

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20070312

J.A., a minor child, Dickey County
Social Services, and North Dakota
Department of Human Services,

Petitioners,

Supreme Court No.: 20070312
Dickey County No.: 07-C-047

vs.

Judge Narum, Judge of the District
Court, Southeast Judicial District,
and S. H.,

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

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Respondents.

STATE OF NORTH DAKOTA

THE DISTRICT COURT
DICKEY COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT

HONORABLE DANIEL D. NARUM

BRIEF IN RESPONSE TO PETITION
FOR SUPERVISORY WRIT

Jason R. Butts
North Dakota ID #05927
SMITH, STREGE & FREDERICKSEN, LTD.
321 Dakota Avenue
P.O. Box 38
Wahpeton, North Dakota 58074
(701) 642-2668
Attorney for Respondent S.H.

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ISSUE PRESENTED FOR REVIEW

Petitioner North Dakota Department of Human Services (Department) has requested that the Supreme Court take jurisdiction of this matter pursuant to N.D.C.C. § 27-02-04, by issuing a supervisory writ to the District Court. It is respondent S.H.'s position that the District Court did not err when it denied the Department's Motion for Judgment on the Pleadings. S.H. asks this Court to deny the supervisory writ requested by the Department.

STATEMENT OF THE CASE

S.H. initiated a custody action against the Department and Dickey County Social Services (Dickey County) by service of a Summons and Complaint dated May 21, 2007. Respondent's Appendix ("App.") 7. In the Complaint S.H. requested she be awarded sole physical and legal custody of J.A., and in the alternative, liberal and regular visitation of J.A. Id.

On August 1, 2007, the Department moved for judgment on the pleadings. App. 14. On September 21, 2007, S.H. served a Brief in Response to Motion on the Pleadings. App. 24. A hearing was had on October 2, 2007. On October 5, 2007, the District Court issued an Order Denying Motion for Judgment on the Pleadings. App. 48. On October 10, 2007, the Department filed a Motion for Reconsideration of the Order Denying Motion for Judgment on the Pleadings. App. 51. The District Court denied the Motion for Reconsideration on October 19, 2007. App. 60. The Department brought its Petition for Supervisory Writ on October 24, 2007.

STATEMENT OF THE FACTS

S.H. is the maternal grandmother of J.A. App. 10. Both of J.A.'s parents had their parental rights terminated in June 2005. App. 3. At that time, J.A. was placed in the custody of the Department. Id. S.H. was targeted as a suitable

adoption candidate and she started the process. App. 32. J.A. lived with S.H. for 15 months, from May 2005 until July 2006. App. 11.

In May 2006, the Department filed a Report of Suspected Child Abuse or Neglect. App. 8. This report centered around E.H., S.H.'s son (J.A.'s uncle). Id. E.H. had been visiting his mother from Arizona in April and May 2006. Id. The investigation that followed proved that there was never any abuse by E.H. and the Department then pursued an allegation of failure to protect against S.H. Id. The result of this investigation caused Dickey County to make a determination of "Services Required", which included a list of requirements for S.H. and J.A. to follow. Id.

Though S.H. followed their recommendations, and completed everything that they had asked of her, the Department made a decision to remove J.A. from S.H.'s care. App. 8 and 12. Based on that decision, the adoption agency that S.H. was working with made a decision to withdraw its support and closed its file, effectively eliminating the possibility of S.H. adopting J.A. App. 8. S.H. had received supervised visitation with J.A., but Dickey County terminated her visitation in January 2007. App. 11. Thereafter, S.H. brought a custody action on May 21, 2007. App. 7.

