20130403
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
May 5, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20130403

Robin F. Medalen,
n/k/a Robin F. Rosendahl, Plaintiff and Appellant

vs.

Carter P. Medalen, Defendant and Appellee.

Appeal from Fifth Amended Judgment
District Court for Barnes County
Southeast Judicial District
The Honorable John T. Paulson
Case No. 02-01-C-91

REPLY BRIEF OF APPELLANT (Corrected)

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STATEMENT OF ISSUES PRESENTED

I. Whether the district court's finding of contempt was an abuse of discretion where there was no finding of intentional obstruction of a court order.

II. Whether the court should rescind the lower court's award of attorney's fees to Appellee; and whether Appellant should be awarded attorney's fees for this appeal.

LAW AND ARGUMENT

I. It was an abuse of discretion for the court to hold Appellant in contempt of court where there was no proof of intentional obstruction of a court order.

[¶1] Carter uses ¶22 of Montgomery v. Montgomery, 2003 ND 135, 667 N.W.2d 611, out of context in support of his position that the trial court did not err. (Brief of Appellee, ¶19). The three paragraphs immediately preceding ¶22 of Montgomery indicate that the court was only expressing reservations about the referee's decision in that case and in fact did *not* find the custodial parent in contempt for her failure to force a 14-year-old child to visit her father.

[¶2] Given the actual decision in Montgomery to let stand the referee's finding of no contempt, the paragraph cited by Appellee is *dicta* and is not properly used in support of his position. Certainly, there is nothing wrong with the Supreme Court describing high standards of conduct as an aspirational matter for parties, as when the court in Montgomery stated at ¶22: "If Susan believes a different visitation is warranted by the child's current circumstances, she may move to modify that part of the judgment." In the instant case, Robin had no desire whatsoever to move the district court for a modification reducing Carter's parenting time.

[¶3] Robin did, however, want Carter to take responsibility for the issues existing between him and the minor child. She perceived the problems between the child and her father as a temporary matter that should, and likely would, be resolved with the passage of time, particularly if Carter would take the initiative to improve the relationship.

[¶4] Appellee's brief suggests that Robin's behavior in this matter was "[i]n derogation of the finding in Sevland v. Sevland, 2002 ND 110, ¶10, 646 N.W.2d 689." (Brief of Appellee, ¶20.) Again, the instant case is clearly distinguishable. Sevland involved two young children, ages six and eight at the time of their parent's divorce. By their behavior in supervised visits, it is clear that their mother had worked to poison the relationship between the children and their father, if nothing else than by the simple act of refusing to bring the children to the court-ordered exchange point for a period of two years when they were too young to make any decisions for themselves. Sevland, ¶8.

[¶5] Robin, on the other hand, had facilitated regular contact between K.M. and Carter for eleven years, from the time of the divorce when the child was only four years old. The parties never lived in the same town following their divorce. For some years, they lived more than 150 miles apart, requiring many hours on the road by both parties to accomplish the transfers which they did for more than a decade.

[¶6] Further, in Sevland, also at ¶10, the court found that the custodial mother had not presented any evidence that the children had been subjected to any risk of harm, either physical or emotional, by visitation with their father. In the instant case, there was clear evidence that K.M. had been emotionally traumatized by the father's behavior after the vehicle incident in January 2013. Father, mother, and daughter all testified about the significance of the vehicle incident to the father/daughter relationship. Carter's testimony

includes the following words and phrases about his reaction to having been lied to regarding a school dance (which K.M. promptly acknowledged and for which she promptly apologized) and his further allegations about having been lied to regarding the severity of the vehicle incident (which K.M. denied under oath at the contempt hearing) (Tr. 69-70):

> "I was very frustrated. . ." (Tr. 27:14]; ". . . I still admittedly had a bit of a chip on my shoulder about the initial denial, . . ." (Tr. 28:18-20); "I confronted KM about it . . ." (Tr. 29:24-25); "And my frustration ramped up quite a bit at that point . . ." (Tr. 31:12-13); ". . . an argument kind of ensued, and I made a remark - - I mean I lost my temper from - - and I just kept getting more frustrated. I made a remark I wish I could take back from that, but I mean other than that, I guess I think I responded like any other parent." (Tr. 32:6-10); "And both of us kind of were scolding KM about that. And then I remember Mandy [Carter's current wife and K.M.'s step-mother] being kind of mad . . ." (Tr. 64:18-20); "KM was scolded, but she - - and even yelled at at times, . . ." (Tr. 65:9-11).

[¶7] There is a very wide range of responses available to a parent who believes that they are being lied to by a child, many of which do not involve arguing, yelling, losing one's temper, or saying things one later regrets. As the parent, Carter should be held to a higher standard than the child. His behavior should help K.M. grow in moral behavior and accountability. Instead, he modeled inappropriate behavior which traumatized her to the point that she did not want to see him for several weeks. (Tr. 74:18 - 75:4).

[¶8] There was also uncontroverted evidence that the father/daughter relationship had, in fact, been strained at least since the previous summer, not just since the vehicle incident in January 2013. Following is Carter's assessment of the improvement from the summer of 2012 to the summer of 2013:

> "KM was much more affable and pleasant to be around during the summer. The summer before [2012] she had - - it seemed like she was upset about something, and I guess I don't know what that was. I think mediation got to the bottom of the affair thing that might have been the

> issue, but she was much more interactive with her little sister, interactive with my wife and myself and everything for the most part went pretty well this summer [2013]." (Tr. 38:2-10).

