

IN THE SUPREME COURT OF NORTH DAKOTA

Anna Lynn Carroll,

Plaintiff/Appellee,

vs.

Robert Lee Carroll,

Defendant/Appellant,

and

State of North Dakota

Statutory Real Party in Interest/Appellee.

Supreme Court No. 20170292

Stark County No. 45-2015-DM-222

APPEAL FROM AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT ON REMAND FROM THE SUPREME COURT DATED JUNE 2, 2017 RESULTING FROM A TELEPHONIC STATUS CONFERENCE HELD ON MAY 30, 2017, AND APPEAL FROM ORDER ON HEARING FOR MOTION FOR REVIEW AND AMENDMENT OF CHILD SUPPORT HELD ON AUGUST 1, 2017 AND DATED AUGUST 22, 2017.

STATE OF NORTH DAKOTA APPELLEE'S BRIEF

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TABLE OF CONTENTS

	Paragraph No.
Table of Authorities	¶ 1
Statement of the Issues	¶ 2
Statement of the Case	¶ 6
Statement of Facts	¶ 8
Law and Argument	¶ 15
Issue I: Whether the District Court failed to comply with the mandate of the Supreme Court.	
Issue II: Whether the District Court erred in allowing the use of paystubs containing one piece of inaccurate identifying information as a basis for calculating a child support obligation.	
Issue III: Whether the District Court failed to comply with the Child Support Guidelines.	
Conclusion	¶ 39

[1] TABLE OF AUTHORITIES

<u>CASES</u>	<u>Paragraph No.</u>
<u>Bye v. Robinette</u> , 2015 ND 276, 871 N.W.2d 432	¶ 30
<u>Carroll v. Carroll</u> , 2017 ND 73, ¶ 27, 892 N.W.2d 173	¶ 17
<u>Christoffersen v. Giese</u> , 2005 ND 17 ¶8, 691 N.W.2d 195	¶ 21
<u>Hartleib v. Simes</u> , 2009 ND 205, 776 N.W.2d 217	¶ 26
<u>Korynta v. Korynta</u> , 2006 ND 17, 708 N.W.2d 895	¶ 32
<u>Logan v. Bush</u> , 2000 ND 203, ¶21, 621 N.W.2d 314	¶ 21
<u>Schweitzer v. Mattingley</u> , 2016 ND 231, 887 N.W.2d 541	¶ 35
 <u>OTHER AUTHORITIES</u>	
<u>ADMINISTRATIVE CODE</u>	
N.D. Admin. Code § 75-02-04.1-01(4)(a)(4)	¶ 36
N.D. Admin. Code § 75-02-04.1-01(6)	¶ 20
N.D. Admin. Code § 75-02-04.1-01(6)(a)	¶ 37
N.D. Admin. Code § 75-02-04.1-01(6)(b)	¶ 37
N.D. Admin. Code § 75-02-04.1-02(8)	¶ 32
N.D. Admin. Code § 75-02-04.1-07(3)	¶ 18, 31
N.D. Admin. Code § 75-02-04.1-07(3)(c)	¶ 18
N.D. Admin. Code § 75-02-04.1-07(9)	¶ 31
N.D. Admin. Code § 75-02-04.1-07(11)	¶ 31
N.D. Admin. Code § 75-02-04.1-10	¶ 20

[2] STATEMENT OF THE ISSUES

[3] I. Whether the District Court failed to comply with the mandate of the Supreme Court.

[4] II. Whether the District Court erred in allowing the use of paystubs containing one piece of inaccurate identifying information as a basis for calculating a child support obligation.

[5] III. Whether the District Court failed to comply with the Child Support Guidelines.

[6] STATEMENT OF THE CASE

[7] This is an appeal following an amended judgment and an order for modification issued by the Stark County District Court in a divorce action. The amended judgment amended the original judgment on remand from the Supreme Court. (Docket ID #106; Appendix 39-46). After a hearing on Robert Carroll's motion to modify his child support obligation, the District Court ordered a modification to the child support obligation. (Docket ID #141; Appendix 51-53). Robert Carroll brings this appeal to dispute the District Court's order subsequent to the Supreme Court's order to reverse and remand, the District Court allowing the use of paystubs containing inaccurate identifying information, and the District Court's application of the child support guidelines.

