

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Crystal Beth Martodam,)	Supreme Court No. 20180432
)	Benson County District
Plaintiff/Appellee)	Court Case No. 03-2018-DM-00011
)	
vs.)	
)	
Jason James Martodam,)	
)	
Defendant/Appellant,)	
)	
And)	
)	
State of North Dakota as a Real Party)	
Of Interest)	

Appeal from the

Order dated August 28, 2018, Amended Judgment dated October 10, 2018, and Findings dated March 22nd, 2019

District Court, Benson County, North Dakota
The Honorable Lonnie Olson, Presiding

BRIEF OF APPELLEE

Kyle R. Craig (#07935)
ACKRE & CRAIG LAW FIRM
Attorneys for Plaintiff/Appellee
1600 2nd Ave SW Suite 30
Minot, ND 58701
(701) 838-3325
kcraig@ackrelaw.com

Table of Contents

1. Table of Authorities.....ii

2. Statement of Issues.....¶1, ¶2, ¶3, ¶4, ¶5, ¶6, ¶7, ¶8

The issues presented by Appellee are as follows:

I. Whether the interim order is appealable.....¶1

II. The district court did not err in denying Jason’s ex parte motion.....¶2

III. The district court did not err in denying a motion for sanctions for
discovery issues.....¶3

IV. The district court did not err in awarding primary residential
responsibility to Crystal.....¶4

V. The district court did not err in determining that Crystal was not in
contempt.....¶5

VI. The district court did not err in the exclusion of exhibits offered by
Jason.....¶6

VII. The court did not err in failing to sua sponte ordering a parenting
investigator.....¶7

VIII. The district court did not err in allowing the older children to refuse
parenting time.....¶8

3. Statement of the Case.....¶9, ¶10, ¶11, ¶12

4. Statement of the Facts.....¶13, ¶14, ¶15, ¶16, ¶17, ¶18

5. Standard of Review.....¶19, ¶20, ¶21

6. Argument.....¶22, ¶23, ¶24, ¶25, ¶26, ¶27,
¶28, ¶29, ¶30, ¶31, ¶32, ¶33, ¶34, ¶35, ¶36, ¶37, ¶38, ¶39, ¶40, ¶41, ¶42, ¶43

I.	Whether the interim order is appealable.....	¶22, ¶23
II.	The district court did not err in denying Jason’s ex parte motion.....	¶24, ¶25, ¶26, ¶27
III.	The district court did not err in denying a motion for sanctions for discovery issues	¶28
IV.	The district court did not err in awarding primary residential responsibility to Crystal	¶29, ¶30, ¶31, ¶32, ¶33, ¶34
V.	The district court did not err in determining that Crystal was not in contempt	¶35, ¶36
VI.	The district court did not err in the exclusion of exhibits offered by Jason	¶37, ¶38, ¶39, ¶40, ¶41
VII.	The court did not err in failing to sua sponte ordering a parenting investigator	¶42
VIII.	The district court did not err in allowing the older children to refuse parenting time.....	¶43
7.	Conclusion.....	¶44, ¶45

Table of Authorities

Cases:

<u>Dietz v. Dietz</u> , 2007 ND 84, ¶13, 733 NW.2d 255.....	¶29
<u>Marsden v. Koop</u> , 2010 ND 196, ¶8, 789 NW.2d 531.....	¶29
<u>Morris v. Moller</u> , 2012 ND 74, ¶5, 815 NW.2d 266.....	¶19, ¶30
<u>Rath v. Rath</u> , 2017 ND 128, ¶9, 895 NW.2d 306.....	¶21
<u>Rath v. Rath</u> , 2013 ND 243, ¶11, 840 NW.2d 656.....	¶35
<u>Siewert v. Siewert</u> , 2008 ND 221, ¶17, 758 NW.2d 691.....	¶29
<u>Tibbetts v. Dornheim</u> , 2004 ND 129, ¶11, 681 NW.2d 798.....	¶24
<u>Vandal v. Leno</u> , 2014 ND 45, ¶26, 843 NW.2d 313.....	¶20, ¶37
<u>Zundel v. Zundel</u> , 2017 ND 217, ¶27, 901 NW 2d. 731.....	¶20, ¶37

Statutes:

N.D.C.C. § 14-09-06.2(1).....	¶31
N.D.C.C. § 14-09-30(2)(d).....	¶43

I. Statement of the Issues

- I. [¶1] Whether an interim order is appealable.
- II. [¶2] The district court did not err in denying Jason's ex parte motion.
- III. [¶3] The district court did not err in denying a motion for sanctions for discovery issues.
- IV. [¶4] The district court did not err in awarding primary residential responsibility to Crystal.
- V. [¶5] The district court did not err in determining that Crystal was not in contempt.
- VI. [¶6] The district court did not err in the exclusion of exhibits offered by Jason.
- VII. [¶7] The court did not err in failing to sua sponte ordering a parenting investigator.
- VIII. [¶8] The district court did not err in allowing the older children to refuse parenting time.

II. Statement of the Case

[¶9] The parties in this matter were formally married and were divorced pursuant to a judgment entered on July 16th, 2015 (Appellant's App. 29).

Pursuant to that Judgment, the parties were awarded equal residential responsibility. On April 12th, 2018, Appellee Crystal Martodam ("Crystal") filed a motion

to modify primary residential responsibility, a motion seeking an interim order, and a motion seeking to change the venue of this matter from Cass County to one of the Counties where the parties resided. On May 3rd, 2018, venue was changed to Benson County. On May 4th, 2018, the district court denied a pending motion for ex parte relief filed by the Jason. On May 29, 2018, an Interim hearing was held and at the conclusion of that hearing the court entered an interim order awarding Crystal primary residential responsibility of the parties minor children during the interim and setting a child support amount.

[¶10] On June 27th, 2018, Jason filed a motion for default judgment claiming there had been no response filed to his ex parte motion, which had previously been denied. On June 29th, 2018, the court denied that motion. On August 2nd, 2018, an evidentiary hearing was held on Crystal's motion to modify primary residential responsibility.

[¶11] On August 28th, 2018, the court entered its findings of fact, conclusions of law, and order to amend judgment awarding primary residential responsibility to Crystal.

[¶12] On December 12th, 2018, Jason filed his first notice of appeal. While that appeal was pending, on January 17th, 2019, a motion for contempt and motion to amend judgment were filed with the court. This matter was then remanded to the district court to dispose of those motions. On March 19th, 2019, this matter came for a hearing on those motions. At that hearing, the court determined there had been a prima facie case allowing the matter to proceed for the issue of amending primary residential responsibility, as well as proceeding on the motion for contempt. On March 22nd, 2019, the court entered its findings of fact, conclusions of law, and order to deny the motions for contempt and amend the judgment. A second notice of appeal was then filed by Jason on April 3rd, 2019.

III. Statement of the Facts

[¶13] The parties in this matter were originally married and were divorced pursuant to a judgment entered in July 16, 2015, which awarded them equal residential responsibility of their four minor children. That matter had been resolved via a stipulated agreement. A parenting investigator had been

assigned on that case and had issued a report.

However, that report was never utilized at trial.

[¶14] Three years later, on April 12th, 2018, Crystal filed a motion to change primary residential responsibility to her, a motion for interim relief, and a motion to change venue from Cass County to one of the counties in which the parties resided, as neither party resided in Cass County and the matter had been originally filed in Cass County for the convenience of the parties attorneys.

[¶15] On May 2nd, 2018, Jason responded with a motion for ex parte relief, as well as his own counter motion to modify primary residential responsibility, as well as seeking to hold Crystal in contempt.

[¶16] On May 3rd, 2018, venue was changed in this case to that of the Jason, which was Benson County. On May 4th, 2018, the Honorable Lonnie Olson who had been assigned to hear the case denied Jason's motion for ex parte relief. In doing so, the court noted that no emergency existed, which would warrant issuing such an order.

[¶17] On May 29th, 2018, an interim hearing was held. Jason did not cross examine the minor children

who had submitted affidavits or otherwise submit notice of intent to cross examine those witnesses. At the conclusion of that hearing, the district court issued an order awarding Crystal interim primary residential responsibility of the parties children and assigning Jason parenting time and a child support amount. The proposed order was then submitted and signed on June 13th, 2018. On June 27th, 2018, Jason filed a motion for default judgment claiming that because Crystal had never responded to his ex parte motion, which had been summarily denied, that he should be awarded a judgment by default. The district court then denied that motion on June 29th, 2018. The evidentiary hearing in this matter was then held on August 2nd, 2018. During that hearing, Jason attempted to offer as an exhibit the parenting investigators report, which had been prepared prior to the 2015 judgment. The person who prepared that report was not available as a witness at trial and the district court sustained a hearsay objection to that report and did not receive it. The parties two oldest children testified at this trial and both indicated a desire to continue to reside primarily with Crystal.

[¶18] On August 28th, 2018, the court entered a findings of fact, conclusions of law, and order for amended judgment which awarded Crystal primary residential responsibility of the parties minor children, as well as awarding parenting time and a child support obligation for Jason. In its findings the district court analyzed all applicable best interest factors and determined that all applicable factors where either neutral or otherwise favored Crystal. Thus, the court awarded her primary residential responsibility. On January 17th, 2019, Jason filed a motion for contempt alleging that Crystal had violated the terms of the judgment by willfully refusing to allow him parenting time and that the judgment must be modified to award him primary residential responsibility due to that willful denial of parenting time. On March 19th, 2019, the district court found that a prima facie case existed warranting an evidentiary hearing be held on the motion to amend the judgment and thus the matter was held on both the motion for contempt and motion to amend judgment. This hearing was held on the 19th of March, 2019, and on the 22nd of March, 2019, the district court entered its findings of fact, conclusions of

law, and order to deny those motions. In doing so, the court found that there had been no willful denial of parenting time and thus no basis to modify the judgment or hold Crystal in contempt.

IV. Standard of Review

[¶19] A district court award of primary residential responsibility is a finding of fact, which will not be reversed on appeal unless it is clearly erroneous. Morris v. Moller, 2012 ND 74, ¶5, 815 NW.2d 266. 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, although there is some evidence to support it, on the entire record, we are left with a definite and firm conviction a mistake has been made. Id.

[¶20] A district court has wide discretion in evidentiary matters, and a court's decision to admit or exclude evidence will not be overturned unless the court abused its discretion. Vandal v. Leno, 2014 ND 45, ¶26, 843 NW.2d 313. The court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, it misinterprets, or misapplies the law, or its decision is not the product of a rational

mental process leading to a reasoned determination. Zundel v. Zundel, 2017 ND 217, ¶27, 901 NW.2d 731. [¶21] A district court has broad discretion in making contempt decisions. Rath v. Rath, 2017 ND 128, ¶9, 895 NW.2d 306. This Court will disturb a district courts contempt determination only if the court abused its discretion. Id.

V. Argument

I. Whether The Interim Order Is Appealable

[¶22] A judgment is appealable under N.D.C.C. § 28-27-01. Additionally, certain orders may also be appealed to this Court under N.D.C.C. § 28-27-02. A determination of primary residential responsibility in an interim order is not such an order, and thus, cannot be appealable.

[¶23] “Generally, interlocutory orders in an action are merged into the final judgment and may be reviewed on appeal of that judgment.” Tibbetts v. Dornheim, 2004 ND 129, ¶11, 681 NW.2d 798. Under N.D.R.App.P. 35(a)(2), “upon an appeal from a judgment, the court may review any intermediate order or ruling which involves the merits and effects the judgment of hearing upon the record.” The interim

order in this matter, although a temporary determination or primary residential responsibility, has no permanent bearing on the outcome of the trial. The result of the motion to modify is determined purely on the evidence presented in that hearing. Jason's argument is more properly suited to whether the district court erred in making that determination, and thus, this aspect of the appeal must be dismissed.

**II. The District Court Did Not Err In Denying
Jason's Ex Parte Motion.**

[¶24] Under N.D.R.C. 8.2(a), an interim order may be entered upon a finding of exceptional circumstances, which include: threat of eminent danger to any party or minor child of the party, or circumstances indicating the ex parte interim order is necessary to protect the parties, the minor child of the parties, or the marital estate.

[¶25] Here the district court summarily denied Jason's motion for ex parte relief finding that no such exceptional circumstances existed. Indeed, the only issues were garden variety disputes over parenting time. There was no allegation of threats, violence, or

drugs etc. that would normally necessitate the issuance of an ex parte order.

[¶26] Jason further contends that he somehow obtained a hearing date on his ex parte motion and that his particular motion should have been heard at the originally scheduled interim motion hearing on May 29th, 2018. Jason makes this contention without any evidentiary support and either intentionally neglected to include the correspondence filed with the court indicating that Crystal obtained this hearing date or intentionally attempts to mislead this Court by not including that document. (App. 42).

[¶27] Additionally, as noted above, this would be an interlocutory order and is more properly addressed in the segment relating to whether the district court erred in amending the judgment in this matter.

III. The District Court Did Not Err In Denying A Motion For Sanctions For Discovery Issues

[¶28] Jason complains of allegedly late discovery responses, but does not articulate how that changed the final decision or did he request a continuance or some other recourse and indeed admitted to the court that he was prepared to move forward after having

received the responses. The district court did not err in this regard.

**IV. The District Court Did Not Err In Awarding
Primary Residential Responsibility To Crystal**

[¶29] A district court's award of primary residential responsibility is a finding a fact, which will not be reversed on appeal unless it is clearly erroneous. Morris at ¶5. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, no evidence exists to support it, or, although there is some evidence to support it, on the entire record, we are left with a definite and firm conviction a mistake has been made. Id. In reviewing a district court decision, this Court will not retry a custody case or substitute it's judgment for a district courts custody decision merely because they might have reached a different result. Marsden v. Koop, 2010 ND 196, ¶8, 789 NW.2d 531. In the context of a modification proceeding, there is a two-step process that must be applied. First there must be a material change in circumstance, and secondly, the modification must be necessary to serve the best interest of the children. N.D.C.C. § 14-09-06.6(6). "A material change in

circumstance is an important new fact that was not known at the time prior to the custody decree; however, not every change will be sufficient to warrant a change of custody.” Siewert v. Siewert, 2008 ND 221, ¶17, 758 NW.2d 691. A mature child’s reasonable preference to live with a particular parent may constitute a material change in circumstances. Dietz v. Dietz, 2007 ND 84, ¶13, 733 NW.2d 225.

[¶30] In its findings of fact, the district court mentioned several things that could constitute a material change in circumstance. The first, was that the 50/50 shared parenting arrangement was not feasible. (Appellant’s App. 32). Additionally, the district court found that the oldest child, CRM, expressed a mature preference for residing with his mother. Either way, a material change in circumstance was present and as there is competent evidence to support it, this Court should uphold that determination.

[¶31] The next step is whether the best interest of the minor children are served by a modification. In reaching its decision, the district court conducted an exhaustive analysis of the best interest factors

contained in N.D.C.C. § 14-09-06.2(1). In doing so, the district court found that none of the factors favored Jason and a number of the factors favored Crystal. For example, the district court found that the children had a deeper emotional bond with Crystal, due to not only the children's testimony in court, but also the testimony of both Crystal and Jason. The district court also heard testimony on the manner in which Jason conducts himself with the children and found him to be overly harsh and use excessive discipline. In particular, the district court referenced an occasion where one of the children was so scared during an incident with his father that he wet his pants. When it came to the developmental needs of the children, the district court heard testimony from Crystal and CRM and determined them to be more credible when it came to Crystal helping the children with school work and coming up with an after school program for them to participate in. As competent evidence supports this finding, there was no clear error. The court also found that CRM, who was nearly 17, and had a mature and informed preference to reside with Crystal. CRM

stated as such on the record, there was sufficient evidence to support this conclusion.

[¶32] The district court also found that the children had a close relationship with Jason's father, James, and that Crystal was the only individual who facilitated that positive relationship and Jason, comparatively does not. The court further found that it was important for the children to reside together and it would not be in their best interest to separate them.

[¶33] In his brief, Jason goes to great pains to argue that the district court somehow completely ignored his evidence and only listened to the evidence presented by Crystal. Jason provides no support for this contention and his argument can be more accurately stated that he disagrees with how the district court weighed the evidence and is asking this Court to do something it has repeatedly stated that it will not do, which is reweigh the evidence in his favor. There was no error by the district court in awarding primary residential responsibility to Crystal.

[¶34] Jason next takes issue with the courts finding on the amount of income he was making at the time of trial. The district court properly took notice that

Jason testified that he is not working as many hours due to the pending court hearing, but the court specifically found those hours would return to normal at the conclusion of the court proceeding and properly determined that his income should be \$28,800 and thus assessed him a proper child support obligation.

V. The District Court Did Not Err In Determining That Crystal Was Not in Contempt

[¶35] A district court has broad discretion in determining whether contempt has occurred and a district court should not grant contempt motions for every single possible technical violation of court orders. Rath v. Rath, 2013 ND 243, ¶11, 840 NW.2d 656.

