20120376

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Michael L. Gjesdahl,

Plaintiff,

vs.

Douglas R. Herman, Judge of the District Court, East Central Judicial District, and Jon David Norberg,

Defendant,

Supreme Court #

PETITION FOR SUPERVISORY WRIT CONCERNING:

ORDER DENYING MOTION TO QUASH SUBPOENA, DATED SEPTEMBER 17, 2012

ISSUED BY THE DISTRICT COURT, STATE OF NORTH DAKOTA, COUNTY OF CASS

BRIEF OF PETITIONER, MICHAEL L. GJESDAHL

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Jurisdictional Grounds

Petitioner asks the Court to provide a supervisory and remedial writ. The Supreme Court has original jurisdiction to do so. N.D. Constitution, Article 6, Section 2; NDCC, § 27-02-04.

Petitioner has been subpoenaed to serve as a witness in a criminal trial. The District Court denied his motion to quash the subpoena. Thus, he asks this Court to review an Order Denying Motion to Quash Subpoena.

The Court has previously reviewed orders denying non-party witnesses relief, pursuant to North Dakota Century Code, Section 28-27-02, as such orders are not appealable. Heartview Foundation vs. Glaser, 361 N.W.2d 232 (1985); Reems on behalf of Reems v. Hunke, 509 N.W.2d 45 (1993).

As in this case, in both Heartview and Reems, *witnesses* objected to the disclosure of *confidential matters*. As here, in both cases, the District Court overruled the objections.

Discussing the suitability of the supervisory writ process to such circumstances, this Court has said:

> It is an understatement to observe there is an abundance of case law elucidating the factors we consider when deciding whether or not to employ our supervisory authority. Our jurisdiction to grant a supervisory writ will be invoked only to rectify error and prevent injustice [*Malony v. Cass Cty. Court of Increased Juris.*, 301 N.W.2d 112 (N.D.1980)] and when no adequate alternative remedies exist [*Lang v. Glaser*, 359 N.W.2d 884 (N.D.1985); *Grand Forks Herald v. District Court, Etc.*, 322 N.W.2d 850 (N.D.1982)].
>
> The parties are not entitled to a supervisory writ as a matter of right; rather, the issuing of the writ is entirely discretionary with this court [*Lang, supra*] to be determined case by case [*Lang, supra; Marmon v. Hodny*, 287 N.W.2d 470 (N.D.1980)] and is done rarely and with caution [*Lang, supra; Malony, supra*].

> In this instance the petitioners have no viable alternative remedy to a supervisory writ. The district court order compelling petitioners to answer the interrogatory is not appealable [see Sec. 28-27-02, N.D.C.C.; *Northwest Airlines v. State, Through Bd. of Equal.*, 244 N.W.2d 708 (N.D.1976)], and they have no recourse but to answer the interrogatory or be held in contempt [see Rule 37(d), N.D.R.Civ.P.]. Consequently, the only feasible remedy available to petitioners is to seek a supervisory writ. See *Marmon, supra.*

Heartview, Id., at 233-234.

Here, petitioner's circumstances are identical to Heartview's. His only feasible remedy is to seek a supervisory writ.

Moreover, the instant petition presents an issue of wider policy consequence, unlikely to gain appellate consideration, other than through the writ process.

Statement of Issues Presented for Review

1. May the State subpoena a court-appointed parenting investigator (and experts employed at his behest) to testify in a criminal trial against one of the divorcing parties? What analysis must the District Court employ in answering this question?

2. If such a subpoena is not quashed, should it be modified to mitigate its harmful effects on the investigator's (and other experts') obligations to the Court, the parties, and others? If so, what mitigation should be considered?

