
IN THE SUPREME COURT OF NORTH DAKOTA

Lisa D. Solwey,)	
)	Supreme Court No. 20160158
Plaintiff/ Appellee,)	Dist. Court No.: 16-2013-DM-00010
)	
vs.)	
)	APPELLANT'S BRIEF
Thomas J. Solwey,)	
)	
Defendant/ Appellant.)	
)	

THE DEFENDANT and APPELLANT

SUBMITS AN APPEAL FROM AN ORDER

DENYING AN EVIDENTIARY HEARING FOR LACK OF PRIMA FACIE CASE

IN THE SOUTHEAST JUDICIAL DISTRICT

COUNTY OF FOSTER

STATE OF NORTH DAKOTA

BY THE HONORABLE JAMES D. HOVEY

Dated: May 24, 2016.

Timothy C. Lamb (ND ID #06820)
P.O. Box 5562
305 S. 4th Street
Grand Forks, ND 58206-5562
701-330-1575
lamb-law@earthlink.net
Attorney for the Defendant/ Appellant

TABLE OF CONTENTS

Table of Authorities	next
Statement of the Issues	1
Statement of the Case	2
Statement of the Facts	3
Statement of the Standard of Review	11
Argument	12
Conclusion	21
Certificate of Service	page 12

TABLE OF AUTHORITIES

North Dakota Cases

Para #

<u>Forster v. Flaagan</u> , 2016 ND 12, 873 N.W.2d 904	<i>passim</i>
<u>Grigg v. Grigg</u> , 2015 ND 229, 869 N.W.2d 411	<i>passim</i>
<u>Hankey v. Hankey</u> , 2015 ND 70, 861 N.W.2d 479	<i>passim</i>
<u>Jensen v. Jensen</u> , 2013 ND 144, 835 N.W.2d 819	11, 15
<u>Schumacker v. Schumacker</u> , 2011 ND 75, 796 N.W.2d 636	13

Statutes

NDCC § 14-09-06.6(6)	<i>passim</i>
----------------------------	---------------

Rules

N.D.R.App.P., Rule 39	20
N.D. Judicial Rules of Conduct	16

STATEMENT OF THE ISSUES

¶1 The Defendant submits the following issues before this Court for its consideration and favorable ruling, to wit:

1. Under a de novo review, did the district court err in denying an evidentiary hearing on a motion to modify the primary residential responsibility in the divorce decree with over two years after the entry of judgment pursuant to NDCC § 14-09-06.6(6), where affidavits and exhibits were filed with the motion to show that the moving party should have satisfied the “bare minimum” prima facie standard for an evidentiary hearing?
2. If reversed and remanded, should the trial judge be removed in this case because he has not displayed unbiased and impartial judicial conduct concerning this matter?
3. Should the Appellant be awarded costs and attorney fees if he prevails?

STATEMENT OF THE CASE

¶2 This case comes to this Court from the Southeast Judicial District in Foster County, North Dakota, in an appeal of a decision by the Honorable James D. Hovey, from his decision on April 6, 2016, denying an evidentiary hearing in a motion for modification of primary residential responsibility because of lack of prima facie case. App. 30. The motion to modify was made over two years from the date of entry of judgment under NDCC § 14-09-06.6(6). App. 12. Supporting affidavits and exhibits from the movant Defendant/Appellant were submitted to the district court. App. 13 – 20. Opposing affidavits were also submitted by Plaintiff/ Appellee. App. 22 – 27.

