20210319
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 25, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20210319
Williams County District Court No. 53-2018-DM-00166

Brittany Nicole Eikom, Plaintiff and Appellee

v.

Chase Edward Eikom, Defendant and Appellant

Appeal from Second Amended Judgment dated October 28th, 2021
In District Court, Williams County, State of North Dakota
The Honorable Paul Jacobson, Presiding

BRIEF OF APPELLEE

BRITTANY NICOLE EIKOM

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in not granting Appellant's request for parenting time on certain holidays.

II. Whether the district court erred in not granting Appellant any extended summer parenting time in the first year.

III. Whether the district court erred in establishing a requirement that Appellant not to miss more than four weekends during a 365 day period as a basis for expanding or limiting parenting time.

STATEMENT OF THE FACTS

[1] Chase Eikom (hereinafter "Chase") and Brittany Eikom, n.k.a. Brittany Williamson (hereinafter "Brittany") were divorced on May 25, 2018. Prior to filing the divorce, Brittany had requested that the parties go to counseling and work on their marriage. *Transcript of Evidentiary Hearing*, P. 28, Lines 24-25. Chase instead left the home and did not return. P. 28, Lines 19-20. The divorce action was commenced. Brittany signed the Marital Termination Agreement and the Parenting Plan on April 19, 2018 and Chase signed the same documents on April 20, 2018. *Marital Termination Agreement*, App. P. 11, Index #5 and *North Dakota parenting plan* App. 21, Index # 6. Pursuant to the agreement, Chase's parenting time was supervised. On February 19, 2020, Brittany agreed to Chase having unsupervised parenting time. *Stipulation to Amend Judgment*, App. P 48, Index #37.

[2] Chase was on call twenty-four hours a day, seven days a week, when the Judgment was amended on February 27, 2020. *Transcript of Evidentiary Hearing,* P.7, Lines 21-25, P. 8, Line 1. Accordingly, Chase did not have a set parenting time schedule. Chase would call or text Brittany last minute and state he wanted time and Brittany would work with Chase to get him as much time as she could. *Transcript of Evidentiary Hearing,* P.20, Lines 7-17. Brittany was not always able to accommodate Chase's last-minute requests. B.D.E. sometimes already had other plans. *Affidavit of Brittany Williamson* ¶ 5, App. 68, Index #61. Brittany would however try to work with Chase to find a different time that would work. *Affidavit of Brittany Williamson* ¶ 8, App. 68, Index #61. Brittany also took it upon herself to call Chase when she knew he wasn't working to see if he wanted to spend time with B.D.E., but Chase refused. *Affidavit of Brittany Williamson* ¶ 6, App. 68, Index #61.

[3] Brittany agreed that a set parenting time would be better and agreed that every other weekend parenting time for Chase was appropriate. *Transcript of Evidentiary Hearing,* P.21, Lines 18-21

[4] The parties disagreed on Chase's holiday parenting time and summer parenting time. *Transcript of Evidentiary Hearing,* P.21, Lines 22-24

[5] Brittany informed the district court that Chase does not celebrate holidays and the child would likely just be sitting on the couch watching T.V. Chase did not deny Brittany's allegations. *Transcript of Evidentiary Hearing,* P.21, Line 25, P. 22, Lines 1-16, P. 32, Lines 7-8, P. 32, Lines 12-18, P. 32, Line 25, P. 33, lines 1-5.

[6] Chase had not, before his motion, requested any holidays with B.D.E. *Transcript of Evidentiary Hearing,* P. 32, Line 25, P. 33, lines 1-5.

[7] If Chase did in fact celebrate holidays, he could have informed the district court.

[8] Chase did not provide the district court with any testimony as to what he does during the holidays or what he would do if he was awarded holidays.

[9] Brittany and several of her family members celebrate holidays together and B.D.E. has a great time at their holidays. *Transcript of Evidentiary Hearing*, P. 22, Lines 17-25, P. 23, Lines 1-8.

[10] Chase has moved several times since the parties separated and does not let Brittany know where he has moved to. *Transcript of Evidentiary Hearing* P. 37, Lines 19-25, P. 38, Line 1.

[11] Chase has changed jobs several times in the past three years. *Transcript of Evidentiary Hearing* P. 37, Lines 19-25, P. 38, Lines 1-13.

[12] Chase only asked to spend three overnights with B.D.E. last summer. *Declaration of Chase Eikom* ¶ 4, App. 64, Index #60. *Affidavit of Brittany Williamson* ¶ 7, App. 68, Index #61.

