welfare before a change in placement. The District Court's order at issue in this case does not attempt to analyze the best interest factors, or otherwise make any findings related to the welfare of A.P. The District Court does write that, "Further, regardless of whether the plan changed or not, the issue is whether that plan is best suited to protect the physical, mental, and moral welfare of the child" (R300:¶16). This raises the question as to how the State's proposed plan is best suited to actually do those things, and there does not appear to be any support in the District Court's Order that explains that. Instead, the Court states that the regression A.P. will suffer is not the only factor, and then fails to identify any other factors, despite finding that the best interests of A.P. are

in line with the State's position (R300:¶15).

[¶59] In D.G., the Supreme Court held that:

> Continuity in a child's life, especially a young child, is one of the most important factors in determining that child's best interests. This point is well explained in Beyond the Best Interests of the Child by Freud, Goldstein, and Solnit (New York: The Free Press (1973)), a book discussed in both the majority opinion and the special concurrence in Jordana v. Corley, 220 N.W.2d 515 (N.D.1974). The authors point out that the greatest influence on a child comes from that person or persons the child is used to, fond of, and connected with by experiences, memories, and identification. That person becomes the child's psychological parent in whose care the child feels valued and wanted. With every change in this parent figure, the child's development may regress. In the Interest of D.G. 246 N.W.2d 892, 895 (N.D. 1976)

[¶60] The testimony and reporting of A.P.'s therapist and Guardian Ad Litem both support the same idea advanced by the Supreme Court in D.G.. A.P. identifies the Jensens as her parents, and changes in the parent figure are going to cause regression in A.P.. A.P. is a child in whom continuity and routine are more important due to her autism. In determining her best interests, the District Court has failed to include the effect of the transition on A.P., other than to admit that it will cause her to regress. Additionally, the District Court failed to analyze any of the statutory factors enumerated in N.D.C.C. 14-09-6.2. As noted above, the Guardian Ad Litem did perform an analysis of these factors, and determined that these factors overwhelmingly support A.P. remaining with the Jensens. Throughout this case, North Star has never presented any criticisms of the care provided to A.P. by the Jensens during the three and a half years she has spent with them. The Jensens argue that the W. family is not a suitable placement for A.P., but the District Court has held otherwise. Assuming that the District Court's position is correct, and the W. family is suitable, there are then two suitable placement options, the W. family and the Jensens. The District Court's findings fail to articulate why a change in placement from one to the other is in the best interest of A.P..

[¶61] Interestingly, the State of North Dakota, in representing North Star, has argued to the North Dakota Supreme Court that continuity was a key factor in the placement of A.P.'s younger sister, K.P. North Star placed A.P.'s sister, K.P., with a foster family with the intent of her being adopted by that family (this adoption happened on September 14, 2022). In it's brief to the Supreme Court, the State of North Dakota wrote that, "All of K.P.'s support, safety net, etc., exists with the current foster family, which is why NSHSZ (North Star) considered the current foster home as the best adoptive placement for K.P. NSHSZ's approach with K.P. is consistent with this Court's decisions related to the stability that develops with long-term foster placement, and the attachments that develop as noted above. This is further enhanced due to the young age at which K.P. was placed with the foster family. *See* Brief of Appellee, ¶92, In the Interest of A.P. 976 N.W. 2d 244, 2022 ND 131.

[¶62] North Star's position with regard to K.P is obviously very different with regard to A.P., and the District Court actually asked North Star employee Valery Kirby about this:

> THE COURT: And why not prior? Why not prior to this year? That's one of the big components of the argument in this case is A.P.'s been with the foster parents now for three years. Two years ago a permanency meeting, it wasn't the plan. One year ago, it wasn't the plan, by their allegations. We've got four other kids that have been placed with other grandparents before A.P. Why is this the first time where it's specified in your plan?
>
> Now you indicated that the reason that you talked about were going to -- we're giving up on reunification, we're going towards termination and adoption. But you're not going to specify with who. That hadn't been determined. Why hadn't the biological maternal grandparents been considered as a placement prior to nearly three years after they were initially removed?
>
> THE WITNESS (Valery Kirby): I can speak to the last two and a half years when I've been the foster care case manager. I -- when I first took this case in August of 2019, I was told by the foster parents that there are significant concerns about M.W. and D.L.W. in Florida. Part of my job being brand new to the case was trying to weed out those concerns. The concerns were not safety concerns. So that's one piece of why it did not happen right away. And why J.T. and B.P. did not get placed in

