

20180133

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 1, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jessica Purdy,
Plaintiff/Appellee,

-vs-

Daren Purdy,
Defendant/Appellant.

Supreme Court No. 20180133

File No. 09-2014-DM-00225

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT

JUDGEMENT ENTERED ON FEBRUARY 12, 2018

EAST CENTRAL JUDICIAL DISTRICT

CASS COUNTY, NORTH DAKOTA

THE HONORABLE STEVEN E. McCULLOUGH

Respectfully submitted,

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Defendant/Appellant

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Statement of the Issues

[¶1] The District Court erred in awarding Jessica primary residential responsibility with Daren being awarded additional parenting time which was considered “reasonable”.

[¶2] The Amended Order in affect is not in the best interest of the children involving both parties judiciously.

Statement of the Case

[¶3] This is an appeal from a Motion to Modify Residential Responsibility in front of Honorable Steven E. McCullough on January 4 and 5, 2018. The Court filed its Memorandum of Law and Order for Entry of Amended Judgement and was entered on February 12, 2018. (App. 93) Notice of appeal was filed on April 5, 2018. (App. 107)

[¶4] Appellant (Daren) contest the District Courts decision which granted Appellee (Jessica) primary responsibility while awarding Daren additional parenting time which was considered “reasonable” by the Judicial Court. (App. 92 ¶4)

[¶5] Daren sought equal residential responsibility with modifications to but not limited to;

- a) An evening during the week for the other party to spend time with the children to limit the length of time the children are able to see the other parent.
- b) Expenses for school, camps, and extracurricular activities be shared equally.
- c) A shared parenting calendar system to be used between both parties.
- d) The right of first refusal so that the other parent will have the first option to care for the children.

Jessica proposed Daren have parenting time on;

- a) Alternating weekends from Friday 4:00 p.m. to Sundays ending at 4:00 p.m. opposed to the Sundays ending at 8:00 p.m. on the previous order.
- b) The change to parenting time ending at 4:00 p.m. on Sundays complicates or causes Daren’s family trips and other events to be cut short or unable to attend.
- c) Thursdays from 4:00 p.m. to 8:00 a.m. the following morning on weeks where Daren does not have weekend parenting time.
 1. As this allows Daren to have the responsibility to bring the children to school it does not allow him to exercise his role as a parent immediately after school.

Statement of Case Cont.

- d) Tuesdays from 4:00 p.m. to 8:00 a.m. the following morning on weeks where Daren does have weekend parenting time.
1. Same circumstances as c)1.
 2. The parties shall equally divide the summer months of June, July, and August each year on a week-to-week basis from Sunday 8:00 p.m. to Sunday 8:00 p.m.

Statement of the Facts

[¶6] Daren Purdy and Jessica Purdy married on September 11, 2011. They have two daughters, M.P. that was born in July, 2009 and B.P. that was born in August of 2011. Their residence at the time of separation was in South Fargo, ND. Separation of Daren and Jessica happened in October of 2013. Jessica moved herself and the children to her parent's residence in Reile's Acres in Fargo, ND without proper notice leaving Daren with the financial responsibility of the home. (App. 110 [2-25]-112 [1-3]) (App. 197 ¶2) Daren continued to reside at their marital residence until May 2014.

[¶7] The children were restrained from Daren by Jessica without any custody order in place during the separation which reflects N.D.C.C. § 12.1-18-04.

2. "Restrain" means to restrict the movement of a person unlawfully and without consent so as to interfere substantially with his liberty by removing him from his place of residence or business, by moving him a substantial distance from one place to another, or by confining him for a substantial period. Restraint is "without consent" if it is accomplished by: a. force, intimidation, or deception; or b. any means, including acquiescence of the victim, if he is a child less than fourteen years old or an incompetent person, and if the parent, guardian, or person or institution responsible for the general supervision of his welfare has not acquiesced in the movement or confinement.

Daren made attempts to contact Jessica's lawyer. (App. 16-17 ¶2) Daren also contacted several attorneys seeking representation. (App. 112 [6-16]) On May 9, 2014 the court entered JUDGEMENT BY DEFAULT which ordered Jessica to have primary residential responsibility of M.P. and B.P..

