
IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Bruce Joseph Gomm,)	
)	
<i>Plaintiff/Appellee,</i>)	
)	Supreme Court No.: 20220043
vs.)	
)	
Amy Lorraine Winterfeldt,)	District Court No.: 39-2021-DM-00050
)	
<i>Defendant/Appellant,</i>)	
)	
and)	
)	
State of North Dakota,)	
)	
<i>Statutory Real Party in Interest/Appellee.</i>)	

BRIEF OF DEFENDANT/APPELLANT

**Appeal from the District Court's Memorandum Decision
and Order dated the 19th day of January, 2022
In District Court, Richland County
Southeast Judicial District, State of North Dakota
The Honorable Mark Blumer, Presiding**

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Dated: June 2, 2022.

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JURISDICTIONAL STATEMENT

[¶1] The North Dakota Supreme Court has jurisdiction to review a decision of a lower court pursuant to N.D. Const. Art. VI §§ 2 and 6.

STATEMENT OF THE ISSUES

[¶2] The issues are as follows:

- I. Whether the State of North Dakota has Subject Matter Jurisdiction Due to Improper or Incomplete Registration of the Minnesota Judgment of Dissolution.**
- II. Whether the District Court Erred in not Setting Amy's Motion to Modify Primary Residential Responsibility for an Evidentiary Hearing after Issuing an Order Assuming Jurisdiction from the State of Texas, and indicating therein, that it would Hold and Evidentiary Hearing on the Parties' Motion Pending in the State of Texas (One of which was Amy's Motion to Modify Primary Residential Responsibility and for Amended Judgment)**
- III. Whether the District Court Erred in Determining that Amy had not Established a Prima Facie Case as Required by N.D.C.C. § 14-09-06.6**
- IV. Whether the District Court Erred in Failing to Consider Amy's Supplemental Declaration to her Motion to Modify Primary Residential Responsibility and Exhibits thereto.**
- V. Whether the District Court Erred in Issuing an Order for Amended Judgment Without First Holding an Evidentiary Hearing as Required by N.D.C.C. § 14-05-22(2)**

STATEMENT OF THE CASE

[¶3] On June 8, 2021, Bruce registered certified copies of the following:

1. Minnesota Order for Amended Judgment Granting Parenting Time Modification dated February 18, 2015; R6;
2. Potter County, Texas, Temporary Orders in Suit to Modify Parent-Child Relationship dated June 6, 2020; R7;

3. Potter County Texas Order on Request to Stay Proceedings and Cede Jurisdiction dated and filed June 1, 2021; R8; and
4. Minnesota Findings of Fact, Conclusions of Law & Order for Judgment of Dissolution dated July 8, 2014 (Incomplete – missing Attachments 1, 2 and 3). R9;

and served the same upon Amy. R10. The Clerk of District Court mailed a Notice of Registration of Foreign Custody Determination (R12) to Amy that same day. R13. Also, that same day, Bruce’s attorney, Brock M. Wieber, sent correspondence to the Court stating, in part:

Here is what I am requesting:

1. For the Judgment to be registered in North Dakota;
2. For the North Dakota court to accept jurisdiction of this case; and
3. For a hearing to be set for a final determination of the **pending motions. [emphasis added]**.

R14.

[¶4] On June 10, 2021, Bruce filed an Expedited Motion for Determination of Jurisdiction, Adoption of Interim Order, and Request for Expedited Hearing (hereinafter “Motion”). R17. In his Motion, Bruce again requests the Court to determine that North Dakota has jurisdiction, to adopt the Texas Temporary Orders in Suit to Modify Parent-Child Relationship. *Id.* Additionally, Bruce requests that the matter be heard expeditiously. *Id.* On June 17, 2021, Amy filed a procedural objection to the Motion. R34. On June 24, 2021, the District Court issued a Memorandum Decision (R47) and Order Granting Plaintiff’s Motion for Determination of Jurisdiction and Request for Expedited Hearing and set the matter for a hearing on August 23, 2021. R48.

