

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

| | | |
|----------------------|---|-----------------------------------|
| Adam G. Sather, |) | |
| |) | Supreme Court No. 20200137 |
| Plaintiff/Appellee, |) | |
| |) | |
| vs. |) | |
| |) | |
| Amber M. Sather, |) | Cass County District Court |
| |) | Civil No. 09-2019-DM-00781 |
| Defendant/Appellant. |) | |

**APPEAL FROM THE
DISTRICT COURT OF THE EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE FRANK L. RACEK PRESIDING**

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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 August 26, 2020
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[¶3]STATEMENT OF ISSUES

- I. [¶4]The District Court Erred as a Matter of Law in Failing to Include in Its Parenting Plan the Statutorily Required Provisions Pursuant to Sections 14-09-07, 14-09-30(2), and 14-09-31 of the North Dakota Century Code.
 - A. [¶5]Decision-Making Responsibility
 - B. [¶6]Dispute Resolution
 - C. [¶7]Transportation and Exchanges
 - D. [¶8]Summer Parenting Time
 - E. [¶9]Children's Rights and Residence of Children
- II. [¶10]The District Court's Failure to Award Extended Summer Parenting Time to the Appellant is Clearly Erroneous.

[¶11]STATEMENT OF THE CASE

[¶12]This is an appeal from the Cass County District Court from the Amended Order for Judgment entered on March 3, 2020 (App. 87), and Judgment entered on March 5, 2020 (App. 106).

[¶13]The Appellee ("Adam") initiated this action via a Complaint filed on July 23, 2019. (App. 7). Adam filed a Motion for Interim Relief on August 6, 2019. (App. 13). The State of North Dakota filed its Notice as a Real Party in Interest on August 13, 2019. (App. 22). The Appellant ("Amber") filed her Answer and Counterclaim (App. 24), as well as a Responsive Affidavit (App. 28) on August 14, 2019. Amber filed a Supplemental Affidavit on August 29, 2019. (App. 49). Adam filed a Supplemental Affidavit on September 24, 2019. (App. 54).

¶14] On September 25, 2019, a hearing was held on Adam's Motion for Interim Relief wherein the parties stipulated to an interim parenting time schedule. (Sept. 25 Tr. 8:14 – 10:6). An Interim Order was entered on October 7, 2019. (App. 57). A Pretrial Conference was held on December 26, 2019. (App. 4). A one (1) day court trial was held on January 17, 2020, wherein the details of the parties' stipulated result was read into the record. (Jan. 17 Tr. 2:9 – 7:22). Adam filed a proposed Order for Judgment on February 19, 2020, and Amber filed an Objection to said proposed Order on February 19, 2020. (App. 62). An Order for Judgment was entered on February 19, 2020 (App. 76), and a Notice of Entry of Order was entered on February 20, 2020. (App. 85).

¶15] Amber objected to Adam's proposed Order for Judgment as the Order: 1) contained language regarding the apportionment of extracurricular and daycare costs that was not agreed to by the parties; 2) did not contain the agreed upon language regarding equal parenting time during the summer months; and 3) did not contain the statutorily required provisions regarding decision-making responsibility, parental rights, children's rights, residence of the children, and resolution of conflict. (App. 71-72).

¶16] A hearing was held on Amber's Objection to the Proposed Order for Judgment on February 28, 2020. The District Court removed the paragraph concerning apportionment of the children's expenses (Feb. 28 Tr. 2:21-23), the court ordered the statutory language regarding parental rights, children's rights, and residence of the children be added to the Judgment (Feb. 28 Tr. 3:21-25), but the District Court declined to add provisions regarding decision-making responsibility. (Feb. 28 Tr. 6:3-12).

¶17] An Amended Order for Judgment was entered on March 3, 2020. (App. 87). Judgment was entered on March 5, 2020 (App. 106), and Notice of Entry of Judgment was

entered on March 9, 2020. (App. 115). A Notice that the State of North Dakota is No Longer a Real Party in Interest was filed on May 12, 2020. (App. 116).

[¶18]In the Judgment entered on March 5, 2020, the only provision added was the language from Section 14-09-32 of the North Dakota Century Code regarding parental rights and responsibilities. The Judgment does not address Sections 14-09-07; 14-09-30(2)(a), (b), (d)(3), (e)-(g); 14-09-31; nor does it include language regarding the children's rights.

[¶19]Amber filed her Notice of Appeal (App. 117), and Order for Transcript (App. 120), on May 14, 2020. The Notice of Filing of Notice of Appeal was filed on May 14, 2020. (App. 122). The Clerk's Certificate on Appeal was entered on June 4, 2020. (App. 124).

