

24IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Vickie M. Gooss, nka Vickie M. Lenard,)	
)	
Plaintiff and Appellee,)	
)	
vs.)	
)	Supreme Court No. 20200076
Jeffrey A. Gooss,)	
)	Mercer Co. No. 29-2018-DM-44
Defendant and Appellant,)	
)	Oral Argument Requested
and)	
)	
State of North Dakota,)	
)	
Statutory Real Party in Interest)	
and Appellee.)	

APPEAL FROM SECOND AMENDED JUDGMENT DATED FEBRUARY 27, 2020,
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR SECOND
AMENDED JUDGMENT DATED FEBRUARY 27, 2020, ORDER ON RULE 60
RELIEF ENTERED ON FEBRUARY 7, 2020, AND ORDER ON MOTION FOR
MODIFICATION OF CHILD SUPPORT ENTERED ON JANUARY 16, 2020, OF THE
MERCER COUNTY DISTRICT COURT, THE HONORABLE DAVID REICH
PRESIDING

STATE OF NORTH DAKOTA'S APPELLEE BRIEF

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[2] REQUEST FOR ORAL ARGUMENT

[3] Appellant, Jeffrey Gooss, has requested oral argument on this case. The State wishes to appear for such argument.

[4] STATEMENT OF THE ISSUES

[5] **Issue 1:** Whether the district court had jurisdiction to modify Mr. Gooss' child support obligation.

[6] **Issue 2:** Whether it was inequitable for the district court to require Mr. Gooss to pay child support.

[7] **Issue 3:** Whether the district court abused its discretion in determining the amount of the deviation for visitation travel expenses.

[8] STATEMENT OF THE CASE

[9] The State concurs with the Statement of the Case presented by Appellant, Jeffrey Gooss.

[10] STATEMENT OF THE FACTS

[11] The parties were married and had one child, J.G., born in 2002. They divorced in the State of Nevada in January 2004. (App. 62-73). The judgment of divorce awarded Ms. Lenard primary residential responsibility of their child and ordered Mr. Gooss to pay child support of \$300.00 per month, plus an additional \$50.00 per month on prior period support. (App. 63, 64). The judgment also provided that, if Ms. Lenard moved to Colorado with the child, then Mr. Gooss was to bear all travel expenses and Ms. Lenard would waive child support. (App. 64-65). Ms. Gooss did not move to Colorado but, instead, moved to Arizona. (Tr. 7:14-16; 19:19-23).

[12] An amended decree was entered in the Nevada court on June 17, 2009, which allowed Ms. Lenard to move to the State of Montana. (App. 40-43). Mr. Gooss' parenting time was established should Ms. Lenard and the child move to Montana. (App. 41). Ms. Lenard was ordered to pay for all travel expenses. (App. 41) Mr. Gooss was ordered to pay child support of \$350.00 per month. (App. 41).

[13] On March 11, 2013, the Nevada court adopted the terms of a stipulation entered into by Ms. Lenard and Mr. Gooss. (App. 44-51). This modification maintained primary residential responsibility of the child with Ms. Lenard, established Mr. Gooss' parenting time. and, in Paragraph 7, ordered Mr. Gooss to "pay all travel expenses and confer with Vickie before making any travel arrangements at least (3) three weeks prior,..." (App. 45-47). Paragraph 8 outlines the type of travel arrangements that were to be made. (App. 47). And, finally, Paragraph 9 addressed child support to be paid by Mr. Gooss. (App. 47). Specifically, "Jeff shall pay child support of \$350.00 for the month of March 2013; payment of travel expenses will constitute child support thereafter."

[14] In July 2018, the child support program in the State of South Dakota sent a request to the North Dakota Child Support Division, asking for assistance in reviewing and modifying Mr. Gooss' child support obligation. (Doc ID# 2). This request for assistance was submitted pursuant to the requirements of the Uniform Interstate Family Support Act. With the receipt of the interstate request from South Dakota, the State of North Dakota opened its case. Subsequently, the Nevada judgement dated January 22, 2004 and the Order dated March 14, 2013 were registered in the Mercer County District Court. The

Notice of Registration was issued on August 17, 2018. (App. 6). An Amended Notice of Registration was issued on May 23, 2019. (App. 7).

[15] The State commenced a review of Mr. Gooss' child support obligation and the State filed a Motion for Modification of Child Support on September 9, 2019. (Doc ID## 13-22). At that time, the State also filed its Notice of Statutory Real Party in Interest. (Doc ID# 12). In its Motion, the State requested that Mr. Gooss' child support obligation be modified to \$709.00 per month and the medical support provision be modified to follow N.D.C.C. § 14-09-08.10.

[16] Mr. Gooss filed a response to the State's Motion, as well as a counter-motion to dismiss the State's Motion. (Doc ID## 26-30). Mr. Gooss challenged the district court's jurisdiction to modify the child support ordered by the Nevada court. In addition, he challenged the State's child support calculations. The State filed a Reply brief, addressing Mr. Gooss' objections to the calculations and his counter-motion to dismiss. (Doc ID## 37-40).

[17] As Mr. Gooss had requested a hearing on the State's Motion, the matter was heard by the district court on November 8, 2019. Testimony was received from both Ms. Lenard and Mr. Gooss. Mr. Gooss testified as to his employment and income. (Tr. 11:2 – 17:23; 31: 8 – 32:12). He also testified about his parenting time with the parties' child, and the expenses he believes he incurs in exercising this parenting time. (Tr. 18:18 -29:15; 32:18 - 34:1). The testimony and documentation he provided at the hearing concerned expenses for use of his pick-up but he also admitted that his wife's Lexus was used for some of these

trips and no evidence of the cost of using his wife's SUV was provided. (Tr. 34:3-13). Mr. Gooss testified that he exercises parenting time eight times annually. (Tr. 23:20- 22).

[18] Ms. Lenard also testified concerning the parenting time exercised by Mr. Gooss. Her testimony was that, while the Nevada order established seven different parenting times between Mr. Gooss and their child, he only exercised four of them. (Tr. 37:4-17; 38:20 – 41:4). Further inquiry by Mr. Gooss resulted in testimony that, in 2018, there was one additional time when the child was with Mr. Gooss, but no other specific times were evidenced.

[19] The district court took the matter under advisement and, on January 16, 2020, issued its Order on Motion for Modification of Child Support. (App. 74-79). With entry of this Order, the district court found that it had jurisdiction to modify Mr. Gooss' child support under N.D.C.C. § 14-12.2-45(1)(a).

[20] The district court ordered the modification of Mr. Gooss' child support obligation and required that the calculations be updated by the State, based on the additional information received from Mr. Gooss during the hearing. (App. 77, ¶ 9; 79, ¶ 13). The district court also found it to be in the best interests of the child for a deviation from the guideline amount of support to be ordered due to Mr. Gooss being required to pay all of the expenses associated with the exercise of his parenting plan. (App. 78, ¶ 12). The district court determined that, based on four visits per year and the evidence of Mr. Gooss' expenses, a proper deviation amount is \$3,000.00. (Id.). Pursuant to the child support guidelines, this amount was ordered to be deducted from his annual net income and the new monthly net income to be applied to the child support table of obligations. (Id.).

[21] Mr. Gooss, on January 17, 2020, filed a motion seeking relief from the district court's order for modification of child support. (Doc ID## 48-50). This motion requested that the district court reconsider its decision and vacate its Order on Modification. In the alternative, Mr. Gooss requested that the district court reconsider the deviation amount it had ordered and base the amount on the number of court-ordered visits. The State filed its response to Mr. Gooss' motion on January 31, 2020, (Doc ID# 58), and the district court issued its Order on Motion for Rule 60 Relief on February 7, 2020. (App. 80-81). The district court denied the requested relief from the January 16, 2020 Order on Modification, stating that Mr. Gooss' arguments for relief from the Order were essentially identical to those raised in response to the State's Motion for Modification. (App 81, ¶ 3). Accordingly, the district court was not persuaded "to either reconsider or change its ruling regarding jurisdiction." (Id.). Regarding the deviation amount that had been ordered, the district court held that it had considered both the amount of court-ordered parenting time and the history of actual expenses and practices of the parties. (Id.). Again, Mr. Gooss was found to not have made "a sufficient showing to warrant relief from the court's Order under Rule 60." (Id.). Mr. Gooss' motion was denied.

[22] Subsequent to issuance of the Order denying relief from the Order on Modification, the State filed its Post-Hearing Recommendations and updated child support calculations, as well as proposed concluding documents. (Doc ID# 62; App. 82-97). These were served and filed on February 25, 2020. Mr. Gooss filed an objection to the proposed Findings of Fact, Conclusions of Law, Order for Second Amended Judgment and Second Amended Judgment. (Doc ID #67). The district court issued its Findings of Fact, Conclusions of

Law, Order for Second Amended Judgment on February 27, 2020, and the Second Amended Judgment was also issued on February 27, 2020. (App. 94-102). As a result, Mr. Gooss was obligated to pay child support of \$582.00 per month for the child, J.G., born in 2002. On March 9, 2020, Mr. Gooss filed his Notice of Appeal. (App. 103-104).

[23] LAW AND ARGUMENT

[24] **Issue 1: Whether the district court had jurisdiction to modify Mr. Gooss' child support obligation.**

[25] In deciding whether a North Dakota court had subject matter jurisdiction to decide an issue, the standard of review is one that can be a mixed question of law and fact. State, et al. v. B.B., et al., 2013 ND 242, ¶ 7, 840 N.W.2d 651.

It is well settled under North Dakota law that challenges to a district court's subject matter jurisdiction are reviewed de novo when the jurisdictional facts are not in dispute. Harshberger v. Harshberger, 2006 ND 245, ¶ 16, 724 N.W.2d 148. When jurisdictional facts are disputed, the district court's decision on subject matter jurisdiction necessarily involves findings of fact and conclusions of law. Therefore, when disputed facts surround a challenge to the district court's subject matter jurisdiction, we are presented with a mixed question of law and fact. See Escobar v. Reisinger, 64 P.3d 514, 516 (N.M. Ct. App. 2003) (holding jurisdictional challenge under the Uniform Child Custody Jurisdictional Act ("UCCJA") is mixed question of law and fact). Under this standard, we review the "questions of law subject to the de novo standard of review [and the] findings of fact subject to the clearly erroneous standard of review." Wigginton v. Wigginton, 2005 ND 31, ¶ 13, 692 N.W.2d 108.

Id. (quoting Kelly v. Kelly, 2011 ND 167, ¶ 12, 806 N.W.2d 133).

[26] The jurisdictional facts are not in dispute. Ms. Lenard and Mr. Gooss were married and have one child J.G., born in 2002. They divorced in 2004 in the State of Nevada. The divorce judgment required Mr. Gooss to pay child support of \$300.00 per month, plus \$50.00 per month toward past support. If Ms. Lenard moved to Colorado with the child,

then Mr. Gooss was to bear all travel expenses and Ms. Lenard would waive child support. Ms. Gooss did not move to Colorado but, instead, moved to Arizona.

[27] An amended decree was entered in the Nevada court on June 17, 2009, which allowed Ms. Lenard to move to the State of Montana. Mr. Gooss' parenting time was established should Ms. Lenard and the child move to Montana. Ms. Lenard was ordered to pay for all travel expenses. Mr. Gooss was ordered to pay child support of \$350.00 per month. On March 11, 2013, the Nevada court adopted the terms of a stipulation entered into by Ms. Lenard and Mr. Gooss. This modification maintained primary residential responsibility of the child with Ms. Lenard, established Mr. Gooss' parenting time and, in Paragraph 7, ordered Mr. Gooss to "pay all travel expenses and confer with Vickie before making any travel arrangements at least (3) three weeks prior,..." Paragraph 8 outlines the type of travel arrangements that were to be made. And, finally, Paragraph 9 addressed child support to be paid by Mr. Gooss. Specifically, "Jeff shall pay child support of \$350.00 for the month of March 2013; payment of travel expenses will constitute child support thereafter." The facts also show that Ms. Lenard and the child now live in the State of South Dakota, and Mr. Gooss lives in the State of North Dakota. The 2004 and 2013 Nevada orders were registered in the North Dakota district court pursuant to the UIFSA request received from the South Dakota child support program.

[28] Because these jurisdictional facts are not in dispute, this Court's standard of review is a de novo review of the trial court's determination that it had jurisdiction to modify Mr. Gooss' child support. Jurisdiction to modify a support order of another jurisdiction, such as the Nevada court order herein, is governed by the requirements of UIFSA.

[29] UIFSA requires a North Dakota district court to apply principles concerning continuing exclusive jurisdiction when modifying a child support order of another state, as set for in N.D.C.C. § 14-12.2-45 [UIFSA § 611 (2008)] which provides, in part

1. If section 14-12.2-46.1 does not apply, upon petition a tribunal of this state may modify a child support order issued in another state which is registered in this state if, after notice and hearing, the tribunal finds that:
 - a. The following requirements are met:
 - i. Neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state;
 - ii. A petitioner who is a nonresident of this state seeks modification; and
 - iii. The respondent is subject to the personal jurisdiction of the tribunal of this state; or
 - b. This state is the residence of the child, or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction.
2. Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state and the order may be enforced and satisfied in the same manner.

