20220199
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 22, 2022
STATE OF NORTH DAKOTA

SUPREME COURT OF THE STATE OF NORTH DAKOTA

No. 20220199

E.R.J.

PLAINTIFF – APPELLEE

v.

T.L.B.

DEFENDANT – APPELLANT

Appeal from the June 16, 2022 Findings of Fact, Conclusions of Law and Order for Judgment and the June 21, 2022 Judgment
Divide County District Court
Northwest District
The Honorable Benjamen J. Johnson
Divide County – 12-2021 DM-00006

APPELLANT'S REPLY BRIEF

Thomas J. Corcoran
Corcoran Law PLLP
125 Main Street #3
Williston, ND 58801
Phone and Fax: (701) 204-0660
Email: tjc@corcoranlaw.com
ND Bar ID #07499
Attorney for Defendant-Appellant

Note: Party names and names of minor(s) modified under N.D. R. App. P. 14

TABLE OF CONTENTS

DESCRIPTION **PAGE/PARAGRAPH**

TABLE OF AUTHORITIES

CASES **PARAGRAPH**

STATUTES AND RULES

ARGUMENT

Issue 1 – Whether the District Court's finding of fact that "Tammi" changed her surname to that of her new husband was clearly erroneous

[¶1] At ¶ 21 of Appellee's Brief, Appellee takes the position that the issue of Tammi's correct surname is a matter of witness credibility. This is not a matter of witness credibility. It is a matter of the movant (Ed) never establishing what Tammi's legal last name is.

[¶2] A mistake with regard to a critical finding of fact (Tammi's legal last name) has clearly been made. A finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, if no evidence exists to support it, **or if the reviewing court, on the entire evidence, is left with a definite and firm conviction a mistake has been made.** (emphasis added) *Edwardson v. Lauer*, 2004 ND 218, ¶ 6, 689 N.W.2d 407 (*quoting Kjelland v. Kjelland*, 2000 ND 86, ¶ 8, 609 N.W.2d 100); *In re Berger*, 2010 ND 28, ¶ 8, 778 N.W.2d 579.

[¶3] Even if Tammi had testified erroneously upon direct testimony in confusion as to what was put on her marriage license application, Tammi plainly stated on direct examination that she did not change her name (R:87:4-25 to 5:4) and again stated on redirect examination that she had never changed her surname (R87:13:10-20). This testimony was plain, clear, unambiguous and uncontroverted by Ed. Tammi testified that she did not change her surname after marriage, nor does she ever intend to change her surname. Therefore, Tammi does share the same surname with the child. Facebook or other social media should have no legal status before this Court.

[¶4] Next, and very notably, Appellee erroneously states at ¶ 21 "Further, Tammi testified that the Child did not share the same exact name as anyone in Tammi's home (R:87:25:12-14)." However, Appellee is citing **his own testimony**, not that of Tammi. Tammi never made any such statement.

[¶5] At ¶ 22 of Appellee's Brief, Appellee states, "Despite what Tammi would have the Court believe, there is evidence in the record to support the district court's findings of fact." However, the weight of the evidence, established by Tammi's direct and redirect examination, is that she did not change her name, and that the district court's finding of fact is, in fact, erroneous. Appellee would have this Court pay attention to some testimony and ignore the rest.

[¶6] Furthermore, at ¶23, Appellee notes that N.D.C.C. § 14-03-20.1 is the process by which a party may change their surname by filling out a space on their marriage license application (specifically, subsection 3 thereof). Tammi testified that the marriage license application did have a hyphenated surname (R87:13:12-14) but twice stated that she did not change her name after marriage.

[¶7] Appellee states that the only relevant fact is whether Tammi put the hyphenated name on the license application. However, this is not the end of the inquiry. First, N.D.C.C. § 14-03-20.1(4) states "Use of the option under subsection 3 has the effect of providing a record of the surname change. The marriage certificate containing the new surname, if any, constitutes proof that the use of the new surname, or the retention of the former surname, is lawful." To be clear, Appellee relies entirely upon the marriage license *testimony* and has provided no marriage certificate (or even testimony thereof) evidencing any name change whatsoever. All the Court has is

Tammi's uncontroverted, and twice stated, testimony that she did not change her surname after marriage.

[¶8] Next, Appellee failed to note N.D.C.C. § 14-03-20.1(5) which provides: Neither the use of nor the failure to use the option of selecting a new surname by means of a marriage license application, as provided in subsection 3, abrogates the right of either party to adopt a different surname through usage at a future date. This statutory language instills the right, but not the obligation, for an applicant to change their surname post-marriage through usage.

[¶9] Therefore, even had Tammi filled out her marriage license application using the hyphenated surname, she has unambiguously maintained her maiden surname through usage post-marriage and Appellee has failed to prove otherwise.

[¶10] Therefore, the District Court's Finding of Fact regarding Tammi's surname (and that nobody in her household sharing that name) was clearly erroneous and is grounds for reversal of the Judgment of the District Court, as this was its primary factor in its decision to change the child's surname.

Issue 2 – Whether the decision of the District Court in changing the surname of the child at issue to a hyphenated name consisting of a combination of both Tammi's and Ed's surnames was clearly erroneous

[¶11] The issue of a hyphenated surname for the child was raised for the very first time at the end of Ed's direct examination and at the conclusion of Tammi's testimony when the Court asked if Tammi would consider a hyphenated name. This hyphenated name approach was never raised or requested in the Petition or the pleadings.

[¶12] Throughout the trial, there was no testimony or evidence to support why a hyphenated surname would be in the child's best interest. As stated in Appellee's Brief at ¶24, under North Dakota's enactment of the Uniform Parentage Act, N.D.C.C. Ch. 14-17, district courts are implicitly granted the authority to change a minor child's surname, assuming such a change is in the minor's best interest. Interest of C.J.C., 2000 ND 27, ¶ 5, 606 N.W.2d 117.

[¶13] The word "such" is operative here. The specific Order made by the District Court was to a *hyphenated* surname. Yet, Ed raised the issue of a hyphenated surname for the child as an 'alternative' in the very last moments of his direct testimony (R87:28:3-10). There was absolutely zero testimony or evidence presented at trial as to why a hyphenated name would be in the child's best interest. The Court then *sua sponte* at the conclusion of all testimony raised this singular question to Tammi about whether she had considered a *hyphenated* name. Tammi testified that she did not want that (R87:35:20-25). Yet the Court ordered a hyphenated name anyway, and provided no specific findings as to *why* a hyphenated surname was in the child's best interest, rather than one party's surname over the other, as requested in the pleadings. This alone is grounds for reversal.

Issue 3 - Whether the District Court erred by not considering the factors for "proper and reasonable cause" for a name change found at N.D.C.C. § 32-28-02(3) when considering a name change request in a petition brought under the Uniform Parentage Act, N.D.C.C. § 14-20 *et seq.* under the UPA's "good cause shown" standard found at N.D.C.C. §14-20-57(7).

[¶14] At ¶32 of Appellee's Brief, Appellee states that "she [Tammi] has not proven an intent to mislead or deceive another in bringing the name change action."

[¶15] Testimony at trial established that at the "coffee shop meeting", both parties wanted to settle the issue of the child's surname (R87:18:15-25 for Tammi, R87:29:6-12) without coming to court. By signing the Acknowledgment of Paternity, Ed agreed to naming the child with Tammi's maiden surname. However, Ed also testified that when he signed the Acknowledgment of Paternity, he "understood that a name change could be done later down the road if I felt like it needed to be done, or I wanted it to be done, it was an issue that could be brought up later." (R87:24:20 – R87:25:4).

[¶16] Ed testified that he said at the coffee shop meeting that he wanted to settle the issue of the child's surname without going to court, but in his mind, at that very same time, he knew he could always change his mind and go to court anyway to change the child's surname. This is bad faith.

[¶17] Therefore, if the Court concludes, as put forth by Appellant in her Appellant's Brief, that the District Court should have harmonized N.D.C.C. § 32-28-02(3) and N.D.C.C. § 14-20-57(7), bad faith is then part of the analysis. And Ed showed his bad faith by testifying that at the coffee shop meeting, he simultaneously told Tammi that he wanted to avoid going to court about the child's surname but thought to himself that he could always renege on this agreement.

[¶18] This, would then also be grounds for reversal.

Issue 4 - Whether the District Court erred by not considering emotional injury as the sort of injury recognized by N.D.C.C. § 32-28-02(3).

[¶19] With regard to emotional injury, at ¶ 38 of Appellee's Brief, Appellee states, "Tammi did not show a medical diagnosis, counseling, or other lasting effects of this alleged emotional distress. She and her husband simply testified to Tammi having an emotionally difficult time."

[¶20] First, our District Court held in *In Re Burt*, 53-2018-CV-00172 (Index #46), at ¶ 10 that, "emotional pain or distress could be exactly the type of injury the statutes are protecting against." Yet this factor was not addressed in the instant matter's findings.

[¶21] Next, Tammi's testimony, and that of her corroborating witness, with regard to her emotional injury entirely uncontroverted at trial. And in that regard, Appellee failed to raise the issue of diagnosis or counseling at trial as she now does in her response.

