20210290
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 30, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kate Austin Anderson, Plaintiff / Appellee, vs. Derek Thomas Spitzer, Defendant / Appellant.	)	Supreme Court No. 20210290 Cass County Case No. 09-2013-DM-01245

ON APPEAL FROM THE ORDER FOR SECOND AMENDED JUDGMENT ENTERED AUGUST 27, 2021, THE ORDER ADOPTING REFEREE'S FINDINGS ENTERED SEPTEMBER 28, 2021, AND THE SECOND AMENDED JUDGMENT ENTERED OCTOBER 27, 2021.

FROM THE DISTRICT COURT FOR THE EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY, NORTH DAKOTA
REFEREE STEPHANIE HAYDEN, PRESIDING
HONORABLE REID A. BRADY, REVIEWING

REPLY BRIEF OF APPELLANT
"ORAL ARGUMENT REQUESTED"

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ARGUMENT

I. THE DISTRICT COURT ERRED GRANTING KATE PRIMARY.

[¶1] A district court may modify primary residential responsibility after the two-year period following the date of entry of an order establishing primary residential responsibility if the court finds: 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 the modification is necessary to serve the best interests of the child. N.D.C.C. § 14-09-06.6(6).

[¶2] This statute and our case law dictates that in order for primary residential responsibility to change hands, the moving party must show a general decline in the child's condition such that a modification is necessary in order to serve the best interests of the child. See Slappy v. Slappy, 2021 ND 126, ¶ 28 (No. 20200352).

[¶3] Not surprisingly, Kate does not cite any of this law in her Appellee Brief. Why? Because this law is lethal to her position on this appeal. The fact of the matter is, the district court must have found a "general decline" in the child's condition. It did not.

[¶4] Let's not forget the following statements made during the trial on this issue:

> [¶a] Diane Schull, parenting investigator: "In this case I did not find that there were any special developmental needs. [P.T.S.] seems to be very intelligent, on track, and I believe that both parents can meet his needs." Trial Transcript (March 15, 2021); p. 168;
>
> [¶b] Diane Schull in response to a question regarding how P.T.S. was doing in school: "Yes, actually very well." Id. At p. 205; Lines 23-24.
>
> [¶c] Kate in response to whether the child is getting nearly all A's: "Yes." Id. At p.

216; Lines 10-12.

[¶d] Kate in response to whether P.T.S. is on any sort of behavioral or academic intervention plan: "No." Id. At p. 222; Lines 18-25.

[¶e] Kate indicates that the dean of students has no concern that P.T.S.'s behavior is declining. Id. At p. 221-222; Lines 24-25 & Line 1.

[¶f] Kate describes P.T.S.: "He's a great kid . . . he's got a lot of heart. He's very kind. He's respectful, funny . . . He's also a very hard worker. He does his chores at home. He helps with his little brother whom he adores. Yeah, *he's just a good all around kid*." Trial Transcript (April 5, 2021), pp. 249 & 250; Lines 23-25 & Lines 1-5

[¶g] Kate agrees P.T.S. is "a kid that doesn't need a lot of discipline. He just kind of follows the rules." Id. At p. 250; Line 9.

[¶h] Kate's counsel states in her closing: "If there's one thing we can all agree on is that this child is pretty high functioning. He's not just into hockey, they win the international sports hockey. He's not just doing well in school, he's doing really well in school. He's a perfectionist. He's hard on himself, and he has a temper because of that . . . *this is a child that performs and achieves and succeeds at a very high level*…" Id. At pp. 322 & 323; Lines 21-25 & Lines 1-10 (emphasis added).

[¶5] Furthermore, it must be repeated that the district court found primary residential responsibility should be changed based on only two factors, that is, factors A and E. N.D.C.C. § 14-09-06.2 (a)(love, affection, and other emotional ties existing between the child and the parents); N.D.C.C. § 14-09-06.2 (e)(willingness and ability of each parent to foster a relationship between the other parent and the child). Strikingly absent from these two factors is the "condition" of the child, much less a "general decline."

