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FEBRUARY 13, 2017
STATE OF NORTH DAKOTA

Appellant: Paul Schaffner

Schaffner

Appellee: Teresa Hanson

Date: 2-12-2017

Civil Case Number: 08-11-c-00612

Appeal From: Judge James Hill

Modification of Parenting Time

Appellant Brief

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APPLICABLE LAW

Schaffner is seeking to amend the previous parenting time order entered on November 19, 2013 (document id #193).

Rights and responsibilities of parents is determined by NDCC 14-09-06.(2). Parenting rights and responsibilities are defined in NDCC 14-09-01 meaning: all rights and responsibilities a parent has concerning the parent's child.

Rights and responsibilities are determined from child's perspective and her or his best interests. When determining a child's best interest 13 factors are available to make findings of fact to determine: parenting schedule, parenting plan, parenting time, decision making responsibility, and residential responsibility.

The record is absent regarding any findings of fact for NDCC 14-9-06.2 while presumption existed without ability for Schaffner to rebut presumption. We must look to NDCC 14-05-22. The sub-section has two points.

1- In an action for divorce, the court, before or after judgment, may give direction for parenting rights and responsibilities of the children of the marriage and may vacate or modify the same at any time. Any award or change of primary parental responsibilities must be made in accordance with the provisions of chapter 14-09.

2- After making an award of primary residential responsibility, the court, upon request of the other parent, shall grant such rights of parenting time as will enable the child to maintain a parent-child relationship that will be beneficial to the child, unless the court finds, after a hearing, that such rights of parenting time are likely to endanger the child's physical or emotional health.

A final judgment was entered November 19th, 2013 pursuant to NDCC 14-05-22(2) requiring supervised visits at Family Safety. The following are findings of the court:

Plaintiff shall be entitled to supervise parenting time of two hours twice per week, the same to be supervised at Family Safety Center, Bismarck, North Dakota at plaintiff's expense. Additionally, Plaintiff shall be entitled to telephonic and email contact with the child on a weekly basis, within reasonable hours and appropriate communication. Plaintiff shall comply with provisions of current or future protective orders. **The parenting time modifications shall occur only upon prescribed behavior modifications.**

ISSUES

Schaffner petitioned court to modify parenting time order entered November 19th 2013.

The court reasoned change of employment is not a material change of circumstance in NS best interests pursuant to NDCC 14-05-22- (2)

To modify parenting time, the moving party (Schaffner) must demonstrate a material change in circumstances has occurred since entry of the previous parenting time order and that the modification is in best interest of NS. A material change in circumstances is important new facts that have occurred since the entry of the previous parenting time order.

1- Is change in employment a material change of circumstance to modify parenting time order? Schaffner changed careers August 2015 six months after February 17th findings and two years after initial amended judgment November 19th 2013.

2- - Did court make findings of potential physical or emotional harm to NS in detail if provided at all?

3- Is current order able to provide a relationship beneficial to NS with presumption visitation is in a child' best interest?

4- Is court required to comply with 14-09-06 and make findings within statutes scope to award residential responsibility and subsequent parenting time?

5- Is the court required to offer findings why a change parenting time is not in NS best interest? Since a presumption exists unsupervised is in child best interests.

6- Did the court error not granting Schaffner relief after completion of court ordered behavior modification February 17th, 2015 hearing?

7- Did the court fail to provide findings of fact establishing likely physical or emotional harm to NS with findings February 17th 2015?

8- Did the court fail to provide findings of fact establishing why a change in parenting time is not in NS best interest with February 17th 2015 hearings?

FURTHER ISSUES

The court accused Schaffner of playing games.

Modification of parenting time is governed by case law which explicitly states new facts not known at the time of previous entry of judgment. Schaffner knowledge or lack of knowledge is not relevant to renderings existence on February 17th, 2015 since, rendered findings were never entered as judgment. Schaffner concern was to argue case law which governs modification of parenting time from entry of previous parenting time order.

as indicated in DOC #211 February 17th renderings were not entered with the court. Rules of Civil Procedure 58

(a) Entry of Judgment.