[¶5] Amy filed a Petition for Writ of Supervision with the North Dakota Supreme Court seeking relief from the District Court wrongfully assuming jurisdiction from Texas given

that no pending motion to modify or enforce an order was before the District Court. *See Winterfeldt v. Blumer, et al.*, Sup.Ct.Dock. 20210184, Seq. # 1. The jurisdictional defect was “cured” upon Bruce’s filing a Motion to Modify Defendant’s Parenting Time Pursuant to N.D.C.C. 14-05022(1) on July 6, 2021. R58. The very next day, the North Dakota Supreme Court denied the Writ of Supervision without explanation. *See Winterfeldt v. Blumer, et al.*, Sup.Ct.Dock. 20210184, Seq. # 5.

[¶6] On July 21, 2021, Amy filed a Response to Plaintiff’s Motion to Modify Parenting Time and for Child Support (R71) along with a Declaration in support thereof. (R72). That same day, Amy filed 1) Motion for Contempt of the Minnesota Amended Judgment (R63) and 2) Motion for Contempt of Texas Temporary Orders. (R69). In support of her contempt motions, Amy submitted two additional declarations. R66 and R70.

[¶7] On August 2, 2021, Amy filed a Motion to Modify Primary Residential Responsibility and for Amended Judgment. R91. In support of the motion, Amy submitted a declaration addressing each of the best interest factors and citing to evidence already contained in the record. R93. Bruce submitted his Return to Amy’s Motion to Modify Primary Residential Responsibility and for Amended Judgment on August 16, 2021. R113.

[¶8] On September 8, 2021, Amy filed a Motion for Contempt of Texas Temporary Orders and Minnesota Judgments/Order (Contempt III) to which Bruce did not respond.

[¶9] On October 21, 2021, Bruce filed an Ex Parte Motion (R233) which was granted on November 8, 2021 (R260), but later vacated on November 10, 2021. (R263). After hearing, on November 15, 2021, the Court issued an Order Denying Plaintiff’s Motion for Ex Parte Interim Order. R265.

¶10 On January 19, 2022, more than seven (7) months after Gomm filed his Motion to Modify Parenting Time and more than six (6) months after Amy filed her Motion to Modify Primary Residential Responsibility, the District Court issued a Memorandum Decision and Order on the two motions. R267. It is from this Memorandum Decision and Order from which Amy appeals. R276.

STATEMENT OF THE FACTS

¶11 An Order for Judgment of Dissolution was issued on July 8, 2014 in Kandiyohi County, Minnesota (MN Court File No. 34-FA-13-167) regarding the marriage of the parties hereto as well as custody of their child, A.J.G. R9. The registered Order for Dissolution dated July 8, 2014, is an incomplete copy of said Order as it is missing: 1) Attachment 1 – Partial Stipulated Findings of Fact and Conclusions of Law; 2) Attachment 2 – Parenting Plan; and 3) Attachment 3 – Appendix A. The record does not contain a copy of any judgment entered pursuant to the Order for Judgment of Dissolution. R435:2:¶4. Per the incomplete Order for Judgment of Dissolution, Bruce was awarded sole physical and legal custody of the parties' minor child, A.J.G. R9. On February 18, 2015, the District Court, Kandiyohi County, Minnesota, issued an Order for Amended Judgment Granting Parenting Time Modification and Judgment was thereafter entered on April 13, 2015. R6. Among other things, the February 18, 2015, Order vacated paragraph 9, modified paragraph 5, and reinstated paragraph 21 of the Order section of the July 8, 2014, Order. R6:10:¶¶1 and 2.

¶12 Following the parties divorce, both parties moved to the State of Texas and court proceedings were initiated there. R435:2 Throughout 2020 and 2021, the Potter County, Texas District Court exercised jurisdiction over this matter, and multiple motions were