[¶6] And, when discussing the best interests factors, the Court made the following findings evidencing the opposite of a general decline:

[¶a] Factor B: "This factor favors neither party." (R213:3:b)

[¶b] Factor C: "By all accounts, P.T.S. appears to be developing well. He is an accomplished athlete and receives high academic marks. Both parents acknowledge that P.T.S. is very competitive." (R213:3:c) "Ms. Schull opined that Derek does a better job of keeping in contact with P.T.S.'s teachers than Kate." (R213:4:c) "This factor favors neither party." (R213:4:c)

[¶c] Factor D: While ignoring the fact that Derek "claimed" Kate moved six or seven times in the last seven to eight years by instead focusing on whether any of those moves were evictions, the Court found that "Despite Kate's past financial difficulties, *there was no evidence that P.T.S. was affected*." (R213:4:d) (Emphasis added). "This factor favors neither party." (R213:4:d)

[¶d] Factor D: "The Court has no concerns with regard to the sufficiency and stability of Derek's home environment." (R213:4:d) Wouldn't there be a concern about the sufficiency of Derek's home environment if there was an "emotionally abusive" situation going on as Kate would now like this Court to believe?

[¶e] Factor E: When talking about the child not feeling well and not wanting to go to Derek's home, the Court found: "Both Kate and Derek testified that this was an unusual situation." (R213:5:e)

[¶f] Factor F: "Both parents appear to be generally morally fit *as that fitness impacts the child*." (R213:6:f)

[¶g] Factor G: "This Court does not have any concerns with either party's physical

or mental health." "This factor is neutral." (R213:6:g) If Derek was emotionally abusing the child, wouldn't this have been an issue? Is this not why parental capacity evaluations are done in such cases? Not only did the parenting investigator not ask for one, neither did Kate. The record is completely absent of any sort of professional testimony regarding a general decline in the child's (mental) condition.

[¶h] Factor H: Despite Derek living in the school district where the child lives and Kate living in another State (MN), which would require moving school districts upon a change in custody, the district court found: "This factor is neutral." (R213:7:h)

[¶i] Factor I: "P.T.S. expressed a preference for the schedule to remain the same. P.T.S. indicated he would miss family at each home if the schedule changed." (R213:7:i) Although the district court noted that P.T.S. may be a people pleaser, there was no mention that Derek was abusing, mentally or emotionally, the child. Why? Because it hasn't happened -period.

[¶j] Factor J: "This factor favors neither party." (R213:7:j)

[¶k] Factor K: "The boys [Derek's stepson and P.T.S.] enjoy playing with other children in the neighborhood." (R213:8:k) "Despite the age difference, it is reported that P.T.S. and A.S. [Derek's daughter] have a good relationship." (R213:7:k)

[¶l] Factor L: "Neither party has made an allegation of harm to the child." (R213:7:l) In other words, the district court found that *Kate never even made the allegation that Derek was harming the child*. "This factor is not applicable." (R213)

[¶m] Factor M: "No other factors were considered by the Court." (R213:7:m) In other words, the court did not mention whether it believed the child's condition had generally declined or, if it had, which is denied, how it had any connection to Derek.

[¶7] Instead of citing the district court's order, as found above, Kate gives her take on what the evidence at trial should have shown, with very few citations. These numerous remarks, when made without citations, are nothing more than conjecture and speculation. See e.g., Earnest v. Garcia, 601 N.W.2d 260, 1999 ND 196 (Judges, appellate or not, are not ferrets, obligated to engage in unassisted searches of the record for a position).

[¶8] And when there are citations, much is exaggerated. One such example is found on page 14 of Kate's Appellant Brief, to wit: "At the evidentiary hearing, Kate testified that P.T.S.'s anxiety regarding his father causes P.T.S. to be *incredibly stressed*." Id. at ¶ 24 (emphasis added). In reality, this is what was stated at trial, much by the way of Kate's lawyer's leading questions (testimony):

> Q: Do you think that P.T.S.'s anxiety is getting worse?
> A: *Sometimes, yes. Yes*.
> Q: Do you think that P.T.S. walks on eggshells?
> A: Yes, at times. Especially with situations regarding his father. The pick-up times or things where he can't find something and we may be a few minutes late, *I know he gets a little more anxious*.