STATEMENT OF THE FACTS

¶3 The parties, Lisa D. Solwey (“Lisa”), Plaintiff/ Appellee, and Thomas J. Solwey (“Tom”), Defendant/ Appellant, were married on August 8, 1998, in Walhalla, North Dakota. Dkt. 1. They were divorce on October 9, 2013, in Carrington, ND. Dkt. 19. Lisa was awarded primary residential responsibility and Tom was ordered to pay \$1,274 a month in child support. *Id.* The notice of entry of judgment was filed on October 11, 2013. Dkt. 21. Tom and Lisa had four children from their marriage: M.L.S., born 1999; twins C.T.S. and K.E.S., born 2003, and K.D.S., born 2007. Dkt. 19. Tom and Lisa both live in Carrington, ND. App. 13. Both are gainfully employed. *Id.*

¶4 Because the parties were having a multitude of problems with the parenting of the children, on August 3, 2015, Tom filed a motion to modify the judgment prior to the two year statutory allowance for reasons of material changes that presented an environment that may endanger the child’s physical or emotional health. Dkt. 28. The district court found that there was a lack of information presented to allow a prima facie case and denied an evidentiary hearing and the motion on November 2, 2015. App. 5.

¶5 Following the order denying the first motion and the two-year statutory requirement under NDCC § 14-09-06.6(6), on November 18, 2015, Tom filed another motion to modify the judgment for essentially the same reasons as the first motion, but with addition information, including police reports and juvenile court records. App. 12. The motion was accompanied by an affidavit by Tom, citing numerous problems (App. 13), along with an exhibit of a police report of 8/26/15 re: an incident involving C.T.S. and unruly behavior (App. 20); an affidavit from K.E.S., age 12, citing a number of issues (App. 16); an affidavit from C.T.S., age 12, citing problems with his environment (App. 18), along with a police

report, proposed parenting schedule change for him, and a juvenile court hearing notice for the 8/26/15 incident at his mother's house (App. 20, Dkt. 53, 54, 55).

¶6 In response, Lisa filed an affidavit refuting the negative allegations made by Tom. App. 22. In addition, Lisa had K.E.S. and C.T.S. file affidavits clarifying their earlier affidavits. App. 25, 27. Notably, K.E.S. was consistent in her affidavits, requesting 50/50 parenting time. App. 16, 25. Otherwise, there was some conflicting information presented in the affidavits. *Id.* However, Lisa offered no corroborating evidence or exhibits to support her response affidavits.

¶7 After the second motion was filed on November 18, 2015, the district court ordered family mediation under the North Dakota Family Mediation program on March 2, 2016. App. 29. Devils Lake attorney Mike Hurly was appointed as the mediator. App. 35. Before the mediation session took place on April 8, 2016 (see letter notice from Mr. Hurly, supplement to the court record), the district court filed its order denying the motion for modification on April 6, 2016. App. 30. Consequently, the mediation session was all for not, and no agreement between the parties was reached. App 35.

¶8 In its order denying the motion for modification, the district court did acknowledge that the second motion was made under NDCC § 14-09-06.6(6), and after the two-year requirement; thus, a less than heightened standard applied to whether a prima facie case was established with the moving parties' affidavits and supporting exhibits. App. 30 – 33.

Pursuant to NDCC § 14-09-06.6(6), a court may modify residential responsibility if:

- 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.

NDCC § 14-09-06.6(6).

The moving party's allegations presented in the affidavits (App. 13-18) – including the fact that Lisa had a live-in boyfriend, who had four children, who also visited the home, making an eight-member household of children, which impacted Tom's children; C.T.S.'s unruly behavior; K.E.S.'s request for a 50/50 parenting schedule; and Tom's allegation that he had been denied parenting time and not given any notice of C.T.S.'s psychological evaluation at Prairie St. Johns in Fargo by Lisa – were deemed “not [enough to] rise to the level that it would be necessary in the children's best interest for the Court to modify the current parenting plan.” App. 32, ¶ 5. Thus, the district court denied an evidentiary hearing, stating, “Thomas has failed to provide detailed allegations necessary to establish a prima facie case justifying an evidentiary hearing.” App. 33, ¶ 6.

