

A09-0080

STATE OF MINNESOTA

IN SUPREME COURT

IN THE MATTER OF THE WELFARE OF THE CHILD OF:

S.L.J., PARENT

APPELLANT-PETITIONERS' REPLY BRIEF AND APPENDIX

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ARGUMENT

THE DISTRICT COURT'S SEPTEMBER 22, 2008 ORDER APPOINTING PRIVATE COUNSEL TO REPRESENT THE INDIGENT CUSTODIAL PARENT IS A NON-APPEALABLE EX PARTE ORDER.

Respondent argues for the first time on appeal that the district court and the court of appeals improperly addressed the propriety of appointing private counsel instead of the "appropriate public defender," as mandated by Minn. Stat. § 611.18 (2008), to represent the indigent custodial parent purportedly because the County did not timely challenge the district court's September 2008 ex parte appointment order. (RBr. 5-6)

Respondent's argument should be rejected outright because a party may not properly raise an argument for the first time on appeal that was not first raised in the lower court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that failure to raise issue below precludes its litigation on appeal); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (discussing rule and noting that it is "elementary that a party cannot shift his position on appeal") (citation omitted). In the court of appeals, Respondent affirmatively argued that "the district court had the discretion to appoint private counsel at the county's expense," and the court of appeals expressly noted that "[Respondent] has not argued that the county forfeited the argument" challenging the September 22, 2008 ex parte order. *In re Welfare of the Child of S.L.J.*, 772 N.W.2d 833, 838 (Minn. App. 2009), *review granted* (Minn. Oct. 28, 2009). Respondent cannot affirmatively argue in the court of appeals that the district court properly appointed private counsel and then "shift his position" in the supreme court and argue that the issue should not have been addressed.

In any event, because the appointment order was an ex parte interlocutory order, it was not an appealable order. *See State v. J.P. Sinna & Sons, Inc.*, 271 Minn. 430, 434, 136 N.W.2d 666, 668-69 (1965) (holding that ex parte orders not appealable because they lack finality and do not affect substantial rights); *Town of Burnsville v. City of Bloomington*, 262 Minn. 455, 459, 115 N.W.2d 923, 926 (1962) (stating that ex parte orders generally not appealable); *see also* Minn. R. Juv. Prot. P. 47.02, subd. 1 (providing that appeal may be taken only from a “final order of juvenile court”). The order did not determine the action and present a judgment from which an appeal could be taken. *See Boughton v. Boughton*, 385 N.W.2d 384, 386 (Minn. App. 1986) (citing Minn. R. Civ. App. P. 103.03(e)).

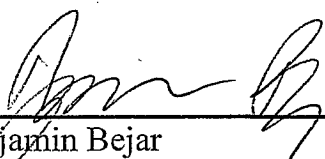
In addressing the September 2008 ex parte appointment order, the court of appeals expressly noted that it was “not aware of any authority requiring the county to challenge such an order at the time it is issued or any authority holding that the lack of such a challenge amounts to forfeiture.” *S.L.J.*, 772 N.W.2d at 838. Indeed, in a related action, the court of appeals issued an order noting in part that the district court’s order appointing private counsel to represent the parent in that case is “an unappealable ex parte order.” *See In re County of Rice, Petitioner*, No. A09-290, (Minn. App. Order dated Mar. 24, 2009) (Touissant, C.J.). (PA-1)

Because the September 2008 ex parte appointment order was not appealable at the time the district court issued the order, the County did not forfeit the right to raise the issue on appeal from the entry of judgment, and the court of appeals had the authority to

address the issue on appeal. *See S.L.J.*, 772 N.W.2d at 837, n.2 (finding that “the issues presented in the appeal are justiciable”).

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Dated: December 16, 2009



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In re County of Rice, Petitioner, No. A09-290, (Minn. App.
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STATE OF MINNESOTA
IN COURT OF APPEALS

In re County of Rice,

ORDER

Petitioner.

#A09-290

In the Matter of the Welfare of the Child
of: S. L. J., Parent.

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Stoneburner, Judge.

**BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE
FOLLOWING REASONS:**

Petitioner Rice County seeks a writ of mandamus to compel the district court to appoint a public defender rather than a private attorney to represent an indigent parent in a juvenile protection matter. The underlying juvenile-protection matter has been dismissed and the parties disagree about whether the petition is moot.

The mootness doctrine is set out in caselaw. *See, e.g., Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005); *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002); *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). Here, however, the petition is premature: The district court appointed the private attorney to represent the parent in an unappealable ex parte order. *State v. J.P. Sinna & Sons, Inc.*, 271 Minn. 430, 434, 136 N.W.2d 666, 668-69 (1965); *Town of Burnsville v. City of Bloomington*, 262 Minn. 455, 459, 115 N.W.2d 923, 926 (1962). The county challenged the appointment

and petitioned this court for a writ of mandamus to compel the appointment of a public defender to represent the parent, but before a hearing occurred in district court, the county dismissed the case. As a result, a hearing on the county's challenge to the appointment never occurred and there was no ruling on the question. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only questions presented to and considered by the district court). Moreover, mandamus is discretionary with this court. *State v. Hart*, 723 N.W.2d 254, 260 (Minn. 2006). And here, a parallel appeal involving these same parties and the same questions is pending in appeal in *In re Welfare of the Child of S.L.J.*, No. A08-80. Under these circumstances, we decline to grant the extraordinary remedy of mandamus.

On this record, we also decline to grant the request of the parent's attorney for conduct-based attorney fees.

IT IS HEREBY ORDERED:

1. The county's petition for mandamus is denied.
2. Respondent's motion for attorney fees is denied.

Dated: March 24, 2009

BY THE COURT

/s/
Chief Judge