

SUPREME COURT

20090075

OF THE

STATE OF NORTH DAKOTA

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No. 20090075

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MELISSA FLECK, N/K/A MELISSA REGAN,

STATE OF NORTH DAKOTA

PLAINTIFF – APPELLANT,

vs.

TROY A. FLECK,

DEFENDANT – APPELLEE.

APPELLANT'S BRIEF

Appeal from the February 17, 2009 Memorandum Opinion and Order
of the District Court
Burleigh County
South Central Judicial District
Honorable Robert O. Wefald
Case No. 08-06-C-1109

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STATEMENT OF ISSUES

1. **Whether the lower court's decision denying Appellant's request for custody and permission to relocate to the State of Arizona with the minor children and by granting custody to Appellee was clearly erroneous?**
2. **Whether the lower court's decision on establishing child support for the Appellant was clearly erroneous?**

STATEMENT OF THE CASE

This is an appeal of a Memorandum Opinion and Order on Motions denying the plaintiff-appellant's, Melissa Fleck n/k/a Melissa Regan (hereinafter "Melissa"), motion to Amend Judgment and Permission to Relocate. The Memorandum Opinion and Order was entered on February 17, 2009 from the South Central Judicial District, County of Burleigh, by the Honorable Judge Robert O. Wefald. (Appendix at 17) [hereinafter "A" at 17].

This action was commenced in July of 2006 by Melissa, by and through her attorney, Theresa L. Cole of American Legal Services, P.C., as a divorce action. Judgment was entered by the Court on or about August 3, 2006 by Judge Bruce Haskell. (A at 5). The physical custody of the minor children, namely J.P.F, whose date of birth is 1999, and D.J.F., whose date of birth is 2000, was to be shared equal between the parties.

On or about the 31st of July, 2008, Melissa sought to amend the Judgment of divorce to 1) change custody of the parties' minor children from a shared custody arrangement to plaintiff having full physical custody subject to reasonable visitation by the defendant; 2) establish a visitation schedule for the defendant; and 3) establish a child support obligation for the defendant and 4) for

permission to relocate to Arizona with the minor children. Troy also initiated an action for change of custody given Melissa's move to Arizona..

This matter proceeded to an evidentiary hearing which was held on January 12, 2009, on the competing motions of Melissa and Troy Fleck (hereinafter "Troy") to amend Judgment dated August 4, 2006 in order to give each of them sole custody of their two children. A hearing was held on January 12, 2009. Melissa was present with her attorney, Theresa L. Cole, and Troy was present with his attorney, Daniel H. Oster. On February 17, 2009, the Honorable Robert O. Wefald entered a Memorandum Opinion and Order denying plaintiff's motion. (A at 17). Melissa herein appeals that Memorandum Opinion and Order. The plaintiff filed her Notice of Appeal on or about February 23, 2009. (A at 47).

FACTS

Prior to, and during the divorce proceedings, Melissa was attending college in Sioux Falls, South Dakota and Troy and the children resided in North Dakota. Since Melissa was a sophomore in high school she knew she wanted to be a nurse. Ever since following around a health care provider in high school she knew it was something she wanted to do. After Troy and Melissa had children, she decided it was a good idea to pursue her dream while the children were still young. (Regan Trans. 8:2-8:11, Jan. 12, 2009).

Melissa discussed with Troy her interest in attending nurse anesthesia school in South Dakota and they agreed that in order to provide a secure future for everyone, she should continue with school. (Regan Trans. 8:12-8:24). Melissa applied at Texas Wesleyan, University of North Dakota, and Mount Marty College. She was accepted into Mount Marty College in Sioux Falls, South Dakota. Melissa proceeded to move to Sioux Falls in August of 2005 with classes beginning in

September of 2005. (Regan Trans. 9:2-9:12).

Throughout the eleven months Melissa attended school, she traveled extensively between Bismarck and South Dakota in order to be with her children. For the first month she was in school, she traveled to Bismarck every weekend. However, due to lack of financial means and there being no feasible way she could maintain successful grades with that arrangement, she made the difficult decision to visit her children in Bismarck every other weekend thereafter. Melissa only missed a weekend visit to Bismarck twice due to conflict of holidays and homework. (Regan Trans. 9:23-10:6). After the eleven (11) month program, Melissa began her residency in Bismarck, North Dakota. During this time, Melissa providing financial support to Troy while she lived in Sioux Falls. She paid for half of the marital home, daycare, dental, medical, cable, and electric. (Regan Trans. 14:1-14:12).

On or about May 23, 2006, Melissa served Troy with a Summons and Complaint, initiating the divorce proceedings. Throughout these proceedings, Melissa maintained her contact with her children via phone calls every night and returning to Bismarck every other weekend.

After Melissa and Troy told their children about the divorce, Troy did not feel comfortable with Melissa staying in the marital house during her visits as previously was the arrangement. She wasn't allowed to take anything from the marital home; none of the beds, children's clothes, toys, or books. She had two options at the time: stay with her grandmother or her cousin. She attempted to stay at both places but found it too burdensome on the family and decided to rent an apartment. Melissa first rented a \$900/month apartment which was also located in her grandmother's apartment building, but soon could no longer afford the apartment. Given Troy had not let her take any of the children's necessities from the home, forcing her to buy all new items, she was forced to find

alternative housing. Consequently, she found an efficiency apartment that would suit her and the children when she came back to Bismarck.