[¶8] Certain periods after May 9, 2014 when the JUDGEMENT BY DEFAULT was entered Daren was unable to exercise all of his parenting time. Daren's increase in work and conflict between the parties were a main factor. (App. 84 ¶39) (App. 112 [20-25]-113 [1-10])

[¶9] During the marriage Daren and Jessica shared the responsibilities of the children equally. (App. 79 ¶21) (App. 108 [13-25]-109 [1-24]) Jessica stated that Daren has not been an involved parent following the divorce. (App. 23 ¶4, 27 ¶56) Daren has exceeded the Courts previous judgement notably during 2016-2017 and has played an important role for the children as a parent. He also frequently asked for more parenting time. (App. 82-83 ¶33-¶34) (App. 120 [13-19]) (App. 121 [23-25]-122 [1-23]) (App. 136 [6-16]) (App. 184 [13-25]-188 [1-2]) (App. 190 [22-25]-191 [1-2]) (App. 193 [17-25]-194 [1-2]) (App. 56-57) In 2015 and 2016 Daren's parenting time included an extra weekday which was not mentioned or recorded by Jessica prior to the hearing. (App. 68-71)

[¶10] Daren has demonstrated the ability to provide for the children's developmental needs. Daren recognized that M.P. was not turning in homework while in Jessica's care. He took proactive steps to gather more information, confirm his suspicion, and addressed it appropriately to Jessica. (App. 22 ¶27) (App. 80-81 ¶26) In the summer of 2017 Jessica informed Daren that the preschool program they had signed B.P. for was full. Daren then took the initiative to find and pay for a preschool for B.P. to attend. (App. 81 ¶27) (App.131 [4-21]) (App. 147 [8-14]) Daren attends all functions relating to the children's education.

[¶11] Since the divorce, Daren and his witnesses have observed lack of hygiene when receiving the children after being under Jessica's care and unsatisfactory environments during her care that go against N.D.C.C. § 14-09-06.2. (App. 20-22 [¶18-25]) (App. 42-49) (App. 114 [6-11]) (App. 115 [12-25]-116 [1-23]) Daren brought up these concerns to Jessica several times. His role as a nurturing parent and the efforts he has made has improved these conditions over the past couple years. (App. 22 ¶25) The Court erred in justifying all the evidence in their decision. (App. 87 ¶3.B)

[¶12] M.P. and B.P. have been unsupervised on multiple occasions to take care of themselves while under Jessica's care. (App. 20¶18) (App. 26 ¶20.d) First evidence of this was in April 2017 which would make B.P. 5 years of age and M.P. 7 years of age. According to the Child Supervision Guidelines from the Depart. Of Human Services of N.D. it is not acceptable for that age for any amount of time to be left unsupervised. (App. 52) In the fall of 2017, Jessica was aware that the children were home alone on multiple occasions after getting off the bus from school. She stated that she had a contingency plan if the babysitter was late. (App. 153 [21-25]-160[1-13]) The Court erred to consider Daren's testimony as a witness to the situation. (App. 123 [2-25]-126 [1-23]) (App. 88 ¶3.B)

[¶13] Jessica also stated in her testimony that M.P. was left alone while she was at work. (App. 160 [18-25]-163 [1-16]) According to the work schedule she provided, there were 12 possible days in the spring of 2017 where this may have occurred. (App. 74-75)

[¶14] In January of 2015 Daren found an unprescribed pill bottle containing the opioid Hydrocodone next to one of the children's feet while putting them in Jessica's vehicle. (App. 21 ¶20) (App. 50) (App. 127 [14-25]-128 [1-22]) The container was not in accordance to N.D.C.C. § 19-02.1-14.1.

2. Drugs or medicines dispensed pursuant to a prescription must bear a label permanently affixed to the immediate container in which the drug or

medicine is dispensed or delivered and which is received by the purchaser or patient. The label must bear the brand name or the generic name, strength, quantity, serial number, date of dispensing, patient name, and directions for use of the drug or medicine, except when the physician or other health care provider authorized by law to prescribe drugs or medicine has notified the pharmacist that the appearance of the name on the label would be alarming to or detrimental to the well-being of the purchaser of the prescription.

6. No prescription drug in solid dosage form may be manufactured or distributed in this state unless it is clearly marked or imprinted with a code imprint identifying the drug and the manufacturer or distributor of the drug.

Jessica's stated she went to the ER in September of 2015 and took one Hydrocodone pill and it made her sick.(App. 26 ¶20.c) Jessica then testified that the doctor gave her a pill to take before she could get her prescription filled but never took it. (App. 178 [9-25]-181 [1-25]) Her timeline does not coincide with Daren's and she has no evidence of going to the ER. Being a registered nurse and parent, Jessica's awareness of the unprescribed controlled substance and its location near the children was negligent. This incident went unnoticed by the court in its findings for the best interest of the children.

