20190196

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 31, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

MCKILEY WILBER,	)	Supreme Court No. 20190196
Plaintiff and Appellant,	)	District Court No. 08-2016-DM-00068
-vs-	)	
SARAH SCAFF,	)	
Defendant and Appellee.	)	

BRIEF OF APPELLEE SARAH SCAFF

Appeal from the Judgment entered

May 7, 2019

In and for the County of Burleigh, State of North Dakota, South Central Judicial District

Honorable James S. Hill, Judge of the District Court, Presiding

Matthew John Arthurs, ND Bar ID #06359
Attorney for Appellee
Arthurs Law
220 North Fourth Street
Bismarck, North Dakota 58501
(701) 426-8396
matt@arthurslaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPELLEE'S STATEMENT OF THE ISSUES

[¶1] Whether the District Court's determination that the Appellee, Sarah Scaff, should have primary residential responsibility for her child is clearly erroneous.

APPELLEE'S STATEMENT OF THE CASE

[¶2] Appellee agrees with the statement of the case presented by the Appellant in regard to its procedural history.

APPELLEE'S STATEMENT OF FACTS

[¶3] Trial in this matter was held on March 5, 2019, at the Morton County Courthouse in Mandan, North Dakota. At issue was the residential responsibility for the child of the parties, B.R.W., age five.

[¶4] Each party had differing litigation strategies at trial. Plaintiff and Appellant McKiley Wilber ("McKiley') focused heavily on attempting to blacken the character and capacity of Defendant and Appellee Sarah Scaff ("Scaff"). App. 57 at ¶29. Less focus was placed on presenting evidence illustrating the Plaintiff's ability as a parent, outside, perhaps, his ability to economically outperform Sarah. Id.. Sarah's strategy, on the other hand, was to showcase her abilities as a parent and to demonstrate why it is in B.R.W.'s best interests for her to have residential responsibility.

[¶5] McKiley's attempts to blacken Sarah included allegations that she had unjustifiably had withheld parenting time from him, that she lives a nomadic, financially unstable lifestyle, that she exposed B.R.W. to Corbin Styron, the father of B.R.W.'s half sister, and that her home is unsafe.

[¶6] A few weeks prior to trial, M.R.W. had bruised face and swollen eyelid when Sarah picked him up from McKiley's care. Sarah took M.R.W. to the hospital, which contacted law enforcement and social services. Through testimony of witnesses and the

introduction of text messages, McKiley went to great lengths at trial to show that Sarah had denied him parenting time while the case was being investigated. Sarah did not dispute that she had withheld parenting time, but was able to establish that her withholding of parenting time had stopped. The District court determined that Sarah's temporary denial of parenting time under the circumstances was legitimate, and this effort to blacken Sarah had fallen flat. App 62.

[¶7] McKiley next attempted to portray Sarah as having an unsteady and chaotic living environment. While McKiley was able to establish that Sarah had moved four times within the last five years, he was unable to establish such outlandish claims as she had lived in a camper on a Wal Mart parking lot. App 55. As to this issue, the District Court found that Sarah's lifestyle is not "nomadic or haphazard as Plaintiff Wilber attempts to suggest" Id., and this effort to blacken Sarah had also fallen flat.

[¶8] Next, McKiley attempted to blacken Sarah's character by her association with Corbin Styron, the father of B.R.W.'s half sister. App. 55. In this effort, McKiley did not subpoena Styron to testify, as he could have. He did not offer certified copies of Mr. Styron's criminal judgments into the record, as he could have. Rather, he asked the District Court to ferret out Styron's criminal history on its own and to take judicial notice of what it found. The District Court simply declined to do so.

[¶9] Though Sarah acknowledged that Styron has a drug history, the District Court found that McKiley was unable to establish that Styron posed a danger to B.R.W.. App. 65. Again, McKiley's attempt to blacken the character of his daughter's mother failed.

[¶10] Finally, McKiley attempted to show the District Court that Sarah's home was unsafe. To establish this, McKiley subpoenaed the Burleigh County Social Services

worker assigned to investigate the case regarding B.R.W. *while her investigation was still pending*. The caseworker, Taylor Isham, described visits that she made to Sarah's home, where she noted pet odors, an overfilled trash can, and a cluttered sink area. Transcript at 80-81. Isham did not testify that she felt that the home was unsafe, however, and no effort had been made to remove Sarah's children from her care due to safety concerns. In fact, the only recommendation that Isham had testified to was a class that deals with parents separating. Id. At 84. In response to this attempt, Sarah introduced photographic evidence of her tidy, clean house and uncontested testimony regarding her cleaning habits. Yet again, this effort by McKiley to blacken Sarah fell flat.

