20090185

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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Morton County Social Service Board as assignee for Jan Teske, Jan Teske, and K.T., minor child by and through her guardian, Jan Teske, nka Jan Thorson, Plaintiffs/Appellees, -vs- Jeremiah Cramer, Defendant/Appellant.	Supreme court No.20090185 District Court No. 30-01-R-1051 FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT OCT 22 2009 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

APPELLEE'S BRIEF of Defendant

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STATEMENT OF THE ISSUES

ISSUE I. Is NDCC 14-09-06.6(5) the applicable subsection for postjudgment modification for motions made within two years of a custody order?

ISSUE II. The Trial Court did not err when it denied Defendant's Motion to Amend the Judgment changing custody of the parties minor child

STATEMENT OF THE CASE

The Statement of the Case as set out in the Appellant's brief is substantially accurate. The Plaintiff/Appellee joins in the same.

STATEMENT OF THE FACTS

The facts of this case are set out in their entirety in the trial transcript. While the Statement of the Facts as set out in the Appellant's brief is substantially accurate, the Plaintiff/Appellee will supplement additional relevant facts omitted therein by reference to the appropriate portions of the trial transcript in the Argument section.

ARGUMENT

ISSUE I. Is NDCC 14-09-06.6(5) the applicable subsection for postjudgment modification for motions made within two years of a custody order?

Because Issue I deals with the proper interpretation of NDCC 14-09-06.6 a copy of that statute is affixed to the brief and marked Exhibit #1 and appears on pages 17 and 18.

The Defendant/Appellant Jeremiah Cramer, hereinafter referred to as "Father" by Motion and Affidavit dated March 25, 2008 App., P.6, 7, 8, 9, 10, 11, and 12 attempted to modify a Custody Order dated September 6, 2006 App., P.17, 18, 19, 120, 21, and 22. The Plaintiff/Appellee Jan Teske hereinafter called "Mother" answered with a Resistance and Response to Motion and Affidavit dated April 8, 2008, App., P.15 and 16. The Trial Court then issued an Order dated April 25, 2008 App., P.17, 18, 19, 20, 21, and 22. That Order in App., P.21 states: "Because the Order establishing custody was entered less then two years prior to the Father's Motion to Amend, he will have the burden of proving that the 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, as required by § 14-09-06.6(5)(b) NDCC."

During the first two years after a custody order no subsequent motion to modify that custody order can be made unless the facts alleged in motion and affidavits meet at least one of the requirements of 14-09-06.6(3)(a)(b) or (c).

> 3. The time limitation in subsections 1 and 2 does not apply if the court finds:
>
> **a.** The persistent and willful denial or interference with visitation;
> **b.** The child's present environment may endanger the child's physical or emotional health or impair the child's emotional development; or
> **c.** The primary physical care of the child has changed to the other parent for longer than six months.

The finding a trial court must make to modify a prior custody order within two years of that order is stated in NDCC 14-09-06.6(5).

> 5. The court may not modify a prior custody order within the two-year period following the date of entry of an order establishing custody unless the court finds the modification is necessary to serve the best interest of the child and:
>
> > **a.** The persistent and willful denial or interference with visitation;
> > **b.** The Child's present environment may endanger the child's physical or emotional health or impair the child's emotional development; or
> > **c.** The primary physical care of the child has changed to the other parent or longer than six months.

When 2 years have passed after prior custody order the finding a trial court must make to modify a prior court order are set out NDCC 14-09-06.6(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 finds:
>
> > **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 I the circumstances of the child or the parties; and
> > **b.** The modification is necessary to serve the best interest of the child.

The Father in this case claims it is the date of the trial court order ruling on the motion to modify that determines whether NDCC 14-09-06.6(5) or NDCC 14-09-06.6(6) applies. If this is the case, the trial judge could eliminate NDCC 14-09-06.6(1)(2)(3) and (5) by simply stating he won't rule on the motion to modify a prior custody order until two years have past.

The language in NDCC 14-09-06.6 is clear about requiring motions to modify prior custody orders that are made when less than two years have past since the prior custody order. are to be decided by NDCC 14-09-06.6(5) and motions to modify custody orders that are made after two years have lapsed are decided by NDCC 14-09-06.6(6).

The Father may still try to claim any event testified to in the case now before the court

that occurred after two years after the prior custody order should be decided under 14-09-06.6(6). In order for this to occur the Father would have had to:

(1) make a motion with supporting affidavits under NDCC 14-09-06.6(4).

> 4. A party seeking modification of a custody order shall serve and file moving papers and supporting affidavits and shall give notice to the other party to the proceeding who may serve and file a response and opposing affidavits. The court shall consider the motion on briefs and without oral argument or evidentiary hearing and shall deny the motion unless the court finds the moving party has established a prima facie case justifying a modification. If a prima facie case is established, the court shall set a date for an evidentiary hearing.

(2) the Father should have moved to amend his original pleading.

In this case the father did neither.

