Melissa Hopper v. Nicholas Rainforth

2011 | Cited 0 times | Nebraska Court of Appeals | March 15, 2011

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

HOPPER v. RAINFORTH

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

Affirmed.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

INTRODUCTION

In this custody modification proceeding initiated by the childs mother, the district court ordered that the father retain physical custody but prohibited him from "remov[ing]" the child from Nebraska despite a previous modification order authorizing him to remove the child to Minnesota. The father attacks the latest order as a void conditional order and alternatively asserts the issue of removal was not raised by the pleadings and constituted an abuse of discretion. Because (1) the cause is equitable in nature and conditional orders in equity are not automatically void, (2) the mothers pleading gave sufficient notice that the prior removal was disputed, and (3) the relief fashioned by the court was not an abuse of discretion, we affirm.

BACKGROUND

Although they never married, Melissa Hopper (Melissa) and Nicholas Rainforth (Nicholas) are the biological parents of H.R., born in September 2004. In March 2006, after a paternity proceeding was instituted by Melissa in the district court for Lancaster County, the parties were awarded joint legal custody of H.R. and physical custody was awarded to Melissa. The award of joint legal custody has never been changed.

As a result of a stipulated modification proceeding, physical custody of the child then shifted to Nicholas along with permission to remove the child to Minnesota. On January 5, 2007, by agreement of the parties, the district court placed temporary physical custody with Nicholas. On January 31, 2008, the courts order implemented the parties agreement placing physical custody of H.R. with Nicholas and allowing him to remove the child to Minnesota, where he had resided since May 2007.

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In November 2009, Melissa filed a request to modify, seeking to regain physical custody of H.R. In the complaint for modification, Melissa alleged that there was a material and substantial change in circumstances and included four specifications. The first specification alleged that "[t]he minor child of the parties has never resided with [Nicholas] in Minnesota." The second claimed that "[t]he minor child of the parties is enrolled in [k]indergarten with Lincoln Public Schools." The third specification was that Nicholas "rarely exercises parenting time with the minor child." Melissas complaint prayed that she be awarded custody of the child and in addition to other specific relief, requested "such other and further relief as the Court shall deem just and equitable."

Nicholas filed a general denial and specifically alleged that there has been no change in circumstances.

After a trial, the district court entered its order on March 15, 2010. The court made numerous findings and discussed the evidence at length. To the extent that additional background information later becomes necessary, we include it at the appropriate point in the analysis. The court acknowledged its earlier order permitting Nicholas to remove H.R. to Minnesota, but then stated, "[I]t is clear that she has continued to spend the majority of the time in Nebraska." The court also stated that "considering the fact [H.R.] spent the majority of the ensuing period in Nebraska, the issue of her permanent removal from Nebraska is an issue that must be reviewed at this time." The court later made the following finding:

The court finds that it is in the best interests of the minor child . . . that her physical custody remain with Nicholas. However, the court also finds that it is not in her best interests that she be removed to the State of Minnesota. This, of course, creates a dilemma. If Nicholas does not return to Nebraska, then [H.R.] would be placed in the custody of Melissa or, if the parties agree, she could reside with [Nicholas parents] with Melissa having certain defined parenting time in accordance generally with this courts standard schedule.

The court then ordered:

That the physical custody of [H.R.] shall continue to be awarded to [Nicholas] subject to [Melissas] rights of parenting time as set forth in the attached Parenting Plan and said Parenting Plan is incorporated by reference as if fully set forth and the parties are ordered to comply with the terms and provisions ther[e]of. All other terms and provisions of this court[]s order for custody dated the 10th day of March, 2006[,] and dated the 31st day of January, 2008[,] shall remain in full force and effect except [Nicholas] may not remove the minor child from the State of Nebraska.

Nicholas has filed a timely appeal.

ASSIGNMENTS OF ERROR

Nicholas alleges that (1) the trial courts order is a void conditional order and (2) the trial court abused its discretion by "readdressing the issue of removal where only a modification of custody had been pled and tried to the court."

STANDARD OF REVIEW

When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. Heinze v. Heinze, 274 Neb. 595, 742 N.W.2d 465 (2007).

Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial courts determination will normally be affirmed absent an abuse of discretion. Jack v. Clinton, 259 Neb. 198, 609 N.W.2d 328 (2000).

