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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert O. Wefald, District Court Judge,)
)
Petitioner)

In the Matter of the:

Petition to Adopt Amendment to NDROC Rule 8.2 on Amending Interim Orders

In accordance with NDRPR Section 3, this Court hereby petitions this Honorable Supreme Court, to adopt an amendment to NDROC Rule 8.2(b) creating new sub-section (5) Amendments as hereinafter set forth:

(b) Interim orders upon motion and hearing.

(1) ...

(5) With the procedures for management of divorce cases set forth in Rule 8.3 being intended to move the case smoothly along toward resolution, amendments of non-ex parte interim orders are not authorized, except upon a showing of the gravest necessity. No motion to amend an interim order may be filed and no hearing may be scheduled except upon the service and filing of a petition for leave to file a motion to amend interim order which is supported by an affidavit, and the court's order finding that there may exist a grave necessity for it to hear such a motion. If child custody is involved, the procedures set forth in NDCC 14-09-06.6(4) must be followed. An interim order may be amended through a stipulation of the parties.

GROUNDS FOR ADOPTION OF THE PROPOSED AMENDMENT

While NDROC Rule 8.2(a) allows for the amendment of an ex parte interim order, nowhere in Rule 8.2 in general, or in Rule 8.2(b) in particular, is there any provision for the amendment of an interim order. Interim orders are intended to be short term, and are not intended to signal the court's intentions with respect to any decision it may make after the trial. This Court has recently denied motions to amend interim orders and it canceled hearings one of each of the parties had simply scheduled with the court administrator in two cases involving interim custody.

The proposed rule is designed to discourage motions to amend interim orders except in cases involving the gravest necessity. Unfortunately, the parties are too often treating interim orders as the judgment, and they are effectively trying to "appeal" the non-appealable interlocutory interim order through a motion to amend. With the procedures set forth in Rule 8.3 to manage divorce cases, there should be no real need to amend an interim order except upon a stipulation of the parties, or the showing of the gravest necessity. Re-hearing the same issues on an interim basis because one of the parties is unhappy with the interim order is simply a waste of the court's time, and an unnecessary expense for the parties.

This Court urges the adoption of this proposed amendment.

Dated this 5th day of November, 1999.

Robert O. Wefald, District Judge

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert O. Wefald, District Court Judge,)
)
Petitioner)

In the Matter of the:

Petition to Adopt Amendment to NDROC Rule 8.2(e)(2) re Affidavits

In accordance with NDRPR Section 3, this Court hereby petitions this Honorable Supreme Court, to adopt an amendment to NDROC Rule 8.2(e)(2) regarding requiring the presence at the hearing of persons submitting affidavits as hereinafter set forth. Language to be deleted is struck through and new language is underlined:

(e) Submission of Evidence.

(1) ...

(2) Unless the court otherwise orders, evidence either in support of or in opposition to the interim order must be presented by affidavit. Evidence from non-parties presented by affidavit may not be considered if ~~unless~~, at least 24 hours prior to the time of the evidentiary hearing, the opposing party requests the party offering the affidavit to makes the affiant available for cross-examination, and the requested affiant does not attend the hearing. The party initially seeking interim relief shall proceed first at the hearing. The affidavits and itemized financial statement of the moving party must be served and filed no later than ten days prior to the commencement of the hearing. Respondent's affidavits and itemized financial statement must be served and filed no later than three days prior to the commencement of the hearing.

GROUNDS FOR ADOPTION OF THE PROPOSED AMENDMENT

This rule in its present form results in the waste of the time of most of the people who are kind enough to help one or the other of the parties by executing an affidavit in support of their position. They are required to be at the hearing in order to have their affidavits considered as part of the evidence. Parties, and often times their attorneys, seem to believe that the interim order hearing is the trial, and that they must "win" the interim order, or all is lost, and hence they seem to feel compelled to gets lots of affidavits.

Generally the most contentious issue is custody, and the affidavits generally extol the virtues of the one parent submitting the affidavit. Since the hearings are usually allotted no more than one-half hour, there is no practical way every affiant is going to be cross-examined on their affidavit. And cross-examination is often unlikely to produce any other than the affiant likes the one parent and is not going to change their mind on cross-examination. Thus, the affiants, other than the parties, are typically not cross-examined, so they just sit there and waste their time just so the judge can consider their affidavit as evidence.

The proposed amendment would do away with the requirement that every non-party affiant would have to be at the hearing for their affidavit to be considered by the court as evidence. Rather opposing counsel would have to request the presence of an affiant at the hearing if cross-examination is required in the limited time available for that party's side of the case. So if the presence of an affiant is required, a party can devote some of their half of the limited hearing time to the cross-examination.

This Court recently held a hearing on a motion for an interim order, which was allotted one-half hour by the court administrator. Twelve non-party affiants showed up at the hearing and none of them were cross-examined. Seven of the them said what a good parent the plaintiff is, and five of them said what a good parent the defendant is. In an order denying a request for a continuance the Court had allotted to each party 10 minutes to cross-examine the other party or any affiant. The other 10 minutes was reserved for the Court and counsel. I'm happy to say that both attorneys completed their cross-examination of the other party on their affidavit in 8 minutes. After the Court asked its questions, and counsel and both parties were allowed to make any statement to the Court, the hearing was concluded in the time allowed. The Court did, however, apologize to the 12 affiants who sat through the hearing without being called to testify, and the Court promised them that it would seek an amendment to this rule so their generally laudatory affidavits on behalf of the party they support could be considered as evidence even if they weren't there to be cross-examined.

The proposed amendment will promote efficiency and not waste the time of willing affiants who simply are not going to be cross-examined in the limited time available.

This Court urges the adoption of this proposed amendment.

Dated this 5th day of November, 1999.

Robert O. Wefald, District Judge