

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Trista Dick,)	
)	
Plaintiff and)	
Appellee,)	
)	
vs.)	
)	Supreme Court No 20180236; Burleigh County
Dustin Erman,)	Case No. 08-2017-DM-00149
)	
Defendant and)	
Appellant.)	

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER FOR JUDGMENT ENTERED ON APRIL 2, 2018
JUDGMENT ENTERED ON APRIL 9, 2018 AND
NOTICE OF ENTRY OF JUDGMENT ENTERED ON APRIL 10, 2018
DISTRICT COURT OF BURLEIGH COUNTY
CIVIL NO. 08-2017-DM-00149
THE HONORABLE JOHN GRINSTEINER, PRESIDING

SOUTH CENTRAL JUDICIAL DISTRICT

BRIEF OF PLAINTIFF – APPELLEE,
TRISTA DICK

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I. JURISDICTION STATEMENT

[1] The District Court had jurisdiction pursuant to N.D. Const. Art. VI, § 8 and N.D.C.C. § 27-05-06. This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6 and N.D.C.C. § 28-27-01.

II. STATEMENT OF THE ISSUE

[2] Whether the district court erred in granting Plaintiff/Appellee primary residential responsibility, whether the district erred in its decision regarding parenting time, and whether the district court erred in granting Plaintiff/Appellee the tie breaker if the parties cannot agree on joint decision-making.

III. STATEMENT OF THE CASE

[3] This matter came before the district court as a residential responsibility dispute, wherein the parties each sought primary residential responsibility of their minor child, RME, born 2014. On June 9, 2017, an interim order awarded Plaintiff Trista Dick (hereinafter Trista) temporary primary residential responsibility, with Defendant, Dustin Erman (hereinafter Dustin) receiving supervised parenting time. (Appellant App. 127-129). Dustin's supervised parenting time was every Wednesday from 5:00 pm until 7:30 pm and every other Saturday from 10:00 am until 5:00 pm. Id. The interim order also awarded Trista decision-making responsibility while the protection order or any no contact order was in place. Id. On October 20, 2017, an Amended Interim Order was issued pursuant to the parties' stipulation allowing for Dustin to have unsupervised parenting time every other weekend from Friday until Sunday and every Wednesday from 5:00 pm until 7:30 pm. (Appellant App. 135-137).

[4] A trial was held on March 13, 2018. Prior to the hearing, each party filed a proposed parenting plan. (Appellant App. 142-145, 146-152). On April 2, 2018, the trial court issued finding of fact, conclusions of law and order for judgment. (Appellant App. 153-159). The trial court also issued a parenting plan which was incorporated by the order for judgment. (Appellant App. 160-163). On April 9, 2018, the judgment and decree were signed by the Clerk of Court. (Appellant App. 164-170). notice of entry of judgment was filed on April 10, 2018. (Appellant App. 171).

[5] On June 8, 2018, Dustin filed his notice of appeal. (Appellant App. 172-173). The Clerk of Court filed a certificate of appeal on July 10, 2018. (Appellant App. 176).

IV. PROCEDURAL BACKGROUND

[6] This matter came before the trial court for determination of primary residential responsibility. Dustin has appealed the decision of the district court. Trista now issues her response.

V. STATEMENT OF THE FACTS

[7] Trista and Dustin started dating in October, 2012. (Tr. 10: 2-4). Their son, RME, was born in 2014. (Tr. 6: 18-23). They were never married. (Tr. 10: 7-9). The parties separated in January, 2017. (Tr. 10:10-11). Trista has been the child's custodial parent since the separation. (Tr. 10; 12-14). Prior to the interim order, Dustin had supervised parenting time with his mother supervising the visit. (Tr. 10: 15-25). Dustin had supervised parenting time of every Wednesday from 4:00 pm until 6:00 pm and every other Saturday from 10:00 am until 5:00 pm. (Tr. 10: 17-23). This is similar to the schedule that was ordered by the District Court in its interim order. (Appellant App. 127-129).

[8] Both parties testified that Dustin works as a farmer in New Rockford, ND, approximately 140 miles from Bismarck, ND, from approximately April until November every year. (Tr. 11: 1-18, 148: 12-14). During the months that Dustin was working at the farm, Trista was in Lincoln raising their child—Dustin would only see the child on the weekends if Trista would drive the child to the cabin for the weekend. (Tr. 11: 19-25). Prior to the parties' separation and after the parties' separation, Trista was the primary caregiver of the child, providing for the child's day-to-day care, taking the child to medical appointments, and taking care of the child's daycare and educational needs. (Tr. 12: 4-20). For eight months out of the year, Dustin rarely saw the child. (Tr. 11: 19-25).

