

In The
Supreme Court of North Dakota

20040330

ROBERT LITOFF,

RECEIVED BY CLERK
SUPREME COURT DEC 27 2004

v.

Plaintiff-Appellant,
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

DEC 22 2004

HELEN PINTER,

STATE OF NORTH DAKOTA

Defendant-Appellee.

APPEAL FROM AN ORDER DENYING MOTION FOR
REINSTATING UNSUPERVISED VISITATION OF
THE DISTRICT COURT OF GRAND FORKS COUNTY,
NORTHEAST CENTRAL JUDICIAL DISTRICT,
THE HONORABLE BRUCE E. BOHLMAN, JUDGE.

BRIEF OF APPELLANT

Bruce Fein (DC Bar #446615)
BRUCE FEIN & ASSOCIATES
910 17th Street, N.W.
Suite 800
Washington, D.C. 20006
(202) 775-1787

Thomas V. Omdahl (ND Bar #04971)
OMDAHL LAW OFFICE
424 DeMers Avenue
Grand Forks, North Dakota 58201
(701) 772-8526

Counsel for Appellant

Dated: December 22, 2004

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
ISSUES PRESENTED.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
ARGUMENT.....	6
I. Standard of Review.....	6
II. The District Court Abused its Discretion in Dismissing Appellant's Unopposed Motions.....	7
III. The District Court Unconstitutionally Abridged Appellant's Liberty Interests in Participating in the Raising of his Daughter Dorothy by Refusing to Reinstitute Unsupervised Visitation Unopposed by Dorothy's Mother.....	9
IV. The District Court Denied Appellant Due Process by Refusing Appellant's Request for a Hearing to Show Changed Circumstances.....	11
V. The District Court erred in Crowning Appellant's Daughter with Veto Power Over Unsupervised Visitation and In Refusing to Hold an Evidentiary Hearing to Determine Whether the Daughter Currently Desires to Exercise That Veto.....	14
VI. The District Court Erred under the North Dakota Rules of Evidence and violated Constitutional Due Process in Relying on Grossly Unreliable Psychological and Psychiatric Opinion	15
CONCLUSION.....	25
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF FILING AND SERVICE	

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Federal Cases</u>	
<u>Barefoot v. Estelle</u> , 463 U.S. 880 (1983).....	20
<u>Chambers v. Mississippi</u> , 410 U.S. 284 (1973).....	24
<u>Daubert v. Merrell Dow Pharmaceuticals</u> , 509 U.S. 579 (1993).....	<u>passim</u>
<u>Frye v. United States</u> , 293 F.1013 (1923).....	<u>passim</u>
<u>General Electric v. Joiner</u> , 522 U.S. 136 (1997).....	16
<u>Meyer v. Nebraska</u> , 262 U.S. 390 (1923).....	9, 11
<u>Parham v. J.R.</u> , 442 U.S. 584 (1979).....	10
<u>Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary</u> , 268 U.S. 510 (1925).....	9, 11
<u>Quilloin v. Walcott</u> , 434 U.S. 246 (1978).....	10
<u>Santosky v. Kramer</u> , 455 U.S. 745 (1982).....	10, 25
<u>Schostak v. Wright</u> , 2003 WL 1960581 (S.D. NY 2003).....	8
<u>Stanley v. Illinois</u> , 405 U.S. 645 (1972).....	<u>passim</u>
<u>Troxel v. Granville</u> , 530 U.S. 57 (2000).....	9, 10, 11
<u>United States v. Ingraham</u> , 42 M.J. 218 (1995).....	22

<u>Washington v. Glucksberg,</u> 521 U.S. 702 (1997).....	10
 <u>North Dakota Cases</u>	
<u>Aus v. Carter,</u> 1999 ND 246, 603 N.W.2d 885 (1999)	6
<u>Bachmeier v. Wallwork Truck Centers,</u> 544 N.W.2d 122 (N.D. 1996)	7
<u>City of Fargo v. Hector,</u> 534 N.W.2d 821 (N.D. 1995)	7
<u>City of Fargo v. McLaughlin,</u> 512 N.W.2d 700 (N.D. 1994)	17, 18
<u>Cosgriff v. Cosgriff,</u> 126 N.W.2d 131 (N.D. 1964)	7
<u>Hawley v. LaRocque,</u> 2004 ND 215, 2004 WL 2650275 (2004).....	6
<u>K.L.G. v. S.L.N.,</u> 2001 ND 33, 622 N.W.2d 232 (2001)	12
<u>Lovin v. Lovin,</u> 1997 ND 55, 561 N.W.2d 612 (1997)	6
<u>Mock v. Mock,</u> 2004 ND 14, 673 N.W.2d 635 (2004)	6
<u>Sevland v. Sevland,</u> 2002 ND 110, 646 N.W.2d 689 (2002)	14-15
<u>Sjol v. Sjol,</u> 76 ND 336, 35 N.W.2d 797 (1949)	7

