

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Tara Dawn Ritter, n/k/a Tara McDonald,)	
)	
Plaintiff / Appellee,)	
)	Supreme Court No.: 20160442
v.)	
)	Morton Co. Case No.:
Joshua Daniel Ritter,)	30-2012-DM-00220
)	
Defendant / Appellant,)	
)	

APPEAL FROM SECOND AMENDED JUDGMENT, DATED OCTOBER 21, 2016,
ISSUED BY HONORABLE BRUCE ROMANICK, SOUTH CENTRAL JUDICIAL
DISTRICT, MORTON COUNTY, NORTH DAKOTA, CASE NO. 30-2012-DM-00220

Reply Brief of Appellant

Suzanne M. Schweigert (ID #05480)
SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
sschweigert@smithporsborg.com
(701) 258-0630

Attorneys for Defendant and Appellant, Joshua Ritter

Table of Contents

	Paragraph Number
Table of Authorities	ii
I. Joshua’s Statement of the Case is proper.....	1
II. Tara’s Statement of the Facts includes disputed facts.	2
III. The district court erroneously relied on pre-material changes.....	3
IV. Joshua’s mandate rule argument is proper.....	11
V. The district court did abuse its discretion in denying Joshua’s Motion for Clarification and/or Modification.	14
Conclusion	15
Certificate of Compliance	18
Certificate of Service	19

Table of Authorities

Paragraph
Number

Cases

Blotske v. Leidholm, 487 N.W.2d 607 (ND 1992).....4

Carlson v. Workforce Safety & Ins., 2012 ND 203, 821 N.W.2d 76012

Frueh v Frueh, 2009 ND 155, 771 N.W.2d 5934

Gray v. Berg, 2016 ND 82, 878 N.W.2d 7913

Neubauer v. Neubauer, 524 N.W.2d 593, (N.D. 1994)16

Rules

N.D.R.App.P. 3812, 13

I. Joshua's Statement of the Case is proper.

[¶1] Joshua's Statement of the Case did not make "unsubstantiated" claims regarding Tara's lack of response to mediation as Tara states. Appellee Brief [hereafter AppelleeBr.] ¶2. Appellant Brief [hereafter AppellantBr.] ¶4 clearly directs the Court to App.67, Joshua's sworn affidavit, for substantiation of Tara's lack of response to requests for conflict resolution. Additionally, Joshua's Statement of the Case does not "misstate" the legal conclusion set forth in the previous Opinion. AppelleeBr. ¶2. AppellantBr ¶6 directly and clearly quotes this Court's previous opinion relating to sharing of parental responsibility being in the best interest of the children in this case.

II. Tara's Statement of the Facts includes disputed facts.

[¶2] Tara presents numerous facts not supported by evidence. Tara erroneously states she has been married to Andy for 5 years. AppelleeBr. ¶7. According to her Affidavit, they were married February 2013, four years ago. App.137. Tara testified they were engaged after her divorce was final. Tr.376-77. However, according to her affidavit, she was engaged in May 2012 and not divorced until September 2012. App.137. Tara testified her separation from Joshua was the result of affairs she believed Joshua had with flight attendants, Joshua testified this was not true and no evidence was presented otherwise. AppelleeBr. ¶3; Tr. 264; 14-16. Joshua testified he was not comfortable with Tara moving out of the marital home and taking the boys to live with Andy during her time with them. AppelleeBr. ¶3; Tr.152; 11-25. Joshua did not "allege" his change in employment gave him more time to spend with the children; he presented testimony from his employer that it does in fact give him more time. AppelleeBr. ¶6; Tr.45; 5-23. While Joshua did acknowledge he was able to maintain a relationship with his children while Tara had

primary, it was through being active in extracurricular activities or through his own contact with their schools for report cards, not cooperation from Tara. Tr. 237;16-21;266:12-15.

III. The district court erroneously relied on pre-material changes.

[¶3] Prior to Joshua's change of employment, Tara was the primary parent due to Josh's work schedule and her availability. Joshua was never incapable of primarily caring for the children, it was just not the decision Tara and Joshua made for their family. Once Joshua's work schedule changed, he had the ability to care equally for the children. Joshua's argument is based on facts, which the District Court overlooked and Tara continues to argue as well (Appellee Br. ¶19), without a modification to equal parenting, it will be impossible for Joshua to ever take on that equal role.