brought by the parties. R21. On June 17, 2020, the Texas District Court issued Temporary Orders in Suit to Modify Parent-Child Relationship in Court File No. 094173-E-FM. R7. In addition to determining that it had jurisdiction, the Texas District Court also allowed Bruce to move to North Dakota and set an interim parenting time schedule for Amy. *Id.* Bruce subsequently moved the Potter County Court to decline jurisdiction, asserting that Texas was an inconvenient forum. R27. The Potter County, Texas District Court granted Bruce's request upon the following conditions: 1) Bruce commencing a child custody proceeding in North Dakota by June 11, 2021, and 2) providing satisfactory proof that a final child custody hearing in North Dakota has been scheduled to be heard expeditiously. R8. On June 8, 2021, Bruce registered the Minnesota Order for Amended Judgment Granting Parenting Time Modification and Judgment (hereinafter "Minnesota Amended Judgment"). R6. On June 10, 2021, Bruce filed an Expedited Motion for Determination of Jurisdiction, Adoption of Interim Order, and Request for Expedited Hearing requesting the State of North Dakota to take subject matter jurisdiction from the State of Texas, adopting the Temporary Orders in Suit to Modify Parent-Child Relationship dated June 16, 2020, and requiring the clerk of court to schedule a final hearing in this matter to be heard expeditiously. R17. On June 17, 2021, Amy filed an Objection to Plaintiff's Expedited Notice of Motion for Determination of Jurisdiction, Adoption of Interim Order, and Request for Expedited Hearing and Expedited Motion for Determination of Jurisdiction, Adoption of Interim Order, and Request for Expedited Hearing (herein after "Amy's Objections"), objecting only to the procedural shortcomings of the Expedited Motion. R33. In her Objection, Amy specifically requested that the Court establish a time in which she must respond to the Expedited Motion. R33:4-7. Without proper notice or an opportunity

to be heard, the Court issued a Memorandum Decision (R47) and Order Granting Plaintiff's Motion for Determination of Jurisdiction and Request for Expedited Hearing (R48).

[¶13] Amy filed a Petition for Writ of Supervision with the North Dakota Supreme Court seeking relief from the District Court wrongfully assuming jurisdiction from Texas given that no pending motion to modify or enforce an order was before the District Court. *See Winterfeldt v. Blumer, et al.*, Sup.Ct.Dock. 20210184, Seq. # 1. The jurisdictional defect was apparently "cured" upon Bruce's filing a Motion to Modify Defendant's Parenting Time Pursuant to N.D.C.C. 14-05-22(1) on July 6, 2021. R58. The very next day, the North Dakota Supreme Court denied the Writ of Supervision without explanation. *See Winterfeldt v. Blumer, et al.*, Sup.Ct.Dock. 20210184, Seq. # 5.

[¶14] On July 21, 2021, Amy filed a Response to Plaintiff's Motion to Modify Parenting Time and for Child Support (R71) along with a Declaration in support thereof. (R72). That same day, Amy filed 1) Motion for Contempt of the Minnesota Amended Judgment (R63) and 2) Motion for Contempt of Texas Temporary Orders. (R69). In support of her contempt motions, Amy submitted two additional declarations. R66 and R70. In the Declaration of Defendant Amy Lorraine Winterfeldt in Support of Motion for Contempt of the Minnesota Amended Judgment, Amy explained how Bruce has historically lied about Amy's conduct in order to garner favor with the Courts. R66. Amy was charged in Minnesota with Depriving Another of Custodial or Parenting Rights – Concealing a Minor Child which was dismissed and she was also charged two counts of Malicious Punishment of Child, for which she was acquitted. R66:¶1, (6) and (7). *See also*, R73 and R74. Despite the dismissal and acquittal, Bruce continues to perpetuate the very lies that were the grounds for him obtaining custody. R60. *See also*, R66.

[¶15] On August 2, 2021, Amy filed a Motion to Modify Primary Residential Responsibility and for Amended Judgment. R91. In support of the motion, Amy submitted a declaration addressing each of the best interest factors and citing to evidence already contained in the record. R93. Bruce submitted his Return to Amy’s Motion to Modify Primary Residential Responsibility and for Amended Judgment on August 16, 2021. R113. In support of his return, Bruce submitted the Declaration of Bruce Gomm dated August 16, 2021. R114. From the outset in his Declaration, Bruce merely denies Amy’s statements as being conclusory all while he, himself, provides no evidence in support of his denials of Amy’s statements. R114:¶3(a)-(w). The vast majority of Bruce’s Declaration is spent addressing on what was in the Minnesota orders/judgments rather than what has occurred since then. R114. Notably, he did not deny that it was him that made the allegations against Amy that resulted in her being charged criminally in both instances. *Id.* The vast majority of Bruce’s Declaration is spent degrading and dehumanizing Amy and minimizing necessity of A.J.G. having parenting time with his mother. By way of example, Bruce perpetuates a lie, lies, deceives and misleads the Court in paragraph 8 of his Declaration when he states:

8. Amy was further charged with Malicious Punishment of a Child when she admitted that she beat a child so hard with a wooden spoon that she left bruises all over his body. The Minnesota District Court’s summary of the situation can be found at ¶ 10(a) of the findings portion of our Amended Judgment (Index #6) and is described as follows:

Then goes onto recite ¶10(a) of the findings portion of the Amended Judgment. R114:¶8. Even though Amy was acquitted of these charges (R124), Bruce continues to rant about them as though they occurred. R114:¶8. On August 22, 2022, Amy filed a Supplemental Declaration of Amy Winterfeldt in Support of Motion to Modify Primary Residential

Responsibility and for Amended Judgment. R130. Included with her Supplemental Declaration were twenty-nine (29) exhibits. *See* R131 – R159.

