

ORIGINAL

20040139

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT # 20040139

IN THE INTEREST OF L.R., A MINOR CHILD

R.R. ,)
)
Plaintiff/Appellee,)
)
v.)
)
G.H., as herself and Guardian)
L.C.R.,)
)
Defendants/Appellants.)

Stutsman County
Case no. 00-R-00215

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUN 25 2004

STATE OF NORTH DAKOTA

BRIEF OF APPELLANTS

Appeal from the Third Amended Judgment
Filed on May 4th, 2004
Stutsman County District Court
Before District Judge Wade Webb

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CASES:

Loll v. Loll, 1997 ND 51, 561 N.W.2nd 625.....5,6

STATUTES:

Rule 52(a), N.D.R.Civ.P5

RULES:

none

STATEMENT OF THE ISSUES

1. Whether the trial court failed to make adequate findings of fact and conclusions of law.
2. Whether the trial court was clearly erroneous in determining an equitable distribution of transportation costs and burdens associated with child visitation.
3. Whether the trial court was clearly erroneous in failing to honor G.H.'s subpoena and determining that a non-custodial parent's financial circumstances were not relevant to legal decision regarding an equitable distribution of transportation costs and burdens associated with child visitation.
4. Whether the trial court was clearly erroneous in deciding that less frequent and longer time periods for child visitation was appropriate for a 4 year old minor child with separation anxieties and behavioral disorders.

STATEMENT OF THE CASE

This case involves an original paternity action and subsequent motions and amended judgments. The original judgment was entered on February 5th, 2002 by District Judge Norman Backes. G.H. was granted full custodial rights to the minor child. R.R. received visitation.

On March 7th, 2003, District Judge Frank Racek made written Findings of Fact, Conclusions of Law and Order for Amended Judgment. This Amended Judgment was filed on March 11th, 2003.

On April 21st, 2004, District Judge Wade Webb issued an order amending the amended judgment. A Second Amended Judgment was filed on April 29th, 2004. In his order amending the amended judgment, Judge Webb ordered entry of a third amended judgment. The Third Amended Judgment was filed on May 4th, 2004. This third amended judgment amended the Second Amended Judgment.

STATEMENT OF THE FACTS

The minor child, L.R., has a birth date of March 27th, 2000. At the time of the hearing for the third amended judgment, L.R. was a little over 4 years old.

When the original judgment was entered, both R.R. and G.H. lived in Jamestown, ND. G.H. was granted full custodial rights subject to reasonable and structured visitation by R.R. See App. 1 through 2.

On December 20, 2002, G.H. made a motion to modify the structured visitation. See App. 4-6. At this time G.H. lived in Bismarck, ND. R.R. opposed the motion and suggested a different structured visitation. See App. 7-8. On March 7th, 2003, Judge Racek made certain written conclusions of law which stated, "The minor child's visitation schedule shall be beneficial and not harmful, and should be modified to this result. The costs and burdens of transportation due to visitation shall be modified to reflect an equitable distribution." Further, Judge Racek made a Finding of Fact which stated, "Regarding the costs and burdens of visitation, the parties' circumstances involving costs and burdens of visitation has significantly changed, due to the travel distance now required for visitation. The Plaintiff's [R.R.'s] circumstances indicate that he is better able, and more capable, to be more responsible for the costs and burdens of transportation, as compared to the Defendant's [G.H.'s] circumstances." See App. 9-14.

On September 19, 2003, G.H. made a motion to amend the amended judgment. See App. 15-17. At this time, G.H. was living in Elgin, ND. G.H.

sought a modification of the structured visitation. R.R. filed a demand for change of judge. Judge Webb was assigned to hear the motion. A hearing was held on December 11, 2003. On March 8th, 2004, Judge Webb denied modification of the structured visitation or its costs and burdens, but ordered entry of a Second Amended Judgment. See App. 18-19. Judge Webb made no written findings of fact or conclusions of law.

