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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Mark Lynn Olson,	)	
	)	
Plaintiff/Appellant	)	
	)	
vs.	)	Supreme Court No. 990343
	)	
Lisa Ann Olson n/k/a	)	
Lisa Ann Michels,	)	
	)	
Defendant/Appellee.	)	

BRIEF OF THE APPELLANT

APPEAL FROM THE ORDER ENTERED BY THE
HONORABLE JOEL D. MEDD ON THE
20TH DAY OF OCTOBER, 1999,
GRAND FORKS COUNTY DISTRICT COURT

Grand Forks District Court No. 98-C-00587

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II. WHETHER THE TRIAL COURT ERRED IN DISREGARDING THE RECOMMENDATION OF THE GUARDIAN AD LITEM.

STATEMENT OF THE CASE

This proceeding began on May 12, 1998 when the Plaintiff, Mark Lynn Olson (hereinafter "Mark") brought an action for divorce.(App. 3-8) The Defendant, Lisa Ann Michels (hereinafter "Lisa") answered the Complaint on May 26, 1998. (App. 9-11) Both parents sought an award of physical custody of their daughter. (App. 6-7, 9-10) Their only child, Faith Ashley Olson, was born on August 2, 1997.(App. 6)

Based upon the parties' Stipulation, Attorney John Thelen was appointed Guardian ad Litem for Faith. On April 9, 1999, he filed an extensive 51 page report including his recommendations. (App. 48-95)

In May of 1999, the parties mediated through the Conflict Resolution Center at the University of North Dakota and all issues were resolved except one dealing with debt. (App. 33-34, 36-47) On July 23, 1999, the Court decided that remaining issue and an Order for Judgment was entered. (App. 96-97) On August 10, 1999, the Judgment of Divorce was entered. (App. 98-106)

Only forty-two (42) days after entry of Judgment, in September of 1999, Lisa brought a Motion to allow her to move Faith from her home in Grand Forks to Houston, Texas. (App. 107) Mark filed and served his Brief and Affidavit opposing that motion. (App. 115-127)

The hearing on Lisa's motion was held on October 20, 1999 and the court ruled later that day. (App. 128-133)

Mark appeals alleging that the trial judge committed reversible error in its decision granting Lisa's request.

STATEMENT OF THE FACTS

The facts relevant to this motion are simple and straightforward.

On June 30, 1995, Mark and Lisa married. (App. 5) Their only child, Faith Ashley was born on August 2, 1997 and is now 2 ½ years of age (Tr. 6). Faith has lived in the Grand Forks area all her life.

Mark and Lisa separated shortly before divorce. They divorced on August 10, 1999. (App. 98-106) Prior to separation, they cooperatively parented Faith. During separation, they essentially shared Faith's time. (App. 116)

Despite the semantics of the divorce decree which provided that Lisa had physical custody after the divorce, Mark testified that the parents continued to share Faith's time. Mark testified that he normally did not go more than five days without seeing Faith. (Tr. 79) In addition, the longest time Faith has ever gone without seeing her father was two weeks. (Tr. 79-80).

In September of 1999, which was less than two (2) months after entry of the final Judgment of Divorce, Lisa brought her motion to allow her to change Faith's residence from Grand Forks, North Dakota to Houston, Texas. (App. 107)

Hearing was held on October 20, 1999. That very same day, the Judge granted her request. (App. 128-133)

Lisa, at the time of the request, was 25 years old. (App. 5) She was employed as the secretary for the Assistant Director of Housing and Conferences at the University of North Dakota. (Tr. 6) Because of her employment, she was able to continue her education at the University with a tuition waiver. (Tr. 7) As she was

a student, she was able to live at a reduced rate, in student housing. (Tr. 7) In addition to those benefits, she earned $15,482.00 in annual salary, and had benefits including health insurance for Faith, retirement benefits, life insurance, paid vacation, and paid sick time. (Tr. 6, 7)

Mark, at the time of hearing, lived with his significant other and her three children in East Grand Forks, Minnesota. (App. 117) Faith developed close relationships with those children, Amber age 14, Amanda age 10, and Adam, age 8. (App.116)

Mark testified that his current relationship was permanent. (Tr. 94) Mark had owned and operated his own construction business, but at the time of hearing, was working as an employee for another contractor. (App. 117)

Mark's affidavit in response to Lisa's motion specifically delineated Faith's schedule since separation. (App. 121-124) As a practical matter, Faith has had the benefit of significant time with each of her parents since her birth. (Tr. 79-80)

