

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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May 17, 2012
STATE OF NORTH DAKOTA

Shannon (Fried) Krueger,)	
)	
Plaintiff-Appellee,)	
)	
)	
vs.)	Supreme Court No: 20120152
)	
)	Barnes County No: 02-2010-DM-143
)	
Hau Tran,)	
)	
Defendant-Appellant.)	
)	

Appeal from District Court's Order Granting Motion for Change of Custody

South East Judicial District

Valley City, North Dakota

Honorable Jay Schmitz, Presiding

BRIEF OF APPELLANT

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ISSUES ON APPEAL

1. Was the District Court's finding that there was a material change in circumstances of JMT clearly erroneous?

2. Was the District Court's finding that a change of custody was necessary to serve the best interests of JMT clearly erroneous?

STATEMENT OF THE CASE

3. This is an appeal from an order granting change of custody of 10-year-old JMT from the Defendant-Appellant Hau Tran ("Mr. Tran" or "Hau") to Plaintiff-Appellee Shannon Krueger ("Ms. Krueger" or "Shannon").

4. Pursuant to stipulation of the parties and an Amended Judgment entered in Burleigh County File No. 06-C-1077 on August 6, 2007, Mr. Tran was granted sole physical custody of JMT. App. 48. Ms. Krueger filed a Motion for Change of Custody on October 18, 2010 in Burleigh County, and Mr. Tran responded through his attorney Kent Morrow, and resisted the Motion. Venue was transferred to Barnes County on Mr. Tran's motion.

5. A three-hour hearing on the Motion for Change of Custody was held on October 31, 2011. The District Court issued its Findings, Opinion &

Order Granting Motion for Change of Custody on January 13, 2012, App. 66, and an amended judgment was entered on January 20, 2012. App. 82. The District Court held that 1) a material change had occurred in the circumstances of the parties, and 2) change of primary residential responsibility was necessary and in the child's best interests.

6. Subsequent to the District Court's order, Mr. Tran retained the undersigned counsel for this appeal. Mr. Tran filed a Motion to Stay Pending Appeal in the District Court on February 1, 2012, which was denied without a hearing on March 8, 2012.

7. Mr. Tran now appeals the District Court's decision to change primary residential custody.

STATEMENT OF THE FACTS

8. JMT, the minor age 10 who is the subject of this Motion, was born December 26, 2001, and tested positive for amphetamines. App. 17. On January 11, 2002, JMT was placed in legal custody of Cass County Social Services and physical custody of her father. App. 18. Ms. Krueger was incarcerated on April 15, 2002 for a probation violation stemming from the use of methamphetamines. App. 22. On June 5, 2002, Social Services terminated its legal custody of JMT. App. 15. Since June of 2002, Mr. Tran has maintained sole custody of JMT for nearly her entire life while Ms.

Krueger has been convicted and incarcerated for drug use on numerous occasions. The relationship between the parties has been contentious from the beginning, and Ms. Krueger has filed motions for contempt and/or change of custody following each of her stints in prison and/or rehab. Despite her own actions over the years, Ms. Krueger continues to allege that she and JMT are victims and that Hau is emotionally abusive and resistant to co-parenting.

9. Shortly after serving time for the 2002 probation violation, Ms. Krueger requested to take JMT to Bismarck from Mr. Tran's and JMT's home in Valley City, North Dakota for the weekend of February 21, 2003, at which time Ms. Krueger absconded with JMT under false pretenses and sought sole custody of the child. App. 21-25. She was not successful. App. 26-30.

10. However, Ms. Krueger attempted to unilaterally keep JMT from Hau beginning in December 2004. App. 35-36, 41. For approximately six months, Ms. Krueger maintained custody of JMT, withheld any contact from Mr. Tran, and did not permit visitation. In order to bring resolution to the matter, Mr. Tran signed a stipulation in 2005 that granted sole custody to Ms. Krueger. App. 31-34. This lasted only a short time.

11. In early 2006 Ms. Krueger was arrested during a drug bust, in the presence of JMT. App. 37, 39, 41, 98. Ms. Krueger pleaded guilty to Possession of Methamphetamine and was placed in the custody of the North

Dakota Division of Parole/Probation for a three year period on each count. Her probation was subject to numerous conditions to ensure that she did not use drugs or alcohol or associate with individuals who used drugs. App. 42. Subsequently, Mr. Tran was awarded sole physical custody on April 28, 2006. App. 43-45.

