

IN THE SUPREME COURT

20090185

STATE OF NORTH DAKOTA

Morton County Social Service Board)
 as assignee for J.T., J.T.. and K.T.,)
 minor child, by and through her)
 guardian. J.T., nka J.T.,)
)
)
)
 Plaintiffs/Appellees,)
)
 vs.)
)
 J.C.,)
)
 Defendant/Appellant.)

Supreme Court No.20090185
 District Court No. 30-01-R-1051

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STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT OF MORTON COUNTY
 SOUTH CENTRAL JUDICIAL DISTRICT
 DISTRICT COURT NO. 30-01-R-1051
 THE HONORABLE DAVID E. REICH

APPELLANT'S BRIEF

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ISSUES PRESENTED

1. Did the Court apply the incorrect statutory provision?
2. Did the Court error in denying the defendant's motion for an amended judgment changing the custody of the minor child of the parties?

STATEMENT OF THE CASE

This is a change of custody case. The plaintiff, J.T., hereinafter referred to as "Mother" and the defendant, J.C., hereinafter referred to as "Father" have never been married. They have one minor child, K.T., born in 1999, hereinafter referred to as "Child".

The original Judgment as amended by stipulation awarded custody of the child to the Mother subject to the visitation rights of the Father. (App. 1-5)

The Father brought a motion to amend the Judgment dated March 25, 2008. The motion sought the change of custody of the Child from the Mother to the Father and the modification of the related Judgment provisions. (App. 6-8) The Mother filed a resistance to the motion dated April 8, 2008. (App. 15-16) The Court issued an Ex Parte Interim Order changing the temporary custody of the child from the Mother to the Father on March 27, 2008. (App. 13-14) The Court found a prima facie case pursuant to NDCC 14-09-06.6(4) by Order dated April 29, 2008. The Interim Order remained in effect until the Court denied the Father's Motion on June 4, 2009.

Evidence was submitted to the Court on June 10, 2008, August 25, 2008 and May 12, 2009.

The Court denied the Father's motion to change custody by Order dated June 4, 2009. (App. 26-50)

The Father appeals from that Order and Judgment. (App. 57)

STATEMENT OF FACTS

The parties have never been married. They have one child, K.T., born in 1999. (App. 9) The child lived with the mother in Mandan, North Dakota, until the Court changed custody by ex parte interim order dated March 27, 2008. The Child then lived with her Father and his family in Minot, North Dakota until the end of the summer 2009.

The Mother became romantically involved with an inmate of the North Dakota State Penitentiary, Larry Desjarlias. She ultimately fled with Desjarlias when he walked away from confinement. She took the Child with her. (App. 67, 68) The Father brought his motion seeking a change of custody when he learned of these events. (App. 87-94) The Ex Parte Order was based upon this fact. (App. 9-12, 13-14)

Desjarlias threatened and traumatized the Child shortly after he and the Mother fled. He, the Child and the Mother were staying in a motel room. The Child was crying because she had a tooth ache. Desjarlias in the presence of the Child said he would kill her if she did not shut up. (App. 68, 69, 95) The Mother delivered the Child to her mother a few days later and resumed her flight with Desjarlias. She married Desjarlias while they were fugitives. (App. 70) She did not return to Mandan until after she had found out that the Father had obtained custody of the Child. (App 1, 73-75) The Mother did not return home after she married Desjarlias because she was afraid that there were arrest warrants for her. (App. 32, 71-72) She admitted that taking the Child and fleeing with Desjarlias was a mistake (App. 85) but claimed that she was being a responsible parent when she returned the child to her mother, "...instead of taking her all around the country or wherever, you know. wherever we stayed at the moment...Well, from hotel to

hotel, or, you know, staying in this place or that place and not being in school." (App. 86) The Child did not feel safe around Desjarlias, but did feel safe around her Father. (App. 58-59)

