ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20000040

Supreme Court No. 2000-0040
Morton Co. No. 95-C-1315

Bryan C. Tibor,

Plaintiff/Appellee,

vs.

Kathleen E. Zich, f/k/a Kathleen E. Tibor,

Defendant/Appellant.

BRIEF FOR APPELLEE

AN APPEAL FROM AN AMENDED JUDGMENT AS TO VISITATION AND CHILD SUPPORT, FEBRUARY 3, 2000.

Mr. Gregory Ian Runge (ID #04724)
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Attorney for Appellee

Mr. Steven Latham
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Bismarck, North Dakota 58501
(701) 223-5300
Attorney for Appellant

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE DISTRICT COURT ERRED IN AWARDING BRYAN SEVEN WEEKS OF SUMMER VISITATION, THAT IS, FROM MAY 31 TO JULY 24 OF EACH YEAR.

II.

WHETHER THE DISTRICT COURT ERRED IN AWARDING BRYAN A DOWNWARD DEVIATION FROM THE CHILD SUPPORT GUIDELINES.

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I. STATEMENT OF THE CASE

Bryan concurs with the rather lengthy Statement of the Case presented by the Appellant.

II. STATEMENT OF THE FACTS

On February 3, 2000, the court, Judge Bruce Haskell entered the following Order and Judgment:

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF MORTON	SOUTH CENTRAL JUDICIAL DISTRICT
Bryan C. Tibor,	)
Plaintiff,	)
v.	) AMENDED JUDGMENT AS
	) TO VISITATION SCHED-
Kathleen E. Zich, f/k/a	) ULE AND CHILD SUPPORT
Kathleen E. Tibor,	) Case No. 95-C-1315
	)
Defendant.	)
.....	)

The parties continue their battle. The defendant flied a Rule 59 Motion for Reconsideration of Court's Order Establishing Visitation Schedule. The plaintiff filed a Reply to Defendant's Rule 59 Cross-Motion and a Motion for Reduction of Child Support.

The defendant correctly pointed out an error in my Order. Easter is not a holiday that provides for a meaningful visitation opportunity. Therefore, any references to Easter are eliminated. The parties will alternate spring break as set out in the Order.

The summer vacation schedule will stay the same on the front end. The end date will be July 24. These dates will allow the children some time at the end of school and at the start of school to do what they need to do. The children have the rest of the year to spend with their extended family in Georgia. Any less time would not allow the children enough time to participate in activities in either Georgia or North Dakota. The dates are set because the parties can't agree the sun comes up in the east. The fewer opportunities for the parties to negotiate and disagree the better.

Visitation is as follows:

Summer

The plaintiff will have the children from May 31 to July 24 of each year. This amount of time is necessary to make up for time during the rest of the year the plaintiff is unable to see the children. In addition, this will give the children the opportunity to participate in activities in Bismarck/Mandan if they so choose.

Holidays

The parties will each have the children for one week for the Christmas/New Year holiday. The week will alternate each year, with the defendant having the children the first week in 1999 and the plaintiff the second. In 2000, the plaintiff will have the children the first week and the defendant the second. The weeks will alternate thereafter. The reason the defendant is given the first week in 1999 is to give the parties as much time as possible to arrange for the children's transportation.

The parties will alternate Thanksgiving. In 2000, the defendant will have the children for Thanksgiving. The plaintiff will have the children for Thanksgiving 2001, and so on. This will place more time between the children's travel for holidays.

The parties will alternate having the children for the entire spring break. In 2000, the plaintiff will have the children for spring break. In the years the plaintiff has the children far spring break, they will travel to North Dakota the day spring break begins and return to Georgia the day before school resumes.

The plaintiff may visit the children at any time in Georgia as long as he provides the defendant with at least one week notice.

The plaintiff will pay all travel expenses incurred by him and the children solely for the purpose of visitation. He will be responsible for making all travel arrangements, with such arrangements to be in compliance with the Judgment and any amendments.

Further conditions

1. The plaintiff will give a minimum of seven days notice of intent not to exercise all or part of scheduled visitation. When such notice is not reasonably possible, the maximum notice permitted by the circumstances and the reasons therefore, will be given. The defendant will give the same notice when events beyond her control make the cancellation or modification of scheduled visitation necessary.
2. The defendant will send an appropriate supply of children's clothing with them, which will be returned clean, when reasonably possible, with the children.
3. The parties will always keep each other advised of their home and work addresses and telephone numbers. The defendant will provide the plaintiff with grade reports and notices from school as soon as they are

received, and will permit the plaintiff to communicate directly with the school and with the childrens' doctors and other professionals outside the presence of the defendant. Each parent will immediately notify the other of any medical emergencies or serious illnesses of the children. If a child is taking medication, the defendant will provide a sufficient amount and appropriate instructions for the visitation period

4. Telephone calls between the parents and children will be liberally permitted at reasonable hours. The children may call either parent at reasonable hours and with reasonable frequency at the cost to the parent called, if the call is long distance. The parent the children are with will not refuse to answer the telephone or turn it off to deny the other the ability to call or be called.

