

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20200054
Williams County Court No. 2019-JV-00023

In the Interest of M.M., Child

**State of North Dakota, by and through
Williams County Social Services,**

Petitioner and Appellee

v.

**M.M., a child; M.M., Mother,
and
J.J., Father,**

Respondents

Respondent and Appellant.

APPEAL FROM THE CIVIL JUDGMENT
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE PAUL JACOBSON

APPELLEE’S BRIEF

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF THE ISSUES

[¶1] The issues are as follows:

- (a) Whether there was clear and convincing evidence to support the District Court's order terminating J.J.'s parental rights.
- (b) Whether J.J. has established an ineffective assistance of counsel claim.

STATEMENT OF THE FACTS

[¶ 2] In February 2019, Williams County Social Services petitioned to terminate the parental rights of the biological mother, M.M., and the biological father, J.J., for the minor child M.M. and transferring the care, custody, and control of the child M.M. to the North Dakota Department of Human Services for the purpose of placing the child for adoption. (Respondent/Appellant's Appendix [hereinafter "Appellant's Appendix"], at 7-13, ¶¶ 1-36). The petition alleged, among other things, that the child M.M. was a deprived child; that the lack of significant progress towards reunification with the mother M.M. or the father J.J. demonstrated that the conditions and causes of the child M.M.'s deprivation are likely to continue or will not be remedied and that by reason therefore, the child M.M. is suffering and/or will probably suffer serious physical, mental, moral, and/or emotional harm. (Appellant's Appendix, at 8-9, 11, ¶¶ 8-14, 23). The petition also alleged that the child M.M. had been in foster care, in the care, custody, and control of Williams County Social Services for at least 450 out of the previous 660 nights. (Appellant's Appendix, at 11, ¶ 24).

[¶ 3] On January 7, 2020, the district court held a hearing on the petition, which was continued to allow the mother M.M. to obtain legal counsel. (Electronic Transcript, 1-7-20, at 2:25 – 7:53). At the beginning of the continued hearing, held on February 3,

2020, the mother M.M. consented to termination of her parental rights, which the mother M.M. confirmed in writing after the hearing. (Electronic Transcript, 2-3-20 [hereinafter “Tr.”]), at 1:40; Appellant’s Appendix, at 56). J.J., the biological father, contested termination of his parental rights at the hearing. (Tr., at 3:14)

[¶ 4] During the hearing, the State offered the testimony of Shelly Sikes, the social worker who signed the petition on behalf of Williams County Social Services¹ and the person who had been working with the biological mother M.M., the biological father J.J., and the foster parents, J.T. and A.T, with regard to the child M.M.’s care and custody. (Tr., at 9:50 – 10:45).

[¶ 5] Ms. Sikes testified that she was the on-call social worker on September 18, 2014, when law enforcement officers called Williams County Social Services to notify them the child, M.M., who was four months old, had been found at a local hotel with his mother M.M., drugs were found in the hotel room, and the mother was under the influence. Williams County Social Services took custody of the child M.M. and placed him in a licensed foster home belonging to J.T. and A.T. (Tr., at 10:45 – 11:50). J.J. was residing in Las Vegas, Nevada at the time, and was contacted approximately five to seven days after M.M.’s initial placement in foster care. (Tr., at 12:15, 14:12, 51:09 – 51:45).

[¶ 6] After the initial placement in foster care, Williams County Social Services worked with the mother M.M. toward reunification with the child M.M. (Tr., at 11:15 - 12:15). In the latter part of 2014, the child M.M. was placed with the mother M.M. for a

¹ Ms. Sikes testified at the hearing that she was currently employed by North Star Human Service Zone Board, the newly created human service agency established by the redesign of social services by the State Legislature in 2017; however, because Williams County Social Services was the agency involved in this case between 2014 through 2019, it will be that agency referred to in this brief.

trial home visit. That visit only lasted for 46 days and ended on January 15, 2015, because the mother M.M. had been picked up by law enforcement for drug possession. The child M.M. went back into the same foster care home on January 16, 2015. (Tr., at 12:29 – 13:36).

[¶ 7] After the child M.M.'s return to foster care in January 2015, Williams County Social Services began working with J.J. to reunify him with the child M.M. (Tr., at 1:01:18 – 1:02:23). Williams County Social Services tried on three separate occasions to reunify J.J. with M.M. through the process under the Interstate Compact on the Placement of Children (ICPC) (Tr., at 14:37 – 14:49).