[¶16] On September 8, 2021, Amy filed a Motion for Contempt of Texas Temporary Orders and Minnesota Judgments/Order (Contempt III) to which Bruce did not respond. Included in support of the Motion, Amy filed a declaration (R222) and forty-two (42) exhibits. *See* R178 – R219.

[¶17] On October 21, 2021, Bruce filed an Ex Parte Motion (R233) which was granted on November 8, 2021 (R260), but later vacated on November 10, 2021. (R263). After hearing on November 15, 2021, the Court issued an Order Denying Plaintiff’s Motion for Ex Parte Interim Order. R265.

[¶18] On January 19, 2022, more than seven (7) months after Gomm filed his Motion to Modify Parenting Time and more than six (6) months after Amy filed her Motion to Modify Primary Residential Responsibility, the District Court issued a Memorandum Decision and Order on the two motions without holding an evidentiary hearing. R267. It is from this Memorandum Decision and Order from which Amy appeals. R276. Additional facts are contained in the Motion to Dismiss for Want of Subject Matter Jurisdiction and supporting documents as well as in Amy’s Responsive Brief to Plaintiff’s Brief in Opposition to Motion to Dismiss for Want of Subject Matter Jurisdiction, which are incorporated by reference as if fully set forth herein.

LAW AND ARGUMENT

[¶19] The District Court’s errors are numerous and its level of ineptitude utterly shocking, all of which are addressed in the following paragraphs.

I. Whether the State of North Dakota has Subject Matter Jurisdiction Due to Improper or Incomplete Registration of the Minnesota Judgment of Dissolution.

[¶20] This issue has been fully briefed in Amy's Brief in Support of Motion to Dismiss for Want of Subject Matter Jurisdiction and Responsive Brief to Plaintiff's Brief in Opposition to motion to Dismiss for Want of Subject Matter Jurisdiction. Said Briefs are incorporated by reference as if fully set forth herein.

II. Whether the District Court Erred in not Setting Amy's Motion to Modify Primary Residential Responsibility for an Evidentiary after Issuing an Order Assuming Jurisdiction from the State of Texas, and indicating therein, that it would Hold an Evidentiary Hearing on the Parties' Motion Pending in the State of Texas (One of which was Amy's Motion to Modify Primary Residential Responsibility and for Amended Judgment)

[¶21] The District Court violated the law of the case doctrine and its obligations to the Texas District Court when it failed to hold an evidentiary hearing on Amy's Motion to Modify Primary Residential Responsibility and Bruce's Motion to Modify Parenting Time. The law of the case doctrine is based upon the theory of res judicata. *Pennington v. Continental Res. Inc.*, 2021 ND 105, ¶ 9, 961 N.W.2d 264. "The doctrine of res judicata forecloses parties from relitigating claims and issues that have been previously decided." *City of Glen Ullin v. Schirado*, 2020 ND 185, ¶ 6, 958 N.W.2d 155. Whether res judicata applies is a question of law fully reviewable on appeal. *Lucas v. Porter*, 2008 ND 160, ¶ 16, 755 N.W.2d 88; *Ungar v. N.D. State Univ.*, 2006 ND 185, ¶ 10, 721 N.W.2d 16.

[¶22] The law of the case doctrine has two branches. *Peoples State Bank of Truman, Inc. v. Molstad Excavating, Inc.*, 2006 ND 183, ¶ 12, 721 N.W.2d 43 (citing *Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002)). The branch alleged to apply here provides that "unless corrected by an appellate tribunal, a legal decision made at one stage of a civil or

criminal case constitutes the law of the case through the pendency of the litigation.'" *Id.* at ¶ 12 (*quoting Ellis* at 646). A judge should not revisit rulings previously made in the same proceedings unless "special circumstances" exist. *Peoples State Bank*, at ¶ 11. Whether circumstances justify revisiting a prior ruling made is a case-specific inquiry. *Id.* at ¶ 13.