Melissa has since remarried and attempted to find employment in the Bismarck/Mandan area. Since Melissa attended school at Mount Marty, she was allowed to complete her residency in Bismarck. (Regan Trans. 12:8-12:10). Melissa and her husband, Shawn Regan (hereinafter “Shawn”), decided to move to Bismarck and rented a house. They returned in August of 2006 and the divorce was finalized. (Regan Trans. 14:16-14:25). Melissa and Troy worked out an agreement to share custody of the children. She took care of the children every other weekend. She picked them up from school every day and was with them until Troy got off work. During their time together they would have dinner, complete homework, play games or have play dates, depending on when Troy arrived. However, due to Melissa’s job, she had to be at work at 6:30 a.m. every morning and nobody was available to watch the children, thereby forcing Melissa to give up her overnights with them. Eventually she secured a babysitter who was at their house at 5:45 a.m. every morning. (Regan Trans. 23:20-24:1). This was great for the Regans and allowed more time for Melissa to spend with her children. There was an issue with shared custody between Troy and Melissa. Troy was inflexible when it came to switching visitation. Troy was very set in not allowing Melissa to switch holidays. This caused heartache on both Melissa and the children. Melissa continued to search for a permanent position in Bismarck for at least nine months to no avail. When Melissa first moved to Bismarck, she signed on with CompHealth, which is a locum travel agency for CRNA’s, and was working to get her placement. CompHealth had a difficult time placing Melissa as a new graduate. They would find her work in rural areas as the sole anesthesia provide, but being a new graduate, Melissa was not comfort with being by herself. CompHealth would find her work for one

week in one town and another week in another, all in different towns. (Regan Trans. 26:24-27:10). Melissa applied at St. A's and Medcenter One and spoke with the head of the CRNA anesthesia department, and still could not find a permanent position in Bismarck. (Regan Trans. 27:20-27:25). Melissa continued to actively seek employment locally for nine months. (Regan Trans. 28:14-28:16). Since Melissa moved to Arizona no position has opened up for a CRNA in North Dakota. (Regan Trans. 28:23-29:2).

It is clear that Melissa and Shawn both exerted serious attempts to secure employment in the Bismarck/Mandan area, but were unsuccessful in that there were no jobs available in their field. Given they were unable to secure employment in North Dakota, they looked elsewhere and were both able to find great offers in Arizona. Both Melissa and Shawn were able to find jobs in Arizona and moved there in April 2008. (Regan Trans. 24:24-24:25). Shawn was offered a full-time W-2 position with benefits and vacation and Melissa was offered a 1099 position. (Regan Trans. 29:22-29:24).

As Melissa testified in court, the advantages of moving to Arizona to herself and the children would be significant. Her employment provided her with a substantial income at the same time being able to spend a significant amount of time with the children. The community Melissa and the children would live in is a very safe environment with many new young families and children. Melissa researched the availability of extra curricular activities for the children as well as the special education programs the children may need. Melissa and her husband have a network of friends and family living in the area as well. It is clear that the move would be very advantageous to their family.

Melissa firmly believes that a structured visitation schedule can be adopted that would allow

Troy and the children to maintain their relationship. Melissa has always been cooperative with regards to visitation and in fostering and preserving Troy's relationship with their children. Melissa is willing to take full responsibility for the transportation costs involved with the visitation pursuant to the visitation schedule. However, should Troy choose to exercise visitation outside of the schedule, he shall be solely responsible for said costs.

We believe Judge Wefald erroneously ruled that it was best for the children to live with Troy. We firmly believe a tragic mistake has been made.

STANDARD OF REVIEW

Questions of law are fully reviewable on appeal. Kienzle v. Selensky, 2007 ND 167, ¶ 9, 740 N.W.2d 393. Interpretation of a statute is a question of law fully reviewable on appeal. Pryatel v. T.E., 2007 ND 166, ¶ 7, 740 N.W.2d 100. The primary objective in interpreting a statute is to determine the legislature's intent. Id.

LAW AND ARGUMENT

I. Whether the lower court's decision denying Appellant's request for custody and permission to relocate to the State of Arizona with the minor children and granting custody to Appellee and denying Appellant's change of custody was clearly erroneous?

The test for changing the custody of a minor child is set forth in North Dakota Century Code § 14-09-06.6. The court may modify a prior custody order after the two-year period following the date of entry of an order establishing custody if the court finds a material change has occurred in the circumstances of the child or the parties and the modification is necessary to serve the best interest of the child. N.D.C.C. § 14-09-06.6(6). If it has been less than two years since the date of the order establishing custody then under § 14-09-06.6(3) there must be an exception justifying a modification

by a showing of willful interference with visitation, danger to the children's health, or a change in primary physical care of the child to the other parent for longer than six months.

In deciding whether to change custody, a court must consider whether there has been a material change of circumstances since the original custody decree. N.D.C.C. § 14-09-06(6)(a). If the court decides there has been a material change in circumstances, it must decide whether a change in custody is necessary to serve the best interests of the child. N.D.C.C. § 14-09-06.6(6)(b). The clear change of circumstances was Melissa relocating to Arizona.