[¶ 8] The first attempt at reunification was approved through ICPC in September 2015. (Tr., at 17:09). Williams County Social Services provided J.J. financial assistance to enable him to travel to North Dakota to meet M.M.; however, when J.J. came to North Dakota, Williams County Social Services had J.J. tested for drugs due to safety concerns. His test came back positive for cocaine. (Tr., at 14:50 – 15:58). At that time, Williams County Social Services discussed the results with J.J. and told him that he needed a chemical substance evaluation and that he needed to follow through with any recommendations. (Tr., at 16:05 – 17:09).

[¶ 9] Williams County Social Services made a second attempt at reunification with J.J. through ICPC, but it was denied in July 2016 because J.J. failed to submit to a drug and alcohol evaluation and J.J. indicated that he no longer wanted to follow through with the requirements of ICPC. (Tr., at 17:10 – 18:10).

[¶ 10] In December 2016, Williams County Social Services provided J.J. financial assistance to fly from Nevada to North Dakota for a visit with M.M. M.M. was

2-1/2 years old at the time and was in foster care. Although the visit itself went well, afterwards M.M. expressed a lot of anxiety about being left anywhere and wanted to make sure that his foster parents J.T. and A.T would be with him. It affected M.M. socially and emotionally to the point that he didn't want to be left anywhere without his foster parents, including for age appropriate activities such as swimming and pee wee wrestling. (Tr., at 19:51 – 21:20; 21:33 – 22:52).

[¶ 11] Williams County Social Services made a third attempt through the ICPC process for reunification between J.J. and M.M., but it was denied in June 2017 because J.J.'s drug screen test came back positive for high levels of methamphetamine. (Tr., at 23:08 – 24:50). At that time, it was again recommended that J.J. complete a chemical substance evaluation and follow through with recommendations. (Tr., at 24:50 – 25:40). Although J.J. participated in individual addiction therapy for a period of time in the summer of 2017, the therapist discharged him from therapy because the therapist indicated J.J. needed a higher level of addiction treatment. (Tr., at 25:40 – 26:39).

[¶ 12] After the third attempt in working through the ICPC process was denied, Williams County Social Services continued to work with J.J. and recommended that he obtain local support services where he lived to support a sober life. Although J.J. was sometimes consistent in accessing those services at times, there were periods of time when he was not. In addition, , J.J. had some legal problems at the time causing further disruption in this life. (Tr., at 28:17 – 29:15).

[¶ 13] Ms. Sikes testified that, during the three-year period between 2017 and 2019, Williams County Social Services' care plan for J.J. for reunification with M.M. required J.J. to complete a chemical substance evaluation, follow through on any

recommendations, and follow through with support services to support a sober life for J.J. (Tr., at 19:17 – 19:50). However, as Ms. Sikes testified, while Williams County Social Services continued to work with J.J., he at times made progress in his care plan but overall there were periods of relapse, instability, and drug usage, including a time when J.J. was homeless for 1-1/2 years. (Tr., at 19:16 – 29:34).

[¶ 14] In April 2019, J.J. moved from Nevada to Utah. (Tr., at 26:50 – 27:06). In June 2019, Williams County Social Services offered financial assistance to J.J. for him to travel to North Dakota for a visit with M.M. (Tr., at 27:36 – 28:16; 30:01 – 30:37). By this time, M.M. was 5 years old. During this visit, Williams County Social Services had J.J. tested for drugs. He tested positive for methamphetamine and amphetamine. (Tr., at 37:33 – 38:15). During this visit, Williams County Social Services made plans to meet J.J. at the local park to give J.J. time with M.M. Ms. Sikes was present at the park during the visit, along with A.T. (Tr., at 58:10 – 59:29). J.J. and M.M. played and both were very engaged with each other; however, J.J. asked to end the visit after 40 minutes. (Tr., at 30:37 – 32:50). J.J. was offered another visit with M.M. the next day where M.M., Ms. Sikes, and A.T. met J.J. at the Williston recreational center and indoor water park. While M.M. was running around playing in the water park, J.J. was present for a period of time but left for a longer period of time. Ms. Sikes had to go look for J.J. and found him in a sitting area on his phone talking with a potential employer. Later, when they all met at McDonald's for dinner, and even before the visit was scheduled to end, J.J. said good-bye to M.M. and walked back to his hotel. (Tr., at 32:51 – 35:52).

