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

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STATE OF NORTH DAKOTA

**IN THE INTEREST OF K.L., A CHILD
IN THE INTEREST OF M.S, A CHILD**

State of North Dakota,)
Petitioner/Appellee,) Supreme Court No. 20070309;
v.) 20070310
)
T.L., Mother,) District Court No. 09-06-R-549;
Respondent/ Appellant,) 09-07-R-274
K.L., a child; M.S., a child; B.A. and)
John Doe, fathers, and S.S., father,)
Respondents.)

BRIEF OF APPELLANT

**APPEAL FROM ORDER ON REQUEST FOR REVIEW
DATED SEPTEMBER 17, 2007,
OF EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE CYNTHIA A. ROTHE-SEEGER, PRESIDING**

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STATEMENT OF THE ISSUES

- I. Whether the trial court erred in determining that there was clear and convincing evidence that the conditions and causes of deprivation are likely to continue.
- II. Whether the trial court erred in determining there was clear and convincing evidence that the children will probably suffer serious physical, mental, moral, or emotional harm.
- III. Whether T.L. was deprived of effective assistance of counsel.

STATEMENT OF THE CASE

A. Nature of the case, course of the proceedings, and disposition in the trial court.

[¶1] This is an appeal of the termination of the appellant's (hereinafter "T.L.") parental rights concerning her two minor children. T.L. is the biological mother of K.L. and M.S. The mother's parental rights were terminated in an Order for Judgment on August 17, 2007, and affirmed in an Order dated September 17, 2007.

[¶2] The children were removed from T.L.'s care in June 2006 by law enforcement official due to dangerous conditions at the residence the family was

staying at. Donnette Torgerson, L.S.W., an employee with Cass County Social Services (hereinafter “social services”), petitioned the court for a finding that the children were deprived. The court issued an order on October 11, 2006, finding that the minor children, K.L. and M.S., were deprived under North Dakota law.

[¶3] Social services brought a petition for the termination of parental rights on March 22, 2007. A hearing on the petition was held on June 21 and 22, 2007, and July 10, 2007, before Judicial Referee Susan Thomas. On August 17, 2007, Referee Thomas issued Findings of Fact, Conclusions of Law, and Order for Judgment terminating the mother’s parental rights of both K.L. and M.S. (App. 8).

[¶4] The mother requested a review of the Referee’s Findings of Fact, Conclusion of Law, and Order for Judgment by the District Court pursuant to North Dakota Supreme Court under N.D.Sup.Ct.Admin.R. 13(11). (App. 18). The District Court adopted the Judicial Referee’s Finding of Fact, Conclusions of Law, and Order for Judgment. (App. 25).

[¶5] A notice of appeal was filed on October 15, 2007. (App. 37).

B. Statement of facts

[¶6] T.L. is the biological mother of K.L., born in 2001, and M.S., born in 2004. The father of M.S. is S.S. The paternity of K.L. has not been adjudicated, but B.A. is the putative biological father of K.L.

[¶7] On June 7, 2006, the family was residing in a home that was subject to a probation search. During the search, law enforcement contacted social services due to the conditions of the home being unsafe for the children. (Transcript of hearing on

June 21, 2007, (hereinafter T.) at 16). The minor children, K.L. and M.S. were taken into protective custody that same day. (T. at 17).

[¶8] A drug screen was done for T.L. and S.S. on June 9, 2006. (T. at 39). Both children tested positive for drug use, (T. at 19-20); the mother for amphetamines and THC and S.S. for methamphetamines and amphetamines. (T. at 21). A hair sample of M.S. was collected on June 9, 2006. (T. at 66). The hair sample was positive for amphetamines, methamphetamines, benzoylecgonine, and cocaine. (T. at 67). M.S.'s sample showed a low exposure to cocaine and a moderate exposure to methamphetamine. (T. at 67). A hair sample of K.L. was collected on June 9, 2006, as well. (T. at 68). K.L.'s hair sample tested positive for amphetamines and methamphetamines with the levels indicating low to medium exposure. (T. at 68-69).

