

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ROY W. BROOKS,

APPELLANT

Vs.

SARAH C. BROOKS, A/K/A/ SEGO,

APPEALEE

SUPREME COURT NO. 2015-0044

DISTRICT COURT NO. 19-2013DM-00004

APPEAL FROM THE DISTRICT COURT, BURLEIGH
COUNTY, NORTH DAKOTA, SOUTH CENTRAL DISTRICT,
HONORABLE GAIL HAGERTY

BRIEF OF APPEAL

March 10, 2015

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STATEMENT OF THE CASE

The appellant, Roy W. Brooks, ("Appellant") filed a Motion for modification/amendment of the parental residential responsibility on 6th January, 2015, (Record Appendix, 1, hereinafter, R.A..) Appellant submitted an affidavit which showed a material change in circumstances. The District Court, Honorable Gail Hagerty, arbitrarily denied the motion ordering that "...Mr. Brooks should either obtain legal advice or educate himself concerning the law before bringing motions." (R.A. 2) However, the appellee, Sarah C. Brooks, A/K/A/ Sego, (Appellee) filed no opposition refuting any of the contentions claimed by the appellant's affidavit. Instead, former counselor of record, Alexander S. Kelsch, filed a return to defendant's motion to amend and or modify the primary residential responsibility. (R.A. 3) Appellant then returned an opposition to plaintiff's response to defendant's motion to modify and or amend primary residential responsibility, informing the court that counselor Kelsch no longer represented the plaintiff, and if he was hired anew, failed to timely file any notice of representation according to proper court rules. (R.A. 4). The Court so disregarded the fundamental rights of parents, and as such, arbitrarily denied appellant's motion in contrast to any legal regards made thereto. (R.A. 2) This appeal followed.

STATEMENT OF FACTS

In April, 2013, the appellee filed for divorce in Grant County, The parties were married on July 2, 2010 in Bismarck ND. The parties have three (3) minor Children ages 4-6 years old. Two of which are twins. On September 18, 2014, the parties entered into a mutual stipulation of divorce along with a parenting plan and distribution of assets/debt. The Court, Honorable Gail Hagerty approved the mutual stipulation of divorce (R.A. 5). Appellant agreed to allow the Appellee to have primary residential responsibility since the minor Children would be living in the family residence at 306 College Street, Flasher, ND. 58535. Appellant moved into an apartment at 75 ½ 5th Ave E., Flasher, ND. 58535, in order to maintain his relationship with the Children. Since then, and leading up to the entering of the agreement, appellant has endured arbitrary treatment by the court based solely on his inability to afford legal representation. Equally, appellee has continuously discouraged any relationship between appellant and the Children which has been the direct cause of appellant seeking any guidance or assistance from the Court. The appellee has constantly changed material matters outlined in the stipulated agreement, to suit herself and thereby employing situations of emotional and developmental disparities with the minor children. If not for these deviations from what was agreed to, no further matters would be brought to the court for dispositions. However, in bringing the issues as they came to light, the court disregarded anything the appellant contended and arbitrarily dismissed matters which directly affected the best interests of the minor children. The appellee has since taking the minor Children out of their primary residence, moved them in

with a resident of Flasher, married him, and has yet to inform appellant of any of these material changes which under the sanctity of the stipulated agreement, appellee was legally obligated to do so. In appellant's attempt to apprise the court of these matters which are changes in the circumstances, the court has systematically been arbitrarily opposite in its orders, against the very nature of the best interests of the minor Children, Appellee's chronological behavior since filing for divorce, and which is a matter of record, should in the least, offer concern to the Court in making sure the best interest of the minor children is being protected, and that their emotional and developmental needs are not being compromised by either parent. The Court shows utter arbitrary disregard for material matters the appellant proffered when it denied waiver of filing fees to modify/amend child support based upon appellant has no income which is not a temporary situation. The very same affidavit information appellant provided this court, he provided to the district court (R.A. 6), yet there in the district Court denied the application arbitrarily. (R.A. 7). Appellant may not be versed in the law as is regarded by practicing attorneys, but all the same it is without just cause to be voiceless in matters that potential harm and damage the minor children involved because one parent elects to be selfish rather than responsible.