A district court's decision on child custody, including an initial award of custody, are treated as findings of fact and will not be set aside on appeal unless clearly erroneous. Klein v. Larson, 2006 ND 236, ¶ 6, 724 N.W.2d 565. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the entire evidence, is left with a definite and firm conviction a mistake has been made. Gietzen v. Gabel, 2006 ND 153, ¶ 6, 718 N.W.2d 552. Under the clearly erroneous standard of review, the Supreme Court does not re-weigh the evidence or reassess the credibility of witnesses, and will not retry a custody case or substitute its judgment for a district court's initial custody decision merely because it might have reached a different result. Dvorak v. Dvorak, 2006 ND 171, ¶ 11, 719 N.W.2d 362. A choice between two permissible views of the weight of the evidence is not clearly erroneous. Dvorak, at ¶ 11.

In this case, Melissa sought to relocate the children to Arizona, and thus established the existence of a change of circumstances which in turn supported the change of custody. The best interest and welfare factors that are to be considered by a court in evaluating custody are found at Section 14-09-06.2 of the North Dakota Century Code.

Section 14-09-06.2 N.D.C.C. provides as follows:

Best interests and welfare of child—Court consideration—Factors

1. For the purpose of custody, the best interests and welfare of the child is determined by the court's consideration and evaluation of all factors affecting the best interests and welfare of the child. These factors include all of the following when applicable:

a. The love, affection, and other emotional ties existing between the parents and child.

As testified by Melissa at the hearing, the bond between the children and her is "very close."

The children are able to be open with their mother. The children can talk to Melissa about their problems and some of the fears they have. They are definitely close. (Regan Trans. 62:20-62:22).

On the contrary, the relationship between Troy and the children is rocky. Melissa testified that she doesn't believe Troy has the emotional capacity to effectively deal with the children's emotions. (Regan Trans. 62:10-63:13). Troy and his mother have emotions of a rock. There have been instances when D.F. will be crying and Troy tells him to 'suck it up and get back out there'. (Regan Trans. 63:1-63:13).

Melissa testified that she is fortunate to have the option to work only twice a week whereas Troy works Monday through Friday, every day. Should the children move to Arizona to be with Melissa, they would not need to go to an after school program like they do in Bismarck, namely, BLAST. While Melissa lived in Bismarck, she would pick up the children from BLAST, go home, complete homework, have a family meal, and when time provided, the children could have play dates. (Regan Trans. 22:6-22:9). During the time Melissa was in Bismarck, she attended the children's activities. (Regan Trans. 25:1-25:12). While Melissa lives in Arizona, she flies to Bismarck in order to be with her children every two weeks. (Regan Trans. 31:1-31:3).

Shawn testified to a noticeable change in the children's attitude when they stay with Melissa.

Shawn noticed that D. is very disrespectful the first couple days but after a couple days he'll shape up and return to the D. that they know. He does not notice much change in J., she remains sweet. (Regan Trans. 180:15-180:24).

Colleen Walsh [hereinafter Colleen], Melissa's mother, described her daughter as woman of integrity, of strength, honesty, warm and caring, as well as professional. (Walsh Trans. 192:2-192:8). She states that Melissa has never placed anything priority other than her children. (Walsh Trans. 192:18-192:20). She continued to describe instances in which the children would be bothered by something and they could easily talk to their mother about it. Melissa allows her children to express their feelings and shows them love and warmth. (Walsh Trans. 192:24-193:8). In all the years Colleen has known Troy, she has not seen him as an emotional person. (Walsh Trans. 193:18-193:19). She sees Shawn as very strong and very caring on the other hand. She sees an emotional interaction between Shawn and Melissa that she never saw between Troy and Melissa. (Walsh Trans. 194:1-194:5). Colleen's huge concern with the children being placed in Troy's custody is she believes they will be turned against their mother or any other family member, including her as a grandma. She believes this because her calls to them never get returned. A kiss, which is usually easily received by the children now has to be encouraged by Troy's mother. According to Colleen, Troy's mother never cared for Melissa and it is clear to her that she shows favoritism between J. and D. (Walsh Trans. 197:1-197:20). A huge part of parenting is stability, warmth, and care. Melissa has all of those qualities. (Walsh Trans. 198:17-198:19).

We believe the evidence supported a finding that this factor favors Appellant.

b. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.

Troy does not have the capacity to put their problems aside and focus on the children. (Regan Trans. 68:18-68:19). Melissa undoubtedly loves her children and shows them affection and guidance by having an open communication with them as she testified at the hearing. Melissa testified to the enjoyment and involvement she has had even while living so far away from her children, even while Troy became inflexible when it came to switching visitation and providing for their children while they were in Melissa's care. Troy's inflexibility was apparent when Melissa wanted to attend special occasions with the children on numerous occasions. Another example of his inflexibility is when Troy wanted to take the kids to the circus during Melissa's time with them. He threatened that if she didn't let him take the kids, she could forget about having the kids in Arizona during her two-week block. (Regan Trans. 73:3-73:8). During an Easter holiday Melissa had hoped to take the children with her to Rapid City, South Dakota in order to see Shawn since they had not seen him in three months. Melissa asked Troy to switch holidays with her in order for the children to attend the trip, but Troy said absolute not. (Regan Trans. 25:17-25:9). While Melissa attended school she called J.F. and D.F. every night. Even when she could not get ahold of them right away, she would call back. (Regan Trans. 13:9-13:14). Another instance was when Melissa was trying to settle into her new home in Peoria, Arizona and thought it'd be a good idea to have the kids for a month on and a month off for the time being. Once again. Troy made excuses as to why it would not work. This time he blamed it the airline not being safe. (Regan Trans. 76:7-76:14). Troy believed it was abuse or neglect to have a child fly on an airplane. (Regan Trans. 77:1-77:6). Troy stated that when you force your child to do something they don't want to do, like flying, that is child abuse. (Fleck Trans. 252:24-253:2). Unfortunately, as parents, we sometimes have to force children to do things they do not want to do.