[¶4] Tara states Joshua's burden "requires him to prove that disruption to the lives of his children is necessary for their well-being." Appellee Br. ¶18. That is not Joshua's burden. Joshua's burden is to prove there has been a material change and a change is necessary to serve the child's best interest. Fruehv. Frueh, 2009ND155, ¶8, 771 N.W.2d 593. Joshua's argument has been, and continues to be, equal parenting will not be a disruption to the children's lives as he is already heavily involved in their lives and, in the absence of reasons against, equal parenting is in their best interests. Joshua has also provided a stable and loving home for the children since the parties' separation. However, as Blotske stands, a case almost 25 years old and cited by Tara, a father who loves his children, and in an original custody proceeding, could be ruled in favor of, in a modification he cannot. 487 N.W.2d 607, 611. This is patently unfair in modifications from primary to equal following a material change, and practically sets an impossible standard for modification in cases with two loving, capable parents. The Ritter children have been living with Joshua

for 48 hours a week. Joshua's request for equal parenting time adds merely 36 more hours per week. Joshua is not asking for a dramatic change from primary to primary. These children have lived in Joshua's home for years, they are comfortable there, and have a school routine in Joshua's home as well as Tara's. These factors distinguish this case from the aversion of changing residential responsibility of happy children that have been in the same living situation for a substantial amount of time, as cited in Blotske.Id.at609.

[¶5] Contrary to Tara's argument, the evidence does not show Joshua "did not always take advantage of opportunities" or "spent years resisting the responsibilities" of daily parenting, he has not "chos[en] instead to focus squarely on the more 'fun' aspects of parenthood."AppelleeBr¶24. The evidence does show Joshua has sought to be engaged in parenting his children, coaching them, being involved in their education and asking to attend doctor's appointments, and she repeatedly thwarted his attempts to be a daily parent. Again, at issue is the District Court looked to the past, prior to the change in circumstances, and then used situations that occurred prior to the change, for deciding a change should not occur. Joshua testified to the reality without modification, Tara does not allow him to be a day-to-day parent and failing to overturn that erroneous application of the facts to the case is unjust.

[¶6] Tara states, "[w]hile the court noted both parents needed to communicate better, it considered Joshua's absence in the children's daily lives and put more weight in the evidence that Joshua had voluntarily acquiesced to Tara becoming the primary caregiver without raising an issue with the arrangement for years."AppelleeBr¶27.Joshua's absence from the children's daily lives was due to his job, prior to the material change, the district court erred in failing to distinguish that. The district erred in finding factors(a) and (b)

avored Tara as the decision was based on reasoning of the pre-material changed circumstances. Factor(c) specifically directs the district court to assess the parents' ability to meet the children's developmental needs in the future. The only analysis relied on by the district court, only addresses the past thus the district court erred in not assessing Josh's future ability to provide for the children.

[¶7] The district court found Joshua and Tara both provide stability.App.625-26. Since the parties' divorced and Joshua and Tara moved into their current homes, the children have had homes with both. Joshua's parenting time has been 48 hours per week. While the children have spent less time in his home, again, this goes back to the court's reasoning on basing its decision on past facts, and only because of Joshua's previous schedule. The children have been flourishing in both homes and their stability and continuity of their homes and communities are important to both parents.

[¶8] Regarding stability, Tara now characterizes her extended family as living "a bit farther away than Joshua's extended family."AppelleeBr.¶34. Tara's characterization ignores the facts testified to that Joshua's immediate family, his mother, who is also very involved in the children's lives and activities lives in Bismarck. Joshua's extended family lives in Dickinson, Fargo, South Dakota, and during lake season, in Minnesota.Appellant Br¶27. By her own testimony, Tara's parents and siblings live in British Columbia and extended family lives in Saskatchewan.Id. British Columbia and Saskatchewan are quite farther than "a bit" away from Joshua's extended family in ND and two neighboring states. The district court erred in not finding this factor to favor Joshua and Tara equally as the reasoning focused on pre-material changed circumstances and erroneously interpreted Tara and Joshua's impact of extended family to be equal.

[¶9] Regarding factor(f), Tara argues Joshua’s alleged affairs are different than the affair she had with her husband. Appellee Br¶41-42. No evidence was submitted, outside of Tara’s testimony, to any extramarital affairs on Joshua’s part. The Findings also did not address these perceived affairs, instead focusing on Joshua’s work schedule and mindset regarding finances in its Factor(f) analysis. Those two points do not relate to moral fitness and the district court improperly weighed them under this factor. Joshua argues on appeal there is ample evidence of Tara’s affair during her marriage to Joshua, while she tries to argue it was not an affair because they were eventually married and the relationship happened after she separated from Joshua. However, she carried on a relationship with another man, was engaged to and had a child with him, while married to Joshua. Appellant Br¶32; App.136. That is an affair under any definition and the district court erred in finding this factor favored neither when the only evidence noted in the Findings about Joshua’s moral fitness related to work habits and finances.