ANALYSIS

Does This Court Have Jurisdiction?

At oral argument, we inquired whether the district court had jurisdiction of the child custody proceeding such that we have jurisdiction of this appeal. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. In re Adoption of David C., 280 Neb. 719, 790 N.W.2d 205 (2010). Our jurisdiction of this appeal depends upon whether the district court had jurisdiction of the child custody dispute. When a lower court does not have jurisdiction over the case before it, an appellate court also lacks jurisdiction to review the merits of the claim. Sack v. State, 259 Neb. 463, 610 N.W.2d 385 (2000). Thus, we first examine the district courts jurisdiction, and we turn to the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

Because the district court for Lancaster County made the initial child custody determination, the court retained exclusive and continuing jurisdiction over the instant modification proceeding unless jurisdiction was lost under Neb. Rev. Stat. § 43-1239(a) (Reissue 2008) or until the court declined to exercise its jurisdiction under Neb. Rev. Stat. § 43-1244 (Reissue 2008). See Watson v. Watson, 272 Neb. 647, 724 N.W.2d 24 (2006). As the court did not decline jurisdiction under § 43-1244, we need only address whether the court lost its exclusive and continuing jurisdiction pursuant to § 43-1239(a).

Section 43-1239(a) provides:

Except as otherwise provided in section 43-1241 [providing temporary emergency jurisdiction in cases of abandonment or abuse], a court of this state which has made a child custody determination consistent with section 43-1238 or 43-1240 has exclusive, continuing jurisdiction over the

determination until:

(1) a court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the childs care, protection, training, and personal relationships; or

(2) a court of this state or a court of another state determines that the child, the childs parents, and any person acting as a parent do not presently reside in this state.

The district court maintained exclusive and continuing jurisdiction under § 43-1239. This jurisdiction would continue unless the district court determined that neither the child, nor the child and one parent, nor the child and a person acting as a parent had a significant connection with this state and that substantial evidence was no longer available in this state concerning the childs care, protection, training, and personal relationships. In Watson, relying upon a California courts opinion, the Nebraska Supreme Court quoted the drafting committees reporters explanation of the intended application of this section of the UCCJEA: """So long as one parent, or person acting as a parent, remains in the state that made the original custody determination, only that state can determine when the relationship between the child and the left-behind parent has deteriorated sufficiently so that jurisdiction is lost." . . ." 272 Neb. at 654, 724 N.W.2d at 30, quoting Grahm v. Superior Court, 132 Cal. App. 4th 1193, 34 Cal. Rptr. 3d 270 (2005) (emphasis omitted). As the California court explained, ""If the remaining parent continues to assert and exercise his [or her] visitation rights, then the parent-child relationship has not deteriorated sufficiently to terminate jurisdiction." Watson v. Watson, 272 Neb. at 654, 724 N.W.2d at 30, quoting Grahm v. Superior Court, supra.

The district court implicitly determined that it retained jurisdiction, and the facts clearly support its decision. Although Nicholas had earlier obtained the courts permission to remove H.R. to Minnesota, the child spent much of the intervening time residing with Nicholas parents in Nebraska. Shortly after Nicholas was granted physical custody of H.R. in the courts January 2008 order, H.R. was enrolled in preschool in Minnesota. However, by the winter of 2008, H.R. was back in Nebraska living in Lincoln with Nicholas parents. Between January and May of 2009, H.R. attended preschool in Lincoln. H.R. spent only 11/2 weeks in Minnesota during the summer of 2009, after which she returned to Lincoln and began attending kindergarten there in late summer of that same year. The record reflects that after Nicholas learned of Melissas intent to seek custody, he surreptitiously took H.R. to Minnesota on November 21, 2009, and enrolled her in school there. Melissas complaint for modification was filed merely 3 days thereafter. Throughout this period, Melissa resided in Nebraska and exercised her visitation with the child. Clearly, both the child and Melissa continued to have a significant connection with this state and substantial evidence was available in this state concerning the childs care, protection, training, and personal relationships.

Based upon this record, we agree with the district courts implicit determination that it had exclusive

and continuing jurisdiction to determine the custody modification proceeding. As the district court had jurisdiction of the custody determination, we have jurisdiction of this appeal, and we turn to its merits.

