APPEAL NOS. 27488, 27490

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ADOPTION OF A.A.B. and B.A.B.
MINOR CHILDREN

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE DOUGLAS HOFFMAN,
CIRCUIT COURT JUDGE

STATE APPELLANT'S BRIEF

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ORDER GRANTING PETITION FOR ALLOWANCE OF APPEAL FROM INTERMEDIATE ORDER FILED AUGUST 7th, 2015

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PRELIMINARY STATEMENT

For purposes of brevity and clarity, the Department will refer to Troy and Twyla Hansen as "Petitioners" throughout this brief. The South Dakota Department of Social Services will be referred to as the "Department". The children subject to the petitions for adoption shall be referred to by their initials, A.A.B. and B.A.B. Len and Lisa Homelvig shall be referred to as the "Homelvigs". The Settled Record consists of Minnehaha County file ADP 15-05 & ADP 15-06 which will be cited as "SR1" and "SR2" respectively, followed by the page number(s) of the page(s) cited. References made to the appendix will be referred to as "App." followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

The circuit court entered an order denying the Department of Social Services' motion to dismiss the adoption petitions filed by the Petitioners. Pursuant to SDCL 15-26A-13, the Department filed a petition to this Court requesting permission to take an intermediate appeal of the circuit court's order and to hold any further actions in abeyance pending the outcome of this appeal. This court granted the Department's petition for intermediate appeal.

STATEMENT OF ISSUES

I. **May Petitioners file a petition to adopt children in the custody of the Department without its consent?**
The circuit court ruled that Petitioners may file a petition to adopt A.A.B. and B.A.B. without obtaining the permission of the Department of Social Services.

Most relevant cases
In re D.M., 2004 S.D. 34, 677 N.W.2d 578
In the Matter of the Adoption of D.M., 2006 S.D. 15, 710 N.W.2d 441

Most relevant Statutes
SDCL § 25-6-12
SDCL § 26-8A-27
SDCL § 26-4-9.1

Other sources
ARSD 67:14:32:17

STATEMENT OF FACTS AND CASE

The children in this case, A.A.B. and B.A.B., were siblings who came into the custody of the Department as a result of abuse and neglect proceedings. A.A.B., whose date of birth is September 30th, 2012, was taken into custody on January 8th, 2013, and placed with the Petitioners (SR1 29). The Minnehaha County State's Attorney's Office filed a petition alleging A.A.B. was subject to abuse and neglect. Shortly after the case was commenced, the Department learned that A.A.B.'s mother was pregnant with B.A.B. Upon B.A.B.'s birth, on October 18th, 2013, the child was discharged from the hospital directly

into the custody of the Department. A petition was also filed alleging B.A.B. was subject to abuse and neglect. After obtaining temporary custody of B.A.B., the Department approached Petitioners about being a foster placement for this child as well. The Petitioner's declined, citing issues they were having with another child they had adopted. The Department then placed B.A.B. with the Homelvigs.

Despite the Department's efforts to reunite the children with their biological parents, they were not able to make sufficient progress towards reunification. As a result, the circuit court signed an order terminating their rights to A.A.B. and B.A.B. on May 2nd, 2014 (App. 1). The order also specified that the Department retained adoptive custody of the children. Neither parent appealed the termination of their rights and A.A.B. and B.A.B. became eligible for adoption. Several department staff then met to discuss placement options for A.A.B. and B.A.B. The group discussed both the Petitioners and the Homelvigs as placement options for the children and determined that A.A.B. and B.A.B. should both be adopted by the same family so the siblings could grow up together. This necessitated moving one of the children from their current foster

placement. The group ultimately decided that it was in the children's' best interest to be adopted by the Homelvigs.

After they learned that they were not selected to adopt A.A.B. and B.A.B., the Petitioners filed separate petitions to adopt B.A.B. (SR1 4) and A.A.B. (SR2 3) on January 13th, 2015. Petitioners also filed a Motion for Interim Physical Custody of B.A.B. (SR1 2) who had been placed with the Homelvigs. A hearing on Petitioners' motions was scheduled for March 6th, 2015(2015 SR1 16; SR2 13). The Department filed Motions to Dismiss the Petitions on February 2nd, 2015 (SR1 18; SR2 10). The Department also submitted a brief in support of its motion, and Petitioners filed a reply brief. A hearing on the Department's motion was originally scheduled for April 9th, 2015 before the Honorable Susan Sabers(SR1 21; SR2 13). The hearing was rescheduled several times, and Judge Sabers advised the parties that she could not hear the case due to moving to the criminal rotation. A hearing on the Department's motion was heard on April 27th, 2015 by the Honorable Douglas Hoffman (SR1 26; SR2 30). After the hearing, Judge Hoffman directed the parties to prepare supplemental briefs on case law from other jurisdictions regarding whether a person needed the consent of the state agency to adopt a child in its custody. The Court entered its memorandum

opinion June 10th, 2015[1] denying the Department's motion to dismiss the petitions to adopt A.A.B. and B.A.B (App. 10, 12). In its opinion, the circuit court ruled that Petitioners had standing to adopt A.A.B. and B.A.B. through the adoption statutes in SDCL 25 Ch. 6. It also found that SDCL 26-8A did not control the proceeding since the Petitioners had filed a separate petition to adopt the children and had not sought to intervene in the A&N proceedings (App. 3).

STANDARD OF REVIEW

Adoption in South Dakota is governed by statute. *In the Adoption of D.M.*, 2006 S.D 15.,¶10 710 N.W. 2d, 441, 446. "Statutory interpretation is a question of law reviewed de novo." *Engesser v. Young,* 2014 S.D. 1, ¶22, 856 N.W.2d 471, 478(citations omitted.) This case involves the interpretation of several different statutes. "When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute." *Moss v. Guttormson,* 1996 S.D. 76, ¶9, 551 N.W.2d 14, 17 (citations omitted).

[1] The order was incorrectly dated July 19th, 2013.

ARGUMENTS AND AUTHORITIES

Petitioners may not file a petition to adopt children in the custody of the Department without its consent.

A. Petitioners do not have standing to file petitions to adopt A.A.B. and B.A.B.

In its memorandum of law, the circuit court found that SDCL 25 Ch.5 granted Petitioners standing to file a petition to adopt A.A.B. and B.A.B. "It is clear that SDCL Ch. 25-6, Adoption of Children, applies to adoptions of children in the custody of DSS." (App. 5)

This case is not about whether it is in A.A.B. and B.A.B.'s best interest to allow the Petitioners to file a petition to adopt them. It is about who has the ability to raise this issue before the court. "While a child's best interest is the paramount consideration in every adoption, it has no bearing on the preliminary determination of whether a party has standing." *Michael P. v. Greenville Co. Dep. of Soc. Serv.*, 385 S.C. 407, 418-419, 684 S.E.2d 211, 217(Ct.App. 2009).

"'Standing' is the legal right of a person to challenge the conduct of another in a judicial forum." *In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1062 (Okla.1985). "In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an

adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen,* 392 U.S. 83, 99-100, (1968). "Thus, persons having the right to petition for adoption are deemed to have a legally protectable interest in the adoption and therefore have standing to object to another person's petition to adopt. Conversely, the person who has no right to petition lacks that interest and therefore lacks standing to object." *In re the Adoption of J.C.G.*, 501 N.W.2d 908, 910 (Wis.App. 1993).

Petitioners have no legal ability to petition the court to adopt A.A.B. or B.A.B. because they are not interested parties in the A&N proceedings. This Court previously stated:

> Standing is established through being a 'real party in interest' and it is statutorily controlled." *Wang v. Wang,* 393 N.W.2d 771, 775 (S.D.1986). Under SDCL 15-6-17(a), "[e]very action shall be prosecuted in the name of the real party in interest." The real party in interest requirement for standing is satisfied if the litigant can show "'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the Defendant.

The Matter of Baby Boy K., 1996 S.D. 33, ¶13, 546 N.W.2d 86,89. (Citations omitted).

The Petitioners fail to meet the requirement for standing because they have no legally recognized interest

in the adoption of either child. Being a foster parent does not confer upon Petitioners a right to adopt either A.A.B. or B.A.B. *Drummond v. Fulton County Dept. of Family and Children's Services*, 563 F.2d 1200,1207 (C.A.Ga.1977) ("Therefore, in the eyes of the state, which creates the foster relationship, the relationship is considered temporary at the outset and gives rise to no state created rights in the foster parents."); *Crispell v. Florida Dept. of Children and Families*, 2012 WL 611201, 4 (M.D.Fla.,2012.) ("[T]here is no such thing as a right to adopt, nor is there a protected liberty interest in maintaining a relationship with one's foster children").

The circuit court ruled that SDCL 25-6-2 granted Petitioners standing to petition for the adoption of A.A.B.[2] and B.A.B. without the Department's consent. "Using the plain language of this statute, any child, even children in DSS custody, can be adopted by any adult person, including

[2] **25-6-2. Adoption of minor child permitted--Minimum difference in ages--Best interests of child.** Any minor child may be adopted by any adult person. However, the person adopting the child must be at least ten years older than the person adopted.

In an adoption proceeding or in any proceeding that challenges an order of adoption or order terminating parental rights, the court shall give due consideration to the interests of the parties to the proceedings, but shall give paramount consideration to the best interests of the child."

foster parents not selected by DSS" (App. 5). The circuit court's application of SDCL 25-6-2 to this case ignores other sections throughout the code which limit the ability of a party to adopt a child who is in the custody of the Department. "Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result." *Whitesell v. Rapid Soft Water & Spas, Inc.,* 2014 S.D. 41, ¶14, 850 N.W.2d 840,843.

SDCL 25-6-2 does not speak directly to whether "any child" also includes children in the custody of the Department. Several other sections of the adoption and A&N statutes do speak directly to children in the custody of the Department.

After the parental rights of a child's natural parent are terminated in an A&N proceeding, the Department is automatically granted legal custody of that child.

> Upon the entry of the final decree of disposition terminating the parental rights of both parents or of the surviving parent, the court shall vest the Department of Social Services with the custody and guardianship of the person of the child for the purpose of placing the child for adoption and authorizing appropriate personnel of the department to consent to adoption of the

> child without need for any notice or consent of any parent of the child.

SDCL 26-8A-27 (2015).

The court, while acknowledging this fact, found that SDCL 26-8A-27 did not prevent Petitioners from utilizing the adoption statutes. "Essentially, this statute [SDCL 26-8A-27] placed DSS upon the same footing as an adoption agency in a private adoption… But it stops short of granting DSS veto power over an adoption for which it has not consented." (App. 6) The court's reading of SDCL 26-8A-27 ignores the authority granted to the Department by the legislature concerning children in its legal custody. When the legislature entrusted the Department with custody of children, it also granted it the power to adopt administrative rules concerning children in its custody. Among those powers was to promulgate rules regarding adoptions:

> The Department of Social Services shall establish a program of adoption services. The secretary of social services may adopt reasonable and necessary rules for the operation of the program of adoption services including… [a]doptive applications and placements;

SDCL 26-4-9.1(2015)

Relying on its authority to promulgate rules, the Department chose to adopt a specific rule forbidding a

party from filing an independent petition to adopt a child in its custody without its consent.

> An applicant shall not file a petition to adopt a child placed with them by the department without prior approval of the department. When the department has given legal approval to an applicant to begin legal proceedings for the completion of adoption, the department shall send legal information about the child to the applicant's attorney.

ARSD 67:14:32:17.

Because it has the authority to withhold its consent, any party seeking to adopt a child who is in the legal custody of the Department can only do so by first obtaining the Department's consent.

> Before the hearing on a petition for adoption, the person adopting a child, the child adopted, and the other persons whose consent is necessary, shall execute their consent in writing,…

SDCL 25-6-12(2015).

This Court has previously determined that the Department is a party whose consent is necessary before one adopts a child in its custody. "The only persons identified as participants or parties to an adoption are the persons adopting the child, the child, DSS, and other persons whose consent is necessary. *See* SDCL 25-6-3; SDCL 25-6-4; SDCL 25-6-10; SDCL 25-6-11; SDCL 25-6-12." *In the Matter of the Adoption of D.M.*, 2006 SD 15, ¶ 10, 710 N.W.2d 441, 446.

While SDCL 25-6-2 sets the minimal requirements for adoption, it by no means prevents the Department from refusing to grant its consent for the adoption of children in its custody. When the rights of the children's parents were terminated, the Department was entrusted with the legal custody of these children and acts as their sole guardian. Along with custody, the Department was granted the authority to deny its consent to an adoption it does not feel is in the children's best interests. To adopt the court's broad application of SDCL 25-6-2 would render these other statutes meaningless and hinder the Department's ability to act on behalf of a child in its custody. Regardless of what long term plan the Department chose for a child in its care, any person who disagreed with that decision could frustrate that plan by simply filing a petition to adopt. So long as they fit the minimal requirements of SDCL 25-6-2, a court would have to entertain their petition. This outcome runs contrary to the intention of the legislature.

To support its interpretation of SDCL 25-6-2, the circuit court also cites *Rodriguez v. Miles,* 655 S.W.2d 245 (Tex. App. 1983). Much like the facts of this case, *Miles* involved competing adoption petitions for children in the state's custody. After the Texas Department of Families

chose one foster family to adopt two children, a different set of foster parents filed their own competing petition. The *Miles* court allowed the family who was not chosen to petition the court to adopt despite the state's refusal to grant its consent. It reasoned that the Texas statute which allowed "any adult" to adopt "any child" applied to children in the state's custody.

Despite its factual similarities, *Miles* does not lend support to the court's application of SDCL 25-6-2 in this case. Texas also had a statute which granted a party the right to challenge a managing conservator's refusal to give its consent to an adoption. "The court may waive the requirement of consent to the adoption by the managing conservator if it finds that the consent is being refused, or has been revoked, without good cause." *Miles*, 655 S.W.2d at 249 (Quoting Texas Family Code Ann. § 16.05 (repealed 1995)).

Three years before to *Miles*, the same Texas court detailed the history of this statute:

> Prior to the 1974 enactment of Title Two of the Texas Family Code, the matter of consent in adoption cases was governed by Tex.Rev.Civ.Stat.Ann. art. 46a. This Court in Lutheran Social Service, Inc. v. Farris, supra, construed art. 46a to require agency consent for adoption.

Goetz v. Lutheran Social Service of Texas, Inc., 579 S.W.2d 82 (Tex.Civ.App., 1979).

As the court in *Goetz* pointed out, prior to the passage of this statute, a party could not bypass the state's consent.

> While article 46a is silent as to whether the adoption agency's consent to adoption is required in substitution for parental consent, the effect of the statute '. . . obviously is that after the parental consent for placement is given the child placing agency stands in loco parentis to the child and is clothed with the authority to give or withhold the consent necessary to the entry of a judgment for adoption.' (Internal citations omitted)… The preservation of the integrity of the agency adoption process should be paramount in the construction of article 46a. Apropos that subject the Supreme Court has expressed concern for the protection of the agency adoption process in other cases. (Internal citations omitted).

Id.(citing *Lutheran Social Service, Inc. v. Farris,* 483 S.W.2d 693 (Tex.Civ.App., 1972)).

Perhaps most informative was the Court's ruling regarding petitioners argument that a court may allow an adoption in the best interests of a child, regardless of an agency's consent.

> Appellees' position is that the courts are free to depart from the statutory scheme when prompted to do so by unusual circumstances, as in this case, and when convinced that to do so would serve the best interests of the child. We cannot agree. Adoption was unknown at common law and exists solely by reason of statute. (Internal citations omitted.) Since this is so, adoption proceedings do not depend upon equitable principles, and courts must be

> governed by the statute which is the sole authority for adoption.

Id.

Prior to enacting a specific law to this effect, Texas courts refused to find that any person had standing to challenge the state's refusal to give its consent. It was precisely because the Texas legislature enacted a statute granting them a right that the petitioners in *Miles* had standing to challenge the state's refusal to grant its consent.

The South Dakota legislature has not codified any similar right in South Dakota law. Therefore, *Miles* does not support a reading of SDCL 25-6-2 that would allow the Petitioners to file an adoption petition over the objection of the Department.

Courts in other jurisdictions have similarly ruled that the state's determinations regarding decisions on behalf of children in its custody should be given deference by the courts. *In re E.G.* 738 N.W.2d 653 (Iowa App.,2007) ("The legislature… did not give the juvenile court the right to establish custody or consent to adoption"); *Idaho Dept. of Health and Welfare v. Hays*, 46 P.3d 529(Idaho,2002)("…the authority to give or withhold consent to an adoption necessarily includes the authority to select

the adoptive parents; the Department has the sole authority to select who should adopt the children.") *In Re Adoption of S.C.P.*, 527 A.2d 1052, 1054 (Pa. 1987) ("Our thorough consideration of the facts and equities of this case leads us to conclude that S.C.P.'s best interests are served by allowing the Bureau, his legal custodian, to steward his adoption proceedings without interference from his former foster parents.")

It is for good reason that the legislature limited the number of individuals who have standing to file an adoption petition. Allowing any adult to file a petition to adopt a child in the Department's custody under SDCL 25-6-2 would result in a free-for-all. Once a parent's rights were terminated, an unlimited number of adults could file competing petitions to adopt a child in the Department's custody. It would become impossible for the Department to make a long term placement decision for a child because anyone who wanted to adopt that child could file a competing petition. The process of vetting potential adoptive parents would be expensive and extremely time-consuming. Children who were already caught in the limbo of an A&N proceeding would be forced to wait even longer while the courts sorted through an indeterminate number of conflicting petitions for adoption. Such a result runs

contrary to the intent of the legislature to minimize the time a child spends in foster care. To ensure that abused and neglected children could be moved to a permanent home as soon as possible, it gave the Department the authority to make the decision on which placement was in that child's best interests.

The circuit court also interpreted SDCL 25-6-11 as granting a right of any person to adopt a child regardless of whether they received consent of the Department.[3] "SDCL § 25-6-11 makes certain that SDCL Ch. 25-6 can be utilized by Petitioners as the statutory scheme through which to adopt children in DSS custody. In fact, the statute expressly contemplates petitions for adoption of children in DSS custody by persons other that the person DSS recommends." (App. 5).

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[3] **25-6-11. Notice to Department of Social Services--Recommendation of department--Appearance.** Upon the filing of a petition for the adoption of a minor child the petitioner therein shall notify the Department of Social Services, by mailing to the department a copy of the petition. The petitioner also shall notify the department of the date fixed for hearing the petition, or mail to the department a copy of the order fixing the date of the hearing. The department shall make a recommendation as to the desirability of the adoption. The department may appear in any procedure the same as the party in interest, and may request a postponement of hearing on the petition in the event more time is needed for its investigation. This section only applies to a child in the custody of the department.

