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IN THE SUPREME COURT 20000145

STATE OF NORTH DAKOTA

Jenese A. Peters-Riemers,

Appellee,

v.

Roland Clifford Riemers,

Appellant.

Supreme Ct. No. 20000145

District Ct. No. C-00-35

APPEAL FROM A PROTECTION ORDER
ISSUED BY THE DISTRICT COURT
TRAILL COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

THE HONORABLE NORMAN J. BACKES

AMICUS BRIEF OF THE ATTORNEY GENERAL

State of North Dakota
Heidi Heitkamp
Attorney General

By: Reid A. Brady
Assistant Attorney General
State Bar ID No. 05696
Office of Attorney General
900 East Boulevard
Bismarck, ND 58505-0041
Telephone (701) 328-3640
Facsimile (701) 328-4300

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STATEMENT OF ISSUES

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II. Whether the statutes' provisions creating presumptions comply with separation of powers.

STATEMENT OF CASE

Roland C. Riemers ("Riemers") appeals from a district court protection order issued against him. In his brief, Riemers asserts, in part, the protection order stems from N.D.C.C. § 14-05-22(3) and N.D.C.C. § 14-09-06.2(1)(j) ("statutes") and the statutes violate his due process rights as a parent and violate the separation of powers doctrine. The State supports Appellee's arguments asserting Riemers' constitutional arguments should not be considered. The State submits this amicus curiae brief to specifically support the constitutionality of the statutes if the Court considers the constitutional issues. See N.D.C.C. § 32-23-11 (providing "if the statute . . . is alleged to be unconstitutional, the attorney general of the state must be served with a copy of the proceeding and is entitled to be heard").

FACTS

The State adopts the Appellee's Statement of the Case. (See Brief of Appellee at 1-3.)

LAW AND ARGUMENT

I. The statutes' provisions creating presumptions against a parent based upon a preponderance of the evidence comply with due process.

The purpose of a standard of proof, as embodied in due process, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Addington v. Texas, 441 U.S. 418, 423 (1979) (citation omitted). The standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." Id.

In Santosky v. Kramer, 455 U.S. 745 (1982), the Supreme Court analyzed whether due process requires a state support its allegations by at least clear and convincing evidence in termination of parental rights proceedings. In reviewing a New York statute that allowed use of the preponderance of evidence standard in termination of parental rights proceedings, the Court resorted to the test set forth in Matthews v. Eldridge, 424 U.S. 319, 355 (1976). Id. at 754. Under the test, three factors must be balanced: 1) the private interests affected by the proceeding, 2) the risk of error created by the state's chosen procedure, and 3) the countervailing governmental interest supporting the use of the challenged procedure. Id.

Applying the first factor, the Court noted the "nature of the private interest threatened and the permanency of the threatened loss" are important considerations. Id. at 758. The Court recognized "[w]hen the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." Id. at 759. The Court thus concluded the first factor strongly favored heightened procedural protections. Id. at 761.

Applying the second factor, the Court noted that when termination proceedings occur, the child is not living at the child's natural home since the child cannot be found "permanently neglected" until the child has lived with a social service agency for more than one year. Id. at 766 n.16 (citation omitted). The Court reasoned, "[f]or the child the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo." Id. at 765-66. "[F]or the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural

family." Id. at 766. The Court thus indicated the second factor favored heightened procedural protections. Id.

Applying the third factor, the Court recognized a state interest in preserving and promoting the welfare of the child. Id. The Court noted the state's goal is to provide the child with a permanent home, and that "while there is still reason to believe that positive, nurturing parent-child relationships exist, the [governmental] interest favors preservation, not severance, of natural familial bonds." Id. at 766-67. The Court thus indicated the third factor favored heightened procedural protections. Id. at 767.

Summarizing the balancing process provided by the Matthews v. Eldridge test, the Court stated "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." Id. at 768 (citation omitted). "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." Id. at 747-48.

Following Santosky, in Mullin v. Phelps, 647 A.2d 714, 721 (Vt. 1994), the court held the lower court's finding of sexual abuse by a mere preponderance of the evidence was insufficient to terminate "all parent-child contact" between the father and the children. The court emphasized the lower court's decision "effectively terminated" the father's rights. Id. at 722. The court thus distinguished cases in which the restrictions on a parent's rights were not complete, such as where supervised visitation was provided, and cases in which the restrictions were not permanent, such as where

restrictions could be modified in subsequent proceedings. Id. The court concluded "due process required the [lower] court either to find the existence of sexual abuse by clear and convincing evidence or to permit, at minimum, continued contact between the father and the boys consistent with their safety." Id. at 724.