Is Order Granting Custody of H.R. to Nicholas if He Returns to Nebraska Void as Conditional Order?

In the discussion of conditional orders, both parties rely on Vogel v. Vogel, 262 Neb. 1030, 637 N.W.2d 611 (2002). Vogel involved a trial court order which granted the mother (the custodial parent) permission to permanently remove the parties children from Nebraska to Virginia so that she could accompany her new husband who had been transferred from Nebraskas Offutt Air Force Base to Washington, D.C. In its order, the district court provided for annual transfer of physical custody of the children between the parties in the event the mothers husband, who was in the U.S. Air Force, was transferred overseas. Also, in the event the mother and father were to establish residences within 50 miles of one another at any time in the future, an alternate visitation schedule would be effective. The Vogel court vacated these contingent orders saying:

We have stated that if a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. Simons v. Simons, 261 Neb. 570, 624 N.W.2d 36 (2001). A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. Custom Fabricators v. Lenarduzzi, 259 Neb. 453, 610 N.W.2d 391 (2000); Village of Orleans v. Dietz, 248 Neb. 806, 539 N.W.2d 440 (1995).

. . . We conclude that such orders [involved herein] are conditional in that they do not "perform in praesenti" and become effective only upon the happening of certain future events which may or may not occur. Whether such orders will ever become effective is speculative. The impact of such potential events on the childrens best interests and the proper judicial response to the potential events identified in the orders complained of are better assessed at the time of their occurrence. 262 Neb. at 1039, 637 N.W.2d at 619-20.

The order being questioned in the case before us is a bit different from the Vogel order in that the court here has definitely determined that H.R. is going to live in Nebraska--now, and not at some point in the future. The only condition attached is with respect to who her custodial parent will be. It will be Nicholas if he returns to Nebraska with her. But if not, the custodial parent will be Melissa, or Nicholas parents if Nicholas and Melissa so agree. Nonetheless, at least on the surface, the order suffers from the same defect as did those in Vogel, in that there is an "unknown"--specifically, whether Nicholas will return to Nebraska and thereby continue as the custodial parent.

However, we must take note of a decision rendered after Vogel, which neither partys briefing discusses--Strunk v. Chromy-Strunk, 270 Neb. 917, 708 N.W.2d 821 (2006). Strunk involved a property settlement approved by decree in which the wife received the marital residence and the husband was to receive a $50,000 payment within approximately 3 years from the wife--but if the real estate were

sold then the wife would owe the husband an additional $75,000. The courts opinion in Strunk observed that, traditionally, cases decided under its void conditional judgment rule had been actions at law purporting to make a final judgment of dismissal, contempt, suspension, or injunction, but which expressly conditioned said "judgment" upon a specified future action or inaction of one of the parties. The Supreme Court in Strunk then noted that it had not yet expressly applied the doctrine to an equity action such as the dissolution action then before it. The court in Strunk explained the traditional conditional judgment rule:

While conditional orders will not automatically become final judgments upon the occurrence of the specified conditions, see Lemburg v. Adams County, 225 Neb. 289, 404 N.W.2d 429 (1987), they can operate in conjunction with a further consideration of the court as to whether the conditions have been met, at which time a final judgment may be made. See Custom Fabricators v. Lenarduzzi, 259 Neb. 453, 610 N.W.2d 391 (2000). In Lenarduzzi, we attempted to resolve any confusion arising from the use of the term "wholly void," explaining that conditional orders are not void as interlocutory orders, but are void only insofar as they purport to be final judgments. We stated that conditional interlocutory orders do not perform in praesenti and do not have force and effect as a final order or judgment from which an appeal can be taken. Nevertheless, they can operate, for instance, as an order properly scheduling the completion of pretrial tasks, the failure of which to meet subjecting the parties to possible sanction as the facts may warrant. Such orders cannot operate as final, appealable judgments without further court consideration regarding the task or obligation that was purportedly not met, however, "because parties should not be left to guess or speculate as to the final effect of a conditional interlocutory order." Id. at 461, 610 N.W.2d at 397. See, generally, 2-H Ranch Co., Inc. v. Simmons, 658 P.2d 68 (Wyo. 1983) (explaining that conditional judgments are more properly termed "nonexistent," but that law governing execution on void judgments is still applicable because, like judgment void for lack of jurisdiction or voidable as erroneous, such judgments are entitled to no force or effect). 270 Neb. at 930, 708 N.W.2d at 834 (emphasis omitted).

The Strunk court, citing Trieweiler v. Sears, 268 Neb. 952, 689 N.W.2d 807 (2004), then noted the broad principle that courts of equity are not constrained by the same rules as courts at law and that a court of equity will devise a remedy to meet the situation. It also cited Ludwig v. Matter, 210 Neb. 87, 313 N.W.2d 234 (1981), for the proposition that an action in equity vests the trial court with broad powers authorizing any judgment under the pleadings. The court in Strunk v. Chromy-Strunk, 270 Neb. 917, 708 N.W.2d 821 (2006), cited authority from a good number of other states allowing conditional orders in equity matters, including citation to LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. App. 2000) (conditional custody awards not precluded when in childs best interests), and to Stephen v. Stephen, 937 P.2d 92 (Okla. 1997) (in its powers to equitably settle conflicting rights, court may attach such reasonable conditions to custody orders as seem proper).

Before reaching the ultimate conclusion, the Strunk court discussed its earlier decision in Vogel v. Vogel, 262 Neb. 1030, 637 N.W.2d 611 (2002),and explained that "our reasoning in Vogel was premised on considerations other than the conditional nature of the order." 270 Neb. at 934, 708

N.W.2d at 836. The Strunk opinion said, "Instead of simply concluding that the provisions of the order were void because they failed to perform in praesenti, we stated, in effect, that the conditional order was not appropriate because it was unnecessary and unwise to speculate as to the best interests of the child under changed circumstances." Id. at934, 708 N.W.2d at 836-37. The Strunk court further explained that the contingent provisions in Vogel were contrary to a proper assessment of the best interests of the child, which is paramount in custody determinations, because the impact of the future events on the childrens best interests and the proper judicial response are better assessed at the time of their occurrence. Thus, the Strunk court said that the availability of future modification remedies because of changed circumstances meant that the conditional judgment in Vogel was not only unnecessary to resolve the equities presented, but was contrary to an equitable resolution.

In the end, the Nebraska Supreme Court in Strunk held that a strict prohibition against conditional judgments in equity matters was not appropriate, saying:

We now expressly hold that the void conditional judgment rule does not extend to actions in equity or to equitable relief granted within an action at law. Rather, where it is necessary and equitable to do so, a court of equitable jurisdiction may enter a conditional judgment and such judgment will not be deemed void simply by virtue of its conditional nature. Conditional judgments are a fundamental tool with which courts sitting in equity have traditionally been privileged in order to properly devise a remedy to meet the situation. We will not take away that tool by extending our void conditional judgment rule into the realm of equity. Rather, we follow the numerous decisions from other jurisdictions, set forth above, and precedent by this court that recognizes that a strict prohibition against conditional judgments is inappropriate to equitable relief. 270 Neb. at 934-35, 708 N.W.2d at 837.

We conclude that the Strunk courts holding disposes of Nicholas first assignment of error, and we therefore determine that the void conditional judgment rule does not apply to the district courts order in the case before us.

Before turning to Nicholas second assignment of error, we recall the Strunk courts further observation that simply because a conditional judgment in an action at equity is not automatically void, it does not follow that all conditional judgments are acceptable on direct review or that judgments in equity cannot, for different reasons, be void and therefore subject to collateral attack. Certain conditional judgments may still be considered erroneous or an abuse of discretion, be set aside where procured by fraud, or be considered void as contrary to statute or public policy. 270 Neb. at 935, 708 N.W.2d at 837. Bearing this in mind, we turn to the second assignment of error.

Did Trial Court Err in Deciding Where H.R. Should Live, Given That Melissa's Pleading Did Not Specifically

Pray for Modification of Removal Permission?

Nicholas second assignment of error joins two concepts, which we dissect for separate discussion. Nicholas complains that Melissas complaint did not raise the issue of modification of the earlier removal order. He also argues more generally that the district court abused its discretion in mandating that the child return to Nebraska.

Nicholas correctly points out that the burdens of proof for the removal of a child from Nebraska by a custodial parent and for a change of custody are different. Custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. State ex rel. Reitz v. Ringer, 244 Neb. 976, 510 N.W.2d 294 (1994), overruled on other grounds, Cross v. Perreten, 257 Neb. 776, 600 N.W.2d 780 (1999). A material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. McDougall v. McDougall, 236 Neb. 873, 464 N.W.2d 189 (1991). In contrast, in a removal case the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state, and clearing that threshold, the custodial parent must next demonstrate that it is in the childs best interests to continue living with him or her. Jack v. Clinton, 259 Neb. 198, 609 N.W.2d 328 (2000).

However, the first prong of Nicholas argument rests upon the notion that Melissas complaint for modification gave him no notice that the removal issue would be contested. We disagree. As we have already noted, an action in equity vests the trial court with broad powers authorizing any judgment under the pleadings. Ludwig v. Matter, 210 Neb. 87, 313 N.W.2d 234 (1981). Nicholas points to the prayer of Melissas complaint, but conveniently ignores the complaints allegations that "[t]he minor child of the parties has never resided with [Nicholas] in Minnesota," that the child was "enrolled in [k]indergarten with Lincoln Public Schools," and that Nicholas "rarely exercises parenting time with the minor child."

Melissas pleading gave Nicholas fair notice that the childs residence would be contested. Under the liberalized rules of notice pleading, a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief. Davio v. Nebraska Dept. of Health & Human Servs., 280 Neb. 263, 786 N.W.2d 655 (2010). The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted. Id. The rationale for this liberal notice pleading standard is that when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining a defense upon the merits. Id. Melissas specific allegations put Nicholas on notice that she would be claiming that he effectively abandoned the removal permission by leaving the child with his parents in Lincoln.

Under both prior law and current notice pleading rules, the prayer for relief or demand for judgment was not the statement of Melissas claim. As the Nebraska Supreme Court explained in Trieweiler v.

Sears, 268 Neb. 952, 689 N.W.2d 807 (2004), under our former system of code pleading, the nature of an action is determined not by the prayer for relief but from the character of the facts alleged. The prayer of a petition is not a part of the allegations of fact constituting the cause of action; thus, where the facts alleged state a cause of action and are supported by the evidence, the court will grant proper relief, although it may not conform to the relief requested. Id. A prayer for general relief in an equity action is as broad as the pleadings, and the equitable powers of the court are sufficient to authorize any judgment to which a party is entitled under the pleadings and the evidence. Id. The prayer is not part of the pleading, tenders no issue, and neither adds to nor takes from the evidence required of either party. Id. The same principles apply under the notice pleading regime.

The sufficiency of a pleading is tested by the Rule 8(a)(2) statement of the claim for relief and the demand for judgment is not considered part of the claim for that purpose, as numerous cases have held. Thus, the selection of an improper remedy in the Rule 8(a)(3) demand for relief will not be fatal to a partys pleading if the statement of the claim indicates the pleader may be entitled to relief of some other type.

Dingxi Longhai Dairy, Ltd. v. Becwood Technology Group L.L.C., 2011 WL 536490 (8th Cir. 2011), quoting 5 Charles Alan Wright & Arther R. Miller, Federal Practice and Procedure § 1255 at 508-09 (3d ed. 2004). This authority makes it abundantly clear that Melissas prayer for change of custody and other equitable relief did not limit the power of the district court to fashion an appropriate equitable remedy. Further, Nicholas cites no authority to suggest that the equitable powers of a district court were somehow diminished by the adoption of the notice pleading rules.

Finding no merit to Nicholas pleading argument, we turn to his more general argument regarding the relief adopted by the district court. At this point, it becomes necessary to set forth additional factual background. Melissa became involved with Nicholas when she was a senior in high school and moved in with him either during her senior year or shortly thereafter--she could not recall. He is 4 years older than she. It was during this living arrangement that she became pregnant with her first child, H.R.

In addition to H.R., Melissa has two other children from two different fathers. Only one of those children lives with Melissa, and the other child was given up for adoption. The men with whom Melissa has been involved have criminal records.

Shortly after the time of her second childs birth, Melissa began using and selling drugs. Melissas mother arranged for her to participate in a drug treatment program at a treatment center in Lincoln, which program Melissa did not complete. In fact, she ran away from the treatment center and was on the run for several months before turning herself into the police. She was ultimately convicted of felony possession of methamphetamine. Although Melissa tried drug court, she testified that she quit and decided to just serve her time. Thus, Melissa was incarcerated in November 2007 and released in June 2008. In the instant proceeding, Melissa testified that she no longer uses drugs or

sees the friends she had when she was using, and she submitted as evidence a recent "clean" urinalysis test.