The Father may also try to claim his pleading to events that occurred two years after the custody order were amended by Mother's consent. Such an argument was made in Soby Construction Inc. v. Skjonsby Truck Line Inc. The court's response was:

> In the present case, Soby made no motion to amend the pleadings to change the theory of its case from one of specific negligence to one of the presumption of negligence based upon bailment. Neither did Soby present any evidence that would sufficiently notify Skjonsby that Soby was changing its theory to a presumption of negligence. The evidence presented by Soby at trial was relevant to and consistent with the specific negligence theory stated in its complaint, Consequently, it cannot be said that Skjonsby allowed an amendment of the pleadings by consent.

The above language in Soby when applied to the facts in the case now before the court would indicate that the Mother in the case now before the court never consented to any amendment.

The Appellee agrees with Appellant that 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)

The Appellee does not agree with the Appellant that trial court didn't apply the appropriate law. Because of what was said above Appellee believes that the trial courts decision to apply NDCC 14-09-06.6(5)(b) is a proper application of the law.

ISSUE II. The Trial Court did not err when it denied Defendant's Motion to Amend the Judgment changing custody of the parties minor child.

In order to consider appellant's arguments in Issue II of Appellant's brief, the test for changing custody of a child has to be NDCC 14-09-06.6(6) and not NDCC 14-09-06.6(5)

5. The court may not modify a prior custody order within the two-year period following the date of entry of an order establishing custody unless the court finds the modification is necessary to serve the best interest of the child and:

a. The persistent and willful denial or interference with visitation;
b. The child's present environment may endanger the child's physical or emotional health or impair the child's emotional development; or
c. The primary physical care of the child has changed to the other parent for longer than six months.

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.

The motion and affidavit filed by the father are dated March 25, 2008. The mother's Resistence and Response to Motion an Affidavit are dated April 8, 2008. The prior custody order sought to be modified is dated September 6, 2006. Therefore since less than 2 years have past since the Father's Motion and Affidavit the proper test in this case for changing custody is NDCC 14-09-06.6(5)

The Appellant in his brief doesn't contest the fact that the trial courts decision is correct if

the test for changing custody is NDCC 14-09-06.6(5). The Appellant's argument in Issue II won't work unless NDCC 14-09-06.6(6) is the test for changing custody.

The Appellant's brief in Issue II selects only a number of favorable facts for him and then claims they are sufficient to grant his motion to change custody.

The trial court in this case considered NDCC 14-09-06.2 Best Interests and Welfare of Child. The application of the facts to the best interest of the child by the trial court are:

"Application of the facts to the best interest factors indicates the following:

a. There exists love, affection, and other emotional ties between both parents and the child. Jan was K.T.'s primary care giver from birth until March 2008. Jeremiah did not start exercising regular visitation until K.T. was six years old.

b. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child. Both parties have the capacity and disposition to give the child love, affection, and guidance and the continue the child's education. Both parties have limited financial means. There was testimony about the number of absences from school while K.T. was in Jan's care. Jan testified that the absences were due to various illnesses. It appears that K.T. has done well in school regardless of who has had custody.

c. Both parties have the disposition to provide the child with food, clothing, medical care, or other remedial care, and other material needs.

d. The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity. K.T. lived with Jan from the time of her birth in March 1999, until March of 2008 when Jeremiah obtained temporary custody. For a short period of time in 2001, Jan was married to David Thorson who was convicted and is currently incarcerated

for child molestation involving a child other than K.T.. Jan moved K.T. out of the house to stay with her mother when she found out about the charges against Mr. Thorson. After the relationship with Mr. Thorson ended, up until Jan became involved with Larry Desjarlais in late 2007 or early 2008, it appears that Jan provided a stable and satisfactory living environment for K. T.. During the time of her relationship with Larry Desjarlais, she went off of her medication, did not maintain her mobile home in sanitary condition, and fled with Mr. Desjarlais, first with K.T., and then again after leaving K.T. with her mother. Jeremiah has provided K.T. with a stable satisfactory environment since March 2008.

e. The permanence, as family unit, of the existing or proposed custodial home. Jeremiah lives in a house in Minot with his wife, Lisa, and their five sons, plus K.T.. They testified that they intend to remain in their present house, unless they could find a better one that they can afford. K.T. currently shares a room with her two younger brothers. Jeremiah is attempting to complete two additional bedrooms in the basement of the home which, when completed, would allow K.T. to have her own room.

Jan lives in a mobile home in Mandan. The home that she lived in with K.T. prior to March 2008 burned down and she now lives in a mobile home approximately one-half mile from her pervious home. She purchased the home with the insurance proceeds from the fire and owns her current home. The pictures submitted of the home indicate that it is clean and well maintained. K.T. has her own room in Jan's home.

f. The moral fitness of the parents. This factor does not appear to favor either party.

g. The mental and physical health of the parents. Jeremiah is in good health, both physically and mentally. Jan testified that she is in good health physically, but that she has been

treated for PTSD, depression, anxiety, and borderline personality disorder. She takes medication for her depression. She testified that her mental health condition can affect her ability to care for K.T. if she does not take her medication. She was not taking her medication in March 2008 when she left with Larry Desjarlais. She submitted a certificate which indicated that she completed a partial hospitalization program in December 2008 to address her mental health issues. She testified that she is current on her medications and is doing well.

h. The home, school, and community record of the child. There was testimony of numerous absences while K.T. was attending school (grades 1-3) in Mandan. Her attendance was much improved during the time she attended school in Minot while in Jeremiah's care. However, notwithstanding the absences, it appears that she has done well in school in both Mandan and Minot.