Trial Transcript (April 5, 2021) P. 257; Lines 19-25. Above and beyond Kate not being qualified to testify regarding the child's mental health, the actual testimony from Kate regarding the child getting "a little more anxious" is a far cry from the child being "incredibly stressed" as was alleged in Kate's Brief. Kate is grasping at straws at this point, knowing there simply isn't enough for this court to uphold the district court's decision. And rightfully so.

[¶9] When zooming out and looking at this case from the 10,000 foot view, it is plain to see the court modified primary residential responsibility over a difference in parenting styles. When looking at cases in which this Court has actually upheld changes of custody/residential responsibility, the difference is striking.

[¶10] For instance, in Anderson v. Resler, 2000 ND 183, 618 N.W.2d 480, Resler was engaging in inappropriate discussions with the child about sex with her father, as well as consistently interfering with parenting time for two years straight. Resler had stated to others that her plan was to completely eliminate the father's relationship with the child. The district court had also first attempted to resolve the frustration of visitation through other methods other than changing custody, but Resler simply wouldn't cooperate.

[¶11] In Hendrickson v. Hendrickson, 2000 ND 1, 603 N.W.2d 896, custody was changed to the father because of the mother's repeated alienation. Notably, she admitted she consistently hung up on the father until he paid her $20,000. The father also reported that on several occasions assistance from the police was necessary to complete exchanges. The mother effectively trained the children against having a relationship with the father. See also Kelly v. Kelly, 2002 ND 37, 640 N.W.2d 38 (mother claiming to have had five strokes and friend and a co-worker took care of her daughters. Mother moving 8 times since the separation and divorce. Mother having multiple relationships).

[¶12] Obviously there is a stark contrast in the history of cases in which this Court has upheld a modification of primary custody and this one. A child "testing boundaries" and "starting to act out a little bit more" is not enough. Appellee Brief, ¶ 5. And, bickering over whether the child should play hockey after a concussion is not enough. Bickering over the punishment of a child after a "squirt gun incident" is not enough. Bickering over parenting time, with no real loss of time is not enough. And with no qualified individual, such as a counselor or a psychologist, some slight insinuations the child gets "a little more anxious" before exchanges when he may be late is not enough.

[¶13] This is not a case of abuse. This is not a case of parental alienation. This is a case

where the parties have had some disagreements regarding parenting. But who hasn't? Is this the new standard to change primary residential responsibility? One would hope not, or welcome the floodgates of litigation.

[¶14] Although it is not necessary to address the rest of Kate's Appellee Brief, Pages 8 through 17, which concentrate the vast majority of its efforts on exaggerating the district court's actual findings regarding credibility, a few things should be noted.

[¶15] In regard to the "concussion incident," although Kate criticizes Derek for not wanting P.T.S. to play hockey three days after incurring a concussion -by focusing her attention on whether someone was "lying" about the doctor's orders or not- this entire discussion fails to address the actual issue here i.e., whether the child has suffered from a general decline in his condition. He has not.

[¶16] In regard to the "squirt gun incident," again, although Kate attempts to ramp up Derek's alleged lack of credibility, there is no reference of harm to the child or a general decline in the condition of the child until the last paragraph. And then what does her argument consist of? Pure speculation that the child underwent "an immense amount of stress." Upon information and belief, as there is no citation to said statement in the record or the district court's order, the district court never found the same.

[¶17] In regard to the "August 2020 Incident," Kate provides a lengthy argument over how she believes the evidence presented at trial should be interpreted. Remarkably missing from this argument; however, are citations to any portion of the Judgment that says the child has had a general decline in his condition because of this incident.

[¶18] And, even more telling about the district court's order is that Kate engaged in very similar behavior, yet it went ignored. In this regard, Kate argues within the section of her

brief titled the "August 2020 Incident" that Derek "unilaterally decided that he would receive makeup parenting time with P.T.S." Appellee Brief at ¶ 23, Pages 13-14. The evidence shows that July 4, 2020, was Derek's holiday with the child. (R66:3) Yet, Kate "unilaterally" decided to exercise her make-up time on this day, despite knowing Derek would not agree with it. And so why is this so terrible for Derek and somehow acceptable for Kate to do? And why was Derek berated for calling the police on this date instead of the focus being on Kate disobeying the Judgment? Regardless of any clear bias, the fact of the matter is P.T.S. is doing well and wanted the schedule to stay the same, as cited above.