[¶ 15] In October 2019, J.J. completed a 4-day medically-assisted detox program in Nevada, and provided this information to Williams County Social Services. (Tr., at 38:20 – 39:01). He also had a chemical evaluation at that time. (Tr., at 44:08 – 44:37).

[¶ 16] J.J. moved to Minot in December 2019 and, at the time of the hearing, was residing in Minot in a one bedroom apartment. (Tr., at 39:02 – 39:45; 1:28:14 – 1:28:46). He had also accessed services to get on his feet, and was working part-time jobs at K.F.C. and at Dollar Tree. (Tr., at 39:02 – 39:46; 1:03:12 – 1:04:36; 1:28:14 – 1:29:14). J.J. testified that, since completing the October 2019 detox program, he had been clean and had not used drugs (Tr., at 1:29:55 – 1:31:02); however, when another drug test was performed on J.J. on December 31, 2019, the test indicated that J.J. had elevated levels of methamphetamine and amphetamine, along with a positive test for ecstasy and MDMA, drugs that had not shown up before. (Tr., at 38:15 – 39:01; 39:46 – 41:01).

[¶ 17] The last time J.J. saw M.M. was in January 2020, when J.J. travelled to Williston the night before the initial hearing on this petition. He met M.M. after school at McDonald's. Williams County Social Services again paid for J.J. to travel from Minot to Williston. (Tr., at 35:53 – 37:15).

[¶ 18] Ms. Sikes testified that Williams County Social Services would continue to work toward reunification of M.M. with J.J. if J.J. did what was required of him, but that now there was also a long-term concurrent plan in place for M.M., which was termination of J.J.'s parental rights anticipating adoption by his foster parents J.T and A.T. (Tr., at 44:37 – 45:35). Ms. Sikes testified that, while M.M. has some minor asthmatic issues from when he was an infant, he is much better now. She also testified that he does well in school and is stable and settled in his foster home. Ms. Sikes testified

that M.M. needs the routine and structure provided by his foster parents. (Tr., at 45:50 – 47:04). Ms. Sikes further testified that her main concern with reunifying M.M. with J.J. is his instability in housing and job, and a relapse in drug usage. Although Ms. Sikes recognized the positive things working for J.J. in the past month, the overall concern was that J.J. had not been aggressive about doing what he needed to do to reunify with M.M. over the past 5 years. (Tr., at 47:05 – 47:56).

[¶ 19] The State also called Sara Anderson to testify. She is a licensed clinical social worker with Kaleidoscope Behavioral Health and a children’s mental health therapist. Ms. Anderson had worked in therapy with the child M.M. since December 2018. (Tr., at 1:05:45 – 1:06:21). Ms. Anderson testified that when she began working with M.M. it was to help him address separation anxiety issues, attention issues, and assess his relationship with his foster parents. She testified M.M. is very securely attached to his foster parents. Ms. Anderson testified that, in her opinion, if M.M. were removed and returned to J.J. it would be detrimental to M.M. emotionally because he’s been with his foster parents for an extended period of time and he views them as his family; M.M. wants his foster family’s last name and prefers to be called by their last name; he really believes they are his parents and his family; and it would do a lot of psychological harm to M.M. if he was moved to live with J.J. because he doesn’t understand that his foster parents are not his family. (Tr., at 1:06:21 – 1:08:19). Ms. Anderson also testified that when she talked with M.M. about his relationship with his biological parents, especially with J.J., M.M. gets very angry and denies that J.J. is his father and says that his foster father J.T. is his real dad. (Tr., at 1:08:27 – 1:08:47). Ms.

Anderson testified that she supported termination of J.J.'s parental rights and adoption by his foster parents J.T. and A.T. (Tr., at 1:08:48 – 1:09:07).