[¶15] Jessica's Affidavit claims on July of 2016 Daren refused to let the children come out of his residence residing in her calling the police. Jessica worked until 7:00 p.m. Sunday nights and picked the children up on her way home from work. (App. 199 ¶6) Jessica's did not contact Daren concerning the children until 9:35 p.m. and arrive to pick up the children until 10:02 p.m. (App. 164 [8-25]-167 [1-16]) (App. 57) (App. 72) Her testimony states she never had issues with Daren after that night with picking up the children when his parenting time ended. (App. 144 [14-17]) Jessica falsely accused Daren of an altercation.

[¶16] Jessica stated that Daren has no reason to be present in the morning to meet the children at the bus stop because it invades her privacy and doesn't enjoy it. Daren was there from the first day of the 2017/2018 school year. Jessica started a new work schedule that fall. (App. 139 [13-15]) (App. 51) Her work schedule does not show work times from August 21, 2017 to September 30, 2018. (App. 75-76) She was training for her new position until November of 2017 which caused her to not be able to take the children to the bus stop in the mornings except for one day a week. (App. 200-201) Jessica's mother took on the responsibility in the mornings to take the children to the bus stop until her new schedule took effect. (App. 176 [13-25]-177 [1-15]) Daren attempted to take on the responsibility when Jessica was not able. (App. 54 #3)

[¶17] Daren's involvement in taking the children to school on his parenting time and meeting them at the bus stop outside of his parenting time has resulted in their absences to be rare and their tardies' were zero. Jessica's allegation that Daren is a nuisance and invading her privacy is another case in point that her motive is to damage his credibility as an involved parent. (App. 151 [23-25]-152 [1])

[¶18] Jessica's stated that Daren did not exercise his Wednesdays during 2015. (App. 24 ¶15) (App. 25 ¶15) Jessica signed M.P up for religious education during his Wednesday parenting time at her church during the 2015/2016 and 2016/2017 school year. Jessica

did not properly notify this with Daren (App. 73) Daren did make an attempt to pick the children up prior to the class so he would be able to take them on his parenting time but was unsuccessful despite Jessica's allegations. (App. 25 ¶17) The children never missed their class as a result from Daren. Since the classes interfered with his Court ordered time Daren and Jessica agreed that he would take them an extra day either on Tuesday or Thursday during the both school years. Daren still used his time that was left after the children were done with their classes along with the additional day. (App. 118 [14-25]-119 [1-12]) (App. 185 [11-19]) (App. 186 [9-21]) (App.187 [17-25]-188 [1]) Jessica failed to record those additional days Daren took advantage of in her calendars. (App. App. 68-71) Daren was willing to work with Jessica around the classes for the best interest of the children.

¶19] During the 2017/2018 school year Daren signed the children up for a religious education class that better suited his parenting time with the children on Wednesdays. Daren's extra day was then eliminated.

¶20] The two parties have shown the willingness to co-parent and cooperate where conflict has been minimal or obsolete mainly from 2016 to 2017. (App. 84-85 ¶42) They have shared experiences such as going to pumpkin patches, Halloween, meeting Santa, going out to eat, birthdays, and getting ice cream. They also have shared the responsibility of the children's activities since the divorce as previously mention. Daren has shown flexibility during his parenting time to allow the children to be involved with Jessica and her extended family. (App. 173 [9-25]-175[1-14])

¶21] Once the motion was served to Jessica his time with the children decreased strictly to the order in place. (App. 132 [18-25-134 [1-2]) Following the Court hearing on January 4 and 5 of 2018 the events involving both parties with the children has been nonexistent except for school functions and extracurricular activities. The facts and testimonies provide substantial evidence that both parties work together towards the best interest of the children when parenting time is shared beyond the current order.

¶22] Both parties are financially stable and capable of providing for the children independently to ensure N.D.C.C. § 14-09-06.2 is met. Both parties carry health, dental, and vision insurance for the children. Jessica's annual cost for health and dental insurance for the children in 2017 was \$3,040.00. Daren's insurance for the children is provided at no additional cost through his union. Under equal residential responsibility, Daren agreed to increase his obligation of child support in the amount of \$170.00 per month. This is not a deviation from the child support guidelines; this is a voluntary additional monthly payment by Daren for a higher obligation in consideration of both parties sharing the children's expenses for school, camps, and extracurricular activities. (App. 77-79 ¶15-19) This appeal, if granted in favor of Daren, would benefit the children involving both parties.

¶23] In determining a parenting plan, the Court is required to consider the statutory Best Interest Factors confined in N.D.C.C. § 14-09-06.2. Daren's findings went unrecognized in the analysis of best interest B, D, E, H. in result of favoring Jessica in the Memorandum of Opinion. Although, modification of Daren's parenting time was altered granting him additional time because it would be in the children's best interest according to Jessica and the Court.