[8] STATEMENT OF THE FACTS

[9] On August 21, 2015, Anna Carroll initiated this action with the filing of a summons and complaint. (Docket ID #1-2; Appendix 2). The State, through Child Support, filed a notice of State as real party in interest on December 28, 2015. (Docket ID

#20; Appendix 5). Robert Carroll filed an objection to the State’s notice on January 26, 2016. (Docket ID #28). As the District Court explained, “Ultimately, the Child Support unit intervened and such was granted, despite the objection to such intervention by the Defendant.” (Docket ID #75; Appendix 11).

[10] The District Court held a trial on February 19, 2016. (Transcript, p. 1). Days prior to the trial, Robert Carroll served Anna Carroll and the State with a request to continue the trial. (Appendix 6). This motion does not appear on the record, but Anna Carroll and the State responded to the request on February 17, 2016. (Docket ID #45, 48). The District Court’s court reporter informed Robert Carroll by phone that the trial would proceed as scheduled and the District Court denied his motion for continuance. (Docket ID #75; Appendix 11; Transcript, p. 2). The District Court explained that Robert Carroll “was well notified ahead of time we were going to be going forward with this, and so we are going to go forward with it.” (Transcript, p. 2).

[11] The State presented evidence of Robert Carroll’s income through the testimony of Brad Davis, regional administrator of the Child Support office in Dickinson. (Transcript, pp. 9-13). Davis testified that the State did not have evidence of Robert Carroll’s current income, so it imputed income to him using 90% of his income from the first three quarters of 2014. (Docket ID #55, 56; Appendix 8; Transcript, pp. 9-11). This led to a total annual income of \$80,412.00 and a monthly child support obligation of \$1,387.00 (Docket ID #56; Appendix 8; Transcript, pp. 11-13). The District Court adopted the State’s proposed child support calculations and issued its findings of fact, conclusions of

law, order for judgment, and judgment. (Transcript, p. 16; Docket ID #61-62; Appendix 7-8).

[12] Robert Carroll filed motions to vacate the judgment and for a new trial, which the District Court denied. (Docket ID #65, 75, 77, 82; Appendix 9-13). Robert Carroll subsequently filed his first appeal. (Docket ID #85). The Supreme Court reversed the orders and remanded the matter for additional findings and entry of an amended judgment. (Docket ID #92; Appendix 12-31).

[13] A status conference to discuss the Supreme Court decision was held. The District Court issued an amended judgment on remand from the Supreme Court. (Docket ID #106; Appendix 32-38). Robert Carroll filed a motion to review and modify his child support. (Docket ID #111; Appendix 47-50).

[14] On August 1, 2017, Robert Carroll and the State appeared at a hearing on the motion to review and amend. Robert Carroll presented evidence of his income through paystubs from his current employment with Goode Construction, and under direct examination Robert Carroll identified the paystubs as completely accurate in all income information and identifying information, except for the last four digits of the Social Security number displayed. (Docket ID #126, 127; Appendix 52, 53; Hearing Transcript, pp. 11-21). Robert Carroll started his current job on March 20, 2017, and because of that change of employment, the State based its child support calculation on income extrapolation using the paystub for the pay period ending July 20, 2017. This led to a total annual income of \$43,948.00, a net monthly income of \$2948.00, and a child support obligation of \$818.00 per month. (Docket ID #128; Appendix 56-59). The

District Court adopted the State's proposed child support calculations and issued its findings of fact and order. (Transcript, pp. 27, 28; Docket ID #141; Appendix 51-53).

Robert Carroll subsequently filed his second appeal. (Docket ID #131, 147).

[15] LAW AND ARGUMENT

[16] **I. Whether the District Court failed to comply with the mandate of the Supreme Court.**

[17] Robert Carroll argues the District Court failed to comply with the mandate of the Supreme Court and erred in the amount of its award of child support ordered in the June 2, 2017 Amended Judgment. That is incorrect. The mandate ordered the District Court to provide "findings showing how it calculated Robert Carroll's income and under which guidelines it was applying." Carroll v. Carroll, 2017 ND 73, ¶ 27, 892 N.W.2d 173. The District Court complied with both requirements. Additionally, the District Court correctly applied the child support guidelines in the Amended Judgment.