At the time of the initial meetings between the Guardian ad Litem and Mark in the divorce process, Mark expressed his concern to John Thelen that Lisa intended to leave North Dakota. (Tr. 55) Mr. Thelen testified that Mark, as well as some of his family members, expressed their belief that Lisa had plans to move Faith to Texas. (Tr. 55) As early as his application for a temporary order at the commencement of the divorce, Mark expressed his concern regarding a potential move. (App. 20) Because of those expressed concerns, Mr. Thelen specifically questioned Lisa regarding her intentions. (Tr. 56) She told Mr. Thelen that she had

no immediate plans to move to Texas and talked of a move "way down the road." (Tr. 56) She told Mr. Thelen of the potential for such a move but only when Faith was older and could better handle the distance from her father. (Tr. 56) She even told Mr. Thelen that she would not want to be in a position of separation from her child and that it would be unfair to Faith to have that kind of distance from one parent. (Tr. 57) From that, Mr. Thelen said he felt confident, if Lisa were awarded custody, a move would not happen (Tr. 57) Mr. Thelen testified that his recommendation was based, in part, on Lisa's representation that she intended to stay in Grand Forks. (Tr.57) In fact, Mr. Thelen stated that if she had disclosed the potential move, it would have weighed heavily, "very heavily" against her. That was because Mr. Thelen believed Faith, at her age, had a good relationship with both parents and needed them both. (Tr. 57, 58) Mr. Thelen was particularly concerned with a move because of Faith's age. (Tr. 59) He described Mark's relationship with Faith as an "important" and "good" one. (Tr. 59) He felt very strongly the move was contrary to Faith's best interests. (Tr. 86)

Lisa testified that she would move Faith to Houston, Texas; temporarily live with her sister, and work temporarily at a brother-in-law's law firm in a clerical position. (Tr. 10, 11) Her new job paid $22,000.00; $500.00 gross more per month than she was earning at U.N.D. (Tr.10)

The only inquiry Lisa had made regarding housing was to look to a housing guidebook. (Tr. 14) The only inquiry regarding daycare was to assume she would use a daycare provider her sister had used in the past. (Tr.15) She had never even

visited with that daycare provider except to be introduced for less than five minutes. (Tr. 37) She also admitted she had not physically looked at a single apartment. (Tr. 29) She acknowledged there would be significant deposits for rent and utilities, and that she had no money to use for those purposes. (Tr. 30)

Lisa's bachelor's degree is in Textiles, Merchandising and Clothing. (Tr. 8) She has never worked in a law office and has no experience whatsoever in the legal field. (Tr. 31) In fact, she testified the only reason she had the job was because of her relative. (Tr. 33) She admitted she had never typed a legal documents and never done legal research. (Tr. 31) She testified she would work for a medical malpractice firm but also had no medical education. (Tr. 32) She also had no concrete information about jobs available in her career field in the Houston, Texas area.

Although Lisa attempted, on direct examination, to make this move and new job seem as attractive as possible, cross examination revealed otherwise.

Comparing the testimony regarding her new job and new residence to what she had in Grand Forks revealed the following:

Employment	North Dakota	Texas
Income	$15,400/year (Tr. 24)	$22,000/year(Tr. 10)
Health Insurance	Yes - including Faith (Tr. 24-25)	Yes (Tr. 25)
Life Insurance	Yes (Tr. 25)	Unknown (Tr. 25)
Paid Vacation	Yes (Tr. 25)	Not immediately (Tr. 25)
Paid sick time	Yes (Tr. 25)	Not immediately (Tr. 25)

Housing benefit	Yes (Tr. 25)	No (Tr. 26)
Paid education	Yes (Tr. 26)	No (Tr.26)
Commute to work	Minimal	One hour (Tr. 28)

She told the trial judge that one of the advantages of her proposed move was she would be going to where her family was living. (Tr. 33) However, on cross examination, she admitted her mother lives near Devils Lake, North Dakota; her father lives in Langdon, North Dakota; her stepbrother lives in Grand Forks; her stepsister lives in Grand Forks; and her grandmother lives in Devils Lake. (Tr. 33-35) The only family Lisa has in Texas is a sister and brother-in-law. (Tr. 35)In addition, Mark's extended family all reside in North Dakota. (Tr. 35)

The trial judge found from the evidence that 1.) Lisa had a temporary job; 2.) Lisa had a temporary place to stay; and as 3.) Lisa would earn $6,600.00 more in gross annual income there were sufficient facts to justify Faith's move to another state.

Mark disagrees and brought this appeal.

ARGUMENT AND STATEMENT OF AUTHORITY

I. The Trial Court Erred in Allowing Lisa to Change the Residence of a 2 ½ Year Old Child from the State of North Dakota.

Our legislature has addressed the issue of change of residence of children at N.D.C.C. §14-09-07. It provides,

> "A parent entitled to the custody of a child may not change the residence of the child to another state except upon order of the court or with the consent of the non-custodial parent, if the non-custodial parent has been given visitation rights by the decree. A court order is not required if the non-custodial parent: 1) has not exercised visitation for a period of one year; or 2) has moved to another state and is more than fifty miles (80.4 kilometers) from the residence of the custodial parent."

Prior to 1997, this court had heard numerous cases regarding the issue, but in 1997 this court articulated a four part test to be used by trial judges in deciding relocation cases. See, Stout v. Stout, 560 N.W.2d 903, 1997 N.D. 61 (N.D. 1997). It is important to follow the evolution of the law prior to Stout to understand the policy underlying the rule.

