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ISSUES PRESENTED

1. Is the modification of Kyle's parenting time in the best interests of the child?
2. Was there a material change in circumstances justifying the modification of parenting time?

STATEMENT OF THE CASE

This is an appeal from the Cavalier County District Courts' denial of a Motion to Modify Parenting time under N.D.C.C. §14-09-05.1(4).

The Appellant was entitled to Modification of the Parenting Time Order, because the initial order was not in the best interests of the minor child.

The Appellant filed a timely Notice of Appeal on August, 21st 2013.

STATEMENT OF THE FACTS

This is an appeal by Kyle Mackey (Kyle), against the appellee, Lindsey Bredeson (Lindsey), alleging that their child, O.B., has a right to maintain regularly scheduled visitation with a non-custodial parent. And that it is in O.B.'s best interests to continue that visitation.

In January of 2013, the Honorable District Court gave Lindsey the sole decision process as to the visitation and contact between O.B. and Kyle in its final order. (App. pp. 9-12).

Four months passed by, and Kyle had to plead with Lindsey every month, asking her to bring O.B. so that he could see his daughter.

Every month that Kyle asked, Lindsey's response would always be no. Lindsey's reasons would vary between, "we are too busy as a family", "prison is not a good environment for [O.B.]", and, "I only have a couple days off from work for this month." (app. pp. ⁵⁸60)

Lindsey even went as far as telling Kyle that "The Judge said that I don't have to bring [O.B.] to see you." (app. pp. ⁵⁸65).

Without a way to resolve his disputes with Lindsey when they could'nt agree, Kyle only wished to establish and continue a relationship with his daughter.

Kyle had no-where to turn. So he decided to pursue the only option he thought he had.

In April of 2013, Kyle filed a Pro Se Motion to Modify he parenting time, arguing that the change was necessary to serve the best interests of O.B.

In June of 2013, six (6) months after the initial visitation order, and only after Kyle requested the modification of his parenting time, did Lindsey finally allow Kyle to see his daughter, and only for two (2) hours.

Kyle's last visit was December 5th, of 2012. For the first time in seven (7) months Kyle got to spend some irreplaceable time with his daughter, O.B.

O.B. and Kyle played with blocks, colored in a coloring book, and even got to read a story together.

Kyle and O.B. got to bond as father and daughter for the first time in seven (7) months.

It is now October, Lindsey has not returned for O.B. to visit Kyle. So, in the past ten (10) months, Kyle has spent two (2) hours with his only daughter O.B.

Kyle calls to speak to O.B. on the telephone when he can afford too, which is almost weekly.

Kyle continues to do this even though it is extremely discouraging for him to hear O.B. call Lindsey's new husband, "daddy".

Even with the roadblocks, Kyle has been trying to maintain and establish the tiny bit of a relationship he has been allowed to have with O.B. Kyle still requests monthly visits from Lindsey, and she still denies those requests.

With Lindsey only allowing sporadic visitation, and her repeated denials of any visitation to Kyle, Kyle's wife and parents started offering and often requesting to take O.B. to see Kyle on a weekly basis.

Just as Lindsey did with Kyle, she denied Kyle's wife, Amber, any opportunity to spend with O.B. Even going as far as telling Amber she was only allowed to spend three (3) hours with O.B., just as Kyle was allowed too.

Lindsey also denied Amber, and Kyle's parents any opportunity to travel with O.B. Not only just to see Kyle, but also to the grocery store, the park, or to the cafe for ice-cream.

With Lindsey's controlling behavior, Kyle petitioned the District Court to grant regular scheduled visitation of O.B. to Amber, in order to prevent any more serious detriment, or irreparable damage to O.B. that was being caused by Lindsey.

Before Kyle had a chance to respond to Lindsey's request for attorney's fee's, the District Court rendered its decision. (App. pp. 50).

When the District Court entered it's order denying the Motion to Modify visitation, and the Petition for non-parental visitation, Kyle knew that any hopes that he would be able to spend with his daughter were obliterated.

The District Court provided no theoretical basis for its' rationale, other than there was no change in circumstances that warranted the modification of visitation.

