

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

SEP 30 2008

Michelle Reinholdt,

Appellee,

v.

North Dakota Department of
Human Services,

Appellant.

STATE OF NORTH DAKOTA

Supreme Ct. No. 20080210

Williams County No. 08-C-0163

APPEAL FROM THE DISTRICT COURT
WILLIAMS COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT

HONORABLE DAVID W. NELSON

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page(s)</u>
Statement of the Issue.....	1
Whether an applicant is ineligible for Medicaid benefits when the applicant does not exercise her legal rights to receive her share of the marital estate which her guardians gave to her ex-spouse in a stipulated divorce.	
Statement of Case.....	1
Statement of the Facts.....	1
Law and Argument	3
I. The Court's review is limited.....	3
II. Overview of the Medicaid program.....	4
A. The Department implements the Medicaid program and is responsible for promulgating rules and regulations.....	5
B. All assets available to an applicant are considered and an applicant must take affirmative steps to show an asset is unavailable	6
III. Reinholdt is not eligible or entitled to Medicaid benefits when she has failed to exercise her legal rights to receive her share of the marital estate which her guardians gave to her ex-spouse in a stipulated divorce	8
A. Guardians and conservators have a duty to protect the ward's estate	8
B. The Department's finding that Reinholdt has a colorable cause of action against her guardians and conservators for breach of their fiduciary duty is supported by a preponderance of the evidence.	9
C. Reinholdt has a remedy for the breach.....	10
Conclusion.....	11

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Barth v. Barth</u> , 1999 ND 91, 592 N.W.2d 359	10
<u>Donlin v. Donlin</u> , 2007 ND 5, 725 N.W.2d 905	10
<u>Dvorak v. Dvorak</u> , 2005 ND 171, 719 N.W.2d 362	10
<u>Estate of Cook</u> , 171 A. 730 (Del. Ch. 1934).....	9
<u>Hinschberger v. Griggs County Soc. Servs.</u> , 499 N.W.2d 876 (N.D. 1993).....	8
<u>In the Estate of Allmaras</u> , 2007 ND 130, 737 N.W.2d 612	9
<u>Linser v. Office of Attorney General, Dep't of Human Servs.</u> , 2003 ND 195, 672 N.W.2d 643	7
<u>Lorenz v. Lorenz</u> , 2007 ND 49, 729 N.W.2d 692	10
<u>Makedonsky v. N.D. Dept. of Human Services</u> , 2008 ND 49, 746 N.W.2d 185	3-4, 10
<u>Mangall v. Mangall</u> , 559 N.W.2d 221, 1997 ND 19	8
<u>New York State Dept. of Social Services v. Bowen</u> , 846 F.2d 129 (2d Cir. 1988).....	5
<u>Opp v. Ward County Soc. Servs. Bd.</u> , 2002 ND 45, 640 N.W.2d 704	7, 8, 10, 11
<u>Post v. Cass County Soc. Servs. Bd.</u> , 536 N.W.2d 661 (N.D. 1996).....	7, 10-11
<u>Schmidt v. Ward Cty. Soc. Servs. Bd.</u> , 2001 ND 169, 634 N.W.2d 506	6, 7, 8
<u>Schoenwald v. Schoenwald</u> , 1999 ND 93, 593 N.W.2d 350	10
<u>Thompson v. First Nat'l Bank</u> , 269 N.W.2d 763 (N.D. 1978).....	8

<u>Wahl v. Morton County Soc. Serv.,</u> 1998 ND 48, 574 N.W.2d 859	5
<u>Wagner v. Sheridan Cty. Soc. Serv. Bd.,</u> 518 N.W.2d 724 (N.D. 1994)	6
<u>Wisconsin Dep't of Health and Family Servs. v. Blumer,</u> 534 U.S. 473 (2002)	5