[¶9] The children remained in foster care and T.L. was given supervised visitation with the children. The mother was active in all of the visitations offered (T. at 101) and there is a bonding and nurturing between the mother and the children. (T. at 102).

[¶10] Recommendations were made to T.L. that included obtaining employment, obtaining suitable housing, obtaining a chemical dependency evaluation, and undergoing treatment following the evaluation. Within four days of the children being removed from her care, T.L. had an apartment (Transcript of hearing on June 22, 2007, (hereinafter T2.) at 46), which she remained in until January, 2007, when she purchased a trailer. (T2. at 47). Within days of the children being removed, T.L. had also secured a job at Hardee's working nights. (T2. at 48). When T.L. realized that working nights would not allow her to visit her children and

attend her appointment during the day, she quit that job and has found several other jobs since. (T2. at 48). T.L. also completed domestic violence seminars through Quality Resolution following an incident of domestic violence between T.L. and S.S. (T2. at 51).

[¶11] On July 10, 2006, T.L. underwent a chemical dependency evaluation at New Hope Recovery. (T. at 76). Based on the evaluation, Laurie Ray (hereinafter Ray), a licensed addiction counselor, recommended T.L. complete out-patient treatment. (T. at 77). T.L. participated in the out-patient program on July 10th and 11th, then did not return until August 14, 15, 16, and then again on August 31. (T. at 77-78).

[¶12] After the end of August, 2006, it was determined that the mother would benefit from individual counseling to addresses her specific issues and to allow her to go more depth and have more intensity in her treatment. (T. at 78). The individual treatment was set up for weekly meeting. T.L. attended these sessions on September 16 and 26, October 3, November 28, sometime in December, and on January 23, 2007. (T. at 79).

[¶13] After January 23, 2007, it was determined that out-patient treatment was not beneficial for T.L. (T. at 80). It was recommended by Ray that T.L. undergo in-patient treatment because she was not able to completely abstain from using drug and was in need of a structured program that was more intensive and could address her daily needs. (T. at 81-82).

[¶14] Even though in-patient treatment was recommended, T.L. received the barest of assistance in locating and applying for an in-patient treatment program.

After being told that in-patient treatment was necessary, T.L. was given the telephone numbers to Southeast Human Service Center in Jamestown and Sharehouse in Fargo by Ray. (T. at 87). No other assistance was given to aid T.L. in locating, contacting, or applying for in-patient care.

[¶15] On her own, T.L. requested information from social services on Sister's Path, a treatment facility also located in Fargo, North Dakota, which is connected with Sharehouse. (T. at 34). T.L. contacted Sister's Path in March 2007, and was told that there was at least a six-month waiting list. (T2. at 60). She then contacted Lakeland, in Minnesota where she was living, but they did not offer the services she needed. (T2 at 61).

[¶16] The trial record is unclear as to the exact date when Ray notified social services that T.L. needed in-patient treatment. Ruby Knoll, T.L.'s case worker, was notified by letter at least by March 19, 2007, (T. at 118), and was notified of the recommendation for in-patient treatment sometime prior to that date. (T. at 121). Despite social service's knowledge that T.L. was in need to in-patient treatment, the only action they took was to provide T.L. with a brochure for a facility after T.L. requested it. (T. at 34).

[¶17] Social services brought a petition for the termination of parental rights on March 22, 2007.

[¶18] On June 20, 2007, T.L. was accepted into the North Dakota Teen Challenge program. The program is a structured residential treatment program which lasts between thirteen and nineteen months. (App. 6).

[¶19] A hearing on the petition was held on June 21 and 22, 2007, and July 10, 2007, before Judicial Referee Susan Thomas. At the hearing, the State presented testimony from Donnette Torgerson, L.S.W., Beverly Bohn, L.S.W., Brad Hassler, L.S.W., Dale Carrier, Vickie Schmidt, Laurie Ray, L.A.C., Carolyn Marvig, and Ruby Knoll, L.S.W. The respondent presented testimony from Robert Howe and Elias Pichard, and testified on her own behalf. On August 17, 2007, Referee Thomas issued Findings of Fact, Conclusions of Law, and Order for Judgment terminating the mother's parental rights of both K.L. and M.S. (App. 8).