Statement of the Case

Petitioner is the court-appointed parenting investigator in a Cass County divorce action, involving three children. The case involves allegations of domestic abuse, the best interest "super factor." The same facts upon which such allegations are founded are also center stage in a criminal trial, where the defendant (husband) is charged with two counts of Gross Sexual Imposition and one count of Reckless Endangerment. The State has subpoenaed petitioner to testify at the criminal trial about *the same facts* involved

in the divorce/parenting case. He sought, by motion, to quash the subpoena. At hearing, petitioner also asked the Court to quash a subpoena the State served on a psychologist who the divorcing parties involved on petitioner's recommendation. Both the State and the defendant disagreed with the petitioner, upon different rationales.

The Court denied the motion to quash, employing non-discerning reasoning: In its view, *in all circumstances*, a subpoena requires a subpoenaed witness to appear to testify. Moreover, it left matters of testimonial scope not entirely, but largely, unaddressed.

Shouldn't the District Court have, instead, employed a case-specific balancing of the policies underlying a parenting investigator's work—those supporting neutrality and confidentiality—as against the State's and the defendant's articulated need for his testimony?

Statement of Facts

Dr. Jon Norberg ("Jon") and Dr. Alonna Norberg ("Alonna") are involved in a contentious, high profile divorce. They are the parents of three children and, consequently are involved in a contentious, high profile custody battle. The divorce trial is scheduled for a full week, beginning January 14, 2013.

Jon is also the defendant in a criminal prosecution. Alonna is his alleged victim. The criminal trial is scheduled to last a matter of weeks, beginning November 5, 2012.

Both the divorce and criminal cases share the same core facts. Alonna alleges that, without her consent, Jon administered Propofol to her. [Appx., 132]. Propofol is a sedative routinely employed in medical settings and favored for its short-lasting effects. Propofol can be employed for purposes of conscious sedation, moderate sedation, or deep and unconscious sedation. It has an amnesiac effect. Alonna further alleges that,

without her consent, and while she was incapacitated by the Propofol, Jon engaged in sexual activity with her. For his part, Jon disputes Alonna's allegations.

The Honorable Steven Marquart, who presides over the parties' divorce action, appointed petitioner to serve as the parties' parenting investigator [Appx., 44-45].

In his role as parenting investigator, petitioner has spoken to, and/or received information from, literally dozens of people, including: the parties; their children; nannies; co-workers; extended family; friends; school personnel; medical providers; and mental health providers. [Appx., 129-132]. He has accumulated a monstrous investigative file, thousands of pages in length. He has written no less than four reports for the divorce court's benefit, and may provide a fifth. [Appx., 88-233].

North Dakota Rule 8.6 outlines parenting investigator's duties, including to:

> Recommend, as appropriate, psychological evaluations, physical evaluations, parenting evaluations, chemical dependency evaluations, or other evaluations.

N.D.R.C., Rule 8.6(c)(10).

Pursuant to such rule, the parenting investigator recommended that Fargo Psychologist, Krislea Wegner, conduct a Parental Capacity Evaluation of Jon, Alonna, and their children. [Appx., p. 96]. The parties abided by his recommendation. They engaged Dr. Wegner and she performed an exhaustive and helpful evaluation. [Appx., 159-207]. What's more, she remains involved in orchestrating and governing therapy for Jon Norberg and, thus, is expected to provide an additional report prior to the parties' divorce trial. She provides assistance of great importance to the parenting investigator.

The Cass County State's Attorney's Office subpoenaed both the parenting investigator, petitioner herein, and Dr. Wegner to testify "on behalf of plaintiff" against Jon Norberg. [Appx., 35-37].

Petitioner moved to quash the subpoena the State served upon him, based upon the policies underpinning his two essential obligations to both the parties, their children, and the tens of others who'd provided him information—neutrality and confidentiality. [Appx. 38-62; Transcript., 6].

The State opposed his motion, arguing that both Jon and Alonna had waived the duty of confidentiality owed them by the parenting investigator. [Appx., 67-68]. It noted that Jon's and Alonna's fee agreement with the investigator provides:

> *Communications with the investigator and his office staff concerning your case are NOT confidential.*

[Appx., 50].