In addition to proving that there was already stress in the relationship prior to the vehicle incident, Carter's words also speak to the improved atmosphere created by the mediation and counseling arranged by his attorney in May, 2013 (ROA #153, Order for Mediation).

[¶9] Appellee's brief misquotes Ronngren v. Beste, 483 N.W.2d 191, 195 (ND 1992) as stating: "[i]f a judgment is in place it is to be followed as long as it is "clear, specific, and unambiguous."" What the case actually says is "[t]o *hold someone in contempt* for violating a court order, the order must have been clear, specific and unambiguous."

[¶10] The Fourth Amended Judgment (ROA #131), in place when the contempt motion was brought, is not particularly "clear, specific, and unambiguous" as to Robin's obligations. While it does spell out the amount of parenting time that Carter is entitled to exercise, it does not specify to what lengths Robin is expected to go to ensure Carter's parenting time happens when Carter doesn't bother to make the effort to drive to Robin's home to pick K.M. up. The judgment states that, unless otherwise agreed upon by the parties, "transportation for all parenting time shall be shared equally by the parties. . ." (ROA #131, ¶7). The parties had for several years engaged in "motivated transportation" in which the party who next sought parenting time with the minor was in charge of driving. (Tr. 17:3-12). The fact that Carter failed to drive to Robin's home to pick K.M. up for his parenting time during the months in question simply because the child had told him she did not want to go to his home indicates that he, not Robin, was the parent who was guilty of "placing into the hands of [the child] power over the occurrence, length, time, or place of the visits," per Sevland, ¶10.

[¶11] The decision in Lind v. Lind, 2014 ND 70, was filed April 8, 2014, after Appellant's Brief was filed, but prior to the filing of Appellee's Brief. Appellee tries to distinguish the case, but it is factually quite similar to the matter at hand in that the mother testified that she had done nothing to adversely impact the father's parenting time in a case of two teen-age children, each of whom made their own decision that they wanted to see their father "on their own terms" rather than being forced to visit. Lind v. Lind, 2014 ND 70, ¶13.

[¶12] The message recently sent by the Lind case is much more nuanced and reflective of the realities of parenting teenagers, whether in intact families or in families separated by divorce or non-marriage. The teenage years are a time of gradual emotional and physical separation from one's parents and that fact needs to be accepted by courts, both in drafting original orders and in considering whether a parent should be held in contempt of a prior order.

[¶13] The district court judge in the instant case did not stop at suggesting that court orders should be followed to the letter. He made the statement that custodial parents have the positive responsibility to make visitation happen: "I've said it many times. They have the obligation to go *110 percent* to make sure the visitation takes place." (Tr. 113:21-23, App. 36.) [*Emphasis added*.]

[¶14] Lest the reference to 110 percent be considered harmless hyperbole, consider the court's comments a few pages later: "[The custodial parent] should have physically put [the 15-year-old minor] in the car and taken her over there as far as I'm concerned." (Tr. 116:8-10, App. 39.) The court's position does not meet the standard discussed above of being "clear, specific, and unambiguous." A 110 percent enforcement standard which

requires something more or different than is specified in an order fails to meet the standard of "clear, specific, and unambiguous."

[¶15] The court also presumed evidence that was not in the record. Near the end of his oral comments from the bench, the district court judge stated: "I think there was more going on between KM and her mother talking about . . ." at which point he slipped into their voices and imagined a conversation between them which is not supported by the record. (Tr. 119:16-25, App. 40). It is an abuse of discretion for a court to presume evidence not in the record and in particular, to presume evidence that is contradictory to the record. Even a cursory review of the transcript will provide the reader with a considerably more nuanced view of the parties and their motivations. Robin and Carter *both* testified that they individually believe that a parent ought *not* to forcibly put a child in a vehicle against the child's will for the purpose of spending time with the other parent (Tr. 52:24 - 54:9, 60:4-8, & 111-112). That is, however, what was ordered in this case, despite the fact that mediation and counseling had already effectively resolved the issues between father and daughter prior to the August, 2013 hearing, and despite the fact that such an order was completely unnecessary.

II. The court should rescind the lower court's award of attorney's fees to Appellee and Appellant should be awarded attorney's fees for this appeal.

[¶16] Appellee is correct in his assertion that Appellant is not entitled to request attorney's fees for the case in district court as she did not make the request for attorney's fees in her response to the contempt motion. Robin does, however, continue to assert that she should not have been ordered to pay any portion of Carter's attorney's fees under all

the circumstances of the case as detailed above and that she should be entitled to attorney's fees for this appeal.

CONCLUSION

[¶17] Except as corrected in the preceding paragraph, Appellant respectfully requests relief as detailed in the conclusion of Appellant's Brief.

Dated this 5th day of May, 2014.

/s/ Constance Triplett

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Certificate of Service

Constance Triplett, undersigned attorney, hereby certifies that on the 5th day of May, 2014, she served a copy of the **Reply Brief of Appellant (Corrected)** by electronically delivering the same to the following email address:

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Dated this 5th day of May, 2014.

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