Statutes and Rules

42 U.S.C. § 1396.....	4, 5
42 U.S.C. § 1396a.....	5
N.D.C.C. ch. 28-32	3, 4
N.D.C.C. § 28-32-46.....	4
N.D.C.C. § 30.1-29-17 (2007 Supp.).....	8
N.D.C.C. § 30.1-29-20.....	8
N.D.C.C. § 50-24.1-02	6
N.D.C.C. § 50-24.1-01.1	5
N.D.C.C. § 59-01-18.....	9-10
N.D. Admin. Code § 75-02-02.1	6
N.D. Admin. Code § 75-02-02.1-02.1	6
N.D. Admin. Code § 75-02-02.1-25	6
N.D. Admin. Code § 75-02-02.1-25(1).....	6
N.D. Admin. Code § 75-02-02.1-26(1).....	6
N.D. Admin. Code § 75-02-02.1-27	6
N.D. Admin. Code § 75-02-02.1-28	6

Other Authorities

39 Am.Jur.2d Guardian and Ward § 2 (1999).....	8
mayoclinic.com/health/huntingtons-disease/DS00401	1

STATEMENT OF THE ISSUE

Whether an applicant is ineligible for Medicaid benefits when the applicant does not exercise her legal rights to receive her share of the marital estate which her guardians gave to her ex-spouse in a stipulated divorce.

STATEMENT OF THE CASE

The Department of Human Services (Department) appeals the district court order reversing the Department's order denying Michelle Reinholdt's (Reinholdt) appeal from a denial of Medicaid benefits by Williams County Social Services (County). The original denial was based on a finding Reinholdt had assets that exceeded the \$3,000 asset limit for Medicaid eligibility.

STATEMENT OF THE FACTS

Reinholdt is diagnosed with Huntington's disease (or Huntington's cholera), a progressive, degenerative, inherited disease that results in the wasting away of certain brain cells. See mayoclinic.com/health/huntingtons-disease/DS00401. Record on Appeal (ROA) 324. Symptoms of the disease usually develop in middle age. Id. Personality changes and a decrease in cognitive abilities are early signs and symptoms of Huntington's disease. Id. People afflicted with the disease may exhibit irritability, signs of depression, or anger. Id. Due to the decreased cognitive abilities, an individual suffering from Huntington's disease may have trouble making decisions. Id. An afflicted person may also experience problems learning new information, responding to questions, and remembering important information. Id. Family and friends may notice the change in the afflicted individual before the person realizes there has been a change. Id.

Doctors diagnosed Reinholdt with Huntington's disease in 1997. ROA 230. Reinholdt began to exhibit the types of behavior associated with Huntington's disease. Id. By December 2004, Huntington's disease had

incapacitated Reinholdt to the extent that a decision was made to seek a guardian and conservator. ROA 300 – 301. Reinholdt's sister and brother were appointed co-guardians and co-conservators. Id. Shortly after being appointed, the guardians applied for Social Security Disability Insurance benefits for Reinholdt. ROA 241. The Social Security Administration found Reinholdt eligible for SSDI benefits. ROA 190. Her children also received a monthly payment, as beneficiaries. ROA 256.

Due to the severity of the effect of the Huntington's Disease, the Tioga Medical Center admitted Reinholdt on May 18, 2006. ROA 228. On May 23, 2006, Reinholdt was transferred to a nursing home. ROA 228 – 229. Reinholdt and her husband, Loren Reinholdt (Loren) were married at the time. ROA Ex. 4, pp. 302-07 (divorce judgment). On May 25, 2006, Jody Schroeder contacted the County to discuss Medicaid eligibility for Reinholdt. ROA 28. Because Loren and Reinholdt were still married, the County asked Loren to complete an Asset Assessment to determine their asset eligibility under the Medicaid spousal provisions. ROA Ex. 1, pp 294-97. On an attachment to the Asset Assessment, Loren listed his valuation of their assets. Id.