[¶20] The mother requested a review of the Referee's Findings of Fact, Conclusion of Law, and Order for Judgment by the District Court pursuant to North Dakota Supreme Court under N.D.Sup.Ct.Admin.R. 13(11). (App. 18). The District Court adopted the Judicial Referee's Finding of Fact, Conclusions of Law, and Order for Judgment. (App. 25).

[¶21] A notice of appeal was filed on October 15, 2007. (App. 37).

LAW AND ARGUMENT

A. Jurisdiction

[¶22] The North Dakota Supreme Court has jurisdiction over the above-entitled matter under N.D. Const. art. VI, §§2, 6, and N.D.C.C. § 27-20-56(1).

[¶23] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provide as follows:

[¶24] An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.

N.D.C.C. § 29-28-06.

B. Standard of Review

[¶25] A lower court's decision to terminate parental rights will not be set aside unless it is clearly erroneous. N.D.R.Civ.P. 52(a). "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, we are left with a definite and firm conviction a mistake has been made." *In re D.M.*, 2007 ND 62, ¶6, 730 N.W.2d 604 (citations omitted).

C. Whether the trial court erred in determining that there was clear and convincing evidence that the conditions and causes of deprivation are likely to continue.

[¶26] The North Dakota Century Code allows for the termination of parental rights if

- a. The parent has abandoned the child;
- b. The child is subjected to aggravated circumstances as defined under subsection 3 of section 27-20-02;
- 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, in the care, custody, and control of the department, or a county social service board, or, in cases arising out of an adjudication by the juvenile court that a child is an unruly child, the division of juvenile services, for at least four hundred fifty out of the previous six hundred sixty nights; or

d. The written consent of the parent acknowledged before the court has been given.

N.D.C.C. § 27-20-44. All of the elements set forth in this statute must be proven by clear and convincing evidence by the party seeking the termination. *In Re K.S.*, 2002 ND 164, ¶6, 652 N.W.2d 341. “Clear and convincing evidence means evidence that leads to a firm belief or conviction the allegations are true.” *In re D.M.*, 2007 ND 62, ¶7, (citations omitted).

[¶27] T.L. has not raised the finding of deprivation as an issue to be reviewed by the district court nor as an issue on appeal.

1. Reasonable efforts were not used to preserve and reunite the family.

[¶28] Social services did not use reasonable efforts to meet the needs of the family and reunite them. The North Dakota Century Code requires that reasonable efforts be made to preserve and reunify families. N.D.C.C. § 27-20-32.2. Reasonable efforts are defined as:

[T]he exercise of due diligence, by the agency granted authority over the child under this chapter, to use appropriate and available services to meet the needs of the child and the child's family in order to prevent removal of the child from the child's family or, after removal, to use appropriate and available services to eliminate the need for removal and to reunite the child and the child's family. In determining reasonable efforts to be made with respect to a child under this section, and in making reasonable efforts, the child's health and safety must be the paramount concern.

N.D.C.C. § 27-20-32.2(1). The efforts of social services consisted of assistance in searching for employment, teaching parenting skills, offering transportation to and from appointments, administering drug screens, and handing out brochures for addiction treatment. These are not reasonable efforts to use the appropriate and available services to eliminate the need for removal of the children and to reunite the children and their mother.

[¶29] In the case at hand, social services became involved with the family due to instability, primarily caused by T.L.'s and S.S.'s use of methamphetamine. The mother's use of methamphetamine permeated all aspects of her life and undermined her ability to address the tasks and goals set for her. It was S.S.'s and T.L.'s use which caused the deprivation, and if the parents did not address the substance abuse issues, the children would continue to be deprived. (T. at 114).