[¶23] Here, the District Court issued an Order Granting Plaintiff's Expedited Motion for Determination of Jurisdiction and Request for Expedited Hearing. R48. The Order provided "Any Order currently in effect remains effective pending this Court's final determination on the matter." *Id.* As difficult as it is to imagine, this language supports that the District Court intended on trying the Motions currently pending in the State of Texas. What's more, is that the District Court ordered "The calendar control clerk shall set this matter for hearing as expeditiously as possible for purposes of complying with the Order of the Potter County, Texas Court." The ridiculousness of this particular Order and the manner in which the North Dakota Court assumed subject matter jurisdiction was briefed and presented to the Supreme Court in that case *Winterfeld v. Blumer*, 20210184, which, to the extent necessary is incorporated by reference as if fully set forth herein. Most notably in Amy's Brief in Support of the Petition for Writ of Supervision, is that there was no pending motion to modify an order or to enforce an order at the time the District Court issued the Order. It was not until after Bruce filed his Motion to Modify Parenting Time that the Supreme Court dismissed the Petition for Writ of Supervision without addressing any of the issues raised by Amy. Accordingly, the Order became the law of the case and remains in full force and effect. In an about face and contrary to the law of the case, the district court issued an Memorandum Decision denying Amy's Motion to Modify Primary Residential Responsibility and granting Bruce's Motion to Modify Parenting Time. R267.

Not only has the district court violated the law of the case doctrine, it has undermined the integrity of the Court by failing to follow through on a promise made to the Potter County, Texas, District Court.

III. Whether the District Court Erred in Determining that Amy had not Established a Prima Facie Case as Required by N.D.C.C. § 14-09-06.6

[¶24] Whether a moving party has established a prima facie case for a modification of primary residential responsibility is a question of law which the Supreme Court reviews de novo on appeal. *Baker v. Baker*, 2019 ND 225, ¶ 7, 932 N.W.2d 510 (citing *Heidt v. Heidt*, 2019 ND 45, ¶ 8, 923 N.W.2d 530). When a motion to modify primary residential responsibility is brought more than two years after the date of entry of an order establishing primary residential responsibility, modification is appropriate only if the district court finds the following:

- a. On the basis of facts that have arisen since the prior order or which were unknown to the court at the time of the prior order, a material change has occurred in the circumstances of the child or the parties; and
- b. The modification is necessary to serve the best interests of the child.

N.D.C.C. § 14-09-06.6(6). Before proceeding to a full evidentiary hearing on a motion to modify primary residential responsibility, the party moving for the modification must establish a prima facie case. *Wolt v. Wolt*, 2011 ND 170, ¶ 7, 803 N.W.2d 534. An initial prima facie showing is required by N.D.C.C. § 14-09-06.6(4), which reads as follows:

A party seeking modification of an order concerning primary residential responsibility shall serve and file moving papers and supporting affidavits and shall give notice to the other party to the proceeding who may serve and file a response and opposing affidavits. The court shall consider the motion on briefs and without oral argument or evidentiary hearing and shall deny the motion unless the court finds the moving party has established a prima facie case justifying a modification. The court shall

set a date for an evidentiary hearing only if a prima facie case is established.

A prima facie case requires facts that show there could be a change in custody if they are proven at an evidentiary hearing. *Klundt v. Benjamin*, 2021 ND 149, ¶ 6, 963 N.W.2d 278.

The Supreme Court has explained

[T]hat a prima facie case requires only enough evidence to permit a fact finder to infer the fact at issue and rule in the moving party's favor. A prima facie case is a bare minimum and requires facts which, if proved at an evidentiary hearing, would support a change of custody that could be affirmed if appealed. Allegations alone do not establish a prima facie case, and affidavits supporting the motion for modification must include competent information, which usually requires the affiant have first-hand knowledge. Affidavits are not competent if they fail to show a basis for actual personal knowledge, or if they state conclusions without the support of evidentiary facts.

Id. (quoting *Johnshoy v. Johnshoy*, 2021 ND 108, ¶ 5, 961 N.W.2d 282). *See also*, *Kerzmann v. Kerzmann*, 2021 ND 183, ¶ 8 (N.D. 2021). "Section 14-09-06.6(6)(a), N.D.C.C., requires a material change in circumstances to modify primary residential responsibility.

