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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Adoption of D. J. D.; A Child D. D., Natural Mother of D. J. D., and B. D., Adoptive Father Petitioners and Appellees Vs. R. H., Natural Father of D. J. D., and Dept. Of Human Services, State of North Dakota Respondents and Appellants)	Supreme Ct. No. 20140076 District Ct. No.: 08-2013-DM-00070

BRIEF OF PETITIONERS-APELLEES

APPEAL FROM ORDER TERMINATING PARENTAL RIGHTS AND DECREEE OF ADOPITON DATED JANUARY 29, 2013

Burleigh County District Court
South Central Judicial District
The Honorable Dann Greenwood, Presiding

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¶3STATEMENT OF THE ISSUES

I. R. H. fails to show that he received ineffective assistance of counsel. ¶16

II. The procedure in place in North Dakota for ineffective assistance of counsel claims in termination cases is clear and serves all interest. ¶33

III. The Motion for New Trial an Evidentiary should be denied as well., ¶43

¶4STATEMENT OF THE CASE

¶5 On January 28, 2013, B. D. and D. D. filed their petition for the adoption of D. J. D. and the termination of R. H.'s parental rights to D. J. D. Appendix Pg. 57. Judge Feland recused herself for reasons that were not specified and the case was assigned to Donald Jorgenson. Appendix Pgs. 89 and 90. Judge Jorngensn recused himself on November 4, 2013. Id at Pg. 91. On November 7, 2013, the Honorable Dann E. Greenwood was assigned to this matter by this Court. Id at Pg. 97.

¶6 On September 18, 2013 a status hearing was held in Mandan, North Dakota before the Honorable Donald Jorgenson. See Transcript for 9/18 hearing. All were present at the hearing, attorneys and parties, but for R. H.. Id. At that hearing Mr. McCabe, attorney for R. H., stated that he had spoken with R. H. by telephone on prior occasions. Tr. (9/18) Pg. 3 L. 9-10. R. H. would simply tell Mr. McCabe he was not going to come to North Dakota. Id at Pg 3 L 10-11, 13-14.. He would try to get information from his client but R. H. would not provide it. Tr (9/18) Pg. 3, L15-16. See also Tr. (9/18) Pg. 4 L1-6. Mr.

McCabe brought a verbal motion for R. H. to appear telephonically, but this was objected to by D. D. and B. D. and the court correctly denied it. Tr. (9/18) Pg. 3, L22-25 (Request); Id at Pg. 4 L.24-Pg. 5, L. 2.

On January 3, 2014, Judge Greenwood issued an order stating that no re-hearing was necessary. Appendix at Pg. 98. He subsequently issued a certificate of familiarity. Id at Pg. 99.

¶7 The undersigned took over the case for the petitioners while Mr. Morrow took over R. H.'s representation. Id at Pgs. 102 and 103. Mr. Morrow timely filed an appeal of the court decision and timely filed a brief. Id at Pg. 56.

¶8STATEMENT OF THE FACTS

¶9 D. D. had been in a relationship with R. H. while they lived in Texas. During this relationship, R. H. would visit upon D. D. both physical and emotional abuse. Tr. (9/20) P. 17, L23-24. While R. H. would perform these hadious acts, D. J. D. would be right there in the presence of these vicious attacks. Id at Pg. 18, L4-5. D. J. D would remember these incidents; D. J. D.'s strongest memory is that of R. H. threatening to kill D. D. Id at Pg. 10, L. 10. D. J. D. even remembered that R. H. had threatened to kill his mother. Id at Pg. 10, L9-10. D. J. D. has stated that he does not wish to speak with R. H. Tr. (9/20) Pg. 11, L22-23.

¶10 D. D. made the trek to North Dakota years before the hearing was had in this matter and after the abuse, and with her she brought D. J. D. Tr. (9/20) Pg. 17, L25-Pg. 18, L1. The only meaningful communication R. H. had with D. D. or D. J. D. was to threaten D. D. by phone, text and email. Id at Pg. 23, L12-13. As a result of his actions, warrants were filed for his arrest. Id. R. H.

could have taken care of these warrants but has failed to do so. Id at Pg. 33, L6-7. R. H. had the means and know how to contact his son, but again failed to do so. Id at Pg. 16, L17-p.17,L.2. In fact R. H. has not had contact with D. J. D. since April 2012. Id. At Pg. 15, L9-10.