12. On May 14, 2007, Mr. Tran was granted a restraining order against Ms. Krueger after Ms. Krueger, her mother, and her daughter physically assaulted Mr. Tran and again absconded with JMT. App. 57. After Mr. Tran filed a police report, Ms. Krueger's mother left several verbally abusive and racist voice messages with Mr. Tran. App. 54.

13. Ms. Krueger sought custody in July 2007 but later stipulated that Mr. Tran would have sole physical custody of JMT. App. 46-47. Thus, JMT has been living with her father since the Ex-Parte Interim Order Granting Change of Custody was issued in April 2006.

14. Ms. Krueger entered Robinson House on October 17, 2009, her fifth treatment for drug addiction. App. 88-89.

15. After her release, Ms. Krueger filed a Motion for Change of Custody on October 13, 2010, which is the subject of this Appeal.

16. Ms. Krueger requested a child custody investigator in December of 2010. Mr. Tran did not object. The report of Susan Strang was filed on August 11, 2011. Ms. Strang stated that:

JMT is a very bright, sensitive, and soft spoken (almost 10 year old) girl. . . . She participates in gymnastics and girl scouts and likes to swim, watch movies, listen to music and do anything artistic. She enjoys playing outside with her friends. . . . Both parents state that she is a very easy child to parent and discipline. JMT is a good student. . .

Doc ID# 181, p.4.

17. Ms. Strang also indicated the following:

a. Both Shannon and Hau show JMT love, affection and guidance.

Doc ID# 181, p.4.

b. JMT states that she likes to do things with Hau but that she sometimes feels like she spends a lot of time doing thing alone, with sitters or friends. (Emphasis added). Doc ID# 181, p.5.

c. Hau and JMT have both mentioned that they like going for scooter rides together. Doc ID# 181, p.5.

d. Hau's family describes him as a good, loving father. Doc ID# 181, p.5.

e. Family and friends describe Hau as a protective and involved father. Doc ID# 181, p.5.

f. Both parents seem to make JMT's education a priority. Doc ID# 181, p.5.

g. JMT has spent most of her school career in Valley City. She enjoys the friends she has there. Doc ID# 181, p.6.

h. Hau has been consistently present and supportive in JMT's life. Doc ID# 181, p.8.

18. At the hearing on October 31, 2011, Ms. Strang testified that the primary reason she arrived at the conclusion to recommend a change of custody was that "J.T. [sic] is really looking for some more time with her mother." App. 92-93. She also testified that Ms. Krueger had "mostly" received the visitation as ordered by the District Court. App. 94. The District Court indicated that Mr. Tran was held in contempt in 2008 for interfering with visitation as evidence that Mr. Tran is still interfering with visitation; however, the record shows that Ms. Krueger has had visitation and access since that incident. App. 94, 101.

19. In her report and in testimony, Ms. Strang indicated that Mr. Tran appeared to be less than forthcoming. Although she failed to interpret the reasoning behind Mr. Tran's apprehension (his family and cultural history), Mr. Tran did provide sufficient information for Ms. Strang to complete her investigation. Doc ID# 181, p.7. In fact Mr. Tran provided Ms. Strang with the names of Laura and Jason Komrosky as character witnesses

and she neglected to follow up. Mr. and Mrs. Komrosky had previously provided sworn statements assuring the District Court that Hau was an excellent father. App. 62-63.

20. Also at the October 31 2011 hearing, Ms. Krueger testified that JMT was doing very well in school and that there were no real issues with respect to visitation. App. 64, 99.

21. Ms. Krueger testified that at the time of the hearing she had been sober for three years but a relapse of her drug use was a possibility. App. 100. She also testified about a text message that had been sent during that period of sobriety. Ms. Krueger stated that the text, which indicated she wanted to get high, was actually sent by Mr. Tran. App. 96-97. Mr. Tran's attorney did not cross-examine on this issue.

22. Mr. Tran called two character witnesses to testify at the October hearing. Debra Langemo, Mr. Tran's neighbor and JMT's babysitter, stated that Mr. Tran and JMT are "very close," that Mr. Tran is "a very loving father," and that JMT is happy living with Mr. Tran. App. 102-06.