[¶11] McKiley's attempt to illustrate his abilities as a parent also fell flat at trial. The District Court specifically found that his testimony was "soft" and "devoid of emotion". App. 57 at ¶29. McKiley's testimony painted a picture of a bleak world where B.R.W. would have a daily routine of being woken, taken to daycare, picked up from daycare, then staying home alone with his father. Transcript 110-112. Once back at home, B.R.W. is left to color, watch TV or play with toys by himself, while McKiley does independent activities in the same room. Id. B.R.W.'s meals for those days with his father consist of frozen chicken nuggets, chicken strips, hot dogs, bologna sandwiches and, despite McKiley's knowledge of his son's history of dairy sensitivity, pizza with cheese, and milk. Transcript 115-116. Some times B.R.W. gets vegetables, other times not. Id.

[¶12] By contrast, Sarah's strategy at trial was to showcase her strengths as a parent and illustrate her bond with B.R.W. She testified about a daily routine that included B.R.W. having responsibilities and expectations. Transcript at 128. He is fed a home cooked

balanced meal. Id. Care is made to keep dairy out of his diet. Id at 129. Sarah runs a daycare at her house and the child she watches comes in at 8:30. Id at 130. B.R.W., his sister, Sarah and the daycare child spend the morning in free play. Id. Many of the play activities have educational value, such as playing with an alphabet board, a writing board, and pattern copy board. Id. Sarah work with B.R.W. during this morning time to help him learn his letters and numbers, and has taught him to write his name. Id. at 131.

[¶13] Sarah has also created learning toys herself, such as a color coded clock to teach B.R.W how to tell time, and had created a pre-school curriculum for him. Id. She created spelling and reading worksheets. Sarah testified that she typically spends two or three hours a day working with B.R.W. on his academic skills. Id. At 132. Sarah includes playful, hands on lessons to introduce B.R.W. to science as well. Id.

[¶14] When with Sarah, B.R.W. gets a homemade lunch that caters to his dairy sensitivity. Id at 134. After that, Sara and B.R.W read books together until it's time for dinner, where he usually receives another home cooked nutritious and diet appropriate meal. Id. At 135.

[¶15] Sarah also testified about her home, the way that it is set up, and provided photos to the District Court to give it a more clear picture of her home environment.

[¶16] Regarding Sarah's testimony, the District Court observed:

> "Sarah Scaff presents a balanced picture in her relationship with B. R.W. The court finds she has a healthy and productive relationship with her son. He is the complete focus of her parenting and she makes B.R.W. the absolute priority in her life. …. The court finds that Sarah has a strong understanding of the needs of B.R.W. and is attentive in every respect to his social needs and learning environment."

App. 54.

[¶17] It should be noted that Paragraph 16 of the Appellant's Statement of Facts in his brief contains some erroneous material. It is noted here because portions of this paragraph are pasted in several places within the Appellant's brief. The portion in question reads:

> Sarah testified that she could adequately provide for B.R.W., she also testified that her rent alone was $800 per month, leaving her only $200 per month. Transcript 51:7-15. Sarah testified that she had to "re-evaluate and changes to make regarding this," but offered no plan to do so. Transcript 51:18-23
>
> (emphasis added)

The actual transcript reads as follows:

Q. So that only leaves you 200 a month extra. How do you support two kids and yourself on 200 a month?
A. Corbin was helping me. Obviously, now I have a lot to re-evaluate and changes to make regarding this. I am either going to possibly watch another child or I will go back to McDonald's and manage again.
Q. Have you looked into either of those yet?
A. Just slightly.
Q. What do you mean?
A. I have just called my old general manager at McDonald's and seeing if they would take me back, and they will if I decide to do that. I just like to spend as much time with my children as I can. Obviously, of course, I'm going to have bills and I need to figure all of that out now Transcript 51,52.
(emphasis added)

[¶18] It is unknown why the Appellant would assert several times in his brief that Sarah offered *no* plan to improve her financial situation when Sarah clearly, obviously and plainly did so.

STANDARD OF REVIEW

[¶19] The standard of review in residential responsibility cases was concisely stated by the Court in Brouillet v. Brouillet, 2016 ND 40, 875 N.W.2d 485 (N.D. 2016):

> [The District] court's award of primary residential responsibility is a finding of fact, which will not be reversed on appeal unless it is clearly erroneous or it is not sufficiently specific to show the factual basis for the decision. See, e.g., Rustad v. Rustad, 2013 ND 185, ¶ 5, 838 N.W.2d 421; Wolt v. Wolt, 2010 ND 26, ¶ 7, 778 N.W.2d 786. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or, although there is some evidence to support it, on the entire record, we are left with a definite and firm conviction a mistake has been made." Doll v. Doll, 2011 ND 24, ¶ 6, 794 N.W.2d 425. "Under the clearly erroneous standard, we do not reweigh the evidence nor reassess the credibility of witnesses, and we will not retry a custody case or substitute our judgment for a district court's initial custody decision merely because we might have reached a different result." Wolt, at ¶ 7 (quotation marks omitted). The district court has substantial discretion in making a custody determination, but it must consider all of the best-interest factors. Id. at ¶ 9. "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." Id.

