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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jerry M. Kerzmann Jr.,	)	
	)	Supreme Court No. 20210086
Plaintiff and Appellee,	)	McLean County District Court
	)	Case No. 28-2016-DM-00058
vs.	)	
	)	
Tonya L. Kerzmann,	)	
	)	
Defendant and Appellant.	)	
	)	

Appeal from the

Order Denying Evidentiary Hearing of March 10, 2021

District Court, McLean County, North Dakota
The Honorable John Grinsteiner, Presiding

BRIEF OF APPELLEE

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ORAL ARGUMENT REQUESTED

Table of Contents

Table of Authorities

Other Authorities

1) I. Statement of Issues

2) Whether the District Court correctly denied the appellant an evidentiary hearing regarding her requested change of residential responsibility in determining that the appellant failed to meet her prima facie showing. A secondary issue is whether or not the Supreme Court should sanction the appellant in this matter for the appendix that was filed in this matter.

3) II. Statement of the Case

4) This is an appeal from a Final Divorce Judgment. The appellant (hereinafter "Tonya", "defendant" or "Mrs. Kerzmann") is appealing the Court's denial of an evidentiary hearing on her most recent attempt at modifying the judgment in this matter. Tonya was seeking a modification of primary residential responsibility. Primary residential responsibility is with the Appellee (hereinafter "JR," "plaintiff" or "Mr. Kerzmann"), and has been since the parties' divorce in 2016.

5) Paragraph 5 of the statement of the case cited by Tonya in her brief is not disputed. The remainder is disputed and the subject of this appeal

6) III. Facts of the Case

7) The facts of the case as cited by the appellant's brief are not disputed. It should be noted that the appendix contains numerous documents that were not part of the lower court's ruling, that are completely irrelevant to this appeal, and that could subject the appellant to sanctions by this Court.

8) For instance, the appendix contains affidavits and exhibits from prior motions that were dismissed. The inclusion of any such matters violates N.D.R.App.P. Rule 30. The Order of Dismissal actually precludes any such use of those materials. App. pg. 135 ¶ 4. Parts of the appendix from pages 28-29, 62-137, include these prohibited materials that form no basis of the lower court's ruling and are irrelevant. Although minor the appellant also included proof of service documents as well as all documents involving the current establishment of a child support obligation for Tonya that is not on appeal. All of these documents are also irrelevant and should not have been included in the appendix.

9) **IV. Statement Regarding Oral Argument**: Tonya already requested oral argument in this matter. JR would also ask for oral argument. Oral argument allows the Supreme Court to gain a better understanding of the issues presented. It also sometimes forces the other party to make concessions that affect the Supreme Court's Ruling. These concessions rarely come out in briefs.

10) **V. Standard of Review:** This appeal deals with the lower court's denial of an evidentiary hearing on a requested change of residential responsibility. Whether a party has established a prima facie case for a change of primary residential responsibility is a question of law which this Court reviews de novo. Heidt v. Heidt, 2019 ND 45, ¶ 8, 923 N.W.2d 530.

11) **VI. Law and Argument**

12) **A.** The Trial Court Correctly Determined That An Evidentiary Hearing Was Not Warranted In This Matter.

13) To modify custody after a two-year period following a prior custody order, the district court must consider whether a material change in circumstances has occurred, and if the court finds a material change in circumstances, it then must decide whether custody modification is necessary to serve the best interests of the child. N.D.C.C. § 14-09-06.6(6). Section 14-09-06.6(6), N.D.C.C., requires a court to use a two-part analysis in deciding whether or not to change custody of a child:

14) The court may modify the primary residential responsibility after the two-year period following the date of entry of an order establishing primary residential responsibility if the court finds:

a) On the basis of facts that have arisen since the prior order or which were unknown to the court at the time of the prior order, a material change has occurred in the circumstances of the child or the parties; and
b) The modification is necessary to serve the best interests of the child

15) First, the "court must consider whether there has been a material change of circumstances since the original custody decree." Kelly v. Kelly, 2002 ND 37, ¶ 15, 640 N.W.2d 38. "A material change in circumstances is an important new fact that was unknown at the time of the prior custody decision." Thompson v. Thompson, 2012 ND 15, ¶ 6, 809 N.W.2d 331.