[¶25] Amy asserts she sufficiently alleged prima facie evidence of a material change in circumstances to warrant an evidentiary hearing. A district court may deny an evidentiary hearing when the opposing party presents affidavits showing the moving party has no credibility or the allegations are insufficient to justify residential responsibility modification. *Schumacker v. Schumacker*, 2011 ND 75, ¶ 8, 796 N.W.2d 636. "Whether an alleged change in circumstance is material depends upon the particularities of a given case." *Forster v. Flaagan*, 2016 ND 12, ¶ 11, 873 N.W.2d 904. While "a frustration of parenting time does not alone constitute a sufficient change in circumstances to warrant a change in primary residential responsibility . . . 'allegations of parental frustration of

parenting time may be a basis to grant an evidentiary hearing." *Baker*, 2019 ND 225, ¶ 13 (quoting *Hankey v. Hankey*, 2015 ND 70, ¶ 12, 861 N.W.2d 479).

[¶26] In her Declaration, and most significantly, Amy explains how the criminal charges that were brought against her, as a result of false allegations made by Bruce against her, were either dismissed or she was acquitted of the charges. R93:¶4(a). She also explains how she enjoyed unsupervised parenting time for eleven consecutive days in July 2020 and again in August 2020. R93:¶4(c). Amy also references that Bruce had moved multiple times from the date of entry of Judgment (R93:¶4(b)), that he had remarried and that he was in the process of getting divorced again. R93:¶4(d). Bruce does not deny any of these allegations, but rather responds by calling them "conclusory statements." R:114. Bruce acknowledges that a material change in circumstances has occurred albeit for different reasons. R114:5:¶4.

[¶27] Section 14-09-06.6(6)(b) requires any modification of the existing primary residential responsibility to be necessary to serve the best interests of the child. Amy argues she has presented sufficient evidence to meet her burden of showing a prima facie case that modification is necessary to serve the best interests of the A.J.G.

In considering whether the moving party has met the prima facie burden related to N.D.C.C. § 14-09-06.6(6)(b), the district court must consider the applicable N.D.C.C. § 14-09-06.2(1) factors. *See Schroeder v. Schroeder*, 2014 ND 106, ¶ 7, 846 N.W.2d 716. To satisfy the best interests, the moving party must demonstrate a "factual showing that could justify a finding for the moving party that could be affirmed on appeal." *Solwey v. Solwey*, 2016 ND 246, ¶ 20, 888 N.W.2d 756 (emphasis in original). "This is not the time

for the district court to judge whether it would decide the best-interest factors in favor of the moving party." *Id.* at ¶ 20 (citing *Wald v. Holmes*, 2013 ND 212, ¶ 5, 839 N.W.2d 820).

[¶28] Amy's declaration certainly establishes that Bruce has taken every effort to keep A.J.G. from Amy. R93:5(e). Bruce does not deny that A.J.G. should have limited contact with Amy despite the acquittal and dismissal of the criminal charges he had brought against Amy. R114:6:¶6-8. Bruce continues to propagate the criminal charges as though Amy was convicted or should have been convicted. *Id.* Amy asserts that Bruce has moved multiple times since entry of Judgment calling into doubt Bruce's stability and ability to provide A.J.G. continuity. R93:4(b). Further undermining Bruce's stability is that since entry of Judgment Bruce has been married and, at the time, was in the midst of a divorce. R93:4d. Bruce obtained custody by making false allegations against Amy resulting in the criminal charges upon which the Court relied in making its determination that Amy needed to have her parenting time supervised. R93:5(l). It is important to note that Bruce does not deny any of these allegations but rather makes allegations that Amy is mentally ill and otherwise degrades Amy for most of his twenty-plus (20+) page declaration. R114.

[¶29] In *Kerzmann v. Kerzmann*, 2021 ND 183 (N.D. 2021), Jerry Kerzmann argued that the statements within Tonya Kerzmann's affidavit are either untrue or he has different explanations for them. *Kerzmann* at ¶ 15. The Supreme Court held that it must accept Tonya Kerzmann's statements within the affidavit as true. *Id.* (citing to *Solwey v. Solwey*, 2016 ND 246 (N.D. 2016)). In so holding the Supreme Court further noted, "The statements, assumed true, implicate the best interest factors under N.D.C.C. § 14-09-06.2(1) (c), (e), and (h), because the statements relate to the children's developmental

needs, the willingness of each parent to facilitate a relationship with the other, and the school records of the children.” *Kerzmann* at ¶ 15.