> Florida right away when I took over the case. We had to go through the ICPC process. In my ICPC summaries and letters, I stated the concerns that had been shared with me to ensure that Florida was aware of somebody having these concerns and make sure they were being addressed in the home study. Florida came back and said they don't have concerns. They are approved for placement. They were approved for placement for ICPC for all six children under relative ICPC in May of 2020. (R320:116-117).

[¶63] Despite the W. family being approved for all six children, and wanting all six children, (R242.12) North Star still placed K.P. with her foster family. In addressing the similarity between A.P. and K.P, Sarah Anderson testified that:

> So because K.P. has remained here, and A.P. and K.P. are very close, developmentally if you were to look at their develop mentally, just developmentally they would be the closest in age just given the fact that with A.P.'s autism diagnosis, developmentally she is behind kids her age. So she plays very, very well with her sister. She loves her sister. She gets incredibly excited to see her sister, spend time with her sister, play dates, sleepovers, all of those things (R320:32:1-7).

[¶64] Developmentally, K.P. and A.P. are similar. Given this, the impact of any change to their continuity will likely impact them the same way. Given that the State of North Dakota has already made it clear that continuity of placement is important for the children of the P. family, there should be no reason why A.P. should not also stay where she is. A.P. has lived with the Jensens for three and a half years, most of her life, and identifies the Jensens as her family. This Court has established precedent that holds that continuity is one of the most important factors in determining the best interests of a child. The District Court failed to consider this factor, along with all of the enumerated factors under North Dakota law. In addressing this appeal, the Supreme Court should follow the decision in D.G.. In that case, the Supreme Court reversed the district court, and remanded the case with an order that the grandparents receive permanent custody of the minor child. In Int. of D.G., 246 N.W.2d 892, 896 (N.D. 1976). While the nomenclature of custody and permanency has changed, the Court's decision in that case stands for the proposition that changes to the parental figures in a childs life should only be done to promote the welfare of the child, and

nothing in the District Court's Order explains how this move would actually be beneficial, or why it is even necessary. The Supreme Court should respect the importance of continuity for A.P. and the very real risk of the consequences of regression for A.P., and make a similar decision to the Court in D.G..

IV. The District Court has improperly delegated its decision making authority to North Star.

[¶65] The Court's findings about "micromanaging" North Star indicate that the District Court's Order is an unlawful delegation of the authority of the District Court. In Sailer v. Sailer the Supreme Court held that:

> "Generally, a 'court cannot make the report of an independent investigator the conclusive basis of its decision regarding the custody of the children. The reason for this rule is usually expressed by the phrase that the trial court cannot delegate to anyone the power to decide questions of child custody. This Court has also noted it is not the best judicial practice for a trial court to adopt a child custody investigator's report; rather, it would be better for the trial court to take the report into consideration and come to its own conclusions.
>
> Sailer v. Sailer, 2009 ND 73, ¶ 34, 764 N.W.2d 445, 459 (citations omitted).

[¶66] In this case, the District Court's findings adopt the determination of North Star explicitly. The District Court holds that, "Here, North Star has determined that the maternal grandparents are an appropriate family placement, who have satisfied all their requirements" (R300:¶16) As the Court does not make any independent analysis as to whether this is true, it is clear the that the District Court has essentially delegated its authority. This very much reinforced by the statement, "The Court is not in the practice of micromanaging the case plans of social services, and does not see the need to do so in this case" (R300:16).

V. The Court's Actions Have Raised the Appearance of Impropriety in this Case,

which warrants Reversal.