(1) Appropriate Judgment. On the filing of an order for judgment, the prevailing party must submit to the clerk an appropriate form of the judgment. The clerk must sign and file the judgment and enter it in the register of civil actions, at which time the judgment becomes effective.

(2**) Failure to Submit Judgment. If the prevailing party fails to submit to the clerk an appropriate form of the judgment within 30 days after the order for judgment is filed, any party may submit an appropriate form without prejudice to any rights that party may have to challenge it.**

Further confusion existed not by Schaffner that findings were never made under NDCC 14-09-06, to create a bench mark, to create an objective base, to provide Schaffner a basis, to prove a material change in circumstances, or not. The court cited “collateral attack” and talked over Schaffner. He (Schaffner) understands estoppel principals provides for conservation of resources and finality of decisions. The courts expediency is appreciated, nevertheless estoppel principals do not apply to non-existent judgments or summary judgment(s).

FINDINGS TO DENY MATERIAL CHANGE IN CIRCUMSTANCE

All changes of employment are not equal and certainly should not be treated as such. In this instance, the court found Schaffner being "professionally in a better place" is not persuasive.

At the time of February 17, 2017 Schaffner worked in the Bakken primarily as environmental remediation manager. This required Schaffner to work rotation work outside of Bismarck for weeks at a time.

As an aggregate Schaffner respectfully believes a material change of circumstance has occurred and Schaffner's change of employment provided a change of schedule, which created a change of lifestyle, which provided Schaffner stability to create material change of circumstance in NS best interest. Schaffner is a teacher, and NS is school aged, our schedules are similar if not identical.

The court merely offered a conclusory tag-line to deny modification which stands to reason given no findings made under NDCC 14-09-06 providing a benchmark when modifying parenting time "notwithstanding" protection orders and no requisite findings fact, aside from checking - "this goes without saying box."

Schaffner did not place an affidavit into record for the change. However, an affidavit is not required to prove change of circumstances and the court knew Schaffner had been working rotation work and the court cited a specific ND city in remembrance.

FINDINGS OF LIKELY EMOTIONAL OR PHYSICAL HARM

The record and findings do not support such an “onerous restriction” of supervised parenting. Case law dictates precision and not the “categorical” denial the court found persuasive.

When asked what emotional or physical harm would occur with unsupervised parenting time the opposing party had no answer. Likewise, the court found no likely harm with change of parenting time.

Findings indicate under cross-examination by Schaffner, “Teresa testified precisely that she did not believe any modification of parenting plan was warranted nor would be in child best interests.” Also findings state she (Teresa) understands their son prefers a structured visitation schedule and agrees current schedule is most appropriate way. Further findings indicate she (Teresa) “categorically” denies change of current parenting plan is in child’s best interest (paragraph 21).

Teresa’s categorical yet precise denial, although categorical, means any change is not in child’s best interests. Liberalization of phone contact with father is not in child’s best interests. The ability of father to attend games, academic school activities, or attend his confirmation is not in child’s best. Even supervised or unsupervised visitation in an environment where NS and Schaffner can sit at table and chairs not constructed for 4 year olds while playing chess is not in NS best interests. Or Schaffner asking for a school picture without advocates entering into visitation to reprimand Schaffner for inappropriate question.

Schaffner agrees with findings NS is doing well socially, academically, and emotionally. Schaffner would not expect otherwise, Teresa is a good mother. However, Teresa’s categorical denial is not specific to likely physical or emotional harm with change of parenting time. Likewise, in Hendrickson v Hendrickson denying a parent without primary residential responsibility parenting time with a child is "'an onerous restriction,' such that 'physical or emotional harm resulting from the visitation must be demonstrated in detail' before it is imposed."

FINDINGS NS

The court found NS to be mature and thoughtful and Schaffner's opinion does not differ. While Schaffner concedes the court provided the adjective "powerful" in findings.

N.S. provided an affidavit stating his desires regarding visitation prior to motion hearing held on December 29th 2016. Schaffner made no objection to N.S affidavit being placed into record, precluding experience for N.S testifying in court. The opposing party called N.S. to testify while offering no new detail into his desires as a mature 14 year old young man. Likewise, the court asked several questions to gauge maturity level of N.S. Schaffner took opportunity to display interaction with N.S. in a stressful situation.