SUMMARY OF THE ARGUMENT

North Dakota Constitution, North Dakota Century Code, and United States Supreme Court case law has clearly defined the rights of parent in the protections and best interests of the minor Children involved in divorce matters. Appellant has tried on many occasions to express concerns to the District Court on matters that went against the protection of the children's best interests by the appellee, only to be arbitrarily disregarded and forewarned that lacking exemplarily knowledge of the laws of North Dakota could result in a financial burden upon him for any costs the appellee may endure as a result of appellant's motions of any kind, which sought to protect the best interest of the minor Children against emotional and developmental harm. The Court record is clear on these hurdles faced by the appellant, and said instances are not isolated nor should they be treated as expectable legal practice. Appellant puts forth the following arguments to best articulate the injustice to himself, and the welfare of the minor Children involved between the parties.

ARGUMENT

1. STANDARD OF REVIEW

This court has the authority to examine a District Courts decision by invoking supervisory authority. The exercise of which is to prevent injustice where there is no right to appeal or where the remedy by appeal is inadequate. Section 27-02-04; N.D.C.C., Lang v. Glaser, 359 N.W. 2d 884, 885 (N.D. 1985). Further jurisdiction is coffered by N.D. Const. art. VI sections 2 and 6, and N.D.C.C. section 28-27-01.

2. DID THE DISTRICT COURT COMMIT ERR IN NOT HAVING AN EVIDENTARY HEARING ON APPELLANT'S MOTION TO MODIFY AND OR AMEND PARENTAL RESIDENTIAL RESPONSIBILITY GIVEN A MATERIAL CHANGE IN CIRCUMSTANCES EXISTED.

The appellant filed his motion to modify and or amend the primary residential responsibility on the 5th of January, 2015, along with an affidavit in support. There was no opposition or rebuttal of appellant's affidavit from the appellee. The appellant cited N.D.C.C. section 14-05-22, which states in pertinent part:

(2) After making an award of primary residential
The Court shall, upon request of the other parent,
Grant such rights of residential responsibility as
Will enable the Child to maintain a parent Child
Relationship that will be beneficial to the Child...
After a hearing, that such rights of residential
Responsibility are likely to endanger the Child's
Physical or emotional health. (R.A. 1)

When looking at the pleading as a whole, as the Court pointed out in its order denying the motion, the relevancy of the pleading was based not only in section 14-05-22, but N.D.C.C. section 14-09-06.6 (2) which states in pertinent part:

Unless agreed to in writing by the parties, or if
Included in the parenting plan, if a motion for
Modification has been disposed of upon its
Merits, no subsequent motion may be filed with-
In two years of disposition of the prior motion,
Except in accordance with subsection 5.

Subsection 5 states in pertinent part:

The court may not modify the primary residential
Responsibility within the two-year period following
The date of entry of an order establishing primary

Residential responsibility unless the court finds
The modification is necessary to serve the best
Interests of the Child and:

- (a) The persistent and willful denial or interference with parenting time;
 - (b) The Child's present environment may endanger the Child's physical
Or emotional health or impair the Child's emotional development.
- (R.A. 2)

Both subsections of which the appellant's affidavit covered and presented for the Court's consideration. However, no deference was given at any point by the court, more importantly, no opposition contesting the validity of appellant's affidavit was ever filed so how the Court could minimize the contentions draws but one conclusion. A trial Court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner when the Court misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination. Wald v. Holmes, 2013 ND 212 at 18. The prima facie case for a change of primary residential responsibility requires only enough evidence to allow the fact finder to infer the fact at issue and rule in the moving party's favor; it is a "bare minimum", and requires only facts which if proved at an evidentiary hearing, would support a change of primary residential responsibility that could be affirmed if appealed. Charvat v. Charvat, 2013 ND 145 at 9. The appellant's affidavit met this "bare minimum" as well as the prior motions contending like incidents the appellant had brought to the Court's attention, only to be disregarded and harshly scolded by the court in its orders. See docket history.

3. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN NOT FOLLOWING THE MANDATES IN CUSTODY CASES SET BY THE SUPREME COURT, AND ARBITRARILY MADE RULINGS AGAINST THE APPELLANT BASED SOLELY ON HIS INEXPERIENCE IN THE LAW, AND HIS INABILITY TO HIRE LEGAL REPRESENTATION, AND AS SUCH, ARBITRARILY DISREGARDED APPELLANT'S INHERENT PARENTAL RIGHTS AND THE COURTS DUTY TO PROTECT THE BEST INTEREST OF THE MINOR CHILDREN.

