20180388
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 4, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20180388
DISTRICT COURT NO. 45-2013-DM-00253

SIERRA MARIE HOLZNAGEL,

DEFENDANT AND APPELLANT
vs.

NATHAN RICHARD MILES,

PLAINTIFF AND APPELLEE

APPEAL FROM DISTRICT COURT, STARK COUNTY,
NORTH DAKOTA, SOUTH WEST JUDICIAL DISTRICT

BRIEF FOR APPELLEE

MARKUS A. POWELL
(ND ID# 07930)
513 Elks Drive
Dickinson, ND 58601
701-483-8700 (phone)
701-483-8714 (fax)
Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF THE ISSUES

I. The District Court was correct in finding the Appellee established a Prima Facie case requiring a hearing on the merits.

II. The District Court was not clearly erroneous in finding a Material Change in Circumstance and ordering a modification of parenting responsibility.

III. The District Court did not abuse its discretion in scheduling a half day hearing or when allowing the Appellee to call witnesses at that hearing.

IV. The District Court did not abuse its discretion when it denied the Appellant's Motion for Continuance and Motion for Reconsideration or in the Alternative a New Trial.

STATEMENT OF THE CASE

[¶2] This appeal arises following the District Court's order on a motion for modification of primary residential responsibility of the minor child ALM filed by Nathan Richard Miles, the Appellee and ALM's biological father.

[¶3] Sierra Marie Holznagel, *n.k.a* Sierra Shellman, the Appellant, was initially awarded primary residential responsibility of the ALM by the District Court in a judgment entered in September of 2013 in case number 45-2012-DM-00059. The case was subsequently reassigned to case number 45-2013-DM-000253.

[¶4] On October 18, 2017, the Appellee motioned the District Court for an emergency ex parte interim order granting him parenting time and Sierra supervised parenting time based on the fact that ALM was in imminent danger and an order was required to protect ALM. Index #25. A motion requesting modification of the primary residential responsibility was filed at the same time as the request for ex parte interim order. The District Court granted the Appellee's ex parte motion on October 20, 2017.

[¶5] On November 8, 2018, the Appellant filed a Motion to Vacate Amended Emergency Interim Order and supporting brief. On November 13, 2017, the District Court rescinded the emergency interim order, stating "[t]he Court accepts its share of the responsibility in issuing the order contrary to Rule 8.2(a)(8), but agrees with Sierra that the Amended Emergency Interim Order, and the initial Emergency Interim Order, were improvidently granted.

[¶6] On January 1, 2018, the District Court entered a memorandum opinion

finding that Nathan had established a primary facie case that there had been a material change in circumstances had occurred, justifying a hearing on the merits. Then on January 9, 2018, the District Court issued a Notice of Hearing setting the matter for February 26, 2018 as a one day hearing at 1:30pm Mountain Time. The Notice of Hearing stated "[u]nless this Court otherwise orders, evidence either in support of, or in opposition to the relief requested must be presented by affidavit."

[¶7] On February 12, 2018, Attorney DePuydt filed a notice of appearance for Appellant, along with a motion for continuance and supporting brief. The District Court denied the motion for continuance on February 20, 2018.

[¶8] The hearing was held on February 26, 2018 ando n March 21, 2018, the District Court issued a memorandum opinion granting the Appellee's motion for modification of primary residential responsibility. On May 3, 2018, the Appellant filed a Motion to Reconsider and the District Court denied the Motion in its entirety August 31, 2018.

STATEMENT OF THE FACTS

[¶9] ALM is a minor male born to the parties in 2011. The paternity of ALM is not contested. At the time of Appellee's Motion for Modification of Primary Residential Responsibility, the Appellant and ALM were residing in Glen Ullin, North Dakota, in a house owned by the Appellant and her then husband, Jonathan Shellman. ALM was a first grader at Glen Ullin Public School. The Appellee resided at an apartment in Dickinson, ND, along with his fiancé.

STANDARDS OF REVIEW

[¶10] Whether a party has established a prima facie case for a change of primary residential responsibility is a question of law which this Court reviews de novo. E.g., Sweeney v. Kirby, 2013 ND 9, ¶ 3, 826 N.W.2d 330; Thompson v. Thompson, 2012 ND 15, ¶ 6, 809 N.W.2d 331; Wolt v. Wolt, 2011 ND 170, ¶ 9, 803 N.W.2d 534.

[¶11] Under N.D.C.C. 14-05-22, a district court retains jurisdiction to modify parenting time. To modify parenting time, the moving party must demonstrate that a material change in circumstances has occurred since entry of the previous parenting time order and that the modification is in the best interests of the child. Hoverson v. Hoverson, 2015 ND 38, ¶ 12, 859 N.W.2d 390. A trial court's decision to modify parenting time is a finding of fact and will only be reversed on appeal if it was clearly erroneous. Id. "'A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or if . . . on the entire evidence we are left with a definite and firm conviction a mistake has been made.'" Dufner v. Trottier, 2010 ND 31, ¶ 6, 778 N.W.2d 586 (quoting Kienzle v. Selensky, 2007 ND 167, ¶ 14, 740 N.W.2d 393).

[¶12] Determinations as to lengths of a hearing and number of witnesses, Wahl v. Northern Improv. Co., 2011 ND 146, ¶ 6, 800 N.W.2d 700, motions for continuance, Clark v. Clark, 2006 ND 182, ¶7, 721 N.W.2d 6., admission or exclusion of evidence, Ingalls v. Paul Revere Life Ins. Group,1997 ND 43, ¶20, 561 N.W.2d 273, and motions for a new trial, Okken v. Okken, 325 N.W.2d 264, 269 (N.D. 1982), is abuse

of discretion. "A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process. Clark at ¶7..

LAW AND ARGUMENT

I. The trial court was correct in determining that the Appellee established a prima facie case justifying a hearing on the merits.

[¶13] The Court in this matter had in its possession a timely filed Affidavit of Nathan Miles, Affidavit of Deputy Olson (filed as an exhibit), a sworn criminal complaint signed by Rikki Berreth, notorized and approved by Morton County State's Attorney Allen Koppy, and approved by the District Judge (filed as an exhibit) and entered into the public record, and a financial affidavit of Nathan Miles.

[¶14] A prima facie case requires only enough evidence to allow the fact finder to infer the fact at issue and rule in the moving party's favor. Jensen v. Jensen, 2013 ND 144, 835 N.W.2d 819 (citing Kartes v. Kartes, 2013 ND 106, 831 N.W.2d 731). It is a "bare minimum," and requires only facts which, if proved at an evidentiary hearing, would support a change of primary residential responsibility that could be affirmed if appealed. Id. at ¶8. Allegations alone, however, do not establish a prima facie case and affidavits must include competent information, which **usually** requires the affiant to have first-hand knowledge. Id. (emphasis added.) If the moving party's allegations are supported by competent, admissible evidence, the court may conclude the moving party failed to establish a prima facie case only if: (1) the opposing party's counter-affidavits conclusively establish that the moving party's allegations have no credibility; or (2) the moving party's allegations are insufficient on their face, even if uncontradicted, to justify modification. Id. at ¶13. Unless the counter-affidavits conclusively establish the movant's allegations have no credibility, the district court must accept the truth of the moving party's allegations. Id

[¶15] The Appellant argues that the affidavits offered by the Appellee are not competent because they contain hearsay statements and not all statements made by the affiants are made from first-hand knowledge. This contention is wrong, however, as the affidavit of Deputy Olson is a combination of first-hand knowledge and admissible hearsay falling within exceptions to the hearsay rule. For example: statements made to Deputy Olson by John Barry, the superintendent of the Glen Ullin School District and principal of the Glen Ullin School, fall under Hearsay Exception 803(8)(A)(ii) a record or statement of a public office, if it sets out a matter observed while under a legal duty to report. In the affidavit of Deputy Olson, Mr. Barry made his statement and included that he did so in a required 960 incident report, which is required by his public position. If the court finds that they did not meet the requirements of the rule 803 exception, then they would be admissible under Rule 807, the Residual Exception to the Hearsay Rule. Rule 807 states:

> Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a Hearsay Exception in Rule 803 or 804:
>
> 1. The statement has equivalent circumstantial guarantees of trustworthiness;
> 2. It is offered as evidence of a material fact;
> 3. It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> 4. Admitting it will best serve the purposes of these rules and the interests of justice.

N.D.R.Ev. 807.

[¶16] These statements have equivalent circumstantial guarantees of trustworthiness as they were made by a neutral party with no benefit to gain, and by a person who is in a position that requires he look after the welfare of the children who

attend his school. The statements were offered as evidence of the fact that A.L.M. walked to school improperly dressed for the weather, with his younger brother, after missing the bus because they were unable to wake their parents. These statements are more probative on the point for which they are offered than any evidence the Appellee could obtain at the time via reasonable efforts because the school officials were not willing to sign affidavits without being subpoenaed to testify. This is further evidenced by the subpoenas that were issued by the Appellee to John Barry and Missy Turcotte on October 25, 2017. See Index #50 and #51 of the Court record. The veracity of these statements is further bolstered by the Appellant's admission to several of these statements in her own affidavit filed in response to the motion for change of primary residential responsibility.

[¶17] The criminal complaint filed as an exhibit is not hearsay as it was not offered as proof of the matter asserted therein but rather as evidence that there was a criminal case pending against the Appellant for Child Neglect, Reckless Endangerment, and Contributing to the Delinquency of a Minor.

[¶18] The Appellant argues that there was not enough competent admissible evidence submitted to the Court to establish a prima facie case. This is simply not true. The Appellant offered no evidence to establish that the allegations had no credibility nor did she establish that the Appellee's allegations were insufficient on their face to justify modification.

[¶19] Therefore the Court's order establishing a prima facie case in Document ID #240 on January 2, 2018 correctly finds that the Appellee met his burden of

establishing a prima facie case and the matter was correctly set for further proceedings.

II. The Appellee Established a Material Change in Circumstances and, the Court's findings of facts regarding the Material Change in Cicumstances are correct.

[¶20] "A material change of circumstance can occur if a child's present environment may endanger the child's physical or emotional health or impair the child's emotional development." Lanners v. Johnson, 2003 ND 61, ¶7, 659 N.W.2d 864 (quoting Selzler v. Selzler, 2001 ND 138, ¶21, 636 N.W.2d 412). Improvements in a non-custodial parent's situation accompanied by a general decline in the condition of the children with the custodial parent over the same period may constitute a significant change in circumstances. Id.

[¶21] The uncontested evidence available at the time of the evidentiary hearing was that the Appellee's schedule had changed, and he now had a much more stable schedule that allowed him to be home every night and every weekend where he previously had not had that freedom. See 3rd Affidavit of Nathan Miles Doc ID 216 at ¶ 18. Miles also stated in his affidavit that he was now engaged to be married and planning to have additional children. Id. at ¶ 19. He further stated in his affidavit that either he or his fiancé would be able to wake A.L.M. up, get him ready for his day, and get him to school. Id. at ¶ 17. In Miles' financial affidavit, he showed that he had sufficient funds to pay for his expenses and raise his child. See Generally, Financial Affidavit of Nathan Miles DOC ID #119.

[¶22] In her motion for reconsideration, the Appellant attempts to suggest that the Appellee lied regarding his work situation and based on his overtime hours, and

further suggests that his situation is worse than before because he sold his house. A review of the record contradicts both assertions. Nowhere in any of the Appellee's affidavits did he talk about hours of overtime worked, nor did he state that he was worse off financially than he was at the time of the initial judgment. A further review of the Appellee's testimony shows that he did not testify to nor was he asked about his work hours or his financial ability to care for his son. He was asked about his living arraignments but no further inquiry about his ability to financially or physically care for A.L.M. were made. See Audio transcript of Evidentiary hearing 15:19:27 through 15:36:00. The Appellant is attempting to assert new facts into the record regarding Appellee's ability to care for A.L.M. that simply are not in the record.

[¶23] The first prong of the requirements for establishing a material change in circumstance has been met by the factual evidence that the Appellee is in a better position to care for A.L.M. now than he was at the time of the initial custody determination.

[¶24] There is evidence in the record and testimony from the Appellant that she plead guilty to Contributing to the Delinquency/Deprivation of a child when she was not awake and present to care for her young children when they were getting ready for school, resulting in A.L.M. being inadequately dressed for the weather and walking to school with his 4½ year old brother. There is further evidence that on more than one occasion, A.L.M. was locked out of the house in below zero conditions, once while the Appellant was in the shower and once while she was sleeping. There is also evidence that A.L.M. was left unattended in a situation where he was able to ingest medicine, requiring him to be taken to the emergency room and

administered i.v. fluids to help flush the medicine from his system. The Appellant admitted on the stand to all of these allegations. Regardless of the outcomes of these events, they all support a finding of a general decline in the condition of living and safety for A.L.M. in the care of the Appellant.

[¶25] The Appellant tries to suggest that each of these events should be viewed as a "stand alone" event. This argument is nonsensical as they all show a pattern of deteriorating care by the Appellant. Beyond the events noted by this Court, the Appellee offered evidence of many other events of neglect and abuse that the court did not mention in its decision but most assuredly is aware of.

[¶26] As such, the Courts findings regarding a material change in circumstance are valid and District Court was not clearly erroneous in their findings.

III. The District Court's evaluation of the Best Interest of the Child Factors was not clearly erroneous.

[¶27] The Appellant suggests that the District Court erred in finding that the Appellee could adequately provide for a safe environment for A.L.M. because the Appellee did not provide any evidence establishing his ability to provide for the child. This statement is categorically false. The Appellee provided substantial evidence of his ability to provide for the adequate care of A.L.M. His testimony and affidavits provided evidence that A.L.M. would have his own room, he would have help in the mornings getting ready for school, he would live in a stable environment with his father and his father's fiancé. See DOC ID #216 ¶¶17-19. The Appellee provided a financial affidavit that showed that he made sufficient money to cover his bills and provide for his and A.L.M.'s needs. See DOC ID #119. There was evidence presented

that when initially placed with Appellant, the Appellant began the process of establishing a primary care physician by scheduling an appointment and having him seen by a local doctor.

[¶28] The suggestion that because the Appellee lives in an apartment building and the Appellant lives in a house is proof that the Appellant is better equipped to care for A.L.M. is absurd. First, if the Appellant lived in an apartment building when she negligently locked her child out of the house on two different occasions, then at least A.L.M. would have shelter inside the building from the cold. Second, the Appellant fails to mention that in the initial determination, the Appellant was purchasing her house from her father. There was no additional evidence presented that she was able to complete that purchase. To suggest that she is the owner of the house, without additional proof, is misleading. Further the Appellant argues that the Appellee is not financially capapable of caring for A.L.M. because he pushed by his own wedding in order to pay for this case. This fact only goes to show that the Appellee is willing to make great personal sacrifice in order to ensure the safety and security of his child.

[¶29] The Appellant states that there were only two incidences that questioned the Appellant's ability to care for A.L.M. This is not true; there are three incidences that the Court refers to in its order of specific neglect by the Appellant and many additional incidences that show that her care of A.L.M. and her decision to allow her husband, Jonathan, to be the primary care giver to A.L.M. support finding that the Appellee is better equipped to care for A.L.M.

[¶30] The Appellant claims that the Court ignored the Appellant's testimony as to changes made. The Court did not ignore the Appellant's testimony as to the changes made in the way she cares for A.L.M. because no testimony was given. The Appellant testified that she had now taken precautions to prevent A.L.M. from being placed in dangerous situations, but there was no testimony as to what these changes were. She only made this statement after all of her excuses failed, and she attempted to rehabilitate herself. It is in the District Court's authority to weigh testimony and determine it's not credible.

[¶31] Although the District Court used the phrase, "the Court questions Sierra's ability to provide a safe environment…," it is clear from the tone and language used in describing his impressions of the Appellant's testimony that he believed she did not take any of these matters seriously, and as such, he believed she was unable to adequately care for A.L.M. A reading of the order in its entirety leaves no question as to whether the judge had an "inkling or suspicion" or firmly believed the Appellant was not capable of providing a safe environment.

[¶32] The District Court did not ignore that the Appellee was unaware of A.L.M.'s skin condition because evidence was not presented that he was not aware of it. The evidence in the record shows that Nathan was not aware of the name of A.L.M.'s skin condition, however there is ample evidence that Nathan was aware that A.L.M. had a skin condition, diagnosed or undiagnosed, that got noticeably better when the Appellee, his fiancé and his mother used moisturizer on it daily. There was also evidence presented that A.L.M. would arrive at the Appellee's house with very irritated, rashy, and itchy skin, and after being continuously moisturized while with

the Appellee, it would become noticeably better and less itchy by the end of the visit. Further, the suggestion that the Appellee should have taken A.L.M. to the hospital regarding concerns over the rash is amusing being that the Appellant never suggested she had taken A.L.M. to the hospital for the rash. There is testimony that as soon as the Appellee had A.L.M. in his care, he scheduled a Doctor's appointment, partially to address the skin issue.

[¶33] Finally, regarding factor (b) of the best interest of the child factors, the Appellant suggests that this Court did not adequately review the record and testimony because he stated "being exposed to winter weather in February in North Dakota is not something one can dismiss as the responsibility of a two year old." This contention by the Appellant is ironic, being that if the Appellant had more thoroughly reviewed the record, she would have known that this Court was referring to Ms. Shellman's testimony that her two year old daughter must have locked the door on the second occasion that A.L.M. was locked out because she hadn't. If anything, this statement by the Appellant calls into question the thoroughness of her review of the record, not that of this Court's.

[¶34] Regarding factor (d), all of the same facts presented in Defense of the Court's position on Factor (b) are relevant to factor (d). The Appellee incorporates all of those arguments here as well. Regarding the contention that the Court ignored certain factors pertaining to factor (d) cannot be established based solely on the fact that the Court did not specifically address them. It is possible, and the belief of the Appellee, that the Court simply believed the evidence supporting a decision that factor (d) favored the Appellee outweighed the factors against it.

[¶35] Regarding factor (e), the Appellant argues that the conduct of the Appellee during the period of time when he was granted full parenting time via the emergency ex parte order supports a finding that factor (e) should favor neither party. A review of the ex parte order shows that there were no guidelines for visitation ordered in the first order, and the subsequent order merely provided for supervised visitation. The Appellee did his best to interpret what that meant and cannot be faulted for not knowing how to proceed in that situation. The Appellant never made arraignments to have supervised visitation through family connections as was ordered in the amended emergency order. Even if the Court took this two week imposition on the Appellant as evidence of the Appellee attempting to impede A.L.M.'s relationship with his mother, it in no way compares with the evidence and admissions of the Appellant that she impeded the relationship between A.L.M. and the Appellee continuously for the past four years. Therefore, this Court was correct in determining that factor (e) favored the Appellee.

[¶36] Regarding factor (m), the Appellant argues that the purpose of factor (m) is not for the Court to express whether the Court found a party to be likable. This, however, is not at all what the Court was stating when explaining why factor (m) favored the Appellee. The court goes into great detail to describe how the Appellant failed to take any responsibility for her actions and provided excuses for everything. The Court pointed out that the Appellant showed a blatant lack of respect for anyone who opposed her, regardless of the good faith of their belief, and finally pointed out that the Appellant still after all of the testimony and evidence failed to understand the ramifications of her lack of care for A.L.M. These are case-specific factors not

specifically contemplated or delineated by the legislature. The belief of the Court that the Appellant is not capable of understanding when she is wrong or recognizing her behavior is detrimental to A.L.M. is an adequate case-specific finding to award factor (m) to the Appellee.

[¶37] The Appellant further asserts that the Appellee's lack of scruples and lying to weigh factor (m) equally between the parties. To support this, the Appellant attempts to construe evidence and testimony presented by the Appellee as lies without any real evidentiary basis. She accuses the Appellee of lying about the emergency room visit when stating that emergency care was provided. The evidence is concrete that A.L.M. was treated in the emergency room and given I.V. fluids. I am not sure how this wouldn't classify as emergency care. At the most, it would be a dispute in a specific usage of words, not a lie. The position that the Appellee lied about his work schedule has not been established in any way. The position that the Appellee lied about days missed in his affidavit has not been proven. The Appellee testified as to what he was told by the school. It was also not established whether the school was combining tardies and absences when speaking to the Appellee. The evidence shows that the number of late arrivals was not included on the report from the school. The Appellant states that the Appellee had failed to provide photographic proof of dirt or plaque build up but fails to address the photographic evidence of hand print bruises and infected, scabbed feet.

[¶38] It is the job of the trier of fact, in this case the Judge, to weigh the credibility of the witnesses and determine what testimony he believes to be true and

what he believes is not. The Appellant has provided no evidence or argument that the Court's weighing of the evidence was clearly erroneous.

[¶39] Regarding Factor (k), the Appellant suggests that factor (k) should have favored the Appellant based on false statements and evidence given by the Appellee. This contention is completely unfounded. All accusations made by the Appellee were supported by additional evidence, some of which included admissions by the Appellant. Further, this Court in its memorandum stated that the Appellant contradicted herself in her answers while testifying on the stand. If anything, this factor should favor the Appellee as it was proven on the record that the Appellant's statement that the Appellee never called A.L.M., never exercised any additional time with A.L.M., and never showed any interest in taking part in his medical care or educational experience, suggesting he wasn't interested in being involved with his child, was completely false. Testimony showed that the Appellee made great attempts to have more time with his son and speak with his son much more often than he was allowed by the Appellant. Not only did the Appellant make false allegations against the Appellee, she perpetrated the interference of the Appellee's ability to be more involved in A.L.M.'s life.

[¶40] For the reasons stated above, the Appellant has failed to show that the District Court's findings as to the best interest of the child were clearly erroneous.

IV. The District Court did not abuse its discretion regarding the time and manner of the hearing.

[¶41] The District Court is aware of the fact, and can confirm with the Calendar control clerk, that hearings on affidavits are typically set for one hour unless additional time is requested by the Parties. The Appellant failed to request additional time for the hearing before the hearing date. Further, the Appellant failed to raise the issue of time at the evidentiary hearing. The Court specifically asked both parties at the beginning of the hearing if there were any other procedural issues that needed to be addressed. The Appellee addressed the issues he felt were necessary. The Court then turned to the Appellant and asked if they had anything additional, to which the Appellant responded "No." Further, the Court asked the parties whether they wanted to argue orally or brief the issue (which would have saved additional time for cross-examination. The Appellee requested oral argument, the Appellant did not take a position.

[¶42] The Appellant had ample opportunities to inform the Court that she felt she needed more time for the hearing. She failed to raise any concerns about time with the Court and did not prior to the hearing. Further, none the issues the Appellant suggests she was not able to address because of lack of time were not issues that were used in this Court's decision to modify primary residential responsibility.

[¶43] Without requesting additional time or making an objection to the amount of time provided, the Appellant failed to preserve the issue and cannot be awarded a new trial. Because the record was not made the issue is mute.

V. The Court did not abuse its discretion by denying the Appellant's motion for continuance.

[¶44] The Appellant alleges that she was unfairly prejudiced when the Court denied her motion for continuance. She supports this contention by stating that new counsel for the Appellant was not obtained until two weeks before the hearing. She further alleges that this case proceeded faster than the majority of cases in the district. Finally, she state's the Appellee would not have been prejudiced by a continuance of the matter.

[¶45] First, the Appellant was represented throughout the majority of this matter. Original counsel for the Appellant filed his motion to withdraw on December 20, 2017, stating that failure of the Appellant to comply with the fee agreement, failure to bring her account current, and failure to set up a payment arrangement. See Brief in Support of Motion to Withdraw DOC ID #228. The evidentiary hearing was scheduled for February 26, 2018, over two months after original counsel withdrew. The Appellant did not respond to the motion to withdraw. The Appellant did not provide any evidence of a failed attempt to hire additional counsel. The Appellant merely suggested that it was unfair for the Court to only allow new counsel two weeks to prepare for the hearing. The Appellant failed to supply the Court with any factual evidence that there was good cause for why she did not obtain replacement counsel until two weeks before the hearing. A broad assertion that counsel obtained by the Appellant was 150 miles from the Appellant's home town is not justification of a failure on the part of the Appellant to obtain replacement counsel sooner. The Appellant could have filed an affidavit along with her motion for continuance

outlining the attempts she made at obtaining replacement counsel, but she did not. Anything outside of direct evidence from the Appellant as to her inability to obtain counsel is purely speculation.

[¶46] Second, the Appellant states that this case moved faster than other cases in the district. In support of this contention, the Appellant supplied a list of 12 cases recently decided or currently pending in the District. The Appellant fails to mention, however, that 11 of the 12 cases were initial proceedings set for full evidentiary hearings and complete discovery scheduling orders. A motion for primary residential responsibility is a motion heard on affidavits with limited exceptions, scheduled for less time than a full trial, more easily fit into the Court's schedule.

[¶47] Finally, the Appellant argues that the Appellee would not be prejudiced by a continuance in the matter. This case had already consumed this Court with frivolous filings, costing the Appellee extra money in unnecessary attorney's fees. The Court acknowledged at the evidentiary hearing that the case had blown up and created procedural pitfalls. Further, the Appellee provided the court with evidence of how he would be prejudiced if the case was continued.

[¶48] What the Appellant fails to mention is that there was a young child whose safety and future hung in the balance of the decision of the Court. The Court had already ruled that there was a threat of imminent danger to the child when it originally granted the ex parte emergency order. The fact that the order was later rescinded on a procedural issue does not negate that there was a previous finding of harm to the child. The Court was undoubtedly concerned for the safety of the child

and the issues it might create if a continuance was granted. The District Court did not abuse its discretion in denying the Appellant's Motion for Continuance.

VI. The District Court did not give preferential treatment to the Appellee when the Court allowed the Appellee to present evidence by testimony contrary to its own previous order.

[¶49] As argued by the Appellee at the evidentiary hearing, the Court had previously ruled that brief testimony of subpoenaed witnesses would be allowed to ascertain the veracity of the statements made through other affiants. The same issues persisted in obtaining affidavits from the school officials and law enforcement as existed at the time of the Court's initial ruling. Further, the Appellant was aware of that ruling and received advanced notice of the subpoenas and the testimony that was expected by those subpoenaed witnesses. The ruling at the hearing was not inconsistent with previously issued order in that it was in line with the order issued regarding testimony of subpoenaed school officials in Document ID #117. It was reasonable for the Appellee to believe that the school officials subpoenaed would be allowed to testify under the order granted via Document ID #117. It was also reasonable for the Court to rule that the Appellant had ample notice of the intent of the Appellee to call the additional school employee witnesses based on the subpoenas of these witnesses and the previous order, and ample notice of the content of their testimony based on the information supplied in the affidavits of Nathan Miles.

[¶50] The Appellee did not have ample time to request the Court amend its Notice of Hearing as it was unaware of a discrepancy between the notice of hearing and the Court's previous ruling in Document ID #117 until the Court issued its Order

denying the Appellee's request to allow telephonic appearance on Friday, February 23, 2018, when the evidentiary hearing was held on Monday, February 26, 2018.

[¶51] The Order allowing testimony of subpoenaed school officials and the Notice of hearing are not mutually exclusive. The Court and the Appellant were well aware of the policy of the school district and the inability to obtain testimony in any way other than to subpoena those witnesses to the hearing. The Appellant was aware of the Court's previous ruling, she was on notice of the Appellee's intent to call these witnesses to testify, and she was on notice of what these witnesses were expected to testify to. The Appellant was not penalized by the Court's decision to allow testimony of these school officials. Further, there was only one additional witness called by the Appellee that wasn't originally allowed for by the Court's order in Document ID #117. This witness was Ms. Voegle, a teacher who was involved the second incident where A.L.M. was locked out of his house in below zero temperatures. This incident happened on February 7, 2018, very shortly before the evidentiary hearing in this matter and not in time to even attempt to obtain this evidence through a different means. As such, any perceived penalty the Appellant claims was minimal at best and cannot warrant the granting of a new trial.

[¶52] There was no marked advantage to the Appellee, as the witness was not a surprise; at the most, the Appellant would have questioned whether the testimony may not be allowed. The Appellant has failed to provide any real substantial reason for this Court to grant her a new trial. Therefore, the District Court did not abuse its discretion in allowing the testimony from the witnesses.

CONCLUSION

[¶53] The District Court accurately found that there was a prima facie case presented by the Appellee which necessitated a hearing on the merits of his Motion to Modify. During the proceedings in the matter the District Court did not abuse its discretion and none of the Court's finds were clearly erroneous. As such the Appellant is entitled to no relief from this Court.

Dated this 4th day of January, 2019.

REICHERT ARMSTRONG

MARKUS A. POWELL
(ND ID #07930)
513 Elks Drive
Dickinson, ND 58601
(701) 483-8700 (phone)
701-483-8714 (fax)
markusp@reichert-armstrong.com
Attorney for Appellee

IN DISTRICT COURT, COUNTY OF STARK, NORTH DAKOTA

Nathan Richard Miles, Plaintiff and Appellee,	)	Supreme Court Case No. 20180388
Vs.	)	**Affidavit of E-Service**
Sierra Marie Holznagel, Defendant and Appellant, And State of North Dakota Statutory Real Party in Interest and Appellee	)	

State of NORTH DAKOTA)
) SS.
County of STARK)

AFFIDAVIT OF SERVICE BY ESERVICE

[¶ 1] **REBECCA MARCUSEN,** being first duly sworn says that she is 18 years of age and that on this 4th day of January, 2019, she served a **APPELLEE'S BRIEF,** by serving a true and correct copy by email to the below described people:

North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

Attorney for Appellant
Mary Elizabeth Depuydt
depuydt.m@gmail.com

State of North Dakota
Child Support
bismarckcse@nd.gov

REBECCA MARCUSEN

Subscribed and sworn to before me this 4th day of January, 2019.

(NOTARY SEAL)

NOTARY PUBLIC, NORTH DAKOTA

MARKUS POWELL
NOTARY PUBLIC, STATE OF NORTH DAKOTA
MY COMMISSION EXPIRES AUG 9, 2019