[¶19] In conclusion, this is not a modification of primary residential responsibility case. Kate has done her best to vilify Derek, but this is just a red herring. The actual standard applicable to this case, "general decline," was not fulfilled and so, this Court must reverse the district court and allow the child's schedule to "remain the same" as he originally wished, or at a minimum 50/50, as the parenting investigator originally recommended.

II. THE DISTRICT COURT ERRED WHEN SETTING THE EFFECTIVE DATE OF DEREK'S CHILD SUPPORT.

[¶20] Kate begins her argument with the following statement: "Defendant's reliance on Brakke v. Brakke, 535 N.W.2d 687, 690 (N.D. 1994) is misplaced." This is nothing more than a classic strawman argument, in which Kate misrepresents Derek's argument to more easily knock it down. Anyone reading Derek's Appellant Brief can see that he did not "rely" on Brakke, but used it as an analogy after citing the copious amounts of law which support his position, and which just so happens to be completely ignored by Kate. In fact, Kate does not address one statute or case Derek "relied" on within his Brief. That law stands on its own and will not be repeated again, here.

[¶21] Kate then cites the case of Mahoney v. Mahoney, 538 N.W.2d 189 (1995), in support of her argument that someone with primary residential responsibility can pay child support. Mahoney does not stand for this principle and is highly distinguishable from the case at hand. Mahoney dealt with a motion to modify child support, sans a motion to modify residential responsibility. In other words, Mahoney never dealt with a situation in which residential responsibility was changed from an obligor to an obligee. It was simply dealing with a situation in which the court ordered a modification of child support for the current obligor. And, admittedly, there are all sorts of reasons for child support to start at the time the motion is filed in such situations. But that is not the situation here. The district court ordered child support to go back to and through a period in which Derek had primary residential responsibility. Upon lengthy research, and upon information and belief, no law supports the same.

[¶22] Lastly, Kate admits that "a modification of child support should be made effective from the date of a motion to modify, absent good reason to set some other date," but she fails to answer or ignores the glaring question brought forth by such a citation i.e., "why isn't it a good reason to start an obligor's support the day they lose primary custody?" Kate does not respond to this question because it is clear to all concerned that primary custodians don't pay child support and an order directing the same is clearly erroneous.

CONCLUSION

[¶23] The trial court erred in granting Kate's motion. As such, the Court must REVERSE the district court's Order for Second Amended Judgment and the Second Amended Judgment modifying primary residential responsibility.

RESPECTFULLY SUBMITTED this 30th day of March, 2022.

/S/ Greg Liebl

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CERTIFICATE OF COMPLIANCE

[¶1] The undersigned, as attorney for Derek Thomas Spitzer, Defendant/Appellant in the above-captioned matter, and as the author of the Reply Brief of Appellant, hereby certifies that said brief is in compliance with N.D.R.App.P. 32(a)(8)(A) and contains 12 pages.

Dated this 30th day of March, 2022.

/S/ Greg Liebl

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Kate Austin Anderson, Plaintiff / Appellee, vs. Derek Thomas Spitzer, Defendant / Appellant.	)))))))))	Supreme Court No. 20210290 Cass County Case No. 09-2013-DM-01245

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

[¶1] I, Sierra Johnson, being sworn says that she is of legal age, a resident of Fargo, Cass County, North Dakota, not a party to nor interested in the action, and that she served the attached:

1. Reply Brief of Appellant

upon the following person(s):

Ashley Heitkamp **ashley@nilsonbrandlaw.com**
Attorney for Defendant

via electronic means on the th day of March, 2022, by electronically serving through the North Dakota Supreme Court filing system, the same to the person above named at the above-referenced email address. That she knows the person served to be the person named in the papers served and the person intended to be served;

[¶2] I declare under penalty of perjury that the foregoing is true and correct. Executed on the 9th day of March, 2022.

/s/ Sierra Johnson

Sierra Johnson, Affiant
Fargo, ND