[¶36] In the case at bar, Jason alleged to the court that he was being persistently willfully denied parenting time by Crystal. At the hearing that was held on that motion, the district court concluded that there was no such willful and persistent denial of parenting time and instead concluded that Jason was promoting merely technical violations of a court order in an effort to relitigate the prior evidentiary hearing. The district court found that Jason had ample

opportunity to spend time with his children, but elected to choose not to, as he believed sticking directly to the judgment would afford him the opportunity to argue for primary residential responsibility. As there is competent evidence in the transcript, for the district court to have made that conclusion, this was not an error for the district court to conclude. Similarly, the district court did not err in determining that Jason had failed to make a sufficient case to modify primary residential responsibility.

**VI. The District Court Did Not Err In The Exclusion
Of Exhibits Offered By Jason**

[¶37] A district court has wide discretion in evidentiary matters, and this Court will not overturn a district court's decision to admit or exclude evidence, unless the court abused its discretion. Vandal at ¶26. A district court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, it misinterprets or misapplies the law, or its decision is not the product of a rational mental process, leading to a reasoned determination. Zundal at ¶2

[¶38] Jason first complains about a parenting investigating report not being admitted into evidence.

The individual who prepared the report was not subpoenaed by Jason and did not testify at trial. Jason was offering this evidence as in the truth of the matter asserted and thus, it was properly excluded under N.D.R.Ev. 802, which precludes hearsay being admitted. The proper objection was made at trial and the district court sustained said objection. Jason has also made no showing as to how admitting this old, dated evidence would have somehow changed the outcome of the proceeding.

[¶39] A similar objection was made to the mediation report that Jason references. Again, not only was this document hearsay, but it was also settlement negotiations covered under N.D.R.Ev. 408 and thus was properly excluded. Furthermore, Jason has not made any showing how that would change the impact of the case.

[¶40] The identical analysis applies to the Fremstad law correspondence referenced next by Jason.

[¶41] Similarly, the department of transportation letter referenced by Jason is also a hearsay statement, which furthermore had no bearing on the outcome of the case.

VII. The Court Did Not Err In Sua Sponte Ordering

A Parenting Investigator.

[¶42] Jason contends without any support that a parenting investigator would have somehow changed the outcome of this matter. However, no parenting investigator was requested by the other party, nor does Jason point to any authority as to how the district court had an obligation to do so.

VIII. The District Court Did Not Err In Allowing The

Older Children To Refuse Parenting Time

[¶43] In N.D.C.C. § 14-09-30(2)(d), a parenting plan must include provisions including parenting time and a parenting schedule or an explanation as to why the provisions are not included. In this case, the district court not only issued a parenting plan, but further stated it's reasons for why the older children may elect to decline parenting time with their father, finding specifically that the relationship with their father was extremely strained and that they were in fact afraid of their father. There is no error in that decision.

CONCLUSION:

[¶44] Based on the foregoing, Crystal requests that the judgments of the lower court be upheld in their entirety.

[¶45] Dated this 6th day of September, 2019.

/s/ Kyle R. Craig
Kyle R. Craig (#07935)
ACKRE & CRAIG LAW FIRM
Attorneys for Plaintiff/Appellee
1600 2nd Ave SW Suite 30
Minot, ND 58701
(701) 838-3325
kcraig@ackrelaw.com

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Crystal Beth Martodam,

Plaintiff/Appellee,

Supreme Court No. 20180432

v.

Jason James Martodam,

Benson Co. Case No. 03-2018-DM-00011

Defendant/Appellant

And

State of North Dakota as a Real
Party in Interest

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on September 9, 2019, the following documents:

BRIEF OF APPELLEE AND APPELLEE'S APPENDIX

Were emailed to the Clerk of the North Dakota Supreme Court @

supclerkofcourt@ndcourts.gov and courtesy copies were emailed to the following:

Jason Martodam @ jasonmartodam@gmail.com
Appellant

North Dakota Child Support Division @ devilslakecse@nd.gov

Crystal Martodam @ Crystal.martodam@icloud.com

/s/ Kyle R. Craig _____

Kyle R. Craig (#07935)

ACKRE & CRAIG LAW FIRM

Attorneys for Plaintiff/Appellee

1600 2nd Ave SW Suite 30

Minot, ND 58701

(701) 838-3325

kcraig@ackrelaw.com