

IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA

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KIRA LYNN BURGARD,	)	
	)	Supreme Court No.: 20120285
Plaintiff/Appellee,	)	District Court No.: 09-2012-DM-00200
	)	
	)	
vs.	)	
	)	
DAMMON JON BURGARD,	)	
	)	
Defendant/Appellant.	)	
	)	

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APPEAL FROM THE JUDGMENT ENTERED ON THE 17<sup>th</sup> DAY OF MAY 2012,  
IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA, THE  
HONORABLE STEVEN L. MARQUART PRESIDING

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**BRIEF OF DEFENDANT/APPELLANT DAMMON JON BURGARD**

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[1]STATEMENT OF THE ISSUES

[2]I. Whether the Trial Court abused its discretion in granting Appellee's Motion

for Default Judgment, despite the fact that Appellant responded to Appellee's Motion in a timely fashion.

[3]II. Whether the Trial Court abused its discretion in granting Appellee's Motion for Default Judgment, awarding her custody of the parties' two minor children, without considering and evaluating the "best interest" factors required to be considered under N.D.C.C. § 14-09-06.2.

[4]STATEMENT OF THE CASE

[5]This proceeding is a divorce proceeding venued in the District Court of Cass County, Southeast Judicial District, the Honorable Steven L. Marquart presiding.

[6]Appellee (hereinafter referred to as "*Kira*") commenced this action by Summons and Complaint dated February 15, 2012. Docket ID 1 and 2. The Appellant (hereinafter referred to as "*Dammon*"), admitted service of the same on the same date. Docket ID 3. Dammon, acting pro se, requested and was granted an extension of time to answer the Complaint. Docket ID 9. Dammon's Answer was due April 6, 2012. A pretrial conference was set for August 6, 2012, at 2:00 p.m. App.16.

[7]The parties signed a Marital Termination Agreement on March 8, 2012, that was later voided by Kira. App. 40.

[8]On April 9, 2012, Kira moved for Default Judgment. Docket ID 13. Dammon filed a response to the Motion for Default Judgment, along with an Answer and Counterclaim, on April 23, 2012. Docket ID 19-21.

[9]The Court entered its Findings of Fact, Conclusions of Law and Order for Judgment on May 11, 2012, and Judgment was entered on May 17, 2012. Docket ID 28 and 29. Notice of Entry was served by counsel for Kira upon counsel for Dammon on May 21<sup>st</sup>, 2012. Docket ID 30.

[10]Notice of Appeal was filed by Dammon on June 29, 2012. Docket ID 35.

**[11]STATEMENT OF THE FACTS**

[12]The parties to this action were married on June 1, 2007. App. 3. They have two minor children together, O.M.B., born in 2004, and B.E.B., born in 2005. App. 4. On February 15, 2012, Kira commenced an action for divorce against Dammon. App. 10. On February 22, 2012, Attorney Robert Schultz was assigned as mediator. App. 11.

[13]On March 5, 2012, Dammon sought an extension of time to file an answer. App. 12. Judge Steven Marquart granted his request, and ordered that Dammon was allowed to serve and file his Answer to the Complaint within 30 days of the date of the Order (March 7<sup>th</sup>, 2012). App. 13. Therefore, Dammon's time to file an Answer expired on April 6, 2012.

[14]On March 8, 2012, the parties signed a Marital Termination Agreement, settling all of the issues in the action. Kira "voided" the agreement, but Dammon did not find out about her actions until March 23, 2012, the first day of the parties'

scheduled mediation. App. 42. The parties attended the second mediation session on April 3, 2012. App. 42

[15]As stated, Dammon's time to serve and file an Answer expired on April 6, 2012, which was a Friday and three days after the failed mediation session. The following Monday, April 9, 2012, Kira moved the Court for Default Judgment, pursuant to Rule 3.2 of the North Dakota Rules of Court. App. 34. No hearing was requested.

[16]Dammon retained an attorney on April 12, 2012. App. 43. Dammon's attorney immediately contacted Kira's attorney to inquire as to whether Kira would withdraw the Motion for Default Judgment. App. 43. On April 18, 2012, Kira's attorney sent Dammon's attorney a letter, agreeing to withdraw the motion on the condition that Dammon agree to an interim parenting schedule. App. 47. Dammon's attorney received that letter on April 19, 2012. App.43.

[17]On April 23<sup>rd</sup>, 2012, pursuant to Rule 3.2 of the North Dakota Rules of Court, Dammon timely filed a Response and Affidavit to Kira's Motion for Default Judgment, along with an Answer and Counterclaim. App. 36-44. In his Answer and Affidavit, Dammon asserted it would be in the children's best interest to reside with him. Kira filed a Reply Affidavit (App. 45), raising further issues regarding the best interests of the children and asserting primary residential responsibility should be placed with her. App. 45. Kira also filed a Reply to Counterclaim. App 49.

[18]The Findings of the Court indicate that the matter came on for hearing, but it did not, as evidenced by the Docket Sheet. On May 11, 2012, the Court filed its

Findings of Fact, Conclusions of Law, and Order for Default Judgment. App 52-69.  
Default Judgment was entered on May 17, 2012. App.70-86.

