

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Marcella D. Aldinger,)	
)	
Plaintiff and Appellee,)	
)	
vs.)	
)	Supreme Court No. 20190226
James H. Aldinger,)	
)	Morton Co. No. 30-05-C-00324
Defendant and Appellant,)	
)	
and)	
)	
State of North Dakota,)	
)	
Statutory Real Party in Interest)	
and Appellee.)	

APPEAL FROM THE MAY 22, 2019 ORDER FOR SECOND AMENDED
JUDGMENT AND AMENDED JUDGMENT ISSUED BY THE SOUTH CENTRAL
JUDICIAL DISTRICT, THE HONORABLE DANIEL J. BORGEN

STATE OF NORTH DAKOTA'S APPELLEE BRIEF

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TABLE OF CONTENTS

	<u>Paragraph No.</u>
Table of Authorities	1
Statement of the Issues	2
Statement of the Case	7
Statement of the Facts	10
Law and Argument	18
Issue 1: Whether the trial court abused its discretion by requesting new child support calculations and proposed concluding documents be submitted by the State, based on information provided by Mr. Aldinger?	19
Issue 2: Whether the trial court abused its discretion by not ordering the dismissal of the State’s Motion for Modification when it determined that different income calculations were appropriate?	29
Issue 3: Whether the trial court had subject matter jurisdiction to modify the North Dakota child support obligation?	34
Issue 4: Did the trial court err as a matter of law by applying the North Dakota Child Support Guidelines in this case?	40
Conclusion	45

[1] TABLE OF AUTHORITIES

<u>Case Law</u>	<u>Paragraph No.</u>
<u>Ferguson v. Ferguson</u> , 2018 ND 122, 911 N.W.2d 324	38
<u>Horner v. Horner</u> , 549 N.W.2d 669 (N.D. 1996)	42
<u>In Re B.H.</u> , 2018 ND 178, 915 N.W.2d 668	22
<u>Rath v. Rath</u> , 2017 ND 138, 895 N.W.2d 315	41
<u>Rueckert v. Rueckert</u> , 499 N.W.2d 863 (N.D. 1993)	31
<u>Wild Rice River Estates, Inc. v. City of Fargo</u> , 2005 ND 193, 705 N.W.2d 850	27

Statutes

N.D.C.C. § 14-09-08.4	31
N.D.C.C. § 14-09-08.4(4)	31, 32, 33
N.D.C.C. § 14-09-09.7	41, 43
N.D.C.C. § 14-09-09.7(1)	41
N.D.C.C. § 14-09-09.26	11
N.D.C.C. ch. 14-12.2	38
N.D.C.C. § 14-12.2-08	39
N.D.C.C. § 14-12.2-08(1)(a)	39
N.D.C.C. § 14-12.2-15	43
N.D.C.C. § 27-05-06	36
N.D.C.C. § 27-05-06(2)	36

Administrative Code

N.D. Admin. Code § 75-02-04.1-01(6)	42
N.D. Admin. Code § 75-02-04.1-09	42
N.D. Admin. Code § 75-02-04.1-09(1(a))	42
N.D. Admin. Code § 75-02-04.1-09(2)	53

Rules

N.D.R.Civ. P. 52(b)	27
N.D.R.Ct. 7.1	21, 25, 45
N.D.R.Ct. 7.1(b)1)	21, 26, 27
N.D.R.Ct. 7.1(b)(3)	27

[2] STATEMENT OF THE ISSUES

[3] **Issue 1:** Whether the trial court abused its discretion by requesting new child support calculations and proposed concluding documents be submitted by the State, based on information provided by Mr. Aldinger?

[4] **Issue 2:** Whether the trial court abused its discretion by not ordering the dismissal of the State's Motion for Modification when it determined that different income calculations were appropriate?

[5] **Issue 3:** Whether the trial court had subject matter jurisdiction to modify the North Dakota child support order?

[6] **Issue 4:** Did the trial court err as a matter of law by applying the North Dakota Child Support Guidelines in this case?

[7] STATEMENT OF THE CASE

[8] This is an appeal from the Findings of Fact, Conclusions of Law, Order for Second Amended Judgment and Second Amended Judgment entered on May 22, 2019. (App. 14-17). The Second Amended Judgment was entered after a motion for modification of Mr. Aldinger's child support obligation was brought by the Bismarck Regional Child Support Unit following a review conducted by the Bismarck Regional Child Support Unit pursuant to its statutory responsibilities. (Doc ID## 199-210). The State, in its Motion for Modification, requested an increase in Mr. Aldinger's child support obligation from \$427.00 to \$748.00 per month. Mr. Aldinger filed two Answer briefs to this Motion (Doc ID## 211-214) objecting to the State's calculation of his income and the resulting child support obligation. The State filed a Reply to Mr. Aldinger's Answer Brief. (Doc ID##

231-233). No oral argument or evidentiary hearing was requested or scheduled on the State's Motion for Modification of Child Support.

[9] The State, on May 10, 2019, received instructions through an email from the Clerk of District Court, stating that the trial court wanted updated child support calculations based on the trial judge's decision to use income information from the paystub Mr. Aldinger filed as an exhibit (App 13; Doc ID# 223). The State was also to update its proposed Findings of Fact, Conclusions of Law, Order for Second Amended Judgment and Second Amended Judgment forms. Accordingly, on May 20, 2019, the State filed updated child support calculations, along with a Supplemental Brief and new proposed concluding documents. (Doc ID## 261-265). The Court signed the Findings of Fact, Conclusions of Law, Order for Second Amended Judgment on May 22, 2019, adopting the updated calculations. (App. 14-15). The Second Amended Judgment was also filed on May 22, 2019, modifying Mr. Aldinger's child support obligation from \$427.00 per month to \$701.00 per month. (App. 16-17). Mr. Aldinger has appealed this Second Amended Judgment. (App 19).

[10] STATEMENT OF THE FACTS

[11] The parties were married and had two children, R.A., born in 1994, and A.A., born in 2002. They divorced in 2006, with the entry of the Judgment on January 5, 2006. (Doc ID# 57). The Judgment ordered Mr. Aldinger to pay child support of \$469.00 per month for the two children. In May 2008, the State's Child Support Division, through the Bismarck Regional Child Support Unit, received and accepted an application for child support services. Therefore, pursuant to N.D.C.C. § 14-09-09.26, the State became a statutory real party in interest and a Notice of Real Party in Interest was served and filed

with the trial court on July 8, 2010. (Doc ID# 62). With the entry of the Amended Judgment on October 7, 2010, Mr. Aldinger's child support was reduced to \$427.00 per month for the two children. (Doc ID# 71).

[12] After conducting a review of Defendant's child support obligation, a service to be provided pursuant to statute, the State of North Dakota, through the Bismarck Regional Child Support Unit, filed a Motion for Modification of Child Support on April 16, 2019. The Motion requested an increase in Mr. Aldinger child support obligation from \$427.00 per month to \$748.00 per month. (Doc ID## 199-210). The State's calculation of Mr. Aldinger's gross annual income was based on income information received from his employer. (Doc ID# 205).

[13] On April 30, 2019, Mr. Aldinger filed and served an Answer Brief to the State's Motion. (Doc ID## 211-212). He objected to the State's calculations, stating that new or likely future circumstances warrant a different calculation of his income as he was no longer employed as indicated by the State in its Brief. (Doc ID# 211-212). On May 1, 2019, Defendant filed a second Answer Brief, also alleging that the State's calculations are erroneous as there was no consideration given for the difference in the cost of living where he lives, from that of North Dakota. (Doc ID## 213-214) He also raised an issue, concerning a prior payment to the State Disbursement Unit, which issue was not a part of the State's Motion for Modification and for which Mr. Aldinger did not file a motion. Therefore, this discussion was not properly before the trial court. Also, on May 1, 2019, Mr. Aldinger filed a Motion for Dismissal of the State's Motion for Modification, (Doc ID## 215-230), arguing, in part, that his employment situation was not as outlined in the

State's Motion, that his child support obligation has been in effect since 2010 and no justification for a modification had been provided. He also argued that he has had issues with exercising parenting time with the child. Mr. Aldinger filed a copy of a paystub, which the trial court eventually used to determine his annual gross income. (Doc ID# 223).

[14] On May 3, 2019, the State filed a Reply to Mr. Aldinger's initial Answer Brief. (Doc ID# 231) On May 10, 2019, Mr. Aldinger filed a response to the State's Reply. (Doc ID# 234). On May 13, 2019, Mr. Aldinger filed a Motion to Dismiss the State as a party to the action. (Doc ID## 235-241). On that same date, the State filed its Response to Mr. Aldinger's original Motion for Dismissal. (Doc ID## 242-246), and on May 17, 2019, the State filed its Response to both Mr. Aldinger's second Answer Brief, dated May 1, 2019, and his Motion to Dismiss the State as a party to the action. (Doc ID## 248-251). On May 17, 2019, Mr. Aldinger filed a Motion to Invoke Rule 8.1 Mediation (Doc ID## 252-258).

[15] On May 10, 2019, the State received instructions from the trial court, through an e-mail sent by the Clerk of Court, that the court wanted new child support calculations prepared based on income information obtained from the April 26, 2019 paystub that Mr. Aldinger had filed as an exhibit. (Doc ID# 223). Specifically, the trial court wished to use a gross income based on Mr. Aldinger's two-week earnings of \$1,985.60. (App 13). The State served and filed new calculations completed with the trial court's calculated gross annual income of \$51,626.00, as well as new proposed concluding documents and a Supplemental Brief to explain the calculations, on May 20, 2019. (Doc ID## 259-265). The trial court issued the Findings of Fact, Conclusions of Law, Order for Second Amended Judgment on May 22, 2019 (App 14, Doc ID# 266), and the Clerk of Court

entered the Second Amended Judgment on May 22, 2019, as well. (App. 16, Doc ID# 267).

[16] Mr. Aldinger, after being served with the executed Second Amended Judgment, filed a Motion to Invoke Rule 28, seeking the recusal of the trial judge, and a Motion to Dismiss Supplemental Brief Order. (Doc ID## 276-291). Mr. Aldinger filed an additional motion on June 7, 2019, requesting to apply Rule 8.14. (Doc ID## 295-302). The State filed a Response on June 12, 2019, to address two of the three pending motions, specifically Mr. Aldinger's Motion to Invoke 28 U.S.C. 455, and his Motion to Dismiss Supplemental Brief Order. (Doc ID## 303-305). On June 12, 2019, the trial court issued an Order, denying Mr. Aldinger's Motions for 8.14, Motion to Terminate Child Support, Motion to Dismiss and Motion for Recusal. (Doc ID## 306).

[17] Mr. Aldinger filed his Notice of Appeal of the Second Amended Judgment with the North Dakota Supreme Court on July 25, 2019, asking that this Court overturn the Second Amended Judgment, to remove the trial judge from the case, and dismiss the State as a party to the case. (App 19).

[18] LAW AND ARGUMENT

[19] **Issue 1:** Whether the trial court abused its discretion by requesting new child support calculations and proposed concluding documents be submitted by the State, based on information provided by Mr. Aldinger?

[20] Mr. Aldinger has objected to the trial court having requested that the Bismarck Regional Child Support Unit update its child support calculation based on information provided by Mr. Aldinger, in the form of a paystub, and updating its proposed concluding

documents accordingly. However, the request by the trial court is not unusual and is, in fact, an action that is appropriate under the North Dakota Rules of Court.

[21] Rule 7.1 of the North Dakota Rules of Court states, in part,

Preparation by One or More Parties. Preparation of proposed findings of fact and conclusions of law under N.D.R.Civ.P. 52(a) may be assigned by the court to one or more parties. Any findings of fact and conclusions of law prepared by one or more parties must be served upon all other parties for review and comment.

N.D.R.Ct. 7.1(b)(1) (Emphasis added). Therefore, the trial court in this case had discretion to instruct the State to update its calculations to reflect the income the trial court decided was to be used for the calculation of Mr. Aldinger's child support obligation.

[22] When a trial court has the discretion to act, this Court won't overturn the trial court's decision unless the decision was an abuse of that discretion. The abuse of discretion standard is as follows:

A district court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, if its decision is not the product of a rational mental process leading to a reasonable determination, or if it misinterprets or misapplies the law. An abuse of discretion is never assumed and must be affirmatively established, and this Court will not reverse a district court's decision merely because it is not the one it would have made had it been deciding the motion.

In re B.H., 2018 ND 178, ¶ 6, 915 N.W.2d 668 (Internal citations omitted).

[23] Mr. Aldinger has expressed that he had no knowledge that the court had contacted the State, no knowledge that new documents were submitted and signed and no chance to object to the new calculations. (Appellant's Brief, page 7, # 6). He argues that the trial court was not impartial because it instructed the State to perform new calculations and provide updated concluding documents based on those calculations. However, because the

State brought the motion seeking modification of Mr. Aldinger's child support obligation it was not unreasonable for the trial court to ask the State to update its calculations based on the trial court's determination of the appropriate gross income to use in the calculation of Mr. Aldinger's child support obligation. The same is true for the revision of the proposed Findings of Fact, Conclusions of Law, Order for Amended Judgment and proposed Amended Judgment.

[24] The trial court did not ask if the State had an objection to the trial court's gross income determination. Instead, the instructions sent to the State, through the Clerk of Court's office, were more administrative in nature. The trial court and the State did not discuss any substantive issues of the case. The trial court independently determined the gross income it believed to be the appropriate gross income to use for purposes of calculating Mr. Aldinger's child support obligation. Mr. Aldinger has failed to show that there was a lack of impartiality on the part of the trial court.

[25] Mr. Aldinger failed to affirmatively prove that the trial court's request to the State for new child support calculations and new proposed concluding documents was an abuse of its discretion under N.D.R.Ct. 7.1, or that the instruction given, in any way, was harmful to him. In fact, the instruction given to the State was to Mr. Aldinger's benefit as the trial court relied on the proof of income Mr. Aldinger had filed to show that his income was less than the amount proposed by the State.

[26] Mr. Aldinger, in his Statement of Facts (Appellant's Brief, p.7, item 4), contends he was not given time to respond to the new calculations and proposed concluding documents before the trial judge and the clerk of court signed them. Rule 7.1(b)(1) of the

North Dakota Rules of Court does provide that opposing parties are to have fourteen days within which to file any objections to proposed documents before the documents are signed. It is true that, in this case, fourteen days was not provided for a response from Mr. Aldinger but, he did have the opportunity, post entry, to submit his objections to the trial court and he took advantage of this opportunity.

[27] Rule 7.1(b)(3) states that “[n]othing contained in this Rule of Court affects the right of any party to move the court for an order amending the findings of fact finally entered by the court or to make additional findings, under N.D.R.Civ.P. 52(b).” Under N.D.R.Civ. P. 52(b), a party who objects to a finding of fact may serve a motion requesting an amendment of the findings so long as the motion is brought within twenty-eight days of notice of entry of the judgment. Even though the trial court did not wait the fourteen days before signing the Findings of Fact, Conclusions of Law, Order for Second Amended Judgment, as outlined in N.D.R.Ct. 7.1(b)(1), it was harmless error because Mr. Aldinger filed a motion seeking to have the Order and Second Amended Judgment vacated. Therefore, he was able to outline to the trial court his objections with the new calculations and the Second Amended Judgment. These objections were considered by the trial court and addressed in its post judgment Order dated June 12, 2019. (Doc ID# 306). Accordingly, Mr. Aldinger “can show no prejudice resulted from the court’s failure to allow...a timely objection under N.D.R.Ct. 7.1(b).” Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 34, 705 N.W.2d 850.

[28] The trial court did not abuse its discretion in instructing the State to prepare new calculations and proposed concluding documents based on the gross annual income the

trial court had calculated. The fact that the trial court executed those concluding documents prior to Mr. Aldinger having the opportunity to comment on them is harmless error and does not support overturning the Second Amended Judgment.

[29] **Issue 2:** Whether the trial court erred by not ordering the dismissal of the State's Motion for Modification when it determined that different income calculations were appropriate?

[30] After the State filed its Motion for Modification of Child Support, and Mr. Aldinger had filed his two Answer Briefs, he also filed a motion to dismiss the State's motion, a motion to require mediation and a motion to dismiss the State as a real party in interest in the case. He now contends that it was error for the trial court not to consider one of these motions as an alternative to the actual modification of his child support obligation. Mr. Aldinger's argument is not supported.

[31] It is well established that a trial court has continuing jurisdiction to modify a child support obligation as public policy demands that there be proper "support and maintenance of minor children". Rueckert v. Rueckert, 499 N.W.2d 863, 868 (N.D. 1993). This continuing jurisdiction is embodied in the laws of North Dakota, specifically, N.D.C.C. § 14-09-08.4 which statute codifies the right to a periodic review of a child support obligation. This statute provides, in part:

If a child support obligation sought to be amended was entered at least one year before the filing of a motion or petition for amendment, the court **shall** order the amendment of the child support obligation to conform the amount of child support payment to that required under the child support guidelines, whether or not the motion or petition for amendment arises out of a periodic review of a child support obligation, and whether or not a material change of circumstances has taken place, unless the presumption that the correct

amount of child support would result from the application of the child support guidelines is rebutted.

N.D.C.C. § 14-09-08.4(4) (Emphasis added). The evidence presented by both the State and Mr. Aldinger showed that his current child support obligation of \$427.00 per month did not conform to the amount of child support to be paid under the current child support guidelines. Therefore, even though the new child support amount ordered is different than the amount requested by the State in its Motion for Modification of Child Support, the trial court was required to order the increase in support based on the gross income the trial court determined was reflective of Mr. Aldinger's capacity to earn.

[32] The fact that Mr. Aldinger requested the State's Motion for Modification be dismissed because its initial calculation of his gross annual income was not accepted by the trial court, does not mean the trial court's modification was improper or that it had to grant one or more of Mr. Aldinger's other motions. Whether the trial court's decision to modify Mr. Aldinger's child support obligation was proper is a question of law in light of the mandate found in N.D.C.C. § 14-09-08.4(4). Therefore, this Court would review the trial court's decision de novo.

[33] Based on the evidence presented, the trial court's decision to use the paystub Mr. Aldinger filed in response to the State's Motion to calculate his gross annual income was not clearly erroneous. The trial court agreed with Mr. Aldinger's argument that the gross income calculated by the State was not reflective of his capacity to earn, and relied on the more recent paystub provided by Mr. Aldinger to calculate his income. Based on the new monthly net income, after application of the child support guidelines, a child support obligation resulted that was different than the amount Mr. Aldinger was currently ordered

to pay under the Judgment. Therefore, it was not error for the trial court to order a modification of his obligation so that it conforms with the child support guidelines. N.D.C.C. § 14-09-08.4(4). Accordingly, the trial court did not err by not dismissing the State's Motion for Modification. In fact, had the trial court dismissed the Motion, as requested by Mr. Aldinger, it would have erred as a matter of law by not properly applying N.D.C.C. § 14-09-08.4(4), and such an order would have been reversible by this Court. The modification of Mr. Aldinger's child support obligation should be affirmed.

[34] **Issue 3:** Whether the trial court had subject matter jurisdiction to modify the North Dakota child support order?

[35] Mr. Aldinger claims that the North Dakota trial court did not have the right to modify his child support because he does not live in North Dakota, and therefore, this case is an interstate case. A court's authority to decide issues of a case requires the court to have subject matter jurisdiction. The mere fact that Mr. Aldinger now lives in Minnesota does not divest the trial court's jurisdiction over the subject matter of the modification of his child support obligation.