[9] Trista testified regarding Dustin's repeated domestic violence and abuse, towards her, during the relationship. Trista testified that the first physical attack from Dustin occurred in February, 2013 when Dustin put his hands around her throat and she could not breathe. (Tr. 13: 20-25, 14: 1-11). Trista testified that there were pictures taken of the marks he left, a police report, and criminal case. (Tr. 14: 17-25; 15 1-14; Appellee App. 1-9). Trista described another incident of domestic violence in January 2017, where Dustin pointed a knife at her while she was home with the child. (Tr. 18: 1-25). Trista presented the Court with exhibits showing the protection order paperwork and criminal case paperwork. (Tr. 19: 18-25; 20: 1-15; Appellee App. 10-40). Trista further explained that Dustin plead guilty to violating the protection order. (Tr. 21: 21-25). Evidence showed that Trista, her mother, and Dustin's mother all had concerns of Dustin's drinking and anger management. (Tr. 23: 2-25; 24: 1-17; Appellee App. 25-33).

[10] Trista testified that the child was exhibiting serious behavioral problems and that these behavioral problems started after Dustin started his unsupervised parenting time. (Tr. 26: 22-25; 27: 1-5; 29: 7-25). Trista also testified regarding the child's therapy and about the importance of having consistency for the child given these behavioral problems. (Tr. 30: 2-25; 31: 1-25; 32: 1-9).

VI. LEGAL ARGUMENT

A. Standard of Review

[11] The Supreme Court reviews an award of residential responsibility and parenting time under the clearly erroneous standard of review. In re S.R.L., 2013 ND 32, ¶ 3, 832 N.W.2d 324. The clearly erroneous standard “does not allow [the Court] to reweigh the evidence, reassess the credibility of witnesses, or substitute [its] judgment for a district court's initial decision.” Id. citing Martiré v. Martiré, 2012 ND 197, ¶ 6, 822 N.W.2d 450.

“A district court's decision awarding primary residential responsibility is a finding of fact which will not be reversed on appeal unless it is induced by an erroneous view of the law, if no evidence exists to support it, or if on the entire record we are left with a definite and firm conviction a mistake has been made.”

Id. quoting Martiré, ¶ 6, 822 N.W.2d at 453. A choice between two permissible views of the weight of the evidence is not clearly erroneous. Duff v. Kearns-Duff, 2010 ND 247, ¶ 5, 792 N.W.2d 916.

B. The District Court Did Not Err in Granting Trista Primary Residential Responsibility.

[12] A district court must consider the best interests of the child in awarding primary residential responsibility, and in doing so must consider all the relevant best-interest factors contained in N.D.C.C. § 14-09-06.2(1). Duff, at ¶ 5.

[13] At the time of the district court's primary residential responsibility decision, N.D.C.C. § 14-09-06.2(1) outlined the following factors for assessing the best interests and welfare of the child:

- a. The love, affection, and other emotional ties existing between the parents and child.
- b. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.
- c. The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
- d. The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.
- e. The permanence, as a family unit, of the existing or proposed custodial home.
- f. The moral fitness of the parents.
- g. The mental and physical health of the parents.
- h. The home, school, and community record of the child.
- i. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- j. Evidence of domestic violence. In determining parental rights and responsibilities, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has

perpetrated domestic violence may not be awarded residential responsibility for the child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent have residential responsibility. The court shall cite specific findings of fact to show that the residential responsibility best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary to protect the welfare of the child, residential responsibility for a child may be awarded to a suitable third person, provided that the person would not allow access to a violent parent except as ordered by the court. If the court awards residential responsibility to a third person, the court shall give priority to the child's nearest suitable adult relative. The fact that the abused parent suffers from the effects of the abuse may not be grounds for denying that parent residential responsibility. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01. A court may consider, but is not bound by, a finding of domestic violence in another proceeding under chapter 14-07.1.

- k. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.
- l. The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02.
- m. Any other factors considered by the court to be relevant to a particular parental rights and responsibilities dispute.

N.D.C.C. § 14-09-06.2(1).