An attempt to question N.S. regarding an incident at Northridge Elementary School January 24th, 2011 and was denied opportunity by the court thus eliminating legitimate further questioning.

A call was made to police by domestic violence advocates alleging Schaffner had a gun, and was in transit to Northridge Elementary school to kill him and his mother. N.S. was taken to AARC/FSC by Bismarck police, then returned home by police, to watch police clear his home of his father.

A significant event for any 8 year old child which could impact a child's perception of his father. The opposing party objected based upon relevance and was sustained by the court. I believe the vogue cliché is "chilling" when describing such an event for an 8 year old.

Schaffner would argue the courts testimony was equally as "powerful!" when it provided testimony for NS stating, "It was so long ago he probably doesn't remember."

N.S. perception of event is relevant under 401 rules of evidence. N.S perception of event is not precluded under rules of evidence 402. Moreover, it is not in a child's best interest to have lingering doubts about his father wish to do him harm and the mother he loves.

Additionally, the court found NS offered an opinion, in response to questions from his father "he did not believe change in parenting plan was warranted so as to enhance the father son relationship" (paragraph 26). Schaffner never asked NS this question and statement in findings is a fabrication.

Regardless of NS opinions and maturity NDCC 14-05-22 "Visitation between a child and the noncustodial parent is legally recognized to be in the best interest of the child." Healy v. Healy, 397 N.W.2d 71, 73 (N.D. 1986). The visitation statute is not designed to place into the hands of children power over the occurrence, length, time, or place of the visits. See Giangeruso v. Giangeruso, 708 A.2d 1232, 1234 (N.J. Super. Ct. Ch. Div. 1997) Sevland v Sevland.

The courts commentary in findings is remarkable “notwithstanding” fabrication of statements while contributing “powerful” testimony for NS.

Six years after terminating Schaffner parenting rights the court is unable to provide details to potential physical or emotional harm, to NS, at either hearing.

Schaffner appreciates the courts “pat” on the head while pontificating “it’s a start” for him (Schaffner). Then with predictable breezy indifference cites reoccurring issue(s) without specifics to these issues. To conclude the narration, an attempt to fulfill a role of public servant, judge, and attorney, the court proceeds to offer what could be construed as legal advice to opposing party by warning her of expiration of protection order.

Parenting Plan

The court asserts Schaffner's present motion is asking for unrestricted parenting time with NS (paragraph 18) this is not accurate. The court asserts Schaffner opined unlimited would be in his son's best interest notwithstanding his son's testimony (paragraph 20). This again is another fabrication in the courts findings.

However, as Schaffner's brief stated he asked for implementation of parenting time offered in previous hearing in January 2015 provided to the court October 15th, 2014 (id #206). Furthermore, during argument stage Schaffner was precluded from reaffirming his brief and parenting time request. Eventually time ran over and court took phone call from a prosecuting attorney regarding another hearing.

Additionally, on December 20, 2016 the court issued an order and scheduling for mediation. Schaffner was clear on the stand he would not be opposed to mediating visitation. Inexplicably, the court quashed order schedule and order for mediation. The assertion Schaffner wanted willy-nilly visitation is not supported in record and is a fabrication by the court.

MAINTAINING PARENT CHILD RELATIONSHIP

The court cited NDCC 14-05-22 to deny modification. The court shall grant parenting time which will allow a relationship beneficial to the child and in her/his best interest.

The current parenting time order does not allow for a beneficial relationship for child. Schaffner and NS are allowed two visits per week at Family Safety Center. This arrangement is problematic for Schaffner and NS. As testified to at motion hearing 4 disparate parties working together are required to facilitate a visit.

NS is a busy young man playing sports, church activities, and social life of a teenager. Second, visitation at FSC is prohibitive by availability of facilities and personnel. Third, Teresa has a busy schedule teaching and coaching and must be available to drive NS to FSC. Finally, Schaffner has professional and personal obligations which record indicates.

The current arrangement is not able to facilitate a relationship beneficial to NS "notwithstanding" NS testimony. Although Schaffner appreciates FSC and services provided.