In response, the investigator—who drafted such fee contract—explained:

> *The intent in including this statement in my fee contract was, and is,* ***not*** *to abrogate all of my confidentiality obligations as a parenting investigator. It was not my intent when entering that agreement, or now, to depart from the requirements of North Dakota's "Code of Conduct for Custody Investigators."*
>
> *Instead, the intent of that statement was, and is, to make sure that the parties understand that, within the confines of their divorce matter, I am free to disclose any and all of their communications to the Court.*
>
> *Inclusion of a "no confidentiality" provision—with this intent—is entirely consistent with the training the North Dakota Supreme Court provides parenting investigators.*

[Appx., 40].

At hearing, the investigator made the uncontested point that he had not been contacted by Jon, Alonna, or their respective attorneys, to waive his obligation of confidentiality. [Transcript, 20]. Accordingly, during hearing, the investigator invited the Court to put this [paraphrased] question to them: Do you waive the investigator's obligation to keep information gained during his investigation confidentially within the boundaries of the divorce file? [Transcript, 18-19]. The Court declined to pose the

question or determine whether the parties had waived the investigator's confidentiality obligation *as to **their** statements* to him, much less anyone else's. [Transcript, 20].

For his part, Jon argued *not* that he and Alonna had waived the investigator's confidentiality obligation. Instead, he argued, simply, that no witness can avoid a subpoena's authority to "get him to the courthouse" [Appx., 85-86; Transcript 16-17], and that the parameters of his testimony could be fleshed out as questions are posed:

> *So it's our position that, in the clash between a lawfully issued subpoena, and a custody investigator's obligation of confidentiality, a subpoena has to be honored.*
>
> *That just gets him to the courthouse. And once he is at the courthouse, there is all kinds of issues. Confidentiality, has it been waived or not? What is the scope of what he is going to be allowed to testify to? Is his report admissible?*

[Transcript, 17]

The investigator responded that simply having to show up to testify already imposes a significant and chilling burden. [Transcript, 18]. In a file such as this, it may require him to spend days of uncompensated time, preparing to testify and, thus, diminish his desire to assist the court as an investigator in future cases.

In the end, the Court bypassed the confidentiality arguments and accepted Jon's rationale. [Transcript, 22]. It sympathetically agreed that to require a parenting investigator to share information gained during a parenting investigation outside the parameters of that case: (1) imposed chilling burdens on an investigator; (2) could inspire witnesses to be less forthcoming; and (3) could cause the parties and others to use and/or manipulate the investigator. [Transcript, 22]. Yet, in the court's view, those concerns could not even be weighed against the State's or Jon's perceived need for his testimony. Instead, the essence of the Court's rationale was that:

> "...the privileges we have in Article 5, our Rules of Evidence, the introductory, 501, says no person has a – except as stated in these rules, no person has the privilege to refuse to be a witness, to refuse to disclose any matter, to refuse to produce any object in writing, or prevent any other witness or disclosing the matter. I mean, it's just black and white. And I wish there were, if there were some case that I could – especially here in North Dakota or an adjoining state that I could fashion onto, then maybe go out on a limb and say as a matter of public policy I adopt the rule in this case. But I just haven't been able to find anything.

[Transcript, 23].

At hearing on his Motion to Quash Subpoena, petitioner informed the Court of the subpoena to Dr. Wegner, and invited the Court to quash it, too. [Transcript, 7, 10, and 21]. The Court did not speak to his request.

Standard of Review

The District Court's decision rested fully upon its view of the law. It concluded the law was without exception: Subpoenaed witnesses must appear and testify.

This Court reviews both questions of law and mixed questions of law and fact under the de novo standard of review. In re Pederson Trust, 2008 ND 210, 757 N.W.2d 740, 745.

Argument

I.

The State's Subpoena Infringes Upon a Parenting Investigators Two Core Duties: To Be Neutral and to Keep Confidences Within the Case.