It is clear the real concern of our courts is for the preservation, of and protection of, the child's relationship with both parents. As is true with our scheme of custody/visitation law - it is always the best interests of the **child**; not the parent that controls. See, Severson v. Hansen, 529 N.W.2d 167 (N.D. 1995).

In an early relocation case that rejected the concept that exceptional circumstances must be shown to justify removal, it was nonetheless made clear that the test for removal was whether it was in a child's best interest. See, Burich v. Burich, 314 N.W.2d 82 (N.D. 1981). The move in Burich was necessary due to the new employment of the custodial parent's husband. The Burich court stated, "The best interests of the child, however, should still be the primary issue in deciding whether or not a change in residence of the child should be permitted." Id. at 85. The court then continued and stated, "It is interesting to note what representative Wayne Stenehjem, co-sponsor of the bill...said in his appearance before the Senate Committee on social, welfare, and veteran's affairs. **Generally, it was his view that this bill would encourage judges to look into a case a little deeper to determine what is truly best for the child.**" Id. at 85. (emphasis added, citations omitted)

In Olson v. Olson, 361 N.W.2d 249 (N.D. 1985), Ms. Olson requested permission to relocate a young boy for employment reasons. The original judgment which was based upon the parties' stipulation contained a provision that if one parent left Grand Forks, the child's custody would revert to the parent who remained in Grand Forks. In Olson, the parties' son had been in the parents' joint physical custody, but they agreed that the joint arrangement was not working. Olson established that it was the custodial parent's burden to prove that a move was in the child's best interest. It also made it clear that there was no presumption that a parent's decision to leave was in the child's best interest. Ms. Olson had argued

that the court should establish a presumption that it is in a child's best interest to move with his or her custodial parent. In responding to that assertion, this Court stated,

> "The statutory recognition of visitation rights between the child and the non-custodial parent is consistent with placing the burden upon the custodial parent to show that moving the child to another state is in the child's best interest. We conclude that there is no presumption that a custodial parent's decision to change the child's residence to another state is in the child's best interest. We are unpersuaded that it would be consistent with our statutes or otherwise appropriate to adopt such a presumption, and we refuse to do so." Id. at 252.

The importance of a child's relationship with both parents rang loud and clear in this Court's decision in McRae v. Carbno, 404 N.W.2d 508 (N.D. 1987). The McRae case involved a divorced couple that both resided in Fargo. As is true in Faith's case, neither of the parents had remarried. However, the custodial mother made a request to allow a change of residence from Fargo to Spokane, Washington. This case, although prior to Stout, presents the most similar factual circumstance to Faith's case. This court explained the facts in the McRae case as follows,

> "Following their divorce, Lisa and Steven have both resided in Fargo. At the time of these proceedings, Lisa was employed as an assistant warehouse foreman. Lisa asserts that she has secured a position

with her sister's residential house cleaning service in Spokane. There she would earn approximately the same pay as she currently does in Fargo, but the new job, Lisa asserts, would provide her greater flexibility in working hours with the opportunity to spend more time with Rachel. Lisa also asserts that Rachel's maternal grandparents have moved to Spokane and have offered to pay the cost of Lisa and Rachel's move from Fargo to Spokane. Lisa contends that by moving to Spokane, she and Rachel will have a more desirable lifestyle with greater opportunities. Steven resists Lisa's attempt to relocate Rachel to another state, because such a move would make it impractical for him to continue an ongoing personal relationship with Rachel of the type that is now fostered by the weekly visitation privileges. Steven asserts that the move would negatively impact the good father/daughter relationship that Rachel and he enjoy."

Id. at 508-509.

The district judge denied the mother's request for relocation, and that denial was affirmed on appeal. In so doing, this court stated,

"**Being a good parent is very difficult. Being a good parent in a non-custodial role, with the parent-child contact severely limited by court decree, is extremely difficult. The legislature and the past decisions of this court have placed a high level of importance on the rights of children to have the love and**

companionship of both parents. Any act which will interfere with that relationship should be closely scrutinized. .....

In many cases, the determination of custody is an extremely close decision, and the determination that the best interest of the child will be served by placing the child in the custody of one parent takes into consideration the liberal visitation rights granted to the other parent. In some cases a trial judge might very well have placed the child in the other parent's custody if, at the time of awarding custody, the court had known the proposed custodial parent planned to move from the state."

Id. at 510. [emphasis added]

Once again, although the McRae case predated Stout, it does stand for the proposition that this court must consider the best interests of the child in making determinations regarding moves. In addition, the McRae case is factually similar to Faith's case in that the custodial mother in McRae had no more of a plan than Lisa did in this case.

A year later in Hedstrom v. Berg, 421 N.W.2d 488 (N.D. 1988) this court talked of balancing the advantage of the move against the negative impact the move would have on the relationship with the non-custodial parent. The case did affirm the trial judge's grant of a relocation motion but, once again, the Hedstrom case dealt with a move necessitated by the new husband's employment.