Each parent has an unrestricted right to send cards, letters, packages, etc. to the children. The children have the same right as to each parent.

5. The parents will not speak negatively of the other in the children's presence. The parents will discourage their relatives and friends from doing so as well. The parents will encourage the children to respect the other parent. The children will not be used to spy on a parent by the other.

6. NEITHER SUPPORT OR VISITATION WILL BE WITHHELD BECAUSE OF EITHER PARENT'S FAILURE TO COMPLY WITH THIS ORDER. ONLY THE COURT MAY ENTER SANCTIONS FOR NON-COMPLIANCE. CHILDREN HAVE A RIGHT TO BOTH SUPPORT AND IN VISITATION, NEITHER OF WHICH IS DEPENDANT ON THE OTHER. IN OTHER WORDS, NO SUPPORT DOES NOT MEAN NO VISITATION AND NO VISITATION DOES NOT MEAN NO SUPPORT IF THERE IS A VIOLATION OF EITHER VISITATION OR THE SUPPORT ORDER, THE EXCLUSIVE REMEDY IS TO APPLY TO THE COURT FOR APPROPRIATE SANCTIONS.

The above is a minimum schedule. This Order is not to foreclose the parties from agreeing to additional visitation as they find reasonable.

Child Support

The preponderance of the evidence establishes that it would be in the childrens' best interests to allow rebuttal of the child support obligation presumption under the North Dakota Child Support Guidelines, specifically §75-02-04.1-09(2)(I), N.D.A.C. The only way the parties are going to quit fighting is if there is nothing left to negotiate, arrange or discuss. The plaintiff has offered to pay all visitation expenses and make all travel arrangements. The evidence establishes that he will be unable to pay child support and the full amount of travel expenses. The defendant suggests that a reduction in the obligation is not appropriate until after expenses have been incurred. This would lead to an unwieldy process by which there would have to be an annual hearing in which evidence of incurred expenses would be presented. Then, I assume I would have to somehow give the plaintiff a rebate or credit for the expenditures. No authority presented by the defendant supports this theory.

The unrebutted evidence presented at the hearing on December 6,1999 is that the travel expenses would be approximately $15,853.50 per year. However, this amount is based on all the expenses being incurred every year. As it stands, the children will not be visiting every year at spring break. Therefore, one-half of that amount, or $621, must be subtracted. Further, the plaintiff cannot be allowed a reduction for his wife's travel to Georgia. This amount is $3,740. I also do not think it appropriate to allow a reduction for a rental car while the plaintiff is in Georgia. This amount is $120. Therefore, the plaintiff is allowed a reduction of $11,372.50 for purposes of calculating his child support obligation. The plaintiff's present child support obligation is $995 per month. He also pays $200 per month toward arrearages. $995 x 12 = $11,940 per year. $11,940 -$11,372.50 = $567.50. $567.50 + 12 = $47.29 per month. To make it easier for the plaintiff and the State Disbursement Unit, the plaintiffs child support obligation is set at $50.00 per month beginning March 1, 2000. He will continue paying $200 per month on any outstanding arrearage until that amount is paid in full.

The Judgment is ORDERED amended consistent with this Order.

Dated at Bismarck, North Dakota, this 3 day of February, 2000.

BY THE COURT

Bruce B. Haskell, District Judge
South Central Judicial District

Kathy Tibor Zich now appeals from that Judgment.

III. JURISDICTION

The district court had jurisdiction under N.D. Const. Art. VI, § 8, and N.D.C.C. § 27-05-06(1). The appeal from the district court was filed in a timely manner under N.D.R. App. P. 4(b). This Court has jurisdiction under N.D. Const. Art. VI, § 6, N.D.C.C. § 29-01-12, and N.D.C.C. § 29-28-06.

IV. ARGUMENT

A. THE DISTRICT COURT DID NOT ERR WHEN IT GRANTED BRYAN SEVEN WEEKS OF SUMMER VISITATION INSTEAD OF THE SIX WEEKS SOUGHT BY KATHY ZICH.

The lower court held in part:

* * *

The summer vacation schedule will stay the same on the front end. The end date will be July 24. These dates will allow the children some time at the end of school and at the start of school to do what they need to do. The children have the rest of the year to spend with their extended family in Georgia. Any less time would not allow the children enough time to participate in activities in either Georgia or North Dakota. The dates are set because the parties can't agree the sun comes up in the east. The fewer opportunities for the parties to negotiate and disagree the better.