[¶30] T.L. acknowledged that treatment for her addiction to methamphetamine was needed, (T. at 37), and was cooperative and honest. (T. at 114). T.L. underwent a chemical dependency evaluation and out-patient treatment was initially recommended. After T.L. was unable to successfully complete out-patient treatment, it was recommended that she attend in-patient treatment.

[¶31] Even though in-patient treatment was recommended, T.L. received the barest of assistance in locating and applying for an in-patient treatment program. After being told that in-patient treatment was necessary, T.L. was only given the telephone numbers to Southeast Human Service Center in Jamestown and Sharehouse in Fargo by Laurie Ray. (T. at 87).

[¶32] The trial record is unclear as to the exact date when Ray notified social services that T.L. needed in-patient treatment. Ruby Knoll (hereinafter Knoll), T.L.'s case worker, was notified by letter at least by March 19, 2007, but notified by phone prior to that date. Despite social service's knowledge that T.L. was in need of in-patient treatment, the only action they took was to provide T.L. with a brochure for a facility. This unquestionably does not constitute reasonable efforts to meet the needs of the family and for reunification.

[¶33] Social services' reasonable efforts in the case at hand amounts to drawing up a reunification treatment plan and expecting T.L., who they knew was suffering from a methamphetamine addiction, essentially to fulfill the requirements on her own. Social services did not use reasonable efforts to meet the needs of the family here; the needs to the family included treatment, specifically in-patient treatment for the mother, T.L. Simply handing someone with a cognitive deficit, such as the mother's addiction, a brochure is in no way "reasonable". The primary concern that caused the removal of the children was the parent's methamphetamine addition. Social services were well aware of this and did not take reasonable steps to address it.

[¶34] Despite a definite lack of assistance from social services, T.L. was eventually able to locate an in-patient treatment facility that would continue to provide her with the treatment and assistance necessary to completely overcome her addiction. On June 20, 2007, T.L. was accepted into the North Dakota Teen Challenge program located in Mandan, North Dakota. (App. 6). The program is a thirteen (13) - to - nineteen (19) month residential program designed to assist individuals in overcoming drug and alcohol addictions as well as the life controlling

problems associated with the addictions. (App. 6). The program would allow the children to accompany their mother either right away or later date. (T2. at 18-19).

[¶35] While the North Dakota Supreme Court has stated that “[l]ong-term and intensive treatment for a parent is not required if it cannot be successfully undertaken in time to enable the children to be returned to the parental home without causing severe dislocation from emotional attachments formed during long-term foster care,” *In re N.H.*, 2001 ND 143, ¶ 9, 632 N.W.2d, that is not the situation in the case at hand. While the North Dakota Teen Challenge is a lengthy program, it offers the opportunity for reunification while the treatment is on-going. Therefore, there would be no need to delay reunification until the completion of the program.

[¶36] While social services did provide some assistance, the assistance does not rise to the level of reasonable efforts as required by North Dakota law. It is not enough that some services were provided; the statute requires the “exercise of due diligence ... to use appropriate and available services to eliminate the need for removal and to reunite the child and the child’s family.” N.D.C.C. § 27-20-32.2(1). The statutory requirements were not met in this case.

2. The State did not provide adequate prognostic evidence.

[¶37] In determining if the causes and conditions of deprivation will continue or will not be remedied, there must be prognostic evidence forming the basis for a reasonable prediction of continued or future deprivation. *In re D.Q.*, 2002 ND 188, ¶ 21, 653 N.W.2d 713. “To show this, the State cannot rely on past deprivation alone, but must provide prognostic evidence, demonstrating the deprivation will continue.”

Interest of M.B., 2006 ND 19, ¶ 16, 709 N.W.2d 11 (citing *Interest of T.K.*, 2001 ND 127, ¶ 14, 630 N.W.2d 38).

[¶38] The crux of the deprivation in the case at hand was the methamphetamine addiction of both parents. The prognostic evidence offered by the State consisted of conclusory statements based on the mother's past actions. There was no prognostic evidence presented by the State that demonstrated that the deprivation would continue.