After serving her jail sentence, Melissa began dating the father of her third child, who has a criminal history including several convictions for assault. She has also dated another man who was a convicted felon and, by her own admission, should not be around her children. Since Melissas release from prison, she has lived in three different locations. At the time of trial, she was supporting herself with student aid while attending cosmetology school in Lincoln. Melissa testified that she had no intention of moving away from Lincoln. While Nicholas has had custody of H.R., Melissa has acceded to virtually all of his demands and conditions for seeing H.R. because she claims to be "intimidated" by him.

From the time of H.R.s birth until September 2006, Nicholas resided with his parents in Lincoln. He then moved to Minneapolis to attend a music college. When he moved, he granted his parents power of attorney to care for H.R. while he was away. In May 2007, Nicholas left the music college without earning a degree. His testimony was that he left college because of Melissas arrest for possession of methamphetamine. Between September 2007 and December 2008, Nicholas worked for a construction company, but was laid off in the winter of 2008. He then obtained temporary employment until August 2009, when he began working for a landscaping company as a foreman and operations manager. Nicholas works full time and is paid $15 per hour. In addition to his full-time employment, Nicholas has worked as a music promoter and performed with his own band, although the evidence suggests that such ventures have not been financially productive.

In the fall of 2008, H.R. began preschool in Minneapolis; however, after Nicholas was laid off from his work in the winter of 2008, he sent H.R. back to Lincoln to stay with his parents. Nicholas testified that he chose to do this because he preferred that H.R. be with family rather than with a daycare provider. Nicholas testified that while he planned to enroll H.R. in kindergarten in Minnesota for the 2009 school year, she was not eligible because she had not reached the age of 5 by September 1, 2009, and she failed the test for early admission. However, H.R. was eligible for enrollment at a kindergarten in Lincoln, and Nicholas parents enrolled her there. From January to May 2009, H.R. attended preschool in Lincoln. She spent 11/2 weeks with Nicholas in Minnesota in the summer of 2009, returned to Lincoln, and began attending kindergarten in Lincoln in the late summer of 2009, while living with Nicholas parents. On November 21, 2009, Nicholas surreptitiously took H.R. back to Minnesota and away from elementary school without Melissas knowledge and without informing H.R.s teacher or school administrators. He did this after learning from his father that Melissa was planning to seek custody. He took her to Minnesota and immediately enrolled her in a school there. At the time of trial, Nicholas resided in a home owned by his girlfriend, who he had been dating for 13 months. H.R. has her own bedroom there.

We also take note of the comprehensive facts and reasoning set forth in the district courts modification order, in addition to the findings and orders summarized above. The trial court found

that the primary care of H.R. since 2007 had been provided by Nicholas parents, who reside in Lincoln, and that they arranged for medical appointments and church attendance, enrolled her in school, and provided for her in their home. The court recited evidence indicating that Nicholas did not attend H.R.s life events such as "graduation" from preschool in May 2009 or her baptism in August of that year and that he never talked to her teacher. Melissa, on the other hand, attended the graduation and baptism, communicated with H.R.s kindergarten teacher, and regularly exercised what visitation was available to her. The court found that for the years 2008 and 2009, H.R. was in Minnesota at most for 7 months and the rest of the time she was in Nebraska. From January 1, 2009, until her "sudden departure" to Minnesota with Nicholas on November 21, the court found that H.R. spent between 3 and 6 weeks in Minnesota. Her departure to Minnesota occurred when Nicholas, after learning of Melissas intent to seek a modification of custody, came to Nebraska, took H.R. back to Minnesota with him, and then enrolled her in school.