J.F. experiences challenges in school like reading, math, and spelling, and she attends learning disability classes. (Regan Trans. 54:8-54:11). Melissa is a guide to her daughter and encourages her every chance she gets. D.F. has had instances in which he acts out and one time almost got kicked out of BLAST for not listening or talking back. (Regan Trans. 56:1-56:10). Melissa maintains regular contact with the school. She emails teachers when she will be in town and if there is anything she should be aware of or to let them know she's available to volunteer. (Regan Trans. 56:11-56:17). Melissa believes stability would lack if they remain in Troy's custody. The children go from school to Blast to Troy's girlfriend's (Gail) house. (Regan Trans. 57:1-57:5).

Melissa purchased phones for J.F. and D.F. and they are either at Blast or Troy's girlfriend's house. They have complained about being tired from being at her house and are noticeably sleepy when Melissa talks to them. Their normal bedtime is 8:30 p.m. and Melissa has had to wait until 10:15 p.m. to talk to them because that is the time they return home from Gail's house. Melissa testified that this is the case a "majority" of the time. (Regan Trans. 57:1-58:13).

While Troy was deployed to Iraq for fifteen (15) months, Melissa provided the majority of care for the children. (Regan Trans. 43:2-43:9). Melissa was totally responsible for the total care of the children. (Regan Trans. 44:8-44:10).

Further, while Troy and Melissa attended marriage counseling, Melissa came to realize how much the sessions were emotional for Troy. Troy believed the counselor was focusing too much on his childhood and the way his mother treated his father. Melissa believed Troy did not want to attend counseling any more because it was bringing up some bad memories and he didn't want to deal with it. Melissa and Troy stopped attending counseling because of this. (Regan Trans. 50:8-50:15).

Shawn is able to provide full medical, dental and vision, along with a flex spending account to cover any incidentals like braces, or crutches, so there is no need to pay anything out of pocket. (Regan Trans. 174:18-174:24).

We believe the evidence supported a finding that this factor favors Appellant.

c. The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

Melissa is more apt to provide all three children with food, clothing, medical, any other remedial care, and any other material needs. She and her husband have stable jobs and compensated favorably. The children would be covered under Shawn's health insurance. (Regan Trans. 4:25-5:3)

We believe the evidence supported a finding that this factor favors Appellant..

d. The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.

The children have lived with both Melissa and Troy since separation. The children have only suffered in their current environment by not having their mother around. The children would have stability living in Arizona with Melissa. The children have already established friendships in the community, as Melissa testified to at the hearing. (Regan Trans. 74:21-75:20). Melissa is in a stable and loving marriage with Shawn and it has been this way since they married March 21st, 2008 and prior to that when they dated for over two years (Regan Trans. 6:5-6:8) This stable relationship would be an asset to the children and a positive model.

Moreover, Melissa believes the children need routine. The fact that she can work two days a week, opposite of Shawn there will always be somebody home with them. Someone at home to monitor they school work. (Regan Trans. 53:4-53:15). The children are not in a routine in the sole custody of Troy. Between the challenges they face in school and the back and forth between their

dad's house and Gail's, they have no routine or stability. Troy testified that during the school year he visits Gail twice a week. (Fleck Trans. 231:20-231:25). Melissa firmly believes that Troy is lacking in giving extra time and attention to his children, especially J. since she has a learning disability. (Regan Trans. 162:20-162:25).

Troy is employed at the Burleigh County Sheriff's Department as a deputy sheriff. His job entails misfortune and hazards that come with law enforcement. When Melissa and Troy were married, Melissa testified that he always kept a handgun underneath his pants or in the closet. (Regan Trans. 67:11-67:25). This does not speak well for the children's safety if Troy has to keep a handgun in his possession while off the clock. Further, Troy has been in a relationship with Gail for over two years and there is no commitment to marriage. (Fleck Trans. 256:3-256:5). Further, Gail Carlson [hereinafter Gail] testified that not only do they spend once a week together, they also see each other on weekends. (Carlson Trans. 288:8-288:9). During the summer Gail and Troy spend a lot more time together due to the kids's soccer practice. (Carlson Trans. 288:14-288:20). They spend the night at each other's house in front of the kids also. (Carlson Trans. 289:7-289:20). How long will this back and forth last? The children cannot be going from parent to parent in Arizona and then return to Bismarck and be placed in a parent to girlfriend situation.

We believe the evidence supported a finding that this factor favors Appellant.

e. The permanence, as a family unit, of the existing or proposed custodial home.