Although by its plain language, SDCL 25-6-11 would seem to allow the Petitioners to seek to adopt A.A.B. and B.A.B. without the Department's consent, this interpretation is not supported by the legislative history of SDCL 25-6-11. "[R]esorting to legislative history is justified only when legislation is ambiguous, or its literal meaning is absurd or unreasonable." *Petition of Famous Brands, Inc.*, 347 N.W.2d 882,885(S.D. 1984)(Internal citations omitted). "[T]o resolve the ambiguity and determine legislative intent, we 'look to the legislative history, title, and the total content of the legislation." *State v. Mundy-Geidd*, 2014 S.D. 96 ¶7, 857 N.W.2d 880, 884. (Quoting *In re Expungement of Oliver,* 2012 S.D. 9, ¶ 15, 810 N.W.2d 350, 354)(Internal quotations omitted).

Prior to its amendment, it was clear that SDCL 25-6-11 had nothing to do with adoption of a child in the Department's custody. In 2007, the South Dakota legislature passed SB 215, entitled "An Act to eliminate certain filings with the Department of Social Services in adoption cases in which the children are not in the custody of the department." 2007 S.D. Sess. Laws ch. 156 §§ 1-2. (App.14) The bill removed language in SDCL 25-6-9.1 requiring private adoption agencies to file a home study with the Department. It also removed language in SDLC 25-

6-11 that required all private adoptions be approved by the Department.

The intent of the legislature in amending SDCL 25-6-11 was to remove the requirement that private adoption agencies obtain approval of the Department when placing children for adoption. All testimony related to this bill was confined to consideration of that issue alone. At no time was the issue of bypassing Department consent in adoptions of children in its custody ever discussed. S.D.Sen.Jud., *An Act to Eliminate Certain Filings with the Department of Social Services in Adoption Cases in which the Children are not in the Custody of the Department:* Hearings on S.B. 215 82nd Leg. Reg. Sess. (Feb. 7, 2007)(South Dakota Legislature http://legis.sd.gov/sessions/2007/215.htm).

Since the original statute did not deal with children in the Department's custody, and since there is no indication that the legislature intended to amend SDCL 25-6-11 to allow a party to adopt a child in the Department's custody without its consent, Petitioners cannot rely on it to void the Department's decision to withhold its consent.

Through the statutes previously cited, the legislature demonstrated its intent that the Department act in loco parentis for children entrusted to its care.

"The State takes a necessarily strong interest in the care and treatment of every child within its borders." *In re N.J.W.*, 273 N.W.2d 134, 137 (S.D.1978). "When there are allegations, and in this case an adjudication, of abuse and neglect, the State, in its role of *parens patriae,* steps in to protect the child… The Legislature has identified DSS as uniquely qualified to act for the State in this role." *People ex rel. H.O., 2001 S.D. 114, ¶9,* 633 N.W.2d 603, 605. This did not change with the amendment of SDCL 25-6-11.

Finally, the circuit court cited SDCL 25-6-4(6)[4] and SDCL 25-5-29[5] to support its opinion that Petitioners had

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[4] **25-6-4. Consent of child's parents required for adoption--Court waiver of consent.** No child may be adopted without the consent of the child's parents. However, if it is in the best interest of the child, the court may waive consent from a parent or putative father who:
(6) Has been judicially deprived of the custody of the child, if the adjudication is final on appeal to the court of last resort or the time for an appeal has expired;

[5] **25-5-29. Person other than parent permitted to seek custody of child--Parent's presumptive right to custody--Rebuttal.** Except for proceedings under chapter 26-7A, 26-8A, 26-8B, or 26-8C, the court may allow any person other than the parent of a child to intervene or petition a court of competent jurisdiction for custody or visitation of any child with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship. It is presumed to be in the best interest of a child to be in the care, custody, and control of the child's parent, and the parent shall be afforded the constitutional protections as determined by the United

standing to file their own Petitions to adopt A.A.B. and B.A.B. (App. 5, 8) Neither statute, however, applies to a child in the custody of the Department. SDCL 25-6-4 deals with the court's waiver of a biological parent's consent and not with the consent of the Department.

Popularly known as "Timmy's Law", SDCL 25-5-29 was passed in response to this Court's ruling in *Meldrum v. Novotny*, 2002 S.D. 15, 640 N.W.2d 460. By its language, SDCL 25-5-29 does not apply to a child in the custody of the Department. This Court previously found that when it enacted SDCL 25-5-29, "the legislature specifically excluded the right to intervene in A & N proceedings". *In Re D.M.*, 2004 S.D. 34, ¶8, 677 N.W.2d 578, 581.

B. Petitioners cannot circumvent Department's consent by filing their own petition .

States Supreme Court and the South Dakota Supreme Court. A parent's presumptive right to custody of his or her child may be rebutted by proof:

(1)That the parent has abandoned or persistently neglected the child;

(2)That the parent has forfeited or surrendered his or her parental rights over the child to any person other than the parent;

(3)That the parent has abdicated his or her parental rights and responsibilities; or

(4)That other extraordinary circumstances exist which, if custody is awarded to the parent, would result in serious detriment to the child.

Pursuant to SDCL 26-7A, the Department assumed the duty to act in loco parentis on behalf of A.A.B. and B.A.B. Nonetheless, the circuit court ruled the limitations found in SDCL 26-7A and 8A did not apply since petitioners did not intervene in the A&N case. "The statutes regarding abuse and neglect proceedings, SDCL 26-8A, do not control determination of this Motion because Petitioners are not petitioning or adopting through the abuse and neglect proceeding." (App. 6)

Although Petitioners had no standing to intervene in the A&N proceedings, the Court found they could circumvent the requirements found in those statutes by simply filing a new action. Whether Petitioners attempt to intervene in an already filed petition or file their own is inconsequential. The children in this case remain in the Department's custody and they alone have the authority to determine the permanent placement of the children.

This Court first addressed the issue of whether a party had a right to intervene in an abuse and neglect proceeding with *In Re D.M.* The child D.M. was taken into Department custody because of abuse and neglect and was placed with foster parents. Two relatives of the child attempted to intervene in the A&N and gain custody of the

child. This Court denied the relatives relief finding that "[a]doptive placement responsibilities are delegated to DSS without further directive or guidance." *In Re D.M.*, 2004 S.D., at ¶7 (citing SDCL 26-8A-27).

This Court thus established the precedent that SDCL 26-8A-27 conferred upon the Department the sole authority to place a child in its custody for adoption. No other party had the right to intervene because no other party was mentioned in this statute.

After the Court's ruling, the South Dakota legislature passed 2005 SL 140 and amended the abuse and neglect statutes to allow for limited intervention by family members in an abuse and neglect proceeding. A new section, SDCL 26-7A-29.1, was added to give family members who were denied initial placement of a child in the Department's custody due process.

> Except under circumstances where placement was with another relative of the child, any relative who has been denied adoptive placement by the Department of Social Services may request a hearing to determine if the placement was an abuse of discretion. The request shall be filed with the circuit court having jurisdiction pursuant to § 26-8A-29 and shall be filed within thirty days of written notification from the department by regular mail to the relative's last known address. The hearing shall be held within thirty days of the filing of the request for hearing and may be continued for not more than thirty days upon good cause shown. The relative shall be granted limited intervention only for

the purpose of the placement review hearing.

> No intervention may be allowed in a proceeding involving an apparent, alleged, or adjudicated abused or neglected child, including an adoption or guardianship proceeding for a child placed in the custody of the Department of Social Services pursuant to § 26-8A-27, except as provided by this chapter and under the Indian Child Welfare Act, (25 U.S.C. §§ 1901 to 1963, inclusive), as amended to January 1, 2005.

SDCL 26-8A-29.1 (2015)

After the passage of SDCL 26-8A-29.1, the relatives in *D.M.* sought to adopt the child. By this time, the rights of D.M.'s parents had been terminated and the Department's plan was to allow the child's foster parents to adopt. The relatives attempted to intervene in the case, arguing that the new relative preference statutes gave them standing to do so. This Court again denied relief to the relatives finding that the newly passed statutes did not apply to D.M.'s case retroactively. It then turned to the adoption statutes and determined that relatives could not rely on these statutes because the statutes did not name them as a party who could intervene in an adoption of a child in Department custody.

> The only persons identified as participants or parties to an adoption are the persons adopting the child, the child, DSS, and other persons whose consent is necessary… Beyond these parties and participants, the statutes do not specifically recognize any other possible intervenors.

Adoption of D.M., 2006 SD 15 ¶10.

While the legislature did grant family members a right to intervene, it was limited to intervention in the A&N proceedings and "[i]t did not afford the same rights in the adoption statutes." *Id.*

This Court's ruling foreclosed any possibility that a family member could simply file his or her own petition for adoption. It is therefore impossible to reconcile the court's ruling in this case with SDCL 26-8A-29.1. If any person truly can petition to adopt any child, SDCL 26-8A-29.1 is meaningless. A family member who is unsuccessful in challenging the Department's decision in the A&N can simply file their own petition as provided for in SDLC 25-6-2. Conversely, if family members cannot rely on the adoption statutes, it is illogical to conclude that they are the only ones who could not do so. By passing SDCL 26-8A-29.1, the legislature expressed its belief that family members deserved special consideration in determining the custody of a child who was taken away from his or her biological parents. It is unlikely the legislature would then prevent a relative from filing a petition to adopt a child in the Department's custody when any other person could.

The Petitioners cannot avoid this paradox by simply side-stepping the entire intervention issue. See: *People ex Rel H.O.*, 2001 S.D., ¶9.(Circuit court usurped Department's role when it allowed parents to bypass A&N procedures and file voluntary termination of their rights). Just as the family members had no legal right to participate in an adoption of D.M., neither do Petitioners have a legal right to petition a court to adopt A.A.B. or B.A.B. Since the Department stands as the legal guardian of the children post termination, it has the sole right to determine who should adopt a child in its custody. Because Petitioners could not intervene in an adoption proceeding involving A.A.B. or B.A.B., they also are excluded from filing their own petitions before the Department has had a chance to initiate an action. "The purpose of intervention is to obviate delay and the multiplicity of suits by creating an opportunity to persons directly interested in the subject matter to join in an action or proceeding already instituted." *Mergen v. Northern States Power Co.*, 2001 S.D. 14 ¶5, 621 N.W.2d 620,622.

CONCLUSION

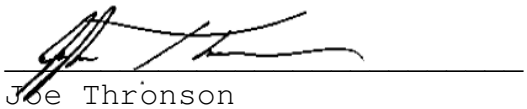
In this case, the circuit court's reading of the adoption statutes to provide the Petitioners with standing

to file a petition to adopt A.A.B. and B.A.B. without the Department's consent was in error. Likewise, its circumvention of SDCL 26-7A and 8A is equally impermissible. The various statutes cited here make clear that the Department is vested with the legal custody of A.A.B. and B.A.B., and it was the legislature's intent that the Department be given the authority to make determinations on behalf of children in its custody. Among those decisions is the authority to withhold its consent to an adoption which, in the considered judgement of the Department, is not the children's best interest. Likewise, Petitioners have no standing to even raise the issue of whether or not such an adoption is in the best interests of the children because they have no legal right to participate in the proceedings.

The issue of foster parent rights is a highly emotional one. Many state legislatures have enacted provisions granting some rights to a person who has served as a foster parent to a child. At this time, the legislature in South Dakota has not granted any similar rights. Until such time as the legislature takes up the issue, the courts of this state must refrain from doing so.

Dated this 6th day of October, 2015.

MARTY JACKLEY
ATTORNEY GENERAL



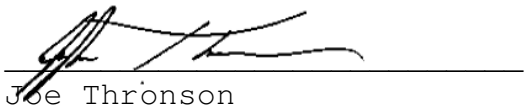
Joe Thronson
Special Assistant Attorney General
Attorneys for Appellee

CERTIFICATE OF SERVICE

Joe Thronson, Special Assistant Attorney General, hereby certifies that a copy of the Department Appellant's Brief was served by e-mail transmission, upon the following at the e-mail addresses set forth below:

Kathryn L. Morrison
kmorrison@bangsmccullen.com

Dated this 6th day of October, 2015.



Joe Thronson
Special Assistant Attorney General
Attorneys for Appellee

INDEX OF APPENDIX

INDEX OF APPENDIX

STATE OF SOUTH DAKOTA) ss COUNTY OF MINNEHAHA	)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

THE PEOPLE OF THE STATE OF SOUTH DAKOTA IN THE INTEREST OF A.A.B. AND B B.A.B. BREYFOGLE MINOR CHILDREN, AND CONCERNING RESPONDENTS,	Juv. 13-46 AND 13-1623 FINAL DISPOSITIONAL ORDER

This matter came on for Final Dispositional Hearing the 17th day of April, 2014, and the 2nd day of May, 2014, the Honorable Peter Lieberman, Circuit Court Judge, presiding. The State of South Dakota was represented by the Minnehaha County Deputy State's Attorney, Pamela J. Tiede; the South Dakota Department of Social Services was represented by its agent, Heidi Broesder; the respondent mother, not appearing in person, but through counsel, Erin Johnson; the respondent father appeared in person and through counsel, Mary Ash; the minor children not appearing in person but through counsel, Christine Cady; [and CASA volunteer]

The Court has reviewed the files and records herein and, being fully informed in the premises, has made and entered its Findings of Fact and Conclusions of Law for Final Disposition and, based upon said Findings of Fact and Conclusions of Law, does now hereby

ORDER, that the South Dakota Department of Social Services has made reasonable efforts to return the children to the Respondent parents; and it is further

ORDERED, that the South Dakota Department of Social Services has made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the family; and it is further

ORDERED, that serious emotional or physical damage would likely result if the minor children were returned to the custody of the Respondent Parents; and it is further

ORDERED, that the least restrictive alternative available in the best interest of the minor children is termination of the parental rights of the Respondent Parents; and it is further

ORDERED, that the parental rights of shall be and are hereby terminated to the above-named minor child(ren), A.A.B & B.A.B. ; and it is further

ORDERED, that the Director of the Division of Child Protection Services of the South Dakota Department of Social Services is hereby granted full adoptive custody of the minor children under SDCL 26-8A-27 for continued foster care placement or adoption and it is further

ORDERED that the South Dakota Department of Social Services has made reasonable efforts to achieve the permanent plan for the children which is adoption.

Dated the 3 day of June, 2014.

BY THE COURT:

Judge of the Circuit Court

ATTEST: Angelia M. Gries, Clerk

By: Deputy

(SEAL)

FILED
JUN 03 2014
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA } ss.
COUNTY OF MINNEHAHA }
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office.

JUN 12 2014

Clerk of Courts, Minnehaha County

By Deputy

CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
LINCOLN & MINNEHAHA COUNTIES
425 North Dakota Avenue
Sioux Falls, SD 57104-2471

CIRCUIT JUDGES
Lawrence E. Long, Presiding Judge
Joseph Neiles
Bradley G. Zell
Patricia C. Riepel
Douglas E. Hoffman
Robin J. Houwman
Mark E. Salter
Susan M. Sabers
Joni M. Cutler
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Karl E. Thoennes III

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July 19, 2013

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Joe Thronson
Special Assistant Attorney General
Department of Social Services
Division of Legal Services
700 Governor's Drive
Pierre, SD 57501

RE: *Adoption of A.B. & B.B.* (ADP15-6 & ADP15-5)

Dear Counsel,

Petitioners, Twila and Troy Hansen, filed petitions for the adoption of minor children A.A.B. and B.A.B. The South Dakota Department of Social Services ("DSS") then filed a Motion to Dismiss Adoption Petitions. The motions came before the Court for hearing on Monday, April 27, 2015. The Court took the matters under advisement following the hearing and requested supplemental briefing from the parties. Having reviewed the record in the case, read the written briefs, listened to the oral arguments and given the matter due consideration, the Court issues this written decision on the Motions.

FACTUAL HISTORY

A.A.B. and B.A.B. came into DSS custody as a result of abuse and neglect proceedings against their biological parents. The Hansen's have served as foster parents

to A.A.B. DOB 9-3-12, since January 8, 2013. Len and Lisa Homelvig have served as foster parents to B.A.B. since her birth on October 16, 2013. In December 2013 Petitioners informed DSS that they would have both children in their home. However, DSS kept the children separate with each set of foster parents keeping one child.

The parental rights of the children's biological parents were terminated by court order on May 2, 2014. DSS had an adoption conference call with several DSS staff on Oct. 22, 2014, and the DSS group's consensus was that the Homelvig's should adopt both children because they did not have any other children and may be able to take additional siblings if any were to be born to the children's birth parents. On October 23, 2014, Petitioners were informed that DSS intended to place both children with the Homelvig's for adoption. The Hansen's responded by petitioning to adopt both children. Thereafter, DSS filed Motions to Dismiss the Hansens' Petitions for Adoption. DSS asserts that Petitioners, as foster parents of A.A.B. have no right to "intervene" in the adoption process of children in the custody of DSS. Petitioners, however, argue that they are not intervening; rather, they have filed their own Petitions for Adoption under South Dakota's adoption statutes, which allow them to do so. Petitioners also assert that DSS has not conducted an adequate investigation into the adoption placement of the children and have made a decision as to adoption placement that is not in the best interest of the children. The Homelvig's have not yet filed any Petitions for adoption of the children.

ISSUE

The issue before this Court is whether foster parents selected by DSS in connection with abuse and neglect proceedings but not selected by DSS for adoptive placement have the right to bring their own petition to adopt their foster child, and her sibling that was placed with another couple, where the other couple has been chosen by DSS to adopt both children.

LAW AND ANALYSIS

South Dakota law discusses adoption of children in more than one chapter of the South Dakota Codified Laws. In this case, Petitioners have brought Petitions for the Adoption of Minor Child under SDCL Chapter 25-6, the chapter titled Adoption of Children. SDCL §25-6-2 provides that any adult person may adopt any minor child. The statute reads:

> **SDCL § 25-6-2. Domestic Relations -- Adoption of Children -- Adoption of minor child permitted--Minimum difference in ages--Best interests of child**
>
> *Any minor child* may be adopted by *any adult person*. However, the person adopting the child must be at least ten years older than the person adopted.

> In an adoption proceeding or in any proceeding that challenges an order of adoption or order terminating parental rights, the court shall give due consideration to the interests of the parties to the proceedings, but shall give paramount consideration to the best interests of the child.

SDCL § 25-6-2 (emphasis added).

This section explicitly states that any minor child can be adopted by any adult person. Using the plain language of this statute, any child, even children in DSS custody, can be adopted by any adult person, including foster parents not selected by DSS.