16) Prior to granting an evidentiary hearing on a motion seeking modification of primary residential responsibility, the party seeking modification must initially establish a prima facie case justifying a modification. Heidt, 2019 ND 45, ¶ 7.

> A party seeking modification of an order concerning primary residential responsibility 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. The court shall set a date for an evidentiary hearing only if a prima facie case is established. N.D.C.C. § 14-09-06.6(4).

17) "A prima facie case requires only enough evidence to allow the factfinder to infer the fact at issue and rule in the moving party's favor." Kartes v. Kartes, 2013 ND 106, ¶ 9, 831 N.W.2d 731 (citing Sweeney v. Kirby, 2013 ND 9, ¶ 5, 826 N.W.2d 330). It is a "bare minimum" and requires only facts which, if proved at an evidentiary hearing, would support a change of primary residential responsibility that could be affirmed if appealed. Kartes, at ¶ 9; See also Sweeney, 2013 ND 9, ¶ 5. Allegations alone, however, do not establish a prima facie case, and affidavits must include competent information, which usually requires the affiant to have first-hand knowledge. Thompson, at ¶ 6. "Affidavits are not competent if they fail to show a basis for actual personal knowledge, or if they state conclusions without the support of evidentiary facts." Id.

18) In determining whether a prima facie case has been established, the district court must accept the truth of the moving party's allegations. Kartes, 2013 ND 106, ¶ 9, 831 N.W.2d 731; Schumacker v. Schumacker, 2011 ND 75, ¶ 8, 796 N.W.2d 636. The party opposing the motion may attempt to rebut a prima facie case by presenting evidence conclusively demonstrating the moving party is not entitled to a modification, but when the opposing party's evidence merely creates

conflicting issues of fact, the court may not weigh the conflicting allegations when deciding whether a prima facie case has been established. Wolt v. Wolt, 2011 ND 170, ¶ 9, 803 N.W.2d 534. Only when the opposing party presents counter-affidavits that conclusively show the allegations of the moving party have no credibility, or when the movant's allegations are, on their face, insufficient to justify custody modification, may the district court decide the moving party has not established a prima facie case and deny the motion without an evidentiary hearing. Id.

19) A party moving for a change of primary residential responsibility must establish a prima facie case justifying a modification before the party is entitled to an evidentiary hearing. Joyce v. Joyce, 2010 ND 199, ¶ 7, 789 N.W.2d 560. "[A]ttempts to establish a prima facie case justifying modification of custody [must] be considered on briefs and supporting affidavits and without oral arguments or an evidentiary hearing." Dufner v. Trottier, 2010 ND 31, ¶ 15, 778 N.W.2d 586. Allegations alone do not establish a prima facie case, and affidavits supporting the motion for modification must include competent information, which usually requires the affiant have first-hand knowledge. Joyce, at ¶ 7. Emphasis added. "Affidavits are not competent if they fail to show a basis for actual personal knowledge, or if they state conclusions without the support of evidentiary facts." Id.. "It is not the purpose of the requirement to allow the moving party an opportunity to investigate allegations." Kourajian v. Kourajian, 2008 ND 8, ¶ 12, 744 N.W.2d 274.

20) Our Court has described how to establish a prima facie case for a change of custody and what a trial court must consider in deciding whether the burden has been met and an evidentiary hearing is warranted:

> The moving party establishes a prima facie case by alleging, with supporting affidavits, sufficient facts which, if they remained uncontradicted at an evidentiary hearing, would support a custody modification in her favor. A trial court can find the moving party has failed to bring a prima facie case only if the opposing party presents counter affidavits conclusively establishing the allegations of the moving party have no credibility, or if the movant's allegations are insufficient, on their face, to justify custody modification. If the opposing party meets that burden, the prima facie case is rebutted and the trial court may deny the motion to modify custody without holding an evidentiary hearing. However, if the opposing party fails to meet that burden, an evidentiary hearing must be held to resolve conflicting evidence and determine whether custody modification is warranted. Hawley v. LaRocque, 2004 ND 215, 689 N.W.2d 386.