[¶10] Joshua did not argue the district court erred in finding(j) and (k) to favor neither party. Appellant Br¶36. Joshua’s argument, absent evidence of these two very serious factors, is a logical one and his request for equal responsibility is still valid. Id.

IV. Joshua’s mandate rule argument is proper.

[¶11] In its previous Opinion, this Court did state “evidence exist[ed] that shared parenting would be in the best interests of the children.” App.157. A hearing on modification was held as directed by the previous Opinion in this case, and the district court erred in not acknowledging the Court’s direction in the Opinion regarding shared parenting.

[¶12] Under Carlson v. Workforce Safety & Ins., this Court “retain[s] the authority to decide whether the district court scrupulously and fully carried out our mandate's terms.” 2012ND203, 821 N.W.2d 760. The District Court's Findings disregarded this Court's Opinion that evidence existed that shared parenting would be in the children's best interests. Accordingly, Joshua presented an argument for the Court to review to determine if the district court did in fact “scrupulously and fully” carry out the previous Opinion. Therefore, the Court should not consider awarding damages under N.D.R.App.P.38.

[¶13] Rule 38 states “If the court determines that an appeal is frivolous, or that any party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs, including reasonable attorney's fees”. N.D.R.App.P.38. “An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates bad faith in pursuing the litigation.” Gray v. Berg, 2016ND82, ¶16, 878 N.W.2d 79. There are no grounds for an award of attorney fees as Joshua's appeal is properly based on clear, reversible errors, thus, frivolity is not the case and Tara's request for attorney's fees must be denied.

V. The district court did abuse its discretion in denying Joshua's Motion for Clarification and/or Modification.

[¶14] Joshua's Motion for Clarification and/or Modification was based on Tara's continued resistance to the parties' joint decision making regarding right of first refusal, access to records, notice of appointments, and conflicting transportation language. Appellant Br ¶46. These were serious concerns the district court failed to address in its Findings or were ambiguous. Tara's cooperation in co-parenting with Joshua was a main issue at trial and a request for clarification based on concerns about the application of the Findings was appropriate.

[¶15] The parties' interpretation on the right of first refusal language is most apparent in Joshua and Tara's affidavits where they both believe the language is clear, but they cannot agree on what that is. Appellant Br¶51. The transportation language was ambiguous as it was stated differently in two different places. Appellant Br¶52. Tara also continued to disallow Joshua to access records. Appellant Br¶54. These two situations presented ambiguities in the Findings. Tara also scheduled doctor's appointments and failed to consult Joshua raising a presumption the language is ambiguous if Tara cannot comply with it. Appellant Br¶55.

[¶16] Joshua properly asked the district court to "clear up genuine ambiguities in the language of a court order" relating to the specific issues discussed above. Neubauer v. Neubauer, 524 N.W.2d 593, 595 (N.D. 1994). His motion was appropriate as it addressed issues of "material importance". Id. Joshua was not intending to amend the original decree but to bring the ambiguities raised by the Findings to the court's attention and request clarification for a more harmonious parenting relationship. With regard to the transportation language, that is different in different places, Joshua did seek to have the court accurately express its intentions and it abused its discretion in selectively clarifying the tax and summer language but not its rationale regarding the other issues raised.

Conclusion

[¶17] WHEREFORE, for the reasons discussed above, Joshua Ritter, respectfully requests the Court REVERSE the District Court's Order Denying Josh's Motion to Modify Primary Residential Responsibility and award equal residential responsibility to Joshua.

DATED this 21st day of June 2017.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By: /s/ *Suzanne M. Schweigert*
Suzanne M. Schweigert (ID #05480)
sschwegiert@smithporsborg.com
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
Attorneys for Defendant/Appellant, Joshua Ritter

CERTIFICATE OF COMPLIANCE

[¶18] The undersigned, as attorney for the Appellant, Joshua Ritter, in the above matter, and as the author of the above brief, hereby certifies that the above brief was prepared in compliance with the North Dakota Rules of Appellate Procedure, with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, addendum and certificate of compliance totals 1993.

DATED this 21st day of June 2017.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By: /s/ *Suzanne M. Schweigert*
Suzanne M. Schweigert (ID #05480)
sschweigert@smithporsborg.com
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
Attorneys for Defendant/Appellant, Joshua Ritter

CERTIFICATE OF SERVICE

[¶19] I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF THE APPELLANT**, was on the 21st day of June, 2017, served upon the following via ELECTRONIC MAIL as follows:

Attorneys for the Plaintiff / Appellee:

Betsy Elsberry
Attorney at Law
103 South Third Street, Suite 9
Bismarck, ND 58501
betsy@nodaklaw.com

*/s/ Suzanne M. Schweigert*_____

Suzanne M. Schweigert