[18] Upon remand, the District Court explained how it calculated Robert Carroll's income and identified the exact guideline section it used to do so. The District Court's amended judgment upon remand stated "it is necessary to impute income to Defendant equal to 90% of his greatest income for a 12-month period in the last 24 months." (Docket ID #106; Appendix 32-38). The District Court determined Robert Carroll's gross annual income figure of \$80,412.00 by applying N.D. Admin. Code § 75-02-04.1-07(3)(c) to \$89,350.14, which is the income Robert Carroll received in 2014. Section 75-02-04.1-07 of the North Dakota Administrative Code provides that if an obligor is unemployed, income must be imputed to them using the greatest of these three figures:

- a. A monthly amount equal to one hundred sixty-seven times the hourly federal minimum wage.
- b. An amount equal to six-tenths of this state's statewide average earnings for persons with similar work history and occupational qualifications.
- c. An amount equal to ninety percent of the obligor's greatest average gross monthly earnings, in any twelve consecutive months included in the current calendar year and the two previous calendar years before commencement of the proceeding before the court, for which reliable evidence is provided.

N.D. Admin. Code § 75-02-04.1-07(3). The District Court responded to the Supreme Court's mandate completely and correctly.

[19] Robert Carroll states he is not aware how the District Court concluded that \$89,350.14 was his gross income. \$89,350.14 is the actual income Robert Carroll received in 2014. When the District Court identified that amount as Robert Carroll's actual income received in 2014, it was not calculating anything. The District Court simply stated a fact. Robert Carroll, for the first time, appears to dispute the accuracy of the evidence used to identify \$89,350.14 as his actual income in 2014.

[20] Robert Carroll argues that \$80,412.00 of gross annual income cannot result in a net monthly income of \$4,922.00 because that gross annual income cannot be divided by nine or twelve months to equal that net monthly income. Robert Carroll is correct that such an equation is not possible, but it appears Robert Carroll misunderstands the differences between gross income and net income. The net monthly income of \$4,922.00 is not calculated by only dividing gross annual income by a certain number of months. Net annual income is calculated by applying the child support guidelines, specifically those deductions included in N.D. Admin. Code § 75-02-04.1-01(6), to an obligor's gross

annual income. This results in a net annual income that is then divided by twelve months to determine an obligor's net monthly income so N.D. Admin. Code § 75-02-04.1-10 can be applied to determine the obligor's monthly child support amount.

[21] Robert Carroll claims the District Court was incorrect in using income earned during less than a twelve-month period and extrapolating that to a twelve-month figure, citing Logan v. Bush, 2000 ND 203, ¶21, 621 N.W.2d 314, and Christoffersen v. Giese, 2005 ND 17 ¶8, 691 N.W.2d 195. However, when reviewing the amended judgment upon remand, this argument is unsupported because there was no extrapolation. The District Court used actual income to determine Robert Carroll's child support obligation.

[22] The District Court completely and accurately addressed the concerns of the Supreme Court in its previous opinion in this case. The District Court explained how it reached the gross annual income used and identified the exact section of the child support guidelines it applied to determine Robert Carroll's income. Therefore, the District Court's amended judgment should be affirmed.

[23] II. Whether the District Court erred in allowing the use of paystubs containing one piece of inaccurate identifying information as a basis for calculating a child support obligation.

[24] Robert Carroll argues the District Court abused its discretion in allowing the use of paystubs that contained incorrect Social Security Number information. This is incorrect. Under direct examination and in his own appellant brief, Robert Carroll admits that all other information on the paystubs, including payment data, was accurate.

[25] It is possible that the errant identification information on Robert Carroll's paystub was simply the result of scrivener's error. At the hearing on his motion to modify his child support obligation, Robert Carroll admitted all other information on the paystubs was correct. (Hearing 08-01-17 Transcript, pp. 15, 21). In his own appellant brief, Robert Carroll concedes that he was paid the amount shown on the paystub. (Appellant's Brief, ¶35).

[26] The District Court weighed the evidence before it and decided to rely upon the paystub for the purposed of calculating Robert Carroll's child support obligation.

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 the reviewing court, on the entire evidence, is left with a definite and firm conviction a mistake has been made. Under the clearly erroneous standard of review, we do not reweigh the evidence or reassess the credibility of witnesses, and we will not retry a... case or substitute our judgment for a district court's initial... decision merely because we might have reached a different result.

