

IN THE NORTH DAKOTA SUPREME COURT

<p>In the Interest of A.M.A., Nicole M. Kirby, Plaintiff/ Respondent, vs. Chad A. Avdem, Defendant/Petitioner, And State of North Dakota, Interested Party.</p>	<p>Supreme Court No. _____ Civil No.: <u>32-2017-DM-00015</u></p>
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PETITION FOR WRIT OF SUPERVISION

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[¶1] PETITION FOR WRIT OF SUPERVISION

**TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF NORTH DAKOTA:**

Petitioner, Chad A. Avdem, respectfully petitions this Court for a Writ of Supervision:

[¶2] QUESTIONS PRESENTED

Did the District Court err in denying an otherwise sufficient N.D.R.Ct. 8.2(a) application for ex parte relief temporarily, determining residential responsibility for the child, when the District Court erroneously concluded that by entered the requested ex parte relief, post judgment, that the order would impermissibly modify primary residential responsibility.

Additionally, does N.D.R.Ct. 8.2(a) require the District Court to make a finding related to the safety and wellbeing of the child and the need to provide protection of a minor child of the existence of a threat of imminent danger to a minor child before denying an application for an ex parte interim order.

[¶3] PARTIES TO PROCEEDING

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STATEMENT OF JURISDICTION

¶6] Review is sought of the decisions in the Nelson County District Court entered on June 10, and June 11, 2020. (doc. 146 & 151)(App. 76-78). Pursuant to N.D.C.C. §27-02-04, the North Dakota Supreme Court has supervisory power over inferior courts and may issue writs in the exercise of this power.

STATEMENT OF THE CASE

¶7] This proceeding concerns residential responsibility and parenting time concerning one minor child, A.M.A., born 2011. The initial judgment was entered May 8, 2015, in Walsh County, North Dakota and awarded primary residential responsibility of A.M.A. to Nicole Marie Kirby (Nicole). (doc. 28). Chad A. Avdem (Chad) was granted parenting time and ordered to pay child support for A.M.A. *Id.*

¶8] In December of 2017, Chad filed a motion to change residential responsibility of A.M.A. alleging an unstable environment, parental alienation, financial instability and lack of financial resources of Nicole, as well as lack of Nicole's ability to maintain meaningful employment. (doc. 41-46). Following an evidentiary hearing, the motion was denied; however, parenting time was modified and increased in favor of Chad. (doc. 131-132). In August 2019, a Second Amended Judgment was entered modifying child support, which remains the controlling Judgment. (doc. 132)(App. 1-11).

STATEMENT OF THE FACTS

¶9] This week, Chad became aware that Nicole has been consuming alcohol in excess, driving with open containers with children in the vehicle, transporting children without enough safety restraints in the vehicle, keeping children out until the early

morning hours, having an affair, exposing her minor children to the affair and lying to her long-time boyfriend Aaron Mork (Aaron) concerning much of the foregoing. (App. 16-21). Some of these incidents involved A.M.A. Id. Other instances did not involve A.M.A. as she transferred to Chad for parenting time on June 5, 2020, and remained in Chad's care for parenting time during the week of June 8, 2020. Id.

[¶10] Aaron has two children with Nicole, both younger than A.M.A. (App. 27). Nicole also has one older child than A.M.A., of a different father. (App. 28). Nicole and all of her children were residing in Aaron's home in Petersburg, North Dakota. Id. Nicole does not own a vehicle, but was driving Aaron's. Id. Nicole does not maintain meaningful employment and has no known financial resources. Id.

[¶11] Aaron filed with the Court in Nelson County requesting an ex parte order, which was granted, reflecting that the Judge found exceptional circumstances. (App. 53-56). *See also*, 32-2015-DM-26. After Aaron was granted his ex parte order, Chad filed for an ex parte order concerning A.M.A. (App. 22-71). Chad outlined in his application that Nicole had recently become homeless, has no vehicle, has no meaningful employment or financial resources. Id. Chad provided an affidavit and all pleadings submitted by Aaron Mork supporting Nicole's irresponsible behavior, consumption of alcohol, her affair and exposing the children to her new romantic interest (who is married), and poor parenting judgment over the past few weeks. (App. 16-56).