Proceedings that may result in mere restrictions on parental rights, however, are distinguishable from proceedings that may result in termination of parental rights. In State in Interest of A.C., 643 So.2d 719 (La. 1994), cert. denied, 515 U.S. 1128 (1995) ("Interest of A.C."), the court upheld a statute that prohibits visitation between a child and a parent found to have sexually abused the child until the court finds that the parent has completed a treatment program and that supervised visitation is in the child's best interests.

Rejecting the contention the statute violated due process because the finding of abuse needed to be shown only by a preponderance of the evidence, the court in Interest of A.C. noted "custody and visitation are only part of the parcel of parental rights." Id. at 726. The court identified residual rights such as the right to consent or withhold consent to adoption, the right to determine religious affiliation, the responsibility of support, and the right of inheritance from the child. Id. Distinguishing Santosky, the court explained "[t]he termination in Santosky [] removed all [parental] rights and, given the greater negative effect on the parent's store of rights, necessarily dictated a higher standard of proof," whereas "[i]n the instant case, only certain enumerated rights of the parent are curtailed via use of [the statute], and some of these curtailed rights are recoverable." Id. at 726-27; see also Matter of Custody of C.C.R.S., 892 P.2d 246, 255 (Colo.), cert. denied, 516 U.S. 837

(1995) (distinguishing Santosky because the case before it involved a custody dispute where the parent retained visitation rights and later proceedings to change custody were possible); J.R.T. v. Harrison County Family Court, 749 So.2d 105, 108 (Miss. 1999) (noting "[p]arental termination has been placed in a unique category of its own" as it involves a "final and irrevocable [decision] in regard to family structure").

The court in Interest of A.C. highlighted the legislature's effort to address the growing problem of domestic violence. 643 So.2d. at 723. The court noted the legislature found "problems of family violence do not necessarily cease when the victimized family is legally separated or divorced" and, "[i]n fact, the violence often escalates, and child custody and visitation become the new forum for the continuation of the abuse." Id.

The court in Interest of A.C. summarized "the need to protect the child from the often deleterious effects of contact with the abusive parent outweighs the limited loss of rights that the parent will experience." Id. at 727; see also W.M.E. v. E.J.E., 619 So.2d 707, 709 (La. Ct. App. 1993) (explaining "[t]he standard of proof required to suspend an abusive parent's visitation rights is a preponderance of the evidence"). The court concluded the preponderance of evidence standard "sufficiently strikes a balance between the fundamental rights of the father and the State's legitimate concerns with the best interests of the child." Interest of A.C., at 727.

Like Interest of A.C., in Mallory v. Mallory, 539 A.2d 995, 998 (Conn. 1988), the court held "the normal civil standard of proof, which is a fair preponderance of the evidence, is applicable in child custody hearings in which there are allegations that a parent has sexually abused his child, at least where the parent retains some visitation rights, which may be

reasonably restricted to protect the best interests of the child." Id. The court emphasized the restrictions on the parent's rights were temporary and the parent retained the right to supervised visitation. Id. at 997-98.

In the instant case, application of the Matthews v. Eldridge factors shows the statutes constitutionally provide for a presumption against a parent based upon a preponderance of the evidence that may be overcome by clear and convincing evidence. The first factor supports the constitutionality of the statutes. Only some of a person's parental rights are subject to restriction under the statutes as the statutes involve visitation and custody, not termination of parental rights. If the requisite statutory findings are shown, a parent still retains residual parental rights such as the right to consent or withhold consent to adoption, the right to determine religious affiliation, the responsibility of support, and the right of inheritance from the child. See Interest of A.C., at 726. A parent also retains the right to supervised visitation with the child. See Mallory, at 997-98.

Under the second factor, two major considerations support the constitutionality of the statutes. First, the risk of an erroneous determination on a parent is minimal. A decision under the statutes is not permanent and, as noted, only restricts some of the parent's rights. See Interest of A.C., at 726-27. Both statutes indicate a parent may avoid or remove the restrictions by making the requisite showing to rebut the presumption. A decision under the domestic violence protection order statute, cited in Riemers' reply brief, similarly is not permanent. See N.D.C.C. § 14-07.1-02(4) (providing for "[a]warding of temporary custody or establishing temporary visitation"). Second, the risk of an erroneous determination on a child is substantial. See Interest of A.C., at 727. A child

may face physical and mental harm from a violent parent if a court erroneously awarded custody or unsupervised visitation to a perpetrator of domestic violence.

