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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

DEC 17 2014

STATE OF NORTH DAKOTA

Dusty Grigg,)	Supreme Court Case No. 20140403
)	
Plaintiff and Appellee,)	
)	District Court Case No. 05-09-C-00056
Vs.)	
)	
Damon Grigg,)	
)	
Defendant and Appellant.)	

APPELLANT'S BRIEF

**APPEAL FROM THE DISTRICT COURT
NORTHEAST DISTRICT
BOTTINEAU COUNTY, NORTH DAKOTA
THE HONORABLE LEE A. CHRISTOFFERSON**

FARON E. TERRY
ND Bar ID # 04925
Terry Law Office
216 S. Broadway, Ste. 203
P.O. Box 717
Minot, ND 58702-0717
Phone: (701) 838-6945
E-mail: bobsta@srt.com
Attorney for the Appellant

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STATEMENT OF THE ISSUES

Issue: Whether the district court erred as a matter of law when it determined that Damon failed to establish a prima facie case justifying modification.

STATEMENT OF THE CASE

Nature of the Case

¶ 1. This case involves the modification of a divorce judgment concerning the primary residential responsibility or parenting time for the parties' minor children.

Course of the Proceedings

¶ 2. The parties' divorce judgment was entered on March 30, 2010. (Doc. No. 61.) The Plaintiff/Appellee, Dusty Grigg ("Dusty"), was awarded primary residential responsibility of the parties' three minor children. The Defendant/Appellant, Damon Grigg ("Damon") served Dusty with a motion to amend the judgment to modify primary residential responsibility or parenting time. (App. at 7.) Damon's motion and supporting documents were filed with the clerk of district court on July 14, 2014. Dusty timely served and filed a response to Damon's motion to amend the judgment. (App. at 25.)

Disposition Below

¶ 3. The district court entered an order on September 25, 2014, denying Damon the right to an evidentiary hearing on his motion to modify primary residential responsibility because the district court found that Damon had not established a prima facie case. (Order, App. at 32.)

STATEMENT OF THE FACTS

¶ 4. The parties have three minor children: J.G. (born in 2001), C.G. (born in 2005), and L.G. (born in 2010). The parties were divorced on March 30, 2010. The divorce judgment provided that the parties would have joint decision making responsibility with Dusty having primary residential responsibility subject to Damon's right to reasonable parenting time. The facts set forth below were gleaned from the Amended Affidavit of Damon Grigg and the Affidavit Exhibit. (See App. at 25-31.)

¶ 5. Initially, the parenting arrangement was working. Both parties resided in Bottineau, North Dakota, where they have extended family. As time progressed, however, the situation with the children began to deteriorate. Since the divorce, Dusty moved with the children about six times causing instability in the children's lives. Dusty eventually moved with the children, her father, Lester, and her step-mother, Lisa, to Cando, North Dakota. The children's grandparents have assumed the role as the children's primary caretakers in their home because Dusty is seldom there. The children have informed Damon that their mother is never home and that their grandparents are raising them. Damon also obtained medical records that report that Lester and Lisa are raising the children because Dusty is never home.

¶ 6. There are occasions when Dusty deprives Damon of his parenting time. Dusty didn't bring L.G. on one particular weekend because Damon was scheduled to work that weekend and the child was placed in the grandmother's care instead of Damon's care. On another occasion, Dusty allowed L.G. to go camping with his grandparents instead of timely delivering L.G. to Damon, which ruined Damon's plans for all the children that weekend. Like most other parents, Damon has to work and that fact should not serve to deprive him of his parenting time. Similarly, L.G. already spends

an extensive amount of time with her grandparents and going on a camping trip with them should not take priority over Damon's parenting time. On Easter, Dusty demanded that Damon cut his holiday with the children short because she alleged that she had to work at 3:30 that afternoon. However, when they met at the drop-off point between Bottineau and Cando, Damon discovered that Dusty did not have to work. Instead, she wanted to get the children early so they could have Easter dinner with her parents. In addition to these incidents that have occurred since Dusty moved to Cando in which Damon was deprived of cherished parenting time, Dusty has taken from the children the electronic devices that Damon gave to them so they may call and text him to keep in regular contact.

¶ 7. More importantly, however, Damon has grave concerns for his children's health and welfare while they live in their grandparent's home and cope with an absentee mother. Around Christmas time (2013), Damon saw that L.G. had a round spot on her face when Dusty dropped the children off for his parenting time. Damon promptly took L.G. to a doctor in Bottineau and L.G. was diagnosed as having ringworm. Damon got medication for L.G. Dusty obtained a second medical opinion in Cando, but she failed to apply the medication as prescribed in order for the spot to heal. When Dusty delivered the children to Damon 10 days later for his parenting time, the ringworm on L.G.'s face was much worse and had grown in size. Damon obtained the medical records and discovered Dusty's step-mother (Lisa) subsequently took L.G. to the clinic in Cando and falsely reported that the ringworm worsened because "the father did not apply the medication." L.G. was not in Damon's care when L.G.'s condition worsened.

