IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
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May 18, 2012
STATE OF NORTH DAKOTA

Richie Fonder,	)	
	)	
Plaintiff/Appellant,	)	Supreme Court No. 20120134
	)	
vs.	)	Ward County No. 08-C-1229
	)	
Bobbi Fonder,	)	
	)	
Defendant/Appellee.	)	

APPEAL FROM JUDGMENT DATED AUGUST 11, 2011, AND THE ORDER DENYING PLAINTIFF'S RULE 59 MOTION TO RECONSIDER, DATED FEBRUARY 7, 2012.
THE HONORABLE RICHARD HAGAR, NORTHWEST JUDICIAL DISTRICT

APPELLANT'S BRIEF

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ISSUES

¶1. Was the trial court's decision of alternating equal parental responsibility clearly erroneous, requiring a reversal?

STATEMENT OF CASE

¶2. This matter began with a Summons and Complaint for divorce (Appx.7), where the Appellant (hereinafter "Richie") was seeking primary residential responsibility of the parties three minor children, as well as an equitable division of the marital estate. The Appellee (hereinafter "Bobbi") filed her Answer and Counterclaim (Appx. 9) seeking the same. An Interim Order was issued after a hearing on (Appx. 11) which gave the parties alternating parental responsibility of the children, coupled with Richie paying child support to Bobbi. Judgment was entered on August 11, 2011 (Appx. 14). Among other things, the Court ordered an alternating parental responsibility arrangement. Richie filed a Motion to Reconsider the Judgment (Appx. 41) on September 13, 2011, requesting the court reconsider its decision to alternate parental responsibility, and award primary parental responsibility to Richie. That Motion was denied on February 7, 2012 (Appx. 49). Richie filed this Appeal (Appx. 53).

STATEMENT OF FACTS

¶3. The parties were married on September 28, 1996, in Las Vegas, Nevada. They have three children ages 7, 10, and 13. They have lived in Minot throughout the course of their marriage, with all three children attending Minot schools. Richie is employed with Canadian Pacific

Railroad, and Bobbi works for a printing company. Richie served Bobbi with a Summons and Complaint for divorce on the basis of irreconcilable differences (Appx. 7), with those differences being Bobbi's adultery, and her illegal drug use (Appx. 15). Richie sought primary parental responsibility of the three children, among other things, as did Bobbi.

¶4. In March, 2008, Bobbi moved out of the marital home and, and Richie stayed in the home with the children (Appx. 19). Just before she left Richie she quit her job with Minot Public Schools (Appx. 25), moved back and forth from the marital home several times, then moved to at least three separate locations, before settling in with her current boyfriend out of the City of Minot (Tr. 3/11/09, p. 21) Bobbi did not seek other employment until October, 2008. Since leaving the marital home, through the trial in January, 2010, Bobbi did not pay one outstanding marital bill (Appx.. 25; Tr. 1/21/10, p. 188).

¶5. From the time of their separation, at the suggestion of a counselor, the parties alternated the custody of the children on an alternating one-week/one-week basis (Tr. 3/11/09, p. 14). At the Interim Hearing held on March 11, 2009, Richie reiterated several times that the alternating parental time with the children was not working, and that he did not think it in the best interests of the children (Tr. 3/11/09, p. 21). Nonetheless, the trial court continued that arrangement in the interim (Appx.11). Following trial, the court ordered that each party would have equal parenting time (Appx. 28029). In his Motion to Reconsider, Richie pointed out to the trial court that the Findings of Fact did not specifically emphasize that it was in the best interests of the children to alternate parental time (Appx. 41). In fact, the Findings never mentioned "best interests of the children" other than to indicate that they must be analyzed under Section 14-09-06.2 (Appx. 16). In its Order Denying Plaintiff's Rule 59 Motion to Reconsider parental

responsibility, the trial court merely stated that the Findings of Fact support such an outcome (Appx. 50).

STANDARD OF REVIEW

¶6. An award of custody is a finding of fact which will not be set aside unless clearly erroneous, that is, if induced by an erroneous view of the law, if no evidence exists to support the finding, or if the reviewing court, on the entire evidence, has a definite and firm conviction that the trial court made a mistake. Kjelland v. Kjelland, 2000 ND 86, ¶8.

