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STATE OF NORTH DAKOTA

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Lisa Colombe,)	
)	Supreme Court No. 20080023
Plaintiff-Appellant,)	
)	
vs.)	
)	
Jessy Carlson,)	
)	
Defendants-Appellees.)	

Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
Civil No. 07-C-0217
Honorable Sonna Anderson, Presiding

**APPELLANT LISA COLOMBE'S BRIEF IN REPLY TO APPELLEE'S
MAIN BRIEF ON APPEAL
SEPTEMBER 2, 2008**

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¶1. This reply brief of Lisa Colombe¹ (hereafter Lisa) considers the consolidated status of Jessy Carlson's Motion to Dismiss and Lisa's response thereto and the arguments made therein.

¶2. Jessy Carlson, the Appellee, (hereafter Jessy) has raised several new issues in his main brief on appeal, but ignores the principal issues that Lisa Colombe, the Appellant, has raised, which are: (1) the failure of the lower court, throughout the proceedings, to consider the best interests of the children; and (2) the denial of due process of law which accompanied the lower court's many failures to consider the best interests of the children, as is demonstrated in the Brief of Lisa Colombe In Response to Jessy's Motion to Dismiss the Appeal. Lisa will examine the various arguments raised in Jessy's main brief as appellee.

¶3. **The Statement of Facts accurately reflects the issues being raised by Lisa during the course of the lower court proceedings:** First, Jessy contends that the Statement of Facts presented by Lisa in her brief is not supported by the evidence presented in the lower court and accepted by the court at the trial on the merits conducted September 25, 2007 at which Lisa was not present. This argument misses the point entirely of reciting the information placed in the various affidavits that Lisa presented to the Court on a *pro se* basis beginning on July 20, 2007, following the Court's emergency *ex parte* order taking the children away from Lisa issued July 19, 2007, and continuing in *pro se* affidavits and motions of Lisa to the Court on July 27, August 7, August 24 and

¹ The last name of Lisa Colombe is misspelled repeatedly in the Appellee's brief as "Columbe".

September 14, 2007, and Motions for Continuance and Motion for Inconvenient Forum dated September 24, and accompanying affidavits on the eve of trial from an attorney who agreed to assist Lisa, dated September 24, 2007. This information, and the allegations contained therein, are recited and included in the appendix for the main purpose of showing that the lower court totally ignored the pleas of the mother to seriously consider the sexual molestation issue that apparently was affecting Vesta, the oldest child, and instead, denied Lisa's motions for continuance, motion for a court investigation, and motion to appoint a *guardian ad litem*. The summary of the allegations contained in these motions and accompanying documents are, in essence, an offer of proof of what Lisa would have stated had she been allowed to present evidence through competent counsel. This information obviates the fact that after the initial Interim Order agreed upon by the parties (dated May 8, 2007 but agreed upon in open court on March 20, 2007) in all subsequent interim, contempt and emergency orders the court never considered the best interests of the children; eight (8) orders in all. The table of orders has been supplied to the Court in connection with Lisa's Response to Jessy's Motion to Dismiss.

¶4. The best interests of the children analysis applies to orders granting interim custody or unsupervised custody, especially because of the seriousness of the sexual molestation issue raised by Lisa: Despite the significant information raised by Lisa's pleadings, Jessy, in his principal brief as Appellee, tries to suggest that the best interests of the children standard does not apply to interim orders regarding custody of children. (Appellee's Brief, ¶26),

citing N.D.C.C. Section 14-09-06.6, which relates to “Limitations on Post-Judgment Custody Modifications.” In this case, Lisa argued that not only had the court not adequately considered the best interests of the children under N.D.C.C. Section 14-09-06.2 in the custody action in the court below (Appellant’s Brief, ¶¶ 19-21), an analysis of the change in custody from Lisa, who had custody of the children from birth, was similar to the analysis required by N.D.C.C. Section 14-09-06.6 on post-judgment change in custody situations. This argument is used to buttress the argument made that the lower court ignored the best interests of the children repeatedly in the interim orders by failing to consider the concerns of Lisa regarding the possibility that her oldest daughter had been sexually molested in the home of the father Jessy.

