20170334
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 16, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jennifer Dickson, v. Brent Dickson,	Plaintiff/~~Plaintiff~~ Appellant, Defendant/~~Defendant~~ Appellee.	Williams County Civil No. 53-2016-DM-00340 Supreme Court No. 20170334

BRIEF OF DEFENDANT BRENT DICKSON

APPEAL TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA FROM THE ORDER DENYING PLAINTIFF'S MOTION TO MODIFY, DATED AND FILED ON JULY 11, 2017, IN THE DISTRICT COURT OF WILLIAMS COUNTY FROM THE HONORABLE JOSHUA B. RUSTAD

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STATEMENT OF ISSUES

[¶1] I. The District Court properly denied Plaintiff's Motion to modify child custody and applied the proper standard.

[¶2] II. The District Court made proper findings regarding the testimony of Defendant.

STATEMENT OF CASE

[¶3] Defendant wishes to include the following information in addition to Plaintiff's statement of the case:

[¶4] The domestic violence restraining order, case 53-2016-DM-00437, was issued on November 8, 2016 and signed on November 15, 2016, after a hearing where Mr. Dickson did not have legal counsel, did not contest the protection order, and there was no adjudication of what actually happened. Tr. at 14.

[¶5] Paragraph 9 is not relevant to this action, was not considered in the hearing, and is an instance of Plaintiff bringing in information on appeal that is not included in this action.

STANDARD OF REVIEW

[¶6] This case involves a motion to modify a previously stipulated child custody order within two years of the original judgment. A district court's decision whether to modify custody is a finding of fact, which will not be reversed on appeal unless it is clearly erroneous. Siewert v. Siewert, 2008 ND 221, ¶ 16, 758 N.W.2d 691. "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.' Id. (quoting Stanhope v. Phillips–Stanhope, 2008 ND 61, ¶ 7, 747 N.W.2d 79).

[¶7] The district court is in a better position to weigh the evidence because it has the opportunity to observe the witnesses' demeanor and assess their credibility, and [the North Dakota Supreme Court] do[es] not retry custody issues or reassess the witnesses' credibility if the court's decision is supported by

evidence in the record. Id. at ¶ 24. A district court's choice between two permissible views of the evidence is not clearly erroneous. Id. See also Frueh v. Frueh at ¶ 7.

LAW AND ARGUMENT

I. The District Court Properly Denied Plaintiff's Motion to Modify Child Custody and Applied the Proper Standard.

[¶8] Jennifer Dickson (hereinafter "Jennifer" or "Plaintiff"), appeals the order of the district court, dated July 11, 2017, denying her motion to modify child custody from joint residential responsibility to primary residential responsibility. The district court denied the motion to modify and ordered the original agreement, from the stipulated divorce judgment dated August, 26, 2016, to remain in effect.

[¶9] Jennifer argues the district court failed to analyze the best interest factors, specifically the domestic violence factor, and the findings did not reflect the testimony. Brent Dickson (hereinafter "Brent" or "Defendant") asks this Court to uphold the district court's decision because the findings were proper, in form and analysis, the district court did not clearly err, and the district court's conclusions were properly supported by the evidence presented.

[¶10] The standard the court utilizes when determining whether or not to grant the motion for modification, was first determined by the North Dakota Supreme Court through caselaw and then adopted statutorily. The original order granting custody was filed on August 26, 2016. Jennifer's motion to change custody was filed on February 9, 2017. Section 14-09-06.6 of the N.D.C.C. governs change of custody proceedings in situations where less than two years has passed since the initial order establishing custody. The statute states the following:

1. Unless agreed to in writing by the parties, or if included in the parenting plan, no motion for an order to modify primary residential responsibility may be made earlier than two years after the date of entry of an order establishing primary residential responsibility, except in accordance with subsection 3.

. . . .

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 parenting time;
    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 residential responsibility for the child has changed to the other parent for longer than six months.
4. A party seeking modification of an order concerning primary residential responsibility 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. The court shall set a date for an evidentiary hearing only if a prima facie case is established.
5. The court may not modify the primary residential responsibility within the two-year period following the date of entry of an order establishing primary residential responsibility unless the court finds the modification is necessary to serve the best interests of the child and:
    a. The persistent and willful denial or interference with parenting time;
    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 residential responsibility for the child has changed to the other parent for longer than six months.

N.D.C.C. 14-09-06.6 (2017).

[¶11] Th[is] provision "was enacted to provide something of a moratorium for the family during the two-year period following a custody determination. The purpose of this moratorium is to spare children the painful, disruptive, and destabilizing

effects of repeat custody litigation." Wagaman v. Burke, 2002 ND 51, ¶ 5, 642 N.W.2d 178 (citations omitted).

[¶12] A party seeking custody modification is then entitled to an evidentiary hearing if the party brings a prima facie case, by alleging, with supporting affidavits, sufficient facts which, if uncontradicted, would support a custody modification in favor of that party. N.D.C.C. § 14-09-06.6(4). The district court, in this case, entered an order finding Plaintiff had met the burden of establishing a prima facie case. See Doc. ID # 31. An evidentiary hearing on the matter was scheduled for June 7, 2017 and the findings of this hearing are the subject of the appeal.

A. Best Interest Factors

[¶13] Jennifer argues the district court failed to enter any specific findings with regard to the best interest factors under N.D.C.C. 14-09-06.2 and that the findings did not consider the domestic violence presumption.

[¶14] Rule 52 of the North Dakota Rules of Civil Procedure requires specific findings. "Although a separate finding is not required for each statutory factor, the court's findings must contain sufficient specificity to show the factual basis for the custody decision." Wolt v. Wolt, 2010 ND 26, ¶ 9, 778 N.W.2d 786. Findings of fact should be stated to afford a clear understanding of the court's decision. Rothberg v. Rothberg, 2006 ND 65, ¶14, 711 N.W.2d 219. Findings are adequate if t[he Supreme Court] can discern from them the factual basis for the trial court's determination. Id.

[¶15] Jennifer states the district court did not consider the best interest factors, specifically factor (j). Jennifer's entire argument stems around the best interest factors while failing to mention the statute for reviewing modifications of custody within 2 years of the original judgment, which is N.D.C.C. § 14-09-06.6. Jennifer's brief to this court does not recite this statute nor does she argue any of the grounds listed in subsection (5) were present, although this is the first consideration of the district court. Jennifer's argument to the court in the evidentiary hearing failed to mention this statute as well.

[¶16] [The North Dakota Supreme Court has] also said that when a party seeking modification of custody does not allege any of the grounds listed under N.D.C.C. § 14-09-06.6(5) as a basis for modification, the trial court does not err in denying a motion to change custody. Wagaman at ¶11. As was the case in Molitor v. Molitor, it appears Jennifer believes the standard to consider when determining whether or not to modify the child custody order, is solely that of the best interests. 2006 ND 163, ¶4.

[¶17] First, the district court must make a finding, under 14-09-06.6(3)(a)-(c) that one of the following has occurred: denial or interference of parenting time, danger to physical or emotion health or development, or a change in residential responsibility for longer than 6 months. Notwithstanding the fact that Plaintiff did not argue or meet this burden in the hearing or the brief, there was no evidence that this court could attribute to this requirement. See generally N.D.C.C. § 14-09-06.6.

[¶18] Similarily, Jennifer has not proven a case for modification of custody under N.D.C.C. § 14-09-06.6(5). Moltitor at ¶16. The party seeking modification has the burden of proving a change is necessary. N.D.C.C. § 14–09–06.6(8). Not every change in circumstances will amount to a "significant change" warranting a change or modification of custody. Ludwig v. Burchill, 481 N.W.2d 464, 469 (N.D.1992) (Levine, J., concurring specially).

[¶19] The Court may not modify the primary residential responsibility within the two-year period following the date of entry of an order establishing primary residential responsibility, unless the court finds the modification is necessary to serve the best interests of the child and that one of the three subsections of (5) apply. N.D.C.C. § 14-09-06.6(5) (emphasis added). To determine whether modifying primary residential responsibility is necessary to serve the best interests of the child, the district court must consider the applicable N.D.C.C. § 14–09–06.2(1) factors. Kelly, 2002 ND 37, ¶ 22, 640 N.W.2d 38. Section 14–09–06.2(1), N.D.C.C., provides these factors which will not be reproduced in this brief but are nonetheless, relevant.

[¶20] Here, the district court clearly found there was not sufficient evidence presented to justify a change in primary residential responsibility. [W]hen a party moves to modify residential responsibility within two years after an order establishing residential responsibility, the court applies a stricter or more rigorous modification standard. See N.D.C.C. § 14–09–06.6(5); In re N.C.M., 2013 ND 132, ¶ 9, 834 N.W.2d 270; Laib v. Laib, 2008 ND 129, ¶ 8, 751 N.W.2d 228. A district court must award primary residential responsibility to the party who will

best promote the child's best interests and welfare. See Rustad v. Rustad, 2013 ND 185, ¶ 6, 838 N.W.2d 421; In re N.C.M., 2013 ND 132, ¶ 13, 834 N.W.2d 270.

[¶21] The two parents have had joint physical custody of the two minor children since the stipulated divorce dated August 26, 2016. The district court's denial of the motion to modify ordered a return to this previous order, stating it was in the best interests of the children to reside with both parents.

[¶22] The district court states, at least twice, in their order that they have already examined this issue and made a custody/visitation adjustment as a result. Order at ¶2, 4. Although the form of the district court's order does not specifically list each finding by the Court, the reasoning is well delineated. The order states as follows:

> 2. With respect to the Plaintiff's existing Motion for Modification of Primary Residential Responsibility, the Court finds that the basis on which the Plaintiff's Motion for Modification rests, has already been examined once by this Court. Plaintiff testified at hearing that her request exclusively arises out of instances and conduct that transpired in late October and early November of 2016.
> 3. Essentially, the evidence submitted at hearing showed that Mr. Dickson had sent a text message with a photo of him with a firearm, which suggested that he was suicidal. Mr. Dickson promptly delivered his children to Ms. Dickson on that October evening based upon what other witnesses described as Mr. Dickson being in a very "dark place." Witnesses for both parties, a law enforcement officer and Mr. Dickson's fiancé stated that Mr. Dickson's mental state on that evening was compromised. Mr. Dickson submitted to a voluntary committal, however, and testified that he had receiving counseling and therapy after the events of late October, 2016.
> 4. Thereafter, Ms. Dickson moved for a restraining order in collateral case number 53-2016-DM-00463, which resulted in an Order that provided, "Until April 9, 2016, the Respondent shall have supervised visitation with the parties' minor children…". See paragraph 3 of Order dated November 15, 2016. Ms. Dickson

> testified at hearing that the present Motion to Modify is premised exclusively on the events of October 2016. There was no testimony to suggest that Mr. Dickson violated the restraining provisions relevant to his children following issuance of the Restraining Order. The Court in connection with the Restraining Order, which was given in relation to the identical facts now before the Court clearly believed that the April 9, 2017 term of expiration of the Order was sufficient to protect Ms. Dickson and the children. Ms. Dickson did not approach this Court in this filing for a Motion to Modify and instead waited until the Restraining Order was nearing expiration. While the Court does not agree with Attorney Pendlay's assertion that the effect of the Restraining Order in a collateral filing presents a res judicata effect in the above-captioned case and instant Motion, the Court does find that Mr. Dickson's compliance with the collateral Restraining Order and Ms. Dickson's testimony that no new allegations have come to pass since the issuance of the November 15, 2016 Restraining Order, that the Motion to Modify Custody is not in the children's best interest and that the collateral Restraining Order, coupled Mr. Dickson's compliance with the same, together with voluntary committal, therapy, and counseling Mr. Dickson received suggests that a return to the terms of the original Judgment dated August 26, 2016 filed in this matter, rather than the modification proposed by the Plaintiff, is in the best interest of the children. The October events appear to be an isolated incident and Mr. Dickson's actions in attempting to better himself and his mental health suggest that the Original Judgment remains in the children's best interest.