Melissa and Shawn Regan have acquired a beautiful ranch-style home in Peoria, Arizona in July of 2008. (Regan Trans. 31:7-31:8). Melissa testified that the home contains four bedrooms, two-and-a-half baths, and is located in a gated community. The community contains walking trails and a clubhouse that contains all sorts of games for the family to participate in. (Regan Trans. 35:15-36:3). The clubhouse puts out many activities for the community. They have game night where

participants rotate tables and play different games throughout the night. (Regan Trans. 74:13-74:17). The youngest child would attend an elementary school located ten minutes away and within walking distance. Located ten miles away is the Junior High School which they would attend later on. (Regan Trans. 36:4-36:22). Melissa is able to make her own work schedule, which as a new graduate, is gold. (Regan Trans. 30:1-30:3). Further, she is only licensed in Arizona. (Regan Trans. 39:24-39:25).

Should Melissa be granted custody of the children, her work schedule would be two days a week with no call, no weekends, and no holidays. (Regan Trans. 33:11-33:22). And with a direct flight from Phoenix to Bismarck, it is only a two and a half hour flight. (Regan Trans. 61:7-61:12). Should the kids attend school in Arizona, they get the recognized holidays off, in the Fall they get a week and a half off for break, they get almost three weeks off for Christmas break, and then in Spring they get another week and a half off. (Regan Trans. 85:13-85:18). So, in addition to the summer and alternating Christmas, the children would have two other holidays that they could fly back to Bismarck. Arizona has beautiful blue skies year round and gorgeous weather compared to Bismarck. (Regan Trans. 88:5-88:6).

Both children are really big on hockey and ten miles from where Melissa lives is a hockey rink where they practice year-round, along with ice skating, gymnastics, and soccer. (Regan Trans. 89:23-90:1). Peoria also has specialized children's hospitals in which to care for the children in case anything should happen. (Regan Trans. 91:3-91:7).

As stated, J. does have a learning disability. Melissa has researched what could be offered to J. should she live with her mother. She located a Come On Learning Center in a town twenty (20) minutes away from Peoria which could assist in making homework easier for J. (Regan Trans. 94:3-94:8). Melissa also found tutors in the area and tutors offered right in the Vistancia school. (Regan

Trans. 94:11-94:13). Vistancia is an excelling school and Peoria has one of the best school districts in the state. (Regan Trans. 120:14-120:18). Their student to teacher ratio for third grade was 28 to 1, and fourth grade was 29 to 1. (Regan Trans. 129:2-129:7).

If the children were living in Arizona, the children's grandmother Colleen. would be able to visit them more often than she does now. (Walsh Trans. 196:6-196:9). More frequent visits from their grandmother is another one of the many benefits of the children being in the custody of Melissa. Troy believes that wherever the children are they are going to make friends. (Fleck Trans. 275:1-275:3).

Troy testified that he is concerned about his ability to visit the children in Arizona. He states he doesn't make enough money and doesn't have enough vacation time to be flying there to visit. He has no friends in Arizona and nowhere to stay when he is there. (Fleck Trans. 247:6-247:10).

We believe the evidence supported a finding that this factor favors Appellant.

f. The moral fitness of the parents.

Troy testified he does not believe Melissa is an unfit parent. (Fleck Trans. 272:11-272:13). Melissa testified as to Troy's moral fitness at the hearing and provided several instances when it was a factor throughout the divorce and after. (Regan Trans. 15:5-16:25). When Melissa moved out of the marital home, she provided that she received no clothing for the children, no beds, no toys and no games for them. At the time Melissa and Troy agreed on splitting the marital fixtures, it was understood to be an even split. Troy was to keep the children's bedroom sets because Melissa was still residing in Sioux Falls. However, when Melissa moved back to Bismarck, she didn't receive anything. Given Troy's unwillingness to share, Melissa had no other choice than to buy everything from toothbrushes to bed sets and everything in between. (Regan Trans. 16:13-16:20). Troy's reasoning behind this was Melissa would be making money in the future. (Regan Trans. 16:22-

16:25).

As part of the divorce judgment Melissa was also to receive 50 percent of Troy's retirement and has never received any of it. (Regan Trans. 17:8-17:11). Melissa testified that Troy is very difficult to work with regarding visitation. (Regan Trans. 26:13) Whereas Melissa is more than happy to work with Troy regarding the children.

Troy's moral fitness also came in question when Shawn's daughter, G., died in a car accident. J.F. and D.F. had met G. previously and Melissa thought attending her funeral would be a way to show their support for Shawn during this tragic time. However, Troy would not allow them to go Rapid City to attend. (Regan Trans. 39:2-39:3). At first, Troy blamed the road conditions and then said he felt the children were too young. Contrary to Troy's reasoning, the weather that day was sunny and the roads were clear, and the children's ages were not a factor since they had previously attending his grandmother's funeral. (Regan Trans. 39:18-39:21).