[¶ 20] A.T., the foster mom, also testified on behalf of the State. She testified that she and her husband J.T. want to adopt M.M. She further testified that she and J.T. have been M.M.'s foster parents for 5-1/2 years, since he was 5-1/2 months old, and he's part of their family, and that M.M. considers himself part of the family and that M.M. argues he is not a foster child and that his foster parents are his mom and dad. (Tr., at 1:11:22 – 1:12:43; 1:12:47 – 1:14:09). She also testified M.M. is in kindergarten now and does wonderfully; he's very healthy, other than having asthma for which he takes an inhaler; and A.T. takes him to all his medical appointments. (Tr., at 1:12:47 – 1:14:09). She further testified that she has been involved with reunification efforts with J.J., including the phone calls J.J. is allowed to make to M.M. three times a week and the visits J.J. has had with M.M. She also testified J.J. had not been consistent with the phone calls to M.M. in 2018 or 2019, and that J.J. only called M.M. 52 times out of the 161 phone calls in 2018. A.T. also testified when the phone rings, and M.M. knows it's J.J., M.M. gets anxious and says he does not want to talk to J.J. A.T. has encouraged M.M. to talk with J.J. about school and his activities, and has encouraged J.J. to ask M.M. about his school, activities, and lunch. (Tr., at 1:14:44 – 1:18:39). She testified the visits M.M. had with J.J. had gone well, but that J.J. showed up late at the park and left early, and then left early when they went to McDonald's. She also testified that there was not a lot of conversation between J.J. and M.M. during these visits. (Tr., at 1:20:11 – 1:21:45).

[¶ 21] A.T. further testified M.M. expresses fear about visits with J.J. (Tr., at 1:21:49 – 1:22:27). A.T. reached out to Sara Anderson to help with M.M. on several

things, including explaining to M.M. he was a foster child and that J.J. was his father, responding to M.M.'s anger outbursts, and helping M.M. with his separation anxiety. A.T. testified M.M. has a large fear of being away from his foster parents; he's scared of them leaving him; they have to explain to him a lot that they are coming back to get him, including when he started kindergarten; and M.M. needs a very structured routine and he can't be left at an activity alone. (Tr., at 1:22:27 – 1:25:44).

[¶ 22] J.J. also testified at the hearing. He testified he arrived in Minot on December 7, 2019, and currently resides in Minot in a one bedroom apartment, but before that he was living on the streets in Las Vegas, Nevada. (Tr., at 1:28:14 – 1:28:46). He testified that he now has two jobs, one as a cook at KFC and the other as an assistant manager at Dollar Tree. (Tr., at 1:28:47 – 1:29:14). J.J. admitted that, in the past 5 years, all of his hair drug tests had come back positive for substances. He also admitted that he had been an addict during that time. (Tr., at 1:38:09 – 1:38:59). J.J. further admitted that, if he was tested the day of the hearing, his hair test would come back positive for drugs, but that a UA test would come back negative. (Tr., at 1:39:05 – 1:39:38). Despite the consistent positive drug test results, J.J. testified that he was not currently involved in any treatment programs, but that he was looking for N.A. meetings. He also testified that he was volunteering at a homeless shelter and taking parenting classes at Ward County every Thursday, and had gone to grief counselling one time to deal with the death of his mother. (Tr., at 1:32:12 – 1:33:48; 1:36:43 – 1:36:59). He admitted that he was not consistent with his calls with M.M. in 2019 because he was living on the streets, could not find a job, and had no way to call. J.J. testified that, since moving to Minot in December 2019, he has tried to be more consistent with phone calls to M.M. in the past

month. (Tr., at 1:33:49 – 1:34:28). J.J. testified that, if M.M. were to come to live with him, and even though he did not have a driver’s license or a vehicle, he had no definite plans for day care or definite plans for transportation for M.M. to get to school. (Tr., at 1:42:57 to 1:43:57).

[¶ 23] After the evidence and arguments of the parties, the District Court ruled from the bench, stating that the evidence of the drug usage, passage of time, and the limited amount of contact J.J. has had with M.M. indicated there was a lack of significant progress toward reunification by J.J. and that this demonstrated that the condition that has existed for 5 years of deprivation are likely to continue and will not be remedied; and although J.J. has apparently not had a misstep in the past month, that does not really compare to what has occurred in the prior 5 years and by reason the child is suffering and will suffer serious physical, mental, moral, or emotional harm. The District Court also found that M.M. had been in foster care at least 450 of the last 660 nights. (Tr., at 1:49:34 – 1:52:16). The District Court’s ruling from the bench was followed by its Findings of Fact, Conclusions of Law, and Order for Judgment, and Judgment. (Appellant’s Appendix, at 48-54).