[¶39] T.L. had made significant efforts to comply with the requirements of the reunification plan. The mother secured housing and employment within days of the children being removed from her care. (T2. at 46-48). She completed the domestic violence seminars through Quality Resolutions. (T2. at 51). T.L. had a chemical dependency evaluation and followed up with the recommendations to the best of her ability at that time. When she was told that she would need in-patient treatment, she attempted to fulfill that requirement by actively seeking assistance. Unfortunately, the assistance was not forthcoming. At the time of trial, the mother was striving to overcome her addiction and had made momentous progress. T.L. had addressed her substance abuse issues and by the June 22, 2007, hearing, she had been clean for sixty-six (66) days, had been attending Narcotics Anonymous meetings, and had changed her peer group. (T2. at 61-62). Overall, T.L. made considerable efforts to fulfill the requirements of the reunification plan and accomplished many of them.

[¶40] While an addiction to methamphetamine is a difficult addiction to overcome, it is by no means impossible. There is a general recovery timeline for those recovering from a methamphetamine addiction. The Matrix Institute has

identified five stages: the Withdrawal Stage which lasts zero to fifteen days; the Honeymoon Stage which occurs between sixteen and forty-five days; the Wall Stage which occurs between forty-five and one hundred-twenty days; the Adjustment Stage which occurs between one hundred-twenty days and one hundred-eighty days; and the Maintenance Stage which occurs after one hundred-eighty days. Anna M. Johnson, *A Perspective Regarding Treatment for Methamphetamine Addiction*, 82 N.D.L.Rev. 1435, 1439-1440 (2006).

[¶41] In addition to T.L.'s efforts to get and remain off methamphetamine on her own and through the use of Narcotics Anonymous, T.L. had been able to locate an in-patient treatment facility that would continue to provide her with the assistance necessary to continue to overcome her addiction. As stated previously, the mother was accepted into the North Dakota Teen Challenge program which is a residential program designed to help individuals in overcoming drug and alcohol addictions. (App. 6). Elias Pickard, the Admissions Director with Teen Challenge, testified at the termination hearing that T.L. seemed to have a real willingness to change and that she was not seeking help as a way to simply keep her children. (T2. at p. 17).

[¶42] The State relied on the mother's past actions in presenting their case that the deprivation was likely to continue. They did not provide sufficient prognostic evidence of a continued deprivation. T.L. did not hide the fact that she was addicted to methamphetamine and she sought help for her addiction. This is not to say that she did not stumble in her attempts to overcome the gripping addiction of methamphetamine. Instead of simply giving up when she was faced with a lack of support and assistance, she managed to abstain from the drug for sixty-six days,

locate and attend Narcotics Anonymous meetings, and locate, apply, and be accepted into a well respected, structured, in-patient treatment facility. There was not sufficient prognostic evidence that the deprivation was likely to continue. The opposite was presented: that T.L. was on her way to a full and lasting recovery from her addiction.

D. Whether the trial court erred in determining there was clear and convincing evidence that the children will probably suffer serious physical, mental, moral, or emotional harm.

[¶43] Evidence used to show a parent's rights should be terminated must demonstrate that due to continued deprivation, the child is suffering, or will in the future suffer physical, mental, moral, or emotional harm. *In re E.R.*, 2004 ND 202, ¶10, 688 N.W.2d 384. The harm that is resultant of deprivation must be clear and convincing. *In re T.F.*, 2004 ND 126, ¶ 18, 681 N.W.2d 786. There were signs of past deprivation evidenced by the hair samples which indicated the children had been exposed to methamphetamine, and one child had been exposed to cocaine. These were signs of past deprivation, not future deprivation, and not necessarily of present deprivation. The only evidence presented indicating the children will probably suffer physical, mental, moral, or emotional harm is a statement from Ruby Knoll, a licensed social worker, to that effect. This in no way raises to the standard of clear and convincing evidence.