21) The trial court must accept the truth of the moving party's allegations and may not weigh conflicting allegations. O'Neill v. O'Neill, 2000 ND 200, ¶ 7, 619 N.W.2d 855. An opposing party may rebut a prima facie case by bringing forward evidence that the moving party is not entitled to the relief requested. Frueh v. Frueh, 2008 ND 26, ¶ 7, 745 N.W.2d 362.

22) Our cases dealing with motions to modify custody generally have recognized that in order to modify custody there must be some evidence the custodial parent's custodial environment may endanger the children. See In re Thompson, 2003 ND 61, ¶ 12, 659 N.W.2d 864 (allegations of physical and emotional neglect of children sufficient to establish prima facie case for evidentiary hearing); Engh v. Engh 2003 ND 5, ¶¶ 7-9, 655 N.W.2d 712

(allegations of endangerment to emotional and physical health of children sufficient to establish prima facie case for evidentiary hearing, but trial court's failure to make finding that custodial father had endangered the children's physical or emotional health or impaired their emotional development required reversal of order changing custody); O'Neill v. O'Neill, 2000 ND 200, ¶ 8, 619 N.W.2d 855 (allegations demonstrating a custodial environment which may endanger children's physical or mental health are sufficient to raise a prima facie case for change of custody); Quarne v. Quarne, 1999 ND 188, ¶12, 601 N.W.2d 256 (child abuse constitutes an environment which endangers the child's physical or mental health and is, as a matter of law, a material change of circumstances warranting a change of custody under N.D.C.C. § 14-09-06.6(5)); Holtz v. Holtz, 1999 ND 105, ¶ 17, 595 N.W.2d 1 (endangerment of child's physical or emotional health or impairment of child's emotional development is material change of circumstances warranting change of custody)

23) B. The Trial Court Correctly Determined That The Moving Affidavit Contained Limited First-Hand Knowledge And Was Not A Competent Affidavit.

24) The case law on this matter is clear. Affidavits must contain first- hand knowledge in order to be considered competent. Inadmissible hearsay statements are not competent evidence. Schumacker, 2011 ND 75, ¶ 15. The Court in Schumacker went on to point out then that if an affidavit uses hearsay statements, the statements must fall under an exception to the hearsay rule. This issue was pointed out in JR's responsive brief in this matter. The brief (App. pg 319-320)

points out that the affidavit of Tonya is absolutely riddled with hearsay statements. The brief also points out that there is indication from Tonya that any of the hearsay statements fall under any hearsay exception and, thus, they should be excluded and not considered by the court.

25) Mrs. Kerzmann did file a reply brief. However, as the Court can see, the reply brief does not address the hearsay issue, it does not offer any analysis on what possible hearsay exception would apply, nor does it even try to indicate any arguments on the hearsay issue. Instead, the appellant is trying to argue these issues for the first time on appeal. This Court has routinely held that matters cannot be argued for the first time on appeal. "We have repeatedly held that issues not raised in the trial court cannot be raised for the first time on appeal." Molitor v. Molitor, 2006 ND 163, ¶ 12, 718 N.W.2d 13 (citing Wenzel v. Wenzel, 469 N.W.2d 156, 158 (N.D. 1991)).

