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

**APR 25 2008**

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;
vs.	)	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 APPELLEE**

**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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**[¶2] STATEMENT OF ISSUES**

- I. WHETHER THE TRIAL COURT PROPERLY TERMINATED THE PARENTAL RIGHTS OF T.L. WHERE CLEAR AND CONVINCING EVIDENCE ESTABLISHED THAT THE CAUSES OF DEPRIVATION ARE LIKELY TO CONTINUE OR WILL NOT BE REMEDIED?
- II. WHETHER THE TRIAL COURT PROPERLY TERMINATED THE PARENTAL RIGHTS OF T.L. WHERE CLEAR AND CONVINCING EVIDENCE ESTABLISHED THAT K.L. AND M.S. ARE SUFFERING OR WILL SUFFER SERIOUS PHYSICAL, MENTAL, MORAL, OR EMOTIONAL HARM?
- III. WHETHER T.L. HAD EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL MOVED FOR A CONTINUANCE AND PRESENTED EVIDENCE TO THE COURT THAT T.L. HAD BEEN ACCEPTED TO A METHAMPHETAMINE TREATMENT PROGRAM THE DAY BEFORE THE TRIAL STARTED?

### **[¶3] STATEMENT OF THE CASE**

[¶4] This is an appeal from an Order on Request for Review dated September 27, 2007, filed by the Respondent, T.L., which affirmed the Findings and Order of the Judicial Referee and Memorandum dated August 17, 2007, which terminated the parental rights of T.L., B.A., John Doe, and S.S. to the children K.L. and M.S.

[¶5] On March 22, 2007, a petition was filed by Ruby Knoll, a social worker with Cass County Social Services, seeking termination of parental rights with regard to two children, K.L., who was born on June 6, 2001, and M.S., who was born on August 22, 2004.

[¶6] Trial was held on June 21 - 22, 2007, and July 10, 2007. T.L. and S.S. appeared with counsel. Part way through the first day of trial, S.S. affirmed a conditional affidavit of voluntary termination of his parental rights to the child, M.S.

[¶7] T.L. filed a Request for Review dated August 24, 2007. The Honorable Cynthia Rothe-Seeger, upon de novo review of the record, adopted the Findings and Order of the Judicial Referee and Memorandum.

[¶8] The mother filed this appeal. No other Respondent joined in the Request for Review or this appeal.

### **[¶9] STATEMENT OF THE FACTS**

[¶10] At the time of trial on this matter on June 21 and 22, 2007, and July 10, 2007, the children, K.L. and M.S. had been in foster care for just over a year. On June 7, 2006, the children, K.L., then age five and M.S., then age one and one-half, were removed from the custody of T.L. and S.S., the father of M.S., by law enforcement. (Tr. Vol.I at 17).

[¶11] In June of 2006, T.L. and S.S. had been temporarily living at an apartment in Fargo. (Tr. Vol.I at 16). The renter was subject to a probation search on June 7, 2006. (Tr.

Vol.I at 16). Police officers and a child protection worker from Cass County Social Services observed paraphernalia, needles, pills in baggies, and alcohol in various places of the residence which were accessible to the children. (Tr. Vol.I at 16). Sleeping arrangements for the children were on the living room floor while T.L. and S.S. were sleeping on a sofa. (Tr. Vol.I at 17). Law enforcement determined that the residence was not safe for the children. (Tr. Vol.I at 16). T.L. told the CPS worker that prior to the family's stay at that residence they had lived at a motel for three weeks. (Tr. Vol.I at 16).

[¶12] Both T.L. and S.S. admitted to using illegal drugs. (Tr. Vol.I at 39; Vol.II at 53). On June 9, 2006. S.S. tested positive for methamphetamine and amphetamine and T.L. tested positive for amphetamine in drug screens administered at Cass County Social Services. (Tr. Vol.I at 19, 67).

[¶13] On June 8, 2006. hair samples had been collected from the children and were submitted for testing. (Tr. Vol.I at 20). Test results for M.S. indicated exposure to amphetamine, methamphetamine, benzoecgonine, a derivative of cocaine, and cocaine. (Tr. Vol.I at 67). The methamphetamine indicated a level of 2578 picograms, well above the cut off level of 300 picograms. (Tr. Vol.I at 67). Test results for K.L. indicated exposure to amphetamine and methamphetamine.(Tr. Vol.I at 68, 69).