The Mother's testimony regarding her relationship and future intentions regarding Desjarlias was evasive, equivocal, and contrary to her actions. She indicated on June 10, 2008, that she didn't know what her future plans were. (App. 74, 75) She was still wearing her wedding ring and was still having contact with him at that time. (App. 76) She also acknowledged that it would not be a good idea for her to have contact with him in the context of the legal action. (App. 77) She was still having at least phone contact with Desjarlias in the presence of the Child during the second week of July 2008. (App. 105-106) She admitted that she allowed the Child to see Desjarlias during Thanksgiving of 2008. (App. 114-115) and that Desjarlias had been staying with her for a month after he got out of prison in November and December of 2008. (App. 113-114) She testified that she and the Child may have contact with Desjarlias even though they are getting divorced and notwithstanding all of the events that occurred. (App. 36) The Mother even insisted that a DVD demonstrating Desjarlias and the Child playing together be submitted to the Court as late as the August 25, 2008 hearing. (App. 110) She was still in the process of a divorce at the time of the August 2008 hearing. (App. 108, 109) There has been no activity in the divorce, which was apparently commenced by Desjarlias rather than the Mother since September 25, 2008 and is now pending dismissal.

The Mother's residential status was unstable while the Child was with her Father.

She had stayed at three different places from late March to the June 10th hearing. (App. 78) She was staying at a hotel at the time she sought a protection order against Desjarlias on January 8, 2009. (App. 39)

The Father learned after he initiated the action that the Mother's first husband was charged and convicted of molesting an 8 year old child that had resided in his household. The Mother continued to live with that husband until he was sentenced although she did place the Child with her mother. She did not divorce him until 2007 (App. 62-66)

The Father also learned that the Child's school attendance had been abysmal. She was absent 20 days in the First Grade (2005-2006): 14 days in the Second Grade (2006-2007); and 30 days in the Third Grade (fall 2007 to March 22, 2008) with two months still remaining in the school year, when the Father obtained temporary custody. (App. 102)

The Child's pediatrician, Dr. Diana Peterson, testified that the Child's medical history did not justify or explain the Child's school absences which were well in excess of normal. (App. 60-61) The Child had no medical problems while with her father. (App. 103, 104) The Child testified that some of her school absences were due to oversleeping. (App. 111, 112) and that her mother was still getting letters from Desjarlias. (App. 23-25, 79-82)

The Child missed 2 1/2 days of school in the custody of the Father from March 22, 2008 to the end of the school year in late May 2008 due to nightmares and the trauma she had suffered while with her Mother and Desjarlias. (App. 95-96, 97-101) The Child had perfect attendance the following year, 2008-2009. The Mother admitted that the

child's perfect attendance while with the Father was a dramatic change from when the Child lived with her. (App. 116-117)

She demonstrated no interest in the Child's education in Minot. She didn't know what her attendance had been, what school she was attending or her teacher's name for the remainder of the third grade. (App. 83, 84) She did not know the name of the Child's teacher for the 2008-2009 school year nor had she ever met or visited with her. (App. 115)

LAW AND ARGUMENT

Two issues are presented to the Court: the first is a matter of law and the second is the matter of discretion.

I. THE TRIAL COURT ERRED BY APPLYING THE INCORRECT STATUTORY PROVISION.

The last Order pertaining to custody was entered on September 6, 2006. The Court determined that the two year limitation of NDCC 14-09-06.6(1) and (5) applied because the Father's motion was made within two years of the last Order.

The Court misconstrued and misapplied the statutory provisions. NDCC 14-09-06.6(1) provides that no motion "...may be made earlier than two years after the date of entry of an Order establishing custody except...". (Emphasis added) That subsection pertains to the time of bringing a motion not to the granting of relief. NDCC 14-09-06.6(5) provides that a Court "...may not modify a prior custody Order within the two year period following the date of entry of an order establishing custody unless...".

(Emphasis added) NDCC 14-09-06.6(6) provides that "The Court may modify a prior custody order after the two year period following the date of entry of an order establishing custody...". (Emphasis added)

The timing of the motion, although irrelevant to the issue was the result of the emergency created by the Mother and her abandoning of the Child.

Subsection 1 applies to the timing of the bringing of a motion. Subsection 5 applies to the granting of relief within two years. Subsection 6 applies to the granting of relief after two years. The Court's order in this matter was dated June 4, 2009, more than two and a half years after the last order on September 6, 2006. Therefore NDCC 14-09-06.6(6) is the proper statute and criteria to be applied.

The Court therefore placed the wrong burden upon the Father: that being that modification is necessary to serve the best interest of the Child and that the Child's present environment may endanger the Child's physical or emotional health or impair the Child's emotional development (App. 26-50) rather than a material change has occurred in the circumstances of the child or the parties and the modification is necessary to serve the best interests of the child as found in NDCC 14-09-06.6(6).