Statutes

NDCC § 14-09-6.6.....6
NDCC § 14-09-6.6(3)(a).....6
NDCC § 14-09-28.1(e)6
NDCC § 14-09-28.1(f).....6

Rules

Fed. R. Evid. 70216
N.D.R.Civ.P. 557

Other Authorities

Clingempeel, et al., Joint Custody after Divorce:
Major Issues and Goals for Research
91 Psychological Bulletin 102 (1982).....13
Emery, et al., Divorce, Children and Social Policy (1983).....13
Felner, Child Custody Resolution: A Study of
Social Science Involvement and Impact
18 Prof. Psychol.: Res.& Prac. 468 (1987).....21
Gitlin, Mental-Health Professionals in Child-Custody Cases:
Giving "Expert" Testimony its Due
89 Ill. B. J. 350 (2001)21, 22
Goldstein, et al., Beyond the Best Interests of the Child (1979)23
Hagen, Whores of the Court (1997).....23
Melton, The Clashing of Symbols: Prelude to Child and Family Policy
42 Am. Psych. 345 (1987)23
Mischel, Personality and Assesment (1968).....23
Mnookin, Child Custody Adjudication: Judicial
Functions in the Face of Indeterminacy
39 Law & Contemp. Probs. 226 (1975).....23

Romer, <u>Child Sexual Abuse in Custody and Visitation Disputes: Problems, Progress and Prospects</u> 20 Golden Gate U. L. Rev. 647 (1990).....	19
Scott, et al., <u>Rethinking Joint Custody</u> 45 Ohio St. L. J. 455 (1984)	12
Shuman, <u>The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment</u> 36 Fam. L. Q. 135 (2002)	22, 23
Shuman, <u>What Should We Permit Mental Health Professionals to Say about "The Best Interests of the Child"?: An Essay on Common Sense, Daubert, and the Rules of Evidence</u> 31 Fam. L. Q. 551 (1997)	19, 20, 21, 24
Wah, <u>The Changing Nature of Psychological Expert Testimony in Child Custody Cases</u> 86 Judicature 152 (2002)	23
Warshak, <u>Divorce Poison</u> (2001).....	12

ISSUES PRESENTED

- 1) Whether the District Court abused its discretion in refusing to grant Appellant's unopposed Motion for Default Judgment without holding a hearing to determine the appropriateness of the relief requested?
- 2) Whether the District Court denied Appellant his constitutionally protected liberty interest in participating in the raising his daughter Dorothy in denying his unopposed Motion to Reinstitute Unsupervised Visitation and for a Evidentiary Hearing, which constituted a tacit agreement between Dorothy's parents endorsing unsupervised visitation?
- 3) Whether the District Court flouted constitutional due process in denying Appellant an evidentiary hearing to determine whether changed circumstances justified reinstatement of unsupervised visitation with Appellant's daughter?
- 4) Whether the District Court erred in crowning Appellant's daughter with veto power over unsupervised visitation; and, in refusing to hold an evidentiary hearing to determine whether the daughter currently desires to exercise that veto?
- 5) Whether the District Court committed error in violation of the North Dakota Rules of Evidence and constitutional due process in giving decisive expert weight to the shockingly unreliable unscientific testimony of two mental health professionals to deny the Motion to Reinstitute Unsupervised Visitation and Evidentiary Hearing and Motion for Default Judgment?

STATEMENT OF THE CASE

Appellant's request for unsupervised visitation with his sixteen year-old daughter, Dorothy, was previously before this Court. *See* Appendix, pg. 106. The request was denied; Appellant renewed the request in a Motion to Reinstitute Unsupervised Visitation and Evidentiary Hearing on August 30, 2004. *See* Appendix, pg. 113. The motion requested the District Court to reinstitute unsupervised visitation with Dorothy Litoff, and to hold an evidentiary hearing if the issue were in doubt.

Appellant made good service upon Appellee Pinter's counsel on August 30, 2004. Pinter's new address in Germany had been wrongfully concealed from Appellant, for which she was held in contempt. Appellee's counsel alerted Appellant's counsel that she was no longer representing Appellee on September 17, 2004 (though she did not move to be dismissed as counsel of record until October 5, 2004). Service was then made on September 29, 2004 to Appellee's address in Germany furnished by Appellee's counsel. Appellee, as Dorothy's mother and legal custodian, decided not to oppose Appellant's Motion by declining to file any opposition.

Appellant filed a Motion for Default Judgment on October 12, 2004. *See* Appendix, pg. 136. Again, Appellee decided not to oppose the motion by declining to file any opposition. The District Court dismissed Appellant's uncontested motions without a hearing in a succinct order filed on October 28, 2004. *See* Appendix, pg. 140. The Court faulted Appellant for failing to complete all of the assessments and evaluations recommended in its antecedent ruling on February 21, 2003: a psychiatric examination, a mental health assessment and assessment for inclusion in a sexual offenders program, and medication. The Court further reasoned that Dorothy had not

consented to a reinstatement of visitation as required in its earlier order, although her current sentiments were unknowable without calling her as a witness. Accordingly, the District Court concluded "there is no merit in rearguing matters that have been previously decided by the court and affirmed on appeal." *See* Appendix, pg. 140. The District Court declined expressly to address Appellant's request for an evidentiary hearing to demonstrate changed circumstances or the motion for default judgment.

Appellant filed his notice of appeal on November 18, 2004. *See* Appendix, pg. 142.

STATEMENT OF FACTS

Appellee has schemed to compromise Appellant's visitation rights with Dorothy since their annulment was finalized in May 21, 1990. In June 1990, Texas Child Protective Services barred Appellee from unsupervised contact with Dorothy because it viewed her as a threat to the child's welfare. *See* Appendix, pg. 131-132. On September 30, 1999, a district court in Texas found Appellee in violation of a custody order on nine separate occasions, all related to surrendering Dorothy for purposes of Appellant's visitation rights. *See* Appendix, pg. 5. Twice in August 2000, Appellant was accused by Appellee of abusing or neglecting Dorothy's needs. Each allegation against Appellant was proved false. In Appellant's request for an appeal of the August 31, 2001 assessment report to the administrative court in North Dakota, filed on November 19, 2001, Appellant related that Appellee "has made at least 3 complaints against [him] to the Texas Child Protective services, but they have never made a finding against me." *See* Appendix, pg. 133.