And that there was no exceptional circumstances that justified non-parental visitation, and also the fact that Amber had not spent any time with O.B.

This appeal followed that order.

STATEMENT OF ISSUES

Issue #1: Is the modification of Kyles parenting time in the best interests of the child?

ARGUMENT

When the district court gave Lindsey the sole decision authority, as to the visitation between Kyle and O.B., it was unknown if Lindsey would permit reasonable visitation.

If this Honorable Court allows O.B.'s visitation with Kyle to be subverted by Lindsey, there will be no question of the harm or detriment that it will cause to O.B.

When the District Court entered its initial judgment, and when the Honorable District Court denied Kyle's motion to modify, it did so by an erroneous view of the law.

The District Courts erroneous view allows Lindsey to continue her spiratic visitation. Which is not in the best interests of O.B. The only method to correct the irreparable damage that will be caused by Lindsey, is to allow Kyle regular scheduled visitation time with O.B.

The requested modification of parenting time is in the best interests of O.B., because, the Honorable District Court granted sole discretionary authority over the manner and timing of O.B.'s and Kyles visitation, to Lindsey.

And finally, the District Courts visitation order didn't include a method of resolving any disputes when Lindsey, and Kyle don't agree.

But this appeal is not of the initial visitation order. It is an appeal of the District Courts denial of the Motion to Modify

Kyle's parenting time.

The modification of Kyle's parenting time is necessary, because for months Kyle requested that Lindsey bring O.B. to see Kyle. Those requests were always denied.

Where is Kyle to turn too? What is the alternative to Lindsey's final decision of "no"? The only thing to do was for Kyle to beg and plead with Lindsey.

The conflict over visitation can pose harm to the emotional welfare of a child caught in the middle. The District Court should have modified the visitation schedule providing a creative solution to what has become a source of contention between Kyle and Lindsey. Reinecke v. Griffith, 533 N.W.2d 699

This Supreme Court stated in its' own words that, "When parties can-not cooperate in arranging visitation we [The Supreme Court] have reccommended a structured visitation." Blotske v. Leidholm, 487 N.W.2d 607 (ND 1992)

The initial visitation order that granted Lindsey sole visitation authority, was not in O.B.'s best interests pursuant to, N.D.C.C. §14-09-31(3).

The modification of Kyle's parenting time is the only method left to ensure that O.B.'s best interests are upheld.

When Kyle initially made a motion to modify his non-existent parenting time, he did so under N.D.C.C. §14-05-22(1).

Helpfenstein v. Schutt, 2007 ND 106

The Honorable Court recently found that section 14-05-22(1), includes the power to vacate or modify ANY decree if it is in the best interests of a child. See Prchal v. Prchal, 2011 ND 62
[emphasis added]

When the District Court denied Kyle's request to modify the visitation order, it essentially denied Kyle all visitation.

By denying Kyle visitation, the Court isn't allowing O.B. to build and establish a relationship with Kyle, which goes against the best interests of O.B. Love v. Dewall, 1999 ND 139, 598 N.W.2d 106 (ND 1999), Schempp-Cook v. Cook, 455 N.W.2d 216 (ND 1990)

Kyle should be allowed reasonable visitation time. That visitation "is one of the reasonable rights allowed to [a] non-custodial parent." Prchal, 2011 ND 62 (emphasis added)

The reasonable visitation priveleges allowed to Kyle are not only created to promote the best interests of O.B., but also because O.B. is entitled to the love and companionship of both parents. Garbebring v. Rizzo, 269 N.W.2d 104, 110 (ND 1978), Blotske v. Leidholm, 487 N.W.2d 607, 610 (ND 1992)

"Regular scheduled visitation is an integral part of developing a healthy relationship with a non-custodial parent." Iverson v. Iverson, 535 N.W.2d 739, 742 (ND 1995), Johnson v. Schlotman, 502 N.W.2d 831, 835 (ND 1993), Loll v. Loll, 1997 ND 51.