The parties are entitled to a determination by the trial Court which is based on an appropriate application of the law. Anderson v. Anderson, 448 NW2d 181 (ND 89); Delorey v. Delorey, 357 NW2d 488 (ND 84)

II. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR AN AMENDED JUDGMENT CHANGING CUSTODY OF THE MINOR CHILD OF THE PARTIES.

The trial Court applied the provisions of NDCC 14-09-06.6(5) in its analysis of the case. (App. 27, 28) "...because the motion to change custody was made less than two years after the previous order establishing custody the burden of proving that the child's present environment with [Mother] may endanger the child's physical or emotional health or impair the child's emotional development. See NDCC 14-09-06.6(5)(b)." (App. 46, 47) Even if this is the correct statutory provisions the Court nevertheless abused its discretion and erred in its finding and decision.

The cited provision requires the moving party to show that the modification is necessary to serve the best interests of the child and the child's present environment may endanger the child's physical or emotional health or impair the child's emotional development.

The district court's decision whether to change custody is a finding of fact subject to the clearly erroneous standard of review. Anderson v. Resler, 2000 ND 183, ¶618 NW2d 480 (ND 2000). 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. NDRCivP 52(a): Mosbrucker v. Mosbrucker, 1997 ND 72, ¶5, 562 NW2d 390 (ND 97).

The test for changing the custody of a child is set forth in NDCC 14-09-06.6(6):

The court may modify a prior custody order after the two year period following the date of entry of an order establishing custody if the court find:

- a. On the basis of facts that have arisen since the prior order or which were unknown to the court at the time of the prior order, a material change has occurred in the circumstances of the child or the

parties: and

b. The modification is necessary to serve the best interests of the child.

First, in deciding whether to change custody, a court must consider whether there has been a material change of circumstances since the original custody decree. NDCC 14-09-06.6(6)(a). Second, if the court decides that there has been a material change in circumstances, it must decide whether a change in custody is necessary to serve the best interests of the child. NDCC 14-09-06.6(6)(b). Kelly v. Kelly, 2002 ND 37. 640 NW2d 38 (ND 02).

The trial Court can be affirmed only if there is an irrebuttable presumption in favor of the mother, only if education and school attendance are meaningless, and only if gross errors in judgment by the mother are irrelevant.

The facts established by the Father demonstrate overwhelmingly that the Child's environment with the Mother seriously endangered her physical and emotional health and development.

The Court glossed over the Child's abysmal school attendance while with her Mother by merely stating "K.T.'s grades in school were good despite her absences." (App. 32) "It appears that K.T. has done well in school regardless of who has had custody". (App. 43) "Despite the excessive number of absences when she attended grades 1-3, the evidence indicates that she got good grades and did well in school." (App. 48) and "However, notwithstanding the absence, it appears that she has done well in school in both Mandan and Minot." (App. 45) The Courts are not required to wait

until the damage has occurred before intervening and changing custody.

The mother admitted receiving three letters from the Child's school expressing concern over her attendance. School attendance is so elementary that it is required by law. See NDCC 15.1-20-01 to 15-1.20-04. The principal at the Child's school, Mary Stark Elementary, noted the obvious in her letters to the Mother, that it is "...very important for children to be present in school in order for them to gain skills and acquire habits that will help them with healthy and productive lives." (App. 23, 24, 25) The Child's attendance even by the Mother's own admission dramatically improved while in the Father's custody. Either the Child's health or parenting dramatically improved while with her Father. Either way, this contrast by itself requires the Child's custody be changed to her Father.

In this case, the Mother grossly neglected the child's school attendance and education and consistently put her own interests and her husband's before her Child. The contrast between the history of her parenting and that of the Father could hardly be more dramatic. A more compelling basis for changing custody could hardly be imagined.

The Mother even insisted that a DVD demonstrating Desjarlias and the Child playing together be submitted to the Court as late as the August 25, 2008 hearing. (App. 110)

CONCLUSION

The decision of the trial Court must be reversed and an Order entered directing that the trial Court change the custody of the Child from the Mother to the Father or be remanded for further proceedings.

Respectfully Submitted this 5th day of October, 2009.



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appellant's Brief and Appendix was, on the 5th day of October, 2009 mailed to:

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