[¶14] Ruby Knoll was assigned as case manager on June 8, 2006. (Tr. Vol.I at 105). She met with T.L. and S.S. and outlined what services the family needed. (Tr. Vol.I at 46, 105-106; Vol.II at 66). A case plan was developed addressing the primary areas that T.L. needed to address: chemical dependency, mental health, housing, employment and relationship counseling (Tr. Vol.I at 106). Ms. Knoll provided T.L. with information about where services were available and offered assistance to T.L. to make appointments. (Tr. Vol.I

at 108). She also directed the parent aide to assist with calls and transportation. (Tr. Vol.I at 108). The parent aide also offered assistance with writing resumes and filling out and dropping off job applications. (Tr. Vol.I at 109). Permanency planning meetings were regularly scheduled. T.L. attended three of the meeting but missed two.(Tr. Vol.I at 119).

[¶15] In July, 2006, T.L. went to New Hope Recovery for a chemical dependency evaluation. (Tr. Vol.I at 76. 106). She met with Laurie Ray, a licensed addiction counselor, for an initial assessment and began outpatient treatment on July 10, 2006. (Tr. Vol.I at 76). The outpatient program at New Hope Recovery is a six week program consisting of group therapy three times a week for two hours followed by an aftercare component of twelve weeks of weekly meetings. (Tr. Vol.I at 76). T.L. went to sessions on July 10 and 11, 2006, then did not return to treatment until August 14, 2006. (Tr. Vol.I at 77). On August 31, 2007, with T.L.'s non-attendance having affected her ability to do group therapy, Ms. Ray recommended individual counseling which would only require T.L. to attend sessions one hour per week. (Tr. Vol.I at 78). From the end of August, 2006, until mid December, 2006, T.L. attended only five sessions of individual counseling. (Tr. Vol.I at 78).

[¶16] On November 13, 2006, T.L. attended an intake appointment with Dale Carrier for an assessment of her mental health needs. (Tr. Vol.I at 51). Mr. Carrier, a Licensed Professional Clinical Counselor, diagnosed T.L. as having major depressive disorder. (Tr. Vol.I at 53). Appointments for counseling were set up and a referral was made for assessment of medications for T.L. (Tr. Vol.I at 54). T.L. attended the first session and then failed to show for any further counseling or to follow up on the medical assessment. (Tr. Vol.I at 54). Mr. Carrier testified that T.L. did not indicate to him that she was actively using methamphetamine. (Tr. Vol.I at 60).

[¶17] On January 23, 2007, when T.L. last met with Laurie Ray, T.L. told her about her continuing methamphetamine use. ( Tr. Vol.I at 81; Vol.II at 59). During counseling, Laurie Ray had made recommendations to T.L. that she needed to pursue getting help for her mental health issues, seek rape and abuse services for her relationship issues with S.S., find appropriate housing and steady employment, and abstain from chemical use. (Tr. Vol.I at 80; Vol.II at 54-55). Ms. Ray testified that T.L failed to follow through on all of these recommendations. (Tr. Vol.I at 80). Based on T.L.'s failure to engage in outpatient group therapy or individual counseling, Ms. Ray told T.L. that she would need a structured program where they could address her needs daily. (Tr. Vol.I at 81). Ms. Ray provided T.L. with possible inpatient treatment facilities both in Fargo, including Sharehouse, and Jamestown, and advised that she contact Southeast Human Service Center to assist her in accessing those programs. (Tr. Vol.I at 87; Vol.II at 59). Ms. Ray testified that in January, 2007, she provided Ruby Knoll with the recommendations she had made to T.L. (Tr. Vol.I at 89, 90).