¶ 8. The summer of 2013, C.G. was outside with his grandfather, Lester, and they rode on a motor bike without proper gear and clothing. C.G.'s leg was burned from the muffler. Dusty failed to take C.G. to a doctor to have the burn tended. C.G.'s has expressed unhappiness because his grandfather, Lester, regularly torments C.G. with inappropriate horseplay and teasing. C.G. is upset because Lester wrestles with him. C.G. does not like engaging in wrestling sessions with his grandfather, and he is powerless to stop the unwanted touching. Lester also tries to make C.G. draw pictures of his god-mother's breasts and asks C.G. if he breast feeds on them. Damon firmly believes that this home environment, where C.G.'s grandfather torments him and his mother is seldom there, is injurious to C.G.'s physical and mental health. When things are not good at home, things are not good at school either.

¶ 9. C.G. was having trouble focusing on his school work and his grades were falling. The school recommended an evaluation for attention deficit hyperactive disorder (ADHD). It took Dusty three months to make an appointment with a doctor to have C.G. evaluated. Damon accompanied Dusty and C.G. to the evaluation and the doctor prescribed daily medication for C.G. However, when C.G. went the pharmacy to have the prescription filled, the pharmacist called the doctor to have the prescription changed from every day to just school days. Dusty refuses to inform Damon what she discussed with the pharmacist that caused the pharmacist to call the doctor and have this significant change made. Dusty withholds information from Damon concerning the welfare of the children and refuses to answer his questions.

¶ 10. J.G.'s mental health has also deteriorated since she moved in with her grandparents and must deal with the routine absence of her mother. J.G. was failing two

of her school classes, experiencing conflicts with her grandparents, and in need of counseling for depression. Dusty failed to discuss this matter with Damon and he only found out when J.G. told him about her grandfather's threat. J.G.'s grandfather (Lester) threatened J.G., if counseling didn't work, then he was going to send her away to a school for troubled kids. Damon received a letter from a counselor from the Lake Region Human Service Center about missed appointments for J.G.'s counseling. The counselor informed Damon that she attempted to schedule therapeutic outreach sessions at J.G.'s school one day each week, but Dusty did not want J.G. to meet with the counselor at the school. Dusty did not respond to the counselor's requests to schedule other options for J.G.'s counseling, so the case was closed. J.G. is in need of treatment, but her mother has failed to facilitate that treatment.

LAW AND ARGUMENT

Issue: Whether the district court erred as a matter of law when it determined that Damon failed to establish a prima facie case justifying modification.

¶ 11. More than two years have elapsed since the final judgment was entered in the parties' divorce action on March 30, 2010. The law on a motion to modify primary residential responsibility post judgment is provided in N.D.C.C. § 14-09-06.6. In particular, N.D.C.C. § 14-09-06.6(6) provides the following:

6. The court may modify the primary residential responsibility after the two-year period following the date of entry of an order establishing primary residential responsibility 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 in the circumstances of the child or the parties; and

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

¶ 12. The party seeking to modify custody bears the burden of establishing a prima facie case that a material change of circumstances has occurred. N.D.C.C. § 14-09-06.6(8). Movants seeking an evidentiary hearing can only use moving papers and supporting affidavits to establish a prima facie case. N.D.C.C. § 14-09-06.6(4). “A prima facie case does not require facts which, if proved, would mandate a change of custody as a matter of law. A prima facie case only requires facts which, if proved at an evidentiary hearing, would support a change of custody that could be affirmed if appealed.” Frueh v. Frueh, 2008 ND 26, ¶ 6, 745 N.W.2d 362. Although the opposing party may file counter affidavits disputing the moving party’s allegations, the trial court may not weigh conflicting testimony in order to determine if the moving party established a prima facie case. O’Neill v. O’Neill, 2000 ND 200, ¶ 7, 619 N.W.2d 855. “Allegations, supported by affidavit, demonstrating a custodial environment which may be endangering the childrens' physical or mental health, are sufficient to raise a prima facie case for change of custody, entitling the movant to an evidentiary hearing.” Id. (citing Quarne v. Quarne, 1999 ND 188, ¶ 12, 601 N.W.2d 256). Whether a party has established a prima facie case is a question of law which this Court reviews de novo. Anderson v. Jenkins, 2013 ND 167, ¶ 8, 837 N.W.2d 374.

¶ 13. As a matter of law, Damon has presented sufficiently serious allegations, supported by affidavit and exhibits, to present a prima facie case warranting an evidentiary hearing on his motion. Damon has first-hand knowledge that his children are suffering since they moved to Cando. Relocation of a parent may constitute a material

change of circumstances. Mock v. Mock, 2004 ND 14, ¶ 7, 673 N.W.2d 635. Disputes have arisen between the parties over times that Damon was unnecessarily deprived of precious parenting time. Dusty also took away the electronic devices that Damon gave to the children so they could keep in regular contact with him. Interference with parenting time presents a prima facie case for modification. Sweeney v. Kirby, 2013 ND 9, ¶ 8, 826 N.W.2d 330.