Laws and Argument

[¶24] Whether the Court can justifiably deny the facts and findings according to the N.D.C.C. § 14-09-06.2.

- a. The love, affection, and other emotional ties existing between the parents and child and the ability of each parent to provide the child with nurture, love, affection, and guidance.
- b. The ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment.
- c. The child's developmental needs and the ability of each parent to meet those needs, both in the present and in the future.
- d. The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community.
- e. The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.
- f. The moral fitness of the parents, as that fitness impacts the child.
- g. The mental and physical health of the parents, as that health impacts the child.
- h. The home, school, and community records of the child and the potential effect of any change.
- m. Any other factors considered by the court to be relevant to a particular parental rights and responsibilities dispute.

[¶25] Whether the Court can refute that Jessica was in possession of a controlled substance near the children not in accordance to N.D.C.C. § 19-02.1-14.1.

[¶26] Whether the court can will err in finding that the length of time the children have lived in each parent's home is adequate for them to experience and prosper from it.

[¶27] Whether the court can err in finding Jessica's statements and recordings about Daren's parenting time prior to the Judicial Court hearing are true and accurate.

[¶28] Courts can only deny or restrict parenting time if there is persuasive evidence it won't serve a child's best interest.

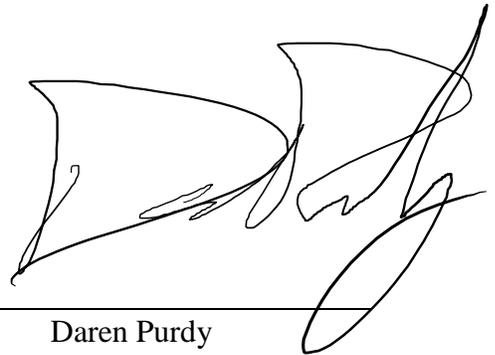
[¶29] Whether or not the Court can err in fact that the "boilerplate" schedule is in the best interest of the children.

Conclusion

[¶30] The District Courts ruling with regard to equal residential responsibility should be reversed for the best interest factors of the parties' children M.P. and B.P.. The best interest factors should be reevaluated with consideration of all Daren's findings, evidence, and testimony from both parties that proves he is an involved parent in every aspect of the children's lives even when it is not his ordered parenting time. Jessica's allegations towards Daren have been proven erroneously recognized by the Court. Conflict between Daren and Jessica are justifiably less or nonexistent when parenting time is shared well beyond the order that is in place. There is no plausible reason as to why equal residential responsibility would cause harm to the children concerning their best interest factors specifically a, b, c, d, e, f, g, and h.

Respectfully submitted this 1st day of August, 2018.

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A handwritten signature in black ink, appearing to read 'Daren Purdy', is written over a horizontal line. The signature is stylized and cursive.

Daren Purdy

Supreme Court Clerk's Office - Cota, Terra

From: darenpurdy <darenpurdy@protonmail.com>
Sent: Friday, August 10, 2018 6:48 PM
Cc: (SUP) Clerk of Court Office; jason@plmfamilylaw.com
Subject: Fw: amended brief
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1
2 IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

3
4 JESSICA PURDY,

5 Plaintiff,

6 vs.

7 DAREN PURDY,

8 Defendant

9
10 State of North Dakota

11 Statutory Real Party in Interest

Case No.: 09-2014-DM-00225

AFFIDAVIT OF SERVICE

12 I, Daren Purdy, certify under penalty of perjury under the laws of the State of
13 North Dakota that on the 1st day of August 2018 I did the following and served such documents
14 via email to the persons listed below:

15
16 *Appellant's Appendix*

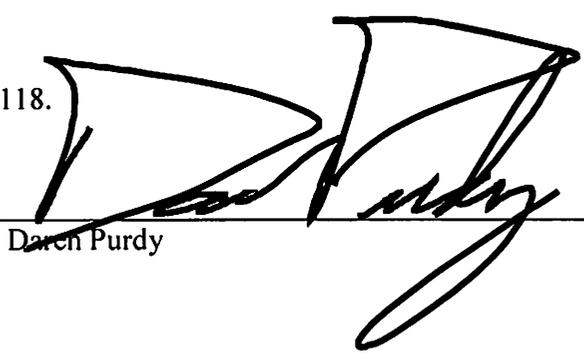
17 *Appellant's Brief*

18 I served the above documents via email to the following persons:

19 Supreme Court Clerk's of Court Office

20 Jason McClean of Parvey, Larson, and McLean, PPLC

21
22
23 Dated this 20th day of August, 2018.

24
25
26 
27
28 Daren Purdy

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AUG 21 2018