It is clear that SDCL Ch. 25-6, Adoption of Children, applies to adoptions of children in the custody of DSS. SDCL 256-4(6) refers to the chapter as applying to cases where the parental rights of the parents of the child to be adopted have been judicially terminated. SDCL 25-6-6 provides that the Circuit Court has jurisdiction in "all matters relative to the adoption of children." SDCL 25-6-9.1 specifically applies to adoption of children in DSS custody ('no child who is in the custody of the Department of Social Services shall be placed in a home for adoption until..."). Moreover, the language of SDCL 25-6-11 clearly states that the section applies to adoptions of children in the custody of DSS. The statute provides:

> **SDCL § 25-6-11. Domestic Relations -- Adoption of Children -- Notice to Department of Social Services--Recommendation of Department--Appearance**
>
> Upon the filing of a petition for the adoption of a minor child the petitioner therein shall notify the Department of Social Services, by mailing to the department a copy of the petition. The petitioner also shall notify the department of the date fixed for hearing the petition, or mail to the department a copy of the order fixing the date of the hearing. *The department shall make a recommendation as to the desirability of the adoption.* The department may appear in any procedure the same as the party in interest, and may request a postponement of hearing on the petition in the event more time is needed for its investigation. *This section only applies to a child in the custody of the department.*

SDCL § 25-6-11(emphasis added).

SDCL § 25-6-11 makes certain that SDCL Ch. 25-6 can be utilized by Petitioners as the statutory scheme through which to adopt children in DSS custody. In fact, the statute expressly contemplates petitions for adoption of children in DSS custody by persons other than the person DSS recommends. Clearly, a recommendation from DSS would not be necessary if DSS had veto power over a proposed adoption of a child in DSS custody. Therefore, DSS has statutory authority only to make a recommendation to the Court in adoption proceedings involving children in its custody. The statute does not give DSS the

exclusive ability to bring petitions for adoption or to veto any adoption petitions brought by someone other than DSS's recommended adoption placement.

The statutes regarding abuse and neglect proceedings, SDCL Ch. 26-8A, do not control determination of this Motion because Petitioners are not petitioning or adopting through the abuse and neglect proceeding. Rather, Petitioners have brought a separate Petition for Adoption under the adoption statutes. SDCL §26-8A-27 provides the directive for DSS custody following termination of parental rights in an abuse and neglect proceeding, which has taken place in this case, but the statute does not provide the procedure through which a petition for adoption can be brought following termination of parental rights. Nothing in the text of SDCL §26-8A-27 prevents SDCL Ch. 25-6 from being applied in this context. SDCL §26-8A-27 states, in pertinent part:

> **SDCL § 26-8A-27. Minors -- Protection of Children from Abuse or Neglect -- Final decree terminating parental rights of one or both parents--Child support arrearages--Custody of child**
>
> Upon the entry of the final decree of disposition terminating the parental rights of both parents or of the surviving parent, the court shall vest the Department of Social Services with the custody and guardianship of the person of the child for the purpose of placing the child for adoption and authorizing appropriate personnel of the department to consent to adoption of the child without need for any notice or consent of any parent of the child. ...

SDCL § 26-8A-27. Essentially, this statute places DSS upon the same footing as an adoption agency in a private adoption granting DSS authority to place the child for adoption and to consent to an adoption. But it stops short of granting DSS veto power over an adoption for which it has not consented. Therefore, the adoption chapter can be utilized by Petitioners as they seek to adopt the children at issue in this case, who have previously been adjudicated as abused and neglected, because any adult person, including foster parents not selected by DSS, may bring a petition to adopt any minor child, even a child in DSS custody, according to the plain language of the statute, and SDCL 26-8A-27 does not contradict this.

This interpretation of the South Dakota adoption statutes is consistent with other jurisdictions' law as well. Although there is some split among jurisdictions, many other jurisdictions do provide foster parents standing to bring petitions for adoption. 2 Am Jur Adoption, § 116 states, "foster parents may have standing to petition for adoption of a child where a judgment for termination of the natural parental rights had been entered." Petitioner's supplemental brief cites several jurisdictions that follow similar principles.

A Texas court dealt with a case that was very factually analogous to the case currently before this Court. The Texas court was faced with a case in which two foster families filed petitions to adopt a child. Rodriguez v. Miles, 655 S.W.2d 245 (Tex. App. 1983). The Department opposed one foster family's Petition, but the trial court' waived consent

of the Department and allowed the family that was not selected by the Department to adopt the child. Id. The foster family that was not selected by the trial court appealed, challenging the standing of the foster family selected to adopt the child by the trial court. Id. The Texas Court emphasized that this was not an "intervention" but, rather, a separate petition for adoption. Id. In holding that the foster family that was opposed by the Department did indeed have standing to bring the Petition, the Texas Court recited the following language of a Texas statute similar to that of South Dakota: "[a]ny adult is eligible to adopt a child who may be adopted." Id at 248.

Significant discussion is given in the briefs to the In re D.M. cases from the South Dakota Supreme Court. In re D.M., 2004 S.D. 34, 677 N.W.2d 578; In re Adoption of D.M., 2006 S.D. 15, 710 N.W.2d 441. I do not find these cases particularly useful to the issues at bar because both cases deal with intervention (in an abuse and neglect proceeding in the first case and an adoption case in the second,) not a petition for adoption. In neither case did the complaining party bring his own petition for adoption as Petitioners have done here. Id. Furthermore, intervention is procedurally distinguishable from bringing a petition for adoption as the Texas Court of Appeals pointed out in Rodriguez v. Miles, *supra*. Therefore, this Court does not utilize the In re D.M. cases as the basis for a decision here. If anything, the latter In re D.M. case is helpful to Petitioners because it involved a foster family that brought a petition for adoption under the adoption statutes, which is exactly what the foster parents in the present case are doing procedurally to seek adoption of the children.

The sum total of the In re D.M. cases, viewed in the context of the totality of the South Dakota adoption statues cited above, is that, ordinarily, a party seeking to adopt a child in DSS custody must file his own petition for adoption in order to be heard. While there is no right to intervene in either the abuse and neglect case or another's petition to adopt the child, nothing precludes the Hansen's from filing their own petition, and they have done so. Similarly, the Homelvig's may file their own petition to adopt these same children. If they do, I will consolidate the adoption petitions for trial.

DSS points to the second paragraph of SDCL 26-8A-29.1 to support its position on this Motion to Dismiss. That statute, passed in 2005, provides, in pertinent part:

> **SDCL § 26-8A-29.1 Minors—Protection of Children from Abuse or Neglect**
>
> No *intervention* may be allowed in a proceeding involving an apparent, alleged, or adjudicated abused or neglected child, *including an adoption or guardianship proceeding for a child placed in the custody of the Department of Social Services pursuant to § 26-8A-27,* except as provided by this chapter and under the Indian Child Welfare Act, (25 U.S.C. §§ 1901 to 1963, inclusive), as amended to January 1, 2005.

SDCL § 26-8A-29.1 (emphasis added). This statute, read in context, is specifically focused upon the procedure to be followed by relatives of children placed for adoption by

DSS pursuant to abuse and neglect proceedings, to object to, and seek to review of, DSS's adoption placement, when the placement was with a non- relative. SDCL § 26-8A-29.1. In such a case a relative denied adoption placement is granted a limited right of intervention to seek a review hearing in Circuit Court of the adoption placement. The second paragraph of the statute, as quoted above, goes on to note that this procedure, and any similar procedure mandated under federal law for Indian children, are the exclusive procedures for intervention under these circumstances.

Review of the session law, SL 2005 Ch.140, puts this statute into additional context. Along with enacting SDCL 26-8A-29.1, SL 2005 Ch. 140 amended SDCL 26-7A-19(2) to set forth an explicit placement preference to qualified relatives and custodians following temporary custody hearings in abuse and neglect cases. Therefore, it is clear that §26-8A-29.1 was added to the abuse and neglect chapter to provide structure to the processing of claims of priority by relatives who are passed over by DSS in favor of foster care or adoption placement with a non-relative.

While inartfully drafted, SDCL 26-8A-29.1 should not be read to completely usurp the authority of the Circuit Court under SDCL Ch. 25-6 to hear adoption petitions brought by "any adult person." To do so would eviscerate SDCL Ch. 25-6. When statutes appear in conflict, it is the duty of the Court to adopt a reasonable interpretation that will harmonize them. Lewis & Clark Rural Water Sys., Inc. v. Seeba, 2006 S.D. 7, ¶ 64, 709 N.W.2d 824, 841. Adoption is wholly of statutory origin. 2 Am Jur 2d, Adoption §5. Adoption statutes must be construed as a whole, without isolation of particular sections to produce a "consistent, harmonious and sensible effect to all of its parts." Id. at §13. The question of who may adopt is controlled by such interpretation of the governing legislation. Id. at §15.

"[F]oster parents are generally among those individuals who may adopt and are not barred from adopting by an agreement between them and the welfare agency providing that no action for adoption may be taken." Id. at §25. Indeed, in some jurisdictions, "even so-called mandatory language of an adoption statute requiring consent of the agency ... having legal custody does not deprive the court of jurisdiction to determine an adoption petition where the best interest of the child are at stake." Id. at §93. See also Annot., Adoption of Child in Absence of Statutorily Required Consent of Public or Private Agency or Institution, 83 A.L.R. 3d. 373. Taking all of these considerations together, it is the view of this Court that the South Dakota Legislature did not intend to abrogate by virtue of SDCL §26-8A-29.1 the clear mandate set forth in SDCL Ch. 25-6 granting the Court express authority and jurisdiction to decide adoption petitions brought by "any adult" to adopt "any minor child" under the best interest of the child standard. See, SDCL § 25-6-2. In other words, "[t]he jurisdiction of the [circuit court] to act in adoption cases [is] not dependent upon the willingness of [the Secretary of the Department of Social Services], as guardian of the minors, to consent to the proceedings." 83 A.L.R. 3d, supra, at §3(b).

Furthermore, there is another statute which is applicable in this case that was not in play in the In re D.M. cases- SDCL 25-5-29, known as "Timmy's Law," enacted after the

decision in Meldrum v. Novotny, 2002 S.D. 15, 640 N.W.2d 460. SDCL 25-5-29 provides:

> **SDCL §25-5-29. Domestic Relations – Parent and Child -- Person other than parent permitted to seek custody of child--Parent's presumptive right to custody—Rebuttal**
>
> Except for proceedings under chapter 26-7A, 26-8A, 26-8B, or 26-8C, the court may allow any person other than the parent of a child to *intervene or petition* a court of competent jurisdiction for custody or visitation of any child with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship.

SDCL § 25-5-29 (emphasis added). In this case, which is brought under SDC 25-6, and not under any of the Title 26 chapters referenced in the statute, the Hansen's meet the criteria to petition for custody with respect to A.A.B. and an adoption petition is a proper pleading in which to seek custody of a child with whom one has formed a significant bond as a primary caretaker in the role of a foster parent. The Homelvig's, having served as B.A.B.'s foster parents since birth, therefore, meet the criteria with respect to B.A.B. to intervene under SDCL 25-5-29 in the Hansen's petition. This holding is in keeping with the clearly articulated public policy of the State of South Dakota, as expressed in the legislation set forth above, that the courts of this state shall be open to claims by qualified adults, particularly those who have served in a caretaker role and to whom the child has formed a significant bond, that that child's best interests are served by awarding custody to them.

Finally, it is worthy of mention at this juncture that, while the public policy of this state also requires compelling circumstances to justify the separation for siblings, See, Roth v. Haag, 2013 S.D. 48, 834 N.W.2d 337, maintaining siblings in the same household should never override what is in the best interests of the children. Simunek v. Auwerter, 2011 S.D. 56, 803 N.W.2d 835. These children have never lived together. Ultimately, this Court will exercise its statutory duty to consider the relevant evidence and then grant the adoption petitions that further the best interests of A.A.B. & B.A.B.

CONCLUSION

The Court **DENIES** DSS's Motion to Dismiss the Hansens' Petition for Adoption of Minor Child A.B. and B.B. Ms. Morrison shall prepare the necessary Orders.

Sincerely,

Douglas E. Hoffman
Circuit Court Judge

Cc: Clerk's file

FILED
JUN 08 2015
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

IN THE MATTER OF THE ADOPTION OF A.A.B., Minor Child.	ADP. 15-6 **AMENDED NUNC PRO TUNC AMENDED ORDER DENYING THE DEPARTMENT OF SOCIAL SERVICE'S MOTION TO DISMISS**

The above entitled matter having come on before the Court on April 27, 2015. The Court having considered the record, briefs and the papers submitted by the parties, having heard argument of counsel, and being fully informed, and good cause appearing therefore,

IT IS HEREBY ORDERED that the South Dakota Department of Social Service's Motion to Dismiss Petitioner's action for adoption of A.A.B. is DENIED; and

IT IS FURTHER ORDERED that A.A.B. shall not be removed from the physical custody of Twila and Troy Hansen unless and until further Order of this Court or reversal of the denial of the Motion to Dismiss by the South Dakota Supreme Court.

IT IS FURTHER ORDERED that this matter shall be set for hearing so the Court may determine the best interest of the minor child.

Dated this 19 day of August, 2015
Nunc Pro Tunc to June 17, 2015
BY THE COURT:

DOUGLAS E. HOFFMAN
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES
Angelia Gries, Clerk of Courts
BY

FILED
AUG 19 2015
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) : ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
IN THE MATTER OF THE ADOPTION OF A.A.B., Minor Child.	ADP. 15-6 **NOTICE OF ENTRY OF AMENDED NUNC PRO TUNC AMENDED ORDER DENYING THE DEPARTMENT OF SOCIAL SERVICE'S MOTION TO DISMISS**

TO: JOE THRONSON, ATTORNEY FOR DEPARTMENT OF SOCIAL SERVICES:

YOU WILL HEREBY TAKE NOTICE that on August 19, 2015, the Court made and entered an Amended Nunc Pro Tunc Amended Order Denying the Department of Social Service's Motion to Dismiss in the above-entitled matter, which was filed on August 19, 2015, a filed copy of said Order being hereto annexed and herewith served upon you and made a part of this Notice of Entry, the same as if fully and completely set forth herein.

DATED this 19 day of August, 2015.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

By _____
Kathryn L. Morrison
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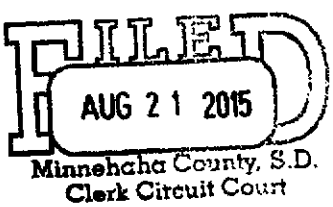
PO Box 88208
Sioux Falls, SD 57109
605/339-6800
605/339-6801 (fax)
kmorrison@bangsmccullen.com
Attorneys for Petitioner



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

IN THE MATTER OF THE ADOPTION OF B.A.B., Minor Child.	ADP. 15-5 **AMENDED NUNC PRO TUNC AMENDED ORDER DENYING THE DEPARTMENT OF SOCIAL SERVICE'S MOTION TO DISMISS**

The above entitled matter having come on before the Court on April 27, 2015. The Court having considered the record, briefs and the papers submitted by the parties, having heard argument of counsel, and being fully informed, and good cause appearing therefore,

IT IS HEREBY ORDERED that the South Dakota Department of Social Service's Motion to Dismiss Petitioner's action for adoption of B.A.B. is DENIED; and

IT IS FURTHER ORDERED that B.A.B. shall not be removed from the physical custody of Len and Lisa Homelvig unless and until further Order of this Court or reversal of the denial of the Motion to Dismiss by the South Dakota Supreme Court.

IT IS FURTHER ORDERED that this matter shall be set for hearing so the Court may determine the best interest of the minor child.

Dated this 19 day of August, 2015
Nunc Pro Tunc to June 17, 2015
BY THE COURT:

DOUGLAS E. HOFFMAN
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES
Angelia Gries, Clerk of Courts
BY _____
Deputy

FILED
AUG 19 2015
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) : ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
IN THE MATTER OF THE ADOPTION OF B.A.B., Minor Child.	ADP. 15-5 **NOTICE OF ENTRY OF AMENDED NUNC PRO TUNC AMENDED ORDER DENYING THE DEPARTMENT OF SOCIAL SERVICE'S MOTION TO DISMISS**

TO: JOE THRONSON, ATTORNEY FOR DEPARTMENT OF SOCIAL SERVICES:

YOU WILL HEREBY TAKE NOTICE that on August 19, 2015, the Court made and entered an Amended Nunc Pro Tunc Amended Order Denying the Department of Social Service's Motion to Dismiss in the above-entitled matter, which was filed on August 19, 2015, a filed copy of said Order being hereto annexed and herewith served upon you and made a part of this Notice of Entry, the same as if fully and completely set forth herein.

DATED this 19 day of August, 2015.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.

By _____
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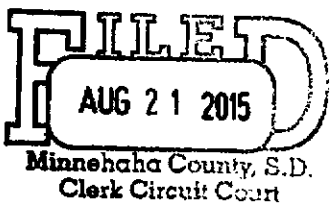

State of South Dakota

EIGHTY-SECOND SESSION
LEGISLATIVE ASSEMBLY, 2007

805N0781 **SENATE BILL NO. 215**

Introduced by: Senators Smidt (Orville), Apa, and Napoli and Representatives Miles, Glenski, and Tidemann

FOR AN ACT ENTITLED, An Act to eliminate certain filings with the Department of Social Services in adoption cases in which the children are not in the custody of the department.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 25-6-9.1 be amended to read as follows:

25-6-9.1. No person may place a child in a home for adoption until a home study has been completed by a licensed child placement agency as defined in § 26-6-14, the Department of Social Services, or a certified social worker eligible to engage in private independent practice as defined in § 36-26-17 ~~and the report has been filed with the Department of Social Services~~. Any person who submitted home studies under this section or under § 26-4-15 prior to July 1, 1990, may continue to submit home study reports without meeting the above requirements. A home study shall include a criminal record check completed by the Division of Criminal Investigation and a central registry screening completed by the Department of Social Services. Any person who violates the provisions of this section is guilty of a Class 1 misdemeanor.

Section 2. That § 25-6-11 be amended to read as follows:

25-6-11. Upon the filing of a petition for the adoption of a minor child the petitioner therein shall notify the Department of Social Services, by mailing to the department a copy of the petition. The petitioner also shall notify the department of the date fixed for hearing the petition, or mail to the department a copy of the order fixing the date of the hearing. ~~The department, except in the case of a stepparent adopting a stepchild, shall then approve or disapprove the report of the child welfare agency, if any, showing whether the proposed adoption is in a suitable home for the child, why the parent or parents wish to give up the child, and whether the child is suitable for adoption.~~ The department shall make a recommendation as to the desirability of the adoption. The department may appear in any procedure the same as the party in interest, and may request a postponement of hearing on the petition in the event more time is needed for its investigation. This section only applies to a child in the custody of the department.

CASE NO. 27488, 27490

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ADOPTION OF A.A.B. and B.A.B.

MINOR CHILDREN

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE DOUGLAS HOFFMAN,
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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ORDER GRANTING PETITION FOR ALLOWANCE OF APPEAL FROM
INTERMEDIATE ORDER FILED AUGUST 7, 2015

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PRELIMINARY STATEMENT

For purposes of brevity, the Petitioners: Troy and Twila Hansen[1], will refer to the South Dakota Department of Social Services and its subsidiaries as the 'Department.' Petitioners, Twila and Troy Hansen will be referred to as the 'Hansens;' Lisa and Len Homelvig will be referred to as the 'Homelvigs;' the minor children shall be referred to as A.A.B. and B.A.B.