ARGUMENT

I. Standard of Review.

[¶ 24] In reviewing a district court’s decision to terminate parental rights, this Court has stated the standard of review as follows:

A court’s decision to terminate an individual’s parental rights is a question of fact, and that decision will not be overturned unless it is clearly erroneous. A finding of fact is clearly erroneous under N.D.R. Civ. P. 52(a) if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, on the entire record, the Court is left with a definite and firm conviction a mistake has been made. This Court does not

re-weigh evidence, and gives due regard to the trial court's opportunity to judge the witnesses' credibility.

Matter of Adoption of A.S., 2018 ND 265, ¶ 9, 920 N.W.2d 301 (internal citations and marked omitted). In this case, the district court's decision to terminate J.J.'s parental rights was not clearly erroneous because there was sufficient evidence to support that decision.

II. There was Clear and Convincing Evidence to Support the District Court's Order Terminating J.J.'s Parental Rights.

[¶ 25] According to N.D.C.C. § 27-20-44(c), a court by order may terminate the parental rights of a parent with respect to the parent's child if:

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, a county social service board, or human service zone, 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[.]

See N.D.C.C. § 27-20-44(c).

a. J.J. does not dispute the District Court's finding M.M. is a deprived child.

[¶ 26] The district court found that M.M. was a deprived child as that term is defined in North Dakota's Juvenile Court Act. (Appellant's Appendix, at 49, ¶ 11). J.J. does not dispute this finding. In addition, as set out in the petition to terminate both the mother M.M.'s and J.J.'s parental rights, at each of the six permanency hearings held in this case between September 14, 2015 and December 20, 2018, the District Court, upon

agreement of the mother M.M. and J.J., kept its prior order in place, which included the finding that the child M.M. was a deprived child and continued M.M.'s placement in the care, custody, and control of Williams County Social Services. (Appellant's Appendix, at 8-10, ¶¶ 9-14).

b. The District Court's finding that M.M. had been in the care, custody, and control of the Williams County Social Service Board for at least 450 out of the previous 660 nights was not clearly erroneous.

[¶ 27] This Court stated previously that, under N.D.C.C. § 27-20-44(c), where a juvenile court found that a child had been in continuous foster care for 450 out of the previous 660 nights, "this determination alone was sufficient for termination of the father's parental rights under N.D.C.C. § 27-20-44(1)(c)(2)[.]" In re N.A., 2016 ND 91, ¶ 21, 879 N.W.2d 82 (terminating father's parental rights where minor child was in foster care for 774 consecutive days and nights prior to hearing).

[¶ 28] In this case, the District Court made the following findings of fact:

That the minor child, [M.M.], has been under the care, custody and control of Williams County Social Services and placed in foster care since September 18, 2014, when he was removed from [his] parents' custody under a temporary order, without returning to either parental home, except for a trial home visit with [the mother] that commenced December 1, 2014 and was ended January 15, 2015, a period of 46 nights.

That the minor child, [M.M.], has been in the care of Williams County Social Services for approximately 91% of his lifetime.

(Appellant's Appendix, at 49, ¶ 12). Based on the District Court's finding, it concluded that:

At the time of the hearing on this matter, [M.M.] will have been in the care, custody and control of Williams County Social Services for at least 450 of the last 660 nights, which is an indication of deprivation under NDCC 27-20-44(c)(2).

(Appellant's Appendix, at 51, ¶ 30).

[¶ 29] The District Court’s findings were supported by the evidence. Ms. Sikes testified that, at the time of the hearing on the petition on February 3, 2020, M.M. had been in foster care continuously since September 18, 2014, except for a trial home visit with the mother M.M., which lasted for 46 days and ended on January 15, 2015. (Tr., at 13:48 – 14:05). Based on the testimony that the trial home visit with the mother M.M. ended on January 15, 2015, and the testimony that the child M.M. had been in foster care up to the date of the hearing on February 3, 2020, the child M.M. had actually been in foster care for 1,845 consecutive days and nights prior to that February 3rd hearing. This is well more than the statutory amount of time of 450 out of the previous 660 nights under N.D.C.C. § 27-20-44(1)(c)(2).