[¶18] In December, 2006, T.L was requested to do a UA at Cass County Social Services and again tested positive for methamphetamine. (Tr. Vol.I at 29). In January, 2007, she requested to be tested by Cass County Social Services and the results were negative. (Tr. Vol.I at 29). She then disputed the positive test results obtained in December, claiming they were invalid. (Tr. Vol.I at 29). In February, T.L. refused a request to do either a UA or provide a hair sample. (Tr. Vol.I at). She was advised that refusal to test would be considered a positive test. She became upset and agitated about the request and left Cass County Social Services without providing a sample. (Tr. Vol.I at 29, 30, 31).

[¶19] On March 8, 2007, almost two weeks after the initial request for T.L. to provide a hair sample for testing, she did so. (Tr. Vol.I at 64, 113). The results of the testing were



positive for methamphetamine and amphetamine at levels that showed substantial methamphetamine use. (Tr. Vol.I at 65).

[¶20] T.L. testified she made a phone call to Sister's Path sometime following the end of her unsuccessful treatment attempts at New Hope Recovery "just to see what it was about." (Tr. Vol.II at 59, 69). She made no further attempts to seek treatment for her methamphetamine use until late March, 2007. (Tr. Vol.II at 59-60). When she was at Cass County Social Services on March 22, 2007, she asked about the Sister's Path program, (Tr. Vol.II at 59-60), having made her own determination to focus solely on programs that would allow her to have the children reside with her. (Tr. Vol.II at 70). T.L. testified that the person she spoke to at Sister's Path told her about the Teen Challenge Program. (Tr. Vol.II at 61). She was provided with information and talked with both Carolyn Marvig, the parent aide with whom she had worked since August, 2006, and Bev Bohn about what she needed to do to reunify with her children. (Tr. Vol.II at 59, 70). T.L. says she did call Sister's Path again but when she found out there was a waiting list, she was "discouraged" and "went out and used." (Tr. Vol.II at 59, 70).

[¶21] T.L. failed to show up at a meeting set in March, 2007, with Ruby Knoll to talk with her about her progress toward reunification. (Tr. Vol.I at 119). At that time, based upon the lack of progress, Ruby Knoll made a determination to proceed with a petition to terminate T.L.'s parental rights to K.L. and M.S. (Tr. Vol.I at 119).

[¶22] From March, 2007, until June 19, 2007, T.L. made no further efforts to seek treatment for her meth use. She made no further efforts to seek therapy or medication for her depression. She remained unemployed, having five jobs from June, 2006, until June, 2007, and not working at any of them for more than two weeks. (Tr. Vol.II at 68). She supported

herself by 'loans' from other people and selling possessions. (Tr. Vol.II at 67).

[¶23] Evidence regarding where T.L. lived from June, 2006, until June, 2007, was more conflicting. (Tr. Vol.I at 111). She stated she had an apartment "within four days" of the children being removed from her custody and remained there until January, 2007. (Tr. Vol.II at 46-47). It appears this is the same apartment where S.S. resided even though following a domestic violence incident in July, 2006, for which T.L. was arrested and charged, there was a no contact order in effect between T.L. and S.S. (Tr. Vol.I at 112; Vol.II at 49). She also testified that she broke off her relationship with S.S. in January, 2007, and then needed to find her own place. (Tr. Vol.II at 58). She said she stayed with a friend then a friend gave her \$1,000.00 to buy a trailer located in Moorhead, yet she also testified that the license for the trailer was "in the mail, so to speak" at the time of trial in June, 2007. (Tr. Vol.II at 67). At some point, electricity and water services were cut off to the trailer, but T.L. continued to stay there. (Tr. Vol.II at 72). To complicate matters, T.L. was on probation in Minnesota. (Tr. Vol.II at 70). Ultimately, she had to seek a travel permit from her probation officer so she could reside with her mother in Fargo. The travel permit had expired on June 19, 2007, but she testified that at the time of trial she continued to reside with her mother in North Dakota. (Tr. Vol.II at 72, 73).

[¶24] On June 19, 2007, T.L. contacted Teen Challenge, the program she had been referred to by Sister's Path at the end of March, 2007. (Tr. Vol.II at 61). T.L. spoke to Elias Pickard, Admissions Director of the program, a mandatory thirteen month inpatient addiction program, about filing out an application. (Tr. Vol.II at 17). With the assistance of Ruby Knoll, her case manager at Cass County Social Services, T.L. faxed a completed application and received a letter of acceptance dated June 20, 2007. (Tr. Vol.II at 19).