The settled record consists of Minnehaha Circuit Court File ADP. 15-05 and ADP. 15-06 which will be cited as 'R1' and 'R2' followed by the page number of the page cited. All references made to the appendix shall be cited as 'App.' followed by the respective page number.

JURISDICTIONAL STATEMENT

The Circuit Court entered an order denying the Department of Social Services' Motion to Dismiss the Hansen's Petition(s) for Adoption of A.A.B. and B.A.B.(R1, 37) (R2, 41). Judge Hoffman denied the Department's argument that the Hansens lacked standing to bring a petition for adoption of their foster child and the child's sibling (R1 28) (R2 32). Judge Hoffman issued the court's decision by memorandum opinion on or about June 10, 2015 (App. 1) (R1, 37) (R2, 41). Judge Hoffman signed Order(s) Denying Department's Motion to Dismiss on July 17, 2015. Amended Nunc Pro Tunc Amended Order Denying the Department of Social Services Motion(s) to Dismiss were signed and filed by the court of August 19, 2015 (R1, 100) (R2, 113).

[1] The Department often refers to Petitioner as "Twyla" in its brief; Petitioner's legal name is 'Twila.'

The Department filed a petition to the Supreme Court of South Dakota requesting permission to take an intermediate appeal of the Circuit Court's order (not filed with the circuit court) on or about July 6, 2015. Appellees objected but Appellant's intermediate appeal was granted August 7, 2015 (R1, 44) (R2, 57).

STATEMENT OF LEGAL ISSUES

I. Whether foster parents have standing to file a petition for adoption of their foster child and the foster child's sibling. The Circuit Court found that the Hansens have standing to bring petitions to adopt their foster child and the sibling of the foster child, even though the Hansens were not recommended by the Department to adopt either child.

Relevant Cases

1. *In the Matter of the Adoption of D.M.,* 2006 S.D. 15, 710 N.W.2d 441;
2. *The Matter of Baby Boy K.,*1996 S.D. 33, 546 N.W.2d 86
3. *Oglala Sioux Tribe v. Van Hunnik,*--- F. Supp. 3d ----, 2015 WL 1466067, (D.S.D. Mar. 30, 2015)
4. S*tate v. Myrl & Roy's Paving Inc.,* 2004 SD 686 N.W.2d 651.

Relevant Statutes

SDCL 25-6-2
SDCL 25-6-6
SDCL 25-6-11
SDCL 25-6-12

STATEMENT OF THE CASE AND FACTS

This matter was brought before the Honorable Judge Douglas Hoffman of the Second Circuit, Minnehaha County. The children, A.A.B. and B.A.B., are siblings who came into Department's custody through abuse and neglect proceedings against their legal parents. A.A.B., born September 3, 2012[2], was placed with the Hansens on January

[2] Department indicated the child's date of birth was September 30, 2012, on page 2 of Department's brief; this is incorrect.

8, 2013. B.A.B., born October 16, 2013[3], was placed with the Homelvigs, a different set of foster parents (R1, 9) (R2, 16). As to the specifics of the abuse and neglect proceeding for either child, the Hansens can not speak to this record as they were not a named party during the abuse and neglect proceedings. When B.A.B. was born, the Hansens were approached by the Department to take B.A.B. into their care immediately following B.A.B.'s birth (R1, 9) (R2, 16). The Department should have been aware that the Hansens were already at capacity in regards to their foster license; any additional child would have been a violation of said license; therefore, the Hansens declined. The Hansens did not inform the Department that they could not take B.A.B. into their home due to issues with another child the Hansens had adopted[4]. As the Department is aware, the Hansens also adopted a son that was placed in their care through the Department in 2011, prior to the birth of A.A.B. and B.A.B.; said adoption was not completed until January 2015. Once the Hansens were legally capable of taking B.A.B. without violating their foster license, they made inquiries with the Department in December 2013, in order to have B.A.B. transferred to their home to be reunited with her sibling, A.A.B., who was in their care (R1, 9) (R2, 16).

B.A.B. was placed in the home of first-time foster parents, Lisa and Len Homelvig (R1, 9) (R2, 16). The Homelvigs took the child shortly after birth; thus, B.A.B. was not subjected to much of the dysfunction of the biological parents (as A.A.B. was) (R1, 9) (R2, 16). It was anticipated at the time that placement would be for a short period as the biological parents had taken action as requested by the court and

[3] Department indicated B.A.B.'s date of birth was October 18, 2016 on page 2 of Department's brief; this is incorrect.
[4] Department incorrectly states on page 3 of its brief, the Hansens declined to take B.A.B. into their home when originally offered by the Department due to their adopted son.

Department (R1, 9) (R2, 16). Unfortunately, the biological parents' action was short-lived and it was clear placement of the girls would be much longer (R1, 9) (R2, 16). The Hansens believe the biological parents' rights were terminated to both children on or about May 2, 2014 (R1, 9) (R2, 16).

In December of 2013, the Hansens informed their caseworker they were in a position to take B.A.B. into their home (R1, 9) (R2, 16). At that time, the Department had an opportunity to place the children in the same home as B.A.B. had been with the Homelvigs just over three (3) months (R1, 9) (R2, 16). Both sets of foster parents, biological extended family members and the Department met together to review the possible adoption of A.A.B. and B.A.B (R1, 9) (R2, 16). In December 2013, when asked whether the Homelvigs desired to take both children, the Homelvig's requested time to think about this decision (R1, 9) (R2, 16).

In January of 2014, the Department informed the Hansens they were making attempts to place B.A.B. in the Hansen's home due to statements made by the judge presiding over the abuse and neglect proceedings in regards to the siblings residing in the same home (R1, 9) (R2, 16). At a meeting in February 2014, all biological extended family members of the children supported a decision that both A.A.B. and B.A.B. should be placed with the Hansens (R1, 9) (R2, 16). Later, the Department informed the Hansens that B.A.B. would not be moved into the Hansens' home because it looked "bad" (for the Department) if they had to move a child several times in one case (R1, 9) (R2, 16). The Hansens were perplexed by this rationale as it did not appear to align with the Department's standard of what was in the best interest of the minor child (R1, 9) (R2, 16).

From the end of 2013 through the beginning of 2014, the Hansens continued to meet with the Department to develop a case plan wherein it appeared both girls would be placed with the Hansens (R1, 9) (R2, 16). Multiple individuals from the children's biological extended family were interviewed to determine where B.A.B. and A.A.B. should be permanently placed (R1, 9) (R2, 16). At that time, the Hansens again represented to the Department that they would like to adopt both children if the opportunity arose (R1, 9) (R2, 16).

On October 23, 2014, the Hansens were informed by the Department both A.A.B. and B.A.B. should go to the Homelvigs (R1, 9) (R2, 16). The Department stated its decision was due to the Homelvigs having no other children in their home (R1, 9) (R2, 16). The Department has previously stated A.A.B. would be placed with the Homelvigs as the Department is concerned the biological parents (of the children) may have additional children that would need to be placed with foster parents and such potential children should be placed with their siblings (R1, 9) (R2, 16). Again, this line of thinking does not take into account what is in the best interest of A.A.B. or B.A.B. The Hansens were dumbfounded by this news as they had previously reported to their caseworker Kelly Witte and CASA worker Wynne Hindt that they desired to adopt both children.

During the entirety of this process, the Hansens have planned playdates for B.A.B. and A.A.B. so the children could try to develop a sibling-bond (R1, 9) (R2, 16). For an extended period of time, the Homelvigs did not cooperate to facilitate the playdates (R1, 9)(R2, 16). The Department did not take any action to establish a relationship between the siblings until months after the Hansens filed their adoption action(s). The children have never had an overnight visit together (R1, 9) (R2, 16).

Further, there has been no plan of action as to how A.A.B. would be transitioned into the Homelvig's home (R1, 9) (R2, 16). From October 2014 to February 2015, the Department took little to no action in order to transition either child into their new home.

Since the Hansens have taken A.A.B. into their home, it has become glaringly apparent that A.A.B. suffers from an adjustment disorder in large part to the abuse and neglect the young child suffered at the hands of her biological parents (R1, 9) (R2, 16). The Hansens and A.A.B. have an extremely close bond. A.A.B. exhibits signs of anxiety, anger and extreme sadness when she is separated from Twila Hansen (R1, 9) (R2, 16). After the original adoption recommendation was made, Hansens contacted the Department to address some of their concerns regarding A.A.B.'s psychological issues (R1, 9) (R2, 16). Twila Hansen spoke directly with Patti Reiss (R1, 9)(R2, 16). The Department did not complete any follow up investigation at that time regarding placement of the girls (R1, 9) (R2, 16). On or around November 19, 2014, counsel for the Hansens contacted Ms. Reiss regarding their concerns (R1, 9) (R2, 16). Specifically, that A.A.B. has severe attachment issues and the Department had failed to complete a thorough investigation for placement of A.A.B. (R1, 9) (R2, 16). The doctor of the minor children was not contacted (as is regular protocol for any adoption through the Department) and A.A.B.'s daycare providers were not contacted for purposes of the adoption(R1, 9) (R2, 16). A letter from Dr. Eich, the minor children's doctor as well as a letter from counsel for the Hansens was forwarded to Ms. Patti Reiss at the Pierre office on or around November 19, 2014 (R1, 9) (R2, 16). In her letter dated November 6, 2014, Dr. Eich notes to the Department that she believes moving A.A.B. from the Hansens'

care would be traumatic to the minor child. Ms. Reiss indicated she would review the placement recommendation of A.A.B. again (R1, 9) (R2, 16).

On January 15, 2015, Virgena Wiesele and Patti Reiss made representations that a second, thorough investigation was completed after counsel's letter in November 2014 (R1, 9) (R2, 16). It was confirmed that A.A.B. and B.A.B.'s doctor was contacted as well as A.A.B.'s daycare providers (R1, 9) (R2, 16). Immediately following said phone call, Twila Hansen contacted Dr. Eich, pediatrician for the children (R1, 9) (R2, 16). Dr. Eich was not available but her nurse confirmed that neither she nor the doctor had been contacted by the Department in regards to the adoption investigation (R1, 9) (R2, 16). The daycare provider reported that the Department had only requested incident reports and had not spoken to anyone at the daycare regarding any substantive matters (R1, 9) (R2, 16).

The Hansens grew concerned the Department and specifically, the case worker assigned to A.A.B. did not complete a thorough investigation into the best interest of A.A.B. for purposes of adoption. On or around January 13, 2015, the Hansens filed their actions to adopt B.A.B. (R1, 4) and A.A.B. (R2,3). On or around February 2, 2015, the Department filed its own Motion(s) to Dismiss (R1,18) (R2,10) and submitted a brief on the matter. The Hansens filed a Motion for Interim Physical Custody of B.A.B. (R1, 2). The Hansen's Motion was originally scheduled with the Honorable Susan Sabers on March 6, 2015 (R1, 16) (R2, 8). This hearing was later rescheduled so the Department's Motion(s) could be heard on April 9, 2015 (R1, 21) (R2, 13). The Hansens also submitted a response brief. The Petition(s) for Adoption were transferred to the Honorable Douglas Hoffman as Judge Sabers was moved to the criminal rotation. Department's Motion was

heard April 27, 2015 (R1, 26) (R2, 30) . No testimony was presented at this time; counsel simply provided argument to the court. Judge Hoffman instructed counsel to prepare supplemental briefs, including case law from other jurisdictions regarding the standing of foster parents to challenge the placement recommendation of the state agency. After receiving supplemental briefs, the court entered a memorandum opinion on June 10, 2015[5], denying Department's Motion(s) to dismiss the Hansens' actions for adoption of A.A.B. and B.A.B. (App. 1). In the memorandum opinion, the court found the Hansens met the criteria under SDCL Ch. 25-6, and thus have standing to bring Petition(s) for Adoption of A.A.B. and B.A.B. (App.1). The court notes in its concluding paragraph that "maintaining siblings in the same household should never override what is in the best interest of the children" (App. 1) *Simunek v. Auwerter*, 2011 S.D. 56, N.W.2d 835.

STANDARD OF REVIEW

"Adoption is a creature of statute." *In the Matter of the Adoption of D.M.,* 2006 S.D. 15, ¶10, 710 N.W.2d 441, 446 (citing *Calhoun v. Bryan*, 1911 S.D. 28, 133 N.W. 266, 270). Furthermore, "the rights and procedures for adoption are governed by statute. Challenges to adoptions are likewise controlled by statute." *Id.* "Statutory interpretation is a question of law reviewed de novo." *Engesser v. Young*, 2014 S.D. 81, ¶22, n.1, 856 N.W.2d 471, 478 (citations omitted). "We interpret statutes in accord with legislative intent. Such intent is derived from the plain, ordinary and popular meaning of statutory language." *Perdue, Inc. v. Rounds,* 2010 S.D. 38, ¶7, n.2 782 N.W.2d 375, 377 . (quoting *Unruh v. Davison County,* 2008 SD 9, ¶ 5, 744 N.W.2d 839, 842). " 'When a statute's language is clear, certain and unambiguous, our function confines us to declare its

[5] The court's memorandum was incorrectly dated July 19, 2013.

meaning as plainly expressed.' " *Id.* (quoting *Wiersma,* 1996 SD 16, ¶ 6, 543 N.W.2d at 790 (citations omitted)).

ARGUMENT AND AUTHORITIES

Petitioners not selected by the South Dakota Department of Social Services to adopt a foster child in Petitioner's care may bring a Petition for Adoption.

A. The Hansens have standing to file petitions to adopt A.A.B. and B.A.B.

The Circuit Court, in its memorandum opinion dated July 19, 2013 found the Hansens have standing to bring their petitions for adoption of A.A.B. and B.A.B. as:

> It is clear that SDCL Ch. 25-6, Adoption of Children, applies to adoptions of children in the custody of DSS. SDCL 25-6-4(6) refers to the chapter as applying to cases where the parental rights of the parents of the child to be adopted have been judicially terminated. SDCL 25-6-6 provides that the Circuit Court has jurisdiction in "all matters relative to the adoption of children." SDCL 25-6-9.1 specifically applies to adoption of children in DSS custody ('no child who is in the custody of the Department of Social Services shall be placed in a home for adoption until…). Moreover, the language of SDCL 25-6-11 clearly states that the section applies to adoptions of children in the custody of DSS.

(App. 3).

The Hansens assert they do not require the recommendation of the Department for purposes of placement and adoption of A.A.B. and B.A.B. in order to bring petitions for adoption for both A.A.B. and B.A.B. The Department asserts that because it has not approved the Hansens for adoptive placement of A.A.B. and B.A.B., Hansens must lack standing and are therefore unable to properly bring before the Circuit Court, their petitions for adoption (R1, 18) (R2, 10). However, this Court has previously found:

> Standing is established through being a 'real party in interest' and it is statutorily controlled." *Wang v. Wang,* 1986 S.D., 393 N.W.2d 771, 775. Under SDCL 15–6–17(a), "[e]very action shall be prosecuted in the name of the real party in interest." The real party in interest requirement for standing is satisfied if the litigant can show " 'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the Defendant.' " *90

> *Parsons v. South Dakota Lottery Commission,* 1993 S.D. 504 N.W.2d 593, 595 (quoting *Gladstone, Realtors v. Bellwood,* 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66, 76 (1979)). In determining standing the focus is on the party seeking relief, not on the issues he presents. *In re Adoption of Baby Boy D.,* 742 P.2d 1059, 1062 (Okla.1985), *cert. denied,* 484 U.S. 1072, 108 S.Ct. 1042, 98 L.Ed.2d 1005 (1988). We do not consider whether the party filing the challenge "will ultimately be entitled to any relief but whether he has the legal right to seek judicial redress for his grievance."

The Matter of Baby Boy K., 1996 S.D. 33, ¶13-¶14, 546 N.W.2d 86, 89-90. The lack of recommendation from the Department may have an impact on the court's final determination of adoption for A.A.B. and B.A.B.; however, as stated in *Baby Boy K*, whether the Hansens will be successful in their adoption actions does not have any impact on standing, or Hansens' ability to bring the adoption action(s) in the first place. Further, even if the Hansens received the Department's recommendation for placement of A.A.B. and B.A.B., the Circuit Court would still maintain the ability to review the adoption of the children before it was granted by the same court.

The Department further asserts the Hansens lack standing because "they are not interested parties in the A&N proceedings."[6] However, standing under SDCL Chapter 25-6 does not require the Hansens be interested parties in any other proceeding in regards to the minor child they seek to adopt, including abuse and neglect proceedings. Standing for purposes of an adoption action is addressed in SDCL §25-6-2; the statute reads:

> SDCL §25-6-2. Domestic Relations – Adoption of Children – Adoption of minor child permitted – Minimum difference in legal ages – Best interests of child. Any minor child may be adopted by any adult person. However, the person adopting the child must be at least ten years older than the person adopted.
>
> In an adoption proceeding or in any proceeding that challenges an order of adoption or order terminating parent rights, the court shall give due consideration

[6] Appellant's brief, page 7.

> to the interests of the parties to the proceedings, but shall give paramount consideration to the best interests of the child.

SDCL §25-6-2. As the Circuit Court notes in its memorandum decision, "This section [referring to SDCL 25-6-2] explicitly states that any minor child can be adopted by any adult person. Using the plain language of this statute, any child, even children in DSS custody, can be adopted by any adult person, including foster parents not selected by DSS" (App. 3). Hansens clearly have standing to bring petitions for adoption as they are (more than) ten years older than both A.A.B. and B.A.B. Further, the Hansens have satisfied all applicable statutes regarding their ability to adopt A.A.B. including: SDCL §25-6-3[7], §25-6-9[8], §25-6-9.1[9],§ 25-6-10[10] and §25-6-11[11]. Hansens have filed a Motion

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[7] SDCL 25-6-3. Consent of spouse required for adoption. A married man may not lawfully separated from his wife cannot adopt a child without the consent of his wife, nor can a married woman, not thus separated from her husband, without his consent, provided the husband or wife not consenting is capable of giving such consent.

[8] SDCL 25-6-9. Period of residence in home required before petition granted. No petition for adoption shall be granted until the child shall have lived within the proposed foster home for a period of at least six months.

[9] SDCL 25-6-9.1. Home study report required--Criminal record check and central registry screening to be included--Violation as misdemeanor**.** No person may place a child in a home for adoption until a home study has been completed by a licensed child placement agency as defined in § 26-6-14, the Department of Social Services, or a certified social worker eligible to engage in private independent practice as defined in § 36-26-17. Any person who submitted home studies under this section or under § 26-4-15 prior to July 1, 1990, may continue to submit home study reports without meeting the above requirements. A home study shall include a fingerprint based criminal record check completed by the Division of Criminal Investigation and a central registry screening completed by the Department of Social Services. In addition, no child who is in the custody of the Department of Social Services may be placed in a home for adoption until a fingerprint based criminal record check has been completed by the Federal Bureau of Investigation for each adopting parent. Any person who violates the provisions of this section is guilty of a Class 1 misdemeanor.