LAW AND ARGUMENT

¶7. In deciding custody, the Court is required to consider the factors found under N.D.C.C. 14-09-06.2. In its decision, the trial court made findings on each factor, but found that neither parent was favored over the other in any section. The court then ordered that the parties share equally the residential responsibility of the children on a week to week basis. It is the position of the undersigned that the trial court erred in weighing the best interests factors on several accounts, and further erred in misinterpreting the law as it applies to custody.

¶8. While rotating physical custody is not *per se* erroneous, DeForest v. DeForest, 228 N.W.2d 919 (N.D. 1975), the district court's findings must support a conclusion that alternating custody is the best interest of the children. Kaloupek v. Burfening, 440 N.W.2d 496, 498 (N.D. 1989). We require a factual finding because it is generally not in the best interest of the child to be bandied back and forth between parents in a rotating physical custody arrangement. Id, at 497. Rotating physical custody is not *per se* clearly erroneous when supported by a district court's findings that alternating custody is in the best interests of the child. Peek v. Berning, 2001 ND 43, ¶20 (citing Kasprowicz v. Kasprowicz, 1998 ND 68, ¶15.

The Court has indicated that rotating custody orders are disapproved by the courts and are presumptively not in the best interests of very young children. In re Lukens, 1998 ND 224, ¶15. Generally, rotating custody arrangements are only in the child's best interests if parents are able to cooperate and put aside their differences and conflicts in their roles as parents. Jarvis v. Jarvis, 1998 ND 163, ¶36.

¶9. When the parties first separated, they agreed to a week to week custody arrangement. However, by the time of the interim hearing on March 11, 2009, Richie had voiced his displeasure with such an arrangement for several reasons, including the fact that the parties cannot cooperate when it comes to the children. At every hearing in this case, including the trial, Richie has told the court that it is not fair to the children to be shuffled around on a weekly basis (Tr. 1/21/10, p. 202; Tr. 1/22/10, p. 284). At every hearing in these proceedings, Richie has related that Bobbi does not take her parenting time seriously, nor does she make the children a primary focus in her life.

¶10. Richie indicated that several times, Bobbi would make unilateral decisions regarding the children that affects his relationship with them. For instance, during her week with the children, Bobbi went out of town to party, over Father's Day weekend 2009, and left the children with her sister (Tr. 1/21/09, p. 224). Richie wanted the kids with him, but Bobbie refused this visit, and the kids spent the weekend with her sister. During Christmas, 2009, Richie wanted to see the kids some time on Christmas Day, and was denied by Bobbi in a violent outburst by her over the phone in front of the children (Tr. 1/21/09, p. 223-224). There was testimony by three people who heard Bobbi's boyfriend, Bob Ladish, screaming and threatening Richie over the phone (Tr. 1/21/09, p. 221-222). This evidence was not refuted by Bobbi. This is not cooperation, and it

will surely continue into the future with his type of parenting schedule, where the court is allowing each parent to make absolute decisions affecting the relationship of each with the children.

¶11. This matter commenced in 2008, and trial was held in January 2010. The trial court issued its Findings almost two years later on August 11, 2011. The best interests of the child factors (N.D.C.C. §14-09-06.2) were amended in July 2011. The factors analyzed by the trial court were under the amended version, not the former. "Because the action in the instance case commenced before the effective date of the legislative amendments, we apply the former version of the statute." Sorenson v. Slater, 2010 ND 146, ¶11, *citing* State v. Rohrich, 450 N.W.2d 774, n.1 (N.D. 1990). The evidence presented, and argued by counsel at trial, was based on the then existing factors under §14-09-06.2. Had it been foreseen that the court would analyze the best interests in a different format, the strategies at trial may have been different. For example, in its Findings under factor e, the court focuses on Richie's view that he is the better parent and more in tune with the children's needs than Bobbi, and because of that, Bobbi has more of a willingness to encourage the relationship between the children and Richie (Appx. 20). At trial, evidence on factor e was presented that looked at the permanence as a family unit of the proposed custodial home. This was critical to Richie's position, but was not considered by the court in its decision, and will be more fully discussed below. The use of the amended version of section 14-09-06.2 was prejudicial to Richie's position.

