

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Leah M. Lagro,)	
)	
Appellant,)	
)	Supreme Court No. 20050094
vs.)	
)	Burleigh County Case No. 02-C-3096
James A. Lagro,)	
)	
Appellee.)	

Appeal from the Order Denying Motion to
Amend Judgment dated February 1, 2005,
of the Burleigh County District Court,
South Central Judicial District,
Honorable Donald L. Jorgensen

Brief of Appellant

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Table of Contents

	Paragraph
Table of Authorities	1
Statement of Issue	2
Statement of Case	4
Statement of Facts	10
Law and Argument	17
Conclusion	26

Table of Authorities

Cases	Paragraph
<u>Damron v. Damron</u> , 2003 ND 166, 670 N.W.2d 871	21
<u>Frieze v. Frieze</u> , 2005 ND 53, 692 N.W.2d 912	20
<u>In the Interest of K.M.B.</u> , 2000 ND 50, 607 N.W.2d 248	24
<u>Lanners v. Johnson</u> , 2003 N.W.2d 61, 659 N.W.2d 864	20
<u>Tank v. Tank</u> , 2004 ND 15, 673 N.W.2d 622	23
<u>Volz v. Peterson</u> , 2003 ND 139, 667 N.W.2d 637	22, 25
Statutes and Rules	
NDCC § 14-09-06.6	6, 19, 21, 22, 25

2

Statement of Issue

3

Was the trial court's denial of an evidentiary hearing on Leah Lagro's motion for custody modification clearly erroneous?

4

Statement of Case

5 The parties' divorce trial was held on January 13, 2004. (Appendix [hereinafter
"A"] 4). Judgment was entered on March 3, 2004. Id. The judgment provides for joint
custody, with the minor child residing with James Lagro [hereinafter "Jim"] during the
school year and with Leah Lagro [hereinafter "Leah"] during summer vacation. Id.

6 On December 30, 2004, Leah filed a Rule 3.2 Motion for Custody Modification
with a supporting brief and supporting affidavits. (A 10-39, 94-96). Leah specifically
requested in her motion that the trial court order an evidentiary hearing under NDCC § 14-
09-06.6. (A 30-37).

7 Jim was granted an extension of time to file a response to the motion and later
timely filed a response with a supporting brief and affidavits. (A 40-93).

8 The trial court issued its Order Denying Motion to Amend Judgment on February
1, 2005. (A 97-99). The trial court ruled that "[a] review of plaintiff's affidavit and
supporting affidavits, together with other materials and the response of the defendant herein
do not convince this Court that there exists a prima facie case justifying a modification or
amendment to the existing judgment." (A 98).

9 Leah filed her Notice of Appeal of the trial court's order on March 16, 2005.

10

Statement of Facts

11 The Judgment dated March 3, 2004, provides in pertinent part:

- “2. Plaintiff and Defendant are granted the joint custody of the minor child, Taylor, with the minor child residing with the Defendant for the term of one week prior to the commencement of school classes through one week following the conclusion of school classes. During the remaining school vacation the minor child shall reside with the Plaintiff.
3. Recognizing the minor child’s need to have frequent visitation with each parent, and the flexible work schedule of the Plaintiff, Plaintiff shall have temporary custody of the minor child as follows:
 - a. While the minor child is attending preschool or kindergarten, Plaintiff shall have visitation from the end of such class day until 5:30 p.m. on Monday, Wednesday and Friday, and until 8:00 p.m. on Tuesday and Thursday. On those days where the minor child has no class, Plaintiff shall have visitation commencing at 8:00 a.m. until the child’s return to the Defendant as indicated herein.
 - b. When the minor child enters first grade, Plaintiff’s visitation with the minor child shall be from the end of each class day consistent with the foregoing indicated hours.
 - c. Plaintiff shall have temporary custody commencing at the end of the first week subsequent to school recess, Defendant

shall have visitation Tuesday and Thursday evenings commencing at 5:30 p.m. and concluding on the following morning at 8:00 a.m. and alternating weekends.

- d. Each of the parties shall be entitled to one week of summer vacation with the minor child, the same to be scheduled with the other parent on or before May 1 of each year.
- e. Throughout the calendar year, and subordinate to the holiday schedule, Plaintiff and Defendant shall have visitation with the minor child on alternating weekends.
- f. The holiday visitation schedule is as follows:
 - I. Plaintiff would have Taylor on Memorial Day and Labor Day in even-numbered years and Defendant would have him in odd-numbered years. Defendant would have Taylor on Easter, the Fourth of July, and Thanksgiving in even-numbered years and Plaintiff would have him in odd-numbered years.
 - ii. Christmas vacation would be split between the parties with the Plaintiff having Taylor on Christmas Day in even-numbered years and the Defendant having him on Christmas Day in odd-numbered years.
 - iii. Plaintiff will have Taylor on Mother's Day and the Defendant would have him on Father's Day.

