

**IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA**

Vickie M. Gooss, )  
nka Vickie M. Lenard, )  
) )  
Plaintiff/Respondent, )  
) )  
vs. )  
) )  
Jeffrey A. Gooss, )  
) )  
Defendant/Appellant. )  
) )  
and )  
) )  
State of North Dakota, )  
) )  
Statutory Real Party in Interest. )

**Supreme Ct. Case No. 20200076**  
District Ct. Case No. 29-2018-DM-00044

**PETITION FOR REHEARING**

APPEAL FROM SECOND AMENDED JUDGMENT DATED FEBRUARY 27, 2020,  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR SECOND  
AMENDED JUDGMENT DATED FEBRUARY 27, 2020, ORDER ON RULE 60  
RELIEF ENTERED ON FEBRUARY 7, 2020, AND ORDER ON MOTION FOR  
MODIFICATION OF CHILD SUPPORT ENTERED ON JANUARY 16, 2020 OF THE  
MERCER COUNTY DISTRICT COURT, THE HONORABLE DAVID REICH

**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF ISSUES**

¶ 1. Whether the district court erred in determining the amount of deviation for visitation travel expenses.

## **STATEMENT OF THE CASE**

¶ 2. This case was initiated by the State of North Dakota (hereinafter “the State”) registering the Nevada Stipulation and Order to Modify Custody of the parties. App. 6. A corrected payment history was then provided to the court and an Amended Notice of Registration was entered. App. 7.

¶ 3. The State filed a Motion for Modification of Child Support on behalf of Plaintiff, Vickie Lenard f.k.a. Vickie Gooss (hereinafter Vickie). Defendant, Jeffrey Gooss (hereinafter “Jeff”), filed a response thereto, along with a Countermotion to Dismiss, requesting a hearing. The State filed a Reply, and Jeff filed a Reply in Support of Countermotion to Dismiss.

¶ 4. A hearing was held on November 8, 2019, and the matter was taken under advisement.

¶ 5. On January 7, 2020, the district court entered an Order on Motion for Modification of Child Support. App. 74. Jeff filed a Motion for Relief from Order on Motion for Modification of Child Support. The State filed a Response thereto. The district court then entered its Order on Motion for Rule 60 Relief, denying such motion, on February 7, 2020. App. 80.

¶ 6. Findings of Fact, Conclusion of Law, Order for Second Amended Judgment was entered on February 27, 2020. App. 94. The Second Amended Judgment was entered

that same day. App. 100. The Notice of Entry of Second Amended Judgment was filed on February 28, 2020.

¶ 7. Jeff filed his Notice of Appeal on March 9, 2020. App. 103.

¶ 8. This Court issued its Judgment on November 23, 2020.

### **STATEMENT OF FACTS**

¶ 9. In approximately 2014, Vickie moved to South Dakota with the minor child. As before, the parties did not modify the parenting plan. Rather, they simply followed the Order as to the parenting time schedule and Jeff bearing all travel expenses. Trans. 22:2-4. Vickie also continued to refuse to help with any of the actual traveling, so Jeff or his wife have continued to do 100% of the traveling. Trans. 42:9-11.

¶ 10. Aside from the summer months when Jeff has extended parenting time, this typically means that a majority of two of the three days of parenting time is spent traveling each month. The parties live approximately 322 miles apart, and the drive is approximately five hours each way or ten hours each day to pick up or drop-off J.T.G for Jeff's parenting time. App. 54. Because Jeff does 100% of the travel, this amounts to approximately a 650 mile round-trip each way, or 1,300 miles each time Jeff has parenting time. Trans. 12-19. Jeff further testified that with stops for gas the total travel time is approximately 12 hours. App. 26:10-13.

¶ 11. At the hearing, Jeff testified that he has visitation 8 separate times per year. Trans. 23:20-22. This amounts to roughly 10,300 miles a year. Trans. 23:23-25. Jeff testified that his vehicle gets approximately 14 miles per gallon, which amounts to 736 gallons of gas and \$2,208 in gas expenses each year related to his parenting time travel. Trans. 24:1-11. He further testified that he has additional expenses of \$300 per year for oil

changes (Trans. 24:12-23), \$158 per year for tire rotations (Trans. 24:24-25:11), \$129 per year for alignments (Trans. 25:12-19), \$770 per year for tires (Trans. 25:20-26:6), \$560 per year for food (Trans. 26:14-24), \$500 per year in vehicle repairs (Trans. 26:1-28:16), and \$2,400 per year in lost wages (Trans. 28:17-29:15). Based on the testimony presented, Jeff incurs expenses of \$7,025.

¶ 12. Although Vickie originally testified that Jeff only exercises 4 visitations (Trans. 37:9-11), on cross-examination, she acknowledged that he had at least 2 additional visitations, for a total of 6 (Trans. 39:17-19 and 40:13-25). Pursuant to the current custody order, Jeff has seven (7) parenting times during the year. App. 46-47.

¶ 13. The district court entered its Order on Motion for Modification of Child Support on January 16, 2020. App. 74. The district court determined that “[u]sing the dollar amount estimates testified to by Jeffrey and applying them for four visits in the past year as testified to by Vickie, Jeff’s actual travel expenses incurred predominately for the purpose of exercising parenting time with J.T.G. total approximately \$3,000.00.” App. 78. The court further determined that it was in the best interest of J.T.G. that a deviation from the guidelines in the amount of \$3,000 be given.