[13] Chase did not inform the district court of anything he does with B.D.E. during the summer or what he would do with B.D.E. during the summer if he was awarded more time.

[14] Chase had wanted to terminate his rights to the child during the divorce. *Transcript of Evidentiary Hearing* P. 36, Lines 2-3.

[15] In his Appellant Brief, Chase incorrectly stated that the district court refused to permit rebuttal testimony from Chase. *Brief of Defendant-Appellant*, ¶ 8.

[16] After Brittany's testimony, the district court specifically asked, "I believe I've heard all the witnesses now, correct?" *Transcript of Evidentiary Hearing* P. 39, Lines17-19. Counsel for Chase replied, "yes". *Transcript of Evidentiary Hearing* P. 39, Line 20. Had Chase wanted to rebut anything stated by Brittany he could have done so at that time. Chase also had opportunity to respond to Brittany's affidavit during his direct testimony had he chosen to do so.

STANDARD OF REVIEW

[17] The issues before the Court are all related to determination of parenting time.

[18] The standard of review for determination of parenting time is as follows:

> Determination of parenting time is a finding of fact subject to the clearly erroneous standard of review. *Rustad v. Baumgartner*, 2018 ND 268, ¶ 8, 920 N.W.2d 465 (citing *Rustad v. Rustad*, 2014 ND 148, ¶20, 849 N.W.2d 607).

[19] A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support, or if, upon review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Wigginton v.*

Wigginton, 2005 N.D. 31 ¶ 8, 692 N.W.2d 108 (citing *Berg v. Berg*, 2002 ND 69, ¶ 4, 642 N.W.2d 899).

ARGUMENT

I. The District Court Did Not Err in Not Awarding Appellant the Holiday Parenting He Defines as Major Holidays.

[20] The District Court did not grant Chase any of the major holidays because Chase does not celebrate the major holidays. Even if Chase is correct in his claim that alternating holidays is customary, the district court decided that it was in the child's best interests to spend holidays with people that celebrated the holiday.

[21] Despite what Chase claims, the district court did not just provide a random reason. All the evidence before the district court showed that Chase did not celebrate the holidays and there was concern that the child would just be sitting on the couch watching T.V. It is self-evident that it is in a child's best interests to be with the parent that is going to celebrate the holiday. The child can sit on a couch watching T.V. anytime. Holidays are days that are special because they are celebrated. If not celebrated they would just be another day.

[22] Chase is incorrect in his assertions that Brittany must show by a preponderance of the evidence that there is a risk of physical or emotional harm to the child in order for her to receive the major holidays. Brittany would only need to show risk of physical or emotional harm if she was eliminating or putting significant restrictions on all of Chase's parenting time.

[23] Chase cites *Hendrickson v. Hendrickson*, 2000 ND 1, 603 N.W.2d 896 and *Wolt v. Wolt*, 2010 ND 26, 778 N.W.2d 786 to illustrate his argument. Neither case is relevant to the issues in this case. In *Hendrickson*, the trial court eliminated all parenting time for one year and in *Wolt*, the trial court put significant restrictions on parenting time. In

Hendrickson this Court decided that the trial court could not eliminate all parenting time for one year, and upheld the decision in *Wolt.* The trial court in this case did not eliminate all parenting time nor did it put significant restrictions on Chase's parenting time.

[24] *Catlin v. Catlin*, 494 N.W.2d 581 (N.D. 1992), makes it clear that restricting or even eliminating additional parenting time a parent may customarily receive does not require the same burden as eliminating or significantly restricting all parenting time. In *Catlin* the district court did not grant the noncustodial parent any additional parenting time during the summer, unless he moved out of North Dakota. The Court upheld the district court's decision. The Court stated, "In *Dschaak* we concluded that the trial court had erred in refusing, without explanation, to award extended summer visitation with a school age child and a fit noncustodial parent. In this case the child is not of school age, the court has given consideration to the request for summer visitation and has determined such visitation to be appropriate in the event the noncustodial parent should move from the state. *Dschaak* was not intended to eliminate the reasonable discretion of the trial court in these matters". *Id*. At ¶ 16. The district court has reasonable discretion to determine extended summer parenting time and would therefore also have reasonable discretion to determine the holiday schedule. The district court determined that the child should spend time with the parent that would celebrate the holiday. The district court's determination was reasonable, in the child's best interests, and based on the facts presented.