## [¶25] ARGUMENT

[¶26] Under N.D.C.C. §27-20-44(1)(b)(1), the trial court can terminate parental right where clear and convincing evidence establishes that a child is deprived, that the causes of deprivation are likely to continue and that the child is suffering, or is likely to suffer, serious physical, mental, moral, or emotional harm. In the Interest of A.S., 1998 ND 181, 584 N.W.2d 853. (citing N.D.C.C. §27-20-44(1)(b)(1)). N.D.R.Civ.P 52(a) provides that the findings of fact in a juvenile matter should not be set aside unless they are clearly erroneous. The party appealing a juvenile court decision has the burden of showing that the findings of fact are clearly erroneous. Striefel v. Striefel, 2004 ND 210, ¶8, 689 N.W.2d 415. On review, the evidence is viewed in the light most favorable to the findings without reweighing the evidence or reassessing the credibility if there is evidence supporting the findings in the record. Id.

I. WHETHER THE TRIAL COURT PROPERLY TERMINATED THE PARENTAL RIGHTS OF T.L. WHERE CLEAR AND CONVINCING EVIDENCE ESTABLISHED THAT THE CAUSES OF DEPRIVATION ARE LIKELY TO CONTINUE OR WILL NOT BE REMEDIED?

[¶27] Although evidence of past deprivation alone is not sufficient to terminate parental rights, evidence of a parent's background, including previous abuse or deprivation, may be considered in determining whether deprivation is likely to continue. In the Interest of A.L., 2001 ND 59, ¶14, 623 N.W.2d 418 (citations omitted). Prognostic evidence is necessary to determine if the causes of deprivation will continue. Id. This Court has defined prognostic evidence as evidence that forms a basis for a reasonable prediction of future behavior. Id. In affirming the termination of parental rights in In the Interest of A.L., the Court found that the evidence supported that they had been offered services over almost a

ten year time period and yet the parents refused to change their behaviors to prevent deprivation of their children. Id. at ¶16. The Court pointed out that the evidence established a “pattern of conduct” by the parents that formed a basis for the reasonable prediction of their future behavior and established that the children were suffering and would continue to suffer harm. Id. A lack of parental cooperation with social service agencies is also pertinent to determining if deprivation will continue. M.B., 2006 ND 19, ¶16, 709 N.W.2d 11; Interest of E.G., 2006 ND 126, ¶10, 716 N.W.2d 469; Interest of A.K., 2005 ND App 3, ¶8, 696 N.W.2d 160.

[¶28] T.L. concedes that the children, K.L. and M.S.. are deprived children and does not raise that issue on appeal.

[¶29] Evidence was presented to the trial court outlining a lifestyle of instability and methamphetamine use by T.L. since before the children were placed into protective custody until the time of trial. She and the father of M.S. were temporarily living in a residence with other adults who were on probation. When a search was conducted by law enforcement, the children were removed and placed into foster care.

[¶30] Hair sample testing conducted on samples collected on June 8, 2006, for both children showed exposure to a variety of illegal drugs. T.L. continued to test positive for methamphetamine use while the children were in care. She tested positive for methamphetamine use in December 2006. In January, 2007, she requested to be tested and the results were negative. She refused a request for testing in February, 2007, even though she was advised a refusal would be considered a positive test. She continued a relationship with S.S. that was marked by domestic violence. She continued to live with S.S. in violation of a protection order which was the result of an incident of domestic violence between them

in July, 2006. She testified she remained in that relationship until sometime in January, 2007,

[¶31] After the children were removed from her care, T.L. was offered extensive ongoing services by Cass County Social Services including chemical dependency and mental health evaluations, a parent aide who offered transportation and assistance with employment applications and was available during visitations for guidance on parenting issues, case management services with a plan of care setting out the steps she needed to take to reunify with her children and referrals to the services she needed. Permanency planning meetings were regularly scheduled, with T.L. attending three out of five of the meetings. Even with these resources available to her, T.L. made little or no progress.