I. The reasonable preference of the child, if the Court deems the child to be of sufficient intelligence, understanding, and experience to express a preference. K.T. was interviewed by the Court. She indicated that she loves both parents and would be fine in the custody of either parent.

J. There was no evidence of domestic violence.

K. The interaction and interrelationship, or the potential for interaction and interrelationship of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. Since living with Jeremiah, K.T. has also been living with five stepbrothers and her step mother, Lisa. It appears that she gets along well with her stepbrothers and with Lisa and that these are positive relationships. The only person identified at trial who may have a significant negative impact on

the child's best interests is Larry Desjarlais. The evidence indicates that Mr. Desjarlais threatened K. T. and that she is afraid of him. Jan testified that she is in the process of divorcing Mr. Desjarlais, that she has not seen him since December 2008, and does not know his current whereabouts. A review of the court records regarding the divorce, Burleigh County file no. 08-08-C-2422, indicates that the divorce remains pending and that there has been no activity on this file since September 2008. Jan has obtained a domestic violence protection order against Mr. Desjarlais which will remain in effect until January 8, 2010.

L. There was no testimony of either parent making false allegations against the other of harm to the child.

M. Any other factors considered by the court to be relevant to a particular child custody dispute. Both parties have extended family members in their respective communities.

After her separation from David Thorson in 2001, and except for the time that she was involved with Larry Desjarlais in late 2007 and the early months of 2008, during which time she was off her medication, it appears that Jan was able to provide a stable and loving home for K.T., and it would not necessarily be in her best interests to change custody to Jeremiah.

Even if the Court were to find that the modification of custody was necessary to serve K.T.'s best interests, because the motion to change custody was made less than two years after the previous order establishing custody, Jeremiah has the burden of proving that the child's present environment with Jan may endanger the child's physical or emotional health or impair the child's emotional. development. See. N.D.C.C. § 14-09-06.6(5)(b).

The two primary arguments that Jeremiah made to support his position that K.T.'s present environment with Jan may endanger her physical or emotional health or impair her emotional

development were: (1) the potential involvement of Larry Desjarlais in Jan's life, and (2) the number of K.T.'s absences from school while she was in Jan's care in grades 1-3.

At the time of the most recent hearing in this mater, Jan was living in the mobile home that she purchased in February 2009. She purchased the home with the insurance proceeds from the fire involving her previous home and owns her current home. She works out of her home working for Google and doing daycare. Photographs of the home depict its condition to be clean and well maintained. K.T. has her own room in the home.

Jan testified that she is in the process of divorcing Mr. Desjarlais, that she has not seen him since December 2008, and does not know his current whereabouts. The court records regarding the divorce indicate that the divorce remains pending and that there has been no activity on this file since September 2008. Jan has obtained a domestic violence protection order against Mr. Desjarlais which will remain in effect until January 8, 2010.

Regarding K.T.'s absences from school, Jan testified that K.T.'s absences from school were health related. Despite the excessive number of absences when she attended grades 1-3, the evidence indicates that she got good grades and did well at school. K.T. was active in extracurricular affairs, including dance and softball.

Except for the time that Jan was with Larry Desjarlais, and off of her medication, she provided a stable and satisfactory home for K.T.. If Larry Desjarlais is out of the picture and Jan is on her medication and in compliance with the Social Services recommendations, it does not appear that K.T.'s present environment with Jan would endanger her physical or emotion health or impair the child's emotional development.

Because the weight of the evidence does not establish that K.T.'s present environment

with Jan would endanger her physical or emotional health or impair her emotional development, Jeremiah's motion to amend the Amended Judgment entered September 6, 2006, to change the custody of the parties' minor child, K.T., from Jan to Jeremiah is DENIED." App., P.42, 43, 44, 45, 46, 47, and 48.

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).

Therefore the questions now before the North Dakota Supreme Court are:

1. Whether the trial courts findings of fact are clearly erroneous?

2. Whether the trial courts findings are induced by an erroneous view of the law?

3. Whether the reviewing court is left with a firm conviction a mistake has been made?

The answer to the above questions are:

1. That a reading of the trial courts consideration of NDCC 14-09-06.2 Best Interest and Welfare of Child and the application of facts to the best interest makes it clear that there is evidence and testimony to support the trial courts findings.

2. The law in this case is clear. 14-09-06.6(5) applies to motions made to modify prior to custody orders that are made when less then two years have elapsed since the prior custody order.

3. The trial court was correct in applying 14-09-06.6(5) to this case.

CONCLUSION

For the above reasons the decision of the trial Court must be affirmed.

Dated this 22 day of October, 2009.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appellee's Brief was, on the 22 day of October, 2009 mailed to:

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