In Lechler v. Lechler, 2010 ND 158, paragraph 9, 786 N.W. 2d 733, belies a two-step analysis for a motion to modify primary residential responsibility:

The party seeking to change primary residential responsibility has
The burden of proving there has been a material change in
Circumstances and a change in primary residential responsibility
Is necessary to serve the Child's best interest. Frueh v. Frueh, 209
ND 155, paragraph 8, 771 N.W. 2d 593. This Court has defined a
"material change in circumstances" as "an important new fact
That was not known at the time of the prior custody decree."
Siewert v. Siewert, 2008 ND 221, paragraph 17, 758 N.W. 2d 691.
A district Court's decision whether to modify primary residential
Responsibility is a finding of fact which will not be reversed on
Appeal unless clearly erroneous. Dunn v. Dunn, 2009 ND 193,
Paragraph 6, 775 N.W. 2d 486. In this instant matter, the Court
Made no finding of facts as the course of action was the result of
An arbitrary reaction to appellant's untrained legal skills. None

Of which involved the best interest of the Children as articulated By appellant's affidavit which clearly demonstrated to the court, Was a "material change in circumstances?" Siewert, supra at 17. A finding of fact is clearly erroneous if there is no evidence to Support it, if a finding is induced by an erroneous view of the Law, or if the reviewing Court is left with a definite and firm Conviction a mistake has been made. Id. See also, Gussiaas v. Neustel, 2010 ND 216, paragraph 5, 790 N.W. 2d 476.

The court made no initial primary residential responsibility determination in this matter. Trial was initial set for September 9, 2014, but the parties mutually agreed to a stipulated parenting plan outside of court. That plan has not been followed by the appellee, instead, the appellee has endangered the emotional and developmental wellness of the minor children by involving herself in relationships that were outside the best interest of the minor Children. Appellee during the course of the divorce proceedings, was involved with a man that in her words, turned out to be "psycho and too radical." The minor Children, however, were brought into this situation and the appellee was taking them to the guy's house and sleeping over. Appellee was also bringing the guy to the Children's residence and letting him sleep over. When appellee ended this relationship in November, she jumped into another one with a guy in Flasher, posting on Facebook that she was in a relationship with him as of December 27, 2014 at which time she was sleeping over the guy's house with the minor Children, and the minor Children were sleeping in a recliner chair and on the floor. Appellee then moved the minor Children out of their residence, and moved in with this

new guy. Appellee ended her relationship with the "psycho", thirty-eight days prior to this new relationship. Appellee then married the new guy on January 21, 2015, less than thirty days after announcing she was in a relationship with him. The new guy has a son of approximately 8 years old who weighs about 70 lbs. Appellant was told by his youngest female child, who is four years old and weighs about twenty-five to thirty pounds, that the male child of this new guy has been pouncing on her in a "wrestling" manner, and that the older boy child has been telling all of Appellant's children to "shut up" constantly, and calling them "babies." Appellant has tried to discuss these issues with the appellee, only to be told "it's none of your business, I am aware of it, and don and I are trying to reign the kid in, his mom let him run wild." As a father, there is no solace in knowing that the mother of your children has brought upon the Children emotional discomfort and long term developmental uncertainty. "A material change of circumstances can occur if a child's present environment may endanger the child's physical or emotional health or impair the child's emotional development." Siewert v. Siewert, 2008 ND 221, paragraph 17, 758 N.W. 2d 691 (quoting Stanhope v. Phillips-Stanhope, 2008 ND 61, paragraph 6, 747 N.W. 2d 79). The District court did not consider any of these material changes when the order was issued denying appellant's motion to modify primary residential responsibility. (R.A. 2) The District did not even make any finding of facts especially since appellant submitted an affidavit swearing to the material changes that took place since September 18, 2014, when the court signed the stipulated agreement.

4. IT WAS NOT HARMLESS ERR FOR THE DISTRICT COURT TO DENY APPELLANT'S MOTION WITHOUT ANY FINDINGS OF FACT OR AN EVIDENTARY HEARING WHEN PARENTAL RIGHTS ARE INVESTED AND THE BEST INTEREST OF MINOR CHILDREN AT ISSUE.

The Supreme Court of the United States has traditionally and continuously upheld the principle that parents have the fundamental right to direct the education and upbringing of their Children. A review of cases taking up the issue shows that the Supreme Court has unwaveringly given parental rights the highest respect and protection possible. What follows are some of the examples of the Court's past protection of parental rights.