[¶12] Chad's request for ex parte relief was denied, with the District Court's order stating that the District Court could not modify residential responsibility pursuant to N.D.R.Ct. 8.2(a)(8). (App. 84-85). The Court did not address whether or not there were exceptional circumstances presented in Chad's case. Chad then submitted a motion for

reconsideration, providing an updated order editing language that the District Court appeared to not approve, indicating specifically that the District Court was only modifying parenting time, with Chad having more than 50% parenting time and Nicole's parenting time subject to her having an appropriate residence, abstaining from alcohol prior to and during her parenting time, as well as not exposing A.M.A. to her romantic interest. (App. 76-83). Chad's motion was denied a second time, with the court stating it could not modify primary residential responsibility pursuant to N.D.R.Ct. 8.2(a)(8). (App. 86).

[¶13] On June 11, 2020, a second order was issued in Aaron's case, vacating the previously issued ex parte order, stating that the Court could not modify residential responsibility. (App. 87). On June 11, 2020, the ex parte application was resubmitted altering the language in the proposed order, which appeared to be the reason the Court *sua sponte* vacated its order, in Aaron's case, which was not decided at the time of this submission. If the second request for ex parte application is denied for the same reason, an identical issue will be present in domestic matter 32-2015-DM-00026.

[¶14] In Chad's case, the District Court's refusal to review the ex parte application modifying parenting time places A.M.A. in a situation that she will return to Nicole's care, while Nicole remains without a residence, without a vehicle, without meaningful employment, with a romantic interest who is married to another, and without any safeguards or restrictions on her consumption of alcohol. These facts combined with the poor judgment over the past few weeks provide exceptional circumstances. The refusal to modify parenting time is interrelated to the law included within North Dakota

Rule of Court 8.2 (a)(8). The refusal of the District Court to provide relief is not in the best interests of any of the children involved.

STANDARD OF REVIEW

[¶15] Because this is a decision regarding an award of parenting time, it would be similar to the standard of review used in a custody proceeding. A district court's decision to modify primary residential responsibility "is a finding of fact subject to the clearly erroneous standard of review." Kelly v. Kelly, 2002 ND 37, ¶ 13, 640 N.W.2d 38. "A finding of fact is clearly erroneous if there is no evidence to support it, if the finding is induced by an erroneous view of the law, or if the reviewing court is left with a definite and firm conviction a mistake has been made." *Id.* (citing N.D.R.Civ.P. 52(a)).

ISSUE/ARGUMENT

[¶16] The District Court erred in denying an otherwise sufficient N.D.R.Ct. 8.2(a) application for ex parte relief temporarily determining residential responsibility for the child, when the District Court erroneously concluded that by entering the requested ex parte relief, post judgment, that the order would impermissibly modify primary residential responsibility.

[¶17] Additionally, does N.D.R.Ct. 8.2(a) require the District Court to make a finding related to the safety and wellbeing of the child and the need to provide protection of a minor child of the existence of a threat of imminent danger to a minor child before denying an application for an ex parte interim order.

[¶18] Ex Parte relief may be sought in cases where exceptional circumstances exist:

N.D. R. Ct. 8.2(a)(1) requires a court find there are exceptional circumstances to justify issuing an ex parte order. Exceptional circumstances include a threat of imminent danger to the parties' minor child or when the order is necessary to protect the parties' child. N.D. R. Ct. 8.2(a)(1). "Imminent" means near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous. Rudnick v. Rode, 2012 ND 167, ¶ 1, 820 N.W.2d 371, 373.