Requiring a parenting investigator to testify in a separate (but related) action, for or against an investigated parent, conflicts with two essential obligations he owes the parties, the Court, the children, and all collateral witnesses: (1) the duty to be neutral, impartial, independent, and free of conflict; and (2) the duty to keep investigative data,

as well as his knowledge and opinions, confidentially within the confines of the action in which he is appointed.

North Dakota Rules of Court, Rule 8.6 is followed by an appendix, entitled "Code of Conduct for Custody Investigators." It embraces the neutrality concept—which is irrefutably implicit, anyway—in provisions such as:

> *A custody investigator shall preserve professional independence in the discharge of the investigator's duties. An investigator should act in accordance with the law, free from all other influence, rendering investigative services based upon the investigator's best knowledge. An investigator should avoid any impairment of independence and must not permit professional standards to be compromised by external pressure.*
>
> *Facts should be presented in as neutral and clear a manner as possible.*
>
> *A conflict of interest arises when a custody investigator has competing, incompatible duties or when there is a conflict between a custody investigator's private interests and the investigator's professional responsibilities. A custody investigator must exercise independence, act with loyalty, and preserve the confidentiality of the case as necessary. The custody investigator should avoid cases in which there is a conflict of interest.*

N.D.R.C., Rule 8.6, Appendix.

The Appendix also imposes upon investigators a broad and affirmative obligation to preserve the confidentiality of his or her work, which would surely include all statements received from parties, children, and collaterals, all documents, all psychological reports provided at the investigator's behest, and more. It says:

> *Confidentiality and record maintenance are obligations of the custody investigator. All custody investigators shall maintain confidentiality and protect against unauthorized disclosure and usage of information acquired in connection with the investigation. Confidentiality is required for all forms of transmission: verbal, written, digital, manual or hardcopy records, videos, and pictures, etc.*

N.D.R.C., Rule 8.6, Appendix.

These concepts, of course, are not unrelated. Confidentiality is important to maintain neutrality. For example, when dealing with a similar conflict-resolution role, courts recognize that a mediator who testifies is inevitably seen as acting contrary to the interests of at least one of the parties. NLRB vs. Joseph Macaluso, Inc., 618 F. 2nd 51 (9th Cir. 1980).

Addressing the same notion, commentators state:

> *It is true, this departure from neutrality is not personal or intentional when a mediator is compelled to testify under subpoena. Nonetheless, if a mediator can be converted into the opposing party's weapon in court, then her neutrality is only temporary and illusory.*
>
> *Neutrality is a bedrock principle of mediation that provides the basis for an effective working relationship between a mediator and parties to a mediation.*

The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predicability? 85 Marq. L. Rev. 79, 81 (Fall 2001).

The very same comments could be said, in truth, about a parenting investigator.

II.

A Subpoena's "Get Him to the Courthouse" Effect Does Have Exceptions

Jon and the Court are wrong to think a subpoena has the no-exception effect of requiring witnesses to show up at trial or hearing and, *only then*, may the Court rule upon objections and questions of scope. This notion is refuted at the ground level of North Dakota's subpoena rule itself. It provides:

> (4) *Quashing or Modifying a Subpoena.*
>
> (A) When Required
>
> On timely motion, the issuing court **must** quash or modify a subpoena that:
>
> (i) fails to allow a reasonable time to comply;
>
> (ii) requires attendance beyond the location requirements of Rule 45 (c)(3);

(ii) requires attendance beyond the location requirements of Rule 45 (c)(3);

(iii) **requires disclosure of** privileged or **other protected matter**, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other **confidential research, development, or commercial information**; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

N.D.R.Civ.P., Rule 45(c)(4)(emphasis added).

In their pleadings and oral argument, all involved parties agreed that a parenting investigator's investigative data, thoughts, conclusions, and reports are "confidential." The District Court agreed. Accordingly, under Rule 45(c)(4)(A), it had a mandatory duty to "quash or modify" the State's subpoena.

