
IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

**IN THE MATTER OF THE ADOPTION OF D.J.D.
Burleigh Co. No. 08-2013-DM-00070
Supreme Court No. 20140076**

**D.D., natural mother of D.J.D.,
and B.D., adoptive parent,**

Petitioners and Appellees,

v.

**R.H., natural father of D.J.D.,
and Department of Human Services, State of North Dakota**

Respondents

R.H., natural father of D.J.D.,

Appellant

**ON APPEAL OF ORDER TERMINATING PARENTAL RIGHTS AND DECREE
OF ADOPTION, THE HONORABLE DANN GREENWOOD, DISTRICT JUDGE
PRESIDING, SOUTH CENTRAL JUDICIAL DISTRICT, FILED JAN 29, 2014**

BRIEF OF RESPONDENT/APPELLANT

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[¶2] Statement of the Issues

[¶3] I. Natural father, R.H., was denied the effective assistance of counsel in the termination and adoption proceedings.

- a. The deficient representation by R.H.'s counsel was readily apparent in the record.
- b. Alternatively, the North Dakota Supreme Court should remand the record for an evidentiary hearing to determine whether R.H. was denied effective assistance of counsel.

[¶4] Statement of the Case and Procedural History

[¶5] This appeal is brought from an order terminating the parental rights of R.H., father of child, D.J.D, and a decree of adoption of D.J.D. Both the Order and Decree were signed by Judge Dann Greenwood on January 28, 2014 and filed on January 29, 2014.

[¶6] A Petition for Adoption and Termination of Parental Rights of Natural Father was brought by Petitioners on January 28, 2013. R.H. filed an Application for Appointed Defense Services on April 4, 2013. On April 17, 2013, R.H. was appointed counsel. Hon. Cynthia Feland subsequently moved to recuse herself due to her past working relationship with adoptive father, B.D. Hon. Donald Jorgensen was assigned to the case on July 8, 2013. A status conference was held September 18, 2013, and the Termination Hearing was held September 20, 2013, both in front of Judge Jorgensen. Judge Jorgensen later recused himself and Hon. Gail Hagerty was appointed. Judge Hagerty also recused herself. Upon request, this Court assigned Hon. Dann Greenwood. Judge Greenwood entered a Certificate of Familiarity on January 10, 2014, and issued his Memorandum Decision (App. at 6) on January 22, 2014. Trial Counsel for R.H. properly requested transcripts of the September 20, 2013 termination hearing, and the September 18, 2013 Status Conference. (App. at 5, Docket No. 50). At the time of filing, R.H. has not received a transcript from the Status Conference.

[¶7] This Appeal was timely brought under the Rule 2.2 of the North Dakota Rules of Appellate Procedure. Appellant simultaneously moves this Court for an evidentiary hearing or new trial under N.D.R.App.P. 27 and 4(a)(3)(A)(v-vi). (App. at 49, Motion for New Trial or Evidentiary Hearing).

[¶8] Statement of Facts

[¶9] D.J.D. was born in 2007 to biological father, R.H., and biological mother D.D. (App. at 24). D.J.D. has lived with his mother in Bismarck, ND, since 2010. (App. at 24-25). The last time R.H. has seen D.J.D. in person was May of 2010. (App. at 26). The last telephonic contact R.H. had with D.J.D. was April, 2012. (App. at 26). Petitioners previously moved for termination of R.H.'s parental rights and were denied in 2012. (App. at 26, 32). Between the first and second petitions for termination R.H. would request phone contacts through the Family Safety Center. (App. at 26-27). The last two attempts at phone contact were allegedly missed by R.H. (Id.). Previous attempts between the last phone contact, in April 2012, were refused by D.J.D. (App. at 27). Due to allegations of abuse and threatening communication from R.H. toward D.D., a protection order is in place between R.H. and D.D. (App. at 28-30). R.H. has been unable to come to North Dakota due to felony warrants for his arrest based on the allegations of D.D. (App. at 33-34).