[¶30] Just as the statements in *Kerzmann* implicated the best interest factors, so do the statements made in Amy’s declaration. Amy’s statements, assumed true, implicate the best interest factors under N.D.C.C. § 14-09-06.6 (d), (e), (h), (k), and (l) because the statements relates the child’s stability, continuity, the willingness of each parent to facilitate a relationship with the other, and the making of false allegations of abuse by one parent against the other.

[¶31] Amy’s declaration further provides prima facie evidence that A.J.G. is adversely affected given that the child is required to enjoy parenting time with his mother through supervised parenting time; Bruce fails to encourage and facilitate a close relationship with A.J.G. and his mother (R114); Bruce has failed to address A.J.G.’s medical needs R93:5(b). Just as *Kerzmann* established that her children were being adversely affected as required by case law interpreting the legislature’s use of the term “necessary”, so has Amy.

[¶32] Amy has established a prima facie case by demonstrating that there has been a material change in circumstance, that those material changes in circumstance are detrimental to the child and that it is in the best interest and welfare a modification occur.

IV. Whether the District Court Erred in Failing to Consider Amy’s Supplemental Declaration to her Motion to Modify Primary Residential Responsibility and Exhibits thereto.

[¶33] N.D.C.C. § 14-09-06.6(4) governs postjudgment modifications to primary residential responsibility and provides:

A party seeking modification of an order concerning primary residential responsibility shall serve and file moving papers and supporting affidavits and shall give notice to the other party to the proceeding who may serve and file a response and opposing affidavits. The court shall consider the motion

on briefs and without oral argument or evidentiary hearing and shall deny the motion unless the court finds the moving party has established a prima facie case justifying a modification. The court shall set a date for an evidentiary hearing only if a prima facie case is established

N.D.R.Ct. Rule 3.2(2) sets forth the procedural framework for the filing of motions when filed pursuant to said rule, it provides:

Briefs. Upon serving and filing a motion, the moving party must serve and file a brief and other supporting papers and the opposing party must have 14 days after service of a brief within which to serve and file an answer brief and other supporting papers. The moving party may serve and file a reply brief within seven days after service of the answer brief. Upon the filing of briefs, or upon expiration of the time for filing, the motion is considered submitted to the court unless counsel for any party requests a hearing on the motion.

[¶34] The plain language of N.D.C.C. 14-09-06.6(4) contemplates the submission of affidavits. In this case, that is precisely what Amy has done, submitted two declarations. Furthermore, Bruce has waived any right to object by raising new issues in his responsive Brief and declaration to which Amy must have an opportunity to respond to afford her due process of the law. The exhibits submitted demonstrate that Bruce's declaration is riddled with lies and deceit in an attempt to mislead the Court and address items not contemplated by Amy in her motion. R114. Furthermore, the Motion was filed pursuant to N.D.R.Ct. Rule 3.2 which contemplates a response by the movant.

V. Whether the District Court Erred in Issuing an Order for Amended Judgment Without First Holding and Evidentiary Hearing as Required by N.D.C.C. § 14-05-22(2)

[¶35] Section 14-05-22 provides:

1. In an action for divorce, the court, before or after judgment, may give direction for parenting rights and responsibilities of the children of the marriage and may vacate or modify the same at any time. Any award or change of primary parental responsibilities must be made in accordance with the provisions of chapter 14-09.

2. After making an award of primary residential responsibility, the court, upon request of the other parent, shall grant such rights of parenting time as will enable the child to maintain a parent-child relationship that will be beneficial to the child, unless the court finds, **after a hearing**, that such rights of parenting time are likely to endanger the child's physical or emotional health.

[emphasis added].

[¶36] "In awarding visitation to the non-custodial parent, the best interests of the child, rather than the wishes or desires of the parents, are paramount." *Deyle v. Deyle*, 2012 ND 248, ¶ 17, 825 N.W.2d 245 (quoting *Bertsch v. Bertsch*, 2006 ND 31, ¶ 5, 710 N.W.2d 113).

A non-custodial parent's visitation may be curtailed or eliminated entirely if it is likely to endanger the child's physical or emotional health. However, a restriction on visitation must be based on a preponderance of the evidence and be accompanied by a detailed demonstration of the physical or emotional harm likely to result from visitation.

