



THIRD JUDICIAL CIRCUIT COURT

P.O. Box 1054

WATERTOWN, SOUTH DAKOTA 57201

(605) 882-5090

CHAMBERS OF
RONALD K. ROEHR
JUDGE

CONNIE STOEGBNER
COURT REPORTER

August 28, 2008

Timothy J. Cummings
Green, Roby, Oviatt, Cummings & Linngren
P.O. Box 1600
Watertown, SD 57201-6600

Doug Cummings
East River Legal Services
335 N. Main Ave., Suite #300
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Re: Troy Stavig v. Jessica Stavig; Codington Co., Div 05-0464

Counsel:

Troy Stavig (Troy), the plaintiff, and Jessica Stavig (Jessica), the defendant, were previously divorced in a judgment of divorce entered by this Court on June 26, 2006. That judgment, which was entered pursuant to agreement of the parties, granted the parties joint legal custody of their minor child, Skyler Allen Stavig (Skyler), born on June 15, 2002, and granted Jessica primary physical custody. On September 12, 2006, Troy moved this Court for an order modifying the judgment by awarding him primary physical custody of Skyler. The Court heard the motion on August 12, 2008.

Facts

Troy is twenty-eight years of age. He has cohabited with his fiancée, Katie Timm, since August of 2007, in a three-bedroom home in Watertown owned by his parents. His fiancée's son, Ethan, age five, also lives with them.

Troy graduated from high school in Watertown in 1999. In 2000 he received completed a one-year course of study in power line construction and management at a Mitchell vo-tech.

Troy was employed by Prairie Wave in Watertown for three and one-half years, but was laid-off one month prior to the hearing which the company was bought-out and his department eliminated. At the time of the hearing, Troy was unemployed and looking for new employment.

Jessica is twenty-four years of age. She has cohabited with Kent Amble in Watertown since February of 2007.

Jessica graduated from high school in 2002.

Jessica works for Winner's Casino, in Watertown, approximately sixteen to twenty-four hours per week. She was previously employed at O.E.M., and part-time at the Human Service Agency.

This Court appointed Dr. Thomas Price, a licensed psychologist, to complete a child custody evaluation. After completing his evaluation, he prepared a report (received as plaintiff's Exhibit 1). He also testified at trial Dr. Price's evaluation appears to be thorough and professional; his report and testimony, including conclusions and opinions, are helpful to the Court.

Constance Kieso, a licensed professional counselor, also testified. The Court gives no weight to her criticism of Dr. Price's report and evaluation.

The Court does not find Jessica to be a credible witness.

As necessary, additional facts will be set forth in the Decision portion of this letter opinion.

Decision

The standard for deciding custody of a minor child is the best interests of the child. The Court must consider "the best interests of the child in respect to the child's temporal and mental and moral welfare." SDCL 25-5-10. In doing so, the Court is guided by a variety of factors. *Fuerstenberg v. Fuerstenberg*, 1999 SD 35, 591 NW2d 798. Child custody has not previously been contested; the child custody provisions of the judgment and decree were entered by stipulation. Consequently, Troy need not show a substantial and material change in circumstances. *Id.*, at ¶

33; *Jeschke v. Wockenfuss*, 534 NW2d 602, 605 (S 1995); and *Kappenman v. Kappenman*, 523 NW2d 410, 413 (SD 1994).

Both Troy and Jessica are fit parents. Each is able to provide for Skyler's "temporal, mental and moral welfare." Troy is a little more able to do so than is Jessica.

- In high school Troy had a mild case of Tourette's syndrome. He is no longer on medication for this condition, and there is no indication that it continues to be a factor in his health. Troy does have a minor problem with anger control. Jessica may suffer from depression or other mental conditions; she has refused to provide a presurgical psychological evaluation completed by Dr. Packard. Otherwise, both parties appear to be in good mental and physical health.
- The one occasion in which Jessica allowed an ATCO patient to provide overnight care to Skyler causes some concern about her disposition to properly protect Skyler. Otherwise, both parents have the capacity and disposition to provide the child with protection, food, clothing, medical care, and other basic needs.
- Both have the ability to give Skyler love, affection, guidance, education and to impart the family's religion or creed. Troy is inclined to impart the family's religion or creed, as he regularly takes the child to Sunday school and at one time enrolled Skyler in a church-sponsored pre-school. Conversely, Jessica does not take the child to church or Sunday school, and without any apparent reason or explanation, removed the child from a church-sponsored pre-school to send him to an Interlakes Community Action Program.
- Jessica is not committed to encouraging contact between Tyler and his father. After agreeing that Tyler could accompany Troy on a trip to Tennessee, she arbitrarily changed her mind. She allows regularly scheduled visitations. However, on occasion she agrees to changes or additional visitations or contact, then later arbitrarily changes her mind.

The Court also considers the prospect of a stable and consistent home environment for Skyler.

- Skyler has a good relationship with both parents. Skyler has a good relationship with his paternal grandparents. He has a relationship with his maternal grandparents; there is not sufficient evidence for the Court to characterize the relationship.

- The child appears well-adjusted to his home, school and community.
- Skyler is bonded to both parents. He is a little more bonded to Troy than Jessica, and Jessica acknowledged this to Dr. Price.
- Jessica has had primary physical custody of Tyler since the parties separated in June of 2005. Troy's motion to modify custody has been pending since September 12, 2006.

Jessica has been Tyler's primary caretaker since birth.

Skyler is too young to have an intelligent preference as to his custody.

There is no evidence of harmful parental misconduct by either parent.

Tyler has no siblings.

In awarding custody, the Court also considers a conviction of domestic abuse, a conviction of assault against certain persons, and a history of domestic abuse. SDCL 25-4-45.5. Neither parent has any such conviction. Domestic abuse is defined as "physical harm, bodily injury, or attempts to cause physical harm or bodily injury, or the infliction of fear of imminent physical harm or bodily injury between family or household members." SDCL 25-10-1(1). On two occasions Jessica petitioned the circuit court in Codrington County for a protection order for domestic abuse from Troy. On both occasions she had the proceeding dismissed prior to a hearing on her petition. As previously indicated, Troy has a mild anger control problem. During the marriage he would get angry, use vulgar language, and call Jessica names. Sometimes Jessica would respond in kind. Sometimes the parties would engage in shoving or pushing each other; sometimes this shoving and pushing was initiated by Troy. Troy did not hit or injure Jessica. Some of these incidents took place in Skyler's presence. Dr. Price screened for domestic violence; he reviewed the protection order files, Troy's anger management class records, diagnosis and outcome; and he administered his own tests. Dr. Price's conclusion is that Troy's anger is a minor condition.

Considering all the circumstances, the Court concludes that Tyler's best interests require that Troy have physical custody. Any presumption created by SDCL 25-4-45.5 has been rebutted. Troy's motion is granted. His attorney may prepare proposed findings of fact and conclusions of law and a proposed order.

Finally, there is another paternity file in Codington County (Rec 05-0632) pertaining to these parties and the same child. That file is consolidated with this file.

Sincerely,

A handwritten signature in cursive script that reads "Ronald K. Roehr". The signature is written in black ink and is positioned below the word "Sincerely,".

Ronald K. Roehr
Circuit Court Judge