The North Dakota Department of Human Services administrative court concluded that Appellant had been negligent of Dorothy's emotional health in a ruling issued July 12, 2002. *See* Appendix, pg. 81. Judge Al Wahl reasoned that the allegation of sexual abuse was "erroneously applied" in the first report of Grand Forks County Child Protection Team; that the greater weight of the evidence supported a finding of Appellant's negligence towards his daughter; and, that no evidence supported the allegations of inappropriate sexual comments. *See* Appendix, pg. 100. Counseling services were recommended appropriate for neglect. *See* Appendix, pg. 100. On the heels of Judge Wahl's decision, Appellee, through her attorney in Texas, the state which had retained jurisdiction of the custody order, successfully moved a Texas state court to terminate Appellant's visitation rights in October 2002.

In November 2002, Appellant filed a Motion in the Grand Forks District Court, which had acquired jurisdiction from the court in Texas, to establish a visitation schedule. Appellant presented results of the administrative court's recommended psychological exam, which confirmed he posed no immediate danger to his daughter. Dr. Dina Trevino offered her opinion that while Appellant displayed varying degrees of personal flaws, he presented no physical or emotional threat to anyone, including Dorothy. *See* Appendix, pg. 25.

The District Court, however, denied Appellant's motion based primarily on the purported expert opinion of Dorothy's psychologist, Dr. Ann Simun. She opined that Appellant had caused Dorothy emotional harm and suffering. *See* Appendix, pg. 59-61. The reliability of the opinion was dubious. Dr. Simun spoke only with

Dorothy. She assumed the truth of Dorothy's allegations, despite Judge Wahl's finding that her accusation of "inappropriate comments" was groundless. Dr. Simun never examined Appellant. Nor was there any evidence showing that Dr. Simun had ever accurately diagnosed anyone or accurately predicted a patient's future behavior. Moreover, telltale evidence of Dorothy's asserted depression, like medication, poor social skills, reclusiveness or otherwise, were non-existent. As Dr. Simun conceded, Dorothy's dejection might have been occasioned by her recent move to North Dakota from San Antonio, a sheltered family life with Appellee Helen Pinter and her step-father, Gregory Pinter, or other causes unconnected with Appellant. *See* Appendix, pg. 67-69. Indeed, Dr. Simun conceded the possibility, in light of the contentious history between Appellant and Appellee, that Dorothy's allegations were orchestrated by Appellee. *See* Appendix, pg. 75-76.

The District Court disputed Judge Wahl in upgrading Appellant's alleged shortcoming from "negligent" to "sexually abusive"; and, in crediting Dorothy's discredited charge that Appellant had made inappropriate comments. *See* Appendix, pg. 104. The District Court terminated all visitation between Appellant and Dorothy. Id. Appellant was directed to undergo psychological therapy and counseling as conditions to reinstatement of visitation. The District Court also endowed Dorothy with an absolute veto power over visitation. Id.

This Court affirmed the District Court's decision terminating visitation on November 13, 2003. It upheld the perplexing finding of "sexually abusive" behavior by Appellant. *See* Appendix, pg. 110. It accepted as truthful Dorothy's allegations of inappropriate comments. Id. It bypassed as premature any review of Dorothy's

visitation veto. Id. District Judge Bohlman finalized his ruling in a Second Amended Judgment signed May 21, 2004.

Before that date, Appellee Pinter had moved by stealth on or about February 2004 to Weisbaden, Germany with her third husband and Dorothy. By that decampment Appellee Pinter flouted her obligations to apprise Appellant of Dorothy's new address under NDCC § 14-09-28.1(e), and (f). The District Court held Appellee in contempt for that violation. *See* Appendix, pg. 134. Ordinarily, NDCC § 14-09-6.6 would have prevented Appellant from seeking modification of the custody order within two years. The code opens the window earlier, however, if there is a "persistent and willful denial or interference with visitation." *See* NDCC § 14-09-6.6(3)(a). Appellant thus brought his Motion to Reinstitute Unsupervised Visitation on August 30, 2004, which was tacitly accepted as timely by the District Court.

ARGUMENT

I. Standard of Review

The North Dakota Supreme Court reviews constitutional questions *de novo*.

The North Dakota Supreme Court reviews whether a party has established a prima facie case entitling them to an evidentiary hearing on motions to modify child custody *de novo*. *See* Hawley v. LaRocque, 2004 ND 215, 2004 WL 2650275 (2004), *citing* Mock v. Mock, 2004 ND 14, 673 N.W.2d 635 (2004).

Custody orders are provisional and the trial court has continuing jurisdiction to modify custody when new evidence arises. *See* Aus v. Carter, 1999 ND 246, 603 N.W.2d 885 (1999) *citing* Lovin v. Lovin, 1997 ND 55, 561 N.W.2d 612 (1997).

The North Dakota Supreme Court will set aside a trial court's dismissal of an unopposed motion for default judgment where the trial court has abused its sound discretion. *See* Cosgriff v. Cosgriff, 126 N.W.2d 131 (N.D. 1964) *citing* Sjol v. Sjol, 76 ND 336, 35 N.W.2d 797 (1949).