[¶67] Prior to this current brief, the Jensens petitioned this Court for a Stay of the Order at issue here, in order to prevent A.P. from being moved to Florida. *See* Docket Number 20220201, Docket X. One of the issues raised in this brief was the fact that, after the Court entered it's Order in this case, the undersigned received additional discovery in related administrative case involving the Jensens. These previously undisclosed documents made it clear that during the pendency of this case, the District Court Judge's spouse assembled documents in response to a subpoena issued by the counsel for the Jensens, and had communications with the State's Attorney about that document production. *See* Id. The addressing a similar situation, the Supreme Court has determined that:

> The Rules of Judicial Conduct direct a judge's decisions on disqualification. Rule 2 demands that "[a] judge shall avoid impropriety and the appearance of impropriety in all his activities." Rule 2(A) thus directs that "[a] judge shall respect and comply with the law and shall act in such a manner that promotes public confidence in the integrity and impartiality of the judiciary." Rule 3(C)(1)(a) makes a judge's disqualification "appropriate when the judge's impartiality might reasonably be questioned."
>
> Sargent Cnty. Bank v. Wentworth, 500 N.W.2d 862, 877 (N.D. 1993)
>
> A violation of the Rules of Judicial Conduct by the judge who presides over a case can result in the reversal of a judgment. *Baier; Matter of Estate of Risovi.* This can occur even when the judge has no actual knowledge of, or inadvertently overlooks, a disqualifying circumstance. *See Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Judge Eckert's conduct did not show any intentionally unethical behavior, nor can any be implied in view of the frivolity of the *Williams* litigation. Rather, the record shows beyond question that Judge Eckert fairly tried this case. Nevertheless, the appearance of impropriety is so important to our judicial system that, in the interests of justice, reversal of a judgment may be required even without any intentional bias or impropriety. *See Baier; Matter of Estate of Risovi; see also Liljeberg,* 486 U.S. at 864, 108 S.Ct. at 2205 [for a violation of 28 U.S.C. § 455(a), which requires disqualification when a judge's impartiality might reasonably be questioned, "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process"]

Sargent Cnty. Bank v. Wentworth, 500 N.W.2d 862, 879–80 (N.D. 1993)

[¶68] In the Wentworth case, the Supreme Court determined that the appearance of impropriety was enough to reverse a District Court decision and remand for a new trial and a new Judge. In that case, the Judge had previously been represented by the law firm that was arguing the case in front of that Judge. The Supreme Court made it clear that while it found no impropriety on behalf of the Judge, the appearance of impropriety itself warranted the reversal. *Id.* This case presents a similar fact pattern to the unique circumstances found in Wentworth. The District Court entered a ruling indicating that it would not "micromanage" North Star, and simply adopted their determination as the Court's own. After trial, the undersigned discovered evidence that prior to the final hearing, the Judge's spouse, who works for North Star, had participated in producing discovery materials related to the case and had conferred with State's Attorney Jordan about the production of that information. This is the appearance of impropriety. A situation where the Court simply adopts the determination of North Star out of an unwillingness to "micromanage" them, and where the Judge's spouse is also involved in the case, should be reversed. As in the Wentworth case, the Supreme Court should consider the risk that the denial of relief here will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. It's clear that this situation, if publicly known, would absolutely undermine the confidence of the public in the judicial process. Whether there was intentional misconduct or not, a reasonable perspective in this matter is that the Court's refusal to "micromanage" North Star is related to the employment of the Judge's spouse at North Star. Further, this issue does increase the risk of injustice in future cases, as the Court's comments here could easily have a chilling effect on the willingness of future litigants to utilize the judicial process. After all, what would the point be in litigating with North Star if the District Court, because it doesn't want to appear to micromanage them, simply adopts

whatever North Star determines? The fact that this happened within the closed confines of a juvenile hearing, should not serve to excuse the conduct; the fact that the public will likely never know what happened here does not change the appearance of impropriety. This appearance should warrant the same reversal the Supreme Court prescribed in Sargent County Bank v. Wentworth.

[¶69] In making this argument, the undersigned is not asserting that a Judge's spouse should be barred from employment with public agencies likely to be subject to that Court's jurisdiction. Rather, some care should be taken to ensure that either the Judge or the spouse is not assigned to cases involving the other. That wasn't the case here, which is part of the reason why the appearance of impropriety has arisen.