¶11 The only time R. H. would contact D. J. D. was when proceedings were pending. See Appendix Pg. 7, ¶4. See also Tr. (9/20) at Pg. 30, L252- Pg. 31, L9. After that the contacts would stop or die away. See. Tr. (9/20) Pg. 15, L6, 9-10. R. H. did not even send birthday cards or presents during this time despite knowing D. D.'s parents local address and phone number; again failing to take the most basic steps to keep contact with his child. Id at Pg. 16, L17-Pg. 17, L2.

¶12 The contact that has taken place has been supported by B. D. and D. D. Id at Pg. 16, L11-13. They have taken D. J. D. to the few sporadic, requested phone calls. Id. At Pg. 28, L4-7. R. H. has failed to even to bother to answer the last two times that it has taken place. Id at Pg. 28, L20-21.

¶13ARGUMENT

¶14Standard of Review

¶15"Ineffective assistance of counsel is a mixed question of fact and law, which is fully reviewable on appeal." Coppage v. State, 2014 ND 42, ¶17,_____ N.W.2d _____. (Citations omitted)

¶16 I. R. H. fails to show that he received ineffective assistance of counsel.

¶17 When a party brings an ineffective assistance of counsel claim in a termination of parental rights proceeding, he bears a heavy burden. Interest of K.L., 2008 ND 131, ¶31, 751 N.W.2d 677, 685. A person bringing an ineffective assistance of counsel claim in termination of parental rights proceeding must show under the two prongs of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) that 1) counsel was ineffective, namely that trial counsel's performance fell below an objective standard and 2)that this defective representation was the reason for the loss. Interest fo K.L. at ¶¶ 29-30. "In addition to Strickland, the deficiency must be readily apparent in the record on direct

appeal in the context of termination cases". Interest of K.L. at ¶31.

¶18 As to the first prong of Strickland, there is a strong presumption that trial "counsel's conduct fell with the wide range of reasonable professional assistance". Coppage at ¶17. (citations omitted). Bluntly put, R. H. has failed to overcome this presumption and to show Mr. Kevin McCabe, R. H.'s trial counsel, in this matter acted ineffectively. Contrary to this notion, Mr. McCabe acted competently and honorably given the facts.

¶19 The performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Strickland at 688. The record clearly shows that Mr. McCabe had received little or no information from R.H going so far as to state, "…I have nothing on this case from [R. H.]." Tr. (9/18) Pg. 4,L1-2. In fact, the record shows that Mr. McCabe begged R. H. for information, but was only told he was not coming to North Dakota from Texas because of warrants that were being held for his arrest.

¶20 R. H. claims that Mr. McCabe was ineffective because he did not bring any witnesses nor did he present any evidence outside of cross examination. See Appellant Brief at ¶16. If this line of flawed reasoning were to be held as true, then no counsel would ever be found for a criminal defendant again as in most cases there are no witnesses for the defense to call and they would therefore be ineffective. This because many a time that there is no evidence to present that would help in a matter.

¶21 This brings us to point two of the R. H.'s illogical argument, the fact that Mr. McCabe did not ask for a telephonic appearance on the behalf of R. H. The record, specifically the transcript of the hearing of September 18, 2013, clearly shows that Mr. McCabe did in fact ask for R. H. to be allowed to appear at the hearing of September 20, 2013 to appear telephonically. He was rightfully denied.

¶22 In fact, R. H. would have us believe that Mr. McCabe sat back and did absolutely nothing in this matter, but again, the record shows a different story. The record clearly shows that Mr. McCabe,

despite a lack of information, filed a brief and motion to have the Honorable Cynthia Feland recused from the case when she was assigned. He also filed a "Demand for change of Judge" after Judge Jorgenson recused himself. Appendix at Pg. 96.

¶23 The fact that no responsive pleadings were not filed is of no consequence in this matter. R. H. tries to bring this contention that under N.D.R.Ct.3.2 the court could have legally drawn the conclusion that R. H. did not oppose the adoption due to a lack of responsive pleadings. This strawman must fail for several reasons. First, Rule 3.2 by its very language is limited to those motions brought before the court within an action, not to the responsive pleadings. To argue that a learned judge of the bench would see no responsive pleading filed as an admission under this rule is plain insanity. Assuming that the court would do this, the Petitioners would still have had to shown that they were entitled to the relief sought under Rule 3.2 which would require evidence to be presented.