¶12. The weight assigned to each factor, where neither parent was favored under any of the categories, is not consistent with the evidence presented. Factor a. There was evidence presented that Richie clearly spends more time with the children than Bobbi does. From the time

of their separation to the time of trial, Richie has missed four hours of his allotted time. On the other hand, it was shown that Bobbi was not focused on the needs of the kids while they were in here care. There was much evidence presented that Bobbi was at the bar more with more frequency than she was at home with the children. Her designated vacations from work have been spent with her boyfriend, not her children. During these times, Richie eagerly agreed to have the kids with him, even though it was Bobbi's week. Her affection has not been shown towards the kids, but more towards her boyfriend. Richie testified that there had been times that Bobbi wouldn't see the kids for more than 10 days at a time. Bobbi took a part time job two nights a week where she would work until after midnight, including the night (Thursday) that they agreed to transfer the kids. Richie testified at length of his focus in the kids school activities, progress, and the kids' other extra-curricular activities. He gave specific examples of this. Bobbi failed to present any evidence whatsoever about her emotional ties or bonds that she shares with the kids. In two days of trial, Bobbi never mentioned the youngest child's name.

¶13. Under factor a, the court found that Richie had a better and stronger relationship with the youngest child, but assigned no value to that finding. The court went on to say that this child gets slighted in the area of attention by his mother, with regards to the child's hygiene, personal cleanliness, and clothing, which was disconcerting to the court. The court assigned no weight to this finding. Later in its Findings (factor e) the court found that Richie is correct in his feeling that he is the better parent, the more interested and more dedicated parent, the parent who spends the most actual time with the children, and the parent who is more focused on the needs of the children (Appx. 20), The court went on to say "Richie is clearly focused on this children and has, for the most part, separated himself from all other endeavors and interest for the sake of his

children. This is more specific when the children are in his care in his week of parenting, but it is also evident that he is always thinking of the children, even in his off weeks." (Appx, 20). Nonetheless, the court found that the first half of factor a did not favor either parent. (Appx. 16).

¶14. The court then went on to analyze the second half of factor a which includes the ability of each parent to give the child guidance. The court stated:

> "Another example of concern by the Court in Bobbi's guidance for the children as her association with illegal drug use. There was testimony that she had stopped the usage, but the Court has some distrust that this usage has stopped completely. Her continued use, or being around the environment of illegal drug use, is again, an example that her guidance of the children is somewhat tainted." (Appx. 17)

There was ample evidence given that Bobbi has an extensive drug history. What was brought out at trial was that she has used methamphetamines (Tr. 1/21/10, p.34), cocaine (Tr. 1/21/10, p. 6, 38), marijuana (Tr. 1/21/10, p.8; Tr. 3/11/09, p.37, 47), and has misrepresented or flat out lied about that usage to the court (Tr. 1/21/10, p. 138-148). The following are excerpts of those misrepresentations:

> March 11, 2009 Transcript p.37
> Probst: When was the last time you used marijuana?
> Bobbi: I don't recall.
> Probst: What was the occasion of your usage of marijuana?
> Bobbi: I–it's been so long, I don't even–I don't know. I don't recall.
>
> March 11, 2009 Transcript p. 47
> Probst: Okay. And the pot, that you had smoked up to a least some time ago, who bought that?
> Bobbi: I have no idea.
> Probst: You don't know who buys your pot for you?
> Bobbi: I don't receive pot. I don't know whose it was.
> Probst: Do you smoke it in your home?
> Bobbi: No.
> Probst: Where do you smoke it?

Bobbi: I haven't in–I don't remember the last time–whatever it was. I haven't.

March 11, 2009, Transcript p. 63
Stanley: The last time you used it, do you know where you got it?
Bobbi: From Mr. Fonder.

March 11, 2009 Transcript p. 64
Stanley: Since you have not been with your husband, since you're not residing with him and so on and so forth, have you used it?
Bobbi: No.

