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STATE OF NORTH DAKOTA

OCT 22 2008

SUPREME COURT NO.: 20080188

STATE OF NORTH DAKOTA

DISTRICT COURT CASE NO.: 06-C-01133

Amanda Serr,

- Plaintiff/Appellee,

- vs -

Cody Serr,

Defendant/Appellant.

APPEAL FROM AMENDED JUDGMENT
DATED JUNE 30, 2008
THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE DONALD L. JORGENSEN

APPELLEE'S BRIEF

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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

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STATEMENT OF THE ISSUES

- I. Did the lower court abuse its discretion in revising the matter of custody from the time of the first appealed judgment dated August 2007 to the current judgment dated June 30, 2008?
- II. Did the lower court err in its application of the child support guidelines in the current judgment?
- III. Does the changing of a few words from the first judgment in August 2007 to the current judgment change the fact that Cody Serr is in fact the custodial parent with 52 more custodial nights than Amanda Serr?

ADDENDUM TO THE APPELLANTS' STATEMENT OF FACTS

Both parties prior to the entry of judgment agreed that custody of their child would be joint physical custody.

In *Serr v. Serr* 2008 ND56: 746 N.W.2d 416 the issues in on remand are found at

¶16. We conclude that the district court did not err in its award of joint physical custody in the divorce judgment based upon the parties' February 2007 stipulation. We therefore, affirm the district court's award of custody. Nevertheless, there is some discrepancy between the court's amended findings of fact, conclusions of law and order for judgment and the court's August 2007 judgment. As discussed, while the amended findings of fact, conclusions of law and order for judgment refer to the parties' attempt "to achieve an equal division of custody and spending equal time" with the child, the subsequent August 2007 judgment does not reference "equal" custody and provides specific times which are not "equal." While the judgment controls, we recognize that on remand the district court may need to address whether the August 2007 judgment accurately reflected the court's amended findings of fact, conclusions of law and order for judgment in reconciling its award of child custody with its child support calculations.

¶22. In this case, unlike *Boumont*, the divorce judgment awards "joint custody" of the parties' minor child as "co-custodial parents," but the judgment does not specifically award "equal physical custody" as that term is defined by N.D. Admin. Code § 75-02-04.1-08.2. The divorce judgment on its face does not award each parent physical custody of the child "exactly fifty percent of the time," but instead awards more physical custody time to Cody Serr. Because the district court judgment does not award "equal physical custody," we conclude the district court erred in applying N.D. Admin. Code § 75-02-04.1-08.2 to determine the parties' child support obligations. We, therefore, reverse the district court's award of child support and remand for proper application of

the child support guidelines.

¶23. Cody Serr also asserts the district court erred in its child support calculation by failing to apply guidelines for “extended visitation” and for Amanda Serr’s alleged underemployment. These issues may be addressed on remand.

ARGUMENT

The following language appears in ¶16 in Serr v. Serr 2008 N.D.36: 746 N.W.2d 416.

“.... while the judgment controls we recognize that on remand the district court may need to address whether the August 2007 judgment accurately reflects the court’s amended findings of fact, conclusions of law and order for judgment in reconciling its award of child custody with its child support calculations.”

Therefore according to the above language in ¶16 the trial court did not abuse its discretion in revisiting the matter of custody from the time of the final appealed judgement in August 2007 to the current judgment dated June 30, 2008.

The trial court decided that the August 2, 2007 judgement didn’t accurately reflect the amended findings of fact, conclusions of law and order for judgment. To correct this in its June 9, 2008 order amending the judgement on remand said.

“That the parties have attempted to achieve an equal division of custody of the minor child, with the plaintiff having custody of the minor child from Thursday afternoon through Sunday afternoon and the defendant having custody of the minor child the remaining period of time.

That the foregoing shall constitute and satisfy the provisions of Section 75-02-04.1-08.2 North Dakota Administrative code, with each of plaintiff and defendant awarded exactly 50 percent of the custody of the minor child. M. and that such equal custody of the minor child shall result in a child support obligation contemplated by said section.”

