

## IN THE SUPREME COURT STATE OF NORTH DAKOTA

## SUPREME COURT CASE NO. 20220051

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**Tim Hamburger,****Plaintiff and Appellant**

v.

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**Kimberly Hamburger,****Defendant and Appellee**

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**APPELLEE'S BRIEF**

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Appellant Appeals From:

**ORDER DATED DECEMBER 21, 2021 DENYING PLAINTIFF'S MOTION TO  
AMEND MOTION AND DENYING PLAINTIFF'S MOTION FOR RELIEF FROM  
JUDGMENT(INDEX #341)****from the***Southwest Judicial District Stark County Court  
Civil Case No. 45-2015-DM-00255  
Honorable James D. Gion, Judge of the District Court*

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## **STATEMENT OF THE ISSUES**

(As set forth by Appellant in Brief of Appellant)

1. Did the trial court commit clear error finding that there was no agreement or acquiescence to a change of custody?
2. Did the trial court abuse its discretion when it refused to order Kimberly to pay prior period child support?
3. Did the trial court abuse its discretion denying child support from the time that TLH [sic] moved for custody and support, such motion filed May 5, 2021, until TLH moved out on his own?
4. Did the trial court abuse its discretion by denying Tim an evidentiary hearing?
5. Did the trial court abuse its discretion by not awarding attorney fees related to a contempt proceeding against Kimberly?

## **STATEMENT OF THE CASE**

### **I. Nature of Case**

6. This appeal by the Appellant, Tim Hamburger (“Tim”), pertains to an action modifying the divorce judgment, specifically residential responsibility and child support, which he brought against the Appellee, Kimberly Hamburger (“Kimberly”).

### **II. Course of Proceeding and Disposition Below**

7. The record in this action is extensive. The following is a summary of the items and events relevant to this appeal.
8. This divorce action commenced on October 2, 2015, with the filing of the Summons and Complaint. (R1-2). A trial was held on October 4, 2016. Among other issues decided, Kimberly was granted primary residential responsibility for the minor

child, TLH, and Tim was allowed supervised parenting time every Thursday for two hours at Family Connection in Dickinson, ND. (R115:2:¶¶ 4,6). Tim was ordered to pay child support to Kimberly beginning January 1, 2017. (R115:3:¶ 10).

9. An Amendment to Judgment was entered on January 25, 2019 which increased Tim's monthly child support obligation. (R181). This amendment was a result of a motion by the State of North Dakota Child Support. (R169-180).

10. On July 8, 2020, Tim filed a Motion to Stay Child Support and supporting documents. (R185-190). The Court issued its Memorandum Opinion on Tim's Motion on October 8, 2020. (R195). Pursuant to the Memorandum Opinion, Tim's monthly child support obligation was stayed beginning August 1, 2020, and Kimberly was ordered to repay any over-payment of child support for the months of August, September, October and November of 2020, if there was such. (R198, 200).

11. Tim then brought his Motion for Change of Custody (request for evidentiary hearing) [sic] on May 5, 2021. (R202). In it, he requests that the trial court:

- a. change the primary residential responsibility of the parties' child T.L.H. DOB 11/16/2003, from Defendant Kimberly Hamburger to Plaintiff Tim Hamburger;
- b. establish a child support obligation for Defendant on the basis provided by statute;
- c. direct Defendant to pay for her share of medical expenses in the amount of \$480 which have occurred in support of T.L.H. and which Kimberly Hamburger refuses to pay; and
- d. for such other and further relief which the court may deem just and equitable.
- e. Plaintiff requests an evidentiary hearing.

*Id.* Kimberly filed a response to Tim's Motion on May 18, 2021. (R212-215).

12. The Court granted a hearing on Tim's Motion on May 20, 2021. (R218). On June 8, 2021, a Notice of Hearing was filed which scheduled the evidentiary hearing for

November 5, 2021. (R222).

13. Tim filed a Motion for Summary Judgment on June 12, 2021. (R227). Kimberly filed a response on June 21, 2021. (R234). Tim then filed Tim Hamburger's Response to Defendant's Answer to Tim's Motion for Summary Judgment on July 4, 2021. (R238). The trial court denied Tim's motion for summary judgment on July 9, 2021. (R243).

14. A Status Conference was held on November 1, 2021. At that hearing, the issues of Tim's Motion from May 4, 2021, were narrowed to only include those of primary residential responsibility and child support. (Tr 25 1-7, 26 10-20).

15. On November 2, 2021, Tim filed a motion to allow him to amend his motion from May 5, 2021, to include the issue of back child support. (R286). Kimberly responded to this motion on November 3, 2021, and on November 19, 2021, resisting the requests made. (R291, 321). Shortly thereafter, the parties agreed to continue the hearing scheduled for November 5, 2021, to December 22, 2021. (R296-298).

16. Tim then filed an Application for Order to Show Cause on November 12, 2021, along with supporting documents. (R309-316). The District Court issued its Order to Show Cause on November 16, 2021, directing that the matter would be heard at the hearing on Tim's motion to amend his previous motion on December 2, 2021. (R317).

17. The hearing on Tim's Motion to Amend his May 5, 2021 Motion and his Application for Order to Show Cause was held on December 2, 2021. The District Court then issued its opinion on December 16, 2021, denying Tim's Motion to Amend. (R338). On December 21, 2021, the Court signed its Order Denying Plaintiff's Motion to Amend Motion and Denying Plaintiff's Motion for Relief from Judgment. (R341). The hearing scheduled for December 22, 2021 was cancelled as all remaining issues had either been

resolved, decided, or had become moot.