The court has known for 2 years the Family Safety Center is unable to provide 2 visits per week (doc id #208). These emails explicitly state management at Family Safety Center is unable to provide services provided to Schaffner.

FINDINGS DO NOT SUPPORT DECISION TO MODIFY PARENTING TIME

A district court's decision to modify parenting time is a finding of fact which will not be overturned unless clearly erroneous. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or if, although there is some evidence to support the finding, on the entire evidence, we are left with a definite and firm conviction a mistake has been made." Kienzle v. Selensky,

A change in work schedule is recognized as material change in circumstance to modify parenting time. In this case Schaffner's work schedule changed to include change of profession requiring no overnight travel; extended rotations of work outside immediate area; and change provides schedule similar to NS.

A change of parenting time is analogous to change in primary residential responsibility. This Court has noted "a parent's work schedule is an appropriate consideration in deciding primary residential responsibility." Hammeren v Hammeren'

In Ritter v Ritter this court found Joshua Ritter's change in employment resulted in a significant difference in his work schedule and his ability to care for his children. Joshua Ritter's new in-state job, more predictable work schedule and general availability constitutes a material change in circumstances.

In Young v Young this court found change in a parent's work schedule may also be a change of circumstances material to visitation and has been recognized in other jurisdictions. See Grange v. Grange, 725 N.W.2d 853, 860 (Neb. App. Ct. 2006) (a significant change in a party's work schedule may suffice to reopen the subject of visitation); Ahrens v. Conley, 563 N.W.2d 370, 372-73 (Neb. App. Ct. 1997) (change in work schedule, the child's increased age and child's preference to spend more time with parent collectively suffice as a material change of circumstances for visitation).

PHYSICAL OR EMOTIONAL HARM

A mixed question of law and fact arises when facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. This is subject to clearly erroneous standard and N.D.C.C. 14-05-22-(2)

The district court had continuing jurisdiction to address issues relating to "parental right and responsibilities' and parenting time." The court must grant such rights of parenting time that is beneficial to child, unless the court finds, after a hearing that such rights are likely to endanger the child's physical or emotional health. The Supreme Court has stated "a restriction of parenting time must be supported by the preponderance of evidence and accompanied by a detailed demonstration of the physical or emotional harm likely to result from visitation." Wolt v. Wolt, 2010 ND.

In Keita v. Keita 2012 ND 234, the Supreme Court reversed an award of supervised parenting time after finding insufficient evidence in the record and insufficient detailed findings demonstrating the physical harm or emotional harm to the child likely to result from visitation. The court may give direction for parenting rights and responsibilities of the child and may modify the same, at any time before or after judgment.

In this case, NS has had no contact with his father since prior issuance of protection order 6 years ago. Logically if the relationship is not re-established soon, it will be as though Schaffner's parenting rights have been terminated, with the exception of his child support and other financial obligations. A conflict over visitation or parenting time can harm the emotional welfare of a child caught in the middle. Dufner v.Trotier, 2010 ND 31. Siewert v Siewert, 2008, ND 221. The judgment puts the minor child in the middle and neither protects nor provides for the minors emotional needs. To deny further contact in this case would have the same effect of terminating Schaffner's parental rights.

Unsupervised parenting time is considered in child's best interest. However findings of fact do not support the decision.

February 17th 2015

The court denied Schaffner's motion to modify parenting time after a hearing in February 17, 2015. The previous court required completion of LSS Batterers Group treatment course prior to modification of parenting time. The course was completed and certificate was filed with the court (doc id # 209). Likewise, the plaintiff provided a plan which was not provided to Schaffner or litigated (doc id #218). Finally a detailed parenting plan was filed with the court by Schaffner (doc id #206).

Subsequently the court denied this motion with trademark paternal narrative as December 29th 2017 hearing.

Like the most recent decision, the court made no findings of potential physical or emotional harm to NS. The court did imply a change of parenting time was not in NS best interests, "notwithstanding" the preexisting presumption otherwise, and accordingly, the court in its breezy indifference, failed to find facts why modification is not in NS best interest.

Schaffner is asking court to review decision pursuant rule 58 of civil procedure. Additionally, Schaffner recognizes a mere technical violation of a rule is not always appropriate given nature of parenting time modification and need for finality of decisions for children. In this instance Schaffner respectfully asks to review February 17, 2015 decision and consider completion of court prescribed behavior modification and specific parenting plan.

RULE 58. ENTRY AND NOTICE OF ENTRY OF JUDGMENT

(a) Entry of Judgment.

(1) Appropriate Judgment. On the filing of an order for judgment, the prevailing party must submit to the clerk an appropriate form of the judgment. The clerk must sign and file the judgment and enter it in the register of civil actions, at which time the judgment becomes effective.
(2) Failure to Submit Judgment. If the prevailing party fails to submit to the clerk an appropriate form of the judgment within 30 days after the order for judgment is filed, any party may submit an appropriate form without prejudice to any rights that party may have to challenge it.

(b) Notice of Entry of Judgment.

(1) In General. A notice of entry of judgment must identify the docket number and the date the judgment was signed.
(2) Service. Within 14 days after entry of judgment in an action in which an appearance has been made, notice of entry of judgment in compliance with Rule 58(b)(1) must be served by the prevailing party on the opposing party. A copy of the judgment must be served with the notice of entry.
(3) Filing. The prevailing party must file the notice of entry of judgment. A copy of the judgment may be filed as an attachment to the notice of entry.

(4) Post Judgment Motion or Appeal. Service of notice of entry of judgment is not required to begin the time for filing a post-judgment motion or an appeal if the record clearly evidences actual knowledge of entry of judgment through the affirmative action of the moving or appealing party.

Schaffner assumes the court was citing rule 58(b)(4) while talking over him citing alleged knowledge was relevant. It seems self-evident but this sub-section relates specifically to entered judgments or orders, not merely renderings.

In this case, the prevailing party failed to submit to the clerk an appropriate form of the judgment within 30 days after the order for judgment is filed, any party may submit an appropriate form without prejudice to any rights that party may have to challenge it.

MUST COURT COMPLY WITH 14-9-06.2

No findings have been entered or rendered under NDCC 14-09-06.2 with analysis of NS best interest. The court summarily determined Schaffner parenting rights and responsibilities are essentially terminated.

Unlimited discretion without statutory encumbrances provide finality of decisions while conserving judicial resources. But - at least officially - Schaffner's parenting rights have not been terminated, he is still paying child support without complaint.

The court has not made findings for either party to comply with NDCC 14-09-06.2 as in section K)

Evidence of domestic violence. In determining parental rights and responsibilities,the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent have residential responsibility. The court shall cite specific findings of fact to show that the residential responsibility best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary to protect the welfare of the child, residential responsibility for a child may be awarded to a suitable third person, provided that the person would not allow access to a violent parent except as ordered by the court.

Additionally the court may consider domestic violence as defined by NDCC 14.07.01

"Domestic violence" includes physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members.

The court did not cite protection orders as domestic violence in 14.07.01 to require supervised parenting. This stands to reason because no findings of fact were entered by either court aside from checking a box.

CONCLUSION

1- Schaffner is asking the court to reverse and remand with instructions to apply parenting plan provided to the court. Schaffner new employment is a material change of circumstances.
2- Schaffner is asking court to reverse and remand with instructions to apply parenting plan based upon completion of the courts previous behavior modification requirement at February 17th, 2015.
3- Schaffner is asking the court to remand to district to:

- A full evidentiary hearing to comply with NDCC 14.9.06
- To require parenting investigator and require attorney representing NS at mutual cost between parties.
- To remove case from current court.

Certificate of Service

STATE OF NORTH DAKOTA

File # 08-11-c-00612

Paul Schaffner

Plaintiff.

Vs.

Teresa Hanson

Defendant.

I, (**Paul Schaffner**), swear that I am at least 18 years of age, and on (**2-13-17**), pursuant to Rule 25(a)(4) of the N.D. Rules of Appellate Procedure, I served notice of appeal, in the above entitled case, by emailing a true copy to Scott Hager at: shager@pagelweikum.com

Dated
2-13-2017

Paul Schaffner