¶24 Second in the same vein as the last argument, evidence would still need to be presented had no one

ever heard from R. H. in regards to this matter. Also R. H. put all parties and the court on notice the he opposed the Petition when wrote upon upon his application for counsel that "this isn't my idea to do this." Appendix Pg. 75.

¶25 What the record clearly shows is that Mr. McCabe fought valiantly for his client, given the facts and circumstances of this case. Contrary to the hollow claims of R. H., Mr. McCabe challenged the petition filed in this matter in an effective manner. See Transcript of September 20, 2013. He effectively challenged the petitioner's claims that the phone calls were the cause of stress in D.J.D. 's life. See Appendix, Pg. 2, ¶6. Counsel for R. H. also pointed out on cross that R. H. was up to date on his child support. Tr. Pg. 22, L 6-11. He also attempted to show that R. H. was trying to keep in contact with D.J.D. thus not having abandoned him. The evidence merely showed that this was not true.

¶26 It is worth noting that under N.D.C.C. § 14-15-01(1) that to abandon a child you either have not have substantial contact with the child or not support them financially, which was alleged in the

Page redacted pursuant to ND Rule 14

petition. R. H. claims that Mr. McCabe left these allegations untouched. However, it can be inferred from Mr. McCabe's line of questions at the hearing that he was attempting to show that R. H. had not abandoned the child, but rather was merely doing the best that he could do in regards to communication and to payment of child support.

¶27 This brings us to the second prong of Strickland in which R. H. must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Flanagan v. State, 2006 ND 76, ¶10, 712 N.W.2d 602. He must show where trial counsel was incompetent and specify what the probable, different result would have been. Coppage at ¶17. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Flanagan at ¶10.

¶28 Let us say for the sake of argument, and without conceding any point, that Mr. McCabe was ineffective, it would not change the result of the matter or be sufficient to undermine that result. R. H. fails to carry his burden and show where the

result would have been different. The evidence was such that only one outcome was clear; D. J. D. had been abandoned by R. H.

¶29 To directly confront R. H.'s points of where the matter would have been different. One contention he makes is that had Mr. McCabe asked for a new hearing, then R. H. would have been able to show he was trying to communicate with D. J. D. or offer an explanation. See Appellate Brief at ¶19. A new hearing would not be necessary as this point was made by Mr. McCabe's cross of D. D. and B. D., and a new hearing would not have changed this matter. As it was before the Court it can be safely assumed that it was taken into account by the Court. Therefore, a new opportunity to present the same information to the Court would do little to change outcome.

¶30 In ¶18 of his brief, R. H. also makes the argument this motion would have allowed R. H. to appear in person or by telephone. It has clearly been shown that R. H. was not going to come to North Dakota due to the warrants out for his arrest. He also fails to show how a rehearing would have

allowed Judge Donald Jorgenson to rehear this matter, as he had already recused himself. This also ignores how this would have changed the outcome of this matter.

¶31 As to the outcome being different as claimed in ¶¶ 16-17 , R. H. makes the erroneous statement that but for the perceived deficiencies of Mr. McCabe's representation of him then he would not have had his right to D. J. D. terminated. Again the crux of R. H.'s argument is N.D.R.Ct. 3.2 to state that the result would have been different had a responsive pleading been filed. As noted before this is a strawman argument. Rule 3.2 by its very language is limited to motion brought after responsive pleadings are made. Even if rule 3.2 did control evidence would still need to be brought by the Petitioners in this matter because they would have to show they were entitled to the relief sought.

¶32 R. H. has failed to do any heavy lifting in this matter in showing ineffectiveness of Mr. McCabe and an even poorer job of showing how the outcome would have been different. The outcome of this matter, namely the termination of R. H.'s rights, is

sound and unshaken by the arguments of R. H. Therefore R.H. request should be denied.

¶33 II. The procedure in place in North Dakota for ineffective assistance of counsel claims in termination cases is clear and serves all interest.

¶34 There are two competing interest in this matter Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts, 6 J. App. Prac. & Process 179 (2004), The question becomes which procedure serves the interest of everyone.

¶35 R. H. would have us believe that that a procedure requiring a hearing upon an effective of assistance claim would be fine, but it does not take into account the needs of the stability of the children in this jurisdiction whereupon parental rights can be forcibly terminated; step parent adoption and cases involving deprivation. See N.D.C.C. §§ 27-20-44 (Juvenile Court may terminate parental rights of deprived child) and 14-15-19.

¶36 Stability is an important factor for a child in an adoption/termination proceeding such as this. Ineffective Assistance of Counsel in Parental-Rights

Termination Cases: The Challenge for Appellate Courts at 207. So much so that the legislature has came down and stated that no adoption can be undone for any reason after one year by anyone, even the person adopting the child. See N.D.C.C. § 14-15-15(2)

¶37 While this proceeding is ongoing, it leaves the stability of D. J. D. in the air. It is a prolonged process which goes on and on. This matter was filed in January of 2013 and here we are 14 months later still arguing about the very future of D. J. D. To add another hearing would only draw it out for that much more longer and add to that instability.

¶38 R. H.'s approach would also have the affect of doing harm to those people caught up in termination cases brought under N.D.C.C. § 27-20-44 by adding a hearing which would add time and that has the potential to do harm. Ineffective assistance of Counsel in Parental-Rights Termination Cases: the Challenge for Appellate Courts, at 207. Children waiting to be adopted would have to linger because adoptive parents would not want to come forward while the termination order is uncertain. Id. Also

longer time due to this could cause emotional harm to a child. Id. Simply put, to adopt the proceeding of R. H. would do violence to the stability of the children in North Dakota.

¶39 Also the state suffers as well when an additional hearing is added. This is because they foot the bill for foster care. Id. This, again, would lengthen the time that the child is in foster care thus leading to a larger bill. Id.

¶40 R. H. correctly points out that Justice Calkins states that the direct appeal is the best method. He also correctly points out that Justice Calkins' article points to a hearing upon remand. What R. H. fails to tell this Court though is that Justice Calkins states that to get this hearing, the parent claiming that there is ineffective assistance of counsel must meet a two prong test; 1) persuade the court that they are likely to prevail and 2) and then only when the record it is insufficient for determining the merits of ineffectiveness claims. Id at 209-210

¶41 So, if we are to do as R. H. request and adopt the procedure proffered by Justice Calkins in her

article, he still must lose because the record in this matter is sufficient to show the effectiveness of counsel. Further, in this two step approach, R. H. must persuade this Court that he would prevail in a hearing. However given the arguments of R. H. and the record before the Court, it is clear that R. H. received effective counseling and representation from Mr. McCabe.

¶42 This procedure should not be adopted in this jurisdiction for the reasons stated above. The procedure in place is the perfect balance of both parent's rights and the child's interest.

¶43 III. The Motion for New Trial an Evidentiary should be denied as well.

¶44 For the reasons listed under Issue II, this court should deny R. H.'s request for a new trial or evidentiary hearing.

¶45CONCLUSION

¶46 Based upon the foregoing, the Petitioners requests that the R. H.'s request be denied in their entirety.

¶47 Dated this 20th day of March, 2014.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Adoption of D. J. D.; A Child D. D., Natural Mother of D. J. D., and B. D., Adoptive Father Petitioners and Appellees Vs. R. H., Natural Father of D. J. D., and Dept. Of Human Services, State of North Dakota Respondents and Appellants	Supreme Ct. No. 20140076 District Ct. No.: 08-2013-DM-00070

CERTIFICATE OF SERVICE

APPEAL FROM ORDER TERMINATING PARENTAL RIGHTS AND DECREEE OF ADOPITON DATED JANUARY 29, 2013

Burleigh County District Court
South Central Judicial District
The Honorable Dann Greenwood, Presiding

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¶1 On March 20, 2014, I, Bryn David Denham, did serve upon Tyler Morrow, attorney for the Appellant, R. H., a copy of:

a. Petitioners-Appellees' Brief; and

b. Petitioners'-Appellees' Appendix; and

c. This Certificate of Service

¶2 Service was made by me by serving Mr. Morrow at his email address listed in the North Dakota Supreme Court web page namely: tyler@ralawfirms.com.

Dated this 20th day of March, 2014.

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