January 21, 2010 Transcript p. 143
Probst: When was the last time you used marijuana?
Bobbi: Over a year, close to a year.
Probst: So January of 2009?
Bobbi: That would be my answer, yes.
Probst: Okay. Will you please read the question number 6, and read your answer to the Court?
Bobbi: Do you admit or deny that you have used marijuana after August 2008? Deny.
Probst: And when did you give us that answer?
Bobbi: May 9th? No. June 2009.

January 21, 2010 Transcript p. 145,146
Probst: January of 2009 was the last time you used marijuana?
Bobbi: Yes, that would–yes, as best as I know.
Probst: And you said it was supplied to you be Brenda Pyler.
Bobbi: Correct.
Probst: Ms. Fonder, again, what you're reading out of was from March 11, 2009. Could you please read line 23? The question and your response.
Bobbi: "The last time you used it, do you know where you got it from?" Answer: "Mr. Fonder."
Probst: So, were you accurate in that testimony?
Bobbi: Oh, no I —
Probst: You just testified it was Brenda Pyler.
Bobbi: Right.
Probst: So March 11th, three months after the last time you used, you implicated your husband. Why would you do that?
Bobbi: Slip of my mind.

March 11, 2009 Transcript p. 47
Probst: Have you ever done drugs in front of Geri Appelt?

Bobbi: No.
Probst: Eddie Braun?
Bobbi: Not that I'm aware of, no.

January 21, 2010 Transcript p. 6
Probst: Have you ever used cocaine?
Bobbi: Yes.
Probst: When was the last time you used?
Bobbi: Close to two years ago.
Probst: Who was with you?
Bobbi: We were at a house party. It was Ed and Chris Braun's house.
Probst: Who was with you?
Bobbi: Ed and Chris.

January 21, 2010 Transcript p. 141
Probst: Would you please read to the Court, question 7 and your response?
Bobbi: Do you admit or deny that you have use cocaine after the birth of your last child? Response: Deny.

Despite the evidence, and the fact that the court distrusted her testimony, it gave it little or no weight, and made no mention of her lying under oath. "A parent's intentional presentment of false evidence to a court of law could be relevant to child's best interests and to a parent's fitness for custody." Aus.v. Carter, 1999 ND 246, ¶14. "Such deception could involve false or misleading evidence of an environment that may endanger the child's physical or emotional health." Id. The court also found that she was untruthful regarding her infidelity (Appx. 21). ¶15. This is a clear indication that Bobbi lacks the capacity to give her children the proper guidance as they mature. A similar scenario was found in Vining v. Renton, 2012 ND 86, ¶21, where the trial court stated:

> "The Court is concerned that Vining has recently demonstrated an attitude that it is perfectly acceptable to provide false information or to stretch the truth, even in sworn affidavits and testimony before the Court in order to be seen in a perceived better light. The Court is concerned that this attitude will be imputed to the child, allowing the child to believe that telling little white lies to her father, or to the court OK, as long as it can help achieve the desired results."

¶16. Bobbi moved out of the marital home, left the children with Richie, and within a week was sleeping with her current boyfriend. She walked out on all of her marital financial obligations. Her disregard for the law was shown in her arrest for hit and run, while she had the kids in her vehicle (Tr. 12/10/10, p. 24), driving without liability insurance (Id.), and her continuous drug use. These last facts did not make it to the court's Findings, and all are important to a full analysis under this factor. Factor a clearly should have favored Richie, but the court found it favored neither of the parties. This was clearly erroneous.

¶17. Under the former factor c, (analyzed by the trial court under factor b) the disposition of the parent to provide the child with food, clothing, medical care, etc., should have been in Richie's favor. Although there was no evidence that the children were lacking in their necessities, there was ample evidence that Bobbi does not have the necessary disposition to provide these things to her children. It was shown that Bobbi had paid a total of $150 towards the children's medical and dental bills, despite Richie's continual requests that she pay her share, and despite the court's orders that she pay an equal share of the same. At trial, Bobbi testified that since she left Richie, she had run up $18,139 in debts (none of it for the benefit of the kids), while she was earning at least $1,500 from her job, $1,100 per month in child support from Richie, and at least $900 from her boyfriend. She has several money judgments against her and several accounts in collections (all incurred after the parties separation). Bobbi has paid absolutely nothing on the marital debts. Regarding her driving without insurance charge, she testified that she had been driving without insurance for at least 5 months because she couldn't afford it. Bobbi testified that she intended on filing for bankruptcy. All these facts were overlooked by the court in its Findings.