[¶32] T.L. had the opportunity to access many services available in the community. She completed a chemical dependency evaluation and a mental health evaluation and failed almost totally to engage in the counseling offered to her. She remained unemployed at the time of trial, admitting she had had five jobs in the year's time but managed to sustain employment for a two week period, at most. The trailer she testified she purchased after being given the money to do so by a friend, was uninhabitable at the time of trial, with no running water or electricity, even though she testified she lived there for a time after the utilities were cut off. By her own admission, she continued using methamphetamine until at least the end of April, 2007. The only service offered that she consistently engaged in was visitation of the children.

[¶33] Prior to the children being placed into foster care, T.L. made choices concerning use of illegal drugs and her unstable lifestyle and she continued to make the same choices following their placement. She has made choices throughout the time K.L. and M.S. have been in foster care that are inconsistent with their safety and well being. At the time

of trial, she had not completed the tasks needed to reunify with K.L. and M.S. yet she wanted the court to grant her another six months to finally engage in treatment. Following any initial success at a treatment program, T.L. would have to complete a program and show that she can remain drug free. When a parent, through voluntary actions, without reasonable justification, makes himself unavailable to care for and parent a young child, the child should not be expected to wait or assume the risk involved in waiting for permanency and stability in her life.” In re A.K., 2005 ND App3, ¶8.

[¶34]Cass County Social Services offered multiple services to T.L. and she failed to take advantage of them. There is little to no evidence in the record that T.L. made changes or sustained them for any length of time. She would still face months of treatment and aftercare before being available to parent K.L. and M.S. A parent’s expressed willingness to make changes or engage in intensive and long term treatment is outweighed by the children’s needs for nurturance and permanence. In the Interest of A.S., 1989 ND 181, 584 N.W.2d 853.

II. WHETHER THE TRIAL COURT PROPERLY TERMINATED THE PARENTAL RIGHTS OF T.L. WHERE CLEAR AND CONVINCING EVIDENCE ESTABLISHED THAT K.L. AND M.S. ARE SUFFERING OR WILL SUFFER SERIOUS PHYSICAL, MENTAL, MORAL, OR EMOTIONAL HARM?

[¶35]To terminate a parent’s rights, there must also be evidence that continued deprivation had led to the children suffering or will in the future probably result in physical, mental or emotional harm to the children. In the Interest of D.D., 2006 ND 30, ¶23, 708 N.W.2d 900. “Assisting a parent to establish an adequate environment for the child by offering long term and intensive treatment is not mandated if it cannot be successfully undertaken in a time frame that would enable the child to return to the parental home without

causing severe dislocation from emotional attachments formed during long-term foster care.”

In the Interest of E.R., 2004 ND 202, ¶11, 688 N.W.2d 384. The conduct of a parent plus “prognostic evidence, including reports and opinions of the professionals involved” may be used to form the determination that deprivation will continue. In the Interest of J.S., 2008 ND 9, ¶15, 743 N.W.2d 808 (citing T.A., 2006 ND 210, ¶15, 722 N.W.2d 548), and the risk of harm may also be proven by prognostic evidence. In the Interest of T.A., 2006 ND 210, ¶19, 722 N.W.2d 548 (citing In the Interest of E.G., 2006 ND 126, ¶15, 716 N.W.2d 469). A parent’s lack of cooperation with social services can also be evidence with deprivation is likely to continue. Id., at ¶15 (citing In re T.F., 2004 ND 1267, ¶19, 681 N.W.2d 786).

[¶36] T.L. testified that she was not employed and did not have stable housing at the time of trial. She claimed she had a job “within a couple of days” and housing “within four days” of the time the children were placed into protective custody, then testified that she had five jobs from June, 2006, to June, 2007, why she quit some of them, and that the longest time she was employed was about two weeks.

[¶37] The trial court heard extensive evidence that T.L. had not successfully engaged in any level of treatment for her methamphetamine use and could point only to having made an application to an inpatient treatment program two days prior to the start of trial. She had made no steps to address her mental health needs since November, 2006. She continued to demonstrate her lack of insight into how her failure to make any progress on addressing the issues that brought the children into care would affect them. Even if she engaged in the needed inpatient treatment beginning in July, 2007, she was many months away from being able to provide for the needs of her children even with continued services. During that time, K.L. and M.S. would continue to lack permanence in their lives and depend on others for

nurturing—of necessity becoming bonded with their caretakers.