The Court could have circumvented the effects of Rule 45(c)(4)(A) by wrestling with, and resolving, the question of whether Jon and Alonna had, by waiver, freed the investigator from his duty to maintain confidences within their divorce file. The parties raised, discussed, and disagreed about this issue. The investigator specifically invited the Court to question at least Jon about his position.[1] Yet the Court declined to inquire, deeming the appropriate moment of inquiry to be the midst of trial. [Transcript, 20].

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[1] Alonna provided the Court no written position to the Motion to Quash. Neither she, nor counsel on her behalf, attended hearing on such motion.

III.

Competing Policies Must be Recognized

Like many interesting legal disputes, this one involves laudable policies, in conflict.

The State's argument that the subpoena must be honored is bolstered by the argument that the ability to compel a witness to attend trial is critical to the "search for truth."

Here, this policy collides with the policy goals underlying a parenting investigator's related duties of neutrality and confidentiality. The main policy, of course, is the free flow and disclosure of information to the Court—through the investigator—in order to discern and serve the best interests of children. People provide parenting investigators information that may be helpful or unhelpful, innocuous or embarrassing. Their information may even be relevant to a related criminal proceeding, whether inculpatory or exculpatory. However it may be characterized, to the extent such information relates to a parenting investigator's job, it is important that it be disclosed—confidentially, within the investigated action. Confidentiality encourages such disclosure.

The policy underlying an investigator's obligation of neutrality has to do with more than mere fairness and freedom of bias. It is also closely linked to the goal of encouraging liberal disclosure, the free flow of necessary information, again in the service of children's best interests.

Allowing an investigator to be subpoenaed to testify in cases other than that in which he or she is appointed undermines these goals. Unable to trust in an investigator's neutrality and confidence, parties—and their aligned friends, family, and

supporters—may be less likely to share information. Just as likely, the information they do choose to share may be more shaped and calculated.

Without the protection of confidentiality, parties—and their aligned friends, family, and supporters—may manipulate, if not entirely hijack, the investigator's work. This case provides a terrific example as, throughout his involvement, it has been apparent to the investigator that the parties have both used him to obtain information and discover documents for use ***in the criminal action***. They are both well aware that the investigator's file must be disclosed to them. Accordingly, they have each made requests that the investigator speak with people, or obtain records, only marginally, if at all, related to the best interest factors.

These policy considerations focus on the parties, the children, and collateral sources. However, neutrality and confidentiality protect investigators, too. Remember, their role is one of service to the Courts as they guard and protect the best interests of the state's children. Family Court judges will agree: Good and trustworthy investigators are worth their weight in gold; they are also few and far between. Their work is thankless, bruising, consuming, and at times frightening. Unfortunately, it is often insufficiently compensated.

Thus, exposing investigators to the prospect of being required to testify, without compensation, in actions other than that in which they have been appointed, is likely to dampen enthusiasm—of both active investigators and those considering the role. Again, this case is a poster child. The investigator has now accumulated approximately 10-feet of documents. The parties and the Court have expressed empathy for the investigator's predicament, and hope that the scope of his testimony will be closely drawn. However, as of this moment, no order confines the scope of his testimony. Prior to testifying in

this action, he will need to familiarize himself with his entire file. He will need to attend trial and testify. And, in the process, he will be removed from his legal practice, all without compensation.

This chilling effect cannot be diminished by deeming this a curious and unusual case. To be sure, by virtue of its facts, it may well be. However, in the respect that it involves facts relevant to multiple proceedings, it is not. In fact, many, if not most, parenting-time cases, involve facts that may be relevant to other proceedings. Drug use, domestic violence, sexual behaviors, all may be relevant to residential responsibility and parenting time, while just as relevant to a criminal prosecution, protection order, or mental health proceeding.

In other words, the question raised here is likely to have occurred many times in the past, and is likely to occur many times in the future.

The policy considerations raised herein apply as directly to associated referrals, such as, in this case, Dr. Krislea Wegner, as they do to the referring investigator.

IV.

So?

It is often true that problems are more easily identified than solutions, three of which come to mind here.