[¶10] R.H. has paid child support for D.J.D. for the past three years and D.D. admitted that he is generally up to date. (App. at 35).

¶11 Law & Argument

¶12] The Court has jurisdiction over this matter under N.D. Const. art. VI, §§ 2, 6, and N.D.C.C. § 14-15-15.

I. Natural father, R.H., was denied the effective assistance of counsel in the termination and adoption proceedings.

¶13] In a parental termination proceeding, an indigent parent has the right to effective assistance of counsel. Interest of K.L. and M.S., 2008 ND 131, ¶29, 751 N.W.2d 677. The Court recognized that the majority of states recognizing a right to effective assistance have adopted the Strickland standard used in post-conviction relief proceedings. Id. at ¶27. The Court reiterated the Strickland standard as a two part test. Id. at ¶30. Under Strickland v. Washington, 466 U.S. 668, 688 (1984), the party alleging ineffective assistance of counsel must show that “counsel’s performance fell below an objective standard of reasonableness and the deficient performance prejudiced [the parent]” such that the outcome would have likely been different. Interest of K.L. at ¶ 30 (citing Johnson v. State, 2004 ND 130, ¶17, 681 N.W.2d 769).

a. The deficient representation by R.H.’s counsel was readily apparent in the record.

¶14] While recognizing the right to effective counsel, the Court also required that “counsel’s deficiency must be readily apparent in the record on direct appeal.” Id. Trial counsel was noticed of his appointment on April 13, 2013. (Case No. 08-2013-DM-00070, Docket ID #17). The hearing in this matter took place on September 20, 2013, over five months after trial counsel was appointed. (App. at 6). In spite of the lengthy period of his appointment, trial counsel failed to file a responsive pleading to the petition and affidavits of the adoptive parents. (Id.).

[¶15] At the hearing, trial counsel was present, but R.H. was not as he lives in Texas. (Id. at 6-7). Judge Greenwood stated in his memorandum that “[R.H.]’s counsel acknowledged that [R.H.] was aware of the hearing but advised that he would not appear and counsel was to proceed in his absence.” (Id.). However, no motion was filed by counsel to allow R.H. to appear telephonically. (See App. at 3, Case No. 08-2013-DM-00070 Docket generally).

[¶16] Finally, trial counsel failed to present any representation on R.H.’s behalf aside from cross examination. (App. at 7). Trial counsel did not present any witnesses, nor did he offer any testimony through affidavit or deposition. (Id.). At the close of Petitioner’s argument, trial counsel rested with no closing argument. (App. at 44).

[¶17] Because of this deficient performance by trial counsel, R.H. was prejudiced as the Court would not likely have terminated his parental rights. Under Rule 3.2(b) of the North Dakota Rules of Court, a hearing may be held by using electronic means, including telephonic or videoconferencing means. N.D.R.Ct. 3.2(b). Due to trial counsel’s failure to request R.H.’s presence by telephone or videoconferencing, he was denied the ability to present his case to the Court. Further, all of the allegations and contentions made by Petitioners went unchallenged at the hearing. R.H. was also prejudiced by trial counsel’s failure to file any responsive pleadings, offer any affidavits in support of R.H.’s case, or offer any affidavits objecting to Petitioners’ claims. Rule 3.2(c) states that “[f]ailure to file a brief by the opposing party may be deemed an admission that, in the opinion of party or counsel, the motion is meritorious. N.D.R.Ct. 3.2(c). By failing to respond, the Court may have taken this as an admission by R.H. and trial counsel that the Petitioners motion had merit and that they did not fully intend to

object. Finally, trial counsel's failure to call any witnesses or offer an argument on R.H.'s behalf was clearly prejudicial to R.H.'s case.

