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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jennifer L. Dickson,	)	
Plaintiff, ~~Appellee~~ Appellant,	)	Supreme Court No. 20170334
vs.	)	
Brent D. Dickson,	)	
Defendant, ~~Appellant~~ Appellee.	)	

REPLY BRIEF OF PLAINTIFF/APPELLANT, JENNIFER L. DICKSON

Appeal from District Court of Williams County
North West Judicial Court
District Court No. 53-2016-DM-00340
The Honorable Josh B. Rustad

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I. Argument

A. The District Court's Failure to Consider Evidence of Domestic Violence also extends to the requirements of N.D.C.C. 14-09-6.6 (5).

[¶1] In his brief, the Defendant argues that the Plaintiff failed to raise the requirements of N.D.C.C. 14-09-6.6(5), which states that:

> 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.
> (Emphasis added).

What the Defendant fails to grasp is that the entire argument of the Plaintiff is that the Court failed to properly consider the domestic violence perpetrated against the Plaintiff and her children by the Defendant. Had the court properly considered this evidence, as is required by North Dakota caselaw, the District Court would have determined that the requirements of N.D.C.C. 14-09-6.6(5) were met, and that the present environment of the children, being in the custody of a perpetrator of domestic violence, clearly endangered their physical and emotional health. As the Supreme Court recently noted in O'Hara v. Schneider, any act of domestic violence, regardless of whether the child is directly threatened, cannot be discounted. O'Hara v. Schneider, 2017 ND 159, ¶2-5, 897 N.W.2d 326 (N.D. 2017). The District Court should have followed this holding, and should have determined that the Defendant's actions constituted a danger to the children under N.D.C.C. 14-09-6.6(5).

[¶2] In Anderson v. Hensrud the North Dakota Supreme Court discussed the two step process of a motion to modify child custody in the context of allegations of domestic violence:

> Unlike an initial custody determination in which the trial court considers only the best interests and welfare of the child, a motion to modify custody requires a two-step analysis. First, the trial court must determine whether there has been a significant change in circumstances since the original custodial placement. If there has been a significant change in circumstances, then the trial court must determine whether the significant change compels, in the child's best interests, a change in custody. The two-step analysis reflects the "doctrinal aversion to changing the custody of a happy child who has been living with one parent for a substantial time." Here, the trial court articulated what it perceived to be competing considerations in this case: the context of a modification proceeding which presumes that the original custodial placement was correct, and the statutory presumption against awarding custody to a perpetrator of domestic violence absent circumstances which require that the violent parent receive custody.
>
> Competing considerations may exist, but the statutory presumption against awarding custody to a perpetrator of domestic violence is a presumption which can be overcome only by clear and convincing evidence that other circumstances require the child be placed with the violent parent. It applies over a presumption that the original custodial placement was correct, a presumption which may be overcome simply by proving by credible evidence that its nonexistence is more probable than its existence. Furthermore, if presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. In view of the legislative history surrounding section 14–09–06.2(1)(j), NDCC, the reasons for its enactment, and decisions such as *Heck v. Reed,* 529 N.W.2d 155 (N.D.1995), there is no doubt that the presumption against awarding custody of a child to a violent parent is founded upon weightier considerations of policy than is a presumption that the original custodial placement was correct.

548 N.W.2d 410, 412–13 (N.D. 1996) (internal citations omitted). In this case, the weightier considerations of policy discussed by the Supreme Court required the District Court to view the domestic violence allegations as paramount, both in terms of the significant change in circumstances and the best interest factors. The District Court's failure to do this is clear error and must be reversed.

B. The Defendant Engaged in Domestic Violence, and the Statutory Presumption Applies to this Conduct.

[¶3] In his brief, the Defendant argues that the domestic violence he engaged in was one incident and that it also did not rise to the statutory definition of domestic violence under North Dakota law. In this case, there can be no argument that the statutory presumption against awarding custody to a perpetrator of domestic violence does not apply; as this Court has held, as long as the Defendant's conduct comports with the statutory definition of "domestic violence," including that he was not acting in self-defense, the trial court must apply the presumption. *See* Anderson v. Hensrud, 548 N.W.2d 410, 414 (N.D. 1996). The Defendant's argument that there is only one incident of domestic violence is both factually wrong and legally irrelevant. Domestic violence can be exhibited through a pattern of conduct or by a single act. *Id.* Further, the Defendant has himself admitted, in his own sworn affidavit made under penalty of perjury, to at least one other incident where he sent a picture of a gun to the Plaintiff, and threatened to kill himself. (Doc Id. 38 at ¶8). This is clearly a pattern of behavior, and as the Supreme Court has written, "domestic violence is learned, assaultive or controlling behavior aimed at gaining another's compliance." Anderson 410, 414 Again, the Defendant himself admits that his sending of these pictures was intended to control the Plaintiff. (Trial Tr. At 20). This is clearly a pattern of domestic violence, involving the use of a dangerous weapon, and its is reasonably proximate to the hearing. This is domestic violence under North Dakota law, the District Court made a clear error when it discounted this violence. The statutory presumption must be applied in this case.

[¶4] The Defendant places great weight on the idea that the Defendant, being subject to a Domestic Violence Restraining Order, had already been subject to a "penalty" for his behavior, and that accordingly, the District Court felt this was punishment enough. Defendant's Brief at

¶33. If the Supreme Court were to uphold this idea, then the statutory presumption enacted by the North Dakota Legislature would mean nothing. The North Dakota Supreme Court, and the Legislature, have been extremely clear in setting out that when the statutory domestic violence presumption applies, the offending parent cannot have unsupervised parenting time with the children. Thus, the idea that the Defendant had somehow already been punished enough under the Restraining Order is completely contrary to North Dakota's statutes and case law. Further, it is actually expressly contradicted by N.D.C.C. 14-07.1-07, which states that any proceeding for a domestic violence protection order is in addition to any other civil or criminal remedies.

[¶5] Finally, the Defendant argues that the District Court's findings in this case are similar to those in the Tutlintseff case, which found that a defendant had taken steps and actions in correcting his domestic violence behavior. Defendant's Brief at ¶34. However, in that case, the Court found that the domestic violence did not involve any allegations of the use of a dangerous weapon or the infliction of serious bodily harm. Tulintseff v. Jacobsen, 2000 ND 147, ¶ 19, 615 N.W.2d 129. This is in stark contrast to the present case, which involves at least two incidents of the Defendant engaging in domestic violence with a firearm. The Defendant's behavior in this case must be taken seriously, and the Supreme Court must reverse the District Court's ruling and apply the statutory presumption.

II. Conclusion

[¶6] For these reasons, and for those presented in the Plaintiff's Appellant Brief, the Plaintiff requests that the Supreme Court grant the relief requested in the Plaintiff's Appellant Brief.

RESPECTFULLY SUBMITTED this 6th day of March, 2018.

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CERTIFICATE OF SERVICE

[¶7] I hereby certify that a true and correct copy of the foregoing Reply Brief of Plaintiff/Appellant, was served electronically on this 6th day of March addressed to:

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