VI. The Court's Findings of Fact related to the suitability of the W. family is Not Supported by the Evidence in this Case.

[¶70] The District Court's findings of fact are clearly erroneous if there is no evidence to support it, if the reviewing court is left with a definite and firm conviction that a mistake has been made, or if the finding was induced by an erroneous view of the law.

[¶71] In this case, one of the Court's findings of fact is that the maternal grandparents are an appropriate family placement. As is mentioned above, this is not so much a finding by the Court as an acceptance and adoption of a previously made determination by North Star out of a reluctance to "micromanage" North Star.

[¶72] Extensive testimony was received by the Court related to the suitability of the W. family, and both Sarah Anderson, the child's therapist, and her Guardian Ad Litem believed that the W. family are not a suitable placement option and that placement of A.P. with them was not in her best interest.

While it is obviously within the District Court's authority to assign credibility to witnesses, here, the extensive amount of evidence related to safety concerns makes it clear that a mistake has been

made. The facts set forth above contain extensive references to safety concerns set forth by the Guardian Ad Litem and the child's therapist, and these concerns are only briefly mentioned in the Court's Order. The District Court finds that the plan proposed addresses A.P.'s needs (R300:19), but never addresses the multitude of safety concerns, other than to set out that the W. family meet all relevant state protection standards (R300:17).

[¶73] There is no evidence, other than the testimony of North Star employee Valery Kirby, which supports the position that the W. family is suitable. On the other hand, the extensive evidence from the Guardian Ad Litem strongly supports the position that they are not. Anderson and Nehring repeatedly testified to concerns being raised, and never receiving answers to those concerns. The Court has erred by adopting the testimony of North Star over the Guardian Ad Litem and the therapist. Further, as is mentioned above, the Court appears to simply be adopting the position of North Star without conducting any sort of analysis of its own.

ORAL ARGUMENT REQUEST

[¶74] Oral Argument has been requested to emphasize and clarify the appellant's written arguments on their merits.

CONCLUSION

[¶75] The District Court's Order in this case is not specific enough to enable the Supreme Court to review it properly. What is contained in the Order is an assertion that the Order is made in the best interests of A.P., without any analysis of the best interest factors. The Order also unlawfully adopts the determinations of North Star without any independent analysis by the District Court. Rather than perform its obligations to determine the best interests, the District Court's Order indicates that the Court does not "micromanage" North Star. The Court's findings ignore significant evidence contrary to the Court's findings and ignore the importance of continuity in

A.P.'s life. The Court's Order is not supported by the evidence presented in this case, does not properly apply, or even present the best interest factors. The District Court's Order does not address the fundamental question of why a change in placement is necessary for A.P. For these reasons, the Order must be reversed, and the Jensens request that in reversing this order, the Court remand it for an Order granting their Motion. This is in keeping with the Court's holding in D.G. which should be reaffirmed.

Respectfully submitted this 16th day of September, 2022.

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IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee	)	
v.	)	
A.P., child; S.P., mother; B.P., father, Respondents	)	
and	)	Supreme Court No. 20220201 Williams County No. 53-2018-JV-00084
D.L.W., grandmother; M.W., grandfather Interested Parties and Appellees	)	
and	)	
Karena Jensen, foster mother, and Keith Jensen, foster father, Interested Parties and Appellants	)	

CERTIFICATE OF COMPLIANCE

[¶1] The undersigned, as attorney for Appellants in the above matter, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional spaced, 12 point font typeface, and the total number of pages of the above Brief totals 33 pages, inclusive.

Dated this 16th day of September, 2022.

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and	)	
Karena Jensen, foster mother, and Keith Jensen, foster father, Interested Parties and Appellants	)	

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on September 16, 2022, I filed and served the foregoing document on the following by electronic mail transmission, pursuant to Rules 25 and 31 of the N.D.R.App.P.:

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20220201

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SEPTEMBER 20, 2022
STATE OF NORTH DAKOTA

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