Order Regarding Motions at ¶1-4.

[¶23] It is clear the district court considered the only factor the Plaintiff was alleging had changed since the stipulated agreement: the allegation regarding "domestic violence." The order didn't need to be thirty pages and there had been no allegations regarding any of the other interest factors had changed. The motion to modify was being made on one incident. Plaintiff needed to present evidence regarding any change between the date of the previous order, August 2016, and the date of the hearing, July 2017. The only evidence Plaintiff presented was in regard to the conduct by Defendant on one day: October 26, 2016. Therefore, the judge only needed to consider the effect of the incident

which occurred on October 26, 2016, which had already been examined by the district court.

[¶24] The judge in the district court, was also the judge in the restraining order. Tr. at 12:3. The judge stated both on the record and in the order, he had considered the arguments of parties, pleadings, filings, and contents of the entire file in this matter, Plaintiff's motion, Defendant's response, and all of the filings in the record. The district court, in making the determination on the motion to modify child custody, additionally took into consideration the testimony, allegations, and order in the restraining order case. See Order at ¶4.

B. Domestic Violence Rebuttable Presumption

[¶25] It appears the main argument in Plaintiff's brief is that the district court failed to properly analyze the domestic violence presumption when ordering a return to the original decree. This is an improper conclusion.

[¶26] The determination whether there has been domestic violence is an issue of fact determined by the court, as trier of fact, and will not be set aside on appeal unless it is clearly erroneous under N.D.R.Civ.P. 52(a). Lovcik v. Ellingson, 1997 ND 201, ¶ 10, 569 N.W.2d 697. The best interest factors include a rebuttable presumption that a parent who has committed domestic violence may not be awarded residential responsibility for the child, stating:

> ¶ If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child. . . . As used in this subdivision,

> "domestic violence" means domestic violence as defined in section 14-07.1-01.

[¶27] N.D.C.C. § 14-09-06.2(1)(j). "Domestic violence" means "physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household member." N.D.C.C. § 14-07.1-01(2).

[¶28] "A determination whether the presumption under N.D.C.C. § 14-09-06.2(1)(j) is applicable is a finding of fact, which will not be reversed on appeal unless clearly erroneous." Gietzen v. Gabel, 2006 ND 153, ¶ 9, 718 N.W.2d 552. When addressing whether evidence of domestic violence triggers the presumption, the district court "must make specific and detailed findings regarding the effect the allegations of domestic violence have on the presumption." Cox v. Cox, 2000 ND 144, ¶ 17, 613 N.W.2d 516 (citing Holtz v. Holtz, 1999 ND 105, ¶ 27, 595 N.W.2d 1). The district court's findings should be sufficiently detailed to allow this Court to understand the basis for its decision. P.A. v. A.H.O., 2008 ND 194, ¶ 10, 757 N.W.2d 58. Here, the district court couldn't have been clearer: Plaintiff did not meet her burden.

[¶29] A trial court's evaluation of evidence of domestic violence in a custody determination is guided by subsection (j) of N.D.C.C. § 14–09–06.2(1). Section 14–09–06.2(1)(j) was amended in 1993 to create a rebuttable presumption against awarding custody to a parent who had perpetrated domestic violence when the court found "credible evidence that domestic violence has occurred." See 1993 N.D. Sess. Laws ch. 144, § 2. In 1997 the Legislature

amended the statute again, raising the level of domestic violence required to trigger the presumption. See 1997 N.D. Sess. Laws ch. 147, § 2.