[10] SDCL 25-6-10. Time of hearing on petition fixed--Investigation ordered by court. Whenever a person, or a husband and wife jointly, petition the circuit court for leave to adopt a minor child, the judge of the circuit court shall fix a time for hearing not less than ten days from the filing of such petition. The petition may be filed with the circuit court before the six-month period required by § 25-6-9 has passed. The circuit court may, in the case of a stepparent adopting a stepchild, and shall in all other cases, direct a court

for Temporary Custody of B.A.B. in order to comply with SDCL Chapter 25-6 (SDCL 25-6-9 and SDCL 25-6-9.1). Thus, the Hansens have standing to bring said adoption action(s), not because they are foster parents of A.A.B., but due to their ability to satisfy SDCL §25-6-2 as well as other pertinent sections of SDCL Ch. 25-6.

The Department claims the Circuit Court "ignores other sections throughout the code which limit the ability of a party to adopt a child who is in the custody of the Department.[12]" However, the Department cannot point to any one statute that mandates all adoptions for children in the care of the Department be approved by the Department; nor can the Department find any statutory authority or case law that demands all Department adoptions proceed through SDCL Ch. 26-8A. The Department's argument is flawed for two reasons: First, if all adoptions for children in the care of the Department were to proceed through the abuse and neglect statutes of SDCL Ch. 26-8A, there would be no reference to such children in the adoption statutes of SDCL Ch. 25-6. Second, if the Department retained ultimate authority as to the placement and adoption of children in its care, Department adoptions would not require the Circuit Court as the court would have

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services officer or other officer of the court or an agent of the Department of Social Services or some other discreet and competent person to make a careful and thorough investigation of the matter and report such findings in writing to the court. A history of any previous child support obligations of each prospective adoptive parent shall be included in the investigative report.

[11] SDCL 25-6-11. Notice to Department of Social Services – Recommendation of department – Appearance**.** Upon the filing of a petition for the adoption of a minor child the petitioner therein shall notify the Department of Social Services, by mailing to the department a copy of the petition. The petitioner also shall notify the department of the date fixed for hearing the petition, or mail to the department a copy of the order fixing the date of the hearing. The department shall make a recommendation as to the desirability of the adoption. The department may appear in any procedure the same as the party in interest, and may request a postponement of hearing on the petition in the event more time is needed for its investigation. This section only applies to a child in the custody of the department

[12] Appellant's brief, page 9.

no authority under the argument of the Department. As the Circuit Court found in its memorandum opinion:

> The statutes regarding abuse and neglect proceedings, SDCL Ch. 26-8A, do not control determination of this Motion because Petitioners are not petitioning or adopting through the abuse and neglect proceeding. Rather, Petitioners have brought a separate Petition for Adoption under the adoption statutes. SDCL §26-8A-27 provides the directive for DSS custody following termination of parental right in an abuse and neglect proceeding, which has taken place in this case, but the statute does not provide the procedure though which a petition for adoption can be brought following termination of parental rights. Nothing in the text of SDCL §26-8A-27 prevents SDCL Ch. 25-6 from being applied in this context.

(App. 4). Citing to SDCL §26-8A-27, Department asserts the Department is given ultimate control over the placement/adoption of the child. However, such control asserted by the Department is greater than what South Dakota Legislature has given to biological parents that retain their custody rights. Specifically, SDCL §25-6-4 states:

> No child may be adopted without the consent of the child's parents. However, if it is in the best interest of the child, the court may waive consent from a parent or putative father who:
>
> (1) Has been convicted of any crime punishable by imprisonment in the penitentiary for a period that, in the opinion of the court, will deprive the child of the parent's companionship for a critical period of time;
>
> (2) Has, by clear and convincing evidence, abandoned the child for six months or more immediately prior to the filing of the petition;
>
> (3) Has substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection;
>
> (4) Being financially able, has willfully neglected to provide the child with the necessary subsistence, education, or other care necessary for the child's health, morals, or welfare or has neglected to pay for such subsistence, education, or other care if legal custody of the child is lodged with others and such payment ordered by the court;
>
> (5) Is unfit by reason of habitual abuse of intoxicating liquor or narcotic drugs;
>
> (6) Has been judicially deprived of the custody of the child, if the adjudication is final on appeal to the court of last resort or the time for an appeal has expired;
>
> (6A) Has caused the child to be conceived as a result of rape or incest; or
>
> (7) Does not appear personally or by counsel at the hearing to terminate parental rights after notice pursuant to §25-5A-11 and 25-5A-12 which was received at least thirty days prior to the hearing.

SDCL §25-6-4. Thus, the court has the power to waive consent of a biological parent but (according to the Department) does not have the power to override a recommendation of the Department. Department argues that children in the custody of the Department should not be afforded the same review that children in private adoptions receive. Department is attempting to make two difference classes of children wherein one is afforded the review and therefore protection of a neutral third party; however, the child in Department's custody receives no such review and are subject to the recommendation of the Department alone. However, such an argument is illogical and appears to be in deep contrast with relating statutory authority. As the Circuit Court notes in its memorandum decision:

> SDCL 25-6-11 makes certain that SDCL Ch. 25-6 can be utilized by Petitioners as the statutory scheme through which to adopt children in DSS custody. In fact, the statute expressly contemplates petitions for adoption of children in DSS custody by persons other than the person DSS recommends. Clearly, a recommendation from DSS would not be necessary if DSS had veto power over a proposed adoption of a child in DSS custody. Therefore, DSS has statutory authority only to make a recommendation to the Court in adoption proceedings involving children in its custody. The statute does not give DSS the exclusive ability to bring petitions for adoption or to veto any adoption petitions brought by someone other than DSS's recommended adoption placement.

(App 3-4). The Department argues this Court should examine the legislative history of SDCL 25-6-11 as Department asserts it was not the intent of the legislature when drafting the SDCL §25-6-11 to allow the Hansens to seek adoption of their foster child and child's sibling.[13] However, just as the Department notes in its argument, "[R]estoring legislative history is justified only when legislation is ambiguous, or its literal meaning is absurd or unreasonable." *Petition of Famous Brands, Inc.,* ¶ 12, 347 N.W.2d 882, 885 (S.D. 1984) (Internal citations omitted). SDCL 25-6-11 is neither absurd nor is it ambiguous; thus,

[13] Appellant's brief, page 18.

there is no need to review the legislative history of the statute. This Court has further determined:

> While it is fundamental that we must strive to ascertain the real intention of the lawmakers, it is equally fundamental that we must confine ourselves to the intention as expressed in the language used. *Ex parte Brown,* 21 S.D. 515, 519, 114 N.W. 303 (1907). To violate the rule against supplying omitted language would be to add voluntarily unlimited hazard to the already inexact and uncertain business of search for legislative intent. *Boehrs v. Dewey County,* 74 S.D. 75, 79, 48 N.W.2d 831, 834 (1951).

Id at ¶8, pg. 885.

It appears that language was removed from SDCL §25-6-11 in order to allow private adoptions to proceed without the need for intervention from the Department; it does not follow that because of these amendments, SDCL §25-6-11 is now ambiguous and/or absurd. Even if this Court determines that SDCL §25-6-11 is in fact ambiguous, SDCL§ 25-6-12, also states that the Department *"may* appear" at the adoption hearing to give its consent. See SDCL §25-6-12[14] (emphasis added). If the legislature intended to give the Department complete authority regarding placement of children in its care and

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[14] SDCL 25-6-12. Execution of consent and agreement by parties – Appearances at hearing**.** Before the hearing on a petition for adoption, the person adopting a child, the child adopted, and the other persons whose consent is necessary, shall execute their consent in writing, and the person adopting shall execute an agreement to the effect that the child adopted shall be treated in all respects as his or her own. The consent forms and the agreement of the person adopting shall be filed with the court. At the time of the hearing on the petition, the person adopting a child and the child to be adopted shall appear in court or by other means as may be allowed by the court. All persons whose consent is necessary, except the child and the person adopting the child, unless a different means of appearance is allowed by the court, may appear by a person filing with the court a power of attorney, or a guardian may appear on behalf of the child, or a duly incorporated home or society for the care of dependent or neglected children may by its authorized officer or agent, consent to the adoption of a child surrendered to such home or society by a court of competent jurisdiction. The Department of Social Services may appear in court and consent to the adoption of a child surrendered to it by any court of competent jurisdiction, or, if the department has custody of a child by written agreement of a parent or parents with power of attorney to consent to adoption, by the officer of the department holding such power of attorney.

custody, this would render SDCL §25-6-12 also ambiguous and absurd as well as SDCL §26-6-21. The Department is demanding this Court infer the meaning of a statute not based upon what the statute says, but upon what it does not say. Such an argument is illogical. The Court is to look at the plain meaning of the statute. St*ate v. Myrl & Roy's Paving Inc.,* 2004 S.D. 98, 686 N.W.2d 651.

The Hansens acknowledge the Department has the ability to make a recommendation to the court as to placement of children in its care just as a biological parent may appear at an adoption proceeding in order to be heard by the court. Further, SDCL §25-6-11 states in part, "The department shall make a recommendation as to the desirability of the adoption. The department may appear in any procedure the same as the party in interest, and may request a postponement of hearing on the petition in the event more time is needed for its investigation. This section only applies to a child in the custody of the department." See SDCL §25-6-11. Additionally, SDCL §25-6-12 states in part, "The Department of Social Services may appear in court and consent to the adoption of a child surrendered to it by any court of competent jurisdiction, or, if the department has custody of a child by written agreement of a parent or parents with power of attorney to consent to adoption, by the office of the department hold such power of attorney." See SDCL §25-6-12. Neither SDCL §25-6-11 nor SDCL §25-6-12 mandates the consent from the Department in order to allow an individual to adopt a child from Department custody. The statutes state the Department must make a recommendation; but it does not state nor would it logically follow the Court is bound by such a recommendation.

The Department accuses the Circuit Court of error when the court did not consider administrative rules governing the Department's supposed authority over Department adoptions.[15] The Department specifically cites to ARSD 67:14: 32:17,:

> 67:14:32:17. Filing of petition. An applicant shall not file a petition to adopt a child placed with them by the department without prior approval of the department. When the department has given legal approval to an applicant to begin legal proceedings for the completion of adoption, the department shall send legal information about the child to the applicant's attorney.

ARSD 67:14:32:17. However, there is no such coordinating statute in SDCL Ch. 25-6 or any other statute, which allows the Department to usurp the power of the Circuit Court and control all who may bring a petition for adoption. In fact, ARSD 67:14: 32:17 is in stark contrast to SDCL Ch. 25-6 and Ch. 26-8A. However, if the Court determines the administrative rules are applicable in this case, the Hansens argue the Department failed to follow its own rules and procedures. Specifically, ARSD 67:14:32:10 states:

> 67: 14: 32: 10. Approval or denial of adoption application for children in department custody -- Notice. Within 120 days after application, the department shall notify the applicant in writing of the approval or denial. If the application is denied, the department shall inform the applicant of the reasons for the denial. If the applicant disagrees with the department's determination, the applicant may appeal the department's determination by requesting a fair hearing under the provisions of chapter 67:17:02.

ARSD 67: 14: 32: 10. The Hansens did not complete any child-specific application for adoption of A.A.B or B.A.B. Even the Department noted its Motion to Dismiss, "The child has not, and has never been placed with the Hansens for the purpose of adoption"

[15] Appellant's brief, page 10.

(R2, 10) (R1, 18). The Hansens were not informed that such an application was required before a determination of placement could be made- nor did the Hansens complete any application for the previous child they successfully adopted in 2015. The Hansens were not supplied with any written, formal denial of placement for A.A.B. or B.A.B. Therefore, the Hansens are not "applicants" under the referenced administrative rules and are not bound by such regulation.

Additionally, ARSD 67:14:32:31 also states:

> 67:14:32:31 Fair hearing. An adoptive applicant is entitled to a fair hearing if the applicant is aggrieved or dissatisfied with any action or inaction on the part of the department which relates to the approval or denial of an adoption application. A fair hearing is conducted under the provisions of chapter 67:17:02.

ARSD 67:14:32:31. Again, the Hansens were not provided with any written denial regarding their possible adoptions of A.A.B. and B.A.B. Thus, the Hansens did not have notice or the ability to request a hearing in order to state their grievances. The Department notes in its own Motion(s) to Dismiss, "Only a relative can seek judicial review of the Department's adoptive placement decisions," according to SDCL 26-8A-29.1 (R1, 18) (R2, 10); ARSD 67:14: 32:17 does not have the same limiting language; in fact it allows any applicant to contest the findings of the Department. See ARSD 67:14: 32:17. Therefore, the Department had no intention of informing or providing the Hansens with a hearing to review the placement decision of the Department as the Department did not classify the Hansens as applicants for purposes of ARSD 67:14: 32:17. The Department can not wield the power of its own administrative rules if the Department itself chooses not to follow its own protocol.

The Department also attempts to utilize *In re D.M.* and *In re Adoption of D.M.* in order to argue that the Department's recommendation is necessary for the Hansens to bring petitions to adopt A.A.B. and B.A.B. Specifically, *In the Matter of D.M.*, this Court was tasked with the responsibility of determining whether relatives of a child in Department custody, could intervene in an abuse and neglect proceeding. *In re D.M.,* 2004 S.D. 34, 677 N.W.2d 578. When the relatives of the minor child in question were unsuccessful in their intervention action through the abuse and neglect proceeding, they attempted to intervene in the foster parents' petition for adoption through SDCL Ch. 25-6. *In the Matter of D.M.*, 2006 S.D. 15, 710 N.W.2d 441. The Circuit Court finds in its memorandum opinion:

> In re D.M. is not "particularly useful to the issues at bar because both cases deal with intervention (in an abuse and neglect proceeding in the first case and an adoption case in the second,) not a petition for adoption. In neither case did the complaining party bring his own petition for adoption as Petitioners have done here. Id. Furthermore, intervention is procedurally distinguishable from bringing a petition for adoption …. If anything, the latter In re D.M. case is helpful to the Petitioners because it involved a foster family that brought a petition for adoption under the adoption statutes, which is exactly what the foster parents in the present case are doing procedurally to seek adoption of the children

(App. 5). As the Circuit Court concluded in its memorandum opinion, the "In re D.M. cases, viewed in the context of the totality of the South Dakota adoption statute … is that, ordinarily, a party seeking to adopt a child in DSS custody must file his own petition for adoption in order to be heard … nothing precludes the Hansen's from filing their own petition, and they have done so." App. 5).

Finally, the Circuit Court correctly notes SDCL 25-5-29[16], also known as "Timmy's Law, "enacted after the decision in *Meldrum v. Novonty*, 2002 SD 15, 640 N.W.2d 460" supports the Hansen's claim that they have standing to bring their petitions for adoption of A.A.B. and B.A.B.(App. 6-7). The Hansens brought their action under SDCL Ch. 25-6; not under any Title 26 chapters as referenced in SDCL §25-5-29. See SDCL §25-5-29. Further, as the Circuit Court finds in its memorandum decision:

> [T]he Hansen's meet the criteria to petition for custody with respect to A.A.B., and an adoption petition is a proper pleading in which to seek custody of a child with whom one has formed a significant bond as a primary caretaker in the role of a foster parent… This holding is in keeping with the clearly articulated public policy of the State of South Dakota, as expressed in the legislation set forth above, that the courts of this state shall be open to claims by qualified adults, particularly those who have served in a caretaker role and to whom the child has formed a significant bond, that that child's best interest are served by awarding custody to them.

(App. 6-7).

The Department claims SDCL 25-5-29 does not apply to the present case or to children in the care of the Department because this Court has previously concluded that "legislature specifically excluded the right to intervene in A & N proceedings." *In re D.M.,* 2004 S.D. 34, ¶8, 677 N.W.2d 578, 581. However, as correctly noted by the Circuit Court in its decision, the Hansens have brought their petitions for adoption under SDCL Ch. 25-6; thus, they are not attempting to intervene in the A & N proceeding, nor

[16] 25-5-29. Domestic Relations – Parent and Child – Person other than parent permitted to seek custody of child – Parent's presumptive right to custody – Rebuttal. Except for proceedings under chapter 26-7A, 26-8A, 26-8B, or 26-8C, the court may allow any person other than the parent of a child to intervene or petition a court of competent jurisdiction for custody or visitation of any child with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship.

has the Department provided any authority that the Hansens must proceed through the A & N proceeding. Therefore, SDCL 25-5-29 applies to the present case.

B. SDCL §26-6-21 mandates the Court operate under SDCL Chapter 25-6 in regards to the adoption procedure for children under the care and control of the Department.

The Department ignores direct, statutory authority when stating the Circuit Court has a duty to abide by the abuse and neglect statutes when the child to be adopted is in the care and custody of the Department. SDCL § 26-6-21 provides:

> SDCL 26-6-21. Placement of children for adoption – Consent by agency to adoption. Any licensed child welfare agency may place children in family homes for care or for adoption if authorized to do so in the license issued by the Department of Social Services. Whenever a child welfare agency licensed to place children for adoption shall have been given the permanent care, custody, and guardianship of any child and the rights of the parent or parents of such child shall have been terminated by order of a court of competent jurisdiction, *the child welfare agency may consent to the adoption of such child pursuant to the statutes regulating adoption proceedings.*

SDCL §26-6-21 (emphasis added). Therefore, the adoption agency is not required to give consent. Further, said agency is to abide by the adoption statutes of SDCL Ch. 25-6. SDCL §26-6-1 defines 'child welfare agency' as:

> SDCL §26-6-1. Agencies and institutions defined as child welfare agencies – Department of Social Services. Any agency or institution maintained by a municipality or county, or any agency or institution maintained by a person, firm, limited liability company, corporation, association, or organization to receive children for care and maintenance or for placement in a family home, or that provides care for mothers and their children, is considered to be a child welfare agency. The Department of Social Services is a child welfare agency.

SDCL §26-6-1. Thus, as a child welfare agency, the Department of Social Services is regulated by SDCL §26-6-21 in regards to the adoption of children in the Department's care and must comply with SDCL Chapter 25-6 when the child's biological parents'

rights have been terminated. Furthermore, the Circuit Court is granted authority to determine all matters relating to an adoption in South Dakota: SDCL 25-6-6 provides the Court with ultimate authority in regards to adoptions stating;

> SDCL §25-6-6. Jurisdiction of circuit court – Appeal. The circuit court is vested with the jurisdiction to hear, try, and determine all matters relative to the adoption of children, subject to the right of appeal in the same form and manner as appeals are taken from the circuit court.

SDCL §25-6-6. SDCL 25-6-2 also vests the court with ultimate authority to consider the interests of the parties "to the proceeding but shall give paramount consideration to the best interests of the child," See SDCL §25-6-2.

