

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

No. 20120134

Richie Fonder,
Plaintiff and Appellant

v.

Bobbi Fonder,
Defendant and Appellee

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF
WARD COUNTY, NORTH DAKOTA, NORTHWEST JUDICIAL DISTRICT

THE HONORABLE RICHARD L. HAGAR, PRESIDING

BRIEF OF DEFENDANT/APPELLEE

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RULES

N.D.R.Civ.P. 52(a)11

ISSUE PRESENTED

1. Was the Trial Court's decision to continue joint residential responsibility, after the same had been exercised for nearly three years, clearly erroneous?

STATEMENT OF THE FACTS

2. The factual background set out by Plaintiff, Richie Fonder, although not inaccurate, is, at best, incomplete and, at worst, misleading to this Court. Accordingly, additional or corrected information is required.

3. It is correct that the Plaintiff, Richie Fonder, commenced this action by Summons and Complaint and that Defendant, Bobbi Fonder, filed and served her Answer in August 2008. It is also true that both parties originally sought primary residential responsibility of the minor children at issue in this case and that based on the recommendation of their counselor, they commenced joint residential responsibility, each having the children for one week at a time, in or about September 2008.

4. It is also not denied that Bobbi has at times used illegal substances in the past, as has Richie. But it is also important to note that Richie's illegal drug involvement has not been limited to his own usage. As noted, in the Trial Court's findings and cited by Richie the Court found that "Richie has fallen back on his employment with CP Rail, and his involvement with his children, as the motivator for his abstinence from illegal drug use. He does, however, freely admit that there is still that culture out there that sometimes intrudes on this life...". Despite Richie's adamant denial of this, the fact is that he has participated in selling/brokering drug deals. While there is no evidence that Richie used drugs in the recent past, his brokering of drug deals occurred in close proximity to the trial in this case. (Appendix 1-3 (T. of Trial on January 22, 2010, p. 106, lines 19-25, p.

107, lines 1-25, and p. 108 line 1.)) In fact, testimony provided at trial indicated that this had happened on more than one occasion in the six months leading up to trial (Appendix 4-5 (T. of Trial on January 22, 2010, p. 123, lines 13-25, p. 124, lines 1-6.)) The Court left no question that it was troubled with these facts at trial. (Appendix 6 (T. of Trial on January 22, 2010, p. 108, lines 4-25, p. 109, lines 1-7.))

5. A significant amount of time has been spent attempting to discredit Bobbi and her testimony, while ignoring the fact that Richie did not enter the courtroom with clean hands in this case. While Richie may have had witnesses that testified negatively about Bobbi, one must question the validity and truthfulness of any witness testimony that took the stand on Richie's behalf considering Richie himself admitted to offering witnesses payment (outside of the mandates of a subpoena) for testimony in his favor. (Appendix 7-9 (T. of Trial on January 22, 2010, p. 70, lines 16-25, p. 71, lines 1-6, p.285, lines 4-13.))

6. Richie also raises issues of concern related to financial irresponsibility and home stability. Richie's brief on appeal outlines his concerns about Bobbi's ability to financially provide for the children, while ignoring many of the facts relating to his own financial troubles. In fact, Richie states in his brief "During these proceedings, Bobbi has clearly indicated that she wants the marital home sold, so that she can claim her share of the equity in the home. She is unconcerned how this may affect the children, or how it affects there (sic) best interests in remaining in a stable environment. This goes back to her disposition of being a nurturing parent, or lack thereof." In close review of the records and transcripts in this case, it is apparent that Bobbi has, in fact, had financial struggles along the way, but has done her best to provide for the children. In stark contrast, Richie has had the financial ability to provide a stable home and has opted not

to. Richie, while financially secure (or so alleged), has opted to allow the marital home to go into foreclosure. (Appendix 10-11(T. of hearing on December 10, 2010, p. 52, lines 21-25, p. 53, lines 1-8.)) In fact, from January 2010 through December 2010, Richie only made one full house payment. (Appendix 10-11 (T. of hearing on December 10, 2010, p. 52, lines 21-25, p. 53, lines 1-8.)) According to Richie's own testimony, in 2010 the house payment actually paid totaled a mere \$4,500.00, despite the fact that his net pay for that year was \$26,600.00 (Appendix 12 (T. of hearing on December 10, 2010, p. 101, lines 1-21.)) During that same year, Richie also failed to make child support payments for at least 4 months. (Appendix 13 (T. of hearing on December 10, 2010, p. 98, lines 10-25.)) Despite his inability to remain current on the mortgage and financially provide for his children, Richie found the money to take a vacation to Minneapolis, take the children to Valley Fair and to the Megamall, and also buy new electronics for game play. (Appendix 14 (T. of hearing on December 10, 2010, p. 102, lines 4-16.))

7. Ironically, Richie faults Bobbi for financially struggling, while at the same time faulting her for working a second job to make money to dig out of the hole. In his brief to this Court it is alleged that Richie has only been away from the children for "4-hours" since the parties' separation. Yet, by his own testimony, his normal work schedule is Sunday through Thursday, and on a majority of Sundays the children are watched by either Mr. Fonder's mother or brother. (Appendix 15 (T. of hearing on December 10, 2010, p. 103, lines 8-18.))