[¶ 30] Based on the District Court’s findings that M.M. had been in foster care for at least 450 of the previous 660 nights and the evidence to support these findings, as well as the fact that J.J. does not dispute the District Court’s finding that M.M. was a deprived child, this alone is sufficient grounds for the termination of J.J.’s parental rights. See In re R.L.-P., 2014 ND 28, ¶ 23, 842 N.W.2d 889 (“Because a finding that the children have been in foster care more than 450 out of the previous 660 nights, along with a finding of deprivation, is sufficient to terminate parental rights under N.D.C.C. § 27-20-44(1)(c), it is unnecessary to address the parents’ challenge to the finding that the conditions and causes of the deprivation will likely continue.”)

[¶ 31] Despite this Court’s prior rulings on this issue, J.J. argues that N.D.C.C. § 27-20-44(c) uses the word “may” as to when a district court terminates parental rights and that it is not mandatory for the district court to terminate parental rights if N.D.C.C. § 27-20-44(c)(2) is violated. Even if N.D.C.C. § 27-20-44(c)(2) is construed to be

discretionary, and not mandatory, the District Court in this case did find that M.M. had been in foster care for at least 450 of the previous 660 nights on the date of the hearing and terminated J.J.'s parental rights in part on that basis. Therefore, J.J.'s argument should be rejected.

- c. **The District Court's determination that the causes and conditions of M.M.'s deprivation would likely continue or would not be remedied and the child is suffering and/or will probably suffer serious physical, mental, moral or emotional harm was not clearly erroneous.**

[¶ 32] N.D.C.C. § 27-20-44(c) authorizes the termination of parental rights if the child is found to be a deprived and the district court finds that the conditions and causes of deprivation are likely to continue or will not be remedied. J.J. contests this finding on his appeal.

[¶ 33] This Court has stated with regard to the requirements of this finding:

In determining whether the causes and conditions of a child's deprivation area likely to continue, a court cannot rely solely upon evidence of previous deprivation. Rather, there must be additional prognostic evidence to reasonably predict the deprivation will continue or be unremedied.

In re D.H., 2010 ND 103, ¶ 20, 783 N.W.2d 12 (internal citations and marks omitted).

According to this Court in that case, "[p]rognostic evidence may include a parent's cooperation with social services, as well as the parent's background. A lack of parental cooperation is indicative of the likelihood deprivation will continue." In re D.H., 2010 ND 103, ¶ 20, 783 N.W.2d 12. The District Court in this case specifically stated in its

Findings of Fact, Conclusions of Law, and Order for Judgment:

According to [N.D.C.C.] Section 27-20-44(a)(c)(1) the lack of significant progress towards reunification by either [the mother M.M.] or [J.J.] demonstrates that 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 and/or will probably suffer serious physical, mental, moral or emotional harm.

(Appellant's Appendix, at 51, ¶ 29).

[¶ 34] The evidence at the hearing supports this determination. Ms. Sikes testified that, in order for J.J. to be reunified with M.M., the family care plan required J.J. to complete a chemical substance evaluation, follow through on any recommendations, and follow through with support services to support a sober life. As Ms. Sikes testified, although Williams County Social Services made three requests to ICPC to reunify J.J. with M.M. between September 2015 and June 2017, at the time of each request, J.J. either testified positive for illegal drugs (cocaine at the first request and methamphetamine during the third request) or refused to submit to a drug and alcohol evaluation (during the second request). In addition, although J.J. did participate in individual addiction therapy for a period of time in the summer of 2017, the therapist discharged him from therapy because J.J. needed a higher level of addiction treatment. Yet, J.J. never obtained or completed any higher level addiction treatment and, during the hearing, J.J. testified that he was not currently involved in any treatment programs and was only looking for N.A. meetings. J.J.'s consistent positive tests for illegal drugs, especially during the time when he was hoping to be reunified with M.M., and his failure to participate and complete the necessary higher level addiction treatment supports the District Court's finding that the conditions and causes of M.M.'s deprivation are likely to continue or will not be remedied. In re D.H., 2010 ND 103, ¶ 23, 783 N.W.2d 12 (father's drug use, including the fact that the father tested positive for marijuana both times when social services tested him, supported the juvenile court's finding that the causes and conditions of the child's deprivation are likely to continue); Matter of Adoption of A.S., 2018 ND 265, ¶¶ 12-13, 920 N.W.2d 301 (upholding termination of

father's parental rights where father continued to use methamphetamine after petition was filed and he was late or wholly failed to attend the intensive outreach treatment).