Again, a year later, in Novak v. Novak, 441 N.W.2d 656 (N.D. 1989), this court affirmed the trial judge's granting of a motion to relocate. However, once again, in Novak, the custodial mother had remarried and the relocation dealt with career opportunities for her current husband.

In 1989, Mr. Thomas, the non-custodial father, again advanced the argument earlier advanced in Olson, supra, that the standard should be whether "exceptional circumstances" existed. That again was rejected. See, Thomas v. Thomas, 446 N.W.2d 433 (N.D. 1989) However, as with a number of relocation cases, the move in Thomas was necessitated as the custodial mother had remarried and her husband's job required him to move from Bismarck to Brainerd, Minnesota.

In Stout, this court was faced with deciding whether the trial judge had erred in refusing to allow Ms. Stout to move to Arkansas with their 2 year old son, Tell.

Although it is clear the Stout analysis will apply to Faith's case, the facts in Stout are very different from the facts in Faith's case.

In Stout, neither parent was from North Dakota. Ms. Stout's family was in Arkansas and Mr. Stout's in Missouri. Id. at 905. The couple had moved to North Dakota for Mr. Stout's employment and had no other connection to North Dakota. Id. at 905-906. Both parties had master's degrees in criminal justice, but Ms. Stout had not worked in her career field since their son's birth. Id. at 905. In addition, Mr. Stout had the ability to transfer with his employment.

The trial judge denied Ms. Stout's request to return home and was reversed on appeal. In explaining the trial judge's reasoning, this court stated,

> "It reasoned first, James had exercised his visitation rights and the relationship would suffer; second, the court had denied Julene's request to move at the time of divorce; and third, the $2.50 per hour wage increase was not a sufficient enough economic advantage to justify the separation of Tell and James. The court noted that Julene should be able to rehabilitate herself while remaining in Grand Forks, and that is precisely why the court ordered the combination of child support and spousal support in order to allow Julene to stay in this area, even if she were making a relatively low income. The court also stated that there had been no change of circumstances since Julene's last request to move." Id. at 906.

In establishing the four part test, the court explained,

> "It has long been the policy in this state that the best interest of the child is the primary consideration in determining whether or not a custodial parent may change the residence of the child. Presently, our statute regarding removal, states if the non-custodial parent who has visitation rights does not agree to the removal, the custodial parent must seek a court order. The custodial parent must prove, by a preponderance of the evidence, that the move is in the best interest of the child.

In Hedstrom v. Berg, 421 N.W.2d 488, 490 (N.D. 1988), we held that in removal cases the trial court should waive the favorable factors of the move against the negative impact on the relationship between the child and the non-custodial parent." Id. at 906 (citations omitted)

This Court then thoroughly discussed the statutory law, legislative history, and various case law regarding removal. In addition, this Court looked to the works of Judith S. Wallerstein and the law, both case and statutory, from numerous other jurisdictions.

In summary, this Court stated, "...our research of other jurisdictions has failed to reveal a universally accepted approach to resolving the question of when a custodial parent may relocate, but some guiding principles emerge from several well reasoned cases." Id. at 911.

This Court then stated, "Our review of these cases indicates that until now, our Court has articulated a standard for resolving relocation issues which, simply stated, is the best interest of the child. While we do not dispute that it should be the best interest of the child remains the ultimate objective in resolving relocation issues, we believe that the standard must be given more specific and instructive content in order to provide our trial courts with adequate guidance and to provide more uniform dispute resolution." Id at 912.

It then set forth the four part test the trial court must examine in making relocation decisions:

1. The prospective advantages of the move in improving the custodial parent and child's quality of life.

2. The integrity of the custodial parent's motive for relocation considering whether it is to defeat or deter visitation by the non-custodial parent.

3. The integrity of the non-custodial parent's motives for opposing the move.

4. Whether there is a realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the non-custodial parent's relationship with the child if relocation is allowed, and the likelihood that each parent will comply with such alternate visitation."

Id. at 913.

Since Stout, this Court has heard several other relocation cases.

In Sumra v. Sumra, 561 N.W.2d 290, 1997 N.D. 62 (N.D. 1997), the trial court was affirmed in its award of custody to Mrs. Sumra and allowing her to move to her home country of Wales. This court was very specific in differentiating the Sumra case from the Stout case in that Sumra was an initial decision in a divorce proceeding, not a motion for removal after the original decree had been entered and it involved a move out of the country as opposed to an in-country move. The Sumra case is distinguishable because the court was dealing with a determination of what was best, pursuant to North Dakota Century Code Section 14-09-06.2.

Shortly after Sumra, this court heard the case of In the Matter of B.E.M. vs. K.D.M., 566 N.W.2d 414 ,1997 N.D. 134 (N.D. 1997). In that case, the trial court was reversed in part and affirmed in part. This Court affirmed the portion of the lower court's decision allowing a mother to relocate with a minor child outside of the state of North Dakota. However, this court reversed the portion of the trial court's order which reduced the father's visitation. It is important to note that in this case, the relocation was necessary as the child's mother had married a gentleman who had employment outside the state of North Dakota. That is certainly not the case in Faith's situation.