8. Based on these facts, the Court addressed the Best Interest Factors and found fault with both parties and also found strengths in each and ultimately determined that it was in the children's best interests to maintain the status quo, "joint residential responsibility",

that had been in place for three years prior to the Judgment being entered in this case.

Richie made a Motion to reconsider, but the Court determined that based on the evidence even under the two different versions of the Best Interest Factors, the best interests of the children continued to justify an award of joint residential responsibility. The Court noted in its Findings that Richie works hard to be a good parent and Bobbi is also a good parent without the obvious need to work at it.

9. This appeal followed.

ARGUMENT

10. The Trial Court's decision to continue joint residential responsibility, after the same had been exercised for nearly three years, was appropriate and supported by the facts of the case as outlined in the Finding and Judgment.

11. Richie is correct in citing that an award of "custody"/primary residential responsibility is a finding of fact and the Supreme Court will not disturb the same unless it is clearly erroneous. Brown v. Brown, 1999 ND 199, ¶ 10, 600 N.W.2d 869; N.D.R.Civ.P. 52(a). Under N.D.R.Civ.P. 52(a), a finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, there is no evidence to support it, or, although there is some evidence to support it, on the entire record the reviewing court is left with a definite and firm conviction that a mistake has been made. Brown, 1999 ND 199, ¶ 10, 600 N.W.2d 869. It is also important to note that a complaining party bears the burden of demonstrating on appeal that a finding of fact is clearly erroneous. Reeves v. Chepulis, 1999 ND 63, ¶ 8, 591 N.W.2d 791.

12. The Trial Court clearly reviewed the best interest factors in determining joint residential responsibility in this case. Richie's main argument here is that he believes that he should be awarded primary residential responsibility because, simply stated, he believes he is the better parent. In fact, the trial court recognized this position, and further noted that while Richie works hard to be the better parent, but that Bobbi does the right things and is a good parent without having to be obviously working at it.

13. Richie seems to suggest that the Court did not review the factors in detail as it should have. However, a court is not required to make a separate finding for each factor, rather the court's findings should simply be stated with sufficient specificity to enable a reviewing court to understand the factual basis for the decision. Peek v. Berning, 2001 ND 34, ¶ 6, 622 N.W.2d 186. The trial court did not only meet this requirement, but did in fact outline each factor addressing and highlighting the most essential and creditable evidence in reaching its conclusion.

14. It seems that Richie is unhappy that the Court did not explain why it found some evidence more creditable and gave certain information more weight than other information. However, the trial Court is not required to make both parents happy and, in fact, that is rarely the outcome in such cases. The Trial Court heard the evidence and based on the detail given in the Findings, obviously considered the same. This Court has found on numerous occasions that the Trial Court is in the best position to determine credibility. This Court has held that the trial court is the determiner of credibility issues and that the trial court's decision on the same will not be second-guessed. Due regard is given to the trial court's opportunity to assess the credibility of the witnesses, and the court's choice between two permissible views of the evidence is not clearly erroneous.

Moen v. Thomas, 2001 ND 95, ¶ 20, 627 N.W.2d 146. The bottom line is that while Richie may have witnesses that testified at length against Bobbi, Richie admitted to offering payment and even vacation to witnesses for testimony on his behalf; and that would cause any reasonable person to question credibility of Richie's evidence.

15. Richie, also suggests that this case should be reversed because is not enough detail given to justify the Court's position. However, it is well established that even when the trial court does not fully explain its decision, the decision should not be upset when valid reasons are fairly discernible, either by deduction or inference. Gould v. Miller, 488 N.W.2d 42, 44 (N.D.1992) (citing Ness v. Ness, 467 N.W.2d 716, 718 (N.D.1991)). The Court's rationale in the present matter is discernible.

16. Richie recognizes that rotating primary residential responsibility is not per se erroneous, but notes that the Court's finding must support a conclusion that alternating residential responsibility is in the best interests of the children. DeForest v. DeForest, 228 N.W.2d 919 (N.D. 1975). The Trial Court's Findings certainly meet this requirement. The Trial Court noted that the joint residential responsibility had been ongoing since September 2008, nearly 3 years by the time this case was decided. During that time the children were doing well in school, had friends, and participated well in both academic and in extracurricular activities. The Court Findings, also noted that the children need to have two parents who wish to raise the children appropriately, and that outcome is possible in this case. Finally, the Trial Court noted that both parents are needed for the developmental future of all three children. Based on these comments, it is obvious that the Trial Court considered the situation and concluded that alternating primary residential responsibility was in the children's best interests.

V. **CONCLUSION**

17. The Court's opinion in this case was based on the facts presented and was not clearly erroneous in any respect or in regard to any issue. The record is replete with sufficient evidence to support the Court's position. Accordingly, Bobbi respectfully requests that the Court affirm the Trial Court's decision in the case.

Dated this 14th day of June, 2012.

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was, on the 15th day of June,
2012, electronically transmitted to:

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/S/
Jennifer M. Stanley #05853