

A-07-278

**STATE OF MINNESOTA
IN SUPREME COURT**

IN RE STATE OF MINNESOTA, PETITIONER:

IN RE THE MARRIAGE OF:

CHRISTINA M. DEAL, PETITIONER/RESPONDENT

AND

RYAN S. DEAL, RESPONDENT/RESPONDENT

PETITIONER/RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	2
ARGUMENT	4
A. PUBLIC POLICY BASIS FOR WRIT OF PROHIBITION	4
B. MR. DEAL IS ATTEMPTING TO CIRCUMVENT CRIMINAL RULES OF PROCEDURE	10
CONCLUSION	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<u>J.E.P v. J.C.P.</u> , 432 N.W.2d 483, 487 (Minn.App. 1988)	5
<u>Erickson v. MacArthur</u> , 414 N.W.2d 406, 407 (Minn. 1987)	7
<u>Thermorama, INC. v. Shiller, et al</u> , 135 N.W.2d 43, 46 (Minn. 1965)	7
 <u>Statutes</u>	
M.S.A. 518.17	3, 5, 11
M.S.A. 518.165	5
M.S.A. 260C.163	6
 <u>Rules</u>	
Minn. R. Civ. P. 24.02	3
Minn. R. Civ. P. 26.03	7
Minn. R. Crim. P. 21.01	9
Minn. R. Crim. P. 21.06	10

LEGAL ISSUES

- I. Should a criminal defendant, charged with criminal sexual conduct involving a minor child, be allowed to depose his alleged victim in a civil proceeding regarding the allegations surrounding his criminal charges before the criminal case has been resolved?**

The trial court and Court of Appeals both determined that the criminal defendant could conduct a discovery deposition of his alleged victim, a minor child, in his divorce proceeding, with the limitation that the criminal defendant could not be personally present with the deposition was taken.

- II. Should the public policy interest in protecting children from discovery methods that would subject them to undue embarrassment, harassment, and intimidation weigh heavily in a trial court's discretion to prohibit parties in a dissolution proceeding from taking discovery depositions of minor children?**

The trial court and Court of Appeals both expressed concern for this policy interest, but determined that the neither the scope nor means of discovery could be limited beyond restricting the criminal defendant for attending the depositions of the minor children.

STATEMENT OF THE CASE

The State of Minnesota, through the Office of the Traverse County Attorney, has appealed the Order of the Court of Appeals denying Appellant's request for a Writ of Prohibition. Appellant requested a Writ of Prohibition to prohibit the Trial Court from allowing the discovery depositions of the alleged victim and two potential witnesses in a criminal sexual conduct case. Respondent/Respondent Ryan Deal, who has been charged with criminal sexual conduct involving allegations that he sexually abused his 14 year-old step-daughter, is attempting to take discovery depositions of the step-daughter and her brother. Petitioner/Respondent Christina Deal first filed a Motion for a Protective Order asking the Court to quash the depositions or to at least order a lesser restrictive alternative to a discovery deposition. The Appellant filed a Motion for Permissive Intervention. The Trial Court issued a limited Protective Order which allowed the depositions to occur, but prohibiting the attendance of Mr. Deal. The Trial Court's Order also held that the Appellant lacked standing to permissively intervene. The Court of Appeals reversed the Trial Court on the issue of whether Appellant had standing to permissively intervene, but denied Appellant's Petition for a Writ of Prohibition. Appellant is the State of Minnesota/Traverse County. Respondents are Christina Deal and Ryan Deal, the parties to the dissolution of marriage proceeding.

STATEMENT OF FACTS

Christina Deal initiated a dissolution of marriage action against Ryan Deal on October 4, 2006. Both parties are seeking custody of their one minor child. Mrs. Deal also has three children from her first marriage, and she has sole custody of them.

Throughout their marriage, these children have resided with the parties. Mr. Deal is currently being prosecuted for acts of criminal sexual conduct against Mrs. Deal's 14 year-old daughter, B.N.Q. In the dissolution proceeding, Mr. Deal has attempted to take discovery depositions of B.N.Q. and her brother C.Q. He has claimed that these depositions are for the purpose of gathering information relating to the "best interest of the child factors" of MN. Stat. 518.17 that the Court considers when awarding custody of a minor child. Mr. Deal has also indicated that he plans to question the deponents about issues related to B.N.Q.'s allegations of criminal sexual conduct.

Through her attorney, Mrs. Deal, sought a Protective Order pursuant to Minn. R. Civ. P. 26.03 quashing the deposition subpoenas for her minor children, or, in the alternative, a Protective Order limiting the scope and changing the method of the discovery. At the same time, Appellant sought permissive intervention pursuant to Minn. R. Civ. P. 24.02 asking the Trial Court to prohibit the taking of depositions of the children, as well as Mrs. Deal, since all three individuals could appear as witnesses in the criminal prosecution of Mr. Deal. On January 16, 2007, the Trial Court issued a limited Protective Order allowing the depositions to occur, but precluding Mr. Deal from attending them and denying the Appellant's attempt to intervene. The depositions were scheduled for January 18, 2007, but, on that day, Mr. Deal agreed to postpone them, pending Appellate review of Appellant's Petition for a Writ of Prohibition. A Guardian Ad Litem was appointed by Court Order to the dissolution file on February 26, 2007. On April 25, 2007, Mr. Deal took Mrs. Deal's deposition. On July 12, 2007, Mrs. Deal filed a Motion for a Continuance of the dissolution trial. In response, Mr. Deal filed a

Counter-motion asking the Court to remove the Guardian Ad Litem assigned to the dissolution.

The Appellant then petitioned the Court of Appeals for a Writ of Prohibition on February 3, 2007, requesting the following relief: that the Appellant be allowed to permissively intervene in the dissolution of marriage proceeding and that the Trial Court be prohibited from allowing the discovery depositions to occur. On March 13, 2007, the Court of Appeals rendered a decision finding that Appellant had standing to request a Writ of Prohibition, but denying the request to prohibit the discovery depositions. Appellant filed a Petition for Review on April 13, 2007, and it was accepted on May 30, 2007.

ARGUMENT

A. Public Policy Basis for Writ of Prohibition

The Petitioner/Respondent, Mrs. Deal, concurs with Appellant's Petition for a Writ of Prohibition. Mrs. Deal concurs that the Trial Court abused its discretion when it issued a limited Protective Order allowing the depositions of her minor children to occur, albeit with Mr. Deal absent. While Mrs. Deal understands that the Trial Court may have been restricted by the lack of any statutory authority or case law prohibiting parties in a dissolution from taking discovery depositions of minor children, she nonetheless argues that Courts should give serious consideration to the compelling public policy interest in protecting children from undue embarrassment, harassment, and intimidation when determining whether it is appropriate to take a discovery deposition of a minor child in a dissolution proceeding.

Mrs. Deal concurs with Appellant's assertion that minor children, in general, "should never be subjected to a discovery deposition to begin with, since in all probability they would be talking with the Trial Court *in camera* during a divorce proceeding, and not be made to testify in open court subject to cross-examination." Appellant's Brief p. 7. In furtherance of this policy, custody evaluators and Guardians ad Litem exist to "afford minor children the opportunity to discuss relevant issues with a neutral third party," as an appropriate, not to mention humane, alternative to having them "interrogated by a biased interrogator representing one of the parents." Id.

The appointment of a Guardian ad Litem is mandatory in cases where there is reason to believe that the minor child whose custody is at issue has been a victim of child abuse or neglect. MN Stat 518.165, subd. 2. The Court of Appeals has held that the appointment of a Guardian ad Litem is critically important in cases in which allegations of sexual abuse are disputed. *See J.E.P. v. J.C.P.*, 432 N.W.2d 483, 487 (Minn. App. 1988). It is reasonable to presume that protecting an alleged abuse victim from the painful and humiliating experience of being interrogated about her allegations by the alleged abuser's attorney in a discovery deposition would be included among this statute's myriad policy goals. In the dissolution case, a Guardian ad Litem was appointed by Court Order on February 26, 2007. Since the question of whether Mr. Deal has ever harmed any child is relevant to the "best interest of the child" factors of MN. Stat. 518.17, it would be appropriate for the Guardian ad Litem to interview B.N.Q., even though her custody is not at issue in the dissolution. The Guardian ad Litem would then be able to advise the Court regarding the relevancy the allegations have to the custody of

the parties' child, and Mr. Deal would have the opportunity to cross-examine the Guardian Ad Litem on these matters at trial.

These policy concerns are magnified when the minor child is an alleged victim of sexual abuse from the parent seeking the deposition. As the Appellant argues, the deposition would subject the victim to undue pressure and duress. "Victims of sexual assault, at any age, should not have to be subjected to a discovery deposition while the criminal prosecution is ongoing. Particularly for a minor child, the probability is too great that the victim would, under pressure and duress at the deposition, give unclear or conflicting testimony that could subsequently be used to impeach her at the criminal trial." Appellant's Brief p. 7. As the Appellant cogently states, such a scenario would have little to do with fact-finding and everything to do with intimidation: "If allowed to go forward in this situation, the State could see the criminal case against Mr. Deal crumble not because the truth came out, but because a minor child folded under the withering pressure of a deposition." Id.

This kind of intimidation of a minor child is exactly what that the Child Protection Code aims to avoid. In Child Protection or Termination of Parental Rights proceedings, the Minnesota State Legislature has given Courts wide discretion to protect a child in need of protective services from aggressive interrogation and cross-examination. "In any child in need of protection or services proceeding, neglected and in foster care, or termination of parental rights proceeding the court may, on its own motion or the motion of any party, take the testimony of a child witness informally when it is in the child's best interests to do so." MN Stat. 260C.163. The court not only has discretion to take such testimony on its own motion, but it has wide discretion to select the most appropriate

method of taking the testimony, including taking the testimony outside of the courtroom or requiring counsel for any party to the proceeding to submit questions to the court before the child's testimony is taken and additional questions upon completion of the initial questioning. Id.

The policy concerns that ostensibly informed the drafting of this statute are the same policy concerns that shaped the Appellant's Petition for a Writ of Prohibition, to protect a minor child from undue embarrassment, harassment, or intimidation under the guise of conducting discovery. Furthermore, these policy concerns are also reflected in lesser restrictive alternatives offered in Minn. R. Civ. P. 26.03 for protective orders. Upon a showing of good cause by the moving party, the Court may "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Minn. R. Civ. P. 26.03. The district court "has considerable discretion in granting or denying discovery requests." Erickson v. MacArthur, 414 N.W.2d 406, 407 (Minn. 1987). Moreover, the district court has "broad discretion to fashion protective orders and to order discovery only on specified terms and conditions." Id. at 409. The trial court also has "wide discretion in determining whether the discovery rules are being used by a litigant in bad faith to unreasonably annoy, embarrass, oppress, or injure a party or the witnesses, and also has a wide discretion in protecting the parties and witnesses from such abuses." Thermorama, INC. v. Shiller, et al., 135 N.W.2d 43, 46 (Minn. S. Ct. 1965).

Several of the lesser restrictive alternatives offered by Minn. R. Civ. P. 26.03 would effectively serve this policy concern of protecting child victims of sexual abuse from intimidating discovery tactics. For example, Minn. R. Civ. P. 26.03 gives the Court

discretion to order that “the discovery may be had only by a method of discovery other than that selected by the party seeking discovery.” Minn. R. Civ. P. 26.03 (c). This provision enables courts to require that the discovery be done by a method other than a deposition, such as a written deposition or interrogatories, or requests for admission. As with MN Stat. 260C.183, it also enables the Court to order an *in camera* interview with the child as an alternative to a discovery deposition. Furthermore, Minn. R. Civ. P. 26.03 gives courts the discretion limit the scope of discovery by ordering that certain matters not be inquired into. Minn. R. Civ. P. 26.03 (d). As the Appellant asserts, the Trial Court could have, at a minimum, allowed the deposition of B.N.Q. to proceed with “the proviso that no inquiry into the sexual assault allegation were made,” thus, still permitting Mr. Deal to ask her questions regarding the “best interest of the child” factors of MN. Stat. 518.17. Appellant’s Brief, p. 8. That Mr. Deal was not willing to stipulate to such a proviso suggests his ulterior motive for seeking the deposition of B.N.Q.—to intimidate her into changing her testimony before the criminal trial, as well as to procure information he would not be able to get in the criminal file.

Of course, Mr. Deal argues that he has the right to conduct discovery in the manner of his choosing, as permitted by the *Minnesota Rules of Civil Procedure*. When such discovery involves taking the testimony of a minor child in a dissolution proceeding, however, parents and the courts instinctively subordinate this black-letter approach to the law to larger policy considerations of protecting the child. The reason that there is no case law establishing a standard for when it is appropriate to take discovery depositions of minor children is that there is a tacit understanding pervading Minnesota’s family law courts that it is inappropriate to subject a minor child to a discovery deposition. When

that child is an alleged victim of sexual abuse, the idea of deposition becomes unconscionable. When a lesser restrictive alternative to a discovery deposition exists, the obvious public policy concerns regarding the protection of children should supercede procedural concerns regarding methods of discovery.

It has never been Mrs. Deal's intention to interfere with Mr. Deal's right to discovery, as evidenced by her cooperation with her own deposition on April 25, 2007. However, it remains Mrs. Deal's position that it would be unconscionable for the Respondent to take an oral deposition of B.N.Q. while criminal charges are pending against him. The deposition would require B.N.Q. to sit in a small room across the table from the Respondent's attorney while he interrogates her. This proceeding would give the Respondent the opportunity to intimidate B.N.Q. before the criminal trial commences. The deposition would also unreasonably embarrass B.N.Q., as she could be asked to describe the abuse in vivid detail while her abuser sits right across the table from her. At a minimum, she would be forced to discuss issues involving a man who has already caused her great physical and emotional harm. Since the Respondent will have the opportunity to face his accuser in the criminal trial, he should not be allowed to preempt the criminal trial by facing her in a deposition. Simply put, this attempt to depose B.N.Q. is a thinly veiled attempt to harass, embarrass, and intimidate B.N.Q. before the criminal trial commences.

B. Mr. Deal Is Attempting to Circumvent Criminal Rules of Procedure

Additionally, Mrs. Deal concurs with the Appellant that the Respondent's true intention in seeking discovery depositions of her minor children is to circumvent Rule 21.01 of the *Minnesota Rules of Criminal Procedure*. Under this rule, an oral deposition

in a criminal matter must be ordered by the Court. Minn. R. Crim. P. 21.01. The Court's order must be based on one of the conditions set forth in Rule 21.06, subd. 1 of the *Minnesota Rules of Criminal Procedure*. Minn. R. Crim. P. 21.01. These conditions are limited to the following two situations: 1.) the witness is unable to testify at the trial or hearing because of physical or mental illness or infirmity; or 2.) "the party offering the deposition has been unable to procure the attendance of the witness by subpoena, order of the court, or other reasonable means." Minn. R. Crim. P. 21.06, subd. 1. Since Mr. Deal will most likely be precluded from getting a court order to depose B.N.Q. and C.Q. in the criminal file, he is attempting the discovery depositions in the dissolution file to circumvent the restrictions proscribed by the Rules of Criminal Procedure.

In Mr. Deal's recent Affidavit in Support of his Responsive Motion to the Petitioner's Motion to have the dissolution continued, he essentially admits that his purpose in deposing B.N.Q. was to circumvent the criminal rules of procedure. On July 12, 2007, Mrs. Deal filed a motion to have the dissolution trial continued until following the completion of Mr. Deal's criminal trial. This motion was mainly based on the Guardian Ad Litem's report, which recommended that the trial be continued in order for both parties to undergo Parental Capacity Studies. Since she believed that the Respondent's Parental Capacity Study should include information related to the Respondent's criminal trial, the Guardian Ad Litem recommended that the dissolution trial be postponed until after the criminal trial.

On July 28, 2007, Mr. Deal filed a Responsive Motion objecting to the Petitioner's Motion for a Continuance of Trial and a Countermotion to have the Guardian ad Litem removed from the case. In paragraph 12 of his supporting affidavit, Mr. Deal

accuses Mrs. Deal, her counsel, the Traverse County Attorney, and the Guardian Ad Litem of conspiring to continue the dissolution trial “with the intent and purpose of precluding me the opportunity to hear the allegations and testimony of Mrs. Deal’s minor child under oath, in open Court, subject to cross examination, in advance of the criminal jury trial, so that the Traverse County Attorney can conduct the trial ‘by surprise’.” (A-7). “If the dissolution is postponed, I will be unable to have the benefit of what is otherwise my right granted by this dissolution court, that is to take the testimony of Petitioner’s minor daughter/alleged victim before the criminal trial is held.” Id.

Up to this point, Mr. Deal has claimed that his purpose for the depositions was to question B.N.Q. about matters relating to the best interest factors of MN Stat. 518.17. In this affidavit, however, the Respondent abandons all pretense of merely wanting to depose B.N.Q. about the best interest factors and implicitly admits that his true purpose for the deposition was to get a preview of her testimony in advance of the criminal trial and to subject her to rigorous interrogation by his counsel. Mr. Deal’s tacit admission of his true motives for a discovery deposition demonstrates why the compelling public policy interest in protecting minor children who are victims of sexual abuse from undue embarrassment and intimidation should be of paramount concern when considering the appropriateness of deposing minor children in a civil proceeding. Furthermore, it confirms why it is critically important for the Court to address the gap between the *Rules of Civil Procedure* and the *Rules of Criminal Procedure* that the Appellant has illuminated in his brief. Appellant’s Brief, p. 12. Any exploitation of this gap is problematic with regard to the State’s ability to prosecute a crime, but such exploitation

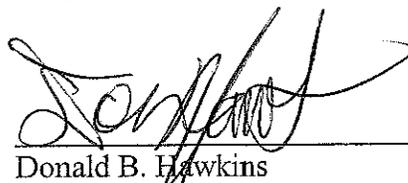
becomes unconscionable when it involves an attempt to intimidate a minor child who is the alleged victim of sexual abuse.

CONCLUSION

Petitioner/Respondent Christina Deal concurs with Appellant's Petition for a Writ of Prohibition. There is a compelling public policy concern related to protecting minor children, particularly those who are victims of sexual abuse, from discovery depositions when acceptable alternative discovery methods are available. As a matter of public policy, it is unconscionable to subject a minor child who is the victim of sexual abuse to a discovery deposition by the alleged abuser. Not only is there is tremendous potential that the deposition will be used by the alleged abuser to embarrass, harass, or intimidate the child, but the deposition also affords the alleged abuser the opportunity to circumvent Rule 21.01 of the *Rules of Criminal Procedure*, which restricts the use of discovery depositions in criminal matters. In considering these issues, public policy concerns regarding the protection of the victim should weigh heavily in the Court's decision.

Respectfully Submitted,

Dated: August 1, 2007



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