

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Amanda Serr,

Appellee,

vs.

Cody G. Serr,

Appellant.

)
) Supreme Court No. 20080188
) Burleigh County District
) Court Case No. 06-C-01133

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

OCT 13 2008

STATE OF NORTH DAKOTA

Appeal from:

Amended Judgment dated June 30, 2008

District Court, Burleigh County, North Dakota
The Honorable Donald L. Jorgensen, Presiding

BRIEF OF APPELLANT

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Statement of the Issues

- I. Did the lower court abuse its discretion in revisiting 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?

Statement of Facts

Following this court's remand, a hearing was held before the Honorable Judge Donald L. Jorgensen on May 20, 2008. At issue is how to interpret and apply this court's intent on remand. Attorney Ben Pulkrabek argued that saying the visitation is equal is enough to trigger section 75-02-04.1-08.2 even though the number of nights with the child are not equal. (Tr. pages 6-8).

Attorney Baer argued that the remand was much narrower, i.e. to compute child support (Tr. page 6), and that since the times are not equal, 75-02-04.1-08.2 does not apply (Tr. page 7), that Ms. Serr was underemployed (Tr. page 9) and extended visitation (Supreme Court remand Serr v. Serr, 2008 ND 56; 746 N.W. 2d 416).

The facts are as set out in the initial appeal. The new facts are that following this court's remand there was:

- a. A hearing on May 20, 2008;
- b. A memorandum opinion dated June 9, 2008;
- c. Letter to Judge Jorgensen dated June 24, 2008;
- c. An amended judgment dated June 30, 2008; and
- d. A notice of appeal dated July 24, 2008.

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Law and Argument

STATE OF NORTH DAKOTA

Language in the lower court's August 2, 2007 judgment regarding custody at

paragraph 5 states:

“Plaintiff and defendant have joint custody of the minor child, M.S. The parties will share custody and visitation as follows: a. Defendant will have the child from Sunday afternoon at 5:00 p.m. Through Thursday afternoon at 5:00 p.m. of each week. Plaintiff will have the child from Thursday afternoon at 5:00 p.m. through Sunday afternoon at 5:00 p.m. of each week... except the parties will alternate the weekends depending upon the plaintiff's work schedule.”

The June 9, 2008 order amending the judgment upon remand states:

“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.S., and that such equal custody of the minor child shall result in a child support obligation contemplated by said section.”

The court by merely saying it is so should not be permitted to make it so. The fact remains that Mr. Serr has the child 52 more nights per year than Amanda.

There is no argument that the parties intended to share custody, that is not the issue. The issue is that it is not and has not been equal.

The Supreme Court remand in Serr v. Serr, 2008 ND 56; 746 N.W. 2d 416 did not grant the District Court the authority to rework its writing of the original judgment. This court said:

“... 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.”

No where does it say reword the judgment; change the rules; amend facts or do anything more than reconcile the 2007 order with the child support guidelines. That certainly means to recompute the child support obligation pursuant to 75-02-04.1-08.2 North Dakota Administrative Code. That section simply and clearly requires that child support be equal or Amanda owes child support to Mr. Serr and he owes her nothing.

Also see Serr v. Serr, supra, last paragraph, wherein it states:

“... We, therefore, reverse the district court's award of child support and remand for proper application of the child support guidelines.

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.”

This court in Serr one discussed the disparity in the lower court's initial judgment and its findings wherein the court said:

“... The subsequent August 2007 judgment does not reference “equal” custody and provides specific times which are not “equal”...”

The new judgment does the same as the 2007 judgment. Mr. Serr does not believe that the lower court has the authority to reduce his visitation without a proper motion before it and a hearing. I raise this because I can envision this lower court to change the visitation language to something worse than what we have now.

While the lower court did address the underemployment of Amanda, it again overlooked the fact that Mr. Serr has 52 more nights per year than Amanda (extended visitation 75-02-04.1-08.1).

While Mr. Serr believes he is in fact the custodial parent and section 75-02-04.1-08.2 controls, he also believes that 75-02-04.1-08.1 must be addressed in conjunction with 08.2.

In Serr one, this court 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, 2004 ND 199; 688 N.W. 2d 370.

The court in Serr one distinguished Boumont because the Serr judgment grants Mr. Serr the extra nights and a 50/50 child support computation is not appropriate or lawful. It is here that the court found error and it must do so again because the 2008 judgment changes no facts. In fact it has muddled things up with its generic use of no time references on pick up and returns.

Conclusion

This is the second time this case has been before this court. The lower court changed little of the facts but decreed the 52 more nights of the child with Mr. Serr equals 50% custody. This flies in the fact of reality.

This case should be corrected at this level since the lower court refuses to do so. The lower court should recognize that Mr. Serr has the child more than 50% of the time and therefore child support should be calculated accordingly.

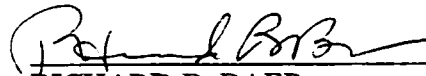
Dated this 13th day of October 2008.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and the Appendix was mailed on the 13th day of October 2008, to Benjamin Pulkrabek, Attorney at Law, 402 1st Street NW, Mandan, ND 58554.



RICHARD B. BAER