

SUPREME COURT OF NORTH DAKOTA

Fleck v. Fleck, 2010 ND 24

778 N.W.2d 572 (2010) · No. No. 20090075 · Decided February 17, 2010

SUMMARY

The Supreme Court of North Dakota reviewed a post-divorce dispute concerning primary residential responsibility, relocation of the children to Arizona, and child support. The court affirmed the award of primary residential responsibility to Troy Fleck, but held that the district court's calculation of Melissa Regan's child support obligation did not comply with the applicable guidelines. The child support award was reversed and remanded for recalculation.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	VANDE WALLE, Chief Justice; CAROL RONNING KAPSNER; MARY MUEHLEN MARING; DANIEL J. CROTHERS; DALE V. SANDSTROM
JURISDICTION	North Dakota
DECIDED	February 17, 2010
DOCKET	No. 20090075
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Melissa Fleck appealed from an order denying her motion to amend the divorce judgment to award her primary residential responsibility and permit relocation of the children to Arizona, granting Troy Fleck primary residential responsibility, and ordering Melissa to pay child support.
STANDARD OF REVIEW	Child-custody and primary-residential-responsibility findings are reviewed under the clearly erroneous standard; the Supreme Court does not reweigh evidence, reassess witness credibility, retry the custody case, or substitute its judgment for that of the district court. Child-support determinations involve questions of law reviewed de novo, factual findings reviewed for clear error, and limited discretionary matters reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Melissa Fleck, n/k/a Melissa Regan v. Troy A. Fleck

TOPICS

child custody relocation child support standard of review appellate procedure

PRACTICE AREAS

family law child custody child support relocation appellate procedure

QUESTIONS PRESENTED

1. Whether the district court clearly erred by awarding Troy Fleck primary residential responsibility and denying Melissa Fleck permission to relocate the children to Arizona.
2. Whether the district court erred as a matter of law in calculating Melissa Fleck's child-support obligation by finding her underemployed and imputing income based on her husband's employment and hourly wage.

HOLDINGS

1. The district court did not clearly err in awarding Troy primary residential responsibility and denying Melissa's relocation request. A parent with joint legal and physical custody who seeks to relocate with a child must first obtain a change in primary custody under N.D.C.C. § 14-09-06.2 and then obtain permission to relocate under N.D.C.C. § 14-09-07; the district court properly applied the best-interests factors after finding a significant change in circumstances.
2. The district court's child-support calculation was erroneous as a matter of law because it did not comply with the child-support guidelines. The court lacked evidentiary support for finding Melissa underemployed and improperly extrapolated her income from her husband's different employment position without applying the guideline requirements for imputing income.

KEY QUOTATIONS

“A parent with joint legal and physical custody may not be granted permission to move with the parties' child, unless the district court first determines the best interests of the child require a change in primary custody to that parent.” (574)

“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 if the reviewing court, on the entire evidence, is left with a definite and firm conviction a mistake has been made.” (575)

“A court errs as a matter of law if it does not comply with the child support guidelines.” (578)

“Moreover, there is no support in the guidelines for the court to extrapolate an obligor's income based on the obligor's spouse's hourly income on the unsupported assumption that the obligor could find employment in a position identical to the spouse's position.” (579)

FACTUAL BACKGROUND

Melissa and Troy Fleck were divorced in 2006 and initially agreed to equal physical custody and joint legal custody of their two children. Melissa moved to Sioux Falls for an 11-month nurse-anesthesia program and later

moved with her new husband to Arizona, where both obtained employment as nurse anesthetists. The children remained in Bismarck with Troy, who had provided their care and maintained their home and schooling during much of Melissa's education, while Melissa exercised substantial travel-based parenting time. The district court awarded Troy primary residential responsibility and calculated Melissa's support obligation by imputing full-time income based partly on her husband's hourly wage.

PROCEDURAL HISTORY

The parties' 2006 divorce judgment incorporated a stipulated agreement for equal physical custody and joint legal custody of their two children. After Melissa moved to Arizona and sought to relocate the children and obtain primary residential responsibility, Troy filed a counter-motion seeking primary residential responsibility and child support from Melissa. Following an evidentiary hearing, the district court denied Melissa's motion, granted Troy's counter-motion, awarded Melissa ample parenting time, and ordered her to pay \$2,246 per month in child support. The Supreme Court affirmed the residential-responsibility award, reversed the child-support award, and remanded for recalculation.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand for recalculation of Melissa Regan's child-support obligation in accordance with the North Dakota child-support guidelines.

CASES CITED

- Maynard v. McNett, 2006 ND 36, ¶ 21, 710 N.W.2d 369
- Dietz v. Dietz, 2007 ND 84, ¶ 13, 733 N.W.2d 225
- Gietzen v. Gietzen, 1998 ND 70, ¶ 10, 575 N.W.2d 924
- Hanson v. Hanson, 1997 ND 151, ¶ 5, 567 N.W.2d 216
- Van Dyke v. Van Dyke, 538 N.W.2d 197, 201 (N.D. 1995)
- Gould v. Miller, 488 N.W.2d 42, 44 (N.D. 1992)
- Jelsing v. Peterson, 2007 ND 41, ¶¶ 10-11, 729 N.W.2d 157
- Eifert v. Eifert, 2006 ND 240, ¶ 5, 724 N.W.2d 109
- Klein v. Larson, 2006 ND 236, ¶ 6, 724 N.W.2d 565
- Gietzen v. Gabel, 2006 ND 153, ¶ 6, 718 N.W.2d 552
- Dvorak v. Dvorak, 2006 ND 171, ¶ 11, 719 N.W.2d 362
- Gonzalez v. Gonzalez, 2005 ND 131, ¶ 12, 700 N.W.2d 711
- Verhey v. McKenzie, 2009 ND 35, ¶ 5, 763 N.W.2d 113
- Buchholz v. Buchholz, 1999 ND 36, ¶ 11, 590 N.W.2d 215
- Doepke v. Doepke, 2009 ND 10, ¶¶ 6-7, 760 N.W.2d 131

- Heinle v. Heinle, 2010 ND 5, ¶¶ 37-38
- State of Michigan, ex rel. Schneider v. Schneider, 2008 ND 35, ¶ 4, 745 N.W.2d 368
- Schumacher v. Schumacher, 1999 ND 10, ¶ 10, 589 N.W.2d 185
- Korynta v. Korynta, 2006 ND 17, ¶ 17, 708 N.W.2d 895
- Berge v. Berge, 2006 ND 46, ¶ 19, 710 N.W.2d 417
- Halberg v. Halberg, 2010 ND 20, ¶ 16
- Brandner v. Brandner, 2005 ND 111, ¶ 18, 698 N.W.2d 259
- Machart v. Machart, 2009 ND 208, ¶ 1 n. 1, 776 N.W.2d 795

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