Both Appellant and Appellee agreed before the original judgment was entered that the custody of the child would be joint physical custody. The problem now is

whether or not the language the trial court used in its order amending the judgment on remand for equal physical custody and the payment of child support complies with the North Dakota Case Law and North Dakota Child Support Guidelines. The language the trial judge believed would make the physical custody equal and the proper payment of child support is found in the trial courts June 9, 2008 Order Amending Judgment on Remand. The entire Order appears in the Appendix on page 3, 4, 5 and 6.

Appellee agrees with appellant that Serr one cited a number of cases in which it held that the lower court must adhere to the guidelines. the guidelines at 75-02-04.1-08.2 states:

“Equal physical custody - Determination of child support obligation. A child support obligation must be determined as described in this section in all cases in which a court orders each parent to have physical custody of their child or children. Equal physical custody means each parent has physical custody of the child, or if there are multiple children, all of the children, exactly fifty percent of the time. A child support obligation for each parent must be calculated under this chapter...”

The court cited Hewson v. Hewson, 2006 ND 16; 708 N.W.2d 889; Logan v. Bush, 2000 ND 203; 621 N.W.2d 314; and Boumont v. Boumont, 2005 ND 20; 691 N.W. 2d 278; and Knoll v. Kuleck, 204 ND 199; 688 N.W.2d 370.

Appellee knows the problems in this case can be resolved only by a trial court order that reflects that the parties agreed to joint physical custody and payment of any child support must be in accordance with the North Dakota Child Support Guidelines.

The trial judge believes his Order Amending Judgment Upon Remand reflects the parties agreement regarding joint physical custody of the child and complies with the

applicable North Dakota Case Law and North Dakota Child Support Guidelines. If said Order does not, then the Appellee respectfully requests the North Dakota Supreme Court to remand this case to the trial court with an order setting out what the trial judge should do so that his order will comply with the parties agreement regarding joint physical custody and will also be in language that complies with the applicable North Dakota Case Law and North Dakota Child Support Guidelines.

CONCLUSION

In this case the parties agreed to joint physical custody and that the child support would be paid according to the North Dakota Child Support Guidelines and expected a judgment that would comply with their agreement. Problems arose because the judgment didn't comply with North Dakota Case Law and North Dakota Child Support Guidelines.

Now, the Appellant wants his appeal to change the parties agreement so he can have sole custody and Appellee would have to pay child support to him.

The trial court believes it has drafted an amended judgment according to North Dakota Case Law and North Dakota Child Support Guidelines that provides for joint physical custody of the child as agreed to by the parties and payment of child support. If the trial courts belief is correct its judgment should stand, however if the trial courts belief is wrong the North Dakota Supreme Court should remand with an order telling the trial judge how to correct the Amended Judgment so that it will comply with North Dakota Case Law and North Dakota Child Support Guidelines.

DATED this 22nd day of October, 2008.

Benjamin C. Pulkrabek

Benjamin C. Pulkrabek. ID# 02908

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CERTIFICATE OF SERVICE BY MAIL

Amanda Serr,)
) Supreme Court No. 20080188
Plaintiff/Appellee.)
) District Court Case No. 08-06-C-1133
vs.)
)
Cody Serr,)
)
Defendant/Appellant.)

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

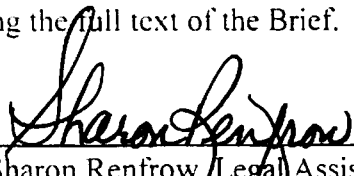
That on October 22nd, 2008, she served, by hand delivering, a copy of the following:

APPELLEE'S BRIEF

by leaving a copy with the person(s) hereinafter named or with their office, at their last known address as follows:

Richard B. Baer
Attorney at Law
1110 College Drive, Suite 211
Bismarck, ND 58501

The undersigned further certifies that on October 22nd, 2008, she dispatched to the Clerk, North Dakota Supreme Court, an original and seven copies of the APPELLEE'S BRIEF and emailed the same containing the full text of the Brief.



Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek