

**IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA**

Krista M. Frisk,

Petitioner and Appellee,

vs.

Daniel J. Frisk,

Respondent and Appellant.

Supreme Court File No. 20050391

BRIEF FOR THE APPELLANT

Appeal from Amended Domestic Violence Protection Order
From the Cass County District Court

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I. STATEMENT OF ISSUES

- A. Whether the district court erred by extending a Stipulated Domestic Violence Protection Order that had expired by its agreed terms.
- B. Whether the district court abused its discretion by extending the Stipulated Domestic Violence Protection on the basis of past alleged “actual or imminent” danger of domestic violence.
- B. Whether the district court erred by including findings of fact from the parties’ divorce proceedings in its Domestic Violence Protection Order.

II. STATEMENT OF THE CASE

A. PREVIOUS PROCEEDINGS

Appellant, Daniel Frisk (“Daniel”), and Appellee, Krista Frisk (“Krista”), were married on December 31, 1993. Brief for Appellant at 1, Frisk v. Frisk, 2005 ND 154, 703 N.W.2d 341 (No. 20050051). On May 11, 2004, Krista applied for and obtained a temporary domestic violence protection order against Daniel. (App. at 8-10). A hearing was scheduled for May 21, 2004 on the matter. (App. at 11). However, on May 21, 2004, the ex parte order was extended until June 3, 2004, when the matter was rescheduled. (App. at 11).

A hearing between Daniel and Krista was held on June 3, 2004. (App. at 23). Daniel submitted responsive affidavits. (App. at 17-22). Krista also submitted affidavits for the hearing. (App. at 12-16). Prior to the end of the hearing, the two parties stipulated to a settlement agreement. (App. at 24, lns. 16-18). The agreement was read into the record of the court. Id. The order subsequently took effect on June 11, 2004. (App. at 28).

On November 10, 2004, Krista filed for an extension of the protection order. (App. at 29). Krista submitted an affidavit in support of her motion, to which Daniel filed a response opposing the extension. (App. at 30-34, 37-42). On November 24, 2004, Krista's attorney requested that Judge Irby grant a temporary extension of the protection order until the scheduled hearing on December 15, 2004. (App. at 43). The temporary order was granted until the hearing date. (App. at 46).

Following the contested hearing on December 15, 2004, Judge Irby granted a two year extension of the protection order. (App. at 60) The terms of the order, which was granted on December 27, 2004, extended the original order until December 15, 2006. (App. at 58-60) Daniel filed a Notice of Appeal on February 8, 2005. (App. at 61) This Court heard oral arguments on June 7, 2005, after the submission of briefs by both parties. (App. at 2).

Prior to oral arguments before this Court, Krista filed for a motion to amend the domestic violence protection on April 22, 2005. (App. at 2). The Court granted the motion for a hearing, setting the hearing date for May 3, 2005. (App. at 2). The district court granted the amendment in part on May 5, 2005. (App. at 2).

In its decision dated August 23, 2005, this Court reversed and remanded the matter back to the District Court. This Court ordered the District Court to consider whether the evidence supported a finding that Daniel Frisk posed an “actual or imminent” danger of domestic violence to Krista. See Frisk v. Frisk, 2005 ND 189, ¶ 14, 703 N.W.2d 341 (“Frisk 1”). The District Court subsequently held a hearing on October 19, 2005, to determine “whether or not we have to go forward with an entirely new set of evidence or whether the Court can simply issue a finding that’s appropriate

and meets the conditions set by the Supreme Court without further evidentiary hearing on this matter.” (Trans. at 3, Ins. 16-20). The District Court entered an order extending the original protection order until December 15, 2006 using the same evidence that had already been presented to it at previous hearings, including the parties’ divorce proceedings. (App. at 71-74). Daniel filed a notice of appeal on November 16, 2005. (App. at 82).

B. FACTUAL BACKGROUND

Daniel and Krista were married on December 31, 1993. Brief for Appellant at 1, Frisk v. Frisk, 2005 ND 154, 703 N.W.2d 341 (No. 20050051). They have three children: Garret, Evan, and Adam. Id. Daniel and Krista separated on May 9, 2004. Id. Krista filed for a temporary domestic violence protection order against Daniel two days later, on May 11. (App. at 4-10). A hearing for a protection order was heard by the District Court on June 3, 2004. (App. at 23). Prior to the conclusion of the hearing, Daniel and the Krista entered a stipulated agreement. (App. at 24, Ins. 16-18). The agreement held that the protection order could not last longer than six months and no finding of domestic violence was to be made. Id.

Following the entrance of the stipulated agreement, Krista called police on several occasions, often reporting only lawful behavior. In July 2004, police were called three times. (App. at 31-32). Krista also alleged that Daniel violated the stipulated agreement by attending a deposition, although this was lawful behavior. (App. at 32). In September 2004, Krista contacted police again because Daniel’s girlfriend had allegedly spoken to the children in Krista’s presence which is lawful behavior. (App. at 32-33). Finally, on

November 1, 2004, Krista saw Daniel walk by her car after she had dropped the children off at school which is lawful behavior. (App. at 33).

On November 10, 2004, Krista filed an application for extension of the domestic violence protection order. (App. at 29). Krista requested that the stipulated order be extended until the Court schedule hearing on December 15, 2004. (App. at 43). The stipulated order had a termination date of December 2, 2004. (App. at 43). Despite Daniel's objection to the temporary protection order, the Court entered an order until the date of the hearing. (App. at 35, 44-46)

At the hearing on December 15, 2004, Krista did not present any evidence that Daniel had violated the stipulated domestic violence protection order. (App. at 47-57). Krista conceded that Daniel had not physically harmed her, committed any bodily injury against her, or had sexual activity with her. *Id.* However, the Court ultimately decided to extend the stipulated domestic violence protection order. (App. at 58-60).

Daniel appealed the District Court's ruling to this Court. He filed a notice of appeal on February 8, 2005. (App. at 61). Following the notice of appeal for Frisk 1, Krista subsequently filed another motion to amend the domestic violence protection order. (App. at 2, Ins. 47-48). A hearing was held on May 3, 2005, to determine whether the physical distances between Daniel, his children, and former spouse should have been expanded to a distance of 300 yards. (App. at 2, ln. 54). The District Court granted the amendment and placed a 50 foot distance requirement on Daniel. (App. at 2, ln. 55).

Following the submission of briefs and oral arguments by both parties, this Court issued its decision in Frisk 1. 2005 ND 189, 703 N.W.2d 341. This Court reversed and remanded the issue back to the District Court with instructions to determine "*whether the*

evidence supports a finding that Daniel Frisk poses an 'actual or imminent' danger of domestic violence to Krista Frisk." Frisk 1, 2005 ND 189, ¶ 14. This Court determined that judgment had not been made on the merits of the extension for the protection order, but instead on the findings of the divorce proceedings and child visitation arrangements. Id. at ¶ 12.

On remand, the District Court extended the stipulated protection order again. (App. at 71-74). However, during the hearing on October 19, 2005, the District Court framed the issue as "whether or not we have to go forward with an entirely new set of evidence or whether the Court can simply issue a finding that's appropriate and meets the conditions set by the Supreme Court without a further evidentiary hearing on this matter." (Trans. at 3, lns. 16-20). Krista argued that the District Court should not "dismiss the protection order" because the Supreme Court opinion in Frisk 1 did not explicitly reject the original order. (Trans. at 4, lns. 10-12). Krista further argued that the issue was "whether the evidence presented at that second hearing was sufficient to allow the Court to enter a finding of actual or imminent domestic violence." (Trans. at 5, lns. 14-16).

In turn, the Daniel argued an expired protection order cannot be amended, and therefore, Krista must "seek a new protection order." (Trans. at 9, ln .20). Furthermore, the first protection order was limited to "a six-month window." (Trans. at 9, ln. 11). Daniel also argued that the protection order was "remand[ed] to the district court for consideration of whether the evidence supports a finding that Daniel Frisk poses - - not posed - - poses an actual or imminent danger of domestic violence to Krista." (Trans. at 8, lns. 10-13).

After taking it under advisement, the district court extended the stipulated domestic violence protection order. (App. at 70-74). The court used the evidence presented in the June 3, 2004, and December 15, 2004, hearings as its grounds for extending the protection order on October 26, 2005. (App. at 71-74). The court referenced its findings from the parties' divorce proceedings, from civil case number 09-04-C-01637. (App. at 72). The court inserted the following findings into its order:

The finding of domestic violence is made on the following examples:

1. Threatening statements to Krista that Daniel would blow up her parents boat and that she would find them floating in Lake Superior;
2. Daniel appeared to be following Krista while she was driving . . . ;
3. After entry of the stipulated order on June 3, 2004, Daniel continued "harassment" type behavior

(App. at 71-72). In response to the new protection order, Daniel filed a notice of appeal on November 15, 2005. (App. at 82).

III. ARGUMENT

The district court has not issued a valid domestic violence protection order to Daniel Frisk. The current amended protection order is invalid for three reasons. First, the original stipulated domestic violence protection order was not procedurally extendable beyond the agreed upon time limit. Second, the district court impermissibly relied on evidence from the June 3 hearing, and should have afforded Daniel a full evidentiary hearing on remand. Finally, the district court's decision to rely on Findings of Fact from the parties' divorce proceeding, which were not introduced as evidence, was impermissible.

A. THE DISTRICT COURT ERRED BY EXTENDING A STIPULATED DOMESTIC VIOLENCE PROTECTION ORDER THAT HAD EXPIRED.

Questions of law are entitled to a de novo standard of review. Kobs v. Jacobson, 2005 ND 222, ¶ 7. The decision of whether a stipulated domestic violence protection order may be extended beyond its own terms is a question of law, fully reviewable by this Court.

Statutorily, a district court may amend its order following “a subsequent petition filed by either party.” See Frisk 1, 2005 ND 154, ¶ 10, 703 N.W. 2d 341; N.D.C.C. § 14-07.1-02(6) (2005). “Once a petitioner succeeds in obtaining a permanent domestic violence protection order, the petitioner is not required to prove actual or imminent domestic violence in order to succeed on a motion to extend that order under N.D.C.C. § 14-07.1-02(6).” Gaab v. Ochsner, 2001 ND 195, ¶ 5, 636 N.W.2d 669. However, “when a stipulation is incorporated into judgment, we are concerned only with interpretation and enforcement, not with the underlying contract.” Frisk 1, 2005 ND 154, ¶ 10 (quoting Karsky v. Kirby, 2004 ND 110, ¶ 8, 680 N.W.2d 257). The Court stated that “we do not believe the Legislature envisioned a procedure by which a party could have his or her liberty interests impinged on a re-occurring basis, despite no finding ever having been made” Id.

In Gaab, this Court deferred to the statutory language of Minnesota’s Domestic Violence Abuse Act for guidance on the extension of protection orders, in addition to Illinois and Washington statutes. See 2001 ND 195, ¶ 5, n.1. Specifically, this Court recited that

[t]he court may extend the terms of an existing order or, if an order is no longer in effect, grant a new order upon a showing that: (1) the respondent has violated a prior or existing order for protection;

(2) the petitioner is reasonably in fear of physical harm from the respondent; or (3) the respondent has engaged in acts of harassment or stalking . . .

Id. (citing MINN. STAT. ANN. § 518B.01, subd. 6a (West. Supp. 2001)) (emphasis added).

As it stands currently, the district court amended the expired stipulated order by extending it after the agreed upon six-month window had closed. Under Minnesota Law, a new order must be granted when the previous order has expired. Should this Court choose to follow Minnesota's footsteps in this case, which Daniel urges it to do, the district court must issue a new order, not extend the expired stipulated domestic violence protection order. This type of boot-strapping opens the door to permitting a party's liberty interests to be impinged without due process and should be made impermissible in North Dakota as it is in Minnesota.

Finally, Ohio offers a position similar to Minnesota. Under Ohio law, a protection order "may be renewed in the same manner as the original order or agreement was issued or approved." OHIO REV. CODE ANN. § 3113.31 (3)(C) (Anderson 2005). However, the Supreme Court of Ohio held that renewal protection orders must "be renewed *at the end of the effective period.*" Felton v. Felton, 679 N.E.2d 672, 676 (Ohio 1997) (emphasis added). It is significant that the Ohio Supreme Court chose this wording. It did not state that the renewal could be made after the protection order had expired. Rather, the renewal must be made before the end of the protection order.

This Court has already encountered the procedural problem of extending an expired order, although did not address it specifically. The district court issued Lina Gaab a permanent domestic protection order on August 24, 2000. Gaab, 2001 ND 195, ¶ 3. The protection order expired on February 25, 2001. Id. Gaab filed a petition to

extend the protection order four days prior to the expiration of the permanent protection order. Id. The district court extended the permanent protection order following a hearing on March 7, 2001. Id. However, the appellant did not raise the procedural issue of whether an exhausted procedural order could be extended, thus preventing this Court from ruling on the issue. See generally id. at ¶ 1-7. The appellant focused exclusively on whether the factual grounds existed to extend the order. Id. at ¶ 4.

In Frisk 1, this Court had the opportunity to decide whether the parties' stipulation precluded the extension of the domestic violence protection order. See Frisk v. Frisk, 2005 ND 154, ¶ 4, 703 N.W.2d 341, 343 (stating that Daniel "argued the parties' stipulation, which provided that the Domestic Violence Protection Order would not exceed six months in duration, precludes an extension of the stipulated Domestic Violence Protection Order.") However, this Court declined to rule on the issue. See generally id. at ¶ 1-13 (no specific guidance is given by the Court as to whether the stipulated order was procedurally extendable). The appellant urges this Court to take this second opportunity to rule on this issue.

The Court has stated that trial courts should be hesitant "to order a revision and modification of a decree where such a decree is based upon an agreement than where such decree is based on the finding of the court." Eberhart v. Eberhart, 301 N.W.2d 137, 143 (N.D. 1981) (quoting Bryant v. Bryant, 102 N.W.2d 800 (N.D. 1960)). A district court's denial of a motion to modify a settlement agreement has been affirmed by this Court. Toni v. Toni, 2001 ND 193, ¶ 14-15, 636 N.W.2d 396, 401. Despite Toni dealing with the non-modification of stipulated spousal support payments, its underlying premise is applicable here. The underlying premise is that stipulated agreements may not be

extended or changed. This premise makes sense because to allow changes and extensions will completely discourage parties from entering into stipulated agreements. Public policy dictates that parties should be encouraged to enter into stipulations and reach agreements as this court has previously noted. In this case and future cases involving stipulated protection orders, parties should be encouraged not discouraged from reaching a mutual agreement.

In this case, the Daniel contends that the district court lacked the procedural ability to extend the stipulated domestic violence protection order. However, should this Court find it procedurally acceptable to extend the stipulated order, Daniel still maintains the extension of the order was inappropriate because the district court needed to make new evidentiary findings.

The current version of the domestic violence protection order is procedurally invalid. It is an extension of an expired stipulated and agreed upon order. This Court's decision to "reverse and remand" in Frisk 1 invalidated the district court's extension. 2005 ND 154, ¶ 14. "The district court must nevertheless explain the reasoning behind its decision and the factual basis supporting it." Id. at ¶ 13. The district court's extension of the stipulated order was invalid because it lacked the necessary language as required by this Court. The district court is required to not only make findings; but to include the facts upon which the court has based its findings.

The stipulated protection order was entered into on June 11, 2004. By its own terms, the original stipulated protection order expired on December 2, 2004. The terms of the stipulated order stated that it lasted for six months, but could be terminated at any time prior to six months. The stipulated protection order did not state that an extension

would be allowed, nor was it bargained for by Krista. Therefore, the stipulated protection order was not extendable or amendable beyond the agreed upon six months.

Had Krista wanted an “extension” of the protection order, she needed to file a new petition for a domestic violence protection order. Krista did file for a temporary extension on November 10, 2004. But this temporary extension is procedurally invalid too, for the same reasons listed above regarding the present protection order. Once again, the November 10, 2004 temporary extension order is an extension of the stipulated protection order that expired on December 2, 2004. The stipulated protection order was limited to six months. Krista’s extension following the stipulated order expired at the scheduled hearing on December 15, 2004 or on December 24, 2004. Thus, as a matter of law, the stipulated protection order that was agreed upon on June 3 2004, and entered on June 11, 2004, could not procedurally be extended by its own terms.

B. THE DISTRICT COURT ABUSED ITS DISCRETION BY EXTENDING THE STIPULATED DOMESTIC VIOLENCE PROTECTION ORDER ON THE BASIS OF PAST ALLEGED “ACTUAL OR IMMINENT” DANGER OF DOMESTIC VIOLENCE.

“A trial court's decision to extend an existing protection order is reviewed under an abuse of discretion standard.” Gaab v. Ochsner, 2001 ND 195, ¶ 6, 636 N.W.2d 669 (quoting Maldono v. Maldono, 631 A.2d 40, 42 (D.C. 1993) (stating that a trial court's determination of good cause to extend an existing protection order is subject to reversal only upon a showing of abuse of discretion)). The extension of an expired stipulated domestic violence protection order is an issue of first impression to North Dakota.

The petitioner must demonstrate some form of domestic violence to receive a protection order. Frisk 1, 2005 ND 154, ¶ 13. “The court may amend its order at any

time upon subsequent petition by either party.” N.D.C.C. § 14-07.1-02(6) (2005).

Furthermore, once a petitioner has successfully obtained a permanent domestic violence protection order that person has no duty to prove domestic violence again to procure an extension. Gaab, 2001 ND 195, ¶ 5.

Krista still has not proven that Daniel Frisk has committed acts that constitute “actual or imminent” danger of domestic violence to the district court in a proceeding for a domestic violence protection order. “Upon a showing of actual or imminent domestic violence, the court may enter a protection order after due notice and full hearing.” N.D.C.C. § 14-07.1-02 (4) (emphasis added). The district court was required to accord Daniel a full hearing following this Court’s remand because no previous findings had been made due to the parties’ stipulation.

The district court abused its discretion by extending the stipulated protection order based on the testimony presented at the previous proceedings. This Court reversed and remanded the case to the district court to consider “whether the evidence support[ed] a finding that Daniel Frisk poses an ‘actual or imminent’ danger of domestic violence to Krista Frisk.” Frisk 1, 2005 ND 154, ¶ 14 (emphasis added). The opinion of this Court was issued on August 23, 2005. See id. at ¶ 1. The district court reconvened on this matter on October 19, 2005. However, the district court did not ask “whether the evidence support[ed] a finding that Daniel Frisk *poses* an ‘actual or imminent’ danger of domestic violence . . .” Id. at ¶ 14. Instead, the district court asked “whether or not we have to go forward with an entirely new set of evidence or whether the Court can simply issue a finding that’s appropriate and meets the conditions set by the Supreme Court without further evidentiary hearing on this matter.” (Trans. at 3, lns. 16-20).

The district court determined a completely different issue than what was appointed to it by this Court. The district court was limited to determining whether there was sufficient, present evidence to grant an extension. This Court did not grant the district court the permission to consider whether past conduct and evidence from other proceedings could be used as evidence against Daniel. As the appellant's previous attorney pointed out, this Court used "present tense rather than past tense." (Trans. at 8, lns. 13-14).

The district court's amended protection order specifically referenced alleged past conduct that occurred during or before the parties divorce hearing. The district court limited its review to the "pleadings and testimony presented at the hearing on June 3, 2004 and December 15, 2004 . . ." (App. at 71). The district court also referenced the alleged findings of domestic violence from the parties' divorce case in 2004. Id. at 2. Finally, the district court laid out three findings on the basis of past alleged conduct. Supra. Daniel contends that the district court wrongfully "cut and paste" alleged past conduct and findings into the extended stipulated domestic protection order.

This Court eliminated the district court's ability to consider evidence from the first hearing when the stipulation was reached. "If we were to determine that stipulations . . . can be the basis for reoccurring extensions of protection orders, it will likely diminish, if not eliminate such arrangements." Frisk 1, 2005 ND 154, ¶ 11, 703 N.W.2d at 344-45. Stipulations containing no findings of domestic violence are contrary to the purpose of section 14-07.1-02. See id. at ¶ 11, 703 N.W.2d at 344 (quoting Gaab v. Ochsner, 2001 ND 195, ¶ 5, 636 N.W.2d 669). This Court went on to state that "although Krista Frisk did submit evidence at the second contested hearing that could

plausibly lead to a finding of ‘actual of imminent domestic violence’ . . .” *Id.* at ¶ 12, 703 N.W.2d at 345 (emphasis added); this Court wisely implies that the second contested hearing would be the only hearing that could be considered by the district court to make findings of fact due to the stipulation entered by the parties.

The district court abused its discretion by making findings of fact on the basis of the June 3, 2004 hearing. The parties stipulated and agreed that no finding of domestic violence was to be made based on the affidavits and evidence presented in conjunction with the testimony at the June 3, 2004 hearing. The parties also agreed that the stipulated order was to last no longer than six months. By having the stipulated order read into the record and entering an order on the basis of that record, the district court agreed to abide by the terms and conditions of the stipulated agreement between Daniel and Krista. Thus, any affidavits or evidence presented to the district court for the June 3, 2004 hearing was nullified by the stipulation, and became ineligible for subsequent consideration.

The findings of the district court are required by this Court to be based upon the evidence presented for the contested hearing on December 15, 2004 or later. Thus, the second contested hearing that took place on October 19, 2005 would also be eligible for the district court’s consideration in its findings of fact. The stipulation of the parties precluded the court from making findings of fact from evidence presented on or before the June 3, 2004 hearing that warranted a court ordered domestic violence protection order. Thus no findings could have been made on the basis of the stipulation. However, the Amended Domestic Violence Protection Order signed on October 26, 2005, contained findings of fact that stem from the June 3, 2004 hearing. Nothing in the December 15,

2004 or October 19, 2005 transcript indicated that testimony had been introduced that alleged Daniel had threatened Krista's parents. Similarly, nothing in these two transcripts indicated that Daniel allegedly followed Krista while driving. The district court's findings of fact are reduced to Daniel's alleged "harassing behavior" for its consideration. Whether the alleged "harassing behavior" in itself proves "actual or imminent" domestic violence by a preponderance of the evidence is for the district court to decide.

The district court should have conducted a new evidentiary hearing and issued a new domestic protection order because it had limited evidence with which to work. As stated above, evidence offered in support of the June 3, 2004 hearing is ineligible for consideration because of the stipulation. Almost ten months passed from when the district court modified the extended stipulated protection order to include the factual findings that were required by this Court. As of January 23, 2006, it will have been over one year since the stipulated domestic violence protection order will have been entered. However, instead of listing alleged present conduct as required by law, the district court used outdated alleged conduct that was presented in previous, and other, proceedings. The district court must hold an entirely new evidentiary hearing to determine whether Daniel poses "an actual or imminent" threat of domestic violence to Krista.

C. THE DISTRICT COURT ERRED BY INCLUDING THE FINDINGS OF FACT FROM THE PARTIES' DIVORCE PROCEEDINGS.

As stated in the previous section, questions of law are entitled to de novo review. Kobs v. Jacobson, 2005 ND 222, ¶ 7. The question of whether a district court may use the findings of fact from a party's divorce proceedings in a separate proceeding for a domestic violence protection order is a question of law.