[¶18] Even after the hearing took place on September 20, 2013, trial counsel had opportunity to ask for a re-hearing in this matter. Judge Greenwood was appointed to the case on November 8, 2013. (See App. at 5, Docket No. 38). A status conference was held on December 2, 2013. (App. at 5). A letter from Judge Greenwood was sent to counsel for both parties indicating that a re-hearing was not needed. (Id., Docket No. 40). At no point did trial counsel motion for a rehearing. Moving for a rehearing was appropriate as Judge Jorgensen was in the best position to evaluate the veracity of witness testimony, not Judge Greenwood. This would also have allowed arrangements for R.H. to attend in person or telephonically.

[¶19] R.H. has been up to date on his child support payments for the past three years. D.D. testified that R.H. had told her that he did not want to be involved with D.J.D. (App. at 33). However, it does not follow logically that R.H. would continue to pay child support for three years, and fight the termination proceedings if he was not interested in being involved with D.J.D. While R.H. allegedly missed the two most recent phone calls with D.J.D., R.H. was not present at the hearing to offer an explanation. Further, the previous calls were frustrated by D.J.D. not R.H.

[¶20] The relationship has also been strained by the distance between R.H. and D.J.D. While it is no legal excuse that R.H. had warrants out in North Dakota, it should be noted that Petitioners appear to have moved back to Texas. (See App. at 48). This is significant as it appears Petitioners took advantage of this distance, and the legal charges facing R.H., by filing these proceedings in North Dakota rather than Texas. Had

Petitioners moved to Texas prior to filing for termination and adoption, these proceedings may have been unnecessary. It is clear that R.H. was interested in keeping a line of communication open with D.J.D., and absent trial counsel's failures, he would have had the opportunity to demonstrate this at the hearing and avoid the termination of his parental rights.

[¶21] Because trial counsel's conduct was deficient on the record, and because this deficiency prejudiced R.H., the Court should vacate the Order Terminating Parental Rights and Decree of Adoption, and remand for a new trial.

- b. **Alternatively, the North Dakota Supreme Court should remand the record for an evidentiary hearing to determine whether R.H. was denied effective assistance of counsel.**

[¶22] The Court has acknowledged that “[w]ithout a record scrutinizing the reasons underlying counsel's conduct, adjudging it subpar is virtually impossible.” State v. Torres, 529 N.W.2d 853, 856 (N.D. 1995). In Interest of K.L., the Court acknowledged the position this puts parents in when making a claim of ineffective assistance of counsel. The Court stated “unlike such claims in claims in post-conviction proceedings, there is not a subsequent statutory proceeding that allows a party to develop a record or evidence for the alleged deficiency.” Interest of K.L., at ¶30. Maine Supreme Judicial Court Justice Susan Calkins has produced a comprehensive legal study of issues and challenges faced by appellate courts related to ineffective assistance claims in parental termination proceedings. Susan Calkins, Ineffective Assistance of Counsel in Parental-Rights

Termination Cases: The Challenge for Appellate Courts, 6 J. App. Prac. & Process 179 (2004).¹

[¶23] Justice Calkins acknowledged that direct appeal is the best option for raising an ineffective assistance claim. Id. at 211. However, like this Court, she also acknowledged that it is extremely difficult to assess a trial counsel's conduct. Id. at 209. Justice Calkins recommended courts allow cases to be remanded for a hearing to determine whether counsel's performance was deficient. Id. at 212.² This procedure has been accepted by a number of courts. See In re Kristin H., 46 Cal. App. 4th 1635, 1673 (1996); State ex rel. Children, Youth & Families Dep't v. Tammy S., 126 N.M. 664, 974 P.2d 158, 163 (1998); In re R.E.S., 978 A.2d 182, 195 (D.C. 2009).

[¶24] In the event that this Court does not find trial counsel's representation deficient on the face of the record, public policy and the interest of justice direct this Court to adopt the procedure proposed by Justice Calkins, and remand the record for further findings. As R.H. has brought a Motion for New Trial under N.D.R.Civ.P. 59, and a Motion for Evidentiary Hearing under N.D.R.Civ.P. 60(b)(6), the Court has authority to remand for further proceedings under N.D.R.App.P. 4(a)(3)(B)(i):

¹ This article was cited generally in Interest of K.L. at ¶ 27.