LAW AND ARGUMENT

I. The Court should deny the Department's Petition for a Supervisory Writ

The Court has limited and narrowly defined authority to issue supervisory writs. "This Court's authority to issue supervisory writs under N.D. Const. art. VI, § 2. and N.D.C.C. § 27-02-04 is discretionary authority we exercise on a case-by-case basis. rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy." State v. Haskell, 2001 ND 14, P4, 621 N.W.2d 358 (emphasis added). In addition, the Department also has the ability to appeal an adverse judgment. The Court does not use its supervisory jurisdiction "where the proper remedy is an appeal merely because the appeal may involve an increase of expenses or an inconvenient delay." Fibelstad v. Glaser, 497 N.W.2d 425, 429 (N.D. 1993). There would be no harm in letting the case go forward and if the Department wished to appeal after a trial on the merits. it could do so.

The Court does not issue a supervisory writ without exigent circumstances, which have not been presented by the Department. "(W)hile the superintending control is an extraordinary power which will be exercised in behalf of a litigant only under conditions that are tantamount to a denial of justice." Ingalls v. Bakken, 167 N.W.2d 516, 518 (N.D. 1969). The District Court's decision to deny the Department's Motion for Judgment on the Pleadings was correct, well thought

out, and followed the law. For these reasons, a supervisory writ is improper and the Department's Petition should be denied by the Court.

II. The District Court did not err when it dismissed the Department's Motion for Judgment on the Pleadings

A. As a psychological parent, S.H. has standing to bring a custody action.

Psychological parents have standing to bring custody actions. See Generally, Patzer v. Glaser, 396 N.W.2d 740 (N.D. 1986), Daley v. Gunville, 348 N.W.2d 441 (N.D. 1984), Manshukhani v. Pailing, 318 N.W.2d 748 (N.D. 1982). The Department argues that because the North Dakota Supreme Court has only heard cases pitting a psychological parent against a biological parent that the analysis applied in those cases doesn't apply to the facts of this case. Petitioner's Brief, pp 15-16. The logic of their argument is faulty. It is true that the most common psychological parent custody action is against a natural parent, but because the facts in the case at bar doesn't fit the usual mold, doesn't render the same analysis meaningless.

"When there is a custody dispute between a natural parent and a third party.... the test is whether or not there are exceptional circumstances which require that, in the best interests of the child, the child be placed in the custody of the third party rather than with his or her biological parent." In re Buchholz, 326 N.W.2d 203, 207 (N.D. 1982) quoting Mansukhani, 318 N.W.2d at 751.

"Exceptional circumstances exist when the custody dispute pits the psychological

parent against the natural parent.” Interest of D.R.J., 317 N.W.2d 391, 394 (N.D. 1982).

It is argued that if exceptional circumstances exist in these instances, they most surely exist when there is a custody dispute between a psychological parent and the Department. A best interest analysis is triggered when exceptional circumstances exist. In Re Buchholz, 326 N.W.2d at 207. The best interests of J.A. are facts that need to be determined, a motion for judgment on the pleadings circumvents a vigorous search for truth and what is in the best interests of the child. “(W)e recognize that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Kouba v. State, 2004 ND 186, P5, 687 N.W.2d 466.

B. N.D.C.C. § 27-20-47 grants the District Court wide latitude regarding placement of a child after the termination of parental rights.

When the court terminates the parents’ rights, it has several options.

1. If, upon entering an order terminating the parental rights of a parent, there is no parent having parental rights, the court shall:
 - a. Commit the child to the custody of the executive director of the department of human services or a licensed child-placing agency willing to accept custody for the purpose of placing the child for adoption or, in the absence thereof, in a foster home;
 - b. Appoint a fit and willing relative or other appropriate individual as the child’s legal guardian; or
 - c. Establish some other planned permanent living arrangement.

2. The custodian has the rights of a legal custodian and authority to consent to the child's adoption, marriage, enlistment in the armed forces of the United States, and surgical or other medical treatment.

3. If the Child is not placed for adoption within twelve months after the date of the order and a legal guardianship or other planned permanent living arrangement for the child has not been established by a court of competent jurisdiction, the child must be returned to the court issuing the original termination order for entry of further orders for the care, custody and control of the child.

N.D.C.C. § 27-20-47. The Department has argued that the District Court lacks the power to use subsection (1)(c) to make custody orders. App. 18.