There is another matter which must be taken into consideration, Troy's trustworthiness. Troy took out a DEAL loan in the amount of \$33,000 in Melissa's name. The application was filled out in Troy's handwriting and Melissa's signature was forged. (Regan Trans. 63:14-63:25). Melissa had taken out excess student loans in order to pay rent in Sioux Falls and help with expenses at the marital home in Bismarck. Troy took the remaining money from their joint account and put it into his account. Altogether a sum of over \$6,000 was taken by Troy without Melissa's permission or knowledge. (Regan Trans. 41:11-41:21). Troy admitted to this at the hearing. (Fleck Trans. 247:12-247:14). Troy claimed he needed the money for household items, and yet Melissa was still paying for half of the household necessities. (Regan Trans. 42:1-42:13). Melissa was already helping pay for running the household and since she is responsible for paying back on those student loans, she was paying for more than half her share of the marital home. Melissa did not want to take out a

\$30,000 loan at the time in case their family needed it later. also, if she didn't need it after all, she wouldn't have this loan repayment. (Regan Trans. 66:9-66:14). Melissa was not aware of this loan until Fall of 2008. (Regan Trans. 135:12-135:14).

We believe the evidence supports a finding that this factor favors Appellant.

g. The mental and physical health of the parents.

Melissa does have high blood pressure but is in overall good mental and physical health. Troy has posttraumatic stress issues which he has seen a counselor for. (Fleck Trans. 262:12-262:19).

We believe that the evidence supported a finding that this factor favors neither party.

h. The home, school, and community record of the child.

While the children have had a good home, school, and community while living in Bismarck, they have also established relationship with neighbors in Melissa's neighborhood in Surprise, Arizona. (Regan Trans. 75:8-75:20). Children flourish with opportunities. Bismarck does not have the endless opportunities Arizona has to offer the children.

We believe that the evidence supported a finding that this factor favors neither party.

i. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

Given the children's ages (9 and 8) they are not able to state a preference.

j. Evidence of domestic violence.

There is no evidence of domestic violence for either party.

k. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.

Prior to moving in together, Melissa and Shawn discussed how they would address their parenting style and how having the children around would work. Melissa and Shawn were reassured through their daily lives that they work really well as a team and could handle it. (Regan Trans. 19:21-20:7). Melissa's current husband, Shawn, and his relationship with the children positively influences the children. The children really got to know Shawn when they lived in Bismarck. They have a very good relationship with him and feel safe with Shawn. (Regan Trans. 35:7-35:13). The children and Shawn have a great relationship (Regan Trans. 22:10-22:13) and would benefit from a two-parent household, whereas Troy's relationship with his girlfriend, Gail Carlson, may cause instability. Melissa and Shawn will be able to provide a two-parent home for the children with adequate income to meet the children's needs and they are both CRNA's. (Regan Trans. 18:25-19:1). Shawn treats the children just like he does his own child. (Regan Trans. 171:11-171:14). Shawn loves D.F. and J.F. They ride their bikes together at the park a block away from their home, they go to the pool, they go with their friends out to the desert and ride four-wheelers. They go to museums and hockey games. (Regan Trans. 172:16-172:25). Shawn's family has also developed very good relationships with J. and D. (Regan Trans. 173:23-173:25). Shawn's sister frequently visits them when J. and D. are visiting Arizona. She brings her daughter along and all the kids play together. (Regan Trans. 173:25-174:3). J. and D. call Shawn's parents grandma and grandpa. (Regan Trans. 174:10-174:13). The best interest of the children should dictate Melissa retain custody. Given this two-parent household and their greater financial compensation than Troy, it would allow Melissa to work less and spend more time with the children, even though relocation would reduce the children's contacts with extended family.

Melissa's mother has established a good relationship with her grandchildren. They are very close in fact and she is able to play as if she was a big kid herself. During the time Melissa lived in

Bismarck, her mom (who resides in San Diego) saw J.F. and D.F. two to three times a year and now that they live in Arizona, her mother has come there to see them and the grandchildren have been able to visit her in San Diego once. (Regan Trans. 48:8-48:21). The children have been able to maintain their relationship with their grandmother when they are staying in Bismarck and when they are staying in Arizona with their mother. The children do have family in Arizona. Shawn's sister and her family live in Tucson, which is about an hour and a half away, Shawn's parents are moving to Phoenix in less than a year, and Melissa's sister and her husband are looking to move to the area. (Regan Trans. 61:19-62:3).

While the relationship between J.F. and D.F. and their paternal grandmother, Shirley Fleck is not a healthy one. (Regan Trans. 49:17-49:21). Shirley plays "favorite" with the children. (Regan. Trans. 78:7-78:17). Shirley hurts D.'s feelings because when she gives J. presents, they are on a larger scale and D. notices. (Regan Trans. 79:1-79:6). During marriage counseling Melissa and Troy received, they focused on the children's relationship with their paternal grandmother, Shirley. Troy did not want to attend these sessions as he thought they focused too much on his childhood and his mother. (Regan Trans. 50:23-50:3).

The Court should reason that given the distance and the ability to work out a visitation schedule, it is still able to foster contacts with Troy's extended family, even if it reduces the frequency of such contact. Extensive and liberal visitation is possible for Troy should the custody of the children be Melissa's.

We believe that the evidence supported a finding that this factor favors Appellant.

1. The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02.

There are no false allegations being made by either party against the other relating to harming

the child.

m. Any other factors considered by the court to be relevant to a particular child custody dispute.

2. In any proceeding under this chapter, the court, at any stage of the proceedings after final judgment, may make orders about what security is to be given for the care, custody, and support of the unmarried minor children of the marriage as from the circumstances of the parties and the nature of the case is equitable.

