

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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SUPREME COURT NO.: 20170441  
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Mathew Zuraff, )  
                  Plaintiff/Appellee, )  
                                          ) )  
                  vs.                          ) )  
                                          ) )  
Natasha Reiger, )  
                  Defendant/Appellant. )

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NORTHEAST      APPEAL FROM THE CIVIL JUDGMENT  
                  ~~SOUTH CENTRAL~~ JUDICIAL DISTRICT  
TOWNER ~~CASS~~ COUNTY CRIMINAL. NO. 48-2017-DM-00006  
                  THE HONORABLE LONNIE OLSON PRESIDING  
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**BRIEF**  
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**STATEMENT OF THE ISSUES**

**[¶1] ISSUES:**

**I. Was the evidence and testimony presented in this case sufficient to require that the trial court make a ruling under NDCC 14-09-06.2 on domestic violence before it could make any decision on parental rights and responsibilities?**

**II. Can a district judge in North Dakota swear in a witness by telephone when that witness whose physical presence is in another state has no notary with him to place him under oath?**

## NATURE OF THE CASE

[¶2] This case involves the establishment of residential responsibility and parenting time.

[¶3] The Summons and Complaint were filed 2-27-2017.

[¶4] The Answer and Counter-Claim were filed on 2-28-2017.

[¶5] A Notice of Bench Trial was filed on 7-12-2017.

[¶6] A Request for Allowing the Telephonic Testimony of Barbara Radonski was filed on 8-10-2017.

[¶7] An Order granting telephonic Testimony was filed on 8-29-2017.

[¶8] Defendant's Closing Argument was filed on 9-22-2017.

[¶9] Plaintiff's Closing Argument was filed on 9-22-2017.

[¶10] Findings of Fact, Conclusions of Law and Order for Judgment were filed on 11-07-2017 and Corrected Findings of Fact, Conclusions of Law and Order for Judgment were filed on 11-07-2017.

[¶11] Notice of Appeal was filed by Natasha Reiger on 12-15-2017.

[¶12] The Order for Transcript was filed on 12-15-2017.

[¶13] The Notice for filing the Notice of Appeal was filed on 12-15-2017.

[¶14] A Clerk's Certificate on Appeal was filed on 1-9-2018 and an Amended Clerk's Certificate on Appeal was filed on 1-18-2018.

[¶15] This case is now before the North Dakota Supreme Court.

## STATEMENT OF FACTS

[¶16] In this case Natasha Reiger is the mother and Matthew Zuraff is the father of JMZ (2014). Ms. Reiger also is the mother of two other children. The oldest of these

children is a girl who lives with her father and the youngest is a boy that lives with Ms. Reiger. Neither of these male children have anything to do with this case.

[¶17] When JMZ was born Ms. Reiger had primary residential responsibility of her. She lost that primary residential responsibility when it was awarded to her mother Natalie Christenson. For health reasons Natalie Christenson was not able to properly raise JMZ so her primary residential responsibility was transferred to Natasha's father, Richard Reiger.

[¶18] JMZ and her father Matthew Zuraff got involved in interstate compact between the states of North Dakota and Washington. That compact decided to and did award primary residential responsibility to Mr. Zuraff prior to trial.

[¶19] When the trial in their case began, JMZ was living with her father Mr. Zuraff in the state of Washington at the following address: 620 - 15<sup>th</sup> St. S Parkland, Washington. The other person residing at that address was Mr. Zuraff's mother, Barbara Radonski. Ms. Reiger, when the trial began, was residing at 725 S. 12<sup>th</sup> St. #27 in Bismarck, North Dakota with her father, Richard Reiger. At the time of trial, Ms. Reiger and Mr. Zuraff had steady employment.

[¶20] Ms. Reiger and Mr. Zuraff both have felony criminal histories. Mr. Zuraff has two felony drug convictions and has spent time in a criminal facility. Ms. Reiger has one criminal conviction but has spent no time in a criminal facility. Both have been on probation because of their felony drug convictions.