> "The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories.'" Beeter v. Sawyer Disposal LLC, 2009 ND 153, ¶ 20, 771 N.W.2d 282 (quoting Heng v. Rotech Med. Corp., 2006 ND 176, ¶ 9, 720 N.W.2d 54). "The requirement that a party 'first present an issue to the trial court, as a precondition to raising it on appeal, gives that court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective review of the decision.'" Beeter, at ¶ 20 (quoting State v. Smestad, 2004 ND 140, ¶ 18, 681 N.W.2d 811). " "It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." Davis v. Enget, 2010 ND 34, ¶ 10, 779 N.W.2d 126 (quoting Messer v. Bender, 1997 ND 103, ¶ 10, 564 N.W.2d 291). Accordingly, " issues or contentions not raised ... in the district court cannot be raised for the first time on appeal." *Beeter,* at ¶ 20.

26) None of the defendant's filings with the lower court argued which hearsay objections may apply to the obvious hearsay in her affidavit. Further there is so much hearsay in the affidavit that even on appeal the defendant only makes a passing attempt to argue how her affidavit may have laid any foundation for hearsay exceptions to apply. "This Court is not in the business of divining what a party meant to argue in its brief. Nor do we raise and address issues not adequately briefed. Issues on appeal should be fully briefed with appropriate supporting citations and with fair and adequate opportunity for a response from the opposing party." Roise v. Kurtz, 1998 ND 228, ¶ 10, 587 N.W.2d 573.

27) If the defendant was going to argue that hearsay objections should apply, the time to do it would have been in the lower court. The defendant should have taken the time to try and argue how all of the hearsay should be considered in this matter or at least which hearsay statements if accepted under an exception could support a prima facie showing. The fact that the defendant did not at any time brief or argue such issues before the lower court should preclude any such argument now with this appellate court. The holdings above should apply to this case and preclude any such arguments.

28) However, even though the appellant is attempting to argue that there are some hearsay exceptions that apply, this Court should determine such arguments are completely without merit. The hearsay starts on ¶27 of Tonya's affidavit. (App. pg. 161). There she talks about statements a child made about a change of residential responsibility. This is pure hearsay, there is no exception

that would cover such statements from a young child, and the affidavit certainly does not indicate any such exception like the ones pointed out in Schumacker, would apply.

29) The hearsay trend really starts amping up from ¶46 on. App. pg. 168. From ¶ 53 on it is almost pure hearsay through ¶80. App. pg 171 -184. This is clearly not a competent affidavit.

30) Further, the affidavit is rife with conclusions with no evidentiary support. ¶'s 44 and 58 include rambling stream of conscious statements that hold no evidentiary value. App. pg. 167 and 173 respectively. The affidavit is hard to read at times because of these rambling statements. Once the Court removes the hearsay statements from the affidavit, it becomes easier to see that an evidentiary hearing is not warranted in this case.

31) A competent affidavit must also contain more than conclusory statements. The affidavit is rife with conclusory statements that are not supported with any evidentiary support. The Supreme Court can see a version of this even in the Appellant's brief. ¶32 states that the children in this matter are "suffering from potential emotional harm from the current parenting time schedule that may impair their health and development." There is no evidentiary support in regards to this statement. It is simply a conclusory statement that cannot be supported by the record before this Court. The truth of the matter is that the children are not suffering at all.

32) C. The Trial Court Correctly Concluded That A Material Change In Circumstance Was Not Shown.

33) The trial court determined that an evidentiary hearing was not warranted. Part of that conclusion was that the first prong, dealing with a material change in circumstance had not been demonstrated. Once the hearsay statements are removed, Tonya had really bad facts to present to the court.

34) She argues that a material change in circumstance is somehow shown by her not getting additional time. She does not argue that she is not receiving the time allotted to her by the judgment. She is trying to argue a prima facie showing has been met because her repeated requests for additional time are not being granted. In essence, she is stating that JR is following the parenting time laid out in the judgment.

35) However, the Amended Judgment (like so many parenting plans) simply says that amendments to the parenting time portion of the judgment have to be made by mutual agreement. If there is no agreement, then there is no amendment. It should be noted here that Tonya is in effect arguing against the parenting time she agreed to as the Amended Judgment was entered by way of stipulation.