23. Jeff Wangrud, Mr. Tran's good friend and neighbor, testified that Mr. Tran and JMT get along well and that Mr. Tran does not speak negatively about either JMT or Ms. Krueger. App. 108-10.

24. Throughout 2011, both prior to and subsequent to the hearing on this Motion, Ms. Krueger filed a series of additional motions seeking to hold Mr. Tran in contempt and seeking a temporary order for change of custody. The substance of these motions was that Mr. Tran was hindering visitation and verbally abusing Ms. Krueger through text messages.

25. While Ms. Krueger had saved text messages dating back to 2009, Mr. Tran had not saved text messages sent to his phone from Ms. Krueger. Nor did Mr. Tran's attorney attempt to subpoena text records sent to or from Mr. Tran's phone.

26. On September 14, 2011, the District Court issued an Order Denying Motion for Emergency Order [for Change of Custody], finding that continuation of abusive and derogatory communications . . . will constitute exceptional circumstances as defined by Rule 8.2(a)(1), in that they pose an imminent threat of psychological and emotional harm to the parties' minor child. App. 64.

27. The District Court, in its Order dated January 13, 2012, held that "lack of interaction, along with Mr. Tran's open hostility and contempt toward Ms. Krueger, is detrimental to TMJ's [sic] emotional health," App. 69, and awarded primary residential custody to Ms. Krueger.

LAW AND ARGUMENT

28. “A trial court's decision to modify custody is a finding of fact subject to the clearly erroneous standard of review. 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, although there is some evidence to support it, the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made.” Barstad v. Barstad, 499 N.W.2d 584, 587 (N.D. 1993) (citing Blotske v. Leidholm, 487 N.W.2d 607, 609-10 (N.D.1992); see also, N.D.R.Civ.P. Rule 52(a).

29. “A request to modify custody requires the determination of two issues in chronological order: (a) whether there has been a significant change of circumstances since the original . . . custody award; and, if so, (b) whether those changes compel or require, in the best interests of the child, a change of custody.” Id. (citing Delzer v. Winn, 491 N.W.2d 741, 743 (N.D.1992). See also, N.D.C.C. § 14-09-06.6(6).¹

¹ The court may modify the primary residential responsibility after the two-year period following the date of entry of an order establishing primary residential responsibility if the court finds:

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

I. A material change has not occurred in the circumstances of JMT

30. Important new facts which were unknown at the time of prior custodial decree constitute a material change of circumstances. Kelly v. Kelly, 2002 ND 37, ¶17, 640 N.W.2d. 38, 41.

31. Improvements in the non-custodial parent's life, by themselves, do not constitute a material change of circumstances. Delzer, 491 N.W. 2d at 744. Such an improvement in the non-custodial parent's situation must be accompanied by a "general decline" in the child's condition while living with the custodial parent. Id.

32. JMT has not experienced a general decline in condition while living with Mr. Tran. While initially there were concerns with respect to her schooling, she has in fact improved and is doing well in school. App. 99. The District Court found no evidence of abuse, no evidence that JMT is not healthy and happy, no evidence that JMT has behavioral issues, no evidence that JMT lives in an unsafe or unclean environment, no evidence that JMT is isolated from family, friends or neighbors, no evidence that she is denied love and affection from her father, no evidence that after 2008 that Ms. Krueger has been prevented from making regular contact with JMT or that she has been denied visitation, in fact, no evidence that JMT is regressing in any way except for occasionally feeling lonely or missing her mother. Doc ID# 181, p.5, 7.

33. The District Court cites Selzer v. Selzer, 2001 ND 138, ¶21, 631 N.W.2d 564, 570, which provides that “[a] material change of circumstances can occur if a child's present environment may endanger the child's physical or emotional health or impair the child's emotional development” (citing Holtz v. Holtz, 1999 ND 105, ¶17, 595 N.W.2d 1, 6). The trial court in Selzer had stated that the "most relevant factor" in its decision was the capacity and disposition of the parents to give the child love, affection and guidance, and to continue the education of the child.

34. These are all things that Mr. Tran provides for JMT. Doc No. 181. p.4-5. Furthermore, the circumstances in Selzer are easily distinguishable from the present matter. The custodial parent in Selzer made “chaotic lifestyle and parenting choices” which included an inability to get the child to school on time and the inability of the child to complete homework, the parent’s association with a convicted sex offender, and the presence of older juveniles in the home who were bad influences.