Counsel for the Department argues that the Court is bound by SDCL §26-8A-29.1[17]. Specifically, that because the statute is silent as to a foster parents' ability to challenge the Department's recommendation of placement, a foster parent is then barred from filing a petition for adoption. The argument is flawed for three reasons: First, SDCL §26-6-21, mandates the Court act in accordance with Chapter SDCL 25-6, not SDCL Chapter 26-8A: Protection of Children from Abuse or Neglect; thus SDCL §26-8A-29.1 does not apply to the present case before the Court. Second, the Court should not infer the meaning of a statute by mere silence; as the Court states in *State v. Myrl & Roy's Paving Inc.,* "Words and phrases in a statute must be given their plain meaning and effect…But in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result," St*ate v. Myrl & Roy's Paving Inc.,* 2004 SD 98, ¶6, 686 N.W.2d 651, 653.

[17] On page 23 of Appellant's brief, Department refers to SDCL 26-7A-29.1. Appellee assumes this was in error and Appellant intended to refer to SDCL 26-8A-29.1 as 26-7A-29.1 is not contained in South Dakota statutory authority.

South Dakota lacks specific, limiting statutory authority in regards to the need for consent from the vested agency for purposes of adoptions. The Department has failed to cite to any South Dakota statutory authority that mandates the Court adhere and yield to a placement recommendation of the Department. In fact, SDCL Chapter 25-6 provides that even the biological parents' consent can be overridden by the court. See SDCL §25-6-4. While the Department spends considerable time discussing case law and statutory authority in other jurisdictions, it has no impact on this case as South Dakota does not have any specific statutory authority to waive (or not waive) the managing agency's placement proposal; nor does South Dakota have any statutory authority that specifically limits a foster parents' ability to petition for adoption or limits a foster parents' standing. It is not necessary to review other jurisdictions as this Court should only consider the plain meaning of the controlling statutes; the Circuit Court notes in its memorandum opinion:

> This interpretation of the South Dakota adoption statutes is consistent with other jurisdiction' law as well. Although there is some split among jurisdictions, many other jurisdictions do provide foster parents standing to bring petitions for adoption. 2 Am Jur Adoption, §116 states, "foster parents may have standing to petition for adoption of a child where a judgment for termination of the natural parental rights had been entered." (App. 4).

Thirdly, Counsel for the Department is not asking the Court to review the plain meaning of the words and phrases of SDCL 26-8A-29.1 but asking the Court to assume the intention of the legislature based on what the statute does not say. It would be unreasonable to infer that the legislature intended to usurp the power of the Court to review the best interest of the child and ignore possible errors on the part of the Department of Social Services; who then is to review the decisions of the Department? There is not one statute that counsel can point to that mandates the Court follow the

directive of the Department of Social Services in Chapter 25-6 or Chapter 26-8A as it pertains to adoptions. As stated above, SDCL 25-6-2, 25-6-6 and 25-6-13 (which specifically references foster parents) See SDCL §25-6-2, SDCL §25-6-6 and SDCL §25-6-13 defers all authority of the Court. Similarly, SDCL §26-8A-21.2, §26-8A-22, §26-8A-25, §26-8A-26 defers the authority to the court regarding what is in the best interest of the child.

The Circuit Court notes in its memorandum decision:

> Essentially, this statute [SDCL §26-8A-27] places DSS upon the same footing as an adoption agency in a private adoption granting DSS authority to place the child for adoption and to consent to an adoption. But it stops short of granting DSS veto power over an adoption for which it has not consented. Therefore, the adoption chapter can be utilized by Petitioners as they seek to adopt the children at issue in this case, who have previously been adjudicated as abused and neglected, because any adult person, including foster parents not selected by DSS, may bring a petition to adopt any minor child, even a child in DSS custody, according to the plain language of the statute, and SDCL §26-8A-27 does not contradict this.

(App. 4).

The Department also argues that this Court should not allow the Hansens to proceed through SDCL Ch. 25-6, as this would allow any person who disagreed with the Department to frustrate the Department's ability to place children in a home of the Department's choosing. However, neither the Department nor the children in its care, require this sort of blinding, all-encompassing, safe-guard.

The South Dakota legislature has mandated several qualifications in order to ensure that random and/or unfit individuals are restrained from filing successful Petitions for Adoption. SDCL 25-6-2 controls who may adopt a child and the standard in which the circuit court is to apply when making this determination. See SDCL 25-6-2. SDCL 25-6-3 mandates the consent of the other spouse as a prerequisite for adoption. See SDCL 25-

6-3. SDCL 25-6-9 requires the child in question reside with the Petitioners for at least six months. See SDCL 25-6-9. SDCL Chapter 25-6 also relies heavily on the ability of the Court to determine what is in the best interest of the minor child in all aspects of the adoption.

In the present case, the Department argues that allowing the Hansens to bring their petitions for adoption of A.A.B. and B.A.B. would result in a 'free-for-all' because "an unlimited number of adults could file competing petitions to adopt a child in the Department's custody."[18] Yet, the Hansen's case is unique in that the Department allowed a child to spend the better part of the child's life in the care of one set of foster parents without taking any legitimate steps to place said child in a permanent home (R1, 9) (R2, 16). Further, the Department claims it has already reviewed the possible placement of the Hansens as well as Homelvigs who are at this point, the only petitioners of the children in question (R1, 9) (R2, 16). The Department's complaint of delay due to the extra work additional petitioners may bring if those without the Department's recommendation are allowed to file their own petitions is without merit. The Department, by their own admission, is to consider relatives of the child to be placed, first; second, the Department will likely review possible foster parents for placement of children regardless of whether they choose to recommend these individuals or not. Therefore, no extra work is created. The possibility that random individuals will come forward and file a frivolous action is possible in any legal matter; this is not exclusive to adoptions. Finally, in order to bring a petition for adoption, the individuals in question must reside with said child for at least six months.

[18] Appellant's brief, page 16)

However, it is not the number of possible petitioners the Court should concern itself with. On the contrary, these restrictions have been utilized in countless adoptions in order to protect children from improper placement. The Department's argument that they would face numerous objections to their placement findings if the Court grants the Petitioners' ability to bring this action for adoption is unoriginal. Private adoptions take place everyday and can be contested by multiple petitioners. It is the duty of the court to apply SDCL Ch. 25-6 to determine which petitioners have met all of the necessary criteria and finally, what is in the best interest of the child. See SDCL 25-6-6. It is not logical that the court would have a different standard for children in the care of the Department than children of private adoptions.

However, the larger concern in the present situation is not the possibility of multiple petitioners in an adoption action but the Department's demand to streamline the adoption process without any transparency. It is the duty of this Court to act as the check and balance on the Department in order to ensure the best interest of the child is being considered in all decisions. The Department's lack of transparency is not a hypothetical, futuristic idea but a very real issue the State of South Dakota is currently experiencing.

In *Oglala Sioux Tribe v. Van Hunnik*, the Court reviewed whether the Defendant's (South Dakota Department of Social Services, Child Protective Services, Seventh Circuit Court and States Attorney for Pennington County) "policies, practices and procedures relating to the removal of Native American children from their homes during state court 48-hour hearings violate ICWA and the Due Process Clause of the Fourteenth Amendment." *Oglala Sioux Tribe v. Van Hunnik*, --- F. Supp. 3d ----, 2015 WL 1466067 (D.S.D. Mar. 30, 2015). Specifically, the Plaintiff argues that Judge Davis, with the help

of other state entities enacted and acquiesced to policies created by Judge Davis that included:

1. Not allowing parents to see ICWA petition filed against them;
2. Not allowing the parents to see the affidavit supporting the petition;
3. Not allowing the parents to cross-examine the person who signed the affidavit;
4. Not permitting parents to present evidence;
5. Placing Indian children in foster care for a minimum of 60 days without receiving any testimony from qualified experts related to "Active efforts" being made to prevent the break-up of the family; and
6. Failing to take expert testimony that continued custody of the child by the Indian parent or custodian is likely to result in serious emotional or physical damage to the child.

Id. at *11. The Court found that when the Defendants failed to challenge Judge Davis' practices/policies for 48-hour hearings, "his policies became the official policy governing their own agencies." *Id.* at *12. The Court explains, "Defendants created the appearance of regularity in a highly irregular process." *Id.* The Court found,

> The DOI Guidelines and the SD Guidelines were publically available to the Seventh Circuit judges including Judge Davis and to the other defendants. A simple examination of these administrative materials should have convinced the defendants that their policies and procedures were not in conformity with ICWA 1922, the DOI Guidelines or the Guidelines promulgated by the South Dakota Unified Judicial System. Indian children, parents and tribes deserve better.

Id. at *16. The Court determined Judge Davis authorized the South Dakota Department of Social Services to determine whether "imminent risk of physical harm to an Indian child has passed and to restore custody to the child's parents…This authorization vests full discretion in DSS to make the decision if and when an Indian child may be reunited with the parents. This abdication of judicial authority is contrary to the protections guaranteed Indian parents, children and tribes under ICWA." *Id.* The Court found Judge Davis' policy to defer to DSS removed the Court from the crucial role of making a

custody decision as mandated by law and further concluded that "The Court cannot delegate the authority to make the custody decision to a state agency or its employees." *Id.* at *17. The Court concluded that Plaintiff was entitled to judgment as a matter of law on their Indian Child Welfare Act claims as well as Plaintiff's Due Process claims. *Id.* *17 and *20.

Just as in the present case, the Department should not be authorized to make a decision that has been given to the court under statutory authority and mandated by law. It is the court's role to determine what is in the best interest of the child pursuant to SDCL 25-6-2. See SDCL 25-6-2. Even though the South Dakota Legislature has given the Department the ability to make an adoption recommendation through SDCL 25-6-12, this should not deprive the court of the ability to review the findings of the Department or make findings of its own. See SDCL 25-6-12. The danger in failing to review the streamlined process of the Department is *Oglala Sioux Tribe v. Van Hunnik*. The court can not allow the Department to take the lead and usurp the ability of the court to act as a check and balance; each child deserves a full review of their case and a determination of what is in said child's best interest.

C. Petitioners did not circumvent the Department's consent by filing their own petition.

The Department argues that Petitioners may not bring their own action for adoption through SDCL Ch. 25-6 as the matter is addressed through abuse and neglect statute SDCL 26-8A-29.1, which provides:

> 26-8A-29.1. Request for hearing by relative denied adoptive placement--Time limits--Intervention. Except under circumstances where placement was with another relative of the child, any relative who has been denied adoptive placement by the Department of Social Services may request a hearing to determine if the

> placement was an abuse of discretion. The request shall be filed with the circuit court having jurisdiction pursuant to § 26-8A-29 and shall be filed within thirty days of written notification from the department by regular mail to the relative's last known address. The hearing shall be held within thirty days of the filing of the request for hearing and may be continued for not more than thirty days upon good cause shown. The relative shall be granted limited intervention only for the purpose of the placement review hearing.
>
> No intervention may be allowed in a proceeding involving an apparent, alleged, or adjudicated abused or neglected child, including an adoption or guardianship proceeding for a child placed in the custody of the Department of Social Services pursuant to § 26-8A-27, except as provided by this chapter and under the Indian Child Welfare Act, (25 U.S.C. §§ 1901 to 1963, inclusive), as amended to January 1, 2005.

See SDCL 26-8A-29.1. As noted by the Circuit Court in its memorandum decision, "This statute, read in context, is specifically focused upon the procedure to be followed by relatives of children placed for adoption by DSS pursuant to abuse and neglect proceedings, to object to, and seek to review of, DSS's adoption placement, when the placement was with a non-relative." (App. 5-6). The Circuit Court further notes, "While unartfully drafted, SDCL 26-8A-29.1 should not read to completely usurp the authority of the Circuit Court under SDCL Ch. 25-6 to hear adoption petitions brought by "Any adult person." To do so would eviscerate SDCL 25-6." (App. 6). The Circuit Court further concludes, "When statutes appear in conflict, it is the duty of the Court to adopt a reasonable interpretation that will harmonize them." (App. 6, *Lewis & Clear Rural Water Sys., Inc. v. Seeba,* 2006 S.D. 7, ¶64, 709 N.W.2d 824, 841).

The Department asserts that because it stands in loco parentis on behalf of A.A.B. and B.A.B., it has limitless power and unchecked authority regarding the placement of the children. However, if this was the case, why then would then South Dakota Legislature specifically mention children in the custody of the Department in additional statutes found in SDCL Ch. 25-6? Further, would it not also follow that the legislature

would then specifically state that SDCL Ch. 25-6 only applies to private adoptions and remove all reference of DSS and its recommendations? This does not seem logical and as the Circuit Court in the present case found, "South Dakota Legislature did not intend to abrogate by virtue of SDCL §26-8A-29.1 the clear mandate set forth in SDCL Ch. 25-6 granting the Court express authority and jurisdiction to decide adoption petitions brought by "any adult" to adopt "any minor child" under the best interest of the child standard. See SDCL §25-6-2 (App. 6).

The Department fails to recognize it may still provide its recommendation in an adoption under SDCL Ch. 25-6; in doing so, the Department may provide to the Circuit Court, evidence as to why placement with the Hansens is not in the best interest of A.A.B. and B.A.B. The Department in its argument, demands to be vested with more authority than the court awards biological parents of children. However, the Department would be in a superior position to any individual seeking an adoption of a child under Department custody given the Department's resources. The Department (like any biological parent) may present their position to the Circuit Court if Department does not agree with the petition for adoption.

CONCLUSION

In conclusion, the Circuit Court's determination that the Hansens have standing to bring petitions for adoption of A.A.B. and B.A.B. is correct. SDCL §25-6-2 provides the Hansens with standing to bring their petitions. SDCL Ch. 25-6 clearly applies to both private adoptions, and adoptions of children in the custody and care of the Department. The Department has failed to establish the trial court erred. When reviewing a question of

standing in adoption, the Court must look to the plain meaning of the statute in order to make such a determination. The Hansens have clearly satisfied SDCL 25-6-2 in order to bring their Petition(s) for Adoption of A.A.B. and B.A.B. The Department's concerns regarding placement may still be addressed at trial with the Circuit Court. Thus, the trial court's decision should be affirmed.

Respectfully submitted this 23rd day of November, 2015, at Sioux Falls, South Dakota.

BANGS, MCCULLEN, BUTLER,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies on this 23rd day of November, 2015, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

Joe Thronson
Special Assistant Attorney General
Department Of Social Services
Division Of Legal Services
700 Governor's Drive
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Attorney for the Appellant

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile at _____
☐ Federal Express
☑ E-transmission

/s/ Kathryn L. Morrison
Kathryn L. Morrison

CERTIFICATE OF COMPLIANCE

I, KATHRYN L. MORRISON, hereby certify this Brief is submitted in Times New Roman typeface, 12 pt., and that the word processing system used to prepare the Brief indicates the number of pages does not exceed forty pages.

DATED this 23rd day November, 2015.

_/s/ Kathryn L. Morrison
Kathryn L. Morrison

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CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
LINCOLN & MINNEHAHA COUNTIES
425 North Dakota Avenue
Sioux Falls, SD 57104-2471

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Bradley G. Zell
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July 19, 2013

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Joe Thronson
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Department of Social Services
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RE: *Adoption of A.B. & B.B.* (ADP15-6 & ADP15-5)

Dear Counsel,

Petitioners, Twila and Troy Hansen, filed petitions for the adoption of minor children A.A.B and B.A.B The South Dakota Department of Social Services ("DSS") then filed a Motion to Dismiss Adoption Petitions. The motions came before the Court for hearing on Monday, April 27, 2015. The Court took the matters under advisement following the hearing and requested supplemental briefing from the parties. Having reviewed the record in the case, read the written briefs, listened to the oral arguments and given the matter due consideration, the Court issues this written decision on the Motions.

FACTUAL HISTORY

A.A.B and B.A.B came into DSS custody as a result of abuse and neglect proceedings against their biological parents. The Hansen's have served as foster parents

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to A.A.B DOB 9-3-12, since January 8, 2013. Len and Lisa Homelvig have served as foster parents to B.A.B , since her birth on October 16, 2013. In December 2013 Petitioners informed DSS that they would have both children in their home. However, DSS kept the children separate with each set of foster parents keeping one child.

The parental rights of the children's biological parents were terminated by court order on May 2, 2014. DSS had an adoption conference call with several DSS staff on Oct. 22, 2014, and the DSS group's consensus was that the Homelvig's should adopt both children because they did not have any other children and may be able to take additional siblings if any were to be born to the children's birth parents. On October 23, 2014, Petitioners were informed that DSS intended to place both children with the Homelvig's for adoption. The Hansen's responded by petitioning to adopt both children. Thereafter, DSS filed Motions to Dismiss the Hansens' Petitions for Adoption. DSS asserts that Petitioners, as foster parents of A.A.B have no right to "intervene" in the adoption process of children in the custody of DSS. Petitioners, however, argue that they are not intervening; rather, they have filed their own Petitions for Adoption under South Dakota's adoption statutes, which allow them to do so. Petitioners also assert that DSS has not conducted an adequate investigation into the adoption placement of the children and have made a decision as to adoption placement that is not in the best interest of the children. The Homelvig's have not yet filed any Petitions for adoption of the children.

ISSUE

The issue before this Court is whether foster parents selected by DSS in connection with abuse and neglect proceedings but not selected by DSS for adoptive placement have the right to bring their own petition to adopt their foster child, and her sibling that was placed with another couple, where the other couple has been chosen by DSS to adopt both children.

LAW AND ANALYSIS

South Dakota law discusses adoption of children in more than one chapter of the South Dakota Codified Laws. In this case, Petitioners have brought Petitions for the Adoption of Minor Child under SDCL Chapter 25-6, the chapter titled Adoption of Children. SDCL §25-6-2 provides that any adult person may adopt any minor child. The statute reads:

> **SDCL § 25-6-2. Domestic Relations -- Adoption of Children -- Adoption of minor child permitted--Minimum difference in ages--Best interests of child**
>
> *Any minor child* may be adopted by *any adult person*. However, the person adopting the child must be at least ten years older than the person adopted.

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> In an adoption proceeding or in any proceeding that challenges an order of adoption or order terminating parental rights, the court shall give due consideration to the interests of the parties to the proceedings, but shall give paramount consideration to the best interests of the child.

SDCL § 25-6-2 (emphasis added).

This section explicitly states that any minor child can be adopted by any adult person. Using the plain language of this statute, any child, even children in DSS custody, can be adopted by any adult person, including foster parents not selected by DSS.

It is clear that SDCL Ch. 25-6, Adoption of Children, applies to adoptions of children in the custody of DSS. SDCL 256-4(6) refers to the chapter as applying to cases where the parental rights of the parents of the child to be adopted have been judicially terminated. SDCL 25-6-6 provides that the Circuit Court has jurisdiction in "all matters relative to the adoption of children." SDCL 25-6-9.1 specifically applies to adoption of children in DSS custody ('no child who is in the custody of the Department of Social Services shall be placed in a home for adoption until…"). Moreover, the language of SDCL 25-6-11 clearly states that the section applies to adoptions of children in the custody of DSS. The statute provides:

> **SDCL § 25-6-11. Domestic Relations -- Adoption of Children -- Notice to Department of Social Services--Recommendation of Department--Appearance**
>
> Upon the filing of a petition for the adoption of a minor child the petitioner therein shall notify the Department of Social Services, by mailing to the department a copy of the petition. The petitioner also shall notify the department of the date fixed for hearing the petition, or mail to the department a copy of the order fixing the date of the hearing. *The department shall make a recommendation as to the desirability of the adoption.* The department may appear in any procedure the same as the party in interest, and may request a postponement of hearing on the petition in the event more time is needed for its investigation. *This section only applies to a child in the custody of the department.*

SDCL § 25-6-11(emphasis added).