[14] The trial court found that the following factors were equal and the Appellant does not disagree with the findings in factors a, b, c, e, g, and h. Although the Appellant makes an argument that factor "h" should have been equal, the District Court did in fact find this factor equal to both parents. (Appellant App. 156). The District Court found the following factors did not apply and the Appellant does not disagree with the findings in factors i, k, l, and m. Therefore, we are left with the analysis of factors d, f, and j.

These factors were found in favor of Trista. (Appellant App. 154-157). In reviewing the District Court’s determination here, this Court cannot “reweigh the evidence, reassess the credibility of witnesses, or substitute [its] judgment for a district court’s initial decision,” because the District Court is in the best position to determine credibility. Martiré, at ¶

i) Best Interest Factor “d”—The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.

[15] The district court found that this factor weighed slightly in Trista’s favor. Both parties testified that Dustin worked as a farmer in New Rockford, ND, approximately 140 miles from Bismarck, ND from approximately April until November every year. (Tr. 11: 1-18, 148: 12-14). During the months that Dustin was working at the farm, Trista was in Lincoln, North Dakota raising their child—Dustin would only see the child on the weekends when Trista drove the child to the cabin for the weekend. (Tr. 11: 19-25). Prior to the parties’ separation and after the parties’ separation, Trista was the primary caregiver of the child, providing for the child’s day-to-day care, taking the child to medical appointments, and taking care of the child’s daycare and educational needs. (Tr. 12: 4-20). For eight months out of the year, Dustin rarely saw the child. (Tr. 11: 19-25).

[16] The parties separated in January, 2017. (Tr. 10:10-11). Trista has exercised primary residential responsibility of their child since the parties separated. (Tr. 10; 12-14). Prior to the interim order, Dustin had supervised parenting time with his mother supervising the visits. (Tr. 10: 15-25). Dustin had supervised parenting time of every Wednesday from 4:00 pm until 6:00 pm and every other Saturday from 10:00 am until 5:00 pm. (Tr. 10: 17-23). This is similar to the schedule that was ordered by the

District Court in its interim order. (Appellant App. 127-129). On October 20, 2017, an amended interim order was issued pursuant to the parties' stipulation allowing for Dustin to have unsupervised parenting time every other weekend from Friday until Sunday and every Wednesday from 5:00 pm until 7:30 pm. (Appellant App. 135-137). Therefore, from the time of separation to the time of trial, Dustin had no more than two consecutive days with the child at a time.

[17] Trista testified that the child was exhibiting serious behavioral problems and that she witnessed that the behavioral problems started after Dustin started his unsupervised parenting time. (Tr. 26: 22-25; 27: 1-5; 29: 7-25). Trista also testified regarding the child's therapy and about the importance of having consistency for the child given these behavioral problems. (Tr. 30: 2-25; 31: 1-25; 32: 1-9).

[18] The evidence showed that Trista has been the child's primary caretaker since his birth and has created a stable home environment for him. Based upon the evidence and testimony, the district court did not err in finding that Trista has and can provide more stability for the child and that it was in the child's best interests to maintain that stability at her home and in the community of Lincoln, North Dakota.

ii) Best Interest Factor "f"—The moral fitness of the parents

[19] The district court found that this factor favored Trista. The district court stated that "[t]here was testimony received regarding both parent's excessive alcohol use, however the testimony and additional evidence showed only Dustin has a court record because of it." (Appellant App. 155). The district court is in the best position to determine credibility and this court cannot "reweigh the evidence, reassess the credibility of witnesses, or substitute [its] judgment for a district court's initial decision." Martiré, at ¶

6. The district court also found concerning the “domestic violence and aggressive, black-out drunk episodes by Dustin.” Id. There is no dispute regarding Dustin’s history of domestic violence and excessive drinking. The exhibits and testimony at trial were clear.

[20] Trista testified regarding Dustin’s repeated domestic violence and abuse, towards her, during the relationship. Trista testified that the first physical attack from Dustin occurred in February, 2013 when Dustin put his hands around her throat and she could not breathe. (Tr. 13: 20-25, 14: 1-11). Trista testified that there were pictures taken of the marks he left, a police report, and criminal case. (Tr. 14: 17-25; 15 1-14; Appellee App. 1-9). Trista described another incident of domestic violence in January 2017, where Dustin pointed a knife at her while she was home with the child. (Tr. 18: 1-25). Trista presented the Court with exhibits showing the protection order paperwork and criminal case paperwork. (Tr. 19: 18-25; 20: 1-15; Appellee App. 10-40). Trista further explained that Dustin plead guilty to violating the protection order. (Tr. 21: 21-25). Evidence showed that Trista, her mother, and Dustin’s mother had concerns regarding Dustin’s drinking and anger management. (Tr. 23: 2-25; 24: 1-17; Appellee App. 25-33).