II. A modification of custody is not necessary to serve JMT’s best interests

35. If a district court determines no material change in circumstances has occurred, it is unnecessary for the court to consider whether a change in primary residential responsibility is necessary to serve the children’s best interests. Glass v. Glass, 2011 ND 145, ¶11, 800 N.W.2d 691, 694 (citing Lechler v. Lechler, 2010 ND 158, ¶ 9, 786 N.W.2d 733).

36. If a district court finds a material change of circumstances has occurred, the court cannot change primary residential responsibility of a child unless the court further finds that the modification is necessary to serve the best interests of the children. Id. at ¶16 (citing Gussiaas v. Neustel, 2010 ND 216, ¶ 12, 790 N.W.2d 476 and Dufner v. Trottier, 2010 ND 31, ¶ 12, 778 N.W.2d 586).” See also, N.D.C.C. § 14-09-06.6(6)(b).

37. “[T]he added requirement of showing a change of [primary residential responsibility] is compelled or required gives some finality to a trial court’s original custody decision and helps ensure that a child is not bounced back and forth between parents as the scales settle slightly toward first one parent and then the other.” Neustal, 2010 ND 216, ¶12.

38. To determine whether modifying primary residential responsibility is necessary, the district court must consider the applicable “best-interest” factors under N.D.C.C. § 14-09-06.2(1). Kelly, 2002 ND 37, ¶ 22.

39. However, the best-interest analysis for change of custody differs from the original custody decision in which the trial court simply applies the statutory factors. Hagel v. Hagel, 512 N.W.2d. 465, 468 (N.D. 1994) (citing Gould v. Miller, 488 N.W.2d 42, 43 (N.D.1992)). First, “the application of these statutory factors must be ‘gauged against the backdrop of the stability of the child’s relationship with the custodial parent,’ because that stability is

the primary concern in a change of custody proceeding.” Id. (citing Barstad, 499 N.W.2d at 587).

40. Second, the trial court must conclude that a change in the status quo is required. Blotske, 487 N.W.2d at 609. A request for modification of custody should only be granted when there is a significant need, not some marginal improvement in the child’s life, Starke v. Starke, 458 N.W.2d 758, 760-61 (N.D.App. 1990),

41. Only when the reasons for transferring custody “substantially outweigh” the child’s stability with the custodial parent should a change be made. Hagel, 512 N.W.2d at 468. Thus, the stability of the custodial parent’s home environment is the most important factor the Court must consider. The District Court in the present case found that stability favored Mr. Tran. App. 72. Nevertheless, other factors, if substantially outweighing stability, could require a change in custody.

Section 14-09-06.2(1), N.D.C.C., provides:

For the purpose of parental rights and responsibilities, 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 and the ability of each parent to provide the child with nurture, love, affection, and guidance.

- b. The ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment.
- c. The child's developmental needs and the ability of each parent to meet those needs, both in the present and in the future.
- d. The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community.
- e. The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.
- f. The moral fitness of the parents, as that fitness impacts the child.
- g. The mental and physical health of the parents, as that health impacts the child.
- h. The home, school, and community records of the child and the potential effect of any change.
- i. If the court finds by clear and convincing evidence that a child is of sufficient maturity to make a sound judgment, the court may give substantial weight to the preference of the mature child. The court also shall give due consideration to other factors that may have affected the child's preference, including whether the child's preference was based on undesirable or improper influences.
- j. Evidence of domestic violence....
- 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.

l. 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.

m. Any other factors considered by the court to be relevant to a particular parental rights and responsibilities dispute.”

42. First, it is important to note that in recent decisions upholding a change of custody, the parent losing sole custody has not provided a stable environment for the child. See, e.g., Vining v. Renton, 2012 ND 86, ¶¶ 18-21; Glass, 2011 ND 145, ¶22.

43. In addition to finding that factor (d), stability, weighed in favor of Mr. Tran, the District Court found that JMT’s good behavior and achievement in school weighed in favor of Mr. Tran. App. 74. The District Court found that Mr. Tran has the ability to provide physical and material needs. App 72. The District Court found that both parents are morally fit. App. 73-74. The District Court found that there is no evidence of physical abuse. App. 75. The District Court found that neither parent has made false allegations against the other parent. App. 76. The District Court did not give significant weight to JMT’s preference to be with her mother. App. 75.