If Lindsey is allowed to continue her spiratic visitation, then obviously there will be no scheduled visitation. And O.B. will be denied any ability to develope a close and continuing healthy relationship with Kyle. See N.D.C.C. §14-09-06.2(e)

Lindsey admittedly with-held contact of O.B. from Kyle for six (6) months from the initial visitation order. Hendrickson v. Hendrickson, 2000 ND 1 (¶19), 603 N.W.2d 896.

In June of 2013, Lindsey finally brought O.B. to visit Kyle. O.B. played well with Kyle. She colored, played with blocks, and even got to read a story with Kyle.

With-holding O.B.'s contact from a loving parent works against the best interest of O.B. Hendrickson v. Hendrickson, 2000 ND 1, (¶19), 603 N.W.2d 896

North Dakota Courts encourage regular visitation for a reason. That regular visitation between a child and a non-custodial parent fosters their relationship. Loll v. Loll, 1997 ND 51, Love v. Dewall, 1999 ND 139, 598 N.W.2d 106 (ND 1999), Schempp-cook v. Cook, 455 N.W.2d 216 (ND 1990)

If O.B. and Kyle are not allowed to foster their relationship through regular visitation, then O.B.'s interests will be harmed substantially.

One of the fundamental requirements of modifying visitation, is demonstrating that the modification is in the best interests of the child. Ibach v. Ibach, 2006 ND 244

Keeping O.B.s best interests at heart, the visitations she has with Kyle are a right. And that visitation right should not be subverted by Lindsey. Garbebring v. Rizzo, 269 N.W.2d 104, 110 (ND 1978)

Failure to modify the District Courts decree, permits Lindsey complete control and total discretionary authority over the manner and timing of any visitation between O.B. and Kyle. Which is not in the best interests of O.B. Wiggington v. Wiggington, 2005 ND 31

Because Lindsey's actions have shown an unwillingness and inability to encourage and facilitate a close and continuing relationship between O.B. and Kyle, Kyle asks that this Court **REMAND** the District Courts order with instructions for a redetermination of a reasonable visitation schedule gaurenteeing Kyle visitation. Duffner v. Trottier, 2010 ND 31, N.D.C.C. §14-09-

06.2(e).

ISSUE #2: Was there a material change in circumstances justifying the modification of parenting time?

ARGUMENT

This Honorable Court has established the precedent when it pertains to what material changes in circumstances justify the modification of parenting time.

Those material changes are outlined as follows:

A. "Important new facts arise that were unknown to the court at the time of the initial visitation order." Duffner v. Trottier, 2010 ND 31

B. "When there has been a frustration of visitation." see Ehli v. Joyce, 2010 ND 199, 789 N.W.2d 560, ALSO, Thompson v. Thompson, 2012 ND 15

C. "When there has been an attempt to alienate a child's affection for a parent." Ehli v. Joyce, citing: Duffner v. Trottier, 2010 ND 31, 778 N.W.2d 586, also: Bladow v. Bladow, 2005 ND 142, 701 N.W.2d 903

D. "A material change in circumstances can exist when a parent re-marries." Ehli v. Joyce, Citing: Duffner v. Trottier, Also: Bladow v. Bladow

In order to better simplify the argument, each of the above sections will be argued separately.

A. "A material change in circumstances occurs when important new facts arise that were unknown at the time of the initial visitation order." Duffner v. Trottier, 2010 ND 31

ARGUMENT

When the District Court entered its judgment, it granted Lindsey primary residential responsibility, and primary decision making responsibility. Along with the sole decision making process as to the visitation between O.B. and Kyle. (App. p.9-12)

The District Court based its judgment ~~on~~^{on} the fact that Lindsey voluntarily took O.B. for visitations with Kyle, while she was not under any court order to do so. (App. p.9-12)

The N.D.C.C. clarifies that the District Courts judgment is not in the best interests of O.B. Because, the order doesn't include a method of resolving disputes when Kyle and Lindsey don't agree. See N.D.C.C. §14-09-31(3).

When the District Court gave Lindsey the sole power to decide the timing and manner of O.B.'s visitation, the District Court inadvertently restricted O.B.'s right to visitation.

What the District Court did not know at the time of the initial visitation order, is that without a court ordered scheduled visitation, guaranteeing Kyle parenting time, Lindsey would voluntarily with-hold O.B.'s contact from Kyle.

Because the District Courts order, allows Lindsey complete discretionary authority as the O.B.'s visits with Kyle, it led Lindsey to say:

a. "the judge said I don't have to bring [O.B.] to see you." (See app. P. ~~59~~⁶⁵)

In essence, completely denying Kyle all visitation. This Honorable Court recently said, "our precedents demonstrate that a complete denial of visitation to a non-custodial parent is a drastic measure that should be exercised only under the most compelling of circumstances." Wilson v. Ibarra, 2006 ND 51

This is not the most compelling of circumstances.

B. "A material change of circumstances may exist when there has been a frustration of visitation." Ehli v. Joyce, 2010 ND 199

ARGUMENT

Lindsey openly admitted in an affidavit to the District Court that she had not returned with O.B. to visit Kyle since January, 2013. (See App. pp. ~~51~~⁵²)

To be fair to Lindsey, recently, in June of 2013, she returned with O.B. However, that was six (6) months after the initial visitation order.

Lindsey frustrated Kyle's parenting time, because she prevented and hindered Kyle from seeing his daughter. (See Blacks Law Dictionary, 4th Pocket Edition, Definition of FRUSTRATION)

Kyle requested visits monthly from Lindsey. Each month Lindsey repeatedly denied Kyles requests.

With no-where to turn after four (4) consecutive months of no visitation, Kyle turned to the District Court, to modify his parenting time.

This Supreme Court observes that "decision making authority can be successful only where parties have demonstrated an ability and willingness to cooperate in the child's best interests."

Zuger v. Zuger, 1997 ND 97, 563 N.W.2d 504 (emphasis added)

It's now almost November, another five (5) months have passed since Lindsey allowed O.B. visitation with Kyle. Please keep in mind that Kyle's one visitation this year was only for two (2) hours.

Lindsey's statements and actions have not demonstrated an ability or willingness to cooperate in O.B.'s best interests.

Lindsey's "failure to permit reasonable visitation (should) be a very significant factor in the court's ultimate disposition."

Haugrose v. Haugrose, 2009 ND 81

C. "A material change in circumstances may exist when there has been an attempt to alienate a child's affection for a parent." Thompson v. Thompson, 2012 ND 15

ARGUMENT

Lindsey's intransigent attitude against Kyle's parenting time, and her voluntary denial of reasonable visitation has not allowed O.B. to build, establish, or maintain a relationship with Kyle. Love v. Dewall, 1999 ND 139, 598 N.W.2d 106 (ND 1999) Schempp-cook v. Cook, 455 N.W.2d 216 (ND 1990)

Lindsey's control over O.B.'s visitation with Kyle has only allowed O.B. to see her father for two (2) hours over the past ten (10) months (Jan. 13' - Oct. 13').

With Kyle's wife, Amber, and Kyle's parents offering to take O.B. to see Kyle at any time over the past ten (10) months, O.B. has lost out on eighty (80) hours of possible visitation time to

spend with Kyle.

Lindsey's actions of with-holding O.B.'s visitation from Kyle has harmed O.B.s and Kyle's father-daughter relationship.

Lindsey's actions seem purposefully designed to poison O.B.s relationship with Kyle. This is done by completely depriving O.B. of a relationship with her father.

Lindsey has also allowed O.B. to know and call Kyle merely 'Kyle' or 'daddy Kyle', and is allowing O.B. to call Lindseys new husband, Kraig, 'daddy'. And in doing so, Lindsey has attempted to alienate O.B.s affection for Kyle. Thompson v. Thompson, 2012 ND 15

If Lindseys alienating behavior is allowed to continue, it is out of any courts scope to measure the harm or detriment it may cause, or will cause to O.B.s well being.

The only way to ensure that O.B.s affection towards Kyle is not harmed, is to allow Kyle, the regular scheduled visitation he is requesting.