When interpreting a statute, one must first look to the plain language of the statute and give each word of the statute its ordinary meaning. N.D.C.C. § 1-02-02, Christianson v. City of Bismarck, 476 N.W.2d 688, 690 (N.D. 1991). The language of N.D.C.C. § 27-20-47 is clear and unambiguous. Its ordinary meaning authorizes the District Court to establish some other planned permanent living arrangement, which presumably could be custody with a grandmother, who is a psychological parent.

The Department has argued that the legislative intent of N.D.C.C. § 27-20-47(1)(c) shows that it is not a "favored living arrangement for a child."

Petitioner's Brief, p. 13. North Dakota law, however, determines that we read N.D.C.C. 27-20-47(1)(c) only using its words and the meanings usually assigned to those words. "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."

N.D.C.C. § 1-02-05. When read using a plain language approach, as N.D.C.C. §

1-02-02 requires, the statute allows the court to grant custody to a psychological parent.

Further, N.D.C.C. § 27-20-47(3) requires the child to be returned to the District Court when that child hasn't been placed for adoption in twelve months. At that time the District Court is to make further orders as to the child's care and custody. Id.

The wording of this statute is clear; the District Court can make an order regarding custody when a child in this instance hasn't been placed for adoption within twelve months. J.A. has not been placed for adoption, and his parents' rights were terminated more than twelve months ago. The District Court has authority to place J.A. with S.H.

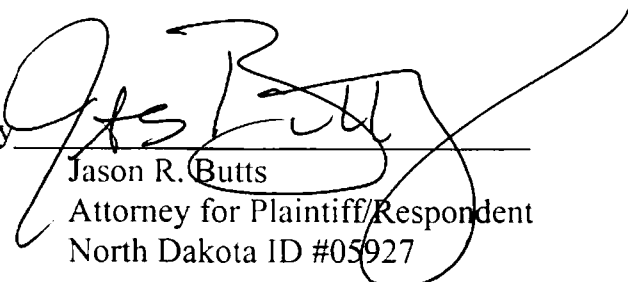
CONCLUSION

The District Court made the correct decision in this matter. A motion for judgment on the pleadings is not proper. Psychological parents have the standing to bring custody actions. Further, N.D.C.C. § 27-20-47 grants the District Court a great amount of discretion when placing minors after their parents' rights have been terminated. This is a case that should be heard on its merits. The Department's petition for a supervisory writ is an attempt at an end run and should be denied.

Respectfully submitted this 2 day of Nov, 2007.

SMITH, STREGE & FREDERICKSEN, LTD.
321 Dakota Avenue
P.O. Box 38
Wahpeton, North Dakota 58074
(701) 642-2668
(701) 642-4729 (Fax)

By



Jason R. Butts
Attorney for Plaintiff/Respondent
North Dakota ID #05927

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**AFFIDAVIT OF SERVICE
BY MAIL**

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Respondents.

STATE OF NORTH DAKOTA)
)SS
COUNTY OF RICHLAND)

Terryl Bates, being first duly sworn, deposes and says that on the 2nd day of
November, 2007, she served the Brief in Response to Petition for Supervisory Writ
and Appendix upon Jean Mullen, Tracey Lindberg, and Honorable Daniel Narum by
placing a true and correct copy of the Brief in Response to Petition for Supervisory Writ
and Appendix thereof in an envelope addressed as follows:

Ms. Jean R. Mullen
600 East Boulevard Ave, Dept. 125
Bismarck, ND 58505-0040

Ms. Tracey R. Lindberg
P.O. Box 174
Breckenridge, Minnesota 56520

Honorable Daniel Narum
Judge of the District Court
Dickey County Courthouse
P.O. Box 336
Ellendale, ND 58436

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

Terryl Bates
Terryl Bates

Subscribed and sworn to before me by Terryl Bates, this 2nd day of
November, 2007.

Suanne M. Goroski
Notary Public
My Commission Expires:

