

COURT OF APPEALS)
ROSEBUD SIOUX TRIBE) ss
ROSEBUD, SOUTH DAKOTA)

IN THE COURT OF APPEALS

In The Matter of The)
Guardianship of:)
ALANA STONE,)
a minor child.)

CA99-04

O R D E R

Appellant Phyllis Stone appeals from ORDER FROM GUARDIANSHIP HEARING DENYING PETITION, FOR DISMISSAL OF CUSTODY AND RETAINING JURISDICTION PENDING DISMISSAL OF THE CASE (Docket Civ. 98-226) entered on November 18, 1999, by the Honorable Brian H. Collins, Associate Judge.

FACTS

This case involves Alana Stone, a minor child, D.O.B.: March 23, 1993; the child's mother, Madonna Billie; and the child's maternal grandmother, Phyllis Stone, Appellant.

In August, 1998, Phyllis Stone petitioned the Rosebud Sioux Tribal Court for Guardianship of Alana Stone who had lived with Phyllis the first three and one-half years of her life. An Interim Order of Guardianship was entered in September 1998. Bernadine Wilson of Dakota Plains Legal Services was appointed guardian ad litem for Alana.

Madonna Billie filed a Motion and Affidavit to Vacate Guardianship, and a hearing was held on November 18, 1999. At the conclusion of the hearing, Judge Brian Collins, the presiding judge, ruled from the bench that Phyllis Stone's petition for Guardianship should be denied and that custody of Alana be transferred back to Madonna Billie.

ISSUES

Phyllis Stone appeals the decision on three issues:

1. DID THE TRIAL COURT ABUSE ITS DISCRETION IN REFUSING TO GRANT THE CONTINUANCE REQUESTED BY PHYLLIS STONE?
2. DID THE TRIAL COURT ABUSE ITS DISCRETION IN RETURNING CUSTODY OF ALANA STONE TO HER MOTHER, MADONNA BILLIE?
3. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ITS EVIDENTIARY RULINGS?

The first issue was raised when Appellant's counsel, Al Arendt, moved for a continuance of the hearing on November 18, 1999. Phyllis had been represented by attorney, Stan Whiting, until he withdrew from the case on November 17, 1999, one day before the hearing. Phyllis contacted Al Arendt on the same day and as would be expected, Mr. Arendt needed time to prepare his case because he was unprepared on such short notice. Mr. Arendt moved for a continuance and Madonna Billie objected on grounds of hardship involving time off from work and transportation costs. Appellant offered to reimburse Madonna Billie for her expenses if the court granted the continuance. The Court denied the motion for a continuance on the ground that a continuance would create a hardship on Ms. Billie.

We believe that the trial court abused its discretion by failing to consider the relative hardship that the denial of a continuance created on the Appellant. Her attorney had less than one day to prepare for trial due to the last-minute withdrawal of her former attorney. "In deciding whether or not to grant a continuance, a trial court must consider (1) whether the delay resulting from the

Continuance

continuance would be prejudicial to the opposing party;" 17 Am Jur 2d, Continuance; (3) the prejudice caused to the moving party by the trial court's refusal to grant the continuance, 4 ALR Fed. 929 (f). We agree with Appellant that Ms. Billie's case was not prejudiced by a delay despite her having to travel a great distance because Appellant had offered to offset any economic loss suffered the the moving party. The relative prejudice to the Appellant far outweighs any inconvenience that a delay would cause to Ms. Billie. Moreover, Judge Collins acknowledged that Stan Whiting had withdrawn from the case one day before the hearing, and he apparently approved the withdrawal of counsel on the eve of trial. If Judge Collins did not overtly approve Whiting's withdrawal, he at least acquiesced in Whiting's action and it was incumbant on the trial court to allow Appellant's new counsel a reasonable time to prepare for trial. As a result of the denial, Mr. Arendt did not have adequate time to prepare for trial, did not have an opportunity to interview witnesses for the Appellant, and was at an unfair advantage. The Court remarked about the unfairness to Mr. Arendt, and should have been aware that Phyllis Stone was deprived of effective legal counsel. Judge Collins ruled immediately after trial from the bench that transfer of custody should proceed around the Christmas Holidays which was several weeks after November 18. The trial court could have just as easily scheduled the trial just prior to the Christmas Holidays to avoid prejudicial effect on Appellant's case. These facts and circumstances are a clear justification and good cause for granting Appellant's request for a continuance, and "The Court has the power to grant continuances upon a showing of

good cause." Oleson v. Snyder, 277 NW 2d 729, 9 ALR 4th 1133 (1979).

The second and third issues of whether the trial court abused its discretion in returning custody of the child to Madonna Billie and in its evidentiary rulings are combined and will be addressed jointly. The transcript of trial speaks for itself. Judge Collins refused to consider the testimony of expert testimony offered by Dr. Rosemary Webb. Judge Collins interjected objections on behalf of Ms. Billie when Dr. Webb attempted to describe the child's stomach ulcers, and he refused to consider the child's pre-counseling developmental problems, the progress made by the child through professional counseling and recommendations of Dr. Webb, a clinical psychologist who functions as a child psychologist. Our conclusion is based in part on the absence of any findings of fact, conclusions of law and a written opinion. We find that the trial court did not take into consideration the testimony of Dr. Webb, and a trial court's failure to consider expert opinions in determining child custody cases is an abuse of discretion. Kappenman v. Kappenman, 479 NW 2d 520 (1992).

F. Study
of Expert
Witness

We are concerned about the apparent antagonism displayed by Judge Collins toward Mr. Arendt. At the outset of trial Judge Collins accused attorney Arendt of placing documents in the court file without following procedures. Although he later recanted the accusation, the animosity of the judge toward the attorney appears to have had a prejudicial effect on the Appellant. The relationship between the trial judge and the attorney should not be allowed to prejudice a party's right to a fair and impartial trial.

In summary, it is our conclusion that the trial court displayed inappropriate antagonism toward Appellant's counsel, abused its discretion in denying Appellant's request for a continuance, and

abused its discretion by ignoring the expert opinion of Appellant's expert witness. These abuses constitute reversible error because Appellant was deprived of effective legal counsel as well as her right to due process of law.

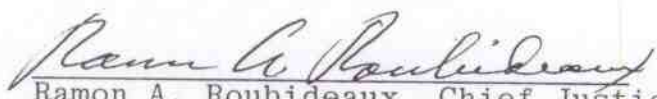
O R D E R

Wherefore, It is ORDERED that the ORDER FROM GUARDIANSHIP HEARING DENYING PETITION, FOR TRANSFER OF CUSTODY AND RETAINING JURISDICTION PENDING DISMISSAL OF CASE entered on November 18, 1999, by the Honorable Brian H. Collins is reversed and remanded back to the trial court for a new trial.

It is further ORDERED that the case below be heard by a Judge other than the Honorable Brian H. Collins.

Done this 19 day of July, 2000.

BY THE COURT:


Ramon A. Roubideaux, Chief Justice


Patrick A. Lee, Associate Justice

Leroy Greaves (recused voluntarily)

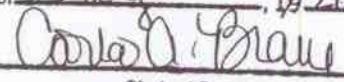
ATTEST:



CLERK OF COURT

FILED
In the
ROSEBUD SIOUX TRIBAL COURT OF APPEALS

The undersigned Clerk of the Rosebud Sioux Tribal Court of Appeals hereby certifies that this document was received and entered on the docket in the above-entitled action by this Court on the 19 day of July, 2000



Clerk of Courts