¶5. Section 14-09-06.2, regarding the best interests of the children, just as much applies to interim orders regarding custody as it does to final judgments, especially when it comes to allegations of sexual abuse. See, e.g., **Mary D., Petitioner, v. Honorable Clarence Watt, Judge of the Circuit Court for Putnam County, and George D. Respondents**, 190 W. Va. 34; 438 S.E. 2nd 521 (W.Va. 1992). In the **Mary D.** case, the West Virginia Court of Appeals makes a forceful case that when allegations of sexual molestation are made, the court must make a careful set of findings relating to such allegations. *Id.* at 528.²

² The case of **Mary D.** involves a case where supervised visitation was ordered because of the possibility of sexual abuse. The West Virginia Supreme Court of Appeals notes the seriousness of an allegation of sexual abuse, and cites favorably a study on sexual abuse cases involving children as follows:

“[t]he harm [of sexual abuse] is sufficiently grave that courts should award temporary custody to the nonabusing parent whenever there is *reason to believe*

In this case, Lisa presented not just her own view, but that of others, as attachments to her various *pro se* motions to the court. In short, the parent who believes sexual molestation did occur should not have to make the Hobbsian dilemma choice of protecting the children or obeying court orders. Instead, the lower court itself should act to protect the best interests of the children when such allegations are made and at a minimum, appoint a guardian ad litem, require an investigation, and ultimately hold a factual hearing on the issue.

¶6. It is possible that the lower court thought the issue disposed of due to the Interim Order that the parties agreed to on March 20, 2007, which provided temporary custody to Lisa. But note that the Interim Order, as issued, conditioned the visitation by Jessy on counseling for the parties. The lower court, in making ruling after ruling giving Jessy visitation and then custody, totally ignored that portion of the interim order requiring counseling as a condition to further visitation, a matter that was agreed to by the parties. Also, the sexual

sexual abuse has occurred or is likely to occur.

While the evidence needed to establish reasonable belief comes from many sources, it is important to remember that child sexual abuse is often very difficult to prove [, so] courts should not place a heavy burden of proof on the petitioner. The threat to the child's welfare is so high if abuse is occurring that temporary custody should be granted when the petitioner raises 'questions going to the merits so serious, substantial, difficult and doubtful, as to make fair ground for litigation and thus for more deliberate investigation.'

...Bearing in mind the effects of sexual abuse, and the interim nature of temporary custody, the court should err in the direction of protecting sexually abused children. That is, improvidently granting temporary custody is less likely to harm a child than improvidently denying such custody. J. Myers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection*, 28 J.Fam.L. 1, 37 (1989) (emphasis supplied) (internal footnote and citation omitted)".

molestation issue had been raised in Lisa's initial pleadings prior to the interim order of March 20, 2007 (dated May 8, 2007), and the court should therefore have been vigilant about this issue going forward. Issues of sexual molestation should not, in any way, be treated lightly by the court in granting temporary custody or unsupervised visitation to the alleged party committing the molestation.

¶7. Failure to grant any of Lisa's motions is a violation of due process requiring reversal: In fact, the argument that the best interests of the children were ignored repeatedly by the court is as much a due process argument as it is regarding a lack of finding of what is in the best interests of the children in light. "Due process" is as much at stake in a custody proceeding as in any other litigation. See, e.g., **Goff v. Goff**, 2000 ND 57, 607 N.W.2d 573, cited previously in the Response to Motion to Dismiss filed by Lisa. The court's repeated failures to grant Lisa the time needed to find competent counsel to represent her in a case where sexual molestation was alleged, and the court's shifting in her positions about whether Lisa's counsel had additional obligations in the case accentuate the denial of due process that was repeatedly on display in the lower court. See the Brief in Response of Lisa Colombe to Motion to Dismiss.