Under the doctrines of Meyer v. Nebraska, 262 U.S. 390 (1923) , we think it entirely plain that the Act of 1922 unreasonably interferes with the **liberty of parents and guardians to direct the upbringing and education of Children.** *Ibid.* at 534. (emphasis supplied) Similarly, in Prince v. Massachusetts, 321 U.S. 158, (1944), the Supreme Court admitted the high responsibility and right of parents to control the upbringing of their Children against that of the State. It is cardinal with us that the custody, care, and nurture of the Child reside first in the parents, whose **primary function and freedom** include preparation for obligations the State can neither supply nor **hinder.** *Ibid.* at 166. (emphasis supplied). Forty-eight years after Pierce v. Society of Sisters, 268 U.S. 510 (1925), the U.S. Supreme Court once again upheld Pierce as "the character of the rights of parents to direct the upbringing of their Children." Yoder, 406 U.S. 205 at 233. In agreement with Pierce, Chief Justice Burger stated in the opinion of Wisconsin v. Yoder, 1972:

This case involves the **fundamental interest** of parents, ...The History and culture of western civilization reflects a strong Tradition of parental concern for the nurture and upbringing Of their Children. This **primary** role of the parents in the **Upbringing of their Children** is now established **beyond debate** **As an enduring tradition.** *ibid.* at 232. (emphasis supplied)

Consequently, it is clear the constitutional right of a parent to direct the upbringing and education of his Child is firmly entrenched in the U.S. Supreme Court case history. Furthermore, a higher standard of review applies to fundamental rights such as parental liberty than to other rights. When confronted with a conflict between parents' rights and state regulations, the court must apply the "compelling interest test." Under this test, the state must prove that it's infringement on the parents liberty is essential to fulfill a compelling interest and is the least restrictive means of fulfilling this state interest. Simply proving the regulation is reasonable is not sufficient. Since the district court in the instant matter did not provide any guidance on the rationale of its order. Arbitrarily denying a contention against the best interest of the minor Children confronts the core fundamentals of parental rights established by a litany of case law throughout the Country. The appellant raised valid issues of emotional and developmental concerns regarding the minor Children, yet because appellant is not well versed in the law or able to afford legal representation, the District Court in essence, usurped appellants fundamental parental rights, arbitrarily.

The illustration of these cases is to generate understanding from the prospective of a Father's role in the upbringing of the minor children regardless of whether the parents are married, or divorced. The Appellee has throughout the course of the proceedings, hindered the Father-Child relationship, and even after agreeing to the parenting plan, changed things to suit her lifestyle choices. By change, appellant has brought to the district courts attention the various occasions that the Appellee has violated visitation, violated permissible contact with the minor Children, and continuously failed to encourage any relationship with the minor Children, and has instead, imposed upon them the choices of engagement in various relationships that she has encountered, and in doing so, at each juncture, cutoff the communication with the minor Children and the Appellant completely. The parental plan the parties signed stipulated that Appellant could communicate with the minor Children "reasonable." Appellee then changed this without cause, telling Appellant he could now only speak with the minor Children, twice a week. However, on any occasion the Appellant has tried to communicate with the Children, appellee would tell him "they are playing," or "unavailable." Never has the appellant sought to communicate with the Children beyond any "reasonableness" articulated in the agreement. It has only been when appellee was in relationships with other men, that communication was hindered. Further, no information regarding the Children is ever shared by the appellee with the appellant. For example, Appellant has ask for records of day care costs on numerous occasions, yet the appellee refuses to provide them. Appellant is responsible for a third of said costs but cannot get any records showing how much time the Children spend at day care and what the costs are. Nevertheless, appellant offsets the value of the services each week by

keeping the Children for the entire day on Thursday's of each week. All issues are a "material change in circumstances as defined in Seibel v. Seibel, 2004 ND 41, paragraph 5, 675 N.W. 2d 182, "important new facts that were unknown at the time of the initial custody decree." The district Court has failed to conclusively rule by which reasoning or rational it was basing its finding's in denying appellant's motion to modify and or amend primary residential responsibility. As such, it was an error against the laws of this State, "A district Court's decision whether to change custody is a finding of fact subject to the clearly erroneous standard of review." Stanhope, supra at 7. "A finding of fact is clearly erroneous if there is no evidence to support it, if the finding is induced by an erroneous view of the law, or if the reviewing court is left with a definite and firm conviction a mistake has been made." Id. A District Court is required to make findings of facts and conclusions of law that are sufficient to enable this Court to understand the factual determinations made by the court and the basis for its conclusion of law. Rothberg v. Rothberg, 2006 ND 65, paragraph 14, 711 N.W.2d 219. The District Courts "findings of fact...should be stated with sufficient specificity to assist the appellate court's review and to afford a clear understanding" of the District court's decision. Id. In the instant matter, there is no findings of facts or conclusion of law from the District Court. It is therefore, error.

5. THE DISTRICT COURT ARBITRARILY DENIED APPELLANTS APPLICATION TO WAIVE FILING FEES ALONG WITH A MOTION TO MODIFY AND OR AMEND CHILD SUPPORT OBLIGATIONS BASED ON LOSS OF INCOME THAT WAS NOT TEMPORARY.