In June 2006, as part of Reinholdt's file, the County received a copy of an Order appointing the co-guardians for Reinholdt dated December 15, 2004. ROA Ex. 3, pp 300-01. The initial copy of the order submitted to the County did not give authority to the guardians to change Reinholdt's marital status. Id. The subsequent letters of co-Guardianship and co-Conservatorship gave the guardians authority over Reinholdt's marital status. ROA Ex. 8, pp. 320-21. Loren and Reinholdt were married for a number of years. The couple has three children. ROA 351. The County also received a copy of a judgment of divorce, wherein Loren was granted a divorce from Reinholdt effective May 31, 2006. ROA Ex. 4, pp. 302-07. Loren was represented by an attorney; Reinholdt did not

appear herself or through an attorney. Id. The divorce and division of assets were by stipulation of the parties. Id. The stipulation was signed and executed by the co-guardians. ROA 240-41. The stipulation and subsequent judgment awarded Loren all the marital assets. Id. Reinholdt retained only her SSDI income. Id.

On December 27, 2006, co-guardian and co-conservator Jody Schroeder submitted an application for Medicaid benefits to the County on behalf of Reinholdt. ROA Ex. 5, pp. 308-12 (denial notice addressed to Schroeder and referencing the December 27, 2006 application). The County denied the application and sent a notice identifying the basis for the denial to Reinholdt, through one of her guardians. Id. The denial notice is confusing because it states two reasons for the denial: (1) the transfer of her assets in the divorce constituted a disqualifying transfer, and (2) the transfer by her guardians of her assets in the divorce was a breach of fiduciary duty and the transferred assets are considered available assets "because the person who made the transfer must account for and replace any amounts lost by the applicant or recipient." ROA at 312.

Given these facts, and for the following reasons, the County's determination Reinholdt was not eligible for Medicaid benefits because of excess assets should be upheld.

LAW AND ARGUMENT

I. The Court's review is limited.

A review of an agency's denial of Medicaid benefits is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Makedonsky v. N.D. Dept. of Human Services, 2008 ND 49, ¶ 5, 746 N.W.2d 185 (citations omitted.) Deference is given to the agency's findings, and the court should not make independent findings of fact or substitute the court's judgment for that of the

agency. Id. at ¶ 6. The reviewing court determines “only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.” Id. Courts reviewing administrative agency’s decisions are required to affirm the decision unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of [N.D.C.C. ch. 28-32] have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency’s rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

Id. at ¶ 5. When a district court order of an agency determination is appealed to the North Dakota Supreme Court, the Court reviews the agency determination.

Id. (citations omitted).

II. Overview of the Medicaid program.

Federal law established the Medicaid program as a jointly financed federal-state program designed to provide health care to needy individuals. 42 U.S.C. § 1396. Inherent in the congressional plan was an intent to require an individual to exhaust his or her own assets before taxpayer revenues are utilized to

provide for that individual's medical care. See New York State Dept. of Social Services v. Bowen, 846 F.2d 129, 133 (2d Cir. 1988) (citing the Senate Report that "Medicaid is intended to be the payer of last resort, that is, other available resources must be used before Medicaid pays for the care of an individual enrolled in the Medicaid program," in holding that the state Medicaid agency could appeal denials of Medicare benefits to an individual where those benefits would pay for services otherwise required to be paid by Medicaid). The North Dakota Supreme Court has recognized this congressional intent. See, e.g., Wahl v. Morton County Soc. Serv., 1998 ND 48, ¶ 18, 574 N.W.2d 859 ("The Medicaid program is intended to be the payor of last resort, with other available resources being used before Medicaid pays for an individual's care."). The Medicaid program is governed by interplay of federal and state law and regulations. 42 U.S.C. § 1396. The Secretary of the U.S. Department of Health and Human Services (HHS), through the Centers for Medicare and Medicaid Services, administers the program at the federal level. Each state electing to participate in the Medicaid program is mandated to establish a plan to implement the program in the individual state. 42 U.S.C. § 1396a. As long as the state establishes program terms that represent a reasonable construction of the federal standards, the state's decision will be respected by a reviewing court. See Wisconsin Dep't of Health and Family Servs. v. Blumer, 534 U.S. 473, 495-96 (2002).

A. The Department implements the Medicaid program and is responsible for promulgating rules and regulations.

North Dakota has elected to participate in the program and has designated the Department as the state agency to implement the Medicaid program in the state. N.D.C.C. § 50-24.1-01.1. Under this authority, the Department adopted rules to implement the Medicaid program and, as relevant to this appeal, to

determine the conditions of eligibility for Medicaid benefits. See N.D. Admin. Code ch. 75-02-02.1.