¶8. The court is entitled to rely on the findings in the court below only when due process has been afforded the parties: Jessy argues that the Supreme Court's standard of review is whether there is "clear and convincing" evidence requiring reversal. Lisa does not quarrel with that standard, if, and only

if, the court had adequately considered her allegations of sexual molestation of one of her children, and she had been given due process in the court below. See, e.g., ***Muraskin v. Muraskin***, 336 N.W.2d 332 (N.D. 1983), fn. 2. That due process is required before reliance can be placed upon a court's judgment should be obvious. It is essentially a pre-condition to application of the standard of reviewability in most cases.³ Lisa has essentially made the point that denial of due process is present when a mother's plea to the court regarding sexual molestation is ignored by the court, resulting in the court denying Lisa's motions for continuance and for a court order requiring an investigation and ultimately a motion for the appointment of a guardian ad litem. It is this failure of the lower court to acknowledge the issue of sexual molestation, resulting in a denial of due process and potentially exposing at least one the children of the parties to serious harm that prevents the ordinary standard of review from being applied in this case.

¶9. North Dakota's courts were and are now an inconvenient forum for the parties to litigate the case: The court's own order of July 27, 2007 recognizes that the parties are all from South Dakota and invites a Motion for Inconvenient Forum. Instead of acting on that invitation, Lisa's counsel remained silent and did nothing, but that does not make the lower court's invitation any less valid. The evidence is in South Dakota. Relatives and witnesses live there.

³ Note North Dakota Rules of Court, Rule 7.2 regarding recognition of Tribal Court Judgments. Under Rule 7.2(b), the courts of North Dakota are entitled to give recognition to Tribal court orders when, among other things: "(3) The order or judgment was obtained through a process that afforded fair notice and a fair hearing;"

Jessy lives there. And the undersigned suspect that the children and Lisa live there. Whether or not Lisa requested permission of the North Dakota court to remove her children to South Dakota should not be a bar to recognition of the inconvenient forum North Dakota presents. See., e.g., *Dennis v. Dennis*, 387 N.W.2d 234 (N.D. 1986) for a general discussion of the inconvenient forum issue presented by N.D.C.C. Section 14-07-07. In this case, the Court made light of the issue in its decision of October 4th, 2007, ruling on various motions filed by Robert Gough, an attorney licensed in South Dakota asking to be allowed to appear *pro hac vice*, and who made various motions to the court on the day of trial, including a motion to dismiss because of an inconvenient forum. The court made no substantive analysis of the motion, essentially claiming the motion was too late, and that Lisa had chosen the court and therefore was bound by it. Lisa's own presentations in the form of affidavits and motions indicated very decisively that the bulk of the information about this case, and about her allegations of sexual molestation, were in South Dakota, not North Dakota. It should have come as no surprise that the lower court recognized that fact and entertained a motion to dismiss based on the inconvenient forum in her July 27, 2008 order. The failure of Lisa's attorney to make a motion regarding the inconvenient forum should not have prejudiced the court, and should not so prejudice the court if this case is remanded to the court below for further proceedings.

¶10. Robert Gough, an attorney licensed in South Dakota, was properly before the court as an out of state attorney on September 25, 2007: Counsel for Jessy cites the appropriate rule for admission of out-of-state attorneys, (Rule 3 of the North Dakota Admission to Practice Rules) but does not take into account Section 2 of that rule, that says an attorney may file the motion for admission as a non-resident attorney “within 45 days after service of the pleading, motion, or other paper”. Mr. Gough made his filing within the 45 days required, and his motions were therefore properly before the court, and the court should have granted the motion for continuance.

Conclusion

¶11. For the reasons stated herein, undersigned counsel respectfully requests that the decision of the lower court be vacated and that the status of the parties be returned to the status existing at the time the initial Interim Order was issued.

Dated this 2nd day of September, 2008.

/s/

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