## **ARGUMENT**

### **A. Standard of Review**

¶ 14. “The standard of review used in child support determinations vary, depending on the issue appealed.” Lautt v. Lautt, 2006 ND 161, ¶ 7, 718 N.W.2d 563, 565 citing Oien v. Oien, 2005 ND 205, ¶ 8, 706 N.W.2d 81. “This Court applies a de novo standard to questions of law, a clearly erroneous standard to questions of fact, and an abuse of discretion in discretionary matters.” Id. Whether or not a particular finding is a finding

of fact or a conclusion of law is to be determined by the reviewing court. Lapp v. Lapp, 293 N.W.2d 121, 124 citing Bosma v. Bosma, 287 N.W.2d at 451. “A particular fact is clearly erroneous when, although there is some evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.” Id. quoting Bender v. Bender, 276 N.W.2d 695 (N.D. 1979).

**B. The District Court Erred in Determining the Amount of Deviation for Visitation Travel Expenses**

¶ 15. This Court appears to have overlooked or misapprehended the facts related to the actual expenses incurred and the actual visitations exercised. As such, Jeff respectfully requests that the Court grant his Petition for Rehearing to apply the proper deviation.

¶ 16. Pursuant to N.D.A.C. § 75-02-04.1-09(2)(j) the amount of child support may be deviated based on:

The reduced ability of an obligor who is responsible for all parenting-time expenses to provide support due to travel expenses incurred predominantly for the purpose of visiting a child who is the subject of the order taking into consideration the amount of court-ordered parenting time and, when such history is available, actual expenses and practices of the parties.

¶ 17. The parties live approximately 322 miles apart, and the drive is approximately five hours each way or ten hours each day to pick up or drop-off J.T.G for Jeff’s parenting time. App. 54. Because Jeff does 100% of the travel, this amounts to approximately a 650 mile round-trip each way, or 1,300 miles each time Jeff has parenting time. Trans. 12-19. Jeff further testified that with stops for gas the total travel time is approximately 12 hours. App. 26:10-13.

¶ 18. At the hearing, Jeff testified that he has visitation 8 separate times per year. Trans. 23:20-22. This amounts to roughly 10,300 miles a year. Trans. 23:23-25. Jeff

testified that his vehicle gets approximately 14 miles per gallon, which amounts to 736 gallons of gas and \$2,208 in gas expenses each year related to his parenting time travel. Trans. 24:1-11. He further testified that he has additional expenses of \$300 per year for oil changes (Trans. 24:12-23), \$158 per year for tire rotations (Trans. 24:24-25:11), \$129 per year for alignments (Trans. 25:12-19), \$770 per year for tires (Trans. 25:20-26:6), \$560 per year for food (Trans. 26:14-24), \$500 per year in vehicle repairs (Trans. 26:1-28:16), and \$2,400 per year in lost wages (Trans. 28:17-29:15). Based on the testimony presented, Jeff incurs expenses of \$7,025.

¶ 19. Although Vickie originally testified that Jeff only exercises 4 visitations (Trans. 37:9-11), on cross-examination, she acknowledged that he had at least 2 additional visitations, for a total of 6 (Trans. 39:17-19 and 40:13-25). Pursuant to the current custody order, Jeff has seven (7) parenting times during the year. App. 46-47. The evidence shows that at the very least Jeff exercised 6 visitations. As such, the deviation must be based on the expenses for 6 visitations.

¶ 20. The district court entered its Order on Motion for Modification of Child Support on January 16, 2020. App. 74. The district court determined that “[u]sing the dollar amount estimates testified to by Jeffrey and applying them for four visits in the past year as testified to by Vickie, Jeff’s actual travel expenses incurred predominately for the purpose of exercising parenting time with J.T.G. total approximately \$3,000.00.” App. 78. First, as explained above, the testimony established that there were at least 6 visitations. As such, the deviation must be based on those 6 visitations. Further, the court failed to account for the lost wages that Jeff incurred for the visitations in its determination. Based



on the testimony provided on the expenses incurred and the 6 visitations exercised, Jeff's income should be deviated down by at least \$5,268.75.

### **CONCLUSION**

¶ 21. Defendant/Appellant, Jeffrey Gooss, respectfully requests that this court grant his Petition for Rehearing. The district court's decision regarding the amount of the child support deviation was clearly erroneous. As such, it is respectfully requested that the case be reversed and remanded for the appropriate deviation.

### **CERTIFICATE OF COMPLIANCE**

¶ 22. The undersigned, as the attorney representing Appellant, Jeffrey Gooss and the author of this Petition for Rehearing hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 9 pages.

DATED this 7<sup>th</sup> day of December, 2020.

/s/ Jennifer M. Gooss  
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**CERTIFICATE OF SERVICE**

**Supreme Ct. Case No. 20200076**  
District Ct. Case No. 29-2018-DM-00044

JENNIFER M. GOOSS, being first duly sworn, does depose and state that she is of legal age and not a party to the above entitled matter and on December 7, 2020, the following documents:

- A. Petition for Rehearing
- C. Certificate of Service

were filed electronically to the addresses as given below:

Supreme Court of North Dakota  
[supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)

Sheila Keller  
[bismarckcse@nd.gov](mailto:bismarckcse@nd.gov)

and were served on the following by depositing in the mailing department of the United States Post Office in Beulah, North Dakota, a sealed envelope with postage thereon duly prepaid:

Vickie Lenard  
702 Zeibach Street  
Rapid City, SD 57703

/s/ Jennifer M. Gooss  
JENNIFER M. GOOSS