[21] Dustin argues that since he completed evaluations and has remained sober, this factor should be equal. The problem with this argument is that some of his black-out drinking episodes and domestic violence episodes occurred in the presence of the child. (Tr. 18: 1-25). The incident involving a dangerous weapon occurred approximately one year prior to trial and occurred when the child was at home. Id. Since that time, and at the time of trial, Dustin had been on an alcohol monitoring bracelet. At the time of trial,

Dustin had been unable to show the Court that he could remain sober on his own or provide a safe and loving home.

[22] The Appellant argues that in Berg v. Berg, 2002 ND 69, 642 N.W.2d, 899, this Court affirmed unsupervised parenting time after the non-custodial parent received counselling and was successful with rehabilitation. The Court in Berg was addressing parenting time, not primary residential responsibility. When addressing parenting time, this Court has stated “[t]he primary purpose of visitation is to promote the best interests of the children, not the wishes of the parents. Stoppler v. Stoppler, 2001 ND 148, ¶ 14, 633 N.W.2d 142. Not only is visitation presumed to be in the best interest of the child, it is a right of the child. *Id.* Furthermore, a noncustodial parent can be deprived of visitation only if visitation is likely to endanger the child's physical or emotional needs. Section 14-05-22(2), N.D.C.C.; Ackerman v. Ackerman, 1999 ND 135, ¶ 13, 596 N.W.2d 332.” Berg, at ¶9. In Berg, the Court cited the non-custodial parent’s recent history of unsupervised visits, the importance of the relationship between the parent and the children, and the testimony of the experts regarding her rehabilitation as support for allowing unsupervised parenting time and Berg is therefore not relevant. *Id.*

[23] In this case, Appellant is using the Berg case as support in his analysis of residential responsibility. However, the Court in Berg, did not address the best interest factors as they relate to primary residential responsibility, but only the decision on whether there should be supervised or unsupervised parenting time. In this case, the district court did not order supervised parenting time.

[24] Based upon the evidence and testimony, the district court did not err in finding that the moral fitness of the parents, as that fitness impacts the child, favored Trista.

iii) *Best Interest Factor “j”*— Evidence of domestic violence. In determining parental rights and responsibilities, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibly. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent to have residential responsibility. . . .

[25] The district court found that this factor heavily favored Trista, stating “[t]he Court finds that the testimony also showed that although only four incidents were documented, Trista had to deal with problems from Dustin’s anger and drinking issues for much of the relationship. . . .” (Appellant App. 156).

[26] Trista testified regarding Dustin’s repeated domestic violence and abuse, towards her, during the relationship. Trista testified that the first physical attack from Dustin occurred in February, 2013 when Dustin put his hands around her throat and she could not breathe. (Tr. 13: 20-25, 14: 1-11). Trista testified that there were pictures taken of the marks he left, a police report, and a criminal case. (Tr. 14: 17-25; 15 1-14; Appellee App. 1-9). Trista described another incident of domestic violence in January 2017, where Dustin pointed a knife at her while she was home with the child. (Tr. 18: 1-25). Trista presented the Court with exhibits showing the protection order paperwork and criminal case paperwork. (Tr. 19: 18-25; 20: 1-15; Appellee App. 10-40). Trista

further testified that Dustin plead guilty to violating the protection order. (Tr. 21: 21-25). Evidence showed that Trista, her mother, and Dustin's mother had concerns regarding Dustin's drinking and anger management. (Tr. 23: 2-25; 24: 1-17; Appellee App. 25-33).

[27] Appellant argues that Trista was not seriously injured. However, the evidence showed that Trista had notable bruising on her neck from the incident in 2013 and was unable to breathe. (Tr. 14: 17-25; 15 1-14; Appellee App. 1-9). Appellant does not explain his definition of serious injury, however, the North Dakota Century Code describes "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs." N.D.C.C. 12.1-01-04(27). Clearly, Dustin caused serious bodily injury. Moreover, in the incident in 2017, Dustin used a knife, which is a dangerous weapon. Either one of these incidents would qualify for the presumption that Trista should be awarded primary residential responsibility. Further, the district court also found a history of domestic violence throughout the relationship.

[28] If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded primary residential responsibility. This presumption may be overcome only by clear and convincing evidence of the best interests of the child may require that parent to

have residential responsibility. There was no clear and convincing evidence that the best interests of RME require Dustin to have residential responsibility.