As was with the case of filings in this matter, moving to waive filing fees in order to file this appeal, appellant on February 16, 2015, filed an identical affidavit to waive filing fees in the District Court, (R.A. 6) along with all necessary and viable information verifying no income. The district Court, however, denied the waiver without any findings of facts of conclusions of law that would demonstrate the basis for exercising its discretion.(R.A. 7) Appellant also submitted information which verified his present economic circumstances, in that, appellant receives state assistance through the Supplemental Nutritional Assistance Program, (SNAP), as well as Housing Assistance from Morton County Housing. (Documents attached to R.A. 6) Based on this information, as was the information submitted to this Court, the District Court arbitrarily denied the waiver of filing fees as a further example of its discontent for issues raised by the appellant without legal representation, or as is clear, the ability to pay the court for any consideration upon the papers filed. Although it is within the Court's discretion, looking at the history of the docket in this matter, the strong orders issued by the Court, and the systematic denial of equal treatment, access to the courts, it is clear error for the district Court to arbitrarily deny a petition to waive filing fees when liberty interests are vested. Appellant sought to amend the child support order so it would not grow out of control as his income status has dwindled to zero and at present, relies on state assistance to get by. Unless there

are different standards between this Court and that of the District Court in allowing for the waiver of filing fees for indigent parties that the appellant is unaware of, in reviewing the financial documents as well as the affidavit the appellant submitted to the District Court and this Court, clearly there is no financial abilities within the appellant's grasp that would allow for him to pay any fees the District Court left standing by its ruling, for the appellant to provide. The consequences of the Courts actions leap into appellant being continuously obligated, in full, to the child support payments that he doesn't have the temporary ability to meet. As a result, Child enforcement would then commence a noncompliant proceeding, the Department of Transportation would revoke driving privileges, and appellant will be incurred with interests from child enforcement due to the arrearages growing out of control because payments are not being made. To permit a temporary reprieve is not allowing for the appellant to negate the responsibility to the Children, nor is it the intent of the appellant for such a result. Appellant is enduring grave financial deprivations and asked that the amendment to the child support obligations be so reflective of the situation appellant is faced with. This Court should instruct REMAND that would best serve equality, justice, and fairness given the gravity of results that could follow absent an adjustment as requested.

CONCLUSION

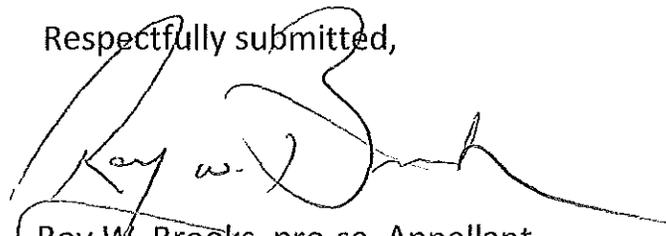
For the foregoing reasons, the Appellant respectfully requests that this Court REVERSE and REMAND the decisions of the District Court, and in doing so, ORDER that the entire case matter be transferred to another Justice of the District Court and not that of the Honorable Gail Hagerty, as fairness and justice warrants impartiality.

ORAL ARGUMENT

The appellant does not believe oral argument is necessary in this case. In the event the Court wishes to hear oral argument, appellant prays competent, professional counsel can be appointed to argue on behalf of the appellant before this Court.

Respectfully submitted,

Dated: 3/11/2015



Roy W. Brooks, pro-se, Appellant

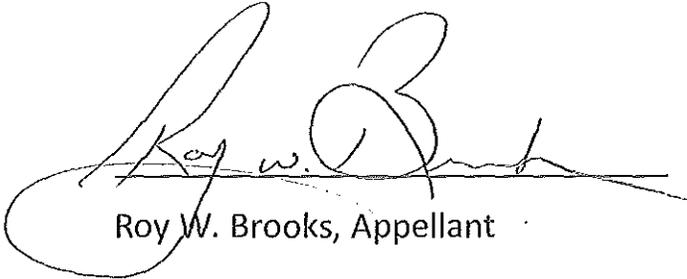
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CERTIFICATION

I, appellant in the aforementioned matter, certify that on this 10th day of March, 2015, I mailed a true copy of said brief to the appellee at her know mailing address, Sarah C. Brooks, A/K/A, Sego, PO Box 104, Flasher, ND 58535. By sending same first class mail postage pre-paid, and placing same in the mail box at the Flasher post office, Flasher, ND 58535.



Roy W. Brooks, Appellant

Dated: March 10, 2015