In determining eligibility for Medicaid, the Department considers whether the applicant has sufficient assets to meet the costs of necessary medical care and services. N.D.C.C. § 50-24.1-02. No person may be found eligible for Medicaid if the total value of that person's assets exceeds \$3,000. N.D. Admin. Code § 75-02-02.1-26(1). In making this determination, all assets available to the applicant are considered. N.D. Admin. Code § 75-02-02.1-25. Certain assets are exempt or excluded from consideration. N.D. Admin. Code §§ 75-02-02.1-27, 75-02-02.1-28. However, assets an applicant has the lawful power to make available are counted. N.D. Admin. Code § 75-02-02.1-25(1).

The burden of establishing eligibility for Medicaid benefits rests with the person applying for benefits. N.D. Admin. Code § 75-02-02.1-02.1; see also Wagner v. Sheridan Cty. Soc. Serv. Bd., 518 N.W.2d 724, 729 (N.D. 1994). As discussed below, Reinholdt cannot meet this burden.

B. All assets available to an applicant are considered and an applicant must take affirmative steps to show an asset is unavailable.

The Department's rules governing Medicaid eligibility provide, as relevant to this case, as follows:

All actually available assets must be considered in establishing eligibility for Medicaid. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative; . . . when the applicant, recipient, or responsible relative has the lawful power to make the asset available, or to cause the asset to be made available.

N.D. Admin. Code § 75-02-02.1-25(1).

The North Dakota Supreme Court has recognized that an asset does not have to be "in hand" to be actually available. See Schmidt v. Ward Cty. Soc. Servs. Bd., 2001 ND 169, ¶ 13, 634 N.W.2d 506. Specifically, this Court has

found that having to take legal action does not mean that an asset is not available. See, e.g., Post v. Cass County Soc. Servs. Bd., 536 N.W.2d 661 (N.D. 1996); Schmidt, 2001 ND 169, 634 N.W.2d 506; Opp v. Ward County Soc. Servs. Bd., 2002 ND 45, 640 N.W.2d 704; Linser v. Office of Attorney General, Dep't of Human Servs., 2003 ND 195, 672 N.W.2d 643. It is not the responsibility of the Department or the courts reviewing an administrative decision to determine whether an asset can be made available. When a colorable course of legal action is available to an applicant, the burden is on the applicant to demonstrate the applicant would be unsuccessful in exercising the legal right. See Opp, 2002 ND 45, ¶¶ 22-23, 640 N.W.2d 704.

In Opp, the Supreme Court found Opp had the potential to obtain a partial distribution of her inheritance from her deceased brother by recourse to the probate court. Id., ¶ 22. The Court recognized the probate court might deny Opp's request for a partial distribution. The Court, however, found that that did not obviate the requirement that Opp make the effort. Id., ¶ 23. Relying on its earlier cases, the Court stated the Medicaid applicant's responsibility, as follows:

However, speculating whether Opp would ultimately succeed in obtaining a partial distribution is not the primary inquiry under our decisions in Post and Schmidt. Rather, Post and Schmidt require a Medicaid recipient to attempt to access the asset through reasonable legal means.

Id.

Because Opp had not made an effort to access, at least partially, the inheritance from the estate of her brother to help pay any medical costs she might incur, the Court found "a reasonable person could reasonably conclude Opp's inheritance is available to her, and . . . the Department's decision that Opp had failed to prove the assets were not 'actually available' to her is supported by a preponderance of the evidence." Id.

Opp was determined not eligible for benefits. As discussed below, Reinholdt is not eligible for benefits based on similar reasoning.

III. **Reinholdt is not eligible or entitled to Medicaid benefits when she has failed to exercise her legal rights to receive her share of the marital estate which her guardians gave to her ex-spouse in a stipulated divorce.**

A. **Guardians and conservators have a duty to protect the ward's estate.**

"The appointment of a conservator vests in the conservator title as trustee to all property of the protected person, presently held or thereafter acquired. . . ." N.D.C.C. § 30.1-29-20. The Editorial Board Comment to that section of the Uniform Probate Code states: "Once appointed [conservator], he is free to carry on his fiduciary responsibilities. If he should default in these in any way, he may be made to account to the court." *Id.* And the general duties of a conservator are defined in the statute to require, "[i]n the exercise of conservator's powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees. N.D.C.C. § 30.1-29-17 (2007 Supp.).