II. The District Court Abused its Discretion in Dismissing Appellant's Unopposed Motions

"A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner." *See* Bachmeier v. Wallwork Truck Centers, 544 N.W.2d 122, 125 (N.D.1996), *citing* City of Fargo v. Hector, 534 N.W.2d 821, 822 (N.D.1995). In denying Appellant's unopposed motions without a hearing, the District Court abused its discretion under Rule 55 of the North Dakota Rules of Civil Procedure.

Rule 55 governs default judgments. When no opposition is filed in response to a Motion for Default Judgment, the Rule anticipates that the Motion shall be granted as a matter of course, at least unless the District Court holds an evidentiary hearing to determine if the relief requested is meritorious. The rule does not contemplate a summary denial of an unopposed Motion for Default Judgment with no opportunity for the movant to adduce evidence to justify the relief requested.

In this case, the District Court arbitrarily assumed without an opportunity for a hearing that no changed circumstances justified reinstating unsupervised visitation. The District Court also failed to consider whether Appellee was willfully defiant of the judicial process. In making no response, Appellee has conceded every allegation and argument in Appellant's motions. The District Court's refusal to enter a default

judgment without a hearing was thus arbitrary, because since the motion on its face alleged facts and circumstances that justified Appellant's visitation requests.

The North Dakota Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure. It is instructive to examine corresponding federal court decisions. In Schostak v. Wright, 2003 WL 1960581 (S.D.NY), the District Court entered default judgment against defendants who failed to answer either plaintiffs' complaint or motion for default judgment. The Court, while recognizing the discretion granted the federal courts to deny default judgments, nevertheless found:

"that denial of this motion [for default judgment] would be unfairly prejudicial to Plaintiffs. Defendants, having failed to respond in any way to the summons and complaint or the instant motion, or otherwise to make any appearance in this action and having failed to provide any explanation for their failure to defend, have defaulted willfully. Since Defendants have failed to proffer any defense and are therefore deemed to have admitted the well-pleaded allegations of the complaint... all of the facts alleged in Plaintiffs' complaint are, as a matter of law, deemed admitted by Defendants..." Id. at 3.

The federal district court's analysis is persuasive in this case. Appellee failed to respond to either the Motion to Reinstitute Unsupervised Visitation or the Motion for Default Judgment. The District Court should have viewed the defaults as willful and granted Appellant's motion. Absent any showing of good faith on the part of Appellee to participate in litigation, the District Court abused its discretion in dismissing Appellant's motion.

III. The District Court Unconstitutionally Abridged Appellant's Liberty Interests in Participating in the Raising of his Daughter Dorothy by Refusing to Reinstitute Unsupervised Visitation Unopposed by Dorothy's Mother

Under Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) and Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-535 (1925), the Supreme Court has recognized "the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534-535. The Court later amplified in Stanley v. Illinois, 405 U.S. 645 (1972):

"The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' [citation omitted]" Id. at 651.

Appellant filed two motions with the District Court seeking to reinstate his visitation rights. Neither his Motion to Reinstitute Unsupervised Visitation nor his subsequent Motion for Default Judgment was opposed by Appellee. In the eyes of the law and for the purposes of child custody or visitation, Appellee has consented to Appellant's request for unsupervised visitation with Dorothy by non-opposition to the arguments and modifications to the custody order requested. In other words, as a matter of law, both of Dorothy's parents agree that Appellant should enjoy unsupervised visitation.

In Troxel v. Granville, 530 U.S. 57 (2000), the United States Supreme Court affirmed the judgment of the Washington Supreme Court that a Washington statute applied to allow non-parental third-party visitation at a court's discretion was a

violation of the parents' due process right to make decisions concerning the care, custody, and control of their children. Justice Sandra Day O'Connor, writing for the majority, explained that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made." *Id.* at 72-73. *See also Quilloin v. Walcott*, 434 U.S. 246 (1978); *Parham v. J.R.*, 442 U.S. 584 (1979); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

The *Troxel* rationale fits this case like a glove. The District Court dismissed the unopposed motions of Appellant without a hearing on the apparent theory that the continued complete curtailment of Appellant's visitation rights would be advantageous to Dorothy, although her mother voiced no objection to the reinstatement of visitation. That impaired the due process right of Dorothy's parent's to make decisions about Dorothy's custody and visitation. The District Court lacked constitutional power to disturb that parental agreement on the theory that a "better" arrangement for Dorothy would be severance of contact with her father.

Troxel does not leave states impotent to protect minor children from parental neglect. But a State must do so consistent with due process in a child neglect proceeding initiated by the State. As *Stanley*, *supra*, taught:

"The State's right -- indeed, duty -- to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here. Rather, we are faced with a dependency statute that empowers state officials to circumvent neglect proceedings on the theory that an unwed father is not a 'parent' whose existing relationship with his children must be considered." *Id.* at 649-650.

This case is indistinguishable. Without a child neglect hearing, the District Court judge decided against a reinstatement of unsupervised visitation with Dorothy by presuming Appellant's unfitness as a parent despite the legal consent of Dorothy's mother.

IV. The District Court Denied Appellant Due Process by Refusing Appellant's Request for a Hearing to Show Changed Circumstances

As amplified in Meyer, Pierce, Stanley, and Troxel, parents are crowned with a fundamental liberty interest to make decisions concerning their children. Stanley insists that a state grant the opportunity for a due process hearing before curtailing or terminating custody or visitation on the theory of parental unfitness. Speaking for a 5-2 majority, Justice Byron White explained:

"What is the state interest in separating children from their fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family." Id. at 652-653.