36) Another claim is that the children are older and want more time with their mother. It is true that the children are older. This could never be a material change in circumstance on its own as every Court is well aware that time exists and children will age after any judgment is entered. They are still very young

children and are not old enough to submit a preference in this matter (nor have they). Any statements about any additional parenting time are all hearsay coming from Tonya. This claim simply cannot be a material change in circumstance as laid out in the defendant's documents.

37) Although not decided directly by the lower court, this Court can also determine in its de novo review that some of the allegations brought by Tonya completely lack credibility. Although again largely hearsay, she says she has been denied access to school records and then provides school records in her documents. JR's affidavits show that such allegations are baseless lies and clarifies the record that Tonya does in fact have full access to school records. The documents submitted by Tonya also show how she requested access to school records and was granted access.

38) She states that she was denied access to medical records. However, she states in her affidavit that she is made aware of appointments and even changes to appointments. She is aware of dental records. With her own statements and JR's affidavits also indicating that she does have access to this information, she is shown to have a complete lack of credibility.

39) She also alleges that JR does not encourage a relationship with Tonya and the children. Tonya does indicate that one of the children went to counseling. This counseling was set up by JR because that child wanted nothing to do with his mother. It was JR that stepped in and set up family counseling. Her affidavit again demonstrates its lack of credibility.

40) D. The Lower Court Correctly Points Out That There Is A Complete Failure In The Documents Provided By The Defendant To Show That The Children's Best Interests Would Be Served By A Change In Residential Responsibility.

41) "The next step in determining whether an evidentiary hearing is required under N.D.C.C. § 14-09-06.6(6)(b), is whether [t]he modification is necessary to serve the best interests of the child." Heidt, 2019 ND 45, ¶ 16. The moving party bears the responsibility of submitting competent evidence that the change would be in the children's best interests. Our case law reflects this preference by requiring a change in circumstances which *compels or requires* a change in custody. Blotske v. Leidholm, 487 N.W.2d 607, 609 (N.D. 1992) (emphasis added). Requiring a showing a change of custody is compelled or required gives some finality to a trial court's original custody decision and helps ensure that a child is not bounced back and forth between parents as the scales settle slightly toward one parent and then the other. See Lovin v. Lovin, 1997 ND 55, ¶ 17, 561 N.W.2d 612.

42) The child's best interests must be considered against the backdrop of the stability of the child's relationship with the custodial parent. Id. "*A child is presumed to be better off with the custodial parent, and close calls should be resolved in favor of continuing custody*." Myers v. Myers, 1999 ND 194, ¶ 10, 601 N.W.2d 264 (emphasis added). "We have said maintaining stability and continuity in the child's life, without harm to the child, is the most compelling

factor when considering a motion for change of custody." Holtz v. Holtz, 1999 ND 105, ¶ 20, 595 N.W.2d 1. This court has "recognized a *doctrinal aversion* to changing the custody of a happy child who has been living with one parent, and the burden on a noncustodial parent seeking a change of custody is daunting and arduous." Damron v. Damron, 2003 ND 166, ¶6, 670 N.W.2d 871.

43) The Supreme Court's usage of terms like 'daunting and arduous' and 'doctrinal aversion' should mean something. Our Supreme Court is not one that uses such terms lightly. What has Tonya submitted to suggest that she has met this daunting burden? Where in her affidavit does she suggest that the children's best interests would be better served by the change of custody to her having primary?

44) The allegations submitted by Tonya, even assuming that they are all truthful (and that is a mighty big assumption based on her own lack of credibility and the objectionable use of hearsay), should be deemed inadequate to qualify as a prima facie showing. What allegations if proven at trial would be sufficient to change residential responsibility? This is the standard.

45) She has not shown any decline in JR's household. She has not shown any issues of harm or potential harm in the custodial parent's house. She has not shown any issues with the children's schooling. She has not shown any issues with Grace, who is nothing but a loving step-mother to the children.