D. "A material change in circumstances may exist when a parent re-marries." Ehli v. Joyce, 2010 ND 199

ARGUMENT

In this case, both parents have re-married. Lindsey married Kriag Gellner on May 18th, 2013. (see App. PP 56)

Kyle married Amber O'meara (n/k/a Amber Mackey) on April 12th, 2013. (see App. PP 53)

Both instances are important facts that were unknown to the district court at the time of the initial visitation order.

Duffner v. Trottier, 2010 ND 31

In fact, Amber Mackey petitioned the District Court to allow her non-parental, 3rd party visitation with O.B. Arguing that the prison environment, and the severe restriction of Kyle's parenting time is an exceptional circumstance that justified the award of visitation to Amber. Wiggington v. Wiggington, 2005 ND 31, ¶1, ¶4, ¶7

The District Court denied Ambers petition, stating that she hadn't spent enough time with O.B. Even though Lindsey doesn't allow Amber anytime with O.B., and thus the reasoning for petitioning the court for visitation. (see App. pp 39)

In fact Lindsey has even attempted to control the amount of time that Amber can spend with O.B., while O.B. is at her grandparents for her one day per month visitation with them. (see App. pp. 56)

Because both parties remarried, there was a material change in circumstances that warranted the modification of Kyle's parenting time. Ehli v. Joyce, 2010 ND 199

CONCLUSION

This Court has held that "the right of non-custodial parents to visitation is not just a 'wish or desire,' - not just a 'statutory right', - it is a right of constitutional magnitude.

And the non-custodial visitation rights must be vindicated by court judgment and enforced by court action if necessary." see Berg v. Berg, 2002 ND 69, ¶24-33

This case does not require this court to break new ground. It does however, require that the non-custodial parents visitation be enforced by court action.

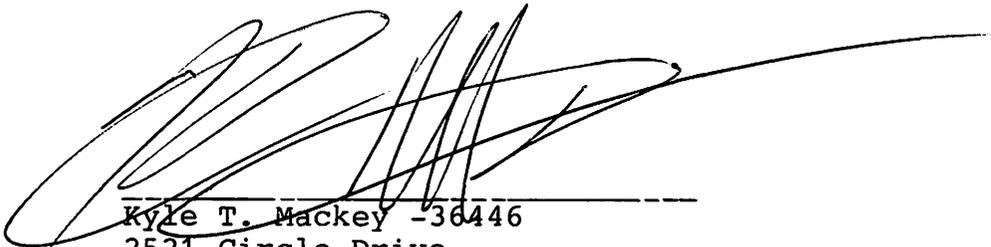
Kyle is a father, who wanted to be a parent. Kyle showed

the District Court that there was a material change in circumstances, and that the modification was in the best interests of O.B.

The District Court provided no indication of the evidentiary or theoretical basis for its decision to deny the motion to modify Kyles parenting time, or its denial of the petition for non-parental visitation, even though both are in the best interests of O.B.

WHEREFORE, Kyle respectfully requests that this Honorable Court, **REMAND** the District Courts order, with instructions for a redetermination of reasonable visistation schedules, gaurenteeing Kyle, and/or Amber visitation.

Dated this 23rd day of October, 2013.



Kyle T. Mackey -36446
2521 Circle Drive
Jamestown, ND 58401

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF STUTSMAN)

CERTIFICATE OF SERVICE

BY MAIL

I, Kyle Mackey, being first duly sworn under penalties of perjury do state that on the 23rd day of October, 2013, I served the following document(s);

1. Appealant's Brief (7 copies + original to Supreme Court)
2. Appealant's Appendix (7 copies + original to Supreme Court)
3. Statement explaining why oral arguments are unnecessary
4. Letter to Penny Miller

upon;

R. Scott Stewart) Clerk of the Supreme Court
P.O. BOX 151) 600 E. Boulevard Ave.
Langdon, ND 58249) Bismarck, ND 58505
)

by placing a true and correct copy in a pre-paid envelope, and deposited the same in the U.S. Mail in Jamestown, ND.



Kyle Mackey

Date: 10-23-13

Subscribed and sworn to before me this 23rd day of October, 2013.



Notary Public

(seal)