[25] Chase argues that Brittany did not provide sufficient evidence to show Chase does not celebrate holidays. Chase is incorrect. Brittany was specifically asked, "So when you were with Chase, did he do anything during the holidays?" *Transcript of Evidentiary Hearing,* P. 21 line 25, P. 22, Line 1. Brittany answered, "No. It was usually always at our

house." *Transcript of Evidentiary Hearing,* P. 22 line 2. Brittany specifically stated "no". Brittany also testified about Chase rarely giving the child gifts and that the past Christmas Chase picked up his gift, stayed for about 10 minutes, and then left. Chase did not give the child a gift. *Transcript of Evidentiary Hearing,* P. 22, lines 5-11. On cross examination, Brittany testified that Chase had never requested any holiday parenting time since they separated. *Transcript of Evidentiary Hearing,* P. 32, line 5. P. 33, Lines 1-5. The statement is relevant because Chase's work schedule did not allow a set parenting time schedule and his time had to be at request. Brittany also testified that people gather at her house during the holidays and the child has a great time. *Transcript of Evidentiary Hearing,* P. 22, lines 17-25, P. 23 1-8. Chase, on the other hand, did not deny anything Brittany said regarding the holidays and never informed the district court of any plans he had for the child during the holidays. The district court gave Chase a chance to rebut Brittany's testimony, but Chase did not do so.

[26] The burden of proof is not beyond a reasonable doubt. Brittany provided testimony regarding holidays and Chase, other than to say he wanted them, did not. The district court based its decision on the testimony provided and it was testimony that was not objected to.

II. The District Court Did Not Err in Not Granting Appellant Extended Summer Parenting Time During the First Year.

[27] The district court has reasonable discretion to determine summer parenting time and the district court's determination regarding summer parenting time was reasonable. Chase is once again trying to add a burden that does not exist. The district court does not have to find that there is a risk of physical or emotional harm if it does not award extended

summer parenting time. As discussed above, *Catlin* made it clear that the district court has a great deal of discretion. In *Catlin* the non-custodial parent was awarded no extended time in the summer unless he moved out of North Dakota. In this case, the district court granted extended summer parenting time provided Chase exercises the parenting time he has been awarded already. Brittany explained she was asking for Chase to first show he was going to reliably exercise the parenting time he was awarded before granting more. Brittany explained that Chase had changed jobs *Transcript of Evidentiary Hearing* P. 37, Lines 19-25, P. 38, Line 1. and residences numerous times in the past few years, *Transcript of Evidentiary Hearing* P. 37, Lines 19-25, P. 38, Lines 1-13, Chase had supervised parenting time a year ago, *Transcript of Evidentiary Hearing* P. 20, Lines 19-25, P. 21, Lines 1-6, and that Chase had only requested 3 overnights during the summer. *Declaration of Chase Eikom* ¶ 4, App. 64, Index #60. *Affidavit of Brittany Williamson* ¶ 7, App. 68, Index #61. Brittany testified that Chase had wanted to sign his rights to the child away during the divorce. *Transcript of Evidentiary Hearing* P. 36, Lines 2-3.

[28] Chase appears to have taken the position that he should be awarded the extended summer parenting time he wants, simply because he asked for it. Brittany does not deny that there is a presumption that parenting time with the noncustodial parent is in the child's best interests, but it is not a presumption that it is in the child's best interest that the noncustodial parent receives all possible parenting time. If that was the case, there would be a presumption that the noncustodial parent would be awarded one day less than half the year.

[29] The district court has reasonable discretion to determine what extended parenting time the noncustodial parent receives. In this case, Brittany provided evidence that Chase

was not stable, and for the sake of stability and being able to plan for the child, Chase needed to show he would exercise his awarded parenting time before additional time was added. The logic is simple: if Chase is not reliable enough to exercise the time he has, it is not in the child's best interests to award Chase additional time. Brittany also explained the positive things she does with the child during the summer. Chase did not provide the district court with a single thing he plans on doing with the child or has done with the child in the past. Chase's only real reason appears to be that he won't have to work during the summer. The district court considered that argument and correctly determined that Chase's work schedule was not a reasonable basis for determining summer parenting time. Brittany therefore disagrees with Chase's inference that the district court's determination was based on "random nonsense".

[30] The district court also noted that Chase just recently had supervised parenting time. Chase argues that because he agreed to supervised parenting time the court should not take his supervised parenting time into consideration. However, even just agreeing to supervised parenting time is relevant. A stable parent does not agree to supervised parenting time. Not only did Chase agree to supervised parenting time, he also wanted to terminate his rights to the child during the divorce. Even if Chase was going through trauma when he signed the agreement and said he wanted to terminate his rights, a parent doesn't have the luxury of taking a break from being a parent because he is going through trauma. Considering Chase's actions and that he had not spent a significant amount of time with the child, a step-up extended summer parenting time schedule is reasonable, and in the child's best interests.