[¶21] Prior to the trial on September 9<sup>th</sup>, 2017, both Ms. Reiger and Mr. Zuraff have taken and completed parental education classes, and other programs recommended by social services. Both had been so successful that a social worker at the trial by the name of Amber Dewey, who testified, refused to recommend which party should be awarded primary residential responsibility.

[¶22] Both Ms. Reiger and Mr. Zuraff are addicted to drugs. Mr. Zuraff has been twice convicted of felony drug crimes in North Dakota and has been incarcerated at the James River Correctional Center for about seven months because of these felony convictions. Ms. Reiger has been convicted of one felony drug crime, but has never spent time at the penitentiary. Both have spent time on probation in North Dakota.

[¶23] The only serious problem that existed between Ms. Reiger and Mr. Zuraff prior to and during the trial was caused by the acts of domestic violence that Mr. Zuraff had perpetrated on Ms. Reiger.

[¶24] When Ms. Reiger was questioned about her fighting with Mr. Zuraff in the past her response can be found in T.P.47, L.10-13.

Q. You never engaged in fighting activities with him - - fighting behaviors?

A. I've tried defending myself. That's about it. Never - -

[¶25] What Mr. Zuraff did to Ms. Reiger during their fighting is set out in T.P.100, L.21-24. A. He's put his hands over my mouth to cut off my breathing. (emphasis added) He's whipped me down to the floor. He's jabbed me with shower curtain rods. He's thrown me into ovens. Just some violent stuff.

[¶26] As to how these things affected Ms. Reiger the answer is found in Tr. P.110,L.15-20.

A. What I went through was pretty traumatizing and pretty scary. So afterwards, after receiving - - after hearing that he had made some threats, I believed it, you know. So yeah, then I got one. Because I had nobody around at the time to protect me, like, and (indiscernible) be sorry if that was the case and if it was to happen.

[¶27] Ms. Reiger's reason for getting a protection order is stated and her reason for having it removed are set out in the T.P.75,L.14-23.

A. Because they felt that it was necessary. I was - - my dad had received a



text message - - or a phone call and threats saying that - - because I had mentioned that JMZ was not to leave the state, she's not going anywhere. And he said - - allegedly, he said that if - - "JMZ.'s leaving with me. If not, I will" - - "I'll kill" - - "I'll kill the fucking bitch," quote for quote words (verbatim).

**Q.** And so, in order to speak to your child, you had to get - - you lifted the protection order?

**A.** Yes.

[¶28] What Richard Reiger, Natasha's father knew about the verbal and physical activities between his daughter Natasha and Mr. Zuraff is set out in the T.P.228,L.14-23.

**A.** That's with the name calling. He would call her names to me over the phone to my daughter, which is not appropriate. You know, she's a bitch, she's a liar, she's this. It was just the name calling.

And then I, kind of, found out through the police department - - with copies - - that he has been beating on her. And he did it one time at the hospital - - the baby was in her arms - - and pushed her, and the baby slipped out of - - out of my daughter's arms but caught her - - caught the baby by the leg. And that's on a police report and was filed.

[¶29] Mr. Zuraff would like to claim all of his problems with Ms. Reiger involved mutual altercations. However this doesn't work out when his testimony at T.P.178,L.24 to P.179,L21 is considered.

**A.** No. It was body check is, I think, how it was placed.

**Q.** What do you mean by body check?

**A.** Just the brunt - - brunt force of my chest, is what it was.

**Q.** You pushed her around a bit, then, at least; would you say that?

**A.** No.

**Q.** If you didn't do any domestic violence, why did you end up going to this

course?

A. Because they issued domestic violence because I had it on my record.

Q. And when you go to that class don't you admit the domestic violence?

A. No. They never make you admit to it. They told me, "You have to go to domestic violence because you have a record of domestic violence."

Q. And so, when you say you have a record of domestic violence, was that that you've been convicted of domestic violence?

A. Of simple assault, yes.

Q. And the person assaulted was Natasha.

A. Yes.

[¶30] The trial judge's response to paragraphs 24 to 29 states that Natasha obtained a protection order against Matthew in the past. Thus, a court did find probable cause of an act of domestic violence, or threat of domestic violence. However this Court does not find sufficient evidence that it involved serious bodily injury. As such, the Court does not need to analyze whether or not there is clear and convincing evidence to overcome the presumption of this subsection of Section 14-09-06.2. Overall, this factor weighs in Natasha's favor.

### ISSUE

[¶31] **I. Was the evidence and testimony presented in this case sufficient to require that the trial court make a ruling under NDCC 14-09-06.2 on domestic violence before it could make any decision on parental rights and responsibilities?**

### ARGUMENT

[¶32] According to Helbling v. Helbling 532 N.W.2d 650 (N.D. 1995), child custody is a finding of fact and that finding will not be disturbed on appeal unless it is clearly erroneous. Lippert v. Lippert 519 N.W.2d 287 (N.D. 1994). Therefore, the

standard of review for a child custody finding of fact is that it will only be erroneous if the appeals court after reviewing the custody findings is left with a definite and firm conviction a mistake has been made.

[¶33] The statute that sets out the rules and procedures for Issue I is NDCC 14-09-06.2(j) Best interests and welfare of child – Court consideration – Factors.

J. Evidence of domestic violence. In determining parental rights and responsibilities, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent have residential responsibility. The court shall cite specific findings of fact to show that the residential responsibility best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary to protect the welfare of the child, residential responsibility for a child may be awarded to a suitable third person, provided that the person would not allow access to a violent parent except as ordered by the court. If the court awards residential responsibility to a third person, the court shall give priority to the child's nearest suitable adult relative. The fact that the abused parent suffers from the effects of the abuse may not be grounds for denying that parent residential responsibility. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01. A court may consider, but is not bound by, a finding of domestic violence in another proceeding under chapter 14-07.1.

[¶34] NDCC 14-07.1(2) defines "domestic violence" to include physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members.

[¶35] The statute that defines Serious Bodily Injury in NDCC 12.1-01-04(29) "Serious bodily injury" means bodily injury that creates a substantial risk of death or

which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs. (Emphasis added)

[¶36] In the case now before the court the evidence and testimony of the domestic violence in the case is set out above in paragraphs 24 to 29. The trial court ignored most of the domestic violence in these paragraphs and only found that a protection order had been brought by Ms. Reiger against Mr. Zuraff.

[¶37] In this case the trial court completely ignores paragraph 25 above of Ms. Reiger's testimony where she states that Mr. Zuraff put his hands over my mouth to cut off my breathing. This cutting off of her breathing is an impediment of her airflow and should have been found as a serious bodily injury to Ms. Reiger and then considered a serious bodily injury under NDCC 12.1-01-04(29). After that the trial judge should have made a specific analysis of whether or not Mr. Zuraff, because of that serious bodily injury to Ms. Reiger, can prove clear and convincing evidence and testimony to rebut that presumption. If there is not clear and convincing evidence to rebut the presumption Mr. Zuraff can't be awarded primary residential responsibility of JMZ.

[¶38] Other additional evidence and testimony the trial judge ignores on domestic violence can be found in paragraph 28 above in the testimony of Natasha Reiger's father, Richard Reiger. The trial court should have specifically analyzed that domestic violence in its findings.

[¶39] The trial judge should have also specifically analyzed the admission of Mr. Zuraff in paragraph 29 to the conviction of simple assault and the fact that the person assaulted was Ms. Reiger.

[¶40] A trial court should not ignore evidence and testimony of domestic violence. When a trial court does ignore evidence and testimony of domestic violence

according to *Gonzalez v. Gonzalez*, 2005 N.D.131, 700 N.W.2d 711 it may be necessary to reverse and remand the case for determination of the custody issue.

[¶41] In this case, the trial court ignores so much of the domestic violence involved in the case that the only way to correct it is to reverse the trial court's findings on child custody and remand the case for specific redetermination of all the custody issues.