¶18. In Krank v. Krank, 2003 ND 146, ¶10, the Court held that when both parents are disposed

to provide the child with food, clothing, medical care, and other material needs, one party's history of higher-income employment, while the other was unemployed and depended on child support, was a relevant consideration in the best interests analysis. Although Bobbi is employed full time, her earnings do not allow her to pay her debts as they become due. Or better said, her spending does not allow her to provide for the children. She can't provide for herself, much less her children. This factor clearly favors Richie, as he has a good paying job, one that he has had since 1991, and can provide for the children, despite paying all the marital debt, and child support to Bobbi.

¶19. Factor d clearly favors Richie. This factor received sparse analysis by the court, that being "there has been stability in each home environment, even though each home environment is a single parent entity." (Appx. 19) The trial court brushed over, and merely gave lip service to the evidence that was presented. "The mere recitation of testimony is not equivalent to a finding of fact." Interest of T.J.K. 1999 ND 152, ¶13. Rule 52(a) of the North Dakota Rules of Civil Procedure requires the district court to "find the facts specially." "The purpose of the rule is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court as a basis for its conclusions of law and judgment." Koller v. Koller, 377 N.W.2d 130, 131 (N.D. 1985). There was no evidence to support a conclusion that Bobbi's home is stable or that it would be in the children's best interests to reside there.

¶20. Since there separation, Bobbi has lived in at least 4 different residences, none of them her own. When she lived with her sister, there was testimony that there were 10 people living in her

2 bedroom house. Bobbi currently lives in a leased trailer rented by her boyfriend, out of the City of Minot. There, the children do not have their own bedrooms, nor does Bobbi have any kind of an ownership interest in the trailer. At one point in the trial Bobbi testified she has no plans on moving. Shortly after that, she testified that she plans on moving to a bigger place. Just before she left Richie she left one job, and did not regain employment for a period of 10 months, leaving that job shortly afterward, to her current employment. None of this points to any kind of stability that the children can rely on. The unpredictable nature of Bobbi's life has not provided any of the permanence or stability needed in a family unit.

¶21. Richie, on the other hand, continues to reside in the marital home where the kids have lived since 2007. He testified at length of the children's home life and all they enjoy regarding it. Knowing this however, the court made no determination of the essential features of what factor d requires. The court failed to make any findings regarding the desirability of maintaining this continuity in the children's lives. Conversely, the court also failed to analyze the evidence as it relates to Bobbi's home. The court did indicate that "Bobbi has plans for getting a larger home in the very near future." (Appx. 19). That in itself should have triggered a discussion as to why, now, it's in the best interests of the children to reside in Bobbi's home, with a move on the horizon. The court however, made no findings as one would expect under this factor.

¶22. 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 best interests in remaining in a stable environment. This goes back to her disposition of being a nurturing parent, or lack thereof. This factor clearly favors Richie, but the continuity that Richie provides to these kids was glossed over by the court.

¶23. Under factor f, the moral fitness of the parties, as that fitness impacts the children, the trial court found that neither party was favored. There was evidence presented that Richie used marijuana prior to his current employment with the railroad, which he has had since 1991, five years prior to this marriage, and seven years prior to the birth of his first child. There is no evidence that he has used any illegal drugs since that time. The court stated:

> "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 his life, and he is still susceptible to being possibly pulled back in. He has made changes in his life that would help facilitate a removal from the drug culture, but the prevalence of that culture in his history, his family, and his work environment, and our culture as a whole, can make that difficult at times. (Appx. 21).