SDCL § 25-6-11 makes certain that SDCL Ch. 25-6 can be utilized by Petitioners as the statutory scheme through which to adopt children in DSS custody. In fact, the statute expressly contemplates petitions for adoption of children in DSS custody by persons other than the person DSS recommends. Clearly, a recommendation from DSS would not be necessary if DSS had veto power over a proposed adoption of a child in DSS custody. Therefore, DSS has statutory authority only to make a recommendation to the Court in adoption proceedings involving children in its custody. The statute does not give DSS the

exclusive ability to bring petitions for adoption or to veto any adoption petitions brought by someone other than DSS's recommended adoption placement.

The statutes regarding abuse and neglect proceedings, SDCL Ch. 26-8A, do not control determination of this Motion because Petitioners are not petitioning or adopting through the abuse and neglect proceeding. Rather, Petitioners have brought a separate Petition for Adoption under the adoption statutes. SDCL §26-8A-27 provides the directive for DSS custody following termination of parental rights in an abuse and neglect proceeding, which has taken place in this case, but the statute does not provide the procedure through which a petition for adoption can be brought following termination of parental rights. Nothing in the text of SDCL §26-8A-27 prevents SDCL Ch. 25-6 from being applied in this context. SDCL §26-8A-27 states, in pertinent part:

> **SDCL § 26-8A-27. Minors -- Protection of Children from Abuse or Neglect -- Final decree terminating parental rights of one or both parents--Child support arrearages--Custody of child**
>
> Upon the entry of the final decree of disposition terminating the parental rights of both parents or of the surviving parent, the court shall vest the Department of Social Services with the custody and guardianship of the person of the child for the purpose of placing the child for adoption and authorizing appropriate personnel of the department to consent to adoption of the child without need for any notice or consent of any parent of the child. ...

SDCL § 26-8A-27. Essentially, this statute places DSS upon the same footing as an adoption agency in a private adoption granting DSS authority to place the child for adoption and to consent to an adoption. But it stops short of granting DSS veto power over an adoption for which it has not consented. Therefore, the adoption chapter can be utilized by Petitioners as they seek to adopt the children at issue in this case, who have previously been adjudicated as abused and neglected, because any adult person, including foster parents not selected by DSS, may bring a petition to adopt any minor child, even a child in DSS custody, according to the plain language of the statute, and SDCL 26-8A-27 does not contradict this.

This interpretation of the South Dakota adoption statutes is consistent with other jurisdictions' law as well. Although there is some split among jurisdictions, many other jurisdictions do provide foster parents standing to bring petitions for adoption. 2 Am Jur Adoption, § 116 states, "foster parents may have standing to petition for adoption of a child where a judgment for termination of the natural parental rights had been entered." Petitioner's supplemental brief cites several jurisdictions that follow similar principles.

A Texas court dealt with a case that was very factually analogous to the case currently before this Court. The Texas court was faced with a case in which two foster families filed petitions to adopt a child. Rodriguez v. Miles, 655 S.W.2d 245 (Tex. App. 1983). The Department opposed one foster family's Petition, but the trial court' waived consent

of the Department and allowed the family that was not selected by the Department to adopt the child. Id. The foster family that was not selected by the trial court appealed, challenging the standing of the foster family selected to adopt the child by the trial court. Id. The Texas Court emphasized that this was not an "intervention" but, rather, a separate petition for adoption. Id. In holding that the foster family that was opposed by the Department did indeed have standing to bring the Petition, the Texas Court recited the following language of a Texas statute similar to that of South Dakota: "[a]ny adult is eligible to adopt a child who may be adopted." Id at 248.

Significant discussion is given in the briefs to the In re D.M. cases from the South Dakota Supreme Court. In re D.M., 2004 S.D. 34, 677 N.W.2d 578; In re Adoption of D.M., 2006 S.D. 15, 710 N.W.2d 441. I do not find these cases particularly useful to the issues at bar because both cases deal with intervention (in an abuse and neglect proceeding in the first case and an adoption case in the second,) not a petition for adoption. In neither case did the complaining party bring his own petition for adoption as Petitioners have done here. Id. Furthermore, intervention is procedurally distinguishable from bringing a petition for adoption as the Texas Court of Appeals pointed out in Rodriguez v. Miles, *supra*. Therefore, this Court does not utilize the In re D.M. cases as the basis for a decision here. If anything, the latter In re D.M. case is helpful to Petitioners because it involved a foster family that brought a petition for adoption under the adoption statutes, which is exactly what the foster parents in the present case are doing procedurally to seek adoption of the children.

The sum total of the In re D.M. cases, viewed in the context of the totality of the South Dakota adoption statues cited above, is that, ordinarily, a party seeking to adopt a child in DSS custody must file his own petition for adoption in order to be heard. While there is no right to intervene in either the abuse and neglect case or another's petition to adopt the child, nothing precludes the Hansen's from filing their own petition, and they have done so. Similarly, the Homelvig's may file their own petition to adopt these same children. If they do, I will consolidate the adoption petitions for trial.

DSS points to the second paragraph of SDCL 26-8A-29.1 to support its position on this Motion to Dismiss. That statute, passed in 2005, provides, in pertinent part:

> **SDCL § 26-8A-29.1 Minors—Protection of Children from Abuse or Neglect**
>
> No *intervention* may be allowed in a proceeding involving an apparent, alleged, or adjudicated abused or neglected child, *including an adoption or guardianship proceeding for a child placed in the custody of the Department of Social Services pursuant to § 26-8A-27,* except as provided by this chapter and under the Indian Child Welfare Act, (25 U.S.C. §§ 1901 to 1963, inclusive), as amended to January 1, 2005.

SDCL § 26-8A-29.1 (emphasis added). This statute, read in context, is specifically focused upon the procedure to be followed by relatives of children placed for adoption by

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DSS pursuant to abuse and neglect proceedings, to object to, and seek to review of, DSS's adoption placement, when the placement was with a non- relative. SDCL § 26-8A-29.1. In such a case a relative denied adoption placement is granted a limited right of intervention to seek a review hearing in Circuit Court of the adoption placement. The second paragraph of the statute, as quoted above, goes on to note that this procedure, and any similar procedure mandated under federal law for Indian children, are the exclusive procedures for intervention under these circumstances.

Review of the session law, SL 2005 Ch.140, puts this statute into additional context. Along with enacting SDCL 26-8A-29.1, SL 2005 Ch. 140 amended SDCL 26-7A-19(2) to set forth an explicit placement preference to qualified relatives and custodians following temporary custody hearings in abuse and neglect cases. Therefore, it is clear that §26-8A-29.1 was added to the abuse and neglect chapter to provide structure to the processing of claims of priority by relatives who are passed over by DSS in favor of foster care or adoption placement with a non-relative.

While inartfully drafted, SDCL 26-8A-29.1 should not be read to completely usurp the authority of the Circuit Court under SDCL Ch. 25-6 to hear adoption petitions brought by "any adult person." To do so would eviscerate SDCL Ch. 25-6. When statutes appear in conflict, it is the duty of the Court to adopt a reasonable interpretation that will harmonize them. Lewis & Clark Rural Water Sys., Inc. v. Seeba, 2006 S.D. 7, ¶ 64, 709 N.W.2d 824, 841. Adoption is wholly of statutory origin. 2 Am Jur 2d, Adoption §5. Adoption statutes must be construed as a whole, without isolation of particular sections to produce a "consistent, harmonious and sensible effect to all of its parts." Id. at §13. The question of who may adopt is controlled by such interpretation of the governing legislation. Id. at §15.

"[F]oster parents are generally among those individuals who may adopt and are not barred from adopting by an agreement between them and the welfare agency providing that no action for adoption may be taken." Id. at §25. Indeed, in some jurisdictions, "even so-called mandatory language of an adoption statute requiring consent of the agency ... having legal custody does not deprive the court of jurisdiction to determine an adoption petition where the best interest of the child are at stake." Id. at §93. See also Annot., Adoption of Child in Absence of Statutorily Required Consent of Public or Private Agency or Institution, 83 A.L.R. 3d. 373. Taking all of these considerations together, it is the view of this Court that the South Dakota Legislature did not intend to abrogate by virtue of SDCL §26-8A-29.1 the clear mandate set forth in SDCL Ch. 25-6 granting the Court express authority and jurisdiction to decide adoption petitions brought by "any adult" to adopt "any minor child" under the best interest of the child standard. See, SDCL § 25-6-2. In other words, "[t]he jurisdiction of the [circuit court] to act in adoption cases [is] not dependent upon the willingness of [the Secretary of the Department of Social Services], as guardian of the minors, to consent to the proceedings." 83 A.L.R. 3d, supra, at §3(b).

Furthermore, there is another statute which is applicable in this case that was not in play in the In re D.M. cases- SDCL 25-5-29, known as "Timmy's Law," enacted after the

decision in Meldrum v. Novotny, 2002 S.D. 15, 640 N.W.2d 460. SDCL 25-5-29 provides:

> **SDCL §25-5-29. Domestic Relations – Parent and Child -- Person other than parent permitted to seek custody of child--Parent's presumptive right to custody—Rebuttal**
>
> Except for proceedings under chapter 26-7A, 26-8A, 26-8B, or 26-8C, the court may allow any person other than the parent of a child to *intervene or petition* a court of competent jurisdiction for custody or visitation of any child with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship.

SDCL § 25-5-29 (emphasis added). In this case, which is brought under SDC 25-6, and not under any of the Title 26 chapters referenced in the statute, the Hansen's meet the criteria to petition for custody with respect to A.A.B, and an adoption petition is a proper pleading in which to seek custody of a child with whom one has formed a significant bond as a primary caretaker in the role of a foster parent. The Homelvig's, having served as B.A.B foster parents since birth, therefore, meet the criteria with respect to B.A.B to intervene under SDCL 25-5-29 in the Hansen's petition. This holding is in keeping with the clearly articulated public policy of the State of South Dakota, as expressed in the legislation set forth above, that the courts of this state shall be open to claims by qualified adults, particularly those who have served in a caretaker role and to whom the child has formed a significant bond, that that child's best interests are served by awarding custody to them.

Finally, it is worthy of mention at this juncture that, while the public policy of this state also requires compelling circumstances to justify the separation for siblings, See, Roth v. Haag, 2013 S.D. 48, 834 N.W.2d 337, maintaining siblings in the same household should never override what is in the best interests of the children. Simunek v. Auwerter, 2011 S.D. 56, 803 N.W.2d 835. These children have never lived together. Ultimately, this Court will exercise its statutory duty to consider the relevant evidence and then grant the adoption petitions that further the best interests of A.A.B and B.A.B.

CONCLUSION

The Court **DENIES** DSS's Motion to Dismiss the Hansens' Petition for Adoption of Minor Child A.B. and B.B. Ms. Morrison shall prepare the necessary Orders.

Sincerely,

Douglas E. Hoffman
Circuit Court Judge

Cc: Clerk's file

FILED
JUN 08 2015
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) : ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
IN THE MATTER OF THE ADOPTION OF A.A.B., Minor Child.	ADP. 15-6 **AMENDED NUNC PRO TUNC AMENDED ORDER DENYING THE DEPARTMENT OF SOCIAL SERVICE'S MOTION TO DISMISS**

The above entitled matter having come on before the Court on April 27, 2015. The Court having considered the record, briefs and the papers submitted by the parties, having heard argument of counsel, and being fully informed, and good cause appearing therefore,

IT IS HEREBY ORDERED that the South Dakota Department of Social Service's Motion to Dismiss Petitioner's action for adoption of A.A.B. is DENIED; and

IT IS FURTHER ORDERED that A.A.B. shall not be removed from the physical custody of Twila and Troy Hansen unless and until further Order of this Court or reversal of the denial of the Motion to Dismiss by the South Dakota Supreme Court.

IT IS FURTHER ORDERED that this matter shall be set for hearing so the Court may determine the best interest of the minor child.

Dated this 19 day of August, 2015
Nunc Pro Tunc to June 17, 2015
BY THE COURT:

DOUGLAS E. HOFFMAN
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES
Angelia Gries, Clerk of Courts
BY Carol VanDorten

FILED
AUG 19 2015
Minnehaha County, S.D.
Clerk Circuit Court

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STATE OF SOUTH DAKOTA) : ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
IN THE MATTER OF THE ADOPTION OF A.A.B., Minor Child.	ADP. 15-6 **NOTICE OF ENTRY OF AMENDED NUNC PRO TUNC AMENDED ORDER DENYING THE DEPARTMENT OF SOCIAL SERVICE'S MOTION TO DISMISS**

TO: JOE THRONSON, ATTORNEY FOR DEPARTMENT OF SOCIAL SERVICES:

YOU WILL HEREBY TAKE NOTICE that on August 19, 2015, the Court made and entered an Amended Nunc Pro Tunc Amended Order Denying the Department of Social Service's Motion to Dismiss in the above-entitled matter, which was filed on August 19, 2015, a filed copy of said Order being hereto annexed and herewith served upon you and made a part of this Notice of Entry, the same as if fully and completely set forth herein.

DATED this 19 day of August, 2015.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

By _____
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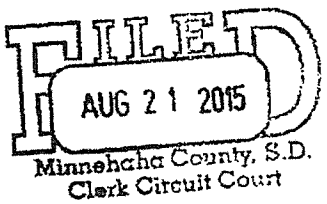

STATE OF SOUTH DAKOTA) : ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
IN THE MATTER OF THE ADOPTION OF B.A.B., Minor Child.	ADP. 15-5 **AMENDED NUNC PRO TUNC AMENDED ORDER DENYING THE DEPARTMENT OF SOCIAL SERVICE'S MOTION TO DISMISS**

The above entitled matter having come on before the Court on April 27, 2015. The Court having considered the record, briefs and the papers submitted by the parties, having heard argument of counsel, and being fully informed, and good cause appearing therefore,

IT IS HEREBY ORDERED that the South Dakota Department of Social Service's Motion to Dismiss Petitioner's action for adoption of B.A.B. is DENIED; and

IT IS FURTHER ORDERED that B.A.B. shall not be removed from the physical custody of Len and Lisa Homelvig unless and until further Order of this Court or reversal of the denial of the Motion to Dismiss by the South Dakota Supreme Court.

IT IS FURTHER ORDERED that this matter shall be set for hearing so the Court may determine the best interest of the minor child.

Dated this 19 day of August, 2015
Nunc Pro Tunc to June 17, 2015
BY THE COURT:

DOUGLAS E. HOFFMAN
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES
Angelia Gries, Clerk of Courts
BY Carol VanHouten
Deputy

FILED
AUG 19 2015
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA)
: ss
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

IN THE MATTER OF THE ADOPTION OF B.A.B., Minor Child.	ADP. 15-5 **NOTICE OF ENTRY OF AMENDED NUNC PRO TUNC AMENDED ORDER DENYING THE DEPARTMENT OF SOCIAL SERVICE'S MOTION TO DISMISS**

TO: JOE THRONSON, ATTORNEY FOR DEPARTMENT OF SOCIAL SERVICES:

YOU WILL HEREBY TAKE NOTICE that on August 19, 2015, the Court made and entered an Amended Nunc Pro Tunc Amended Order Denying the Department of Social Service's Motion to Dismiss in the above-entitled matter, which was filed on August 19, 2015, a filed copy of said Order being hereto annexed and herewith served upon you and made a part of this Notice of Entry, the same as if fully and completely set forth herein.

DATED this 19 day of August, 2015.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

FILED
AUG 21 2015
Minnehaha County, S.D.
Clerk Circuit Court

By _____
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25-6-2. Adoption of minor child permitted--Minimum difference in ages--Best interests of child. Any minor child may be adopted by any adult person. However, the person adopting the child must be at least ten years older than the person adopted.

In an adoption proceeding or in any proceeding that challenges an order of adoption or order terminating parental rights, the court shall give due consideration to the interests of the parties to the proceedings, but shall give paramount consideration to the best interests of the child.

Source: SDC 1939, § 14.0401; SL 1994, ch 199.

25-6-11. Notice to Department of Social Services--Recommendation of department--Appearance. Upon the filing of a petition for the adoption of a minor child the petitioner therein shall notify the Department of Social Services, by mailing to the department a copy of the petition. The petitioner also shall notify the department of the date fixed for hearing the petition, or mail to the department a copy of the order fixing the date of the hearing. The department shall make a recommendation as to the desirability of the adoption. The department may appear in any procedure the same as the party in interest, and may request a postponement of hearing on the petition in the event more time is needed for its investigation. This section only applies to a child in the custody of the department.

Source: SL 1939, ch 168, § 10; SDC Supp 1960, § 55.3715; SL 1979, ch 167, § 2; SL 1979, ch 168; SL 2007, ch 156, § 2.

25-6-12. Execution of consent and agreement by parties--Appearances at hearing. Before the hearing on a petition for adoption, the person adopting a child, the child adopted, and the other persons whose consent is necessary, shall execute their consent in writing, and the person adopting shall execute an agreement to the effect that the child adopted shall be treated in all respects as his or her own. The consent forms and the agreement of the person adopting shall be filed with the court. At the time of the hearing on the petition, the person adopting a child and the child to be adopted shall appear in court or by other means as may be allowed by the court. All persons whose consent is necessary, except the child and the person adopting the child, unless a different means of appearance is allowed by the court, may appear by a person filing with the court a power of attorney, or a guardian may appear on behalf of the child, or a duly incorporated home or society for the care of dependent or neglected children may by its authorized officer or agent, consent to the adoption of a child surrendered to such home or society by a court of competent jurisdiction. The Department of Social Services may appear in court and consent to the adoption of a child surrendered to it by any court of competent jurisdiction, or, if the department has custody of a child by written agreement of a parent or parents with power of attorney to consent to adoption, by the officer of the department holding such power of attorney.

Source: SDC 1939, § 14.0406; SL 1945, ch 47, § 1; SL 1947, ch 54; SL 1973, ch 165; SL 1989, ch 219; SL 1993, ch 213, § 117; SL 2012, ch 142, § 1.