4. Each of the parties hereto are granted the exclusive first opportunity to provide child care for the minor child when the same is needed for more than two hours in length.
5. The joint custody as herein granted shall provide each of Plaintiff and Defendant with full and complete access to all medical records, professional records, school records, and any and all other records pertaining to the health, education and welfare of the minor child, Taylor. Each of the parties are joint custodians of the minor child for emergency services, but shall jointly decide course of education, elective medical, dental and optometric services, and religious education. It is the intent of the court that each of the parties participate to the maximum extent possible in the development of the minor child, Taylor.”

(A 4-6).

12 Taylor was attending kindergarten at the time Leah brought her motion. Leah alleged in her affidavit supporting the motion that she had provided Taylor’s primary physical care under the interim order prior to the divorce and continued to provide Taylor’s primary physical care after entry of judgment. Specifically, Leah stated in her affidavit dated December 29, 2004, that in the ten months since entry of judgment:

- 1) Leah had been acting as Taylor’s custodial parent. (A 18).
- 2) Taylor stayed with Leah two to three nights during the week along with every other weekend. (A 18).
- 3) Taylor stayed with Leah a stretch of eight out of eleven weekends because

Jim was working. (A 18).

- 4) Prior to summer ending, Jim had agreed to continue with the summer schedule. (A 19).
- 5) Leah continued to be physically and financially responsible for taking care of Taylor's medical, dental, and optometric needs. (A 21-23)
- 6) Leah worked her schedule around Taylor's needs and took off work when necessary. (A 18, 24).
- 7) Leah had been taking care of Taylor's school needs, and daily needs. (A 24-26).

13 Leah's statements concerning being the primary caretaker of Taylor were buttressed by the affidavits of Deb Samuelson (A10-11), and Patricia Goettle (A 16-17).

14 On the other hand, neither Jim's affidavit nor the affidavits of any of his witnesses contradict Leah's statements concerning Taylor being in her primary physical care.

15 Leah also alleged that when Taylor was in Jim's care, Jim failed to look out for Taylor's physical or emotional health or emotional development. Leah alleged as follows:

- 1) Jim did not attend Taylor's counseling sessions even though the times were changed to accommodate his work schedule. (A 21).
- 2) Jim attempted to abruptly terminate Taylor's counseling against the recommendation of Dr. Hauge at Archway Mental Health Services. (A 95-96(a)).
- 3) Jim did not take care of Taylor's medical, optometric, or dental needs. (A 21-23).
- 4) Jim did not provide proper structure for Taylor such as allowing him to go

to bed too late. (A 26).

- 5) Jim did not provide Taylor with adequate meals. (A 18-26).
- 6) Jim exposes Taylor to “wrestling” with his girlfriends. (A 24).
- 7) Jim frustrates visitation by not allowing Leah to speak with the child on the phone and by not providing a home address. (A 25).
- 8) Jim tells Taylor about the court proceedings between his parents causing the child to become physically ill from stress. (A 94).

16 The trial court ruled as follows:

“Plaintiff premises her motion upon a multitude of allegations that the defendant has failed to fulfill the terms and conditions of the Judgment as entered herein. Further, plaintiff offers to the Court her extensive time with the minor child, suggesting that she is the primary caretaker of the minor child, notwithstanding that the order of the Court places the minor child in the physical care of the defendant. Plaintiff then concludes that such noncompliance by the defendant may cause physical or emotional harm to the minor child.

* * *

A review of plaintiff’s affidavit and supporting affidavits, together with other materials, and the response of the defendant herein do not convince this Court that there exists a prima facie case justifying a modification or amendment to the existing Judgment.”

(A 98).

17

Law and Argument

18 **Was the trial court's denial of an evidentiary hearing on Leah Lagro's motion**
for custody modification clearly erroneous?

19 Post-judgment custody modifications are governed by NDCC § 14-09-06.6. This statute provides in pertinent part:

14-09-06.6 Limitations on postjudgment custody modifications.

1. Unless agreed to in writing by the parties, no motion to modify a custody order may be made earlier than two years after the date of entry of an order establishing custody, except in accordance with subsection 3.

2. Unless agreed to in writing by the parties, if a motion for modification has been disposed of upon its merits, no subsequent motion may be filed within two years of disposition of the prior motion, except in accordance with subsection 3.

3. The time limitation in subsections 1 and 2 does not apply if the court finds:

- a. The persistent and willful denial or interference with visitation;
- b. The child's present environment may endanger the child's physical or emotional health or impair the child's emotional development; or
- c. The primary physical care of the child has changed to the other parent for longer than six months.