Brouillet at ¶ 7 , Citing Schlieve v. Schlieve, 2014 ND 107, ¶ 8, 846 N.W.2d 733.

ARGUMENT

The District Court's determination that the Appellee Sarah Scaff should have primary residential responsibility for her child is not clearly erroneous.

[¶20] McKiley argues on appeal that the District Court's findings regarding factors a, b, c, d, h, and k under N.D.C.C. § 14-09-06.2(1) are clearly erroneous, but only provides arguments regarding a, b, d, h, and k.. It will be presumed that McKiley concedes that the District Court did not err when it found that factor c favors Sarah.

[¶21] In respect to factor a, which the District Court favored Sarah on, McKiley believes that the Court erred by not finding that this factor favored neither parent. McKiley's chief complaint seems to be that the District Court did not sufficiently explain its finding. Sarah disagrees. Sarah notes that the District Court focused on the current ability of Sarah to better provide guidance for B.R.W in accordance with his developmental needs. App. 58 at 38. McKiley explains that the reason why Sarah was

able to provide more detail to the District Court regarding her ability to provide superior guidance for B.R.W. is because she ran a daycare. McKiley's lack of ability to illustrate why he was unable to provide equivalent nurturing and guidance to B.R.W has less to do with Sarah's daycare and more to do with a failure to present more compelling evidence at trial. The District Court made no error on this factor based on the evidence available.

[¶22] McKiley next argues that factor b, which talks of the abilities of the parties to provide adequate food, clothing, shelter, medical care, and a safe environment, should have been found in his favor, rather than for either party. He bases this view on two arguments. His first argument, that Sarah has no plan to improve her financial situation, as discussed above, is demonstrably and obviously ridiculous, because she plainly testified otherwise. His second argument regarding this factor seems to be that the Court somehow erred when it observed that any cleanliness issues raised by social worker Isham had been resolved (after reviewing photographs and testimony that showed the cleanliness issues raised by social worker Isham had been resolved). It is noted that had social worker Isham believed that B.R.W.'s environment was unsafe rather than just messy, Burleigh County Social Services would have likely removed B.R.W. from Sarah's care. The District Court's observation that McKiley's concern for B.R.W.'s safety under these circumstances is exaggerated is a valid one.

[¶23] McKiley next argues that factor d, the sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community, should have been found to favor McKiley rather than neither parent, as the District Court had found. McKiley seems to argue that because Sarah moved four

times in nearly five years, the District Court should have applied the reasoning of Klein v. Larson, 2006 ND 236, 724 N.W.2d 565 (2006), a case where a parent moved as many as ten times within a year and a half. The District Court's determination that McKiley's concern about Sarah's four moves over nearly five years is exaggerated is not unreasonable. Furthermore, it is arguable that this factor would actually factor Sarah, since taking B.R.W. out of Sarah's home would disrupt his sibling group with his half sister. In addition, McKiley again uses the demonstrably wrong argument that Sarah does not have a plan to improve her financial situation here, in an attempt to show a lack of stability on Sarah's part.

[¶24] It is noted that McKiley's brief on this factor includes facts that were not necessarily in evidence. McKiley refers to the hearsay statement of Detective Niall of the Bismarck Police Department that had been tucked into Isham's social services case notes, which had been admitted into evidence over Sarah's objections. McKiley did not point out this statement to the District Court, and should not then fault the District Court for failing to ferret it out. Simply put, the District Court made no clear error regarding this factor.

[¶25] McKiley next argues that factor h, which speaks to the home, school, and community records of the child and the potential effect of any change, should have been found to favor McKiley rather than Sarah. McKiley's rationale is that the District Court made insufficient findings regarding this issue and that, if anything, McKiley should have been favored here because of Sarah's four moves in five years. While the Court's reasoning on this factor is sparse, the Court's previous finding that McKiley exaggerates

the impact of Sarah's four moves in five years still applies. If anything, any error here regards insufficient findings, not the ultimate determination.

[¶26] McKiley next argues that The District Court's findings were clearly erroneous regarding factor k.: the interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. McKiley argues that the court wholly ignores the evidence and testimony presented in the case, which favor McKiley regarding the father of B.R.W.'s half sister, one Corbin Styron, who McKiley contends is some sort of bad hombre.