In this case, the District Court denied Appellant a due process hearing to determine whether changed circumstances had made unsupervised visitation appropriate for Dorothy's father.

Appellant has alleged multiple changed circumstances that would support his bid for reinstated visitation. Approximately two years have elapsed since the District Court's hearing which culminated in fact-finding and a termination of Appellant's visitation rights. During the interim, Dorothy's opinions and needs may have changed. Earlier speculations about Dorothy's development or personality may have been

discredited by time. Appellee's decampment with Dorothy to Germany without prompt notice to Appellant of her new address and school violated the terms of the custody order and created another new circumstance.

Appellant would argue that his influence on Dorothy is beneficial and pivotal to her maturation as a successful and productive member of society and to her own happiness. An article in the Ohio State Law Journal found that "[a] substantial body of research supports the conclusion that continued contact with both parents is beneficial to children... The tendency of divorced fathers to withdraw may have serious effects on children... As Clingempeel and Reppucci observed, the child whose father remains involved may have 'a larger array of positive characteristics to model and a greater variety of cognitive and social stimulation.'" Scott & Derdeyn, Rethinking Joint Custody, 45 Ohio St. L.J. 455 at 488-490 (1984). Dr. Richard A. Warshak echoed that conclusion: "Children generally do better after divorce when both parents continue to participate in child-rearing." See Divorce Poison, Warshak, (2001), p.2. North Dakota courts have endorsed this belief by using joint custody as the starting point to determine how custody should be divided. But in the event of sole custody, the non-custodial parent has a right to visitation that is presumed to be in the child's best interest. K.L.G. v. S.L.N., 2001 ND 33, 622 N.W.2d 232 (2001). Appellant has shown a persistent desire to involve himself in Dorothy's life and upbringing, especially her educational progress. It speaks volumes that Dorothy's academic performance has plunged since Appellant's visitation rights ended. See Appendix, pg. 121.

Appellant provides an intellectually and culturally enriching presence for his daughter. In Texas, his tutelage placed Dorothy in accelerated educational programs. During the 2001 summer vacation, Appellant and Dorothy visited ten state capitals in the Upper Midwest, as well as large cultural centers like Chicago, Milwaukee, Minneapolis, Cleveland, St. Louis, and Kansas City. Father and daughter visited several zoos, botanical gardens, and various other museums and historical locations, such as Greenfield Village in Michigan, U.S. Grant's home in St. Louis, Missouri, Custer's home and a recreation of a Mandan Indian village in Ft. Lincoln, North Dakota, as well as Abraham Lincoln's home, law office and tomb in Springfield, Illinois. Appellant broadens Dorothy's cultural and intellectual horizons in parallel ways, by encouraging books, magazines, newspapers, drama, a familiarity with current events, and knowledge of her Russian, Polish, Jewish and Filipino ancestry, including culture, history and religion.

Appellant's contribution to Dorothy's psychological maturation and segue from adolescence to adulthood counts overwhelmingly in favor of visitation. As elaborated in the studies of Clingempeel and Reppucci, and Emery, Hetherington, and Fisher, the role of the father is critical to the full maturation of a child's social and academic faculties. *See* Clingempeel & Reppucci, Joint Custody after Divorce: Major Issues and Goals for Research, 91 Psychological Bulletin 102 (1982); Emery, Hetherington & Fisher, Divorce, Children and Social Policy (1983). Dorothy is fast approaching eighteen and with it, her legal emancipation from parental guidance and influence. Appellant's window of opportunity to positively affect his daughter's life is

starting to close. Depriving Dorothy of Appellant's fatherly influence is adverse to the best interests of the child.

Appellant's testimony at an evidentiary hearing would decisively establish that reinstating unsupervised visitation with his daughter Dorothy would not endanger either her physical or emotional health. But the District Court denied an opportunity to demonstrate changed circumstances and parental fitness for visitation. It made no attempt to ascertain Dorothy's wishes. As Justice White admonished in Stanley, supra: "[The State] insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove." Id. at 658.

V. The District Court erred in Crowning Appellant's Daughter with Veto Power Over Unsupervised Visitation and In Refusing to Hold an Evidentiary Hearing to Determine Whether the Daughter Currently Desires to Exercise That Veto

The District Court held that the consent of Appellant's daughter Dorothy was a prerequisite to reinstatement of unsupervised visitation. This Court declined to address the legality of that holding in an earlier ruling, declaring the question premature. *See* Appendix, pg. 110. It is no longer premature. Appellant submits that there is no statutory authority for a District Court to permit a child to dictate custodial or visitation arrangements, like empowering students to stipulate what is to be learned in the classroom. Dorothy is a minor who may not discern her best interests. That is why she is subject to parental control. Although giving appropriate consideration to a child's wishes in custody or visitation matters is irreproachable, giving absolute veto power is irresponsible and an abuse of discretion. Appellant knows of no other case where a child was unilaterally empowered to exclude a parent from visitation or other participation in his upbringing. As this Court held in Sevland v. Sevland, 2002 ND

110, 646 N.W.2d 689, 692 (2002), "[t]he visitation statute is not designed to place into the hands of children power over the occurrence, length, time, or place of the visits."