[¶ 35] J.J.'s failure to take advantage of an opportunity to develop a genuine relationship with M.M. also supports the District Court's finding that the causes and conditions of M.M.'s deprivation will continue or will not be remedied. Interest of B.J.K., 2005 ND 138, ¶ 25, 701 N.W.2d 924 (father's failure to take advantage of the opportunity to develop a genuine relationship with a child for three years after learning about the child, including participating in only just five supervised visitations with the child and failing to attend others and only telephoning the child a single time, despite having no limitation on telephone contact, supported the finding that the causes and conditions of the child's deprivation were likely to continue due to the father's inability to provide adequate care).

[¶ 36] In this case, J.J. only visited M.M. when Williams County Social Services paid his travel costs; J.J. cut short his visits with M.M.; during the visits or phone calls with M.M., J.J. did not have significant conversation with him; and J.J., by his own admission, was not consistent with phone calls to M.M. in the two years prior to the hearing on the petition.

[¶ 37] This Court has also stated prognostic evidence includes the reports and opinions of the professionals involved. Matter of Adoption of A.S., 2018 ND 265, ¶ 11, 920 N.W.2d 301 (citation omitted). Ms. Sikes, the social worker, testified that her main concern in reunifying J.J. and M.M. was J.J.'s instability in housing and job and a relapse in drug usage. Although, as Ms. Sikes testified, J.J. had made some positive steps in the past month, she questioned why J.J. had not been aggressive about doing what he needed

to do to reunify with M.M. over the past 5 years. This Court expressed the same sentiment in In re D.H., 2010 ND 103, 783 N.W.2d 12:

In addition, while Eric's claims regarding his intention to provide a stable environment for David are a positive step, Eric did not demonstrate a present or future ability to be an adequate parent. See Interest of D.D., 2006 ND 30, ¶ 26, 708 N.W.2d 900 ("it is not enough that a parent indicates a desire to improve behavior; rather, the parent must be able to demonstrate present capacity, or capacity within the near future, to be an adequate parent.").

In re D.H., 2010 ND 103, ¶ 27, 783 N.W.2d 12. As previously recognized by this Court, children "should not be expected to wait or assume the risk involved in waiting for permanency and stability in their lives." Matter of Adoption of A.S., 2018 ND 265, ¶ 11, 920 N.W.2d 301.

[¶ 38] In addition to Ms. Sikes' testimony, the District Court also considered the testimony of Sara Anderson, the licensed clinical social worker who had been working in therapy with M.M. As Ms. Anderson's testimony bears out, to remove M.M. and return him to J.J. would be detrimental to M.M. emotionally because he's been with his foster parents for an extended period of time and he views them as his family; and it would do a lot of psychological harm to M.M. if he was moved to live with J.J. because he doesn't understand that his foster parents are not his family. Ms. Anderson also testified that when she talked with M.M. about his relationship with his biological parents, especially with J.J., M.M. gets very angry and denies that J.J. is his father and says that his foster father J.T. is his real dad. Ms. Anderson testified that she supported termination of J.J.'s parental rights.

[¶ 39] The testimony of the two professionals in this case further provides the prognostic evidence needed to support the District Court's finding that the causes and conditions of M.M.'s deprivation are likely to continue or will not be remedied.

[¶ 40] As to the further finding that M.M. is suffering and/or will probably suffer serious physical, mental, moral or emotional harm, J.J. does not contest this finding on appeal. Nonetheless, this finding by the District Court is also supported by prognostic evidence from the hearing. In re D.H., 2010 ND 103, ¶ 26, 783 N.W.2d 12 (Based on prognostic evidence of a parent's criminal history, drug and alcohol use, and lack of cooperation with social services, a juvenile court's finding that the child's deprivation will probably cause him to suffer serious physical, mental, moral, or emotional harm was not clearly erroneous).

[¶ 41] In this case, there was evidence at the hearing of J.J.'s drug use and admitted drug addiction, his failure to obtain necessary treatment for his drug addiction, and his lack of cooperation and compliance with Williams County Social Services and the care plan. This evidence suffices as the prognostic evidence to support the District Court's finding that M.M. is likely to suffer serious physical, mental, moral, or emotional harm.

III. J.J. has not Established an Ineffective Assistance of Counsel Claim.

[¶ 42] J.J. argues that he received ineffective assistance of counsel during the termination hearing because his trial legal counsel did not cross-examine A.T., the foster mother, about her adoption of M.M. and regarding her presence and interference at J.J.'s visits with M.M.