Under the third factor, there is a strong interest in protecting the physical and mental well-being of children. This Court has recognized legislative intent to further that interest. The Court reasoned "NDCC § 14-09-06.2(1)(j) reflects a legislative finding that domestic violence has an adverse effect on children which may be presumed whenever violence is present in the household . . . even if [the children] are not direct targets of the abuse." Heck v. Reed, 529 N.W.2d 155, 163 (N.D. 1995). The majority of children witness the violence that occurs in their homes. Id. (citations omitted). Further, "Congress made a legislative finding that 'even children who do not directly witness spousal abuse are affected by the climate of violence in their homes and experience shock, fear, guilt, long-lasting impairment of self-esteem, and impairment of developmental and socialization skills.'" Id. at 163-64 (citations omitted). There are "the obvious physical injuries from domestic violence which can render victims bedridden or hospitalized." Id. at 164 (citation omitted). "[A] child placed in the custody of a perpetrator of domestic violence remains at risk" because "[m]ore than fifty percent of perpetrators who batter their spouses will also batter their children and the pattern of spouse abuse usually precedes the abuse of the child." Id. (citation omitted). The Court accordingly concluded "NDCC § 14-09-6.2(1)(j) reflects our state public policy that a perpetrator of domestic violence is generally not a proper person to have custody of children because children are seriously and detrimentally affected by exposure to a parent who uses violence to exert control over family members." Id. (citation omitted).

The foregoing demonstrates application of the factors set forth in Matthews v. Eldridge shows the State's strong interest in protecting the well-being of children outweighs a parent's limited interest in avoiding temporary restrictions of some parental rights. The statutes properly balance those interests and allocate the risks of erroneous determination by providing for a presumption against the perpetrator of domestic violence based on a preponderance of the evidence that may be overcome by clear and convincing evidence.

II. The statutes' provisions creating presumptions comply with separation of powers.

The separation of powers doctrine requires each branch of government to "exercise[] great restraint when requested to intervene in matters entrusted to the other branches of government." State v. Hanson, 558 N.W.2d 611, 615 (N.D. 1996). When the legislative branch "fails to exercise restraint and intervenes in a matter entrusted by the Constitution exclusively to the judicial branch, [the Court has] an obligation under the Constitution to say so." Id.

Article VI, § 3, N.D. Const., provides in pertinent part: "[t]he supreme court shall have authority to promulgate rules of procedure . . . to be followed by all the courts of this state[.]" In addressing alleged separation of powers violations by the Legislature, the Court has recognized the interplay between statutes and rules involving evidence. Hanson, at 614.

The Court has explained its mere possession of rule-making power "does not imply that [it] will never recognize a statutory rule" and it "will recognize statutory arrangements which seem reasonable and workable and which supplement the rules [the Court has] promulgated." Traynor v.

Leclerc, 1997 ND 47, ¶ 7, 561 N.W.2d 644 (citations omitted). Where the Legislature enacts a statute that directly conflicts with a rule promulgated by the Court, the rule prevails under separation of powers. Hanson at 614. "[W]hen reviewing a procedural statute and a rule for conflict, [the Court] prefer[s] to harmonize them when possible." Travnor at ¶ 8 (citation omitted). The Court "will uphold the statute unless its challenger has demonstrated the constitutional infirmity." Id. (citations omitted).

Here, Riemers does not demonstrate the statutes conflict with a court rule. The statutes can be harmonized with N.D.R. Ev. 301. Rule 301 governs presumptions "[i]n all civil actions and proceedings not otherwise provided for by statute or by the[] rules." "Rule 301 deals with presumptions, prescribing their effect in all civil proceedings not otherwise provided by law." N.D.R. Ev. 301, Explanatory Note. Rule 301 thus is inapplicable where, as here, statutes provide for the effect of presumptions.

Because Riemers fails to show a conflict between the statutes and a rule promulgated by the Court, the statutes comply with the separation of powers doctrine.

CONCLUSION

The State respectfully requests the Court hold the statutes are constitutional.

Dated this 8 day of September, 2000.

State of North Dakota
Heidi Heitkamp
Attorney General

Reid A. Brady

By: Reid A. Brady
Assistant Attorney General
State Bar ID No. 05696
Office of Attorney General
900 East Boulevard
Bismarck, ND 58505-0041
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for State of North Dakota.

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STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 8th day of September, 2000, I served the attached **AMICUS BRIEF OF ATTORNEY GENERAL** upon Michael A. Birrenkott, Michael L. Gjesdahl, and Roland C. Flattum-Riemers by placing true and correct copies thereof in envelopes addressed as follows:

Michael A. Birrenkott
Michael L. Gjesdahl
Attorney at Law
107 North 8th Street
Fargo, ND 58102

Roland C. Flattum-Riemers
421 1st Avenue South A-10
Grand Forks, ND 58201

and depositing same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Donna J. Connor

Subscribed and sworn to before me
this 8th day of September 2000.

Notary Public

LINDA TINJUM
Notary Public, STATE OF NORTH DAKOTA
My Commission Expires NOV. 17, 2005
STATE OF NORTH DAKOTA
NOTARY PUBLIC SEAL

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