[¶20]**STATEMENT OF FACTS**

[¶21]The parties were married on September 28, 2001, and separated on April 21, 2019. (App. 62). The parties have three minor children, namely M.O.S., born 2003; J.S.S., born 2009; and V.E.S., born 2012. (App. 62). M.O.S. is currently in the custody of the State of North Dakota. (App. 62).

[¶22]Adam was awarded primary residential responsibility in both the Interim Order and the final Judgment. (App. 57, 107). Decision-making responsibility was not addressed in either the Interim Order or the final Judgment. The parties agreed to equal, week-on/week-off parenting time for the summer months, but that was not incorporated in the final Judgment. (App. 74).

[¶23] **SUMMARY OF THE ARGUMENT**

[¶24]The District Court failed to make required findings with respect to decision-making responsibility, the rights of the children, transportation and exchange of the children, summer parenting time, methods for resolving disputes, as well as the residence of the children as delineated in Section 14-09-07 of the North Dakota Century Code.

[¶25]The District Court's failure to make required findings is an error as a matter of law. Questions of law are subject to a de novo standard of review. The District Court's failure to include in its Order for Judgment provisions for decision-making responsibility, the children's rights, the manner in which the children will be transported and exchanged, the framework for resolving disputes, as well as the provisions enumerated in Section 14-09-07 of the North Dakota Century Code is an error as a matter of law.

[¶26]This matter should be remanded back to the district court with specific provisions for the entry of Amended Findings wherein the parties are awarded joint decision-making responsibility, equal summer parenting time, as well as incorporating provisions for transportation, exchange, children's rights, dispute resolution, and residency.

[¶27] **ARGUMENT**

[¶28] **I. The District Court Erred as a Matter of Law in Failing to Include in Its Parenting Plan the Statutorily Required Provisions Pursuant to Sections 14-09-07, 14-09-30(2), and 14-09-31 of the North Dakota Century Code.**

[¶29]Section 14-09-30(1) of the North Dakota Century Code States:

In any proceeding to establish or modify a judgment providing for parenting time with a child, the parents shall develop and file with the court a parenting plan to be included in the court's decree. If the parents are unable to agree on a parenting

plan, the court shall issue a parenting plan considering the best interests of the child.

[¶30]Section 14-09-30(2) of the North Dakota Century Code States:

A parenting plan must include, at a minimum, provisions regarding the following or an explanation as to why a provision is not included:

- a. Decisionmaking responsibility relative to:
 - (1) Routine or day-to-day decisions; and*
 - (2) Major decisions such as education, health care, and spiritual development;**
- b. Information sharing and access, including telephone and electronic access;*
- c. Legal residence of a child for school attendance;*
- d. Residential responsibility, parenting time, and parenting schedule, including:
 - (1) Holidays and days off from school, birthday, and vacation planning;*
 - (2) Weekends and weekdays; and*
 - (3) Summers;**
- e. Transportation and exchange of the child, considering the safety of the parties;*
- f. Procedure for review and adjustment of the plan; and*
- g. Methods for resolving disputes.*

[¶31]**A. Decision-Making Responsibility.**

[¶32]In Hoff v. Gututala-Hoff, 2018 ND 115, 910 N.W.2d 896, this court found,

*If the parents are unable to agree on a parenting plan, the court shall issue a parenting plan considering the best interests of the child. A parenting plan **must** include a provision relating to decision-making responsibility, and that responsibility must be allocated in the best interests of the child... When a trial court does not make required findings, it errs as a matter of law, and it is necessary to remand for additional findings. (Emphasis Added).*

Hoff at ¶6.

[¶33]As is frequently the case in cases involving divorce and residential responsibility, the record in this matter is replete with examples of the parties disagreeing on decisions involving the minor children both routine and major. The District Court's Order for Judgment, as well as the final Judgment include no provisions for decision-making responsibility.

[¶34]Amber raised the issue regarding the lack of a provision regarding decision-making responsibility in her Objection to Adam's proposed Order for Judgment. The

District Court overruled Amber's objection despite the statutory requirement as to the inclusion of provision regarding decision-making responsibility. Section 14-09-30 is not ambiguous as to what must, at a minimum, be included in a parenting plan.

¶35]Decisions regarding everything from the children's haircuts to school attendance must be made, and absent a clear delineation of shared authority, the District Court has done nothing but set the parties squarely on the path to future litigation. Section 14-09-30 is clear in its mandate as to what must be included in a parenting plan, and the District Court failed in fulfilling this mandate.

¶36]**B. Dispute Resolution.**

¶37]Section 14-09-31(3) of the North Dakota Century Code states,

An allocation of decision-making responsibility is not in the best interests of the child unless the order includes a method of resolving disputes when parents do not agree on an issue.