¶9 Despite the fact that the previous motion was made under totally different standards for determining a prima facie case, i.e. an endangered environment vs. a material change after two years, the lower court ignored the need for findings of fact and any legal analysis, and stated: “The Court incorporates into this order the findings of fact and analysis of the order dated November 2, 2015.” App. 33. The lower court side-stepped an analysis of the current case law under NDCC § 14-09-06.6(6). It cited no case law in its order on point with the noted statute, which was the basis for the second motion. App. 30 – 33.

¶10 A motion for reconsideration was filed on April 7, 2016. Dkt. 66. Tom argued that the district court's order made after this Court's holding in Forster v. Flaagan, 2016 ND 12, filed on January 14, 2016, which reversed and remanded the district court's ruling to deny an evidentiary hearing in a motion to modify with very a similar factual background to the case before the bar. *Id.* Despite providing a copy of this Court's decision and arguing

that the facts parallel this case, the district court summarily denied the motion for reconsideration. Dkt. 76. A Notice of Appeal was filed on April 28, 2016. App. 38.

STATEMENT OF THE STANDARD OF REVIEW

¶11 On appeal, the standard of review of whether a district court erred in dismissing a motion without an evidentiary hearing because the movant did not establish a prima facie case justifying modification is de novo. “Whether a party has established a prima facie case for a change of primary residential responsibility is a question of law which this Court reviews de novo.” Jensen v. Jensen, 2013 ND 144, ¶ 8, 835 N.W.2d 819. Otherwise, the standard of review is under the Court’s discretion regarding the remaining issues.

ARGUMENT

1. The district court erred in dismissing a motion for modification of primary residential responsibility for lack of establishing a prima facie case.

¶12 Recently, this Court has reversed and remanded three cases in which the district court dismissed a motion to modify a divorce judgment for primary residential responsibility where very similar facts to this case existed. Hankey v. Hankey, 2015 ND 70, 861 N.W.2d 479 (wherein the Court held that interference with the parenting time was sufficient reason to warrant an evidentiary hearing); Grigg v. Grigg, 2015 ND 229, 869 N.W.2d 411 (finding that interference with the parenting time and bringing a child to counseling without the consent of the other parent were reasons enough to establish a prima facie case for an evidentiary hearing); Forster v. Flaagan, 2016 ND 12, 873 N.W.2d 904 (holding that establishing a prima facie case for an evidentiary hearing for modification of primary residential responsibility is a “bare minimum” standard requiring facts that would

support modification if proven at an evidentiary hearing, where the allegations that one party's marriage and additional children were sufficient to establish a prima facie case).

¶13 Here, the moving party, Tom, submitted competent affidavits and admissible evidence supporting those affidavits, however, the lower court dismissed his motion for modification because there were conflicting affidavits. App. 13-20, 30-33. In Forster, this Court held: "With its conclusion the alleged changes in circumstances were not material, the district court weighed conflicting issues of fact concerning how Forster's marriage and additional children potentially impacted J.F.F. The prima facie determination is not the proper venue for resolving this disputed issue of fact. Schumacker v. Schumacker, 2011 ND 75, ¶ 12, 796 N.W.2d 636 (noting "[a]n evidentiary hearing is the proper forum for the parties to resolve the factual disputes.") Forster v. Flaagen, *supra*, at ¶ 11, emphasis added.

¶14 In addition to Tom's allegation that Lisa's live-in boyfriend and his four children, who visited on weekends from time to time, impacted Tom's four children, who lived under the same roof, Tom asserted allegations that he had been deprived of parenting time and not told of a psychological evaluation at Prairie St. John's in Fargo for C.T.S. by Lisa because of his unruly behavior. App. 13 – 15. Although this Court reversed and remanded similar cases in Hankey, Grigg, and Forster, the lower court dismissed Tom's case regardless of the consistent legal precedent that supports an evidential hearing under similar circumstances. Perhaps, this Court's message that the prima facie venue is not the proper place to resolve issues of fact in dispute has not resonated yet in the district courts.

¶15 Under a de novo review, considering the affidavits and exhibits submitted in support of the motion by the moving party, this Court should find a material change to warrant an evidentiary hearing. Jensen v. Jensen, 2013 ND 144, ¶ 13, 835 N.W.2d 819

(the court must accept the truth of the moving party's allegations, unless they have no credibility). Thus, this Court should reverse the lower court's order dismissing the motion for modification of primary residential responsibility in this case and remand for an evidentiary hearing, as it did in Hankey, Grigg, and Forster.

2. Because the district judge did not act with unbiased and impartial judicial conduct, should this Court reversed and remand his order, he should be removed from this case.

¶16 The North Dakota Judicial Code of Conduct mandates that a judge must act with unbiased and impartial conduct. *See, e.g.*, Canon 1 (“A Judge Shall Uphold and Promote the Independence, Integrity, and Impartiality of the Judiciary, and Shall Avoid Impropriety and the Appearance of Impropriety”, including compliance with the law, Rule 1.1; Canon 2 (“A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently”).

¶17 In this case, the district judge's action to issue his order before the mediation session he ordered is disturbing, frustrating and unprecedented. That action alone mooted the mediation session and put a kibosh to any effort to find a mutually agreeable outcome to resolve the parties' disputes in this matter. If a judge were acting with unbiased and impartial conduct, he would never issue an order before a mediation session was started. Needless to say, the mediation session found that the parties reached no agreement. App. 35.

¶18 In addition, after being advised of this Court's ruling in Forster in a motion for reconsideration, which had very similar facts, and which this Court reversed and remanded for an evidentiary hearing while affirming a well-documented rule of law that conflicting facts must be resolved in an evidentiary hearing vice by way of finding a lack of a prima

facie case, the district judge failed to comply with the law. His bias and impartiality are evident. In the final analysis, it does not serve the children's best interest when a court deliberately and irrationally acts to delay and frustrate the legal process. The lower court's actions are unheard of to practicing family law lawyers and have no precedence. A mere admonishment would not serve as an adequate remedy in this situation.

¶19 Therefore, this Court should order that Judge Hovey be removed from any further consideration of this case if its determination is to reverse and remand his decision.

3. This Court should order that the Appellant's attorney fees be paid by the Appellee since this appeal should be determined to be unnecessary.

¶20 This Court has authority to award costs to the appellant if the district court is reversed. N.D.R.App.P., Rule 39(a)(3). Since the Appellant in this case is bringing an arguably needless case for this Court's consideration, given its rulings in Hankey, Grigg, and Forster, this Court should also award attorney fees to the Appellant for this rather costly effort to attain justice in the North Dakota courts. That would send a serious message in similar potential future cases.

CONCLUSION

¶21 For the reasons stated above, the Court should reverse the lower court's decision not to grant an evidentiary hearing and remand for such a hearing, order a change in judge, and award costs and attorney fees to the Appellant.

Dated this 24th day of May, 2016.

/s/ Timothy C. Lamb
Timothy C. Lamb (ND ID #06820)
305 South 4th Street, P.O. Box 5562
Grand Forks, ND 58206-5562
701-330-1575
lamb-law@earthlink.net
ATTORNEY FOR THE APPELLANT

CERTIFICATE OF SERVICE

I, Timothy C. Lamb, ESQ., a licensed attorney in the State of North Dakota and officer of the court, do hereby certify that on this date a true and correct copy of the following:

Appellant's Brief, and

Appendix,

was served by e-mail to the opposing party to the name and address as follows:

Steven T. Ottmar
office@ottmarlaw.com

Dated this 24th day of May, 2016.

/s/ Timothy C. Lamb

Timothy C. Lamb (ND ID #06820)
305 South 4th Street
P.O. Box 5562
Grand Forks, ND 58206-5562
701-330-1575
lamb-law@earthlink.net
ATTORNEY FOR THE APPELLANT