There is also a significant difference between this case and Faith's case. In The Matter of BEM, the child's mother stated that she would move regardless of whether her motion to take her child with her was granted or denied. In Faith's case, Lisa was very specific in her statements that she would not accept the employment and move to Texas if could not take her daughter. (Tr. 20) Perhaps that statement is the best evidence available that the move was simply not well thought out, nor committed to by Lisa.

In Hanson v. Hanson, 567 N.W.2d 216, 1997 N.D. 151 (N.D. 1997), this court emphasized the importance of the non-custodial parent's rights when a move is suggested. The Court affirmed a trial judge's decision that it was necessary for a mother to obtain judicial permission or the permission of the non-custodial parent when attempting to make a temporary move out of the state.

This Court stated, "Section 14-09-07, N.D.C.C. was created to protect the non-custodial parent's visitation rights in the event the custodial parent wants to move out of the state...it's purpose is to "safeguard the visitation rights of the non-custodial parent and to thereby maintain and promote the parent and child relationships"... Id. at 218.

In Paulson vs. Bouske, 574 N.W.2d 801, 1998 N.D. 17 (N.D. 1998), the trial judge was reversed after denying a mother's request to change the residence of her child.

Once again, the Paulson case is not instructive in this case as the move was necessitated by the custodial mother's current husband's employment.

In Melling v. Ness, 592 N.W.2d 565, 1999 N.D. 73 (N.D. 1999), the trial judge was affirmed after it granted a mother's permission to change a child residence from North Dakota to the state of Florida.

Once again, however, this case is not particularly instructive as there were compelling reasons for the mother's request for a change of residence. Most significantly, the objective court appointed Guardian ad Litem recommended the move, Ms. Melling had found employment and she suffered from a medical condition which was aggravated by the cold. Id. at 568. In Faith's case, the Guardian ad Litem recommended that the move be denied, Lisa had only temporary employment and obviously no medical condition existed.

In addressing the Stout factors, the Melling court stated "no one factor dominates, and a factor that has minor impact in one case may be the dominant

factor in another. The court must balance the prospective advantages of the proposed move in improving the custodial parent and the child's quality of life with the potential negative impact on the relationship of the non-custodial parent and the child." Id. at 571. In addition, the non-custodial parent in the Melling case had committed acts of domestic violence. Id. at 568.

Once again, none of those compelling facts exist in Faith's case.

In Keller v. Keller, 584 N.W.2d 509, 1998 N.D. 179 (N.D. 1998), the trial judge had denied the custodial mother's request to change the residence of a 14 year old girl from Grand Forks to Fort Wayne, Indiana.

The Kellers had divorced when their daughter was 10 years old. She was placed in her mother's custody, and Mr. Keller had liberal visitation. After divorce, the mother completed her post graduate education receiving a Ph.D. in Clinical Psychology. She accepted employment in Fort Wayne, Indiana. She sought court permission to change her daughter's residence and the court denied that request. The trial judge found she had failed to prove an economic advantage of the move and that regular personal contact with Mr. Keller was necessary to protect the child's best interests. Id. at 512.

This court disagreed. Justice Sandstrom dissented. The Stout factors remained constant following Keller.

In Hawkinson v. Hawkinson, 591 N.W.2d 144, 1999 N.D. 58 (N.D. 1999), the trial judge was affirmed after granting Ms. Hawkinson's request to move a 12 year old boy from Moorhead, Minnesota to Minneapolis, Minnesota. Id. at 146. The move was necessitated by Ms. Hawkinson's new husband's employment.

In Hawkinson, this court, without overruling Stout, rewrote the fourth test. This court stated,

> "However, to make explicit that determining the best interests of the child requires consideration of both positive and negative impact of the proposed move, we restate the fourth Stout factor as follows:
>
> 4.) The potential negative impact on the relationship between the non-custodial parent and the child, including whether there is a realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the non-custodial parent's relationship with the child if relocation is allowed, and the likelihood that each parent will comply with such alternate visitation." Id. at 147.

In May of 1999, Goff v. Goff required this court to directly face the issue of how relocation impacts the non-custodial parent's relationship. 593 N.W.2d 768, 1999 N.D. 95.

In Goff, Mrs. Goff sought judicial permission to move the couple's two young children from Fargo to Holland, Michigan. The trial judge denied her request and was reversed on appeal. However, as not true in Faith's case, there was

substantial evidence that there would be advantage to Mrs. Goff by the move. In addition, she was returning to her family home.

In 1999, this court heard a relocation case with peculiar facts in Love v. DeWall, 598 N.W.2d 106, 1999 N.D. 139 (N.D. 1999). In Love, the court had previously placed custody of young child with the paternal grandparents finding that neither parent was an appropriate custodian. Later, after remarriage and complying with court conditions, custody was returned to Ms. Love who sought permission to relocate. She also sought to terminate the visitation arrangement which had been established for the child with the paternal grandparents. The Guardian ad Litem recommended that the move be allowed and that the paternal grandparents have a minimum of one month visitation. Id. at 108. Once again, the trial court allowed the move and was affirmed on appeal. However, the Love case is not instructive in Faith's case especially since the Guardian ad Litem recommended the move while in Faith's case, the Guardian ad Litem strenuously resisted. In addition, the move was requested due to remarriage.

In Tibor v. Tibor, 598 N.W.2d 480, 199 N.W. 150 (N.D. 1999), the District Court judge was reversed after denying a request for change of residence.

However, and once again, the Tibor case is not instructive as it involved a relocation due to the custodial parent's husband's employment and offered substantial financial benefits as a result of that employment. In addition, the Tibor case involved judicial determination of application of the relocation statute in joint

custody cases. Stout required the trial judge to assess the advantages to Lisa and Faith.

These "advantages" as articulated by the court were 1.) a pay increase; 2.) similar benefits; 3.) temporary housing with relative to save money; and 4.) better use of degree due to size of city. (App. 128-134)

First, the trial judge felt a $500.00 per month gross increase in pay was an advantage. This is simply not correct. After taxes, Lisa agreed, the increase in pay was not even sufficient to cover the increased cost of housing. (Tr. 29,30)

If this court were to validate such an economic advantage as sufficient to meet the first prong of Stout, it would be virtually impossible for trial judges to deny a relocation request based upon the argument of economic advantage.

Next, the trial judge stated Lisa's benefits will be about the same. That statement is simply wrong, based upon the evidence presented at pages 4 and 5 of this Brief is a comparison, and it shows clearly the benefits are not similar. By moving to Houston, Lisa lost her life insurance, retirement program, and her paid vacation and sick time until after ninety (90) days. (Tr. 25) Perhaps most significantly, for a $500.00 gross pay increase, she lost her benefits for a tuition waiver at UND and her student housing. (Tr. 25)

It appears the trial judge was blind to the issue of benefits.

The question of whether housing with a relative is an advantage is certainly open to debate. The trial judge ignored the very real possibility that moving into and sharing someone else's home would be disruptive to Faith. The judge felt it was

an advantage because it would allow Lisa to save money to be able to afford housing. **How could a court find an economic advantage to a relocation when the custodial parent cannot even afford independent living.** Does that not beg the question of the obvious financial insecurity that would come to a young parent in a new city.

Second, the trial judge must have considered the integrity of Lisa's motivation in relocating.

Although it is true, these parents anticipated a move; it was equally true that any anticipated move was contemplated - in the future - and not the near future.

The integrity - or lack thereof - with regard to Lisa's motive is evident by the fact she concealed it from Mr. Thelen. The trial judge made no findings on this factor except to say there was no evidence that Lisa's motive was to defeat visitation.

Third, the trial court must have addressed Mark's motives in opposing the move. Although the court found no ulterior motive, it glossed over Mark's important testimony regarding his opposition to the move. He stated,

"Q Did you hear anything that Ms. Michels said that you believe would constitute an advantage to Faith?

A No, I don't.

Q Now taking into account not just the time you two were married but the time that led up to your marriage after you became involved with Ms. Michels, how long of a period of

time were you two together?

A About five years.

Q And in those five years, Mark, did you and Ms. Michels ever take a trip to Texas to spend time with the sister in Houston?

A Yes, we did.

Q How many times?

A Once.

Q Once?

A That I went with. Lisa actually went twice, once with Faith.

Q And then how many times did the sister, Jody, spend time with your family in North Dakota?

A I believe she was up here twice while we were still together. (Tr. 82-83)

Q Now considering that Faith is two years of age, Mark, as her father, do you have any comment for the Court as to the impact you think it would have on Faith to be removed from her extended family so she would not have the opportunity to see them frequently?

A I believe it would be very detrimental to Faith. These are the people she's known all her life. The regular contact that she's had and has been able to experience over the last two years would be pretty much gone other than the three months that

they propose.

Q You heard Ms. Michels testify as to why she thinks this move is an advantage to her, correct?

A Correct.

Q And I believe she said she thought it wasn't an advantage economically because it would allow her to look for a position in her career field –

A Correct.

Q --- correct? Do you agree with that that that's an advantage to Ms. Michels and thus an advantage to Faith that should justify a move?

A No, I don't.

Q Why not?

A The economic advantage isn't there. I don't see how it, when she has stated in her testimony that most of what she's going to be making extra, more than she has now every month, will be eaten up by rent, utilities and such. There's not much economic advantage and the advantage for Faith to be with both parents on a consistent basis such as she is now isn't there because of the distance.

Q Do you see any advantage, Mark, being as objective as you can, do you see any advantage at all to Faith by this move?

A No, I don't. (Tr. 86-87)

Q Do you see any advantage, trying to be as objective as you can, to Ms. Michels by this move?

A No, I don't.

Q In the past in your discussions with her, when you've discussed the possibility of her finding employment in her career field, did you ever discuss locations?

A Yes.

Q Has Ms. Michels, in all the time that you've been with her, ever told you why she wants to leave North Dakota?

A Yes.

Q Yes? You just need to speak up, Mark. In your discussions with her why did she tell you she wanted to leave this area?

A She doesn't like the cold. There's nothing here for her, she doesn't like to be considered a hick.

Q I'm sorry, I can't hear you.

A She doesn't like to be considered a hick.

Q So in your discussions with her she said she didn't like the weather and she thought being a North Dakotan constituted being a hick?

A Backwards, yes. (Tr. 87-88)

Q You know, because I've told you, Mark, that the Court has to assess why you're opposing the move, the integrity of your reason for saying no, I don't want my daughter to move, you know that, right?

A Yes, I do.

Q Okay. What's motivating you to come to this courtroom, Mark, and argue about whether Faith should move with her mom?

A Faith's best interests. I believe that Faith should, at her age should be in regular contact with both parents and not have long periods of interruption and I believe being around her, will facilitate the regular contact that we have had.

Q If you were separated from your daughter if the Court allowed the move and there was a six month period of time where you could not see Faith and Fait could not see you, based upon her level of development right now, do you think that you could maintain any meaningful telephone contact or contact through the mail with her?

A No, not, she can't read or write so that's kind of tough to mail anything as far as to hold a conversation through a letter. Telephone to a minimum, very minimum. (Tr. 88-89)

Q Do you have the present ability, Mark, based on your income, to be buying airline tickets at the rate of $600?

A No, I do not.

Q Ms. Michels' motion asks that you be responsible for all travel expenses associated with your visitation. Based upon your current income do you believe that would prohibit the ability to on a Saturday afternoon jump on an airplane, go to Houston and see your daughter if you had a free weekend?

A It would really prohibit it.

Q Would it be impossible?

A It would be impossible, yes." (Tr. 91)

Finally, the trial judge must have assessed the impact on Faith's relationship with her father and whether there was a realistic possibility of visitation.

Again, the trial judge's findings are insufficient to pass the muster of the Stout/Hawkinson fourth factor. The trial judge simply, and without citation to supporting facts, stated the advantages to Lisa outweighed the negative impact on Faith. Not only did he ignore the many disadvantages of the move, he refused to acknowledge the testimony of the sole objective advocate for Faith - her Guardian ad Litem.

John Thelen testified as follows:

"Q Okay. Knowing that the Court has to make a determination as to four factors under our existing law when it considers a move, and the first being the prospective advantages in the move in improving Ms. Michels' and Faith's quality of life by

this proposed move to Texas, do you have any comment for the Court after your investigation and then hearing her testimony as to whether you believe as Faith's advocate there would be a prospective advantage to Faith in this move to Texas?

A Economically?

Q In any way.

A Well, I think I've expressed as far as the relationship, the problems with the relationship and the distance and what that would cause with her father.

Economically, you know, I don't, from what I hear and for what it's worth, I don't know what it's worth but I don't see a big economic advantage. You have a $500 net increase. When you start factoring in a decrease in child support based on assistance or cost of visitation and you start adding up travel time and I know there's a, the cost of living may be about the same and you start adding up travel time and extra time in day care and that kind of thing, I just don't see the advantage and I know that she's testified she's going to be looking for a different job and where is that going to be? Is it going to be in the Texas area? Well, probably, but I mean that's nothing secure. You know, I don't –

Q With respect to the fourth, accepting that the second and third factors the Court has to look to are pretty subjective which are motives in moving and Mark's motive in opposing but that the fourth standard that the Court has to judge is the potential negative impact on the relationship between Mark and Faith and also factoring in whether there's a realistic opportunity for visitation that would allow mark to continue to have the relationship that he does now with Faith, do you have any comment on that fourth factor?

A I don't think it is realistic and part of it is, of court, the age, the sheer difference. When you talk about the economic part of it and the problems they're going to have, even if you take a look at the cost of the move and try to factor that cost into the increase in income and project how many months do I have to be down there to start recouping that or break even, you know, we are looking at 12, maybe 24 months before your are going to start to break even just with the cost of changing the address. And I know she was living where she can live cheaply and she's definitely going to need that but that's an indication maybe you're not getting enough with this change of job in order to make. And I question the, you know, I think it's going to damper the ability for these people to send Faith back

and forth, you know, not to mention the idea that it's going to, you know, the quantity of the visitation is going to be decreased significantly.

Q Going back to the issue of whether this move would be an advantage to Faith or a disadvantage to Faith, do you see any concern at all for moving Faith to Texas temporarily, getting her adjusted in one home and then moving her out of that home?