[¶ 43] This Court first recognized an ineffective assistance of counsel claim in a parental termination proceeding in State v. T.L., 2008 ND 131, ¶ 29, 751 N.W.2d 677. In that case, the mother premised her claim on her trial attorney’s failure to offer and admit evidence of the mother’s entrance into a second treatment program during the termination proceeding. Id., ¶ 25. This Court, in applying the test announced in Strickland v. Washington, 466 U.S. 668 (1984), stated:

The Strickland standard requires the party asserting a claim for ineffective assistance of counsel to show counsel’s performance fell below an objective standard of reasonableness and the deficient performance prejudiced the parent such that the likely outcome of the proceeding would have been different.

T.L., 2008 ND 131, ¶ 30, 751 N.W.2d 677. (internal citations and marks omitted). This Court further stated:

In addition to demonstrating the elements of the Strickland standard, counsel’s deficiency must be readily apparent in the record on direct appeal in the context of termination cases. It will be necessary for evidence of such a claim to appear on the face of the record because the claim is ordinarily raised on direct appeal. We examine the entire record. If the record affirmatively shows that counsel was ineffective, we will consider the merits of the ineffectiveness claim. We caution, however, that a review of these claims on direct appeal places a heavy burden on the party claiming ineffective assistance of counsel because without a record scrutinizing the reasons underlying counsel’s conduct, adjudging it subpar is virtually impossible.

Id., ¶ 31 (internal citations and marks omitted). In addition, “an unsuccessful trial strategy does not make defense counsel’s assistance defective, and [this Court] will not second guess counsel’s defense strategy through the distorting effects of hindsight.” Id., ¶ 33. “Trial counsel’s conduct is presumed to be reasonable.” Id.

[¶ 44] Based on the above standards, J.J. has not established an ineffective assistance of counsel claim based on his trial counsel’s failure to cross-examine A.T., the

foster mother, related to her adoption of M.M. and regarding her presence and interference at J.J.'s visits with M.M. This issue was addressed by J.J.'s trial counsel with Ms. Sikes, the Williams County Social Services' social worker who also attended the visits between J.J. and M.M. In particular, J.J.'s trial counsel asked Ms. Sikes if the foster mom's presence at the park impacted how M.M. interacted with J.J. Ms. Sikes testified she could not say, but that M.M. did not give any indicators of stress or anxiety and that they made sure to choose activities that M.M. normally did as part of his life. In addition, if J.J. did believe A.T.'s presence at the visit with M.M. impacted J.J.'s time with M.M., J.J. himself could have provided such testimony when he testified at the petition hearing, but he did not do so. The choice of J.J.'s trial counsel not to cross-examine A.T. at the hearing was a tactical decision and does not support J.J.'s ineffective assistance of counsel claim. State v. T.L., 2008 ND 131, ¶ 33, 751 N.W.2d 677 (citing and quoting In re Geist, 796 P.2d 1193, 1203 (Or. 1990) (“...an attorney’s choice of a particular theory of the case, the choice to call or not to call a particular witness, the choice to ask or not to ask certain questions, or the choice of a particular line of argument, will be tactical decisions. The mere fact that a tactical decision may backfire on counsel does not necessarily demonstrate that counsel was professional inadequate.”))

CONCLUSION

[¶ 45] For all of the foregoing reasons, the Appellee respectfully requests that this Court affirm the district court's order terminating J.J.'s parental rights.

REASON FOR REQUEST FOR ORAL ARGUMENT

[¶ 46] Oral argument is being requested because the best interests and welfare of a minor child are at stake and Appellee would like the opportunity to further explain,

including responding to any questions this Court may have, as to why the District Court order's terminating J.J.'s parental rights was appropriate.

Dated this 12th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

[¶ 47] The undersigned, as attorney for the Appellant in the above matter, hereby certifies, as required by Rule 32(e) of the North Dakota Rules of Appellate Procedure, that the number of pages in the above brief totals 25 pages and is in compliance with the page limitation of 38 pages allowed by Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure.

Dated this 12th day of March, 2020.

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CERTIFICATE OF SERVICE

[¶ 48] I hereby certify that a true and correct copy of the foregoing

APPELLEE’S BRIEF was on the 12th day of March, 2020, emailed to the following:

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