Based upon the application of these best interests and welfare factors, it is in the best interests of the minor children to be in the care and custody of their mother, Melissa. Moreover, Troy stated in his testimony at the hearing that he was concerned with paying for trips to Arizona. Melissa has said many times that she could be responsible for the expenses of the children's airfare, as well as Troy's.

Greater financial compensation associated with current husband's new job would allow Melissa to work less and spend more time with children, even though relocation would reduce child's contacts with extended family.

The court must give due weight to the possibility the move will enhance both the economic and non-economic aspects of the custodial family's life. This factor must be considered in light of the importance of maintaining the stability of the custodial parent/child relationship. Hawkinson v. Hawkinson, 1999 ND 58, ¶ 12, 591 N.W.2d 144; Goff v. Goff, 1999 ND 95, ¶ 13, 593 N.W.2d 768. Further, we believe the trial court erroneously did not properly weigh the advantages of the move.

Award of custody of minor child to wife was in the best interest of child, and allowing wife to move out of state with child was not error when wife wanted to return to her parents' home and attend school. Bader v. Bader, 1989, 488 N.W.2d 187.

Pursuant to N.D.C.C. § 14-09-07 regarding the residence of a child:

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 noncustodial parent, if the noncustodial parent has been given visitation rights by the decree. A court order is not required if the noncustodial parent:

1. Has not exercised visitation rights for a period of one year; or
2. Has moved to another state and is more than fifty miles from the residence or the custodial parent.

It has long been the policy in this state that the best interests of the child is the primary consideration in determining whether or not a custodial parent may change the residence of the child. Hentz v. Hentz, 2001 ND 69, ¶ 9, 560 N.W.2d 903, Stout v. Stout, 1997 ND 61, ¶ 9, 560 N.W.2d 903. A custodial parent seeking a court order permitting a change in a child's residence to another state under N.D.C.C. § 14-09-07 must prove, by a preponderance of the evidence, that the move is in the best interest of the child. Hentz at ¶ 5.

The Court in Hentz explained that it has specified four factors for consideration in determining if a requested change in a child's residence to another state is in the child's best interest. The factors are as follows:

- I. The prospective advantages of the move in improving the custodial parent's and child's quality of life,
- II. The integrity of the custodial parent's motive for relocation, considering whether it is to defeat or deter visitation by the noncustodial parent,
- III. The integrity of the noncustodial parent's motives for opposing the move, and
- IV. The potential negative impact on the relationship between the noncustodial parent and the child, including whether there is a realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the noncustodial parent's relationship with the child if relocation is allowed, and the likelihood that each parent will comply with such alternate visitation.

Hentz at ¶7. The Court further held that, "No one factor dominates, and a factor that has minor impact in one case may be the dominant factor in another. A move sought in good faith and to gain

legitimate advantages for the custodial parent and the child must not be denied simply because visitation cannot continue in the existing pattern.” Id.

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

Essential to the Court’s analysis of this factor is the importance of maintaining continuity and stability in the custodial family. Graner v. Graner, 2007 ND 139, ¶ 15, 738 N.W.2d 9. (Citations omitted). We recognize that an improvement in the custodial parent’s quality of life will indirectly benefit the child. Id. Some of the factors the district court should consider include the custodial parent’s proposed employment at the relocation site, whether the custodial parent’s and child’s health and well-being are benefitted, whether the custodial parent has remarried and requests to move to live with the new spouse, whether the custodial parent will have more time to spend with the child, whether there are family members who will provide a support network, the child’s reasonable preference, and educational opportunities. Id.

Melissa is dedicated to maintaining the children’s relationship with their father should they be put in her custody. She is willing to pay for the children’s airline flights pursuant to the visitation agreement set forth. (Regan Trans. 5:17-5:22).

Melissa’s employment will provide her with a substantial income and a significant amount of time to spend with the children. The community the plaintiff and the children would be living in is a very safe environment with many new young families and children. The plaintiff and her husband have a network of friends and family living in the area as well. It is clear that the move would be very advantageous to Melissa and the children.

II. **Whether the lower court’s decision establishing child support for the Appellant was**

clearly erroneous?

We firmly believe that the Court erroneously established child support.

We believe it should be based upon her actual income rather than imputing.

According to North Dakota Child Support Guidelines Chapter 75-02-04.1-02. Determination of support amount - General instructions state as follows:

....

8. Calculations made under this chapter are ordinarily based upon recent past circumstances because circumstances are typically a reliable indicator of future circumstances, particularly circumstances concerning income. If circumstances that materially affect the child support obligations are very likely to change in the near future, consideration may be given to the likely future circumstances.

Appellant is an independent contractor with her place of employment. As such, the statute on self employment dictates the calculation of her income and thus child support. Calculations were made and submitted to the Court based upon her self employment income. The Court rather than using her actual income appeared to attempt to impute income based upon a 40 hour work week. There is neither law nor evidence to support this.

