

SUPREME COURT OF NORTH DAKOTA

Malcolm R. Peek v. Kimberly J. Berning

Peek v. Berning, 622 N.W.2d 186 (N.D. 2001) · No. No. 20000056 · Decided February 15, 2001

SUMMARY

The Supreme Court of North Dakota reviewed a child-custody judgment awarding the unmarried parents joint legal and rotating physical custody. The court affirmed the exclusion of the father's expert opinion but reversed and remanded because the trial court had not made definitive findings that the parents could communicate and cooperate sufficiently for rotating custody to serve the child's best interests.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Kapsner, Justice; Gerald W. Vande Walle, Chief Justice; Mary A. Muehlen Maring; William A. Neumann; Dale V. Sandstrom; Kapsner
JURISDICTION	North Dakota
DECIDED	February 15, 2001
DOCKET	No. 20000056
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The father appealed from a district court judgment awarding the unmarried parents joint legal and physical custody under a rotating physical-custody schedule and from the exclusion of part of his expert witness's testimony.
STANDARD OF REVIEW	Custody determinations are findings of fact reviewed for clear error. A finding is clearly erroneous if it is induced by an erroneous view of the law, unsupported by evidence, or leaves the reviewing court with a definite and firm conviction that a mistake was made. The exclusion of expert testimony based on untimely discovery supplementation is reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Malcolm R. Peek v. Kimberly J. Berning

TOPICS

child custody

family law procedure

appellate procedure

standard of review

expert testimony

PRACTICE AREAS

family law

child custody

evidence

appellate procedure

QUESTIONS PRESENTED

1. Whether the district court clearly erred by awarding joint physical and legal custody under a rotating physical-custody schedule without making specific findings that the parents could communicate and cooperate sufficiently to protect the child's best interests.
2. Whether the district court clearly erred in its evaluation of the statutory best-interests custody factors, including the domestic-violence presumption and the effect of Peek's allegedly false allegations.
3. Whether the district court abused its discretion by excluding the opinion testimony of Peek's expert because the expert disclosure was not seasonable under North Dakota Rule of Civil Procedure 26(e).

HOLDINGS

1. A rotating physical-custody arrangement requires specific findings that the parents can communicate and cooperate sufficiently to set aside their differences and ensure the arrangement serves the child's best interests. Because the district court did not make definitive findings on the parents' ability to cooperate and communicate, the rotating-custody award was reversed and remanded.
2. The district court did not clearly err in finding that most best-interests factors favored neither parent, in declining to apply the domestic-violence presumption, or in treating Peek's alleged false allegations as a factor not favoring him.
3. The district court did not abuse its discretion by excluding the expert's opinions because Peek's supplemental disclosure was not seasonable and the exclusion did not materially prejudice him.

KEY QUOTATIONS

“Generally, rotating custody arrangements are only in the child's best interests if parents are able to cooperate and set aside their differences and conflicts in their role as parents.” (193-194)

“Therefore, we affirm the trial court's exclusion of the opinions of Peek's expert witness, but we reverse and remand because we conclude the trial court clearly erred in awarding rotating physical custody without a specific finding the parents could communicate and cooperate sufficiently to ensure the child's best interests would not be jeopardized.” (195)

FACTUAL BACKGROUND

Malcolm Peek and Kimberly Berning were never married but had one child together in February 1997. After the parties separated in September 1998, Berning left the child with Peek while attending an Alcoholics Anonymous conference, and Peek obtained an interim custody order based on allegations of Berning's substance abuse, violence, and mistreatment of the children. Peek retained custody for fourteen months before trial, after which

the district court found the best-interests factors largely neutral and ordered joint legal and rotating physical custody.

PROCEDURAL HISTORY

After the mother left the parties' child with the father during an out-of-town trip, the father obtained an ex parte interim custody order and retained custody for approximately fourteen months before trial. The district court found the best-interests factors largely in equipoise but awarded joint legal and physical custody with a 28-day rotating schedule before kindergarten and monthly rotation thereafter. The Supreme Court affirmed the exclusion of the expert's opinions but reversed and remanded the rotating-custody award for additional findings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The district court must make definitive findings regarding Peek's and Berning's ability to communicate and cooperate sufficiently before awarding rotating physical custody. If the court cannot make those findings, it must revisit the custody and visitation issues. The exclusion of the expert's opinions is affirmed.

CASES CITED

- Kjelland v. Kjelland, 2000 ND 86, ¶¶ 8, 10, 14, 609 N.W.2d 100
- Cox v. Cox, 2000 ND 144, ¶¶ 9-10, 613 N.W.2d 516
- Brown v. Brown, 1999 ND 199, ¶¶ 15-16, 600 N.W.2d 869
- Aus v. Carter, 1999 ND 246, ¶ 14, 603 N.W.2d 885
- Hurt v. Hurt, 2001 ND 13, ¶ 7, 621 N.W.2d 326
- Ackerman v. Ackerman, 1999 ND 135, ¶ 9, 596 N.W.2d 332
- Silseth v. Levang, 214 N.W.2d 361, 364 (N.D. 1974)
- Kasprowicz v. Kasprowicz, 1998 ND 68, ¶ 15, 575 N.W.2d 921
- Lapp v. Lapp, 293 N.W.2d 121, 128-30 (N.D. 1980)
- In re Lukens, 1998 ND 224, ¶¶ 3, 15-17, 587 N.W.2d 141
- Jarvis v. Jarvis, 1998 ND 163, ¶¶ 36-37, 584 N.W.2d 84
- Dewitz v. Emery, 508 N.W.2d 334, 338-39 (N.D. 1993)
- Kjonaas v. Kjonaas, 1999 ND 50, ¶ 16, 590 N.W.2d 440