"The relationship between a conservator and the protected minor is a fiduciary relationship similar to the relationship between a trustee and a beneficiary." *Schmidt*, 2001 ND 169, ¶ 11, 634 N.W.2d 506 (citing 39 Am.Jur.2d *Guardian and Ward* § 2 (1999)). As such, the conservator "owes a high degree of good faith to the ward or protected person, the estate of the ward or protected person, and other persons interested in the estate." *Mangall v. Mangall*, 559 N.W.2d 221, ¶ 11, 1997 ND 19 (citing *Thompson v. First Nat'l Bank*, 269 N.W.2d 763, 764 (N.D. 1978)). The Supreme Court stated "a conservator must act as a fiduciary in dealing with the protected person's property and must follow the standards observed by a prudent person dealing with the property of another." *Hinschberger v. Griggs County Soc. Servs.*, 499 N.W.2d 876, 880 (N.D. 1993). "The prudent conservator is one who exercises care in a manner consistent with

that of the ordinarily prudent person who feels 'morally bound' to act for the benefit of the protected person and the estate's beneficiaries." In the Estate of Allmaras, 2007 ND 130, 737 N.W.2d 612 (citing Estate of Cook, 171 A. 730, 731 (Del. Ch. 1934)). In Cook, the Delaware court, in describing the fiduciary duty of a trustee in use of a beneficiary's funds, stated "[i]n other words, he must take no risks which would not be taken by an ordinary prudent man who is trustee of another persons property." Estate of Cook, 171 A. 730, 731 (Del. Ch. 1934). The primary object to be attained by a trustee is the safety of the trust funds. Id.

B. The Department's finding that Reinholdt has a colorable cause of action against her guardians and conservators for breach of their fiduciary duty is supported by a preponderance of the evidence.

The Department found that Reinholdt has a colorable cause of action against her guardians for breach of a fiduciary duty. ROA 363. The marriage that was dissolved by the divorce action was lengthy. See, e.g., ROA 236 (discussing that the divorce had been discussed for "a couple of years;" "towards the last few years"). Even though this was a long-term marriage, the guardians decided to allow Loren to receive all of the property. ROA Ex. 4, pp. 302-07; ROA 240-41. The guardian testified that they believed they were doing what was right by Loren, because he had such a difficult time during the last few years of the marriage due to Reinholdt's behavior which was caused by the Huntington's disease. ROA 239; 255. While the guardians purportedly felt sympathy for Loren, and even for Reinholdt's children, their duty was to Reinholdt – to ensure that she had her fair share of the assets. They knew she was going to need financial help to care for herself, especially given her debilitating disease, if she no longer had the marital assets. ROA 241. They failed to protect her assets, and for this, they are liable to Reinholdt, despite their purported "good intentions." N.D.C.C. § 59-01-18. "A trustee who uses or disposes of the trust property in

any manner not authorized by the trust, but in good faith and with intent to serve the interest of the beneficiary, is liable only to make good whatever is lost to the beneficiary by the trustee's error." Id.

Reinholdt was entitled to receive her fair share of the marital estate. Based upon the actions of her guardians, she was deprived of that share, and was left destitute. This finding is supported by a preponderance of the evidence.

C. Reinholdt has a remedy for the breach.

Reinholdt has the lawful right to attempt to recover from the guardians the assets she should have received in the divorce settlement. Decisions of the North Dakota Supreme Court demand that Reinholdt attempt to make the assets available she should have received in the divorce but for breach of their fiduciary duty. See Opp, 2002 ND 45 at ¶23, Makedonsky v. N.D. Dept. of Human Services, 2008 ND 49, ¶ 10, 746 N.W.2d 185. The Department relies on the rationale of the Court: "This Court has also recognized that a long-term marriage supports an equal distribution of property." Donlin v. Donlin, 2007 ND 5, ¶ 11, 725 N.W.2d 905 (citing Dvorak v. Dvorak, 2005 ND 171, ¶ 34, 719 N.W.2d 362 and Schoenwald v. Schoenwald, 1999 ND 93, ¶ 23, 593 N.W.2d 350). See also Lorenz v. Lorenz, 2007 ND 49, ¶ 6, 729 N.W.2d 692 ("a long-term marriage supports an equal division of the marital estate"); Barth v. Barth, 1999 ND 91, ¶ 8, 592 N.W.2d 359 ("An equal division of marital property is a logical starting point in a long-term marriage.") Reinholdt's guardians stipulated to a divorce that left their ward destitute by agreeing to a divorce judgment that failed to distribute the marital assets whatsoever. Under Opp and Makedonsky, Reinholdt has a duty to attempt to recover from her guardians the property she was entitled to receive.

In order to qualify for Medicaid benefits, a Medicaid applicant must prove the applicant would be unsuccessful in pursuing an action. See Post v. Cass Co.

Social Services Board, 556 N.W.2d 661, 665. Reinholdt must take action to attempt to obtain reimbursement from the guardians for their actions in dissipating her share of the marital assets by giving them to Reinholdt's ex-husband. It is not for the ALJ, or a subsequent court in an appeal from this action to make a determination if Reinholdt would be successful in such an action. Opp, 2002 ND 45, ¶ 23. 640 N.W.2d 704.

As the North Dakota Supreme Court said in Opp, "speculating whether Opp would ultimately succeed in obtaining a partial distribution is not the primary inquiry under our decisions in *Post* and *Schmidt*." Opp v. Ward County Soc. Servs. Bd., 2002 ND 45, ¶ 23, 640 N.W.2d 704. "Rather, *Post* and *Schmidt* require a Medicaid recipient **to attempt to access the asset** through reasonable legal means." Id. (emphasis added.) Reinholdt has not attempted to access the asset. Until Reinholdt has made such an attempt, she has not shown the asset is not actually available and as intended by the North Dakota Supreme Court.

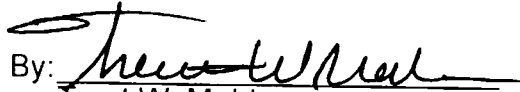
Reinholdt has a potential cause of action against the guardians for breach of their fiduciary duty by failing to protect her marital assets and to ensure that she received her fair share. She has yet to make an attempt to recover her share of the marital assets. Without making the attempt, she is unable to prove the assets are not available to her and she remains ineligible.

CONCLUSION

For the reasons given above, the Department and Williams County Social Services respectfully request the Supreme Court affirm the Department's denial of benefits for Reinholdt on the grounds she has excess assets.

Dated this 30th day of September, 2008.

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Michelle Reinholdt.

Appellee,

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North Dakota Department of
Human Services,

Appellant.

Supreme Ct. No. 20080210

Williams County No. 08-C-0163

STATE OF NORTH DAKOTA)
COUNTY OF BURLEIGH) ss.


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.

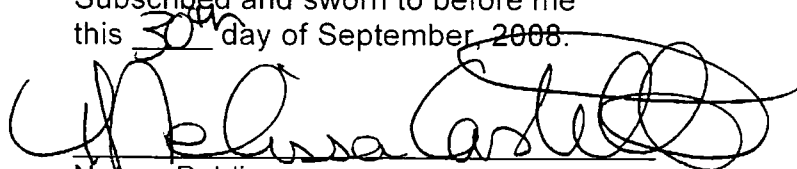
2. I am of legal age and on the 30th day of September, 2008, I served the attached **BRIEF OF APPELLANT and APPENDIX OF APPELLANT** upon Michelle Reinholdt. by and through her attorney, Edward B. Reinhardt, by placing a true and correct copy thereof in an envelope addressed as follows:

Edward B. Reinhardt
Attorney at Law
P.O. Box 4160
Albuquerque, NM 87196-4160

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


Donna J. Connor

Subscribed and sworn to before me
this 30th day of September, 2008.


Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2013