The court acknowledged that while its January 31, 2008, order permitted removal from Nebraska, "because of then-existing circumstances, it actually was not a typical removal case." These circumstances cited by the court included the fact that Melissa was in jail at that time serving a 1-year sentence, and thus, she was unable to have physical custody of the child. The court then reasoned, citing Nicholas residence in Minneapolis at the time of Melissas incarceration in conjunction with the other facts detailed above, that "the issue of her permanent removal from Nebraska is an issue that must be reviewed at this time." The court then concluded:

In reviewing these factors, the court finds that it is not in [H.R.s] best interest that she move to Minnesota. [H.R.] has extended family in the Lincoln area that have been active in her life and can be supportive of both Nicholas and Melissa, both of whom clearly need that support. Nicholas employment is of the type that can be performed as easily in Lincoln as in Minneapolis. It appears that Nicholas is a very controlling person who has attempted to dictate the extent of Melissas parenting time with [H.R.,] which is exacerbated by the distance between the two communities. A move to Minnesota will not enhance the quality of life for [H.R.]

Both Nicholas and Melissa have "issues." As noted, Nicholas is controlling and has been dependent on his parents until the last several years. Melissas choice of boyfriends is less than impressive and her willingness to continue to have children with men who appear unable to commit or support a child demonstrates a lack of maturity and sense of personal responsibility.

After making these findings, the court found that it was in the best interests of H.R. that her physical custody remain with Nicholas and made its order as we have quoted above.

Mindful of both our standard of review and the caution in Strunk v. Chromy-Strunk, 270 Neb. 917, 708 N.W.2d 821 (2006), that it does not follow that all conditional judgments are acceptable on direct review, we approve the district courts order under the circumstances of the case before us. When viewed through the lens of a custody modification, as the case was pleaded, we do not hesitate to say

after our de novo review that a material change of circumstances has been proved. If at the time of the stipulation allowing removal the trial court had known that Nicholas would essentially turn H.R. over to his parents and be a "visiting dad," there would have been no reason to approve her removal to Minnesota. In short, if Nicholas was not really ready to be a full-time parent at the time of Melissas incarceration, as the evidence shows he was not, we have to believe that the trial court would not have decreed as it did in January 2008, allowing H.R. to go to Minnesota. Clearly, Nicholas parents have been the primary caregivers and providers of support for H.R. in recent years. The trial court articulated the shortcomings of Melissa and Nicholas well, and little purpose is served by repeating those cogent observations.

The trial courts core finding that H.R.s best interests are served by her living in Lincoln is fully supported by the record. She was in school there before being suddenly uprooted by Nicholas in an apparent strategic litigation ploy (with no apparent regard for the traumatic nature of such removal), and all of her grandparents, her mother, and her half sibling are there. Nicholas offers no real evidence that H.R. can be better cared for and nurtured in Minnesota. Because Melissas specifications of material changes in circumstances put Nicholas on notice that the vitality of the earlier removal order was at issue and because the district court is vested with broad equitable powers to fashion appropriate relief, we cannot say that the district court abused its discretion in the instant case.

Because this was not a proceeding seeking removal of a child from Nebraska by a custodial parent, we do not believe our analytic calculus must follow the well-known "formula" for such cases, as set forth in Farnsworth v. Farnsworth, 257 Neb. 242, 597 N.W.2d 592 (1999). Nonetheless, even in removal cases, it is frequently said that the paramount consideration is whether the proposed move is in the best interests of the child. See, e.g., Vogel v. Vogel, 262 Neb. 1030, 637 N.W.2d 611 (2002). Therefore, whether H.R. will remain in Minnesota--which was clearly put in issue by Melissas motion to modify custody--is likewise determined by the childs best interests. Therefore, we conclude that what determines this case is simply H.R.s best interests, given that both parents have been found fit, but there are changed circumstances. No authority is cited for the proposition that in circumstances like this, the trial court cannot order the child returned to Nebraska--assuming a change in circumstance, which we have found here. We thus find that the second prong of Nicholas second assignment of error lacks merit.

CONCLUSION

The district court retained exclusive and continuing jurisdiction of the custody modification proceeding. Thus, we have jurisdiction of the instant appeal. Because the proceeding was equitable in nature, the courts conditional order was not automatically void. Melissas specific allegations put Nicholas on notice that she would be claiming that he effectively abandoned the prior removal permission by leaving the child with his parents in Lincoln. Upon our de novo review, we find no abuse of discretion in the district courts order determining that there was a material change of

circumstances justifying the modification order and fashioning an appropriate solution to H.R.s physical custody arrangement. Therefore, we affirm the trial courts decision in all respects.

AFFIRMED.