[36] The underlying judgment in this case is a divorce judgment. Pursuant to N.D.C.C. § 27-05-06, the district courts of this State have the "[p]ower to hear and determine all civil actions and proceedings...." N.D.C.C. § 27-05-06(2). Both Ms. Aldinger and Mr. Aldinger were residents of the State of North Dakota at the time of the filing of this divorce action, and at the time of entry of the divorce judgment. While Mr. Aldinger has moved to the State of Minnesota, Ms. Aldinger continues to be a resident of the State of North Dakota, as does the one remaining minor child.

[37] When parties to a divorce or child support action reside in different States, it is possible that the requirements of the Uniform Interstate Family Support Act (UIFSA) will require that another State's court hear a modification motion, but not under the facts of this case.

[38] The North Dakota Legislature enacted the Uniform Interstate Family Support Act, codified at chapter 14-12.2, in 1995. This uniform law governs the modifying of a child support order when the parties reside in different states. Ferguson v. Ferguson, 2018 ND 122, ¶6, 911 N.W.2d 324. The interpretation of a statute is a question of law, and is fully reviewable by this Court. Id. at ¶ 7.

[39] The question becomes whether, under UIFSA, the trial court had continuing jurisdiction to modify Mr. Aldinger's child support obligation. Pursuant to N.D.C.C. § 14-12.2-08, the trial court did have continuing, exclusive jurisdiction as North Dakota is the residence of the individual obligee and the child for whose benefit the support order is issued. N.D.C.C. § 14-12.2-08(1)(a). In this case, Ms. Aldinger and the parties' one remaining minor child continue to reside in North Dakota. Accordingly, the trial court had subject matter jurisdiction to rule on the State's Motion for Modification, even though Mr. Aldinger is now residing in Minnesota. Therefore, the Second Amended Judgment should be affirmed.

[40] **Issue 4:** Did the trial court err as a matter of law by applying the North Dakota Child Support Guidelines in this case?

[41] Mr. Aldinger argues that this Court should find that the North Dakota child support guidelines are somehow lacking in comparison to the guidelines adopted by other states,

and should not have been applied by the trial court. The fact that Mr. Aldinger does not agree with the provisions of the North Dakota child support guidelines is not a basis for overturning the trial court's decision. Mr. Aldinger is asking this Court to intervene in a determination made by an administrative agency, the Department of Human Services, in the development of the North Dakota child support guidelines. This Court has stated that it cannot modify the child support guidelines. In Rath v. Rath, 2017 ND 138, 895 N.W.2d 315, this Court held:

The Legislature has authorized the Department of Human Services to establish the child support guidelines. N.D.C.C. § 14-09-09.7(1). The Legislature has also stated the guidelines must include certain considerations. See N.D.C.C. § 14-09-09.7. This Court does not have authority to modify the child support guidelines, and any argument about how the guidelines should be amended would be better made to the Legislature or the Department of Human Services.

Rath v. Rath, at ¶ 28.

[42] Pursuant to the North Dakota child support guidelines, the expenses allowed to determine the obligor's net monthly income do not include consideration of the obligor's daily living expenses, other than those specifically defined in the guideline definition of net income. N.D. Admin. Code § 75-02-04.1-01(6). In section 75-02-04.1-09, the guidelines specifically state that the obligor's subsistence needs, work expenses and daily living expenses that are not discussed in subsection 2 of section 75-02-04.1-09, cannot be considered to rebut the child support guideline obligation. N.D. Admin. Code § 75-02-04.1-09(1)(a). Therefore, the fact that Mr. Aldinger may have higher living expenses due to his residing in Minnesota cannot be taken into consideration in the calculation of his child support obligation. Horner v. Horner, 549 N.W.2d 669 (N.D. 1996).

[43] As the modification of Mr. Aldinger's child support obligation was heard by a North Dakota trial court, that court was required to apply the provisions of the North Dakota child support guidelines. See N.D.C.C. §§ 14-09-09.7 and 14-12.2-15. To do otherwise would have been an error by the trial court. Mr. Aldinger may believe that the North Dakota guidelines do not consider things like the obligor's cost of living when other states' guidelines do, but that does not mean the North Dakota guidelines should not or cannot be applied to the calculation of his obligation. His apparent request to this Court to deem the North Dakota guidelines as insufficient is not supported in law.

[44] If Mr. Aldinger believes the North Dakota Department of Human Services should include in its guidelines a provision that another state has adopted, his options are to either convince the Legislature to require the Department of Human Services to include such a provision, or convince the Department of Human Services to do so the next time the child support guidelines are reviewed. His recourse is not through this Court. As the trial court did not err in applying the North Dakota child support guidelines to determine a modified child support amount to be paid by Mr. Aldinger, its decision should be affirmed.

[45] CONCLUSION

[46] Mr. Aldinger has failed to show a basis for overturning the Second Amended Judgment entered on May 22, 2019. The trial court did not err in instructing the State to provide new calculations based on the gross income calculated by the trial court. Issuing such instructions is appropriate under N.D.R.Ct. 7.1 and is not evidence that the trial court was not impartial in this matter. Because the trial court's determination on Mr. Aldinger's

gross income resulted in a child support obligation different than what he is currently ordered to pay, the modification of his obligation was required by law.

[47] The trial court had subject matter jurisdiction to modify the child support obligation in this case, even though Mr. Aldinger no longer resides in North Dakota. Ms. Aldinger and the minor child continue to reside in the State of North Dakota; therefore, the trial court had continuing, exclusive jurisdiction to modify the child support obligation. In determining the amount of support to be paid by Mr. Aldinger, the trial court properly applied the North Dakota child support guidelines. The fact that the North Dakota guidelines do not contain provisions similar to what other states' guidelines may have, is not a basis for overturning the Second Amended Judgment.

[48] Wherefore, the State requests that the Court affirm the trial court's decision in the modification of Mr. Aldinger's child support obligation.

Respectfully submitted this 2nd day of October, 2019.

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[45] CERTIFICATION

[46] 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 20 pages, including the cover page, the Table of Contents and the Table of Authorities.

Respectfully submitted this 2nd day of October, 2019.

/s/Sheila K. Keller
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IN THE SUPREME COURT
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Plaintiff and Appellee,)	
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Statutory Real Party in Interest)	
and Appellee.)	

APPEAL FROM THE MAY 22, 2019 ORDER FOR SECOND AMENDED JUDGMENT AND AMENDED JUDGMENT ISSUED BY THE SOUTH CENTRAL JUDICIAL DISTRICT, THE HONORABLE DANIEL J. BORGEN

AFFIDAVIT OF SERVICE

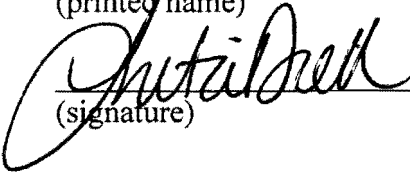
[1] Trista Dick, being duly sworn on oath, deposes and states that she is of legal age and that on October 2, 2019, she served the State of North Dakota's Appellee's Brief in the above matter electronically as follows:

James H. Aldinger smokeing1@hotmail.com
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[2] I declare under penalty of perjury that the foregoing is true and correct.

Signed on the 2nd day of October, 2019, at Bismarck, North Dakota, USA.

Trista Dick
(printed name)


(signature)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Marcella D. Aldinger,)
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Supreme Court No. 20190226
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AFFIDAVIT OF MAILING

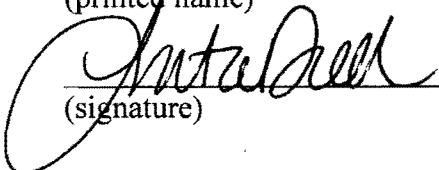
[1] Trista Dick, being duly sworn on oath, deposes and states that she is of legal age and that on October 2, 2019, she placed in the United State mail at Bismarck, North Dakota, a true and correct copy of the State of North Dakota's Appellee Brief:

MARCELLA D ALDINGER
309 1ST AVE NE
MANDAN ND 58554-3338

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

Signed on the 2nd day of October, 2019, at Bismarck, North Dakota, USA.

Trista Dick
(printed name)


(signature)