A My answer to that is I don't want her to go at all because it's not good for Faith, for her to be down there if he's if he's -- if she's up here her best situation is to have both parents accessible with the kind of visitation that they've been able to arrange. When you talk about 60 days in the summer for Mark, you would have to really think seriously about switching the custody issue because summer is his busiest time, that's when he's working his 12 hour shifts, getting as much done during the summer and you're saying let's send Faith up her for the summer when he's going to be as busy as he's going to be. That doesn't make any sense. His best months are during the winter, he's less busy, he can work more 9 to 5. You don't have the timetables when you're in the construction business to get things done because of the weather. That

makes more sense. To say I'm going to send her up her for the summer is like sending him to somewhere else because of his work schedule. You're just not going to see her very much when you're working as much as he does and that's a problematic issue when it comes to workability of the visitation.

(Tr. 61-63)

The trial judge had the obligation to exercise sound discretion in assessing Lisa's move of a 2 ½ year old to Texas. If he abused that discretion, this Court can and must, correct the error. See, Stout v. Stout, Supra.

II. The Trial Court Erred in Not Considering the Testimony and Recommendations of the Guardian ad Litem.

N.D.C.C. § 14-09-06.4 allows the appointment of a Guardian ad Litem in cases where there is special concern for minor children. The Guardian ad Litem's job is to "serve as an advocate of the children's best interests in a divorce proceeding."

Although the court may use its discretion in determining what weight to give the recommendations of the Guardian ad Litem, it must also articulate why those recommendations are followed or rejected. See, Schneider v. Livingston, 543 N.W.2d 228 (N.D. 1996). In assessing a father's argument that the court failed to properly consider a Guardian ad Litem's testimony and recommendation, this court stated,

> "The trial court is statutorily vested with the responsibility of awarding custody of a child to the parent who will promote the best interest and welfare of the child. The court cannot delegate this responsibility to a Guardian ad Litem or other independent investigator. The weight assigned to a Guardian ad Litem's testimony and recommendation is within the trial court's discretion and the court does not have to, nor should it, regard a Guardian ad Litem's testimony and recommendations as conclusive.
>
> ...Evidence that the trial court considered the Guardian ad Litem's testimony and recommendation is found in the court's

memorandum an order in which it made several references to the Guardian ad Litem's report. The references included both agreement and disagreement with the Guardian ad Litem's evaluation, findings independent of the Guardian ad Litem, and comments addressing the Guardian ad Litem's primary parenting concerns. The trial court exercised it's discretion in considering the Guardian ad Litem's testimony and recommendations..." Id. at 233 [citations omitted]

The Schneider case resulted in an order which explained why the trial judge disagreed with the Guardian ad Litem's recommendations.

In Faith's case, she had one advocate in the courtroom on October 20th. That sole voice told the judge what he felt was best - those words and recommendations were ignored. Disregard for Mr. Thelen's opinions, without explanation, is error. There is not a single reference in the trial judge's order as to why the court disagreed with Mr. Thelen's recommendations.

CONCLUSION

In a perfect world, parents would not separate and divorce. In a perfect world, if divorce were absolutely necessary, divorced parents would cooperatively locate near one another and cooperate with one another for the well being of their children. In a perfect world, parents would recognize parenting has little to do with personal convenience and advantage and much to do with sacrifice and cooperation. It is from the sacrifice and cooperation that the real rewards of parenting come.

This is, however, not a perfect world for children of divorce. It is a world in which elected judicial officials are expected to make difficult determinations regarding the futures of young children when those youngster's own parents cannot agree on what is best.

North Dakota Law, since courts began addressing issues of placement of children following divorce, has always been more concerned with the children's than the parents' best interests. No one could credibly argue with the propriety of that statement.

Stout represented a minor departure from that general concept when it allowed the court to consider the advantage of a move to a custodial parent and not just the prospective advantage to the child; the obvious inference being that the advantage to the child flows from the advantage to the parent.

This court now must decide the fate of 2 ½ year old Faith Ashley Olson. Faith has lived in a small community since her birth. In that community, both her parents have secure jobs allowing them to earn income sufficient to support Faith. Her mother has the additional advantage of free on-going college education and safe, secure housing at a reasonable price. Faith has also the advantage of a loving and close extended family in an approximate eighty mile radius. Most importantly, she has the advantage of both her parents.

Lisa, however, and despite her representations to the Guardian ad Litem otherwise, wants to move to Houston, Texas. She has no job there except one, for which she has no education or experience, arranged only because of a relative. She has no permanent place to live, no permanent daycare, and most importantly, she has the stress of a new job miles from home with little support.

This court must decide whether those "advantages" meet the first test of Stout.

Mark believes they do not even come close.

This court should consider just what an affirmance of this case means. Does it not transform the first Stout test into ... Any advantage perceived by the custodial parent! To require so little (a temporary job with fewer benefits and minimal salary increase) would be to effectively require trial courts to grant every motion for relocation.

Mark respectfully asks that this Court reverse the trial judge, enter an order denying the move, and allow Faith the advantage she should have ---- both her parents.

DATED this 17 day of January, 2000.

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