Even if Dorothy's veto were legally sound, the District Court still erred in refusing an evidentiary hearing to determine her wishes. The District Court faulted Appellant for failing to show proof that Dorothy's mind had changed. But Appellant has enjoyed no access to Dorothy since the District Court's last order, and thus no means of ascertaining her sentiments. An evidentiary hearing would have enabled Appellant and the District Court to question Dorothy directly under oath about the matter. The District Court's summary refusal to entertain evidence on the veto issue smacked of the Queen of Hearts in Alice in Wonderland: sentence first, verdict afterwards.

VI. The District Court Erred under the North Dakota Rules of Evidence and violated Constitutional Due Process in Relying on Grossly Unreliable Psychological and Psychiatric Opinion

To prove changed circumstances would support his motion, Appellant requested an evidentiary hearing in his Motion to Reinstitute Unsupervised Visitation. One of Appellant's goals at a hearing would be to establish that nothing in the record or subject to judicial notice shows that psychologists or psychiatrists are any more adept and accurate at predicting future emotional or mental harm to children from parental visitation than are laypersons. Appellant asserts that expert testimony requires a floor of scientific validation that such psychological and psychiatric testimony cannot meet, and has not been met in Appellant's case. Such bogus

unreliable expert opinion that underwrote the District Court's predecessor ruling, nevertheless was the keystone of the District Court's visitation decision.

In Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), the United States Supreme Court reversed Frye v. United States, 293 F.1013 (1923). The latter case held that the admissibility of expert testimony in federal courts should be governed by a "generally accepted scientific technique" standard. Daubert's yardstick pivoted on Rule 702 of the Federal Rules of Evidence, which provides distinct criteria for expert testimony resting on "scientific, technical, or specialized knowledge."

Justice Harry Blackmun, writing for the unanimous Court, instructed:

"[T]he trial judge must ensure that any and all scientific evidence admitted is not only relevant, but reliable... The subject of an expert's testimony must be "scientific...knowledge". The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation... [I]n order to qualify as "scientific knowledge", an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation... [T]he requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability." Daubert, supra at 589-590.

The Court's holding that Rule 702 supersedes Frye's broader "general acceptance" provision is informative. The Court meticulously elaborated the reasons for reexamining Frye and the objective of Rule 702 namely: ensuring the reliability of expert testimony.

In General Electric v. Joiner, 522 U.S. 136 (1997), the Court amplified on Daubert. Chief Justice Rehnquist declared "...while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than

would have been admissible under Frye, they leave in place the 'gatekeeper' role of the trial judge in screening such evidence." General Electric, supra at 142. Thus, it is the duty of the trial judge to ensure that expert testimony is both relevant to the issues in dispute and scientifically reliable.

North Dakota is one 15 states and the District of Columbia that still recognizes the Frye doctrine. While this Court employed the Frye test in City of Fargo v. McLaughlin, 512 N.W.2d 700 (N.D. 1994), psychological or psychiatric testimony about future emotional harm to children caused by parental visitation falls short of the Frye expert testimony standard as understood in that precedent.

In City of Fargo, the expert testimony rested on the results of a field sobriety test. In the initial trial, the district court neglected to establish the scientific reliability of the test. This Court, citing case law from several foreign jurisdictions, concluded that the sobriety test had been repeatedly proven reliable and was generally accepted by the courts as such. Justice Meschke opined:

"...[T]he underlying scientific basis for HGN testing- that intoxicated persons exhibit nystagmus- is undisputed, even by those cases and authorities holding the test inadmissible without scientific proof in each case.[emphasis added, citations omitted] It is generally accepted that a person will show a greater degree of nystagmus at higher levels of intoxication, and that a properly conducted HGN test can identify nystagmus. [citations omitted] We take notice of these physiological facts, and conclude that it is unnecessary to require expert testimony of these widely accepted principles.

These principles comprise the only scientific components of the HGN test. The officer, based upon his training in these principles, observes the objective physical manifestations of intoxication, and no expert interpretation is required. [citations omitted]...

Those cases and other authorities that urge an individualized scientific foundation by expert testimony for admission of HGN test results in each case, point to a number of factors allegedly showing the unreliability of the test... [citations omitted] **None of these factors undercuts the scientific foundation of the test: intoxicated persons exhibit nystagmus, and a properly administered HGN test will identify the nystagmus.**[emphasis added]" City of Fargo, supra 706-707.

The differences between City of Fargo and this case are stark: no scientifically reliable basis exists that would tie Appellant's behavior or personality to endangerment of Dorothy's physical or emotional health. The use of psychological or psychiatric expert testimony like Dr. Simun's on child endangerment fails the Frye yardstick as expounded in City of Fargo, in addition to failing Daubert.

Dr. Simun's expert testimony rested on scientifically unvalidated speculation that Appellant's conduct was the principal cause of Dorothy's depression. Dr. Simun admitted that other possible explanations were her racial background, her transition to high school, her strict family life with Appellee and Gregory Pinter, and her family's move from San Antonio to Grand Forks. Dr. Simun made the unreliable and unsubstantiated inference based on speculation that further contact between Dorothy and Appellant would aggravate her emotional troubles, even though Dr. Simun stated that Dorothy desires a functional and fruitful relationship with Appellant, a feeling reciprocated by Appellant. Dr. Simun's expert testimony fails the Daubert standard. There is no discernable diagnosis. Dr. Simun alludes to "major depression", but she declines to find a formal psychological disorder and does not advocate psychiatric or medicinal therapy. Dr. Simun pointed to no cases similar to Dorothy's. Further Dr.