[¶27] Frankly, a litigant in a residential responsibility action has the burden of persuading the court that a factor under N.D.C.C. § 14-09-06.2(1) weighs in his favor. That burden is not met when one fails to present evidence sufficient enough to support one's argument. McKiley failed to enter Mr. Corbin's criminal history into the record, instead insisting that the Court ferret it out for itself. In addition, McKiley failed to show that Mr. Corbin was currently residing in, present in, or currently frequenting Sarah's place of residence. Sarah's honest testimony that she will continue to have contact with Mr. Styron due to him being the father of her other child does not mean that she and Mr. Styron will have contact at Sarah's home, or anywhere near B.R.W. Absent this type of evidence, the Court did not err when it determined that this factor favored neither parent. Again it is noted that McKiley attempts to introduce to this Court facts that are not necessarily in evidence by providing this Court with all of Mr. Styron's North Dakota criminal case numbers. As they were not part of the original record, Sarah resists their

consideration and urges the Justices of the North Dakota Supreme Court to not ferret out evidence that was outside of what the District Court had originally considered.

[¶28] As an aside, McKiley complains that he should not have to burden all the transportation costs associated with his parenting time. McKiley seems to argue that because New Leipzig is eighty to ninety miles from Bismarck , the District Court should have applied the reasoning of Loll v. Loll, 1997 ND 51, 561 N.W.2d 625, a case where one party lived in Wahpeton and the other party lived in Missouri. It is not known why McKiley wants to take resources from Sarah in order to facilitate his parenting time, but the notion that the journey from New Leipzig to Bismarck is comparable with the journey from Wahpeton to Missouri is absurd.

[¶29] Finally, McKiley frivolously argues that The District Court's Findings of Fact and Judgment are clearly erroneous because, based on the entire record, it is clear a mistake has been made. His argument is absurd because he has conceded that factor c of N.D.C.C. § 14-09-06.2(1) favors Sarah. As no one factor in N.D.C.C. § 14-09-06.2(1) is determinative, a finding for Sarah regarding factor c alone would be enough to justify the District Court's ultimate decision.

CONCLUSION

[¶30] The findings of the district court were not clearly erroneous. McKiley's attempts to have this Court reweigh the evidence in this matter to his favor must be rejected. The findings of the District Court should be affirmed.

[¶31] CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee, and the author of this Brief hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 14 pages.

Respectfully submitted this 31st day of October 2019.

Matthew John Arthurs, ND Bar ID #06359
Attorney for Appellant
Arthurs Law
220 North Fourth Street
Bismarck, North Dakota 58501
(701) 426-8396
matt@arthurslaw.com

ATTORNEY'S CERTIFICATE OF SERVICE

[¶32] The undersigned hereby certifies that a true and correct copy of the foregoing document, pdf format, was on the 31st day of October 2019, emailed to:

Jennifer Goos
Attorney for Appellant
Beulaw3@westriv.com

Matthew John Arthurs, ND Bar ID #06359
Attorney for Appellee
Arthurs Law
220 North Fourth Street
Bismarck, North Dakota 58501
(701) 426-8396
matt@arthurslaw.com

[¶33] The undersigned hereby certifies that a true and correct copy of the foregoing document, in pdf documents, on31st day of October 2019, was emailed to:

Ms. Penny L. Miller, Esq.
Clerk of the Supreme Court
Supreme Court
Judicial Wing, 1st Floor
600 E. Boulevard Ave., Dept. 180
Bismarck, ND 58505-0530
supclerkofcourt@ndcourts.gov

Matthew John Arthurs, ND Bar ID #06359
Attorney for Appellee
Arthurs Law
220 North Fourth Street
Bismarck, North Dakota 58501
(701) 426-8396
matt@arthurslaw.com

ATTORNEY'S CERTIFICATE OF SERVICE

[¶32] The undersigned hereby certifies that a true and correct copy of the foregoing document, pdf format, was on the 7th day of November 2019, emailed to:

Jennifer Goos
Attorney for Appellant
Beulaw3@westriv.com

Matthew John Arthurs, ND Bar ID #06359
Attorney for Appellee
Arthurs Law
220 North Fourth Street
Bismarck, North Dakota 58501
(701) 426-8396
matt@arthurslaw.com

[¶33] The undersigned hereby certifies that a true and correct copy of the foregoing document, in pdf documents, on the 7th day of November 2019, was emailed to:

Ms. Penny L. Miller, Esq.
Clerk of the Supreme Court
Supreme Court
Judicial Wing, 1st Floor
600 E. Boulevard Ave., Dept. 180
Bismarck, ND 58505-0530
supclerkofcourt@ndcourts.gov

Matthew John Arthurs, ND Bar ID #06359
Attorney for Appellee
Arthurs Law
220 North Fourth Street
Bismarck, North Dakota 58501
(701) 426-8396
matt@arthurslaw.com