Hartleib v. Simes, 2009 ND 205, 776 N.W.2d 217 (quoting Koble v. Koble, 2008 ND 11, ¶6, 743 N.W.2d 797). There is evidence to support the accuracy of the information on Robert Carroll's paystub in the form of his own testimony at the motion hearing on August 1, 2017. (Hearing 08-01-17 Transcript, p. 28). There is no evidence a mistake has been made because Robert Carroll had ample opportunity to correct or supplement the record after the August 1, 2017 hearing. The District Court instructed Robert Carroll to provide additional evidence if any appeared after the hearing. (Hearing 08-01-17 Transcript, pp. 28). In the months since the motion hearing, Robert Carroll has submitted no filings to controvert the evidence used to calculate his child support obligation. Surely his employer's human resources division could have provided information explaining

what Robert Carroll's income was if indeed the paystub used for calculation was inaccurate on any data other than the errant Social Security Number information.

[27] The District Court was not clearly erroneous in allowing the use of paystubs that contained incorrect Social Security Number information because the incorrect information included on Robert Carroll's paystub was likely due to scrivener's error; because Robert Carroll affirmed at least twice that all other information, including income information, contained on the paystubs was correct; and because Robert Carroll failed to correct or supplement the record with income information even though he had sufficient time and opportunity to do so. Therefore, the District Court's order should be affirmed.

[28] III. Whether the District Court failed to comply with the Child Support Guidelines.

[29] Regarding the modification of his child support as ordered on August 22, 2017, Robert Carroll asserts the District Court erred in using three months of paystubs to calculate his child support information. He also argues the District Court erred in not following the child support guidelines by not stating the net income used to determine the child support amount or reciting which guideline it used to determine child support. That is incorrect. The District Court properly calculated Robert Carroll's child support obligation using an extrapolated income based on recent reliable income information from paystubs Robert Carroll himself provided, and the District Court provided a net income amount.

[30] This Court's standard of review for child support calculations 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. A court errs as a matter of law if it does not comply with the requirements of the child support guidelines. As a matter of law, the district court must clearly set forth how it arrived at the amount of income and level of support.

Bye v. Robinette, 2015 ND 276, ¶ 4, 871 N.W.2d 432 (quoting Krueger v. Krueger, 2011 ND 134, ¶ 19, 800 N.W.2d 296).

[31] Robert Carroll asserts that neither N.D. Admin. Code § 75-02-04.1-07(3) nor N.D. Admin. Code § 75-02-04.1-07(9) allows the usage of income extrapolation. Although Robert Carroll refers to N.D. Admin. Code § 75-02-04.1-07(9) in his appellant brief, it is probable he intended to employ N.D. Admin. Code § 75-02-04.1-07(11) because he refers to an obligor making a voluntary change in employment. This argument is moot because neither N.D. Admin. Code § 75-02-04.1-07(3) nor N.D. Admin. Code § 75-02-04.1-07(11) applies to Robert Carroll's situation or the calculations performed. As previously explained, N.D. Admin. Code § 75-02-04.1-07(3) is used to impute income for unemployed or underemployed obligors. Robert Carroll was employed with James D. Goode Construction from March 20, 2017 through at least the August 1, 2017 motion hearing. N.D. Admin. Code § 75-02-04.1-07(11) does not apply either. This provision states

Notwithstanding subsections 4, 5, 6, and 7, if an obligor makes a voluntary change in employment resulting in reduction of income, monthly gross income equal to one hundred percent of the obligor's greatest average monthly earnings, in any twelve consecutive months included in the current calendar year and the two previous calendar years before commencement of the proceeding before the court, for which reliable evidence is provided, less actual monthly gross earnings, may be imputed

without a showing that the obligor is unemployed or underemployed. For purposes of this subsection, a voluntary change in employment is a change made for the purpose of reducing the obligor's child support obligation and may include becoming unemployed, taking into consideration the obligor's work history, education, health, age, stated reason for change in employment, likely employment status if the family before the court were intact, and any other relevant factors. The burden of proof is on the obligor to show that the change in employment was not made for the purpose of reducing the obligor's child support obligation.

N.D. Admin. Code § 75-02-04.1-07(11). No party made an argument that Robert Carroll made a voluntary change in employment as defined per the child support guidelines. An obligor obtaining different employment is not automatically a voluntary change in employment per N.D. Admin. Code § 75-02-04.1-07(11). An analysis must be done to determine if the change in employment triggers the usage of that particular section of the child support guidelines. There is no finding of fact or analysis otherwise that Robert Carroll made a voluntary change in employment. Neither N.D. Admin. Code § 75-02-04.1-07(3) nor N.D. Admin. Code § 75-02-04.1-07(11) is applicable for the calculation of Robert Carroll's child support obligation.

[32] It is not impermissible to extrapolate income for an obligor. “[U]nless a trial court makes a determination that evidence of an obligor's recent past circumstances is not a reliable indicator of his future circumstances, the trial court may not extrapolate an obligor's income under N.D. Admin. Code § 75-02-04.1-02(8).” Korynta v. Korynta, 2006 ND 17, 708 N.W.2d 895. Section 75-02-04.1-02(8) of the guidelines explains why past indicators of income are not always the only information a party can use to calculate an obligation.

Calculations made under this chapter are ordinarily based upon recent past circumstances because past circumstances are typically a reliable indicator

of future circumstances, particularly circumstances concerning income. If circumstances that materially affect the child support obligation have changed in the recent past or are very likely to change in the near future, consideration may be given to the new or likely future circumstances.

N.D. Admin. Code § 75-02-04.1-02(8). The District Court made a specific finding that, because Robert Carroll changed employers since 2015 and 2016, the tax returns for those years did not adequately reflect his income and were not reliable indicators of his future income. (Docket ID #141; Appendix 52). Therefore, it was not only permissible, but it was appropriate for the court to consider and use a gross annual income figure calculated by extrapolating income from the year-to-date information contained in Robert Carroll's paystub for the period of July 14, 2017 to July 20, 2017. (Docket ID #127; Appendix 53).

[33] Robert Carroll asserts the District Court stated only a gross income amount but failed to state the net income used to determine the child support amount. This is incorrect. The District Court provided both a gross income amount and a net income amount. "Defendant has a total gross annual income of \$43,948.00 and a net monthly income, for child support purposes, of \$2,948.00." (Docket ID #141; Appendix 52). Additionally, the child support calculations provided by the State and adopted by the District Court include both the net annual income amount of \$35,373 as well as the net monthly income amount. (Docket ID #128; Appendix 56, 57).

[34] Robert Carroll argues that the District Court erred in considering overtime income in its calculation of his obligation. He states that the court failed to consider or discuss this issue in its ruling. However, this issue was discussed in questioning between the District Court and Robert Carroll at the August 1, 2017 motion hearing. Robert Carroll said there could be some decrease of his hours, but he provided no particular details of

what that meant. (Hearing 08-01-17 Transcript, p. 24). Robert Carroll also stated that his employer is good at keeping his employees working. (Id.)

[35] Robert Carroll cites Schweitzer v. Mattingley, 2016 ND 231, 887 N.W.2d 541 as an authority for his argument against including overtime income in calculating his child support obligation. However, Robert Carroll refers to the obligor's argument for why inclusion of atypical overtime income was incorrect, and this argument was not adopted by the Supreme Court in its decision. An appellant's argument is not a controlling authority for any purpose.

[36] Gross income includes overtime income unless it is shown to be atypical. N.D. Admin. Code § 75-02-04.1-01(4)(a)(4). Robert Carroll made no argument that the overtime hours he received during his employment from March 20, 2017 through July 20, 2017 were necessarily an atypical amount. He provided no documentation to show the overtime hours he had worked were atypical. Therefore, Robert Carroll's overtime income was properly included in the calculation of his gross annual income.

[37] Robert Carroll asserts the District Court was wrong to order a child support amount that requires him to pay child support on income that was paid directly to the federal government. This is incorrect. Robert Carroll is misreading and misapplying Schedule 1 of the child support calculations that were adopted by the District Court. Schedule 1 illustrates how to calculate an obligor's hypothetical federal and state income tax based on the requirements of N.D. Admin. Code § 75-02-04.1-01(6)(a) and (b). Schedule 1 takes into consideration the application of the standard deduction for filing single and an exemption for Robert Carroll. It also includes the calculation of the

hypothetical federal income tax obligation and the hypothetical state income tax obligation. These hypothetical tax amounts were deducted from Robert Carroll's gross annual income in order to calculate his net annual income. Therefore, the net annual income adopted by the District Court does not include the hypothetical amounts that would go toward Robert Carroll's federal or state income tax obligations.

[38] The District Court properly calculated Robert Carroll's child support obligation using an extrapolated income based on recent reliable income information from paystubs Robert Carroll himself provided. The District Court provided a net income amount. Robert Carroll cites child support guidelines which do not apply to his situation as well as an appellant's argument that was not adopted by the Supreme Court in its decision and is therefore not a controlling authority. The District Court did not err in using Robert Carroll's overtime income as part of his gross annual income figure. The guidelines worksheet and calculation adopted by the District Court accounts for Robert Carroll's hypothetical tax obligations and does not include such figures in the net income amount used to determine his support payment. Therefore, the District Court's order should be affirmed.

[39] CONCLUSION

[40] The District court did not fail to comply with the mandate of the Supreme Court because it identified which section of the guidelines it was using, and it identified how it calculated Robert Carroll's income. The District Court did not err in the amount of its award of child support ordered in the June 2, 2017 Amended Judgment because it correctly applied the child support guidelines. The District Court did not err in allowing

the use of paystubs containing one piece of inaccurate identifying information because the incorrect information was likely due to scrivener's error; because Robert Carroll confirmed that all other information on the paystubs, including income information, was correct; and because Robert Carroll failed to correct or supplement the record with income information that controverted the subject paystubs even though he had sufficient time and opportunity to do so. The District Court did not fail to comply with the child support guidelines because income extrapolation is appropriate for this situation where Robert Carroll's previous years' tax returns were found to be no longer reliable due to a change in his employment in 2017. The District Court did include a net income amount both in its findings and in the child support guidelines worksheet it adopted. The District Court did not err in using overtime income in its calculation of Robert Carroll's child support obligation because the overtime hours were not shown to be atypical. The District Court did not apply the child support guidelines incorrectly when calculating Robert Carroll's net income because it properly accounted for the hypothetical income tax obligations deducted from his gross income. Therefore, the State respectfully requests this Court affirm the District Court's amended judgment from June 2, 2017. The State also respectfully requests this Court affirm the District Court's order to modify Robert Carroll's child support obligation from August 22, 2017.

Dated this 26th day of January, 2018.

/s/ Steven G. Podoll

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CERTIFICATE OF SERVICE

[43] I hereby certify that a true and correct copy of the foregoing Appellee's Brief was served on the 26th day of January, 2018, by sending via electronic mail to the following:

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By: /s/ Steven G. Podoll
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CERTIFICATE OF COMPLIANCE

[44] The undersigned, as attorney for the Plaintiff, State of North Dakota, in the above captioned matter, and as the author of the Appellee Brief, hereby certified, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the Appellee Brief, excluding words in the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance totals 3960 words. Appellee’s brief was created using Microsoft Word 2010.

Dated this 26th day of January, 2018.

By: /s/ Steven G. Podoll
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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Robert Lee Carroll,)	
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Defendant and Appellant,)	Stark Co. No. 45-2015-DM-222
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and)	
)	
State of North Dakota,)	
)	
Statutory Real Party in)	
Interest and Appellee.)	

APPEAL FROM AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT ON REMAND FROM THE SUPREME COURT DATED JUNE 2, 2017 RESULTING FROM A TELEPHONIC STATUS CONFERENCE HELD ON MAY 30, 2017, AND APPEAL FROM ORDER ON HEARING FOR MOTION FOR REVIEW AND AMENDMENT OF CHILD SUPPORT HELD ON AUGUST 1, 2017 AND DATED AUGUST 22, 2017.

AFFIDAVIT OF SERVICE

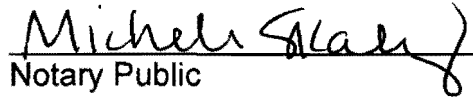
[1] Trista Dick, being duly sworn on oath, deposes and states that she is of legal age and that on January 26, 2018, she served the State of North Dakota's Appellee's Brief in the above matter electronically as follows:

Robert A. Carroll carrollna46@aol.com


Trista Dick

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Subscribed and sworn to before me this 24 day of January 2018.


Notary Public