There was absolutely no evidence presented that Richie freely admits that the drug culture intrudes on his life, or that he is susceptible to being "pulled back in." There was no evidence that any drug culture, be it his friends, family, his history, or society on a whole, that makes him a candidate for future drug use. The court went on to state "both parents attest that they want to make the changes, and they appear to be willing to make those attempts." There was no evidence whatsoever to support this statement as it relates to Richie. At no time did he ever acknowledge that he needed to make changes in his life with regards to any kind of drug usage. It is unclear how the court could make such a finding, as the evidence does not support this finding.

¶24. Nonetheless, the court failed to make any findings as to how Richie's drug use, 19 years prior to the trial, impacts the children. On a positive note, the court did state that his children

were a positive motivator for his abstinence from illegal drug usage. Therefore, it would seem that he would be favored under this factor.

¶25. It is incredible that despite the overwhelming evidence of Bobbi's drug usage, both before these proceedings began, and during these proceedings, and misrepresentations of it, there was only two sentences mentioning her drug use (Appx. 21). In its decision, the court did not mention that Bobbi admitted to using cocaine, marijuana, after the birth of her last child. The court omitted any mention of her methamphetamine use. The court omitted the testimony of her using marijuana in the presence of her children, and the lack of parental control of her children while under the influence of drugs (Tr. 1/21/10, p. 15, 36,74). The court failed to recognize the testimony of nine witnesses who witnessed her drug usage. The court's lack of any findings in this regard, minimizes her association with that culture. The court held that Bobbi has "recently made the decision to attempt a removal from that culture, and her usage." At no time did Bobbi make that statement, and again, it is unclear where the court got it from. It was also clear that any attempts of quitting that lifestyle has been unsuccessful.

¶26. The court went on to mention Bobbi's adulterous affairs, which coupled with her drug use, was the reason for the breakup of this marriage, and that she had lied to the court about her infidelity (Appx. 21). Yet, there was no mention of how any of this affects her ability to provide the children with good moral judgment, and to ensure that the children are getting the best moral guidance that can be expected. To put Richie on the same level as Bobbi under this factor is clearly erroneous, and not supported by the evidence.

¶27. In its Order Denying Plaintiff's Rule 59 Motion to Reconsider, the court merely gave a

parsing exercise in comparing the two versions of §14-09-06.2, and found that there were no substantive changes in the two versions (Appx. 50-51) The court further found that any omissions made by the court, or additional considerations, "clearly falls under paragraph m" and "If not similar enough, the again, factor "m" should cover it." (Appx. 51). However in its Findings, the court made no Findings under factor "m" (Appx. 24). The court's use of the amended version of §14-09-06.2, was in error.

¶28. The court failed to make one specific finding that alternating residential responsibility is in the best interests of these children. The court pointed to no special circumstances that would support such an arrangement. It appears that the court simply went through the motions of considering the best interests factors, but failed to weigh the evidence in any regard. In its Findings, the court alerts us areas of concern, but fails to discuss it in the context of how it may affect the children. The court could have awarded a more traditional residential arrangement, one that provided a primary residence with one parent, and a liberal visitation schedule for the other.

¶29. A final example of how the Findings are not supported by the evidence, and how the court merely brushed over the best interests factors, is that the court found "by clear and convincing evidence that the children were not of sufficient maturity to make sound judgment, that the court does not consider any preference by the children." (Appx.. 22-23). The children did not testify at any of the hearings or at trial in this case. Neither party offered up any kind of preference by the children, and the Judge has never met any of the children. It's not clear what "clear and convincing" evidence the court relied on to reach this conclusion.

CONCLUSION

¶30. Overall, Richie should have been favored in several categories under §14-09-06.2, but was not. The Findings of Fact, and the Conclusions of Law are not supported by the evidence. Richie respectfully requests that this Court reverse the lower court's decision, and award him primary residential responsibility of his three children.

Dated this 18th day of May, 2012.

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CERTIFICATE OF SERVICE

I, Paul M. Probst, do hereby certify, that I caused to be electronically mailed a copy of the

attached APPELLANT'S BRIEF, AND APPELLANT'S APPENDIX on the 18th day of May, 2012, to the following:

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