[¶30] Once the presumption under section 14–09–06.2(1)(j) is triggered, the issue of domestic violence becomes the "paramount factor" in the trial court's custody decision. Engh v. Jensen, 547 N.W.2d 922, 924 (N.D.1996). The presumption prevents an abusive parent from obtaining custody of the child unless the abusive parent proves "by clear and convincing evidence that the best interests of the child require" the abusive parent to participate in or have custody. Id. (citing N.D.C.C. § 14–09–06.2(1)(j)); see also Zuger v. Zuger, 1997 ND 97, ¶ 31, 563 N.W.2d 804. Evidence of domestic violence which is insufficient to trigger the presumption nevertheless remains one of the best-interest factors to be considered by the court under N.D.C.C. § 14–09–06.2. See Reeves, 1999 ND 63, ¶ 15, 591 N.W.2d 791; Ramstad v. Biewer, 1999 ND 23, ¶ 21, 589 N.W.2d 905; Zimmerman v. Zimmerman, 1997 ND 182, ¶ 7, 569 N.W.2d 277; Huesers v. Huesers, 1997 ND 33, ¶ 7, 560 N.W.2d 219.

[¶31] Jennifer argues the Court is required to make specific findings regarding this rebuttable presumption. This is not necessarily true. Although the trial court should make specific factual findings and conclusions regarding the presumption against custody for perpetrating domestic violence, specific findings are not required when there is insufficient evidence of domestic violence to trigger the presumption. Tulintseff v. Jacobsen, 2000 ND 147, ¶ 13, 615 N.W.2d 129. Here, the judge stated on the record, prior to the hearing, that he was aware of the rebuttable presumption, and if required, the presumption would be applied. Tr. at

12:13-25. The judge never states Plaintiff has met the burden to find the rebuttable presumption needs to be overcome. The court, prior to hearing the new allegations, cannot state whether the rebuttable presumption needs to be overcome before hearing the evidence. Rather, the court noted he was aware of the rebuttable presumption and its effect, and if presented would determine whether or not the burden for the rebuttable presumption to be in effect, was met. Id. It was up to Jennifer to present credible evidence to the court, so the rebuttable presumption was triggered.

[¶32] In BeauLac v. BeauLac, the Court determined there are instances where specific findings, or lack of, are not a reason for reversal. 2002 ND 126, ¶19, 649 N.W.2d 210. After a lengthy evaluation, the Court determined that if it wouldn't change the end result, the analysis itself didn't require reversal and remand to make findings, which inevitably would lead to the same result. See Id. (Finding "although explicit findings regarding the application of N.D.C.C. § 14-09-06.2(1)(j), would have aided our review, we can reasonably infer from the record that the trial court considered the evidence of domestic violence and found it insignificant to trigger the statutory presumption." See also Tulintseff at ¶15.) Here, any re-analysis of the case would result in the same adjudication: being with both parents is in the children's' best interests.

[¶33] The evidence presented in the hearing for modification of the previous child custody order was the same evidence presented at the request for a restraining order. Notwithstanding the fact that the district court made a specific

finding that res judicata was not applicable, it is clear the district court considered the evidence already presented and the "penalty" already imposed.

[¶34] The findings in this case, are similar to those in Tulintseff v. Jacobsen. 2000 ND 147, 615 N.W.2d 129, 134. In Tulintseff, the district court found the Plaintiff's steps and actions in correcting his behavior were persuasive. Tulinsteff at ¶6. The district court also found it was not clearly erroneous to find incidents occurring a considerable time ago, were not within a reasonable time proximate to the proceeding, and thus did not meet the definition for purposes of the presumption. Id. at ¶18.

[¶35] Here, the district court noted first that a provision had already been put in place, for a period of three months, where Mr. Dickson had only had supervised visitation with his children. The district court found he had followed the provisions of the restraining order, and "together with the voluntary committal, therapy, and counseling Mr. Dickson received thereafter suggests that a return to the terms of the original Judgment dated August 26, 2016 filed in this matter, rather than the modification proposed by Plaintiff, is in the best interest of the children." Order at ¶ 4.

[¶36] Generally, a] trial court's findings of fact should reflect the basis of the court's decision. Emter v. Emter, 1999 ND 102 ¶ 8, 595 N.W.2d 16. A factual basis is necessary for this Court to review whether the findings are clearly erroneous. Id. [The North Dakota Supreme Court], however, "do[es] not remand for clarification of findings of fact when, through inference or deduction, [they] can discern the rationale for the result reached by the trial court. Holtz at ¶18. The

Court can reasonably infer the trial court considered the evidence of domestic violence and made his findings that the therapy, counseling, voluntary committal and compliance were evidence that the moving party had not met their burden of establishing the rebuttable presumption.

II. The District Court made proper findings regarding the testimony of Defendant.

[¶37] Plaintiff alleges the District Court erred in denying the Plaintiff's Motion for Modification of Primary Residential Responsibility when the Court determined that the Defendant's conduct was an isolated incident, despite the Defendant's sworn testimony that he had engaged in two similar incidents, and despite there being no evidence in the record proving that the Defendant had actually obtained counselling or therapy. App. Brief at ¶1(C) and (D). Plaintiff's interpretation of the facts is incorrect.

[¶38] The North Dakota Supreme Court does not reexamine the record in bits and pieces favorable to a case. Molitor at ¶9. Rather, under the standard of review, they look to "whether there is evidence to support the trial court's decision." Id. In this instance, there is "clearly evidence on the record to support the decision." Id.

[¶39] "In applying the clearly erroneous standard, [the North Dakota Supreme Court] will not reweigh evidence, reassess witness credibility, retry a custody case, or substitute our judgment for the trial court's decision merely because this Court may have reached a different result." Hammeren v. Hammeren, 2012 ND 225, ¶ 8, 823 N.W.2d 482. "A choice between two permissible views of the weight of the evidence is not clearly erroneous." Id. Our deferential review is

"especially applicable for a difficult primary residential responsibility decision involving two fit parents. Id. (quotations omitted). The mere fact that the appellate court might have viewed the facts differently, it if had been the initial trier of the case, does not entitle it to reverse the lower court." Bosma v. Bosma, 287 N.W.2d 447, 451 (N.D. 1980).

[¶40] Because the fact finder may make determinations regarding the credibility of witnesses, the judge is not required to believe a witness's testimony, even when no direct evidence is offered to the contrary. See Id. The court has said the following:

> "[R]eading a cold transcript is no substitute for hearing and observing witnesses as they testify. Tones of voice, hesitations, confusion, surprise, and other telltale indications of mental state convey to trial judges and jurors much that is lost to appellate judges. If we were to judge from the cold print, we might decide many cases differently than trial judges do, and this case might be one of them. But, if we decided differently, we would have no assurance that ours was the better decision."

Molitor at ¶10.

[¶41] The majority of the evidence in this trial is conflicting evidence put forth by the parties regarding the facts surrounding one night. The clearly erroneous burden of proof cannot be overcome. The trial court was in the position to determine the credibility of the parties and made findings accordingly.

[¶42] Plaintiff has erroneously summarized the District Court's order. The actual findings of the Court stated the following:

> ". . . [T]he Court does find that Mr. Dickson's compliance with the collateral Restraining Order and Ms. Dickson's testimony relating that no new allegations have come to pass since the issuance of the November 15, 2016 Restraining Order, that the Motion to Modify Custody is not in the children's best interest and that the collateral Restraining Order, coupled with Mr. Dickson's compliance with the

> same, together with the voluntary committal, therapy, and counseling Mr. Dickson received thereafter suggests that a return to the terms of the original Judgment dated August 26, 2016 filed in this matter, rather than the modification proposed by Plaintiff, is in the best interest of the children. The October events appear to be an isolated incident and Mr. Dickson's actions in attempting to better himself and his mental health suggest that the original Judgment remains in the children's best interest."

Order at ¶4.

[¶43] These findings of fact are again governed by the "clearly erroneous" standard delineated within this brief. See infra at ¶6. Defendant has no doubt the trial court's decision was partly based on the credibility of the witnesses and the testimony received at the evidentiary hearing.

[¶44] Plaintiff makes numerous arguments regarding findings of fact made by the district court, without stating why these determinations are even relevant. Plaintiff states the district court erred for many reasons, including the credibility of Brent Dickson, testimony regarding Mr. Dickson's rehabilitation, testimony regarding Mr. Dickson's intentions, and a finding that Mr. Dickson had not violated the restraining order.

[¶45] The district court found Mr. Dickson has attempted to better himself and his mental health and presumably found his testimony regarding his rehabilitation attempt credible. The judge in a bench trial is the fact finder, and the judge makes determinations of credibility. See infra at ¶45. This Court cannot "second-guess the trial court's assessment of the credibility and weight of the evidence." State v. Hafner, 499 N.W.2d 596, 597 (N.D. 1993). The district court did not clearly err when assessing Mr. Dickson's credibility, demeanor, and

sincerity. Plaintiff may not agree with the findings, but it isn't clear error to have a difference of opinion.

[¶46] The district court also did not err when making factual findings regarding the testimony surrounding Mr. Dickson's conduct. Plaintiff's main allegation is that defendant violated the terms of the restraining order. However, the actual order from the judge states: "There was no testimony to suggest that Mr. Dickson violated the restraining provisions relevant to his children." Order at ¶4 (emphasis added).

[¶47] There was no testimony, in the evidentiary hearing or in any affidavit filed with the motion, regarding an actual violation of the order. There is testimony that Mr. Dickson asked his daughter for dinner, but there is no testimony there was an actual meeting. The restraining order provisions regarding the children, in part, read: 4. Outside of visitation, the Respondent may communicate with the minor children via email or text message. There was nothing disallowing Mr. Dickson from texting his children. The testimony regarding dinner was as follows:

> "Q: (By Mr. Kalil): I'm going to Doc Holliday's for dinner, if you want to come, if it is okay with your mom. No talking about any of this stuff, just normal talk." Brent, what is going on with that text message?
> A: Just asked if she wanted to go for dinner."

Tr. at 46.

[¶48] This is the only testimony regarding the incident. There was also an affidavit signed by Plaintiff regarding the incident. The pertinent portion read as follows:

> 9. On November 10, at 4:31, Brent asked J.R.D. to have dinner with him at Doc Holiday's restaurant in Williston.

Doc. ID #17, ¶9.

Neither the testimony at the evidentiary hearing or the text messages show there was any meeting, just a text that went to his daughter asking her to dinner. This is not a violation of the restraining order, as he was allowed to text her.

[¶49] The last allegation, in regard to the findings of fact, is that the district court erred when interpreting the finding that Brent's "compliance with the [restraining order], together with the voluntary committal, therapy, and counseling Mr. Dickson received thereafter," provided relevant evidence the court could take into consideration. Plaintiff seems to be alleging that it cannot be true Brent attended therapy and counseling, because the testimony regarding his therapy and counseling is sparse. This is incorrect. Again, it is not clear error for Plaintiff and the district court to have a difference of opinion on whether or not something occurred, and it is not clear error for Plaintiff to not believe Defendant's credibility while the district court does. See infra at ¶ 45.

CONCLUSION

[¶50] The district court's denial of Plaintiff's Motion to Modify Child Custody was proper in this matter. The district court considered all the pertinent statutes, presumptions, and rules. The order is proper in form and made proper conclusions. For these reasons, Defendant respectfully asks this Court to affirm the finding of the district court.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jennifer Dickson Plaintiff/Plaintiff, v. Brent Dickson, Defendant/ Defendant	Williams County Civil No. 53-2016-DM-340 Supreme Court No. 20170334

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
): ss
COUNTY OF WILLIAMS)

¶1. I, **Mattie Richardson**, being first duly sworn, state that on the 16 day of February, 2018, this affiant served the following documents:

1. Brief of Defendant Brent Dickson (Word and PDF versions)

Upon:

Clerk of Supreme Court
supclerkofcourt@ndcourts.gov

Thomas Kalil
thomas@pippinlawfirm.com

¶2. The above documents were served by electronic mail in an attachment and addressed to the above-named attorney at the e-mail address listed above.

Mattie Richardson

Subscribed and sworn to before me this 16 day of February, 2018.

ROBYN BOOTH
Notary Public
State of North Dakota
My Commission Expires September 20, 2022

Robyn Booth
Notary Public, State of North Dakota