¶38]Equally important to defining the decision-making responsibility of each parent is the inclusion of a mechanism for dealing with those situations wherein the parties are unable to agree. In Dick v. Erman, 2019 ND 54, 923 N.W.2d 137, this court stated, "[w]ith two parents, there is always a potential for the parties to reach a point of impasse when it comes to decisions about their child. Eventually a decision must be made..." Dick at ¶15.

¶39]The District Court failed to include any provisions regarding dispute resolutions be it the appointment of a parenting coordinator, requirements for mediation or other alternative dispute resolution, or as in Dick, wherein the parties were required to consult a qualified professional. A dispute resolution provision is necessary, as well as statutorily required to allow the parties to effectively co-parent.

¶40]C. Transportation and Exchange.

¶41]In State v. Andres, 2016 N.D. 90, 879 N.W.2d 464, this court stated,

The district court judgment includes, "[t]he legal residence of [the child] for school purposes is Bismarck, North Dakota." The judgment provides when and at what time exchanges will take place between Strating and Andres but does not provide which party is to travel to the other, how they will do so or where they shall meet. Because N.D.C.C. § 14-09-30(2) requires certain provisions to be included in a parenting plan "at a minimum," and because those provisions include transportation and exchange and the child's legal residence for school attendance, the district court's failure to include them was erroneous.

¶42]In the present matter, the Judgment provides no specific times for the start or end of Amber's parenting time save the holiday schedule. There are no details as to the location wherein exchanges for parenting time will occur, who may conduct the said parenting time exchanges, or the parties' responsibilities for transporting the children. As this court noted in Andres,

These provisions are especially important in cases, such as this, when the court creates a parenting plan as a result of the parents' inability to agree to one themselves. On remand, the district court must include these provisions or provide an explanation for their omission.

Andres at ¶11.

¶43]D. Summer Parenting Time.

¶44]While the District's Court's Order and Judgment provides for parenting time during the school year, holidays, and days off from school, there is no mention of summer parenting time. This court has found that,

...[a]bsent a reason for denying it, some form of extended summer visitation with a fit non-custodial parent is routinely awarded if a child is old enough. We have remanded for reconsideration a denial of extended summer visitation absent an explanation or reason for the trial court's failure to grant some sort of extended summer visitation.

Rustad v. Baumgartner, 2018 ND 268, 8, 920 N.W.2d 465, 470.

[¶45]The parties agreed to equal parenting time in the summer months, and despite Amber's efforts to bring that fact to the court's attention, as well as the requirement that a provision of summer parenting time be included in the court's parenting plan, the District Court failed to include any provision regarding summer parenting time. The summer months are often when non-custodial parents are able to spend the most amount of time with their children, and the absence of a provision for extended summer parenting time must be corrected.

[¶46]**E. Children's Rights and Residence of Children.**

[¶47]The District Court ordered that language regarding the children's rights and residency of the children should be included in the Judgment. (Feb. 28 Tr. 3:21-24). However, said language was not included in the final Judgment. The language found in Section 14-09-07 is relevant and important because it puts both parents on notice as to potential relocation, as well as certain triggering events for potential modification. The customary language regarding children's rights is equally important as a compass for parents in their interactions with one another and the children.

[¶48]**CONCLUSION**

[¶49] The District Court's failure to include provisions for decision-making responsibility, the children's rights, the manner in which the children will be transported and exchanged, the framework for resolving disputes, as well as the provisions enumerated in Section 14-09-07 of the North Dakota Century Code, is an error as a matter of law. This matter should be remanded to the district court with specific provisions for the entry of Amended Findings wherein the parties are awarded joint decision-making responsibility,

equal summer parenting time, as well as incorporating provisions for transportation, exchange, children's rights, dispute resolution, and residency.

[¶50] ORAL ARGUMENT REQUESTED

[¶51] Amber respectfully requests oral argument in this matter via reliable electronic means. Oral argument will be helpful to this Court in allowing for further clarification of facts and legal issues via argument by questioning of counsel.

[¶52] CERTIFICATE OF COMPLIANCE

[¶53] Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of twelve (12) pages.

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| |) | |

CERTIFICATE OF SERVICE

1. I hereby certify that on August 26, 2020, true and correct copies of the following documents was served via U.S. Mail, email, and the North Dakota Supreme Court E-Filing Portal:

- A. **Brief of Appellant**
- B. **Appendix to Brief of the Appellant**

2. That copies of the foregoing were sent to the following addresses:

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3. To the best of this affiant's knowledge, the mailing and email addresses above given are the actual addresses of the parties intended to be so served. That the above documents were duly served in accordance with the provisions of the North Dakota Rules of Civil and Appellate Procedure.

Dated this 26th day of August, 2020.

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