44. The District Court concluded that modification of custody was necessary because Mr. Tran’s “attitude, words, and behavior toward Ms. Krueger and women generally,” were cause for concern with respect to JMT’s

psychological and emotional health. App. 77. The District Court makes a tremendous leap associating Mr. Tran's contentious relationship with Ms. Krueger as an indictment of his attitude and relationship with other women and especially with his daughter.

45. Mr. Tran admittedly sent several private text messages to Ms. Krueger that this Court will undoubtedly review and use to make judgments about Mr. Tran. The text messages sent to Ms. Krueger do not define Mr. Tran's attitude toward women and do not reflect on or in any way influence the loving and stable relationship that the custody investigator admits he has with his daughter. Mr. Tran has spent close to the entirety of JMT's life defending himself and JMT from Ms Krueger's attacks on his parenting and her multiple attempts to gain sole custody of JMT almost immediately upon release from prison or rehab. After witnessing Shannon's drug use, relapse into drug use, her immediate family's current drug use, Doc ID# 181, p.3, her and her mother's physical assault of Mr. Tran in front of JMT, her mother's verbal assault of Mr. Tran laced with racial epithets, and Ms. Krueger's false reports to the police and social services, Doc ID# 181, p.4-5., Mr. Tran has become very protective of JMT. The parenting investigator and the court did not consider the emotional toll of the constant threat of change of custody.

46. These private text messages are evidence of a contentious relationship between the parties, but there is no finding that Mr. Tran has interfered with visitation except once in 2008. The District Court found that

both parties said negative things to and about the other, and with no evidence in support found that Ms. Krueger has “the ability to refrain from making disparaging remarks.” App. 73.

47. Furthermore, little or no evidence was presented that indicated that JMT currently suffers from any psychological or emotional disorders. “School staff” has made conclusions regarding JMT’s “occasional” lack of focus and her need for counseling and JMT has indicated she “often feels lonely.” Doc ID# 181, p.4-6.

48. The District Court cites to McDonough v. Murphy, 539 N.W.2d 313, (N.D. 1995). This case is not analogous. In McDonough the court gave significant² weight to the child’s preference to live with the non-custodial parent and also relied heavily on numerous evaluations of the child by a clinical psychologist. JMT was nine years old at the time she indicated a preference, not 13. Moreover, JMT was not interviewed by the District Court and her preference was not given substantial weight. And, while a parenting investigator or school staff member play important roles in protecting children, he or she does not fill the role of someone trained to make psychological evaluations.

49. The District Court states that Mr. Tran’s text messages “exhibit a coarse, chauvinistic attitude toward women . . . which the court finds will

² Counsel notes that the Trial Court altered this word to fit its ruling.

be highly detrimental to JMT's emotional and moral development as she enters adolescence." App. 71.

50. It appears the District Court's final opinion may be skewed by the inundation of motions presented to the court by Ms. Krueger during the pendency of this matter which in some way referenced Mr. Tran's inappropriate text messages. While admitting that Mr. Tran loves JMT, the District Court focuses on his feelings for Ms. Krueger and his reserved nature as evidence that he is not capable of nurturing and providing guidance to JMT. In addition the District Court states that that Mr. Tran is limited in his ability to meet JMT's developmental needs. Again, there is no evidence that JMT is suffering emotionally or developmentally. The testimony of Ms. Strang indicates that JMT simply wanted more time with her mom, not that JMT was suffering due to a distant or otherwise negative relationship with her father or anyone else in the household. Further, there is no indication that JMT's desire to spend more time with her mother, if such a desire is recognized by this Court, is a result of any recent action of Mr. Tran whether in the form of interfering with visitation or discouraging communication with Ms. Krueger.

CONCLUSION

51. For the reasons stated herein, Mr. Tran respectfully asks the Court to find that 1) the District Court's finding that there was a material

change in circumstances was clearly erroneous, and 2) the District Court's finding that a change of custody was necessary to serve the best interests of JMT was clearly erroneous.

52. The Court should overturn the District Court's decision and order that JMT be returned to the primary custody of her father.

Dated this 17th day of May, 2012.

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