The solution the District Court should have employed in this case was to quash the subpoenas to the investigator and psychologist. Rule 45 required it. The State and Jon made no effective showing that confidentiality obligations had been waived. Neither did they make a showing, effective or otherwise, that the investigator's or psychologist's testimony was needed.

A second solution could have been to engage in a case-specific process of comparative weighing. On *the particular facts of this case*, does the "search for truth" goal overtake the investigator's obligation to be neutral and keep confidences? Such a process would surely require a more fully and closely articulated description of the particular testimony sought by the State and by Jon. It could require a closed Court-room or in camera examination.

A third—at least, partial—solution could have been to mitigate the impact testifying would have on the investigator's role, by: (1) closely identifying and confining the scope of his and Dr. Wegner's testimony; and (2) requiring that they be fairly and appropriately compensated for the time away from their regular employments.

V.

Conclusion

The Court should grant a supervisory writ in this case. This case involves an issue on which District Courts and practitioners would benefit from the Supreme Court's guidance. It also presents an issue that cannot be presented by way of appeal.

The District Court's decision rested purely upon a legal interpretation. Thus, this Court should employ a de novo standard of review.

This Court should make clear that, of course, subpoenas may be quashed and/or modified, and are not exception-free commands to "get to the courthouse," only then to learn whether, and to what extent, one must testify.

This Court should reverse the District Court and instruct it to quash the State's subpoenas to the parenting investigator and Dr.Wegner.

If it will not instruct the District Court to quash such subpoenas, it should instruct the District Court to engage in the suggested weighing process to further consider doing so.

Lastly, the District Court should be instructed that, if it does not quash such subpoenas, it must attempt to mitigate their impact on the important investigative process still underway in Jon's and Alonna's divorce action. The scope of the investigator's and psychologist's testimony should be closely subscribed and identified in advance, and they should be fairly compensated.

Respectfully submitted this 9th day of October, 2012.

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AFFIDAVIT OF PERSONAL SERVICE

State of ND vs. Jon David Norberg
File # 09-2011-CR-02632

I, Tiffany Plutowski, swear that I am at least 18 years of age, not a party to or interested in the above action, and that on this date, I served the following document(s) upon the below-listed individual(s) by personal delivery to their respective places of business or employment:

Petition/Brief for Supervisory Writ
Appendix to Petition/Brief for Supervisory Writ
Copy of Transcript of August 30, 2012 Hearing

I delivered such document(s) on this date to the following address(es).

Mr. Gary Euren, Esq.
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The Hon. Douglas Herman
c/o Clerk of District Court
Cass County Courthouse
211 S. Ninth Street
Fargo, ND 58102

Tiffany Plutowski

Subscribed and sworn to before me
this 9th day of October, 2012 in the
County of Cass, State of North Dakota.

Notary Public

HOLLY ALTENDORF
Notary Public
State of North Dakota
My Commission Expires July 2, 2015

AFFIDAVIT OF SERVICE BY MAIL

Michael L. Gjesdahl vs. Douglas R. Herman, Judge of the District Court, East Central Judicial District, and Jon David Norberg

I, Tiffany Plutowski, swear that I am at least 18 years of age, not a party to or interested in the above action, and that on this date, I served the following document(s) upon the below-listed individual(s) by mail to their respective places of business or employment:

Amended Cover to Petition/Brief
Amended Cover to Appendix
Page 91 to Appendix (copy)

I mailed such document(s) on this date to the following people and address(es).

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The Hon. Douglas Herman
c/o Clerk of District Court
Cass County Courthouse
PO Box 2806
Fargo, ND 58102

Tiffany Plutowski

Subscribed and sworn to before me
this 12th day of October, 2012 in the
County of Cass, State of North Dakota.

Notary Public

MICHAEL L. GJESDAHL
Notary Public
State of North Dakota
My Commission Expires Jul. 20, 2016

FILED BY CLERK
SUPREME COURT
SEP 15 2012