Visitation is as follows:
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* * *

App. 73-74.

This was a change from the previous order whereby the lower court initially order that Bryan was to have visitation with the children from "May 31 to July 31." App. 18. The above change is another loss in Bryan's visitation by seven days. Now, the appellant, Mrs. Zich wants to take another week from Bryan.

This Court has held that:

> This court will not reverse a trial court's finding on visitation unless it is clearly erroneous. ***Lohstreter v. Lohstreter***, 1998 ND 7, ¶ 10, 574 N.W.2d 790 (citation omitted). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if

> after review of the evidence, this court has a definite and firm conviction a mistake has been made. *Id.* After reviewing the evidence in the record, we are not left with a definite and firm conviction a mistake has been made in this case.

Love v. DeWall, 1999 ND 139, ¶ 6, 598 N.W.2d 106 (N.D. 1999); *Dickson v. Dickson*, 1997 ND 167 ¶ 14, 568 N.W.2d 284 (N.D. 1997).

In this case, the lower court first ordered Bryan to have summer visitation from May 31 to July 31 of each year. App. 18. At the request of Appellant Zich, the lower court, while not granting the Appellant's requested six weeks, did lower Bryan's summer visitation to from eight weeks to seven weeks. App. 72-73.

When this Supreme Court allowed Appellant Zich to leave North Dakota, it ordered the lower court to again hear the case "for establishment of an appropriate visitation schedule." *Tibor v. Tibor*, 1999 ND 150 ¶ 28, 598 N.W.2d 480 (1999). At the time this case was first heard in the lower court, Bryan was seeing his children close to fifty percent of the year. Now, the Appellant Zich wants to take even more time from Bryan and his children.

No, the lower court's decision to allow Bryan seven weeks of visitation was not will clearly erroneous. Bryan asks this Court to uphold the lower court's order and judgment as to this issue.

B. THE DISTRICT COURT DID NOT ERR WHEN IT GRANTED BRYAN A DOWNWARD DEVIATION IN HIS CHILD SUPPORT.

The lower court ordered:

* * *

Child Support

> The preponderance of the evidence establishes that it would be in the childrens' best interests to allow rebuttal of the child support obligation presumption under the North Dakota Child Support Guidelines, specifically §75-02-04.1-09(2)(l), N.D.A.C. The only way the parties are going to quit

fighting is if there is nothing left to negotiate, arrange or discuss. The plaintiff has offered to pay all visitation expenses and make all travel arrangements. The evidence establishes that he will be unable to pay child support and the full amount of travel expenses. The defendant suggests that a reduction in the obligation is not appropriate until after expenses have been incurred. This would lead to an unwieldy process by which there would have to be an annual hearing in which evidence of incurred expenses would be presented. Then, I assume I would have to somehow give the plaintiff a rebate or credit for the expenditures. No authority presented by the defendant supports this theory.

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* * *

App. 75-76.

The North Dakota Appellate Court has held that:

Section 14-09-09.7(3), N.D.C.C., creates a rebuttable presumption that the amount of child support required under the child support guidelines is the correct amount. Under N.D.Admin. Code § 75-02-04.1-09(2), the presumptively correct amount is rebutted only if a "preponderance of the evidence establishes that a deviation from the guidelines is in the best interests of the supported children and ... (l)[t]he reduced ability of the obligor to provide support due to travel expenses incurred solely for the purpose of visiting a child who is the subject of the order." A trial court's determination of child support is a finding of fact and will not be overturned on appeal unless it is clearly erroneous. ***Dalin v. Dalin***, 545 N.W.2d 785, 788 (N.D.1996). A party seeking a deviation from the presumptively correct guideline amount of child support has the burden of proof. Id.

Carver v. Miller, 1998 ND APP 12 ¶ 20, 585 N.W.2d 139 (N.D.App. 1998)

In *Schmaltz v. Schmaltz*, 1998 ND 212, 586 N.W.2d 852 (N.D. 1998), Sheila Schmaltz argued that the trial court erred in awarding visitation, because it failed to adequately consider the transportation her costs. The child support guidelines permitted a deviation from the scheduled child support amount if the court finds a "reduced ability of the obligor to provide support due to travel expenses incurred solely for the purpose of visiting a child who is the subject of the order." **N.D. Admin. Codes** 75-02-04.1-09(2)(1). ¶ 13. The trial court reduced Sheila's scheduled child support obligation by $2,781 per year expressly "because of the amount of visitation ordered herein." *Id.*

This Court held,

> It is impermissible for a trial court to abate an obligor's child support obligation for temporary periods when the children reside with the obligor. N.D. Admin. Code s 75-02-04.1-02(2); *Edwards v. Edwards*, 1997 ND 94, ¶15, 563 N.W.2d 394. Consequently, we assume the trial court's intent was not to abate Sheila's support obligation for temporary periods in which the children are visiting with her, but, instead, to reduce her support obligation in consideration of the expenses, including transportation costs, associated with the frequent visitations. The town of Harwood, where Sheila resides, is about a one-hour drive from Wahpeton, where Thomas and the children reside. We find no error by the court.