[¶19] North Dakota Rule of Court 8.2 provides the procedure concerning Interim

Motions in Domestic Relation cases:

(a) Ex Parte Interim Order.

(1) No interim order may be issued except on notice and hearing unless the court specifically finds exceptional circumstances. Exceptional circumstances include:

(A) threat of imminent danger to any party or minor child of the party; or

(B) circumstances indicating that an ex parte interim order is necessary to protect the parties, any minor children of the parties, or the marital estate.

(2) No ex parte interim order may be issued unless the moving party executes an affidavit setting forth specific facts justifying the issuance of the order. A restraining and eviction order may not be issued ex parte unless the moving party also appears personally and good cause is shown for issuance of the order.

(3) An ex parte interim order may include provisions relating to **temporary parental rights and responsibilities**, support and other appropriate expenses, use of real or personal property, restraining and eviction.

(4) If there has been an appearance in the action by the opposing party, or if the attorney for the moving party has knowledge that the opposing party is represented by an attorney, the attorney for the moving party must notify the court. After receiving notice of the appearance or representation, the court must attempt to hold an emergency hearing, either in person or by telephonic conference, at which both parties may be heard, before issuing any order. The issuance of an order following an emergency hearing will in no manner affect a party's right to a further hearing on the merits of the order as provided in Rule 8.2(a)(5).

(5) An ex parte interim order must specifically provide:

(A) that a hearing upon the necessity for the issuance of the order or the amounts to be paid be held within 30 days of the issuance of the ex parte interim order, unless an earlier hearing is required under N.D.C.C. ch. 14-07.1, or an application for change of venue is pending. If the ex parte interim order contains provisions delineated in N.D.C.C. ch. 14-07.1, the hearing must be scheduled in a timely manner under the chapter;

(B) that the party obtaining the ex parte interim order must secure a hearing date and personally serve the ex parte interim order and a notice of hearing on the opposing party; and

(C) that the hearing on the ex parte interim order may be waived if the opposing party files a written waiver with the court no later than two days before the hearing date. The written waiver must be served on the moving party.

(6) The ex parte interim order remains in effect until it is amended following a court hearing.

(7) An ex parte interim order modifying parenting time may be issued postjudgment.

(8) No ex parte interim order modifying primary residential responsibility may be issued postjudgment.

(emphasis added)

[¶20] The Supreme Court has provided direction on the definition of primary residential responsibility as:

A "parent with primary residential responsibility" is defined as "a parent who acts as the primary caregiver on a regular basis for a proportion of time greater than the obligor, regardless of description such as 'shared' or 'joint' parental rights and responsibilities given in relevant judgments, decrees, or orders." N.D. Admin. Code § 75-02-04.1-01(9); see also N.D.C.C. § 14-09-00.1(6) and (7) (**defining "primary residential responsibility" as "a parent with more than fifty percent of the residential responsibility" and "residential responsibility" as "a parent's responsibility to provide a home for the child"**). Schiele v. Schiele, 2015 ND 169, ¶ 11, 865 N.W.2d 433, 437-38. (emphasis added)

The issues presented in this case, are presented in another Nelson County cases, involving the same biological mother of different children. An ex parte order was granted in the second case, and then vacated. (App. 87). If the District Court's analysis of N.D.R.Ct. 8.2(a)(8) is upheld, it would have the result of prohibiting any non-primary parent from ever seeking emergency relief, on the theory that any award of parenting time, greater than 50% to the non-primary parent, is essentially is a change in primary

residential responsibility. This interpretation of the rule, does not place the wellbeing or safety of children first, but rather allows a parent who has the title of primary residential parent to, *carte blanche*, behave in any manner without consequence.

[¶21] Further, ex parte interim orders do not last more than 30-days. Even if the parenting time shifted 100% to the favor of the non-primary parent for 30-days, it would not be enough to boost the non-primary parent to over 50% parenting time, during the course of a calendar year. The denial of an emergency motion on the premise that more parenting time to the non-parent would legally shift primary residential responsibility to the non-parent should not be upheld.

[¶22] There is little case law, in North Dakota, which addresses specific issue of granting an ex parte order which temporarily changed residential responsibility, post judgment. However, there is case law showing District Courts have allowed this avenue as emergency relief post judgment. The Supreme Court does not highlight any procedural issues relating to the issuance of said ex parte order, when other issues in the case were presented upon appeal.

[¶23] In Laib v. Laib, a judgment dissolving the marriage and determining child related matters was entered by the Sheridan County district court. 2008 ND 129 P-5, 751 N.W. 2d 228. One year later, one party petitioned for an ex parte interim order for concern over abuse to the children. Id. The ex parte was granted. After an evidentiary hearing a change of custody was granted. Id. The Supreme Court made no mention of any procedural wrongdoings in the entering of an ex-parte order post judgment. *See also* Jensen v. Deaver, 2013 ND 47, 828 N.W.2d 533.

[¶24] Similarly, in Haag v. Haag, the District Court in Burleigh County awarded joint residential responsibility. 2016 ND 34, P3-4, 875 N.W.2d 539. One party obtained a post judgment ex parte interim order for concern over drug and alcohol use of the other party. Id. The District Court ordered the parent with suspected substance abuse to have supervised parenting time in the interim. Id. The Supreme Court was again silent on any procedural errors with the issuance of an ex parte post judgment.

[¶25] In Rudnick v. Rode, Petitioner argued the District Court erred in entering an ex parte order. 2012 ND 167 P1, 820 N.W.2d 371. In 2005 the parties were awarded joint residential responsibility. Id. at P2. In 2010, Rode motioned for an ex parte interim order due to concern of emotional and physical abuse. Id. at P3. The issues on appeal were that the LaMoure county district court failed to hold a hearing on the ex parte within 30 days, and further argued the affidavit to obtain the ex parte relied on hearsay and was not sufficient to establish emergency circumstances necessitating an ex parte. Id. P5-7. The issuance of the ex-parte temporarily changing residential responsibility post judgment, was not one of the issues on appeal.

CONCLUSION

[¶26] For the foregoing reasons, the Petitioner, Chad Avdem respectfully requests that this court issue a supervisory writ directing the District Court to immediately review the application for ex parte motion on its merits, and not simply deny the motion using the rationale that a change in primary residential responsibility would occur if any relief is granted. Jurisprudence has shown that Chad's relief sought, is appropriate, under similar circumstances. More specifically, an order is requested from the Supreme Court indicating that the temporary relief as requested would not modify

primary residential responsibility designation of the prior Judgment. The best interest of the child will not be protected if the exceptional circumstances are not addressed.

Respectfully submitted this 12th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, in compliance with N.D.R. App. P. Rule 32.

Dated this 12th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, the following documents:

- 1. WRIT;**
- 2. CERTIFICATE OF COMPLIANCE; AND**
- 3. APPENDIX**

were filed electronically with the Clerk of Court through the ELECTRONIC FILING PORTAL OF THE NORTH DAKOTA SUPREME COURT, with like service of the above listed documents to the following:

Nicole Kirby, P.O. Box 186, Petersburg, ND 58272

Dated this 12th day of June, 2020.

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IN THE NORTH DAKOTA SUPREME COURT

In the Interest of A.M.A.,

Nicole M. Kirby,

Plaintiff/ Respondent,

vs.

Chad A. Avdem,

Defendant/Petitioner,

And

State of North Dakota, Interested Party.

Supreme Court No. 20200165

Civil No.: 32-2017-DM-00015

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2020, the following documents:

- 1. WRIT;**
- 2. CERTIFICATE OF COMPLIANCE; AND**
- 3. APPENDIX (Updated 06.17.20)**

were electronically served to:

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Dated this 17th day of June, 2020.

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