### ISSUE

[¶42] **II. Can a district Judge in North Dakota swear in a witness by telephone when that witness whose physical presence is in another state has no notary with him to place him under oath?**

### ARGUMENT

[¶43] The standard of review in this case involves an evidentiary matter. According to *Lawrence v. Delkamp*, 2008 N.D. 111[ 7] 750 N.W.2d 452, when deciding evidentiary matters, a district court has broad discretion. *State v. Friedt*, 2007 N.D. 108 8, 735 N.W.2d 848, this Court will overturn the district court's admission or exclusion of evidence only if the district court has abused its discretion. *Id.* "Abuse of discretion occurs when a trial court acts arbitrarily, unconscionably, or unreasonably, or when a decision is not based on a rational mental process." *Id.*

[¶44] Prior to trial, Matthew Zuraff gave notice and made a motion to allow one of his witnesses, Barbara Radonski, to testify at the trial by telephone from the state of Washington. The court granted Mr. Zuraff's motion. After that, Mr. Zuraff did nothing to assure there would be appropriate safeguards in place before Ms. Radonski testified at trial. On the morning of the trial, Natasha Rieger's attorney, Benjamin C. Pulkrabek talked to the trial judge about the need for a notary in Washington to be present with Ms. Radonski and to swear her in. See T. L 11-26. The trial judge's response was that he would swear Ms. Radonski in.

[¶45] At the time of the trial, when it was time to swear Ms. Radonski in, the procedure used is set out in the T. P. 191 L. 4 to P. 192 L. 21.

[¶46] N.D.R. of CivP 43(a) controls telephone testimony in open court. At trial, the witnesses' testimony must be taken in open court unless a statute, the Rules of Evidence, these rules, or other court rules provide otherwise. For good cause, or on agreement of the parties, and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. A party must give notice if a witness is unable to testify orally or if the testimony by contemporaneous transmission may be necessary. (Emphasis added)

[¶47] The words "appropriate safeguards" were interpreted in Lawrence. According to { 14} Rule 43(a), N.D.R.CivP., requires that courts ensure "appropriate safeguards" are in place before permitting presentation of testimony in open court by contemporaneous transmission. One mechanism used by our courts to convey the importance of truth telling to witnesses is the administration of the oath or affirmation. See *Tice v. Mandel*, 76 N.W.2d 124, 137 (N.D. 1956), stating the object of requiring an oath "is first to affect the conscience of the witness and thus compel him to speak the truth, and also to lay him open to punishment for perjury in case he wilfully falsifies". Before testifying, a witness must declare he or she will testify truthfully by oath or affirmation. N.D.R.Ev. 603. The oath or affirmation is to be "administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." *Id.* Persons authorized to administer oaths in recorded court proceedings are governed by N.D.Sup.Ct.Admin.R.25 and N.D.C.C.44-05-01(7).

[¶48] { 15} Here, the court would not allow Delkemp to testify because no one was onsite with Delkemp to administer her oath or verify her identity other than her child.

[¶49] In the case now before the court there was no one present in Washington

with Ms. Radonski to verify her identity or swear her in as a witness. Therefore, Ms. Radonski should not have been allowed to testify.

### CONCLUSION

[¶50] In this case, the trial court ignored much of the testimony and evidence of domestic violence that is in the trial transcript. The only way that can be corrected is for this court to reverse the trial court's ruling on child custody and remand the case for specific redetermination of all custody issues.

[¶51] The testimony of Ms. Radonski, Mr. Zuraff's out of state telephone witness, should be ordered stricken from the record because no appropriate safeguards existed and the trial judge, because of the facts, couldn't swear her in as a witness.

DATED this 7<sup>th</sup> day of March, 2018.

/s/ Benjamin C. Pulkrabek  
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**CERTIFICATE OF SERVICE BY MAIL**

[¶52] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on March 7, 2018, she served, by e-mail and mailed a copy of the following:

**APPELLANTS APPENDIX AND BRIEF**

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The undersigned further certifies that on March 7, 2018, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX AND BRIEF.

/s/ Sharon Renfrow  
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