Schmaltz v. Schmaltz, 1998 ND 212, ¶14, 586 N.W.2d 852(N.D. 1998)

In Bryan's case, the lower court did not err. Bryan demonstrated that he has a reduced ability of the obligor to provide support due to travel expenses incurred solely for the purpose of visiting a child who is the subject of the order

First, Bryan demonstrated his reduced ability to provide support when he presented unrebutted evidence that his income and expenses (including child support) would not allow him to both provide support and visitation expenses. App. 39-41.

Second, Bryan represented to the lower as to what airline fairs were to cost when he presented evidence at the hearing. Transcript of Hearing, dated Dec. 6, 1999 at 5-7; App. 42-51. Bryan verified to the lower court the accuracy of his Exhibit 2, where in the Appellant Zich paid $353.50 for each of the children to fly to Bismarck for the Christmas holiday back here in Bismarck. App. 47, 68, 86-87.

Now, Appellant Zich argues that because Bryan had not incurred any travel expenses he could not ask for a downward deviation from the child support guidelines. Bryan disagrees.

First, Appellant's "incurred" argument puts Bryan in the proverbial "catch-22" situation. Bryan has demonstrated, without opposing evidence, that he cannot afford to buy airline tickets and provide the amount of child support he is presently paying. Based upon Appellant Zich's argument Bryan will never get to see his children.

In ***Schmaltz***, cited above, this Court as well as the lower court let stand anticipated travel expenses. ***Schmaltz*** at ¶14. However, Bryan did demonstrate that his travel expense figures were not only accurate, but that indeed he had expended some funds for travel. App.63-65. He was initially ordered to pay half of the travel expenses. App. 19. And, the expenses were incurred, albeit, remain unpaid. App.63-65.

In ***Schumacher, n/k/a Bonita Wikenheiser v. Schumacher***, this Court held that:

> The first issue on appeal is whether it was clearly erroneous to allow Schumacher a deduction for medical expenses allegedly incurred by the parties' children. Section 75-02-04.1-01(7)(e), N.D. Admin. Code, authorizes a deduction from the total gross monthly income for "[p]ayments made on actual medical expenses of the child or children for whom support is being sought." RCSEU contends Schumacher was not entitled to this deduction because he showed no documentation he made the medical payments. During the hearing, Schumacher testified he had been paying the children's medical bills. Although Schumacher did not know exactly how much he had paid each month, he stated he paid on average $200 each month. No contrary evidence was presented at the hearing. On this testimony and after our review of the entire record, we conclude the deduction for medical expenses was not clearly erroneous.

Schumacher, n/k/a Bonita Wikenheiser v. Schumacher, 1999 ND 10 ¶6, 589 N.W.2d 185 (N.D. 1999).

As in ***Schumacher*** and ***Schmaltz***, the lower court allowed a deduction and a deviation, respectively for expenses anticipated, but not incurred. So it is in Bryan's case. The lower court allowed a downward deviation in Bryan's child support based upon uncontroverted evidence (Exhibit 2) for travel expenses anticipated, but not incurred.

V. CONCLUSION

For the reasons set forth above, Bryan Tibor respectfully requests the North Dakota Supreme Court to uphold the lower court decision in this matter.

Dated this day 21st of July, 2000.

Respectfully submitted,

Gregory Ian Runge
Attorney for the Appellee

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 2000-0040
Morton Co. No. 95-C-1315

Bryan C. Tibor,	)
	)
Plaintiff/Appellee,	)
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vs.	)
	)
Kathleen E. Zich, f/k/a	)
Kathleen E. Tibor,	)
	)
Defendant/Appellant.	)

CERTIFICATE OF SERVICE

I certify that I am the attorney representing the Appellant to this action. I made service of the **BRIEF FOR THE APPELLEE** by a mailing true copy to Mr. Steven Latham, 220 N. 4th St., Bismarck, North Dakota 58501, Attorney for Appellant on this 21st day of July, 2000, in accordance with Rule 5(f) of the North Dakota Rules of Civil Procedure.

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CERTIFICATE OF SERVICE

I certify that I am the attorney representing the Appellant to this action. I made service of the **NOTICE OF MOTION AND MOTION FOR EXTENSION OF TIME TO FILE BRIEF** by a mailing true copy to Mr. Steven Latham, 220 N. 4th St., Bismarck, North Dakota 58501, Attorney for Appellant on this 21st day of July, 2000, in accordance with Rule 5(f) of the North Dakota Rules of Civil Procedure.

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