[¶22] This Court, in Schrodt v. Schrodt, 2022 ND 64, 971 N.W.2d 861, 2022 N.D. LEXIS 51, states:

> It is well-settled that this Court does not review issues that are raised for the first time on appeal: The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories. The requirement that a party first present an issue to the trial court, as a precondition to raising it on appeal, gives that court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective review of the decision. It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Accordingly, issues or contentions not raised . . . in the district court cannot be

raised for the first time on appeal. *Cody v. Cody*, 2019 ND 14, ¶ 15, 921 N.W.2d 679 (quoting *Hoff v. Gututala-Hoff*, 2018 ND 115, ¶ 10, 910 N.W.2d 896).

[¶23] As Appellee did not raise the issue of Tammi's lack of diagnosis or counseling with regard to her emotional state, it is improper for him to raise it for the first time on appeal, and the Court should not consider it. In fact, Ed offered no testimony at trial to rebut the testimony of Tammi and Zeke as to Tammi's emotional state with respect to the child's name change.

[¶24] Therefore, the Court should disregard this part of Appellee's argument. The state of the matter is that Tammi and Zeke testified as to the emotional injury sustained by Tammi during this period, which went uncontroverted and unchallenged in any way by Ed at trial.

[¶25] Therefore, if the Court agrees that N.D.C.C. § 32-28-02(3) and N.D.C.C. § 14-20-57(7) should be harmonized, and consequently that *In Re Burt*, 53-2018-CV-00172 (Index #46) does apply to this matter, the testimony as to Tammi's emotional state remains uncontroverted, and should have been considered as a factor in her favor.

CONCLUSION

[¶26] It was clearly erroneous for the District Court to have found that Tammi took Zeke's surname upon marriage, which became the crux and primary factor in the District Court's decision to change the child's surname to a hyphenated surname of both biological parents.

[¶27] Accordingly, the District Court's analysis of the North Dakota Best Interest Factors is based on the erroneous presumption that nobody in Tammi's household would share the child's surname and is thus clearly erroneous.

[¶28] The District Court's decision to change the child's surname to a hyphenated name consisting of a combination of both Tammi's and Ed's surnames was clearly erroneous.

[¶29] The District Court erred by not harmonizing the statues and considering the factors for "proper and reasonable cause" for a name change found at N.D.C.C. § 32-28-02(3) when considering a name change request in a petition brought under the Uniform Parentage Act, N.D.C.C. § 14-20 *et seq.* (hereinafter "UPA") under the UPA's "good cause shown" standard found at N.D.C.C. §14-20-57(7).

[¶30] The District Court erred by not considering the uncontroverted emotional injury as the sort of injury recognized by N.D.C.C. § 32-28-02(3).

[¶31] **WHEREFORE**, T.L.B. prays that this honorable Court REVERSE the Judgment of the District Court.

DATED this 22nd day of November 2022.

/s/ Thomas J. Corcoran

Thomas J. Corcoran
ND Bar ID #07499
Attorney for Defendant-Appellant
Corcoran Law PLLP
125 Main Street #3
Williston, ND 58801
701-204-0660 (phone and fax)
tjc@corcoranlaw.com

CERTIFICATE OF COMPLIANCE

[¶ 1] This Appellant's Brief complies with the page limit of 12 set forth in N.D. R. App. P. 32(a)(8)(A).

DATED this 22nd day of November 2022.

/s/ Thomas J. Corcoran

Thomas J. Corcoran
ND Bar ID #07499
Attorney for Defendant-Appellant
Corcoran Law PLLP
125 Main Street #3
Williston, ND 58801
701-204-0660 (phone and fax)
tjc@corcoranlaw.com

SUPREME COURT OF THE STATE OF NORTH DAKOTA

No. 20220199

E.R.J.

PLAINTIFF – APPELLEE

v.

T.L.B.

DEFENDANT – APPELLANT

Appeal from the June 16, 2022 Findings of Fact, Conclusions of Law and Order for Judgment and the June 21, 2022 Judgment
Divide County District Court
Northwest District
The Honorable Benjamen J. Johnson
Divide County – 12-2021 DM-00006

PROOF OF SERVICE

---

1. Thomas J. Corcoran does hereby certify that on the 22nd day of November 2022, in conformity with N.D. R. App. P. 31, he sent via email the APPELLANT'S REPLY BRIEF to the following:

   Carrie Lynn Francis, Attorney for Appellee, cfrancis@francislawoffice.net

   Clerk of the Supreme Court of North Dakota, supclerkofcourt@ndcourts.gov

DATED this 22nd day of November 2022.

/s/ Thomas J. Corcoran

Thomas J. Corcoran
ND Bar ID #07499
Attorney for Defendant-Appellant
Corcoran Law PLLP
125 Main Street #3
Williston, ND 58801
701-204-0660 (phone and fax)
tjc@corcoranlaw.com