46) The issues that do exist in this case are all bad for Tonya. She is the one with a drug usage history that resulted in her agreeing to urine samples and

random drug screening in the Amended Judgment. She is the one that was dating a person that is currently facing serious child abuse charges. She is the one that had a complete breakdown in her relationship with KK that required family counseling to resolve. She is the one with instability in her life. She has not even alleged how the boys would be better off with her. Her document lacks any specific allegations that would show that it is necessary to change primary residential responsibility in this matter. As pointed out by Judge Grinsteiner, this is fatal to a motion to try and amend residential responsibility.

47) There is nothing in Tonya's rambling affidavit that would indicate that the children's best interest would be better served by awarding her primary residential responsibility.

48) E. Should the Supreme Court Sanction Tonya Kerzmann for the Appendix That Was Filed in This Matter?

49) N.D.R.App.P. Rule 13 allows the Supreme Court to sanction any person for failure to perform an act required by rule or court order. Rule 30 requires an appellant to file only relevant portions of the lower record. The appendix in this matter is a mess and Mr. Kerzmann is requesting sanctions.

50) It is understood that the parties are only encouraged to file a single appendix. No effort was expended by the appellant to discuss what should be in this appendix. If such steps had been taken an objection would have been voiced over the contents that are found in this appendix.

51) One of the most glaring issues is that the appendix includes materials that were precluded by order from even being considered by the lower court. The Order of Dismissal found on page 135 of the appendix actually precludes the lower court from ever considering the information the appellant decided for some reason to include in this appendix.

52) ¶ 4 of the Order indicates, "Thus, neither party will be allowed to rely on these old allegations moving forward for any motions." The Order of Dismissal was reached by way of stipulation, negotiation, and agreement of the parties. Now for some inexplicable reason, the appellant has decided to include these precluded materials in an appendix.

53) There are other irrelevant things that were added to the appendix for some reason. The addition of these additional materials only makes the appendix more difficult to use for everybody. There is no reason that any information about the stipulation regarding child support should be in this appendix. There is no reason for old proof of service documents.

54) Further, the appendix violates the redacting rules. There are places in the appendix where the appellant did not properly redact the items that were included. Children's names can be found throughout the documents if the Court is so inclined to really read through the entire appendix. Just paging through the appendix briefly, Counsel for JR was able to spot one such issue on page 219.

55) This issue is of course left to the sound discretion of this Court.

56) **VII. Conclusion**

57) For all the foregoing reasons, the lower court's decision should be in all things affirmed. There are so many problems with the affidavit submitted by Tonya in this matter. The lower court correctly determined that there should not be an evidentiary hearing in this case. The affidavit is riddled with hearsay for which no exceptions should apply, no exceptions were argued at the lower court level, the appellant is bringing up hearsay exceptions for the first time on appeal. This Court's de novo review could easily determine that the affidavit is not competent, it is full of conclusory statements with no evidentiary support, that JR's affidavits including the documents submitted by Tonya should that she does not have credibility. Further, this Court could determine, just as the lower court did, that the affidavit fails to show how the children would be better off with Tonya. These issues should lead this Court to a determination that the denial of an evidentiary hearing was well warranted in this matter.

58) Dated this 1st day of July, 2021.

/s/ Justin D. Hager

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CERTIFICATE OF SERVICE

59) I hereby certify that a true and correct copy of the Brief of Appellee were served electronically through the Supreme Court's electronic filing system on the 1st day of July, 2021, to Theresa Kellington, Attorney for Tonya Kerzmann, 619 Riverwood Dr., Ste. 202 Bismarck, ND 58504 at the following email address: theresa @kopcemail.com.

/s/ Justin D. Hager

Attorney for JR Kerzmann, Appellee

Certificate of Compliance

60) I hereby certify that this document complies with the type-volume limitation specified in N.D.R.App.P. Rule 32. This document uses a font of Times New Roman 13 font size. The brief does not exceed 38 pages for a principal brief as there are 22 total pages in the Appellee's Brief including all cover pages, table of authorities and table of contents.

/s/ Justin D. Hager

Attorney for JR Kerzmann, Appellee