“When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not the party raising the question in the district court objected to the findings . . .” N.D. R. CIV. PRO. 52(b) (2005). “In all issues tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon. . .” N.D. R. CIV. PRO 52(a). A trial court’s decision to adopt one party’s proposed findings of fact is acceptable. See Smith Enters. v. In-Touch Phone Cards, Inc., 2004 ND 169, ¶ 11, 685 N.W.2d 741, 744. However, the court itself is not entitled to adopt proposed findings it discovers itself because it is not a party to a proceeding.

The domestic violence statute itself created a limitation for the judges findings of fact to the issues before it. Section 14-07.1-02 reads in part:

1. An action may be brought under this section, regardless of whether a petition for legal separation, annulment, or divorce has been filed; . . .
4. Upon a showing of actual or imminent domestic violence, the court may enter a protection order after due notice and full hearing; . . .
8. The petition for an order for protection must contain a statement listing each civil or criminal action involving both parties . . .

Section 14-07.1-02 has not stated that is acceptable for a court to cross-reference, incorporate, or boot strap the findings of a separate proceeding into the domestic violence protection order. The North Dakota Legislature has spoken on whether evidence of domestic violence maybe used in proceedings that require the usage of Best Interest of the Child Standards. See N.D.C.C. § 14-09-06.2 (j) (stating that “[a] court may consider, but is not bound by, a finding of domestic violence in another proceeding under chapter

14-07.1.”). Section 14-07.1-02 does not duplicate the language found at the end of section 14-09-06.2 (j). The domestic violence protection order statute is silent on whether the findings of a separation proceeding may be considered. Therefore, the legislature did not intend a court to cross-reference the separate records and proceedings of another court case the parties are involved in with the proceedings of a domestic violence protection order. The district court’s use of facts from the divorce proceeding to support its findings of fact in this proceeding is inappropriate and an abuse of discretion.

The district court has erred in its decision to use the parties’ findings of fact from the divorce proceeding because North Dakota Law does not allow the findings of a divorce proceedings to be incorporated into the orders of a domestic violence proceeding. Had the Legislature commanded or intended the findings of a separate, non-domestic protection order proceeding to carry over into the domestic violence protection order proceedings, it would have so stated as it did in N.D.C.C. § 14-09-06.2. However, the Legislature made the policy choice to create a separate proceeding for domestic violence protection orders.

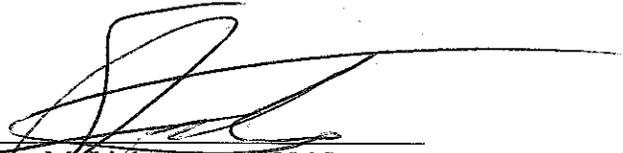
Daniel is entitled to a full evidentiary hearing on the merits of a domestic violence protection order alone. As previously stated, the district court boot strapped its findings of fact from the divorce proceedings. However, the parties divorce proceedings or record are not a part of the record for the domestic violence protection order proceedings. A review of all transcripts from the domestic violence protection order proceedings indicates that neither party’s counsel introduced the district court’s Findings of Fact from the parties’ divorce proceedings as evidence. A showing of actual or imminent domestic

violence cannot be made unless evidence is introduced. And where evidence is not introduced, it cannot be relied upon. Instead, the district court decided on its own to incorporate it into its decision.

IV. CONCLUSION

Appellant, Daniel J. Frisk, respectfully requests that the Court vacate the district court's October 26, 2005, Amended Domestic Violence Protection Order. The district court's order continuing protection until December 15, 2006, was invalid for three reasons. First, the district court erred by extending a stipulated domestic violence protection order that could not be extended by its own terms. Second, the district court abused its discretion by relying upon outdated facts and not providing Daniel a new evidentiary hearing in which findings of domestic violence could be made to satisfy the order of this Court. Finally, the district court erred by including findings of fact from the parties' divorce proceedings in its amended domestic violence protection order.

Dated this 23 day of January, 2006.



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