N.D.C.C. § 14-12.2-45(1-2). In this case, Ms. Lenard and Mr. Gooss divorced in the State of Nevada and neither the parents nor the child continue to reside in the State of Nevada. Ms. Lenard and the child live in South Dakota and Mr. Gooss resides in North Dakota. Ms. Lenard requested the review of Mr. Gooss' obligation to pay child support. Accordingly, all requirements of N.D.C.C. § 14-12-45(1)(a) have been met and the North Dakota district court clearly had jurisdiction to modify the child support order.

[30] Mr. Gooss' argument that modifying the Nevada order on child support requires a modification of the parenting plan is not compelling. Mr. Gooss essentially asks this Court to conclude that the issue of child support and the parenting plan are so intertwined that a

blanket application of UCCJEA subject matter jurisdiction principles to all aspects of the order, including child support, is warranted. This would be a certain misapplication of the law and run afoul the intent of both uniform acts. It would open the door for parties to try to avoid a court's jurisdiction by placing a child support provision within a parenting plan.

[31] Mr. Gooss' argument is based on a misapplication of the law. Issues concerning support for the child of the action cannot be addressed under the UCCJEA but must be addressed under the Uniform Interstate Family Support Act (UIFSA), codified at ch. 14-12.2. The UCCJEA establishes when a state court may establish or modify a child custody determination. Mr. Gooss points to section 14-14.1-14 for the requirement that "a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination....". (Appellant's Brief, ¶ 28). However, the fact that Mr. Gooss has been ordered to pay all expenses of parenting time travel, does not mean a review of his duty to pay child support is also a part of their child custody determination.

[32] The definition of "child custody determination" within the UCCJEA is

a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

N.D.C.C. § 14-14.1-01(2) (Emphasis added). The UCCJEA specifically excludes from the definition of "child custody determination" provisions relating to "child support". Therefore, any provision in the Nevada orders concerning the payment of support is not a part of a child custody determination that falls within the restrictions created by the

UCCJEA. Instead, the support provision falls within the requirements and restrictions of UIFSA.

[33] Conversely, the purpose of UIFSA is to address the establishment, enforcement and modification of child support orders. Ferguson v. Ferguson, 2018 ND 122, ¶ 6, 911 N.W.2d 324. Under UIFSA, a “child support order” is a “support order for a child, including a child who has attained the age of majority under the law of the issuing state or foreign country.” N.D.C.C. § 14-12.2-01(2). The Act also defines the term “support order”. It is

a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or foreign country for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support. The support order may include related costs and fees, interest, income withholding, automatic adjustment, attorney's fees, and other relief.

N.D.C.C. § 14-12.2-01(28). UIFSA also specifies that its provisions do not “[g]rant a tribunal of this state jurisdiction to render judgment or issue an order relating to child custody or visitation in a proceeding under this chapter (ch. 14-12.2, N.D.C.C.).” N.D.C.C. § 14-12.2-03(2)(a). Therefore, by the very terms of each of these uniform acts, the issues of support and parenting time, including a requirement to pay the travel expenses, are to be addressed separately unless the jurisdictional requirements of each act are met in the same case.

[34] When this Court interprets and applies provisions of a uniform law, the comments of the official editorial board may be considered for guidance. Ferguson at ¶ 8. The comments to section 611 of UIFSA discuss the distinction between UIFSA and the UCCJEA as it pertains to jurisdiction:

UIFSA and UCCJEA seek a world in which there is but one order at a time for child support and custody and visitation. Both have similar restrictions on the ability of a tribunal to modify the existing order. The major difference between the two acts is that the basic jurisdictional nexus of each is founded on different considerations. UIFSA has its focus on the personal jurisdiction necessary to bind the obligor to payment of a child-support order. UCCJEA places its focus on the factual circumstances of the child, primarily the “home state” of the child; personal jurisdiction to bind a party to the custody decree is not required.

UIFSA § 611, comt.(2008). Applying this distinction to the facts of this case only supports the findings of the North Dakota district court that it had jurisdiction to modify Mr. Gooss’ child support obligation.

[35] The district court’s modification of the Nevada child support obligation was not a modification of the terms of the parenting plan established by that court. The modification of the child support provision did not modify when Mr. Gooss would have parenting time, where that parenting time would be exercised, who was to travel for the exercise of that time, or which parent was responsible for the payment of the expenses associated with exercising parenting time. All these provisions remained the same and could not be modified by the district court because it lacked jurisdiction under the UCCJEA. What the district court did do, was to take into consideration the terms of this parenting plan to determine if, under the North Dakota child support guidelines, Mr. Gooss’ obligation to pay all of the parenting time travel expenses, should be the basis for a deviation from the guideline amount of child support. The parenting plan was considered, not modified, in the district court’s application of North Dakota law on child support.

[36] North Dakota law requires a parenting plan to address the transportation and exchange of the child to an order, but it does not require that the calculation of child support

be affected by this assignment of the duty to pay for the expenses associated with that transportation. N.D.C.C. § 14-09-30(2)(e). This statutory provision is silent on the treatment, for child support purposes, of the actual expenses of the transportation for parenting time. In fact, how the assignment of such expenses is to be treated for support purposes is to be determined by the North Dakota child support guidelines.

[37] Under UIFSA, a responding jurisdiction, such as North Dakota in this case, must “[d]etermine the duty of support and the amount payable in accordance with the law and the support guidelines of this state.” N.D.C.C. § 14-12.2-15. The district court applied the North Dakota child support guidelines, and considered and approved a deviation from the guideline obligation because Mr. Gooss was ordered, by the Nevada court, to pay all expenses associated with the transportation to exercise parenting time. N.D. Admin. Code § 75-02-04.1-09(2)(j).

[38] The district court applied the undisputed jurisdictional facts to the requirements of N.D.C.C. § 14-12.2-45(1) and properly determined that it had jurisdiction to modify Mr. Gooss’ child support obligation. Therefore, the district court’s exercise of jurisdiction should be affirmed.

[39] **Issue 2: Whether it was inequitable for the district court to require Mr. Gooss to pay child support.**

[40] As an alternative argument, Mr. Gooss contends that, even if the North Dakota district court had jurisdiction to modify the child support provision of the Nevada order, it was inequitable for that court to do so as he should not bear the burden of having to pay all the costs of transportation incurred for parenting time plus a child support obligation.

(Appellant's Brief, ¶ 31). He even goes so far as to state that requiring him to pay all the costs of transportation for visitation is inequitable. *Id.*, citing Loll v Loll, 1997 ND 51, ¶ 19, 561 N.W.2d 625.

[41] While the realities of Mr. Gooss' financial circumstances may be such that having to pay all the costs of the travel and make a child support payment to the State Disbursement Unit (SDU) is more burdensome, he could have sought to modify, through a court of proper jurisdiction, the parenting plan so as to alter the terms of his parenting time schedule or the responsibility for paying the costs of travel. Mr. Gooss did not do so. Instead he argues it is not fair to expect him to do both.

[42] The fact remains that the laws in North Dakota do not find such an outcome to be inequitable to the point where an obligor could not be expected to pay both the expenses associated with visitation and a child support obligation. Instead, the laws address any inequities by including consideration of travel expenses as a reason for a possible deviation from the guideline amount of child support. In the Loll decision, this Court was not faced with deciding how the ordering of all travel expenses affected child support. Therefore, the Loll decision is not applicable to this matter as the effect of the rebuttal criteria of the child support guidelines was not before the Court. Even so, any appearance of an inequitable distribution of travel costs is tempered herein by the district court's ordering a deviation in the calculation of Mr. Gooss' net income, and the resulting child support obligation, by considering the order on transportation expenses. Too, the alleged intent of the Nevada court does not usurp North Dakota law and the application of its child support guidelines

once North Dakota has obtained jurisdiction to modify the support obligation. It is North Dakota law that must be applied to this case.

[43] Also irrelevant is the fact that, at the present time, the child in question is eighteen years of age and graduated from high school in May 2020. At the time of the State's Motion for Modification of Child Support, the child was not yet eighteen years of age. Therefore, Mr. Gooss continued to have a duty of support to the child. Mr. Gooss had a duty of support for the child through May 2020 and the fact that this appeal will not be decided until after he turned eighteen years of age and had graduated from high school does not make the modification of Mr. Gooss' obligation inequitable or moot.

[44] Pursuant to N.D. Admin. Code § 75-02-04.1-13

The child support guideline schedule amount is rebuttably presumed to be the correct amount of child support in all child support determinations, including both temporary and permanent determinations, and including determinations necessitated by actions for the support of children of married persons, actions seeking domestic violence protection orders, actions arising out of divorce, actions arising out of paternity determinations, actions based upon a claim for necessities, actions arising out of juvenile court proceedings, interstate actions for the support of children in which a court of this state has the authority to establish or modify a support order, and actions to modify orders for the support of children....

Mr. Gooss owed a duty of support to the child through May 2020, when the child was eighteen and graduated from high school. Accordingly, pursuant to N.D. Admin. Code § 75-02-04.1-13, the application of the child support guidelines was mandated. In applying the North Dakota child support guidelines, the district court found a basis for deviating from the guideline support amount due to the fact that Mr. Gooss was court ordered to pay all costs of transportation incurred for purposes of exercising his parenting time. The

district court was required to order a child support obligation based on the application of the child support guidelines and its ruling should be affirmed.

[45] **Issue 3: Whether the district court abused its discretion in determining the amount of the deviation for visitation travel expenses.**

[46] Mr. Gooss has argued that the district court failed to follow the child support guidelines in calculating the amount of the deviation to be given. The trial court gave Mr. Gooss a \$3,000.00 per year deduction from his net income due to his having to pay all the transportation expenses incurred to exercise his parenting time. In doing so, the district court determined the deviation amount for four parenting time visits per year. The amount of the deviation was based on Mr. Gooss' testimony detailing the expenses he incurred that he associated with traveling to pick up and return the parties' child a total of eight times (two round trips per visit). Ms. Lenard testified that the court order established seven annual parenting time visits but that Mr. Gooss exercised only four of these visits.

[47] The North Dakota child support guidelines allow a trial court to consider a rebuttal of the guideline amount of support. Section 75-02-04.1-09 of the child support guidelines outlines the limitations on granting a deviation, the burden of proof to be met by the requesting party, and the all-inclusive list of criteria that warrant a deviation. The party requesting the deviation has the burden to prove, by a preponderance of the evidence, that a deviation from the guidelines is in the best interests of the supported child and that at least one of the listed criteria exists. N.D. Admin. Code § 75-02-04.1-09(2). Deciding whether to grant a deviation is within the discretion of the trial court, based on the evidence presented. Pember v. Shapiro, 2011 ND 31, ¶37, 794 N.W.2d 435.

[48] This Court's standard for reviewing a district court's child support decision is well established:

Child support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to the abuse of discretion standard of review. The district court errs as a matter of law if it fails to comply with the child support guidelines in determining an obligor's child support obligation. Halberg v. Halberg, 2010 ND 20, ¶ 8, 777 N.W.2d 872 (internal citation and quotation marks omitted);....

Jacobs-Raak v. Raak, 2020 ND 107, ¶ 27. This Court has further explained that:

A court errs as a matter of law when it fails to comply with the requirements of the child support guidelines in determining an obligor's child support obligation. Lauer v. Lauer, 2000 ND 82, ¶ 3, 609 N.W.2d 450. Thus, the trial court must clearly set forth how it arrived at the amount of income and level of support. Id. The trial court's findings of fact in making its child support determination are overturned on appeal only if they are clearly erroneous. Richter v. Houser, 1999 ND 147, ¶ 3, 598 N.W.2d 193. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, on the entire record, we are left with a definite and firm conviction that a mistake has been made. Id. In reviewing findings of fact, we give due regard to the trial court's opportunity to assess the credibility and observe the demeanor of the witnesses. Wagner v. Wagner, 2000 ND 132, ¶ 12, 612 N.W.2d 555. We do not re-weigh evidence or reassess credibility where there is evidence to support a trial court's findings. Tishmack v. Tishmack, 2000 ND 103, ¶ 7, 611 N.W.2d 204. The trial court's choice between two permissible views of the weight of the evidence is not clearly erroneous. Id.

Lohstreter v. Lohstreter, 2001 ND 45, ¶ 21, 623 N.W.2d 350. "A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." Kelly v Kelly, 2011 ND 167, ¶ 36, 806 N.W.2d 133. In this case, the district court properly applied the child support guidelines and its conclusion to give a deviation in the amount of \$3,000.00 is supported by the facts. The

district court's decision has not been shown to be anything other than the "product of a rational mental process leading to a reasoned determination." Id.

[49] The rebuttal criterion relied upon by Mr. Gooss is found at N.D. Admin. Code § 75-02-04.1-09(2)(j). The criterion concerns the transportation expenses paid by the obligor that were incurred in the exercising of the obligor's parenting time with the children of the order. Over time, this provision has been amended as a result of various reviews of the child support guidelines.

[50] Initially, the provision provided that there could be a rebuttal due to the "reduced ability of the obligor to provide support due to travel expenses incurred solely for the purpose of visiting a child who is the subject of the order;..." N.D. Admin. Code § 75-02-04.1-09(2)(i)(1998). This version of the criterion was reviewed by this Court in Tibor v Tibor, 2001 ND 43, 623 N.W.2d 12, where it was held that "child support deviations allowed by § 75-02-04.1-09(2)(i), for visitation travel expenses, must be calculated on the basis of court-ordered visitation alone. Travel expense for discretionary visitation is not a valid criterion for rebuttal of the presumptively correct child support guidelines." Id. at ¶ 24.

[51] The next version of the child support guidelines included an amendment of this provision. Effective with August 2003, this provision permitted a deviation due to

[t]he reduced ability of the obligor to provide support due to travel expenses incurred predominantly for the purpose of visiting a child who is the subject of the order taking into consideration the amount of court-ordered visitation and, when such history is available, actual expenses and practices of the parties;...

N.D. Admin. Code § 75-02-04.1-09(2)(i)(2002). The effect of the amendment was to provide the trial court with additional guidance this Court found lacking in the earlier version, as expressed in the Tibor decision.

[52] Then, effective with July 1, 2011, the criterion was again amended and, due to other changes to the rebuttal criterion section, became subdivision (j). Since July 1, 2011, this provision allows for a deviation due to

[t]he reduced ability of an obligor who is responsible for all parenting-time expenses to provide support due to travel expenses incurred predominantly for the purpose of visiting a child who is the subject of the order taking into consideration the amount of court-ordered parenting time and, when such history is available, actual expenses and practices of the parties;...

N.D. Admin. Code § 75-02-0.41-09(2)(j). This amendment made the rebuttal criterion applicable only if the obligor is required to pay all parenting time expenses, as opposed to those who share or split the costs associated with the exercise of parenting time.

[53] The current version of the rebuttal criterion provides that the trial court, when determining whether a deviation should be given and in what amount, should “take into consideration the amount of court-ordered parenting time and, when a history is available, actual expenses and practices of the parties.” N.D. Admin. Code § 75-02-04.1-09(2)(j). With the amendments to this provision, the Tibor decision is no longer pertinent.

[54] Mr. Gooss contends that the district court erred when it determined the costs associated with only four visits per year, when the court order scheduled seven visits. He relies on this Court’s decision in Tibor v. Tibor, 2001 ND 43, ¶ 24 for his argument that the district court, based on Tibor, had to use seven visits per year. (Appellant’s Brief, ¶ 37). However, neither the Tibor decision, nor the current version of the rebuttal criterion,

requires a district court to calculate a deviation using the court-ordered number of visits as a minimum. The Tibor decision was based on a prior version of the deviation provision for parenting time transportation expenses and is, therefore, specific to that version of the criterion.

[55] In applying the current version of the rebuttal criterion, the court-ordered amount of parenting time is only one factor for the district court to consider. In addition, the court could consider evidence of the parties' actual practices and actual expenses paid. N.D. Admin. Code § 75-02-04.1-09(2)(j). The provision does not require the district court to apply the deviation for all parenting time ordered or exercised, or give a deduction for all expenses claimed to have been paid. The district court has the discretion to weigh the evidence to determine how many visits and which expenses to use in calculating the amount of the deviation.

[56] The parties agreed that the Nevada order entered on March 14, 2013 outlined seven visits per year. However, their testimony differed as to the actual number of visits that occurred. Mr. Gooss testified that he exercised eight visits per year and Ms. Lenard testified that he only exercised four visits per year. There is some reference to an additional visit in May 2018 but there was no other evidence presented that there were more discretionary visits that year or any other year. Accordingly, the evidence shows that there were at least four visits made each year, out of seven that were ordered. Whether there was six or eight visits is not clear. It was up to the district court to determine how much consideration should be given to the testimony as to the number of visits exercised and what number to use in the determination of the deviation.

[57] Ultimately, it was Mr. Gooss' burden to prove by a preponderance of the evidence that a deviation from the guidelines is in the best interests of the child in this case. N.D. Admin. Code § 75-02-04.1-09(2). He proved to the district court that he is responsible for all transportation expenses associated with the exercise of his parenting time. Therefore, the district court correctly determined that some consideration to a deviation should be given. Mr. Gooss testified as to the expenses he believes he incurs. The vehicle expense amounts were for the use of his pickup, but he also testified that his wife's Lexus was used at times. No evidence was presented to show how the amounts differ when the Lexus was used. There was contradictory evidence as to the actual number of visits being exercised. However, the fact that the district court did not use seven visits per year to determine the amount of deviation, or the full amount of the expense to which Mr. Gooss testified, has not been shown to have been an abuse of discretion by the district court. Therefore, the calculated deviation of \$3,000.00 should be affirmed.

[58] CONCLUSION

[59] The district court's determination that it had jurisdiction to modify Mr. Gooss' obligation to pay child support, was appropriately determined under the jurisdictional requirements of UIFSA and should be affirmed.

[60] The calculation of a child support obligation under the North Dakota child support guidelines was appropriate. The fact that Mr. Gooss is also required to pay all transportation expenses is a factor to be considered under the guidelines and the district court did so. Too, the timing of the modification is not relevant. The motion for modification was filed and the district court issued its order modifying the obligation while

the child was under the age of eighteen. The modification of the child support obligation was not inequitable and should be affirmed.

[61] In calculating Mr. Gooss' child support obligation, the district court found that a rebuttal of the child support guidelines was shown to be appropriate. In determining the amount of the deviation to order under N.D. Admin. Code § 75-02-04.1-09(2)(j), the district court was required to consider the number of court-ordered visits, a history of expenses paid, as well as the actual practice of the parties. Mr. Gooss has not shown that the district court failed to consider these facts, nor did he show that a reduction of his net income in the amount of \$3,000.00 was an abuse of the district court's discretion. Accordingly, this determination of the district court should also be affirmed.

Respectfully submitted this 10th day of July, 2020.

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CERTIFICATION

[85] The undersigned Special Assistant Attorney General, attorney for Child Support, hereby certifies that this Appellee Brief complies with the page limitation of N.D.R. App. P. 32(8) as it is comprised of a total of 26 pages, including the cover page, the Table of Contents and the Table of Authorities.

Respectfully submitted this 10th day of July, 2020.

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24IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Vickie M. Gooss, nka Vickie M. Lenard,)

Plaintiff and Appellee,)

vs.)

Jeffrey A. Gooss,)

Defendant and Appellant,)

and)

State of North Dakota,)

Statutory Real Party in Interest)
and Appellee.)

Supreme Court No. 20200076

Mercer Co. No. 29-2018-DM-44

APPEAL FROM SECOND AMENDED JUDGMENT DATED FEBRUARY 27, 2020, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR SECOND AMENDED JUDGMENT DATED FEBRUARY 27, 2020, ORDER ON RULE 60 RELIEF ENTERED ON FEBRUARY 7, 2020, AND ORDER ON MOTION FOR MODIFICATION OF CHILD SUPPORT ENTERED ON JANUARY 16, 2020, OF THE MERCER COUNTY DISTRICT COURT, THE HONORABLE DAVID REICH PRESIDING

STATE OF NORTH DAKOTA'S APPELLEE BRIEF

[1] Leann McCowan, being duly sworn on oath, deposes and states that she is of legal age and that on July 10, 2020, she served the State of North Dakota's Appellee's Brief in the above matter electronically as follows:

JENNIFER GOOSS

BEULAW3@WESTRIV.COM

[2] I declare under penalty of perjury that the foregoing is true and correct.

Signed on the 10th day of July 2020, at Bismarck, North Dakota, USA.

Leann McCowan
(printed name)


(signature)

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STATE OF NORTH DAKOTA'S APPELLEE BRIEF

[1] Leann McCowan, being duly sworn on oath, deposes and states that she is of legal age and that on July 10, 2020, she served the State of North Dakota's Appellee's Brief in the above matter by placing a true and correct copy in the mail as follows:

VICKIE LENARD
702 ZIEBACH ST
RAPID CITY SD 57703-0247

[2] I declare under penalty of perjury that the foregoing is true and correct.

Signed on the 10th day of July 2020, at Bismarck, North Dakota, USA.

Leann McCowan
(printed name)

Leann McCowan
(signature)