Simun never examined Appellant, making her expert testimony of whether **his** visitation would probably cause Dorothy emotional harm highly dubious.

Even before the ruling in Daubert, the scientific value and reliability of the testimony of mental health professionals, like psychologists and psychiatrists, had been questioned in the legal community under the Frye standard, especially when used in custody and visitation disputes. In a 1990 article for the Golden Gate University Law Review, Susan Romer argued that when testifying on child sexual abuse "[p]sychologists must develop national guidelines and protocols that are consistent and measurable to test whether or not abuse has occurred... However, these clinical methods may never be so "measurable" and "scientific" as to satisfy the Kelly-Frye test [the prevailing California standard in 1990]; they cannot produce the certainty of fingerprint analysis." *See Romer, Child Sexual Abuse in Custody and Visitation Disputes: Problems, Progress, and Prospects, 20 Golden Gate U.L.Rev. 647, 678-679 (1990)*. Romer's analysis in 1990 proved prophetic. After Daubert, the credibility of such expert psychological and psychiatric testimony has been repeatedly challenged.

SMU professor Daniel Shuman, in a 1997 article for Family Law Quarterly, voiced consternation over the prevailing use of expert psychiatric and psychological testimony: "Disappointing as it is to acknowledge, in an age and nation where expertise are so venerated, child custody and other behavioral science experts generally cannot reasonably demonstrate that their ability to make accurate pre-or postdictions is any greater than that of an ordinary mind, or that their expertise is more effective than that of another expert or non-expert." *See Shuman, What Should*

We Permit Mental Health Professionals to Say About "The Best Interests of the Child"?: An Essay on Common Sense, Daubert, and the Rules of Evidence, 31 Fam.L.Q.551, 567 (1997). Shuman relies primarily on two sources in reaching his conclusion: the American Psychiatric Association's amicus brief in Barefoot v. Estelle, 463 U.S. 880 (1983), and, the best interests standard in deciding custody cases. In Barefoot, a psychiatrist in the initial trial answered hypothetical questions related to the petitioner, opining that there was a "'one hundred percent and absolute' chance" that he would commit future criminal acts of violence. In the amicus brief filed by the American Psychiatric Association (A.P.A.) for the petitioner, a large body of research revealed that "long term predictions of future dangerousness were inaccurate and more often than not wrong, and that 'even under the best of conditions, predictions of long-term future dangerousness are wrong in at least two out of every three cases.'"[quoting Brief for the American Psychiatric Association as Amicus Curiae in Support of Petitioner, at 9, Barefoot, supra.] 31 Fam.L.Q. at 559.

The statements of the A.P.A. are damning. Shuman is right to draw a straight line from that admission from the premier psychiatric organization in the United States to the use of mental health testimony as expert testimony in child custody matters. If such psychological and psychiatric testimony is wrong two-thirds of the time in predicting future dangerousness, Shuman is certain the percentage is equally bleak when deciding the best interests of a child:

"To assess the ability of mental health professionals to make accurate predictions requires that the outcome (i.e., the best interests of the child) to be 'operationalized,' or described in a fashion capable of measurement to test the validity and reliability of these predictions. Since the best interests standard is by definition indeterminate, it is incapable of measuring a mental health professional's ability to predict outcomes. Apart from the problem of defining best interests so that predicted outcomes can be operationalized and tested, research on the predictive abilities of mental health professionals does not support claims of omnipotence about the best interests of the child." 31 Fam.L.Q. at 567.

Shuman's analysis demonstrates the impossibility of such expert testimony meeting the reliability and helpfulness standards of Daubert or the Frye threshold. Shuman persuasively points to a survey of family law attorneys disclosing that a majority "do not regard mental health professional input as helpful in reaching appropriate custody determinations, but they present such testimony largely to counter their opponent's experts." 31 Fam.L.Q. at 566, citing Felner, Child Custody Resolution: A Study of Social Science Involvement and Impact, 18 Prof.Psychol.:Res.& Prac. 468 (1987).

In a 2001 article for the Illinois Bar Journal, H. Joseph Gitlin addressed these same concerns as they apply to Illinois, which, like North Dakota, still employs the Frye test. Gitlin urges that a mental health professional should not be considered an expert witness since that testimony is "merely testimony of what a witness observed, heard, etc., and as such is not entitled to any greater weight than lay testimony of the same kind. Moreover, the 'experts' who make recommendations in child-custody cases... are typically no more competent to make good custody decisions than a seasoned family court judge." See Gitlin, Mental Health Professionals in Child

Custody Cases: Giving "Expert" Testimony Its Due, 89 Ill.B.J. 350 (2001). In reviewing the relevant Illinois case law, Gitlin discovered that adherence to the Daubert test was erratic, and made no mention of Frye. The testimonies of psychologists and psychiatrists were routinely given expert weight when they would testify to the best interests or other issues without any scientific basis, frequently serving more as credentialed relationship witnesses than experts. Gitlin states plainly the central contradiction: "It is not surprising, then, that the appellate court in Dilley instructed that the mental-health professional's testimony was entitled to great weight. In Dilley, however, the psychologist did not testify as to what he learned scientifically from well-established psychological tests; rather he testified to what he observed and heard.[citations omitted]" 89 Ill.B.J. at 354. The lesson is simple; the opinion testimony of psychologists or psychiatrists should only be admitted in child custody disputes when it is grounded in science.