4. A party seeking modification of a custody order shall serve and file

moving papers and supporting affidavits and shall give notice to the other party to the proceeding who may serve and file a response and opposing affidavits. The court shall consider the motion on briefs and without oral argument or evidentiary hearing and shall deny the motion unless the court finds the moving party has established a prima facie case justifying a modification. If a prima facie case is established, the court shall set a date for an evidentiary hearing.

* * *

8. Upon a motion to modify custody under this section, the burden of proof is on the moving party.

NDCC § 14-09-06.6 (1997).

20 “A trial court’s decision whether to modify custody is a finding of fact which will not be overturned unless it is clearly erroneous.” Frieze v. Frieze, 2005 ND 53, ¶3, 692 N.W.2d 912. “A finding of fact is clearly erroneous if there is no evidence to support it, if it is clear to the reviewing court that a mistake has been made, or if the finding is induced by an erroneous view of the law. Id.; Lanners v. Johnson, 2003 N.W.2d 61, ¶4, 659 N.W.2d 864.

21 The trial court here apparently analyzed the case under the standard delineated by NDCC § 14-09-06.6(6), for custody motions more than two years after the date of entry of an order establishing custody. This is an easier standard for the party seeking modification than the standard for custody motions brought less than two years from the date of entry of the last order. The later standard is designed to provide “something of a moratorium for the family during the two-year period after a custody determination.” Damron v. Damron,

2003 ND 166, ¶7, 670 N.W.2d 871.

22 Regardless, Leah contends that her affidavits establish a prima facie case justifying modification under NDCC § 14-09-06.6(4).

“In determining whether a party has established a prima facie case under NDCC § 14-09-06.6(4), the trial court must accept the truth of the moving party’s allegations and may not weigh conflicting allegations. The trial court may determine the moving party has failed to present a prima facie case and deny the motion without an evidentiary hearing only if the opposing party’s counter affidavits conclusively establish that the moving party’s allegations have no credibility, or if the moving party’s allegations are insufficient, even if uncontradicted, to justify a modification of custody.”

Volz v. Peterson, 2003 ND 139, ¶14, 667 N.W.2d 637 (citations omitted).

23 A prima facie case does not require facts that would require a change of custody as a matter of law. Tank v. Tank, 2004 ND 15, ¶12, 673 N.W.2d 622. Rather, a prima facie case “is a bare minimum.” Id. It requires only enough facts which, if proven, would support an affirmable change of custody. Id.

24 Leah’s affidavits demonstrate that 1) the child’s present environment may endanger the child’s physical or emotional health or impair the child’s emotional development; and 2) the primary physical care of the child changed to her for longer than six months. Her detailed statements concerning who was primarily responsible for caring for the child in the 10 months prior to bringing the motion should warrant a hearing alone. See In the Interest of K.M.B., 2000 ND 50, 607 N.W.2d 248. Further, there was ample evidence in the

affidavits that Jim was not following through with appropriate therapy for Taylor which is dangerous to the child's emotional health. (A 95-96(a)). There was additional evidence presented by Leah that the child was getting physically ill from Jim bringing up to the child his disputes with Leah. (A 94).

25 The trial court seemed to take stock in Jim's responses to Leah's allegations. (A 98). Jim's responsive affidavits do not conclusively demonstrate that Leah's affidavits are false and should therefore be disregarded in the analysis of whether Leah has established a prima facie case to modify custody. Volz, 2003 ND 139 at ¶14. On the other hand, the contentions in Leah's affidavits, if proven, would establish a basis for changing custody under NDCC § 14-09-06.6(3).

26 **Conclusion**

27 Leah established a prima facie case justifying a modification of custody. Consequently, she should be entitled to an evidentiary hearing on her motion and the trial court's order denying her request for a hearing should be reversed.

28 Dated this 25th day of April, 2005.

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Certificate of Service

Loren McCray certifies that on the 25th day of April, 2005, he served the following document:

1. Brief of Appellant
2. Appendix of Appellant

upon: Brenda Neubauer
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in the following manner:

- by handing a true and correct copy to the attorney personally.
- by leaving a true and correct copy at the office of the attorney with a clerk or other individual in charge thereof.
- by leaving a true and correct copy at the office of the attorney in a conspicuous place therein.
- by placing a true and correct copy thereof in an envelope so addressed and depositing the same, with postage prepaid, in the United State mail at Bismarck, North Dakota.
- by facsimile transmission to the attorney at the facsimile number at m. (CT).
- electronically by electronically filing the same with the United States Bankruptcy Court, District of North Dakota.
- electronically by emailing the same at 8:30 p.m. (CT.)

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