² Justice Calkins also recommended that a procedure be put in place, in the form of a court rule, in order to apprise all parties of the proper procedure for bringing a claim. Calkins at 212.

[¶25] Conclusion

[¶26] The Court should find that because of trial counsel's deficient performance, R.H. was prejudiced in the parental termination hearing. The Court should vacate the Order Terminating Parental Rights and Decree of Adoption, and remand the case for a new trial. Alternatively, the Court should grant R.H.'s Motion for Evidentiary Hearing and remand the record for further findings on the effectiveness of trial counsel.

Dated this 28th day of February, 2014.

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IN THE SUPREME COURT OF NORTH DAKOTA

ON APPEAL OF ORDER TERMINATING PARENTAL RIGHTS AND DECREE OF
ADOPTION, THE HONORABLE DANN GREENWOOD, DISTRICT JUDGE PRESIDING,
SOUTH CENTRAL JUDICIAL DISTRICT, FILED JAN 29, 2014

In the Interest of D.J.D., a child,)	
)	
R.H., natural father of D.J.D.)	
)	08-2013-DM-00070
RESPONDENT/APPELLANT,)	
)	
VS.)	CERTIFICATE OF ELECTRONIC
)	SERVICE
B.D., adoptive father of D.J.D., and)	
D.D., natural mother of D.J.D.,)	
)	
PETITIONER / APPELLEE.)	

Tyler J. Morrow, of Rosenquist & Arnason, PLLP, attorney for the above named Appellant, does hereby certify that he has electronically delivered upon attorney for Petitioner, Bryan Denham, at denhamlaw@yahoo.com, that being his last email address known to Appellant's attorney, a true and correct copy of:

1. Appellant's Brief;
2. Appendix to Appellant's Brief;
3. Notice of Motion for New Trial or Evidentiary Hearing
4. Motion for New Trial or Evidentiary Hearing and Incorporated Brief in Support
5. Notice of Appeal

on February 28, 2014, at approximately 2:00 p.m.

Dated this 28th day of February, 2014.

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In the Matter of the Adoption of D.J.D.,)	
)	
D.D., natural mother of D.J.D.,)	Supreme Court No. 20140076
and B.D., adoptive parent,)	Burleigh Co. No. 08-2013-DM-00070
)	
PETITIONERS AND APPELLEES,)	
)	
v.)	AFFIDAVIT OF SERVICE BY
)	ELECTRONIC DELIVERY
R.H., natural father of D.J.D.,)	
And Department of Human Services,)	
State of North Dakota,)	
)	
RESPONDENTS,)	
-----)	
R.H., natural father of D.J.D.,)	
)	
APPELLANT.)	

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

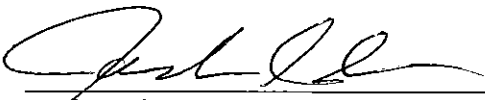
The undersigned being of legal age, being first duly sworn deposes and says that on the 3 day of March, I served a true and correct copy of the following documents:

1. Appellant's Brief (Amended)
2. Appellant's Appendix (Amended)
3. Notice of Motion for New Trial or Evidentiary Hearing
4. Motion for New Trial or Evidentiary Hearing and Incorporated Brief in Support

Electronically to:

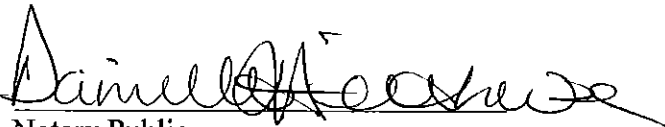
Bryan Denham
Denhamlaw@yahoo.com

Dated this 3 day of March, 2014.


Jordan Olsen

Subscribed and sworn before me, a Notary Public, this 3 day of March, 2014.

DANIELLE HILLHOUSE
Notary Public
State of North Dakota
My Commission Expires December 1, 2016


Notary Public