APPEAL NOS. 27488, 27490

_____

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

_____

IN THE MATTER OF THE ADOPTION OF A.A.B. and B.A.B.
MINOR CHILDREN

_____

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

_____

HONORABLE DOUGLAS HOFFMAN,
CIRCUIT COURT JUDGE

_____

STATE APPELLANT'S REPLY BRIEF

_____

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_____

ORDER GRANTING PETITION FOR ALLOWANCE OF APPEAL FROM
INTERMEDIATE ORDER FILED AUGUST 7th, 2015

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FACTS

Appellees make a number of claims in their brief which are disputed and are not supported by the record. Appellees acknowledge that no testimony was given at the hearing, and that the hearing was limited to arguments by the attorneys. Appellees' brief, 8. The only facts presented in Appellees' brief which have been established by the record are as follows: A.A.B. was born September 3rd, 2012. She was taken into custody by the Department on January 8th, 2013, and placed with the Appellees. B.A.B. was Born October 16th, 2013, and taken into custody. The Department offered to place B.A.B. with Appellees at that time but they declined. B.A.B. was then placed with the Homelvigs. Two petitions alleging that the children were subject to abuse and neglect were filed in Minnehaha County. The children were adjudicated as abused and neglected and the parental rights of the biological parents were eventually terminated by final disposition of the circuit court on May 2nd, 2014, and the Department was granted legal custody of A.A.B. and B.A.B. Appellees were later informed that it was the Department's decision not to place the children with them permanently. Appellees then filed a petition to adopt A.A.B. and a petition for interim custody and adoption of B.A.B. on January 13th, 2015, and

the Department filed a motion to dismiss based on lack of standing. A hearing was held on April 27th, 2015 in front of the Honorable Douglas Hoffman. Judge Hoffman issued a memorandum opinion on June 10th, 2015 denying the Department's motion to dismiss and granting Appellees petitions for adoption. The Department filed a petition for intermediate appeal of Judge Hoffman's ruling. This Court should disregard any additional facts presented by the Appellees claim.

ARGUMENTS AND AUTHORITIES

Petitioners may not file a petition to adopt children in the custody of the Department without its consent.

A. Appellees do not have standing to file petitions to adopt A.A.B. and B.A.B.

Appellees contend that they have standing to file separate petitions to adopt A.A.B. and B.A.B. without the Department's consent by virtue of SDCL 25-6-2, SDCL 25-6-11, and SDCL 25-5-29. None of these statutes grant Appellees standing because other statutes found in the code limit the applicability of these statutes to this case. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory

scheme.'" *Expungement of Oliver*, 2012 S.D. 9 ¶ 9, 810 N.W.2d 350, 352 (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S.Ct. 1291, 1301, 146 L.Ed.2d 121 (2000) (quoting *Davis v. Mich. Dep't of Treasury,* 489 U.S. 803, 809, 109 S.Ct. 1500, 1504, 103 L.Ed.2d 891 (1989)).

Appellees claim that "the Department cannot point to any one statute that mandates all adoptions for children in the care of the Department be approved by the Department". Appellees' brief, 12. However, the Department did cite several statutes in its brief which limit the ability of a party to adopt a child in the Department's custody without its consent. First, SDCL 26-8A-27[1] makes clear that after

[1] 26-8A-27. **Final decree terminating parental rights of one or both parents--Child support arrearages--Custody of child.** On completion of a final dispositional hearing regarding a child adjudicated to be abused or neglected, the court may enter a final decree of disposition terminating all parental rights of one or both parents of the child if the court finds, by clear and convincing evidence, that the least restrictive alternative available commensurate with the best interests of the child with due regard for the rights of the parents, the public and the state so requires. The court may enter a decree terminating parental rights if the court finds, by clear and convincing evidence, that the parents have abandoned the child for at least six months and during this period the parents have not manifested to the child or to the physical custodian or caretaker of the child a firm intention to resume physical custody of the child and to make suitable arrangements for the care of the child. If the court decides to terminate

the rights of a biological parent are terminated, the Department is vested with legal custody of that child. Second, the Department is granted broad rule making authority to care for and ultimately place children in its custody for adoption by SDCL 26-4-9.1[2]. Pursuant to this

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parental rights, any existing child support arrearages shall be addressed by the court in the order terminating those parental rights.

Upon the entry of the final decree of disposition terminating the parental rights of both parents or of the surviving parent, the court shall vest the Department of Social Services with the custody and guardianship of the person of the child for the purpose of placing the child for adoption and authorizing appropriate personnel of the department to consent to adoption of the child without need for any notice or consent of any parent of the child. The final decree terminating parental rights is final and unconditional. The natural parents retain no post-termination rights or privileges including post-termination visitation except for any final visitation allowed by the department.

Upon the entry of a final decree of disposition terminating the parental rights of one parent, the court may leave the child in the custody of the remaining parent and end the proceedings.

[2] 26-4-9.1. Adoption services program established--Rules adopted. The Department of Social Services shall establish a program of adoption services. The secretary of social services may adopt reasonable and necessary rules for the operation of the program of adoption services including:

(1) Program administration;

(2) Adoptive applications and placements;

(3) Investigations and studies;

statute, the Department has promulgated a specific rule which forbids a foster parent from filing their own petition to adopt a child in the Department's legal custody. ARSD 67:14:32:17. "Administrative rules have 'the force of law and are presumed valid.' " *State v. Guerra, 2009 S.D.*, 74, ¶ 32, 772 N.W.2d 907, 916 (quoting *Sioux Falls Shopping News, Inc. v. Depart. of Rev. and Reg.*, 2008 SD 34, ¶ 24, 749 N.W.2d 522, 527). Third, SDCL 25-6-12 indicates that the Department is a party whose consent is necessary for the adoption of a child in its custody.[3] Appellees' interpretation of SDCL 25-6-2, SDCL

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(4) Qualifications for adoptive families;

(5) Postadoptive services;

(6) Protection of records and confidential information required by statutory law to be held confidential; and

(7) Establishing reasonable fees consistent with the costs of such services.

[3] 25-6-12. **Execution of consent and agreement by parties--Appearances at hearing.** Before the hearing on a petition for adoption, the person adopting a child, the child adopted, and the other persons whose consent is necessary, shall execute their consent in writing, and the person adopting shall execute an agreement to the effect that the child adopted shall be treated in all respects as his or her own. The consent forms and the agreement of the person adopting shall be filed with the court. At the time of the hearing on the petition, the person adopting a child and the child to be adopted shall appear in court or by other means as may be allowed by the court. All persons whose

25-6-11, and SDCL 25-5-29 would render the above statutes meaningless.

Appellees first argue that they have standing to file petitions to adopt A.A.B. and B.A.B. because they comply with SDCL 25-6-2. "Hansens clearly have standing to bring petitions for adoption as they are (more than) ten years older than both A.A.B. and B.A.B." Appellees' brief, 10-11. Appellees contend that compliance with this alone is sufficient to grant them standing. Though Appellees then contradict this argument by next noting the other sections with which they also comply. See footnotes 7-11 in Appellees' brief, 11 If SDCL 25-6-2 were the only statute to which Appellees had to adhere, their compliance with these other provisions would be irrelevant for purposes of standing. The fact that Appellees acknowledge that they have also met additional criteria undercuts the argument that SDCL 25-6-2 is the only statute with which they must comply in order to have standing to file petitions to adopt A.A.B. and B.A.B.

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consent is necessary, except the child and the person adopting the child, unless a different means of appearance is allowed by the court, may appear by a person filing with the court a power of attorney, or a guardian may appear on behalf of the child, or a duly incorporated home or society for the care of dependent or neglected children may by its authorized officer or agent, consent to the adoption of a child surrendered to such home or society by a court of

Appellees attempt to circumvent the Department's rule making authority by arguing that the Department did not follow its own administrative procedures when it chose the Homelvigs to adopt A.A.B. and B.A.B. Appellees incorrectly interpret ARSD 67:14:32:10[4] to apply to individual adoptions. This rule pertains to a denial by the Department of an application to serve as an adoptive placement. It does not grant a party a remedy for the Department's denial of a petition to adopt a specific child. "[A]n agency is usually given a reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous, or when the agency interpretation is one of long standing." *State v. Guerra*, 2009 S.D. 74, ¶ 32, 772 N.W.2d 907, 916 (quoting *Nelson v. South Dakota State Bd. of Dentistry*, 464 N.W.2d 621, 624 (S.D. 1991) (citations omitted)).

Appellees did complete an application to be approved as an adoptive placement, and they were approved to serve

[4] **Approval or denial of adoption application for children in department custody -- Notice.** Within 120 days after application, the department shall notify the applicant in writing of the approval or denial. If the application is denied, the department shall inform the applicant of the reasons for the denial. If the applicant disagrees with the department's determination, the applicant may appeal the department's determination by requesting a fair hearing under the provisions of chapter 67:17:02.

as an adoptive placement. However, approval does not guarantee a party the right to adopt a certain child. However, even if this rule did apply to instances in which a party was denied the ability to adopt a specific child, Appellees' remedy would be an administrative hearing as provided by ARSD 67:14:32:31. Appellees petitions would therefore not be proper since they did not exhaust their administrative remedies before filing them.

Next, Appellees argue SDCL 25-6-11 requires only that they give notice to the Department and that its role in such an adoption is merely to make a recommendation to the court. This interpretation of SDCL 25-6-11 contradicts SDCL 26-8A-29, SDCL 26-4-9.1 and SDCL 25-6-12, all of which designate that the Department must give its consent to an adoption of a child in its custody. It is this contradiction which leads to ambiguity. "Legislation is 'ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses." *Petition of Famous Brands, Inc.*, 247 N.W.2d 882, 886 (S.D. 1984) (internal quotations omitted).

In *State v. Mundy-Geidd*, this Court was confronted with a similar case of interpreting ambiguous statues. The Defendant in *Mundy-Geidd* was convicted of DUI pursuant to

SDCL 32-23-1. At the time of her conviction, SDCL 34-20A-93 prohibited municipalities from enforcing ordinances criminalizing intoxication. However, SDCL 34-20A-95 carved out an exception to this rule for crimes involving motor vehicles but was repealed by the legislature in 2012. Defendant argued that the repeal of SDCL 34-20A-95 prohibited her conviction. The State countered that the legislature never intended to prohibit enforcement of SDCL 32-23-1 when it repealed SDCL 34-20A-95, and that the Defendant's reading of the statute produced an absurd result. Defendant countered that the Court could not examine the legislative history of the acts since the language of the statute was unambiguous. This Court disagreed with Defendant, finding that there was ambiguity created by the two statutes. State v. *Mundy-Geidd*, 2014 S.D. 96, ¶ 7, 857 N.W.2d, 880, 883.

This Court turned to the legislative history to reconcile this ambiguity. It noted: "The titles, history, and purposes of the 1974 and 2012 Acts reflects that the 2012 legislature did not intend to end the enforcement of the DUI statute." *Id*, at ¶ 10.

The analysis this Court applied to *Mundy-Geidd* can be extrapolated to this case. Ambiguity exists because SDCL

25-6-11, when read literally, conflicts with several other statutes in the code. To read this statue literally would render SDCL 26-8A-29, SDCL 26-4-9.1, and SDCL 25-6-12 meaningless. Even though the Department was granted legal custody of children after a parent's rights were terminated, and even though the Department was granted the power to promulgate rules to effectuate adoptions, these powers would be rendered null and void by a party who filed their own petition to adopt. Because of this contradiction, it is proper for this Court to analyze the legislative history of SDCL 25-6-11. In doing so, the title, history, and purpose of the amended act are evident. In no way was it the legislature's intent to amend this statute to grant standing to disinterested persons to file petitions to adopt children in the Department's legal custody or strip the Department of the authority to withhold its consent.

Finally, Appellees argue the circuit court correctly ruled that SDCL 25-5-29 applied to this case. Appellees' Brief, 20. Appellees reason that since they brought their action under the adoption statute, SDCL 25-5-29's prohibition does not apply to them. It must be noted that Appellees omit a key portion of the statute which, when read, makes this statute inapplicable to this case.

> Except for proceedings under chapter 26-7A, 26-8A, 26-8B, or 26-8C, the court may allow any person other than the parent of a child to intervene or petition a court of competent jurisdiction for custody or visitation of any child with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship. ***It is presumed to be in the best interest of a child to be in the care, custody, and control of the child's parent, and the parent shall be afforded the constitutional protections as determined by the United States Supreme Court and the South Dakota Supreme Court. A parent's presumptive right to custody of his or her child may be rebutted by proof:***
>
> ***(1) That the parent has abandoned or persistently neglected the child;***
>
> ***(2) That the parent has forfeited or surrendered his or her parental rights over the child to any person other than the parent;***
>
> ***(3) That the parent has abdicated his or her parental rights and responsibilities; or***
>
> ***(4) That other extraordinary circumstances exist which, if custody is awarded to the parent, would result in serious detriment to the child.***

SDCL 25-5-29 (2015 emphasis added)

The language of the whole statute makes it clear that it applies to children whose biological parents still have their rights intact and establishes the procedure by which a court may award custody to a party other than that parent. The statute is inapplicable to cases in which the Department has been granted custody of a child after the termination of a biological parent's rights.

B. Appellees cannot Adopt a Child in the Department's Custody without its Consent

Appellees argue that the circuit court may utilize SDCL 26-6-21 and SDCL 26-6-6 to allow them to file petitions notwithstanding the Department's objections. Appellees confuse the circuit court's jurisdiction with standing. While SDCL 26-6-6 does grant the circuit court jurisdiction to hear adoption matters, it does not grant Appellees standing to file their own petitions. Even if a court retains jurisdiction over an adoption matter, that court cannot grant a party standing where none exists. Contrary to Appellees' argument, SDCL 25-6-2 does not vest the circuit court with the authority to allow a party to file a petition to adopt where other statutes would deprive that party of standing.

Additionally, SDCL 26-6-21 provides the mechanism by which a child in the custody of a child welfare agency may facilitate such an adoption, but it does not require an agency to consent to any adoption. The statute provides that a child welfare agency "may consent to the adoption of such a child…" SDCL 26-6-21 (2015). If the legislature meant to remove the ability of the Department to withhold

its consent, it is puzzling that they did not use the word "*must*".

Appellees also argue that SDCL 26-8A-29.1 does not prohibit them from filing petitions to adopt A.A.B. and B.A.B. Appellees' brief, 23. Appellees read SDCL 26-8A-29.1 to limit the ability of family members to challenge the Department's withholding of consent, and no one else. Such an interpretation would lead to absurd results. To understand this statute, the *D.M.* decisions are of critical importance. They are a guidepost for who may challenge the Department's withholding of consent, and under what circumstances that party may be heard. In *In re D.M.*, this Court ruled that family members could not intervene in an A&N because no statute gave them such authority. *In Re D.M.*, 2004 S.D. 34, ¶7, 677 N.W.2d 578, 581. In *The Adoption of D.M.*, this Court also precluded the family from using the adoption statutes even though the legislature had given them the right to intervene in an A&N through SDCL 26-8A-29.1. *Adoption of D.M.*, 2006 SD 15, ¶10, 710 N.W.2d 441, 446.

Appellees take the position that, because SDCL 26-8A-29.1 does not specifically limit the ability of any person other than a family member to file a petition to adopt a

child in the Department's custody, any person besides family members may file a petition to adopt a child in the Department's custody. However, the opposite is true. Since family members are the only parties mentioned in SDCL 26-8A-29.1, they are the only ones who have a right to challenge the Department's refusal to give its consent. "[A] statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way. Thus, the method prescribed in a statute for enforcing the rights provided in it is likewise presumed to be exclusive." *In re Estate of Flaws*, 2012 S.D. 3, ¶ 19, 811 N.W.2d 749, 752 (quoting Norman J. Singer & J.D. Shambie Singer, 2A *Sutherland Statutory Construction* § 47:23 (7th ed.2007).

The Appellees' interpretation of SDCL 26-8A-29.1 is illogical for three reasons. First, no relative would truly have any preference to adopt a child in the Department's custody as the legislature intended. Even if a relative were to prevail under SDCL 26-8A-29.1, there is no guarantee that that person would ultimately be allowed to adopt a child. After the completion of the A&N, any person could now file their own petition under SDCL 25-6-2. The adoption court would be under no obligation to give a relative any preference in the adoption proceeding.

Second, relatives who were not selected by the Department to adopt would be far better off filing their own petition rather than requesting a hearing under SDCL 26-8A-29.1. This is because under SDCL 26-8A-29.1, a family member must overcome the presumption that the Department acted correctly, while a relative filing under SDCL 25-6-2 would merely need to prove it was in a child's best interest to allow them to adopt. Third, even when one relative was chosen over another, the unsuccessful relative would have a second chance to prevail by filing a petition under SDCL 25-6-2, something that is not permissible under SDCL 26-8A-29.1.

Appellees claim that the Department, by exercising its authority to withhold its consent to an adoption of a child in its custody, removes transparency from the process. Appellees' brief, 26. This is not the case. Pursuant to SDCL 26-8A-29[5], the A&N court retains jurisdiction over this

[5] **Continuing jurisdiction over abused or neglected child.** In any action involving the termination of parental rights of both parents or any surviving parent, the court has continuing jurisdiction of the action and of the abused or neglected child for purposes of review of status of the child until the adoption of the child is fully completed. The Department of Social Services or any other party having custody and guardianship of the child pending adoption may petition the court to review the status of the child at any time before the adoption of the child is completed. The court may issue any orders or decrees necessary to protect the child, to preserve the child's welfare and to facilitate

case. The Department is required to continue periodic status hearings with the court until an adoption has been completed. Additionally, any party that the Department chooses as an adoptive placement must also meet the various criteria indicated in SDCL 25 Ch. 6. Even individuals whom the Department chose to adopt a child in its custody must meet all of these criteria.

Appellees attempt to downplay the affect that allowing a party to circumvent the Department's approval would have on the adoption process. Appellees brief, 25. However, even in this case, the actions of the Appellees have delayed the permanency of A.A.B. and B.A.B. for nearly a year. The Department expressed its intent to place both children with the Homelvigs in October, 2014. In January of 2015, the Appellees filed their own petitions effectively blocking any movement by the Department until this matter has been completed.

Appellees further support their argument by comparing an adoption of a child in the Department's custody with private adoptions. This comparison is not valid because

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adoption of the child by the court or another court of competent jurisdiction without delay. The continuing jurisdiction of the court according to this section does not prevent the acquisition of jurisdiction of the child by another court for adoption proceedings according to law.

the Department's role differs from a private adoption agency. By statute, the Department is granted sole legal custody of any child whose parental rights have been terminated. Private adoptions in South Dakota are voluntary in nature with a child's parent or parents consenting to an adoption.

CONCLUSION

For the foregoing reasons, Appellant Department of Social Services respectfully requests that the circuit court's Order be reversed, and that these cases be remanded with instructions to enter an Order granting the Department's motions to dismiss the petitions to adopt A.A.B. and B.A.B.

Dated this 11th Day of December, 2015.

MARTY JACKLEY
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

Joe Thronson, Special Assistant Attorney General, hereby certifies that a copy of the Department Appellant's Brief was served by e-mail transmission, upon the following at the e-mail addresses set forth below:

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Dated this 11th day of December, 2015.

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