Chapter 75-02-04.1-07 state: Imputing income based on earning capacity states as follows:

1. For purposes of this section;
 - a. "Community" includes any place within one hundred miles (160.93 kilometers) of the obligor's actual place of residence; and
 - b. An obligor is "underemployed: if the obligor's gross income from earnings is significant less than prevailing amounts earned in the community by persons with similar work history and occupational qualifications.
2. An obligor is presumed to be underemployed if the obligor's gross income from earnings is less than:
 - a. Six-tenths of prevailing amounts earned in the community by persons with similar work history and occupational qualifications; or

- b. A monthly amount equal to one hundred sixty-seven times the federal hourly minimum wage.

3. Except as provided in subsection 4, 5, and 9, gross income based on earnings capacity equal to the greatest of subdivision a through c, less actual gross earnings, must be imputed to an obligor who is unemployed or underemployed.

- a. A monthly equal to one hundred sixty-seven times the hourly federal minimum wage.
- b. An amount equal to six-tenths of prevailing gross earnings in the community of persons with similar work history and occupational qualifications.
- c. An amount equal to ninety percent of the obligor's greatest average gross monthly earnings, in an twelve consecutive months beginning on or after thirty-six months before commencement of the proceedings before the court, for which reliable evidence is provided.

....

5. Gross income based on earning capacity may not be imputed if the obligor shows that the obligor has average monthly gross earnings equal to or greater than one hundred sixty-seven times the hourly federal minimum wage and is not underemployed.

Melissa became an Nurse Anesthetist in approximately February of 2008. She is currently a 1099 independent contractor a Nurse Anesthetist with Anesthesia Medical Professionals, P.C. in Sun City, Arizona. Melissa signed an Independent Contractor Agreement with Anesthesia Medical Professionals March 14, 2008. As such, she is known as a part-time employee. Also, under her contract, she is guaranteed a maximum of twenty-four (24) hours per week. She is unable to become a full-time employee given that there are no W-2 positions available. Her current earnings are \$86 per hour while working approximately twenty-four (24) hours per week, in which she works two (2) twelve (12) hour shifts. Based on the foregoing figures, she has gross earnings of \$2,064 per week, \$8,256 per month, and \$99,072 per year. As such, Melissa has the capability to pay child support based upon her gross earnings of \$99,072 per year. Child support calculations reflecting gross income of \$99,072 is \$1,456.

After reviewing the Court's Memorandum Opinion, the undersigned wrote a letter to Judge Wefald concerning the child support he proposed. (A at 32). Attached to said letter was a proposed child support calculation and Melissa's Independent Contractor Agreement which guarantees a maximum of twenty-four hours per week. Therefore, we believe, child support should be based on this number. Further, Melissa testified when being cross-examined by Attorney Oster that she was not a full time employee and she did not intend to work full time. (Regan Trans. 150:16-151:9).

We firmly believe the lower court made an error by using full time income when full time is simply not available to her to calculate her child support. We also believe the lower court erred in stating that she is underemployed. It is unclear why the District Court would state that Melissa is underemployed when she earns approximately \$99,072 per year thereby not qualified as underemployed, whether imputed or otherwise. The statute for imputation does not apply in this case.

The District Court stated in their Memorandum Order and Opinion: "Now that custody has been resolved, Melissa should be able to work more hours." (A at 17). In accordance with North Dakota Child Support Guidelines Chapter 75-02-04.1-07(1)(b), Melissa is not underemployed. The District Court's child support figures are based on her husband's income as a full-time employee earning \$68 per hour and working forty (40) hours per week, earning approximately \$141,440. Based on the full-time income of \$141,440 per year, Melissa was ordered to pay \$2,246 per month in child support to Troy. This is clearly erroneous.

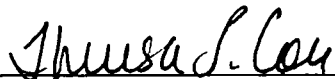
Melissa was questioned whether or not she was considered part time or full. At trial, Melissa testified she was not a full-time employee, but a 1099 independent contractor, which is only considered part-time. (Regan Trans. 148:11-148:20, 149:2-149:18). There are no full time employee positions available.

Melissa clearly states that even though she works 36 hours in two weeks, roughly 72 hours a month, as a 1099, that is not considered full-time. In order to accurately calculate child support for Melissa, we believe it should be based upon her actual income rather than imputing what she may make if she works full time, an option not available for Melissa.

CONCLUSION

It is clear that the District Court made an error when it ruled that the best interest of the children would be served by awarding Troy custody of J.F. and D.F.. It is also clear that the District Court erred when determining child support set forth in the North Dakota Administrative Code Chapter 75-02-04.1. We respectfully request that the District Court's ruling be overturned.

Dated this 1st day of June, 2009.




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Melissa Fleck, n/k/a Melissa Regan,)	Supreme Court No. 20090075
)	
Plaintiff – Appellee,)	
)	
vs.)	
)	District Court
Troy A. Fleck,)	Burleigh Co. Civil No. 08-06-C-1109
)	
Defendant – Appellant.)	

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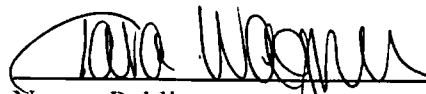
Daniel H. Oster
Neubauer & Oster
619 Riverwood Drive, Suite 202
Bismarck, ND 58502-1015

I declare under penalty of perjury under the laws of the State of North Dakota that the foregoing is true and correct and that this declaration is executed on the 1st day of June, 2009.



Leigh Johnson

Subscribed and sworn to before me this 1st day of June, 2009.



Notary Public
Burleigh County, North Dakota