III. The District Court Did Not Err in Establishing a Requirement That Appellant not Miss Four Or More Weekends in a 365 Day Period as a Basis For Increasing or Decreasing Parenting Time.

[31] The District Court had the authority and was justified in establishing the requirement that appellant not miss four or more weekends in a 365 day period as a basis for increasing or decreasing parenting time. Considering Chase's agreement to supervised parenting time, numerous jobs, numerous residences, request to terminate his rights to the child, and limited amount of exercised parenting time, it was reasonable and in the best interests of the child for the Court to require Chase to exercise the parenting time he was awarded before he was granted more.

[32] The decision was for the benefit of the child. Chase appears to ignore what is best for the child and focuses exclusively on himself. He claims he is being rewarded or punished and his rights are being violated. However, Chase himself, citing *Baumgartner*, 2018 N.D. 268 ¶ 8, states, "It is the best interests of the child, not the wishes or desires of the parents, which are paramount in determination of visitation". *Brief of Defendant-Appellant* ¶ 37. The district court was not rewarding or punishing Chase. The district court was making sure there was a stable parenting plan for the child. All Chase has to do is exercise the time he has, and he will receive the extended time in the summer. Pursuant to the Amended Judgment, Chase must exercise parenting time twenty-three times in one year. The district court reasonably determined that if he can't even do that, it is not in the child's best interests for Chase to be awarded additional time and instead should be awarded time that he will exercise. If Chase isn't going to exercise his time, the child deserves the opportunity to do something else. It appears that Chase has incorrectly taken

the position that parenting time is for his benefit and he should have whatever parenting time he wants whether he exercises it or not.

[33] Chase's position that the district court must find that the child's physical or emotional health would be at risk is incorrect. The district court did not deny Chase all parenting time or place any onerous restrictions on it. The district court made a reasonable determination, based on the evidence provided, and in the child's best interests. The district court may have put a restriction on Chase's parenting time, namely that he had to exercise it, but it was not the type of restriction that would require a finding that the child's physical or emotional health would be at risk. If this Court were to adopt Chase's understanding of "restriction" any restriction would require such a finding. The district court would be required to find a risk of physical or emotional harm every time it didn't award the non-custodial parent one day less than half the year. The noncustodial parent would simply need to state he or she wanted one day less than half the year and the district court restricted him or her to less than that.

CONCLUSION

[34] The district court did not commit an error in any part of its decisions pertaining to this case. As it pertains to extended summer parenting time and holidays the district court has reasonable discretion to decide what is in the child's best interests. In this case, the district court considered the facts presented and made a reasonable determination as to what was in the child's best interests. Chase's argument that the district court made an error is based on Chase's misconception that the district court must make a specific finding that there is a risk of physical or emotional harm if the court doesn't award extended summer parenting time and certain holidays or places any conditions whatsoever on a parent's

parenting time. *Catlin* very clearly disproves Chase's argument. In *Catlin*, the district court awarded no extended summer parenting time unless the noncustodial parent moved out of North Dakota. Not only did the Court uphold the district court's decision to award no extended summer parenting time, without any finding of risk of physical or emotional harm, but the Court also upheld the condition put on the noncustodial parent that he would be awarded extended summer parenting time if he moved out of North Dakota. The district court in *Catlin* made a reasonable determination as to what was in the child's best interests. It did not make a decision to punish the noncustodial parent for residing in North Dakota and reward him if he left. The same is true in this case. The district court made a reasonable determination as to what was in the child's best interests. The decision was not made to reward or punish Chase. As stated earlier, it is the district court's responsibility to determine what is in the child's best interests not what a parent wishes. Accordingly, the district court's decision should be upheld and Chase's appeal should be denied in all things.

Dated this 25th day of February, 2022.

By: */s/ Jacob D. Marburger*

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[35] This Brief contains 16 pages, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify this Brief complies with the type face requirements of N.D.R.App.P. 32 and the type style requirements of that Rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Time New Roman, 12 point font.

By: */s/ Jacob D. Marburger*

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CERTIFICATE OF SERVICE

[36] Jacob D. Marburger, does hereby certify that true and correct copies of the **Brief of Appellee** were served by electronic means upon the following on February 25, 2022, by sending a true and correct copy thereof electronically with the Clerk of the North Dakota Supreme Court, to wit:

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DATED this 25th day of February, 2022.

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