¶ 14. Upon getting the children from Dusty, Damon often discovers that they are without shoes or without proper winter clothing and gear. Damon has also alleged that Dusty is an absentee parent—almost never at home—and the children’s grandparents are essentially raising them. This is a material change of circumstances. Damon’s right to raise his own children is superior to the grandparents’ right. See, e.g., Clark v. Clark, 2005 ND 176, ¶ 17, 704 N.W.2d 847.

¶ 15. Dusty fails to keep Damon informed about important matters concerning the children and their physical and mental health and their education. Damon has alleged that the health and welfare of the parties’ children has deteriorated since Dusty moved with them to Cando, North Dakota. The children have experienced illness and injury. L.G. came in contact with ringworm in her home in Cando. Damon took L.G. to a doctor and obtained medication for her. Dusty and her parents neglected to apply the medication as necessary and the ringworm infection grew worse.

¶ 16. C.G.’s leg was burned and Dusty and her parents failed to obtain medical treatment. C.G. is tormented by his grandfather’s inappropriate physical play and teasing about his god-mother’s breasts and breast feeding. C.G. doesn’t want to engage in wrestling sessions, but he is a small child and is powerless to prevent these unwanted

touchings. C.G.'s school performance deteriorated and his grades began to fall. C.G. is now in need of medication, but the pharmacist asked the doctor to alter the prescription for some unknown reason and Dusty won't discuss the matter with Damon even though Damon was granted joint decision making responsibility. If C.G. needs medication to focus in school, then Damon believes that C.G. also needs medication to focus when he is working on his reading skills, etc., at home. No one at his current home is helping C.J. to get caught up academically. If Damon had primary residential responsibility, he would work with C.G. at home in order to keep him caught up.

¶ 17. J.G. is suffering from depression. She was flunking two of her classes. Her grandfather threatened to place her in a special school for troubled kids. She is in need of counseling, but her mother Dusty had done nothing to facilitate that necessary counseling. The significant decline in the children's emotional and mental health since Dusty moved to Cando, along with their struggles in school, is a material change of circumstances. Damon can see first-hand how these many material changes in circumstances adversely affect his children's best interests and he is anxious for the children to reside with him so he may provide the remedial care that they need.

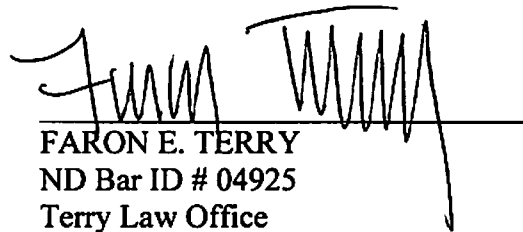
¶ 18. As a matter of law, the trial court must accept the truth of Damon's allegations. Anderson v. Jenkins, 2013 ND 167, ¶ 12, 837 N.W.2d 374. Dusty's counter-affidavit does not conclusively establish that Damon's allegations have no credibility and, in fact, substantiate many of Damon's allegations. The trial court is not allowed to consider Dusty's opposing affidavit for the purpose of weighing the evidence at this point in the proceedings. Damon has clearly alleged sufficient facts which, if proved at an evidentiary hearing, would support a change of primary residential responsibility that

could be affirmed if appealed. Damon is entitled to a full evidentiary hearing so these serious issues concerning his children's health and welfare may be fully fleshed out for the court's full consideration and determination of their best interests.

CONCLUSION

¶ 19. The district court erred as a matter of law when it determined that Damon failed to establish a prima facie case justifying modification. Damon respectfully requests this Court to reverse and remand this case for a full evidentiary hearing.

Dated this 15th day of December, 2014.



FARON E. TERRY
ND Bar ID # 04925
Terry Law Office
216 S. Broadway, Ste. 203
P.O. Box 717
Minot, ND 58702-0717
Phone: (701) 838-6945
E-mail: bobsta@srt.com
Attorney for the Appellant

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STATE OF NORTH DAKOTA

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AFFIDAVIT OF SERVICE

Supreme Court No. 20140403
Bottineau Co. Court No. 09-C-00056

Dusty Grigg,

Plaintiff and Appellee

v.

Damon Grigg,

Defendant and Appellant

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF WARD)

¶1 Nicole Duchscherer, being duly sworn on oath, deposes and states that she is legal age and that on December 23, 2014, she served the following documents in the above matter as follows:

1. Corrected table of contents to the Appellant's Brief; and,
2. Corrected page 23 of the Appendix.

Name(s) and address(es) of individual served:

Gregory W. Liebl
greg.liebl@swlattorneys.com

Tina M. Heinrich
325 28th Avenue SW, Suite C
PO Box 2249
Minot, ND 58702-2249

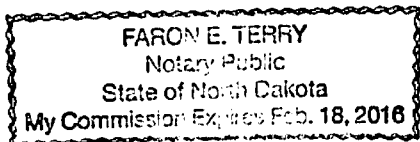
That the above documents were duly e-mailed and mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



Nicole Duchscherer

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF WARD)

Subscribed and sworn to before me this 23rd day of December, 2014.

(SEAL)




Notary Public

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