On March 8th, 2004, R.R. made a motion to modify the structured visitation. See App. 20-22. A hearing was held on March 30th, 2004. On April 21st, 2004, Judge Webb issued an order amending the second amended judgment, preparation and entry of the second amended judgment, and entry of a third amended judgment. See App. 23-25. Judge Webb made no written findings of fact or conclusions of law. Judge Webb did make certain statements and decisions at the conclusion of the March 30th hearing. See TR p. 56, line 5 through p. 64; See also App. 26-34.

In his order amending second amended judgment, Judge Webb states that he reviewed the entire file and testimony contained in the Affidavits and the testimony at the hearing. See App. 23. G.H. filed an affidavit and return to motion. See App. 35-97. R.R. filed an affidavit. See App. 98-103.

G.H. served upon R.R., and filed with the clerk of court, a subpoena requiring R.R. to produce the following: (1) 2004 Federal Income Tax Returns; (2) monthly pay stubs; (3) documents regarding health insurance costs; (4) documents from R.R. disability doctors indicating an inability or restriction on

travel from Jamestown to Elgin, ND. See App. 104. At the hearing, R.R.'s attorney objected to questions regarding the subpoena. The objection was based upon relevancy. The court sustained the objections. See App. 105-107.

G.H. filed a notice of appeal (App. 108) from the Third Amended Judgment. App. 109-113.

ARGUMENT

A district court's finding will not be disturbed unless clearly erroneous. Rule 52(a), N.D.R.Civ.P. Judge Webb made no findings of fact regarding R.R. physically abilities. He made no findings of fact regarding L.R.'s separation anxieties and behavior disorders. He made no findings of fact which would explain why he would deny G.H.'s previous and contemporary motion for 5 day visitations and grant R.R.'s motion for 7 day visitations. He made no findings of fact regarding the financial circumstances of the parties. He gave no explanation for ignoring Judge Racek's previous and contemporary findings and conclusions regarding the parties abilities and capabilities. He gave no explanation for deviating from Judge Racek's previous and contemporary findings and conclusions. He made no findings as to any changes since his last hearing. He made no findings or conclusions as to the credibility of evidence or testimony. Judge Webb unreasonably and arbitrarily changed the visitation schedule and redistributed the costs and burdens of visitation transportation.

In revising a visitation order, the district court should consider an equitable distribution of the costs and burdens of visitation, or provide a satisfactory

explanation for the present unequal distribution. Loll v. Loll, 1997 ND 51 at ¶20, 561 N.W.2nd 625. This means that equitable does not necessarily mean equal. Rather, the parties circumstances need to be taken into account.

Without clear findings of fact, it is impossible to determine whether an order is clearly erroneous. Loll v. Loll, 1997 ND 51 at ¶9. However, the Supreme Court may rely upon implied findings of fact when the record enables an understanding of factual determinations and conclusions. *Id.* at ¶9.

At the hearing, Judge Webb failed to take into account the financial resources or time resources of the parties in determining an equitable distribution of visitation costs and burdens. Previously, Judge Racek and Judge Webb both determined that G.H. should be responsible for 1/3 costs and burdens in non-summer months, ¾ responsible for June and August, and ½ responsible for July. G.H. had the option of making R.R. shoulder the entire burden of visitation by paying him \$25 per trip. Now, G.H. is equally responsible for all cost and burdens of visitation. G.H. is now in an impossible situation where she cannot financially afford to comply with the present third amended judgment.

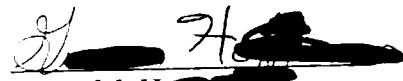
At the hearing, the court relied upon undisclosed experts and testimony not in evidence. The court made its conclusions that 7 day visits were not harmful to a 4 year old child with separation anxieties and behavioral disorders. G.H. had no opportunity to question these expert opinions as to L.R.'s specific circumstances. Instead of the prior more frequent and shorter visitation schedule set forth by Judge Racek and affirmed by Judge Webb, himself, Judge Webb changed visitation

~~to less frequent and longer time periods of visitation.~~

CONCLUSION

This case should be remanded to the district court with instructions to make adequate findings of fact and conclusions of law.

June 22nd, 2004


G. M. H.