[19] **JURISDICTION**

[20]This appeal is from the Default Judgment and Decree entered on May 17, 2012, in District Court, Cass County, North Dakota, the Honorable Steven L. Marquart, District Court Judge, Fargo, North Dakota presiding. The Trial Court had subject matter jurisdiction under N.D. Const. art. VI § 8 and N.D.C.C. 27-05-06. The appeal was timely under N.D.R. App. P. 4(a) (1). This Court has jurisdiction under N.D. Const. art. VI § 2 and N.D.C.C. §§ 27-02-04 and 28-27-01.

[21] **LAW AND ARGUMENT**

[22]Issue I.

**[23]Whether the Trial Court abused its discretion in granting Appellee's Motion for Default Judgment, despite the fact that Appellant responded to Appellee's Motion in a timely fashion?**

[24]The district court has discretion on whether to grant a default judgment, and its decision will not be overturned unless there has been an abuse of discretion. Citibank (South Dakota) NA v. Reikowski, 2005 ND 133, ¶6, 699 N.W.2d 851. "A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law.". Id.

[25]The North Dakota Supreme Court has a strong preference for deciding cases on their merits rather than by default judgment. Filler v. Bragg, 1997 ND 24, ¶14, 559 N.W.2d 225, Schwan v. Folden, 2006 ND 28, ¶19, 708 N.W.2d 863.

[26]In the case at bar, the District Court abused its discretion when it granted Kira's 3.2 Motion for Default Judgment, when Dammon had timely responded to said Motion and had filed his Answer and Counterclaim.

[27]Dammon's Answer was due on Friday, April 6, 2012. App.13. Prior to that time, on March 8, 2012, the parties had entered into a Marital Termination Agreement, settling the issues in the action. App. 42. The Marital Termination was later voided, and the parties attended mediation on March 23, 2012 and April 3, 2012. App. 42.

[28]Dammon's Answer was due on a Friday; on Monday, April 9, 2012, Kira moved for default judgment pursuant to Rule 3.2 of the North Dakota Rules of Court. App. 34. Dammon promptly retained an attorney and through that attorney, inquired as to whether Kira would withdraw her Motion for Default Judgment. App. 43. When Kira refused to do so unless Dammon agreed to her terms for an interim order, Dammon timely filed his response to Kira's Motion for Default Judgment. App. 47, 36-44. Dammon also filed an Answer and Counterclaim.

[29]This is not a case where Dammon sought to delay the action. Dammon believed the action had been settled until he was informed otherwise, on March 23, 2012. App. 42. Dammon attended mediation that day, along with the next scheduled mediation date of April 3, 2012. App. 42. But most importantly, Dammon timely responded to Kira's Motion for Default Judgment, served upon him on April 9, 2012. The portion of Rule 55 of the North Dakota Rule of Civil Procedure, requiring the plaintiff to give notice of the Motion for Default Judgment to the defendant if the



defendant has appeared in the action, serves no purpose if the defendant is not allowed to respond and answer the complaint.

[30]Issue II

**[31]Whether the Trial Court abused its discretion in granting Appellees's Motion for Default Judgment, awarding her custody of the parties' two minor children, without considering and evaluating the "best interest" factors required to be considered under N.D.C.C. § 14-09-06.2?**

[32]Entering a default judgment in this case, where primary residential responsibility of two minor children is contested, should be especially troublesome to the Court. Pursuant to N.D.C.C. § 14-09-06.2, for purposes of awarding parental rights and responsibilities, the "best interests" of the minor child is determined by the court's consideration and evaluation of all factors affecting the child's best interests, including the factors enumerated in that statute.

[33]In an initial child-custody determination, a trial court must decide custody on the best interests and welfare of the child. Wolf v. Wolf, 474 N.W.2d 257 (N.D. 1991). In determining the best interests of the child, the trial court has substantial discretion, but it must consider and evaluate the factors listed in N.D.C.C. 14-09-06.2. Id. Although the trial court is not required to make a separate finding on each statutory factor, the court's findings should be stated with sufficient specificity so that the appellate court can understand the factual basis for its decision. Id.

[34]In this case, the trial judge did not determine the best interests of the children, but rather only made one finding, namely, that it was in the best interests of

the minor children if the Plaintiff (Kira) is awarded primary residential responsibility of the minor children and Defendant (Dammon) be awarded parenting time. App. 53. Clearly, such a finding, even though this judgment was by default, is insufficient to support an award of custody to Kira, when there exist facts on the record that primary residential responsibility is contested and the best interests of two young children is at stake.

[35] CONCLUSION

[36]Based upon the above, Dammon respectfully requests this Honorable Court to find that the trial court abused its discretion in ordering the entry of default judgment, and remand the matter to the District Court for trial.

Respectfully submitted this 8<sup>th</sup> day of August, 2012.

BREDAHL & ASSOCIATES, P.C.

/s/

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