[29] Based upon the evidence and testimony, which showed a history of domestic violence, an incident of violence involving serious bodily injury, and an incident of violence involving a dangerous weapon, the district court did not err in finding that this factor favored Trista.

C. The District Court Did Not Err on its Decision on Parenting Time.

[30] “The primary purpose of visitation is to promote the best interests of the children, not the wishes of the parents. Stoppler v. Stoppler, 2001 ND 148, ¶ 14, 633 N.W.2d 142. Not only is visitation presumed to be in the best interest of the child, it is a right of the child. *Id.* Furthermore, a noncustodial parent can be deprived of visitation only if visitation is likely to endanger the child's physical or emotional needs. Section 14-05-22(2), N.D.C.C.; Ackerman v. Ackerman, 1999 ND 135, ¶ 13, 596 N.W.2d 332.” Berg, at ¶9.

[31] The Appellant cited Deyle v. Deyle, 2012 ND 248, 825 N.W.2d 245. This Court in Deyle, remanded the issue of extended summer time back to the district court because the district court did not give an explanation or reason for not giving extended summer parenting time. *Id.* at ¶19. This Court has stated “If the parents are unable to agree on a parenting plan, the court shall issue a parenting plan considering the best interests of the child.” N.D.C.C. § 14-09-30(1). A parenting plan must include a provision relating to decision-making responsibility, N.D.C.C. § 14-09-30(2)(a), and that responsibility must be allocated in the best interests of the child, N.D.C.C. § 14-09-31(2). The best interests factors are delineated in N.D.C.C. § 14-09-06.2. A district court need

not make separate findings for each best interest factor but, as with custody, the court's findings must contain sufficient specificity to show the factual basis for the decision. Wolt v. Wolt, 2010 ND 26, ¶ 9, 778 N.W.2d 786. . . .” Horsted v. Horsted, 2012 ND 24, ¶ 5, 812 N.W.2d 448.

[32] In this case, looking at the district court’s reasoning throughout its findings, the district court found domestic violence by Dustin—some that occurred in front of the child—, the district court cited it had concerns regarding Dustin’s alcohol and anger problems, the district cited concerns regarding Dustin’s moral character, and regarding the child missing preschool and other activities. (Appellant App. 153-157). The District Court clearly made findings consistent with its decision on the parenting plan.

D. The District Court Did Not Err on its Decision on Decision-Making Responsibility.

[33] This Court has stated “[w]e have recognized that shared decision-making authority can be successful only when the parties have demonstrated an ability and willingness to cooperate in the children's best interests. *See, e.g., Hanson v. Hanson*, 2005 ND 82, ¶ 24, 695 N.W.2d 205; Jarvis v. Jarvis, 1998 ND 163, ¶ 36, 584 N.W.2d 84; Zuger v. Zuger, 1997 ND 97, ¶ 34, 563 N.W.2d 804. . . . Martiré v. Martiré, 2012 ND 197, ¶18, 822 N.W.2d 450.

[34] The record in this case is clear. Per the interim order, Trista was awarded decision-making authority until the protection order and no contact orders were expired. (Appellant App. 127-129). The no contact order had not expired as of the date of trial. (Appellant App. 158). The district did not deviate from the interim order because, as of the date of trial, Trista still had sole decision-making responsibly. The parties had communicated through Dustin’s mother regarding issues related to the child. The parties

had not demonstrated an ability to communicate regarding the child at the time of trial, nor had they demonstrated an ability to work together and cooperate regarding decisions for the child. Furthermore, Dustin's demonstrated history of domestic violence, including serious incidents involving both bodily injury and the use of a weapon, indicated that it was unlikely that the parties would be able to work together or cooperate to make joint decisions regarding the child.

[35] The Court did not err when it issued a tie-breaker to Trista, if the parties could not agree.

VII. CONCLUSION

[36] Based on the foregoing, Trista Dick urges this Court to **AFFIRM** the district court's findings and judgment.

Dated this 29th day of November, 2018.

/s/Bobbi L. Weiler
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF PLAINTIFF-APPELLEE, TRISTA DICK was on the 27th day of November, 2018, served electronically to the following:

Dan Oster
dan@kopcemail.com

and US Mail to:

Trista Dick
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Lincoln, ND 58504

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF PLAINTIFF-APPELLEE, TRISTA DICK was on the 29th day of November, 2018, served electronically to the following:

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