### **STATEMENT OF THE FACTS**

18. Kimberly and Tim are the biological parents of TLH, born in 2003. (R1:1:¶ 4). As previously mentioned, pursuant to the judgment in this action, Kimberly was granted primary residential responsibility for the minor child with Tim being allowed supervised parenting time. (R115:2:¶¶ 4,6). Tim was ordered to pay child support to Kimberly beginning January 1, 2017. (R115:3:¶ 10).

19. In September of 2019, TLH went to stay with Tim. (R213:1:¶ 2). He stayed there until June of 2021 when he enlisted in the National Guard. (R234:3:¶ 6). On September 2, 2021, TLH returned to North Dakota and then moved into his own apartment on September 24, 2021. (R258:1:¶¶ 2-3).

20. Tim moved the trial court for a stay of child support in July of 2020, nearly a year after TLH moved in with him, but did not request a change in residential responsibility at that time. (R186). He did not request a change in residential responsibility until May of 2021. (R202).

21. TLH turned 18 on November 16, 2021. (R338:2:¶ 2). He graduates from Dickinson High School in May of 2022. (R258:3:¶ 3).

### **STANDARD OF REVIEW**

#### **I. Child Support Issues**

22. This Court established the standard of review in child support issues in *Halberg v. Halberg*, 2010 ND 20, ¶ 8, 777 N.W.2d 872

Child support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be

matters of discretion subject to the abuse of discretion standard of review. The district court errs as a matter of law if it fails to comply with the child support guidelines in determining an obligor's child support obligation.

## **II. Family Law Issues**

23. A district court's decision on parenting time is reviewed by this Court under the clearly erroneous standard. *Boldt v. Boldt*, 2021 ND 213, ¶ 8, 966 N.W.2d 897 (quoting *Vetter v. Vetter*, 2020 ND 40, ¶ 8, 938 N.W.2d 417). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it, or if this Court, on the entire record, is left with a definite and firm conviction a mistake has been made." *Id.*

## **III. Award of Attorney Fees**

24. An award of attorney fees is subject to the abuse of discretion standard. *Walstad v. Walstad*. 2013 ND 176, ¶ 29, 837 N.W.2d 911. "A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law." *Id.* quoting *Hoverson v. Hoverson*, 2013 ND 48, ¶ 24, 828 N.W.2d 510.

## **LAW AND ARGUMENT**

### **I. The trial court did not err in finding that there was no agreement or acquiescence to a change of custody.**

25. Tim includes in his Brief of Appellant the issue that he believes the trial court erred in finding that there was no agreement or acquiescence to the change of custody.

26. The trial court addressed this issue in its Memorandum Opinion on Motion to Stay Child Support. (R195). In it, the trial court found that "[w]hile an agreement for the



minor child's residence with Tim may be implied, it is clear from Kimberly's response that there was no agreement to modify primary residential responsibility." (R195:3:¶ 6). This finding appears to be based on Kimberly's Brief in Response to Motion to Stay Child Support in which she states that she still maintains primary residential responsibility of TLH. (R192:1:¶ 2). Kimberly maintained this stance throughout the entire action.

27. Tim has argued that Kimberly agreed to a change of custody early on in this current action. (Aplt's Brief 19 ¶ 32). Kimberly initially did not object to a change in residential responsibility. (R212:1:¶ 2). However, after her initial response brief, the circumstances of the parties changed. TLH enlisted in the National Guard and was gone for boot camp from June 7, 2021 through September 2, 2021. (R258:1:¶ 2). Shortly after he returned, he moved into his own apartment. (R258:1:¶ 3). Because of these changes, Kimberly withdrew her consent to a change in residential responsibility. (R258:2:¶ 5).

28. At no time throughout this action has Kimberly ever agreed or acquiesced that primary residential responsibility had been changed to Tim. Further, although she initially agreed to a change in residential responsibility, she later withdrew the consent, and no formal stipulation was ever filed with the trial court documenting any agreement between the parties on the issue of residential responsibility.

29. Tim has provided no proof that there was ever an agreement between the parties that primary residential responsibility had changed to Tim at any time and Kimberly did not agree to transfer primary residential responsibility to Tim. The trial court did not err in finding that there was no agreement or acquiesce to a change of custody.

**II. The trial court did not abuse its discretion when it refused to order Kimberly to pay prior period child support.**

30. Tim argues that the trial court abused its discretion when it refused to order Kimberly to pay prior period child support. Kim resists, arguing that the trial court correctly decided that Tim should have made a motion for change in residential responsibility at an earlier time in order to be eligible for prior period child support.

31. This Court reasoned in *Jacobs-Raak v. Raak*, 2020 ND 107, 942 N.W.2d 879 (N.D. 2020) that

Generally, a modification of child support should be made effective from the date of the motion to modify, absent good reason to set some other date, and the ‘court retains discretion to set some *later effective date*, but its reasons for doing so should be apparent or explained.’” *Sonnenberg v. Sonnenberg*, 2010 ND 94, ¶ 16, 782 N.W.2d 654 (quoting *Marchus v. Marchus*, 2006 ND 81, ¶ 8, 712 N.W.2d 636 (emphasis added)); see also *Bertsch v. Bertsch*, 2006 ND 31, ¶ 7, 710 N.W.2d 113; *Geinert v. Geinert*, 2002 ND 135, ¶ 10, 649 N.W.2d 237. In *Brakke v. Brakke*, 525 N.W.2d 687, 689-90 (N.D. 1994), this Court provided a narrow exception, allowing retroactive relief when both parents agree to an actual change in primary residential responsibility for an extended period. In that limited circumstance, “Rule 60(b) ([6]), N.D.R.Civ.P., can be used to provide relief from the unjust enforcement of the de facto custodial parent’s support obligation.” *Id.* at 690. The so-called *Brakke* exception was not a retraction from our position that “vested support rights cannot be retroactively modified