[¶44] The evidence must also show that the inability to care for a child will continue long enough to make it impractical or improbable that there would be successful assimilation of the child back to the family if the parental rights are not

terminated. *In re E.R.*, 2004 ND 202, ¶8. There was no indication from any witness that the successful assimilation of the children back into the family would be impractical or improbable. There was no suggestion that the children have developed an emotional attachment to any foster care provider. The evidence presented was that the mother was very involved in the children's lives. T.L. participated in the visits with her children, she was nurturing to the children, and there was an emotion bond between the mother and the children. (T. at 101-102).

[¶45] The testimony presented at the hearing showed that T.L. had begun the process of overcoming her addiction. She had abstained from drugs for over two months and was taking positive steps in the right direction including attending Narcotics Anonymous meetings and changing her peer group. (T2. at 61-62). She had also sought out an appropriate in-patient treatment facility which would allow the children to join her either initially or at a later time. These steps in the right direction by T.L. along with her successful completion of other requirements such as completion of the domestic violence seminars indicate that the cause of the deprivation is not likely to continue.

E. Whether T.L. was deprive of effective assistance of counsel?

[¶46] T.L. was deprived of effective counsel regarding the termination of her parental rights.

[¶47] The issue of a parent's right to counsel during a termination of parental rights proceeding has been established under North Dakota law. The issue of whether a parent may raise the claim of ineffective assistance of counsel during a termination of parental rights proceedings has not been clearly established.

[¶48] The North Dakota Supreme Court was presented with the issue of ineffective assistance of counsel for the termination of parental rights in *In Interest of D.J.H.*, 401 N.W.2d 694 (N.D. 1987). The case's central claim was that the appellant, Sally, was denied independent counsel in the termination hearing was therefore not afforded effective counsel. *Id.* The Court focused on whether or not the trial court abused its discretion in not granting the motion to vacate. *Id.* The Court concluded that Sally was effectively represented by counsel at the termination hearing and the trial court had not abused its discretion in not granting the motion to vacate. *Id.* at 702.

[¶49] The North Dakota Supreme Court also addressed the issue of ineffective assistance of counsel in the termination of parental rights in *Matter of Adoption of J.M.H.*, 1997 ND 99, 564 N.W.2d 623. In that case, the Court recognized that “an indigent parent has a right to court-appointed counsel”, *Id.* at ¶ 21, but failed to “recognize a claim for ineffective assistance of counsel in a civil action.” *Id.* at ¶ 22.

1. Right to court-appointed counsel

[¶50] The right of an indigent parent to court-appointed counsel has a constitutional basis and has been codified in the North Dakota Century Code.

[¶51] The termination of parental rights is “[a] punishment more severe than many criminal sanctions.” *Matter of Adoption of K.A.S.*, 499 N.W.2d 588, 563-564 (N.D. 1993) (citations omitted). Courts throughout the United States have addressed the issue of effective assistance to indigent parents in termination of parental rights cases. The Court of Appeals in Texas aptly stated:

In the absence of a right to effective assistance of counsel, a parent whose parental rights are erroneously terminated due to counsel's

deficiencies has no meaningful remedy to cure such error... Monetary damages are wholly inadequate in termination cases given the nature and severity of the interests involved. Thus, a claim for ineffective assistance of counsel is the only meaningful redress for a parent whose parental rights have been terminated in a proceeding where appointed counsel failed to render effective assistance. Granting a right to effective assistance of counsel would alleviate the possible risk that parental rights might be terminated due to the ineffective assistance of appointed counsel.

In re K.L., 91 S.W.3d 1, 11 (Tex.App. 2002).

[¶52] The North Dakota Supreme Court has stated that “[i]t is beyond question in this jurisdiction that parents have a fundamental constitutional right to parent their children which is of the highest order.” *Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 564 (N.D. 1993). North Dakota has also recognized that Article I, Section 1, of the North Dakota Constitution, which guarantees liberty and the pursuit of happiness, encompasses the right to enjoy “the domestic relations and the privileges of the family and the home.” *Id.* at 564-565 (citations omitted).