Gitlin's observation is trumpeted in a second article by Shuman published in 2002: "The lesson that Frye and Daubert teach is that an expert's opinions 'are not admissible just because somebody with a diploma says it is so.'" *See* Shuman, The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment, 36 Fam.L.Q.135, 139 (2002), citing United States v. Ingraham, 42 M.J.218, 226 (1995). Shuman explores the fallibilities of the tests psychologists and psychiatrists use to evaluate their patients, especially children, in advance of court testimony. Shuman again advocates rigorous vetting of the scientific process associated with a mental health professional's expert testimony in advance of its admission into the record. He lectures: "By virtue of their qualifications alone,

experts do not provide any assurance that their opinions rest on reliable methods and procedures. Instead relying on experts without testing the reliability of their methods and procedures cloak experts' value judgments under the veil of science and risks that their personal and professional characteristics bias the evaluation and the importance of information learned. The scientific method is intended to avoid such problems." 36 Fam.L.Q. at 160.

A respected psychiatrist, Dr. Margaret Hagen, echoes these views in her book, Whores of the Court, 1997, Harper Collins, New York. In her book, she details the use of expert testimony by psychiatrists and psychologists in the American legal system, including child custody cases. Whores, (passim) "Chapter 8- In the Best Interests of the Child". Like Shuman and Gitlin, she is adamant: "What if the foundation of the clinician's belief is strictly personal, manifestly unobjective, and clearly nonscientific? Then, whatever the level of general acceptance, that belief does not belong in courtrooms masquerading as expert scientific testimony." Whores, pg. 298. These authors are but the tip of an iceberg of legal scholars and mental health professionals who have openly challenged the use of psychiatric and psychological expert testimony that addresses a child's best interests. *See e.g.*, Wah, The Changing Nature of Psychological Expert Testimony in Child Custody Cases, 86 *Judicature* 152 (2002); Melton, The Clashing of Symbols: Prelude to Child and Family Policy, 42 *Am. Psych.* 345 (1987); Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 *Law & Contemp. Probs.* 226 (1975); Mischel, Personality and Assessment, (1968); Goldstein, Freud, and Solnit, Beyond the Best Interests of the Child, (1979).

The due process clause creates a heightened standard of reliability for evidentiary rules when the fundamental interest of a parent in visitation or other participation in the upbringing of his child is at stake. *See Stanley*, supra, at 650-651. The undisputed evidence or research shows that so-called “expert” testimony of future dangerousness of criminals is wrong two times out of three. Studies similarly demonstrate that “expert” testimony predicting what custodial or visitation arrangements would serve the best interests of the child or would create child endangerment is no better than testimony from an ordinary mind. *See 31 Fam.L.Q.551*, supra, at 567. It is thus a flagrant violation of due process to sever a parent’s visitation privileges based solely on pure speculation that if the parent underwent a psychiatric examination, a mental health assessment, an assessment for inclusion in a sexual offenders treatment program, and medication then his parenting skills and nurturing of his child might be upgraded to avoid endangering the child's welfare. Yet that is precisely what the District Court did to Appellant in this case.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Supreme Court overturned a murder conviction on the ground that the trial court's application of a Mississippi hearsay rule denied the defendant his constitutional right to due process. Justice Lewis Powell, writing for the majority, elaborated that both the accused and the State, "must comply with the established rules of procedure and evidence designed to assure both fairness and **reliability** in the ascertainment of guilt and innocence." [emphasis added] *Id.* at 302. Accordingly, if wildly unreliable testimony is employed by the State to deny a parent visitation rights, then due process is offended.

In Santosky, supra, the Supreme Court held that due process compelled a "clear and convincing" evidence standard in lieu of the customary preponderance of evidence threshold when a state seeks completely and irrevocably to sever rights of parents in their natural child. Justice John Paul Stevens, writing for the majority, instructed:

"The fundamental liberty interest of natural parents in the care custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." Id. at 753-753.


In Appellant's case the use of wildly unreliable psychiatric and psychological evidence to permanently sever visitation failed the Santosky test of procedural fairness. As the foregoing established, psychological or psychiatric expert testimony not only flouts the Daubert and Frye tests of reliability, but so far departs from science as to violate due process.

CONCLUSION

For the foregoing reasons, the order of the District Court denying the motion for unsupervised visitation and default judgment should be reversed and judgment should be entered for Appellant. In the alternative, the District Court's order should be reversed and the case remanded for an evidentiary hearing to determine if changed circumstances justify reinstatement of Appellant's unsupervised visitation with his

daughter Dorothy. Time is of the essence. Dorothy is sixteen and her legal emancipation from parental guidance and influence impends.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Bruce Fein", written over a horizontal line.

Bruce Fein (DC Bar #446615)
BRUCE FEIN & ASSOCIATES
910 17th Street, N.W.
Suite 800
Washington, D.C. 20006
(202) 775-1787

Thomas V. Omdahl (ND Bar #04971)
OMDAHL LAW OFFICE
424 DeMers Avenue
Grand Forks, North Dakota 58201
(701) 772-8526

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of N.D. R. App. P. 32(a)(7)(A).

1. Exclusive of the exempted portions of the brief, as provided in N.D. R. App. P. 32(a)(7)(A), this brief includes 6,724 words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Word 2000 in 12 point Times New Roman font. The undersigned has relied upon the word count of this word-processing system in preparing this certificate.

Dated: December 22, 2004


Bruce Fein