[¶38] While T.L.'s plea that she needs her children is heartbreaking, the reality is that these children need permanence. The evidence regarding T.L.'s progress during the year while K.L. and M.S. were in foster care is dismal. If she truly had been clean for 66 days at the time of trial, she still had months to go.

[¶39] Based upon T.L.'s own expert's testimony, her chances of getting free of her addiction would depend on her motivation. Robert Howe testified that success all depends on the individual, "because if [they] don't want to quit, there is no program that is going to do anything for [them.] [They are] going to have to want to quit. ...or [they] can do treatment the rest of [their] life and nothing will happen." (Tr. Vol.II at 34). The testimony of Mr. Howe provided the trial court with the realistic chances for T.L.'s recovery from methamphetamine addiction. That evidence along with evidence of T.L.'s inability to prioritize her children's needs above her own provided a firm basis for the court's decision to terminate her parental rights. T.L. continued to use, by her own admission, until well after the termination petition was filed. She stayed in a relationship, violating a protection order, that undermined her ability and motivation to seek treatment. In the six months preceding the trial, T.L. made two phone calls and submitted an application to a program which she testified she knew about in March, 2007, two days before the trial.

[¶40] T.L. knew, as early as January, 2007, that she would have to do inpatient treatment. Yet she continued to follow the patterns of behavior she had in the first six months the children were in care. The positive hair tests for the children indicated that those patterns of behavior were well established before they ever came into care. T.L. exposed her children to high levels of illegal drugs and continued to use those drugs for months and months after



the children were in care.

[¶41] The trial court did not err in finding that the children had suffered harm and were likely to continue to suffer the effects of having a parent whose drug using lifestyle came first. T.L. was no closer at the time of trial to being able to provide K.L. and M.S. with consistent physical or emotional care or provide a stable, drug free home for them than she was in June, 2006. The trial court had before it plentiful prognostic evidence from professionals who tried to provide services to T.L., to T.L.'s own testimony about her status at the time of trial from which to conclude that the conditions and causes of deprivation were likely to continue.

III. WHETHER T.L. HAD EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL MOVED FOR A CONTINUANCE AND PRESENTED EVIDENCE TO THE COURT THAT T.L. HAD BEEN ACCEPTED TO A METHAMPHETAMINE TREATMENT PROGRAM THE DAY BEFORE THE TRIAL STARTED?

[¶42] N.D.C.C. §27-20-26(1) provides that “[e]xcept 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.” N.D.C.C. §27-20-26(1). In J.M.H., 1997 ND 99, 564 N.W.2d 623, the Supreme Court declined to recognize a claim for ineffective assistance of counsel in a civil action. J.M.H. was an appeal from a termination of parental rights in which the appellant raised the issues of ineffective assistance of counsel. In declining to recognize the claim, this Court noted that even if the Stickland standard did apply, the general allegations of ineffective assistance of counsel raised by the appellant were insufficient to establish a claim. J.M.H., 1997 ND 99, ¶22, 564 N.W.2d 623.

[¶43] To succeed on a claim for ineffective assistance of counsel, a petitioner must

prove counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Robinson, 502 N.W.2d 249, 251 (N.D. 1993).

[¶44] T.L. applied for and was appointed counsel pursuant to N.D.C.C. §27-20-26(1). However, as in J.M.H., even if the Court would find that the Strickland standard applies in a termination proceeding, T.L. has failed to show that her counsel's performance fell below an objective standard of reasonableness or that the probable outcome would be different.

[¶45] T.L. contends that the actions of her counsel rose to the level of ineffective assistance by not presenting evidence regarding subsequent steps T.L. alleges she undertook after the close of the State's case and the testimony of T.L. on her own behalf and prior to the continued hearing time set for July 10, 2007,

[¶46] At the outset of the trial, counsel for T.L. moved for a sixty day continuance to allow T.L. to admit herself to the Teen Challenge program. He offered the acceptance letter as an exhibit. The trial court denied the motion and the trial proceeded. During testimony of Laurie Ray, the licensed addiction counselor who saw T.L. for assessment and treatment for her methamphetamine use, counsel requested that the trial court order the witness to provide materials in her possession and set a further hearing date for the limited purpose of cross examination of Laurie Ray on those materials. The trial court granted the request, ordering that Laurie Ray provide the referenced materials to counsel for both parties and setting a further hearing time. Following the presentation of the State's case, counsel for T.L. presented the testimony of two witnesses, one as an expert in addiction treatment, and one regarding T.L.'s application and the nature of the Teen Challenge program. Finally, T.L.

testified on her own behalf.

[¶47] T.L. contends she made application to and was accepted to another treatment program between the first two days of trial on June 20 and 21, 2007, and the July 10, 2007 hearing date. She offers no explanation as to why she did not admit herself to the Teen Challenge program following the first two days of trial or why she sought acceptance in another program. T.L. had already testified and counsel had already presented to the court evidence that she had applied to and been admitted to Teen Challenge. Even if the trial court had received evidence of T.L.'s claim that she had made application and been accepted into another treatment program, all T.L. had in hand at the time of the extended hearing date would be essentially the same evidence the trial court already had before it at the first two days of trial—that she had made an application and been accepted into a treatment program. None of the evidence about what T.L. had done regarding seeking and engaging in treatment up to the time of trial would be disputed or changed with this new evidence. None of the evidence regarding what T.L. had done to achieve stability in housing or employment or ability to provide for the children's needs or safety would be disputed or have been changed by this new evidence. None of the prognostic evidence would be disputed or would have changed with this new evidence.

[¶48] In any ineffectiveness case, a particular decision....(not to investigate),,, must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691.

[¶49] In light of the court's denial of the motion for continuance made by counsel for T.L. at the outset of the trial and the evidence presented regarding Tricia's application and acceptance and testimony about the Teen Challenge program, it would be well within a

parameter of reasonableness for experienced counsel to conclude that evidence of yet another application and admission would serve to weaken her statements of commitment to the Teen Challenge program, why she choose that program, and why the court should grant a motion to continue. Counsel could also reasonably have viewed presenting evidence of application and admission to another program within days of the application and acceptance into Teen Challenge as weakening the case presented that Cass County Social Services did not provide T.L. with reasonable efforts to see she had the needed services available. If she could apply to and was accepted into two in-patient treatment programs, it certainly weakened her assertion that this treatment was not available to her or she didn't know how to access it or was so impaired that she could not do the application process. T.L. knew about programs; she was capable of inquiring about available programs and submitting applications. She knew she could ask Ruby Knoll, whose help she brushed aside for almost a year, to provide assistance with contacting programs and even faxing applications and providing the means to call the programs.

[¶50] The record shows that counsel for T.L. was diligent and thorough in representing her at trial. He moved for a continuance so T.L. could get into treatment, requested an order for additional discovery during the trial and a further hearing date for additional cross examination of a witness, presented evidence and an exhibit regarding T.L.'s application and acceptance into an inpatient treatment program, presented an expert witness on methamphetamine treatment, and presented a witness who testified about the program T.L. had been accepted to. His representation did not fall below an objective standard of reasonableness.

[¶51] Further, even if the Court could find counsel lapsed in representing T.L., there

is no showing that the outcome of the proceeding would have been different. The evidence overwhelmingly shows that T.L. did not, until the eve of the trial, take the needed steps to get herself into an inpatient treatment program. Whether the trial court heard evidence of one application and acceptance, or two, there is clear and convincing evidence that T.L. was not in treatment; that even with inpatient treatment, there are risks of relapse; and that T.L. had exhibited a lack of insight and motivation for over a year while her children remained in foster care.

**[¶52]CONCLUSION**

[¶53]Based upon the above reasons and the evidence presented in this case, the Appellee requests this Court to affirm the Order of the Juvenile Court dated September 17, 2007, terminating the parental rights of T.S. to the minor children, K.L. and M.S.

Respectfully submitted this 25th day of April, 2008.

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