[¶53] The right of an indigent parent to court-appointed counsel has been codified to create a statutory right. Section 27-20-26 of the North Dakota Century Code provides: “Except as otherwise provided in this section, a party who is indigent and unable to employ legal counsel is entitled to counsel at public expense at custodial, post-petition, and informal adjustment stages of proceedings under this chapter.” A termination of parental rights case falls under the North Dakota Juvenile Court Act, referenced in Section 27-20-26, N.D.C.C., N.D.C.C. § 27-20-44. In addition, *In re J.Z.*, clarified that the right to counsel extends to all parties in a proceeding under the Act. *In re J.Z.*, 190 N.W.2d 27, 31. Accordingly, as a party to the termination of parental rights proceeding, T.L. has a statutory right to legal counsel.

[¶54] The state legislature's guarantee of an indigent parent's right to a court-appointed attorney also guaranteed the right that the attorney provide effective assistance. "The right to counsel includes the right to effective counsel and ineffective, incompetent, or inadequate representation is the same as having no counsel at all." *State v. Micko*, 393 N.W.2d 741, 746 (N.D. 1986). Therefore, T.L. not only had the constitutional and statutory right to an attorney, she has the right to the effective assistance of that attorney.

2. Proper method to raise the issue

[¶55] Termination of parental rights cases are categorized as civil in North Dakota. The ordinary remedy for deficient counsel in a civil case is a malpractice action for money damages. In a termination of parental rights case though, liberty and the pursuit of happiness are at stake. Termination of parental rights is traumatic and permanent; no amount of money can substitute for the loss of the child nor will it ever make the parent whole. A malpractice suit will not allow a parent to regain custody of their child.

[¶56] Unlike in civil cases, there is an established right to effective assistance of counsel in criminal matters. The North Dakota Supreme Court has discouraged bringing claims of ineffective assistance of counsel in criminal cases on direct appeal. *See State v. McDonell*, 550 N.W.2d 62, 64 (N.D. 1996). Instead, the Court has encouraged defendants to bring these claims in a post-conviction proceeding to allow the parties to fully develop the record and provide a showing of counsel's performance and the impact of it on the claim. *State v. Schweitzer*, 2007 ND 122, ¶ 25, 735 N.W.2d 873. As there is no procedural equivalent to post-conviction relief

for termination of parental rights proceedings, claims of ineffective assistance of counsel must be raised on direct appeal. For that reason, T.L. filed a notice of appeal to the North Dakota Supreme Court with the intention to raise ineffective assistance of counsel as part of her claim for relief.

3. Standard for effective assistance counsel

[¶57] No clear standard has been articulated for assessing ineffective assistance of counsel claims for civil cases in North Dakota. *But see Matter of Adoption of J.M.H.*, 1997 ND 99, (discussing the standard used in criminal cases in a termination of parental rights case alleging ineffective assistance of counsel, but not explicitly applying it). Other states are divided among the standard for assessing these claims; however, the majority of states have adopted the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), which set the standard for claims of ineffective assistance of counsel in criminal cases. *See John M. v. Arizona Dept. of Economic Sec.*, 217 Ariz. 320, 173 P.3d 1021, 1026 (Ariz.App. Div.2, 2007); *N.J. Div. of Youth and Family Servs. v. B.R.*, 1992 N.J. 301, 929 A.2d 1034, 1038-39 (2007). Although it is not settled law, an inference can be drawn from past North Dakota Supreme Court cases and the trend in the majority of states that the standard likely to be adopted by North Dakota is the one announced in *Strickland*.

[¶58] Like the majority of states, North Dakota uses the *Strickland* standard for claims of ineffective assistance of counsel in connection with criminal cases. *Micko* at 746; *Schweitzer* at ¶ 23. Under *Strickland*, a defendant must prove that (1) the representation was below an objective standard of reasonableness and (2) the defendant was prejudiced by the deficient representation. *Schweitzer* at ¶ 23.

4. Analysis of the case at hand

[¶59] T.L. had a constitutional and a statutory right to court-appointed counsel and since the right to counsel is worthless without the right of effective counsel, T.L. also has a right to the effective assistance of counsel. The issue of ineffective assistance of counsel is properly raised in a direct appeal from the trial court since there is no other adequate procedure or remedy available.

[¶60] In the case at hand, T.L.'s claim of ineffective assistance of counsel stems from counsel's failure to present evidence to the trial court that T.L. had been admitted and checked into a residential inpatient treatment center. Trial counsel was fully aware and knowledgeable of the requirements for termination of parental rights. Trial counsel was also aware that the crux of T.L.'s difficulties in regaining custody of her children was her methamphetamine addiction. Despite this knowledge, trial counsel failed to present evidence, which was in T.L.'s possession at the July 10, 2007, indicating her commitment to treatment and to regaining custody of her children.

[¶61] It was apparent from the hearings held on June 21 and 22, 2007, that there was doubt whether T.L. would be able to overcome her addiction and maintain sobriety. Testimonial evidence was presented by T.L. as to her sobriety and her efforts to seek treatment at an in-patient facility in Mandan, North Dakota. The evidence presented regarding that facility, North Dakota Teen Challenge, was a letter of acceptance and the testimony of the admissions officer. At the July 10, 2007, portion of the termination of parental rights hearing, however, T.L. had not only been

accepted into a program, but she had been fully admitted and had checked into the Robinson Recovery Center.

[¶62] Robinson Recovery Center is an in-patient residential treatment facility that utilizes the Matrix Model of treatment. Mr. Howe testified that programs that utilize the Matrix Model have the best successes rate with methamphetamine addictions since it is “cog-rehabilitation”. (T.2 at 31, 33). Robinson Recovery Center provides the structure of in-patient treatment as well as utilizing a cognitive-behavior approach to treatment which dramatically raises T.L.’s chance for continued success in overcoming her addiction.

[¶63] T.L.’s admission to Robinson Recovery Center not only showed that she was continually dedicated to obtaining and continuing treatment, but that she wanted the best chance of success. T.L. had begun the long walk down the road of recovery through the use of Narcotics Anonymous. Her continued efforts to locate and be admitted to the best treatment program possible for addiction flies in the face of possible prognostic evidence that she would not become a fit parent within a reasonable amount of time.

[¶64] There was no strategic benefit from not presenting evidence concerning T.L.’s admission to Robinson Recovery Center to the trial court. On the contrary, a failure to present evidence that is reasonably calculated to counter the allegation from the opposing side is potentially detrimental to the case and undermines the client’s best interests. Accordingly, trial counsel’s failure to present the evidence was not objectively reasonable in the case at hand.

[¶65] In addition to trial counsel's actions being unreasonable, T.L. was prejudiced by her deficient representation. T.L.'s methamphetamine addiction was cited by the Judicial Referee in her Order and by the District Judge in her Order as a significant indication that the conditions and causes of deprivation are likely to continue and that the children are suffering and will likely suffer serious physical, mental, moral, and emotional harm. Through trial counsel's inadequate and ineffective assistance, evidence available to counter these arguments was not presented to the court. Had the evidence been presented, there is a high likelihood that the court would not have found that the conditions and causes of deprivation were likely to continue or that the children were suffering and will likely suffer serious harm. Therefore, T.L. was prejudiced by her deficient representation.

[¶66] T.L.'s claim of ineffective assistance of counsel lies largely outside of the record. It is easy to understand why the North Dakota Supreme Court has encouraged defendant to utilize the post-conviction proceedings for these claims. Since there is no similar remedy for a civil claim of this nature, the case should be remanded to the trial court for an evidentiary hearing to develop a full record of trial counsel's conduct.

CONCLUSION

[¶67] Appellant requests the Court reverse the Order of the District Court and reinstate her parental rights to K.L. and M.S., the minor children. The appellant also request the Court remand the claim of ineffective assistance of counsel to the trial court for an evidentiary hearing.

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