

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Vickie M. Gooss,)
nka Vickie M. Lenard,)
Appellee,)
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

APPELLANT’S BRIEF

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 that it had jurisdiction.
- ¶ 2. Whether the district court erred in requiring Defendant to pay child support.
- ¶ 3. Whether the district court erred in determining the amount of deviation for visitation travel expenses.

STATEMENT OF THE CASE

¶ 4. 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.

¶ 5. 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.

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

¶ 7. 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.

¶ 8. 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.

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

STATEMENT OF FACTS

¶ 10. The parties were previously married and have one minor child together, namely J.T.G., born 2002. Trans. 5:21-6:1.

¶ 11. The parties were divorced in 2004 in the State of Nevada. App. 62. Pursuant to the divorce decree, Jeff was ordered to pay \$300 per month for child support. App. 64. However, if Vickie relocated to Colorado, child support would be waived, and Jeff was to bear all travel expenses for himself and the child. App. 64-65.

¶ 12. While Vickie did not end up moving to Colorado, she moved to Phoenix, Arizona, and the parties followed the provisions of that portion of the Divorce Decree wherein he bore all travel expenses for himself and the child, and there was no child support obligation. Trans. 19:19-20:5.

¶ 13. On June 19, 2009 an Order was entered in Nevada granting Vickie the ability to move with the minor child out of state to Montana. App. 40. Vickie was ordered to pay all travel expenses. App. 41. Jeff was ordered to pay child support in the amount of \$350 per month. App. 41.

¶ 14. Following continued problems of Vickie refusing to send the minor child for visitation, the matter was brought back in front of the Court on Jeff's Motion for an Emergency Hearing to Enforce Custody and/or Visitation Order. Trans. 21:12-21.

Vickie's primary argument for not allowing Jeff his parenting time was that she could not afford to continue paying for the costs of travel, which was approximately \$700 per month, at the time. Trans. 21:16-22:1.

¶ 15. The parties and court thereafter entered into a Stipulation and Order to Modify Custody. App. 44. To his detriment, Jeff agreed to incur all travel expenses so that he could ensure he was able to have his parenting time with the minor child. Travel expenses were approximately double that of his child support at the time. Trans. 21:23-25.

¶ 16. The Stipulation was signed into an Order on March, 14, 2013, and included the following language: "Jeff shall pay for all travel expenses . . . Jeff shall pay child support of \$350.00 for the month of March, 2013; payment of travel expenses will constitute child support thereafter." App. 47 (emphasis added).

¶ 17. A few months after the Stipulation and Order was entered, Jeff moved to North Dakota. Trans. 6:23-7:4. Although the portion of the order related to the travel being through flights was no longer applicable, the parties continued to follow the parenting time schedule and Jeff continued to bear all travel expenses. Trans. 22:2-4. Additionally, Vickie refused to provide any portion of the travel for any of the parenting time, so Jeff not only paid all travel expenses, but also bore all burden of the travel; often being forced to spend a large portion of his parenting time traveling because Vickie would not allow him to have any additional parenting time. Trans. 2-10.

¶ 18. 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.

¶ 19. 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.

¶ 20. 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.

¶ 21. 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.

¶ 22. 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.

¶ 23. On February 27, 2020, the Second Amended Judgment was entered ordering Jeff to pay child support in the amount of \$582 per month commencing on September 10, 2019. App. 100.

¶ 24. On March 9, 2020, Jeff filed a Notice of Appeal, appealing this Court’s Second Amended Judgment. App. 103.

ARGUMENT

A. Standard of Review

¶ 25. “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 applied 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. North Dakota does not have Jurisdiction to Modify Child Support in this Case

¶ 26. Pursuant to N.D.C.C. § 14-12.2-45(1)(a),

[U]pon petition a tribunal of this state may modify a child support order issued in another state which is registered in this state if, after notice and a hearing, the tribunal finds that:

- a. The following requirements are met:
 - (1) Neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state;
 - (2) A petitioner who is a nonresident of this state seeks modification; and
 - (3) The respondent is subject to the personal jurisdiction of the tribunal of this state.

¶ 27. North Dakota does not have jurisdiction to modify the child support in this case. The Nevada order provides, “Jeff shall pay for all travel expenses and confer with Vickie before making travel arrangements at least (3) three weeks prior beginning April, 2013.” App. 47. It further provides, “Jeff shall pay child support of \$350.00 for the month of March, 2013; payment of travel expenses will constitute child support thereafter.” App. 47 (emphasis added). As such, in order to modify child support, it would necessarily require modification of travel expenses and arrangements, which is outside of the jurisdiction of this Court.

¶ 28. Pursuant to N.D.C.C. § 14-14.1-14, this state “may not modify” a parenting plan of another state unless the court has jurisdiction to make an initial determination under N.D.C.C. § 14-14.1-12, which requires North Dakota to be the home state of the child. As the home state of J.T.G. is South Dakota, North Dakota may not modify the parenting plan. Further, N.D.C.C. § 14-09-30(2)(e) provides that a parenting plan includes transportation

and exchange of the child. Therefore, by modifying child support, the court is necessarily modifying the parenting plan, as it includes the transportation and exchange of the child, which it does not have jurisdiction to do.

¶ 29. The district court stated that the “travel expenses ordered by the Nevada court were in lieu of a monetary amount of child support. In essence, the travel expenses are child support and therefore this court determined that it has jurisdiction to address child support issues in this case.” App. 77 at ¶ 8. It is not relevant whether Nevada treated travel expenses as child support. As explained above, the law does not allow this Court to modify the parenting plan, including transportation. Further, the procedural history shows that the Nevada court did not ever intend for travel expenses and child support to both be paid by Jeff. In the original divorce decree, Jeff was ordered to pay child support; however, once Vickie relocated out of state, the Judgment provided that all child support shall be waived and that the defendant shall bear all travel expenses. App. 62. Then in 2009, the Nevada court ordered that Vickie bear all travel expenses and Jeff pay child support. App. 40. Finally, in the most recent Nevada Order, the court ordered that Jeff pay all travel expenses and no child support. App. 44. Based on this, it is evident that the Nevada court never intended that Jeff bear the burden of both child support and the full travel expenses.

¶ 30. As modifying the child support obligation in this case necessarily includes a modification of transportation, and therefore the parenting plan, North Dakota lacks jurisdiction. As such, Defendant/Appellant, Jeffrey Gooss, respectfully requests that the district court’s decision be reversed.

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C. The District Court Erred in Requiring Defendant to Pay Child Support

¶ 31. Although Jeff maintains that North Dakota lacks jurisdiction to change the Nevada order in any way, even if the court could modify the child support amount without modifying the parenting plan, it would result in an inequitable outcome. As provided above, when Vickie moved to Montana, she was originally ordered to be solely responsible for travel expenses. App. 41. However, due to Vickie consistently withholding parenting time when she did not want to incur that expense, the court ordered that Jeff would pay for travel expenses as child support. App. 47. In fact, he paid about double the amount in travel expenses than he would have paid if he continued to pay child support as originally ordered. Jeff continues to not only pay 100% of travel expenses, but he does 100% of the traveling as well. This results in approximately 10,000 miles per year and over 160 hours of driving each year. Trans. 23:23-25. It also results in him or his wife having to take days off of work, resulting in lost income and as explained above, over \$7,000 per year in travel expenses. Forcing Jeff to now incur child support on top of bearing the expense and actual burden of all travel is inequitable. In fact, this Court has found that allocating “all costs of travel to one parent to be inequitable.” Loll v. Loll, 1997 ND 51, ¶ 19, 561 N.W.2d 625, 629 (explaining that the district court needed to revise its visitation order and consider a more “equitable distribution of the costs and burdens of visitation, or provide a satisfactory explanation for the present unequal distribution”). Further, as explained in detail above, the procedural history clearly evidences that the Nevada court never intended for Jeff to pay child support and incur all of the expenses and burdens of travel for his parenting time.

¶ 32. It is also important to note that the child in question is now 18. He turned 18 and graduated in May, and moved out of his mother’s home for work in March. The

order being changed was in place for six years, and at the eleventh hour was changed. This is unreasonable and unequitable. As such, Jeff respectfully requests that the district court's order be reversed.

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

¶ 33. 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.

Further, this Court has held that child support deviations for visitation travel expenses, “must be calculated on the basis of court-ordered visitations.” Tibor v. Tibor, 2001 ND 43, ¶ 24, 623 N.W.2d 12, 19.

¶ 34. 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.

¶ 35. 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.

¶ 36. 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.

¶ 37. 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. This was clearly erroneous. As stated above, this Court has held that child support deviations for visitation travel expenses, “must be calculated on the basis of court-ordered visitations.” Tibor v. Tibor, 2001 ND 43, ¶ 24, 623 N.W.2d 12, 19. Pursuant to the current custody order, Jeff has seven (7) parenting times during the year. App. 46-47. As such, the deviation must be calculated based on 7 visitations, and Jeff’s income should be deviated down by \$5,250, based on the Court’s Order; however, based on the testimony that Jeff provided at trial, the actual amount of expenses incurred for travel for the 7 visitations is approximately \$6,147.

¶ 38. If this Court determines that North Dakota does have jurisdiction and a child support obligation is appropriate in this case, Jeff respectfully requests that the district court decision be reversed and remanded to apply the appropriate deviation for visitation travel expenses. As this Court has previously held, such deviation must be calculated based on the court-ordered visitations, which was not done in this case.

CONCLUSION

¶ 39. Defendant/Appellant, Jeffrey Gooss, respectfully requests that the district court's decision be reversed in this case. The district court committed an error of law in finding that it had jurisdiction to modify the Nevada order. Further, even if North Dakota had jurisdiction, the court's decision to order child support, and in the amount ordered, was clearly erroneous. As such, it is respectfully requested that even if this Court determined that North Dakota has jurisdiction, that the case be reversed and remanded for the appropriate deviation.

ORAL ARGUMENT REQUESTED

¶ 40. Appellant respectfully requests oral argument. Oral argument would be helpful to the court as it would allow further clarification of the facts and legal issues, as well as provide the ability for the parties to answer any questions that the Court may have.

CERTIFICATE OF COMPLIANCE

¶ 41. The undersigned, as the attorney representing Appellant, Jeffrey Gooss and the author of this Brief hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 15 pages.

DATED this 10th day of June 10, 2020.

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