Rustad v. Baumgartner, 2018 ND 268, ¶ 8, 920 N.W.2d 465. A district court's determination of parenting time is a finding of fact subject to the clearly erroneous standard of review. *Deyle*, 2012 ND 248, ¶ 17. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, upon review of the entire record, this Court is left with a definite and firm conviction a mistake has been made." *Schurmann v. Schurmann*, 2016 ND 69, ¶ 8, 877 N.W.2d 20 (quoting *Capes v. Capes*, 2015 ND 254, ¶ 6, 870 N.W.2d 448).

[¶37] Here, 1) the district court clearly demonstrates its ineptitude for family law and/or ability to follow very basic statutes, 2) punted this matter to the Supreme Court to clean up the never-ending mess it created, or 3) both. Both N.D.C.C. § 14-05-22 and caselaw support that hearing must be held before a Court can place onerous restrictions on a noncustodial parent's parenting time. In failing to hold a hearing, the district court either

had an erroneous view of the law or completely refused to follow the law. The district court did not base its decision upon new evidence that has occurred since entry of the last judgment, but almost exclusively relied upon the findings in the Minnesota Findings of Fact, Conclusions of Law and Order for Amended Judgment and Judgment. R:267. The first seven paragraphs of the district court's Memorandum Decision and Order refer to facts that occurred prior to entry of the Minnesota Amended Judgment. *Id.* at ¶ 1 – 7. In granting Bruce's Motion to Modify Parenting Time the only fact relied upon was the Bruce had relocated to the State of North Dakota. *Id.* at ¶ 15. Despite acknowledging that the Minnesota District Court based its decision to impose supervised parenting time upon Amy as are result of the criminal charges pending against her at the time (*Id.* at ¶ 6) and while at the same time acknowledging that Amy had either been exonerated or the charges dismissed, the Court elected not to hold a hearing and maintain the parenting time restrictions imposed by the Minnesota District Court. The Court's determination to grant Bruce's Motion without a hearing was induced by an erroneous view of the law, the Court made no factual findings supporting its decision, and since there was not an evidentiary hearing there was no evidence to support the district court's decision; a trifecta of ineptitude. At a minimum, the Supreme Court must remand to the district court for an evidentiary hearing on Bruce Motion to Modify Parenting Time.

CONCLUSION

[¶38] For all the reasons stated herein, Amy request that the Supreme Court issue an Order:

- 1) Finding that the district court lacks subject matter jurisdiction and dismissing the matter in its entirety due to improper and incomplete registration of a foreign judgment;

Alternatively,

- 2) Concluding that the Court erred as a matter of law when it failed to follow the law of the case after issuing in order indicating that it would hold an evidentiary hearing in compliance with the Potter County, Texas, District Court's Order on jurisdiction, then wholly ignoring its own order and issuing an order without an evidentiary hearing.
- 3) Finding that Amy has established a prima facie case for modification of primary residential responsibility and remanding to the district court for an evidentiary hearing;
- 4) Concluding the district court erred in excluding Amy's Supplemental Declaration and contemporaneously filed exhibit.
- 5) Concluding that the district court erred as a matter of law in granting Bruce Gomm's Motion to Modify Parenting Time without holding an evidentiary hearing and remanding to the district court for an evidentiary hearing on said Motion.
- 6) For such other and further relief as the North Dakota Supreme Court deems fair and in the interest of justice.

Dated: June 2, 2022.

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CERTIFICATE OF COMPLIANCE

[¶39] The undersigned hereby certifies that the above brief contains 23 pages, which complies with the page limitation under N.D.R.App.P. 32(a)(8)(A).

Dated: June 2, 2022.

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CERTIFICATE OF SERVICE

[¶40] I hereby certify that on June 2, 2022, I caused to be electronically filed the following:

1. Appellant's Brief

with the Clerk of the North Dakota Supreme Court via the North Dakota Court E-Filing Portal and served the same upon:

Amy Clark
amyclark@smithstrege.com

at the email addresses referenced above.

Dated: June 2, 2022.

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CERTIFICATE OF SERVICE

[¶40] I hereby certify that on June 2, 2022, I caused to be electronically filed the following:

1. Appellant's Brief

with the Clerk of the North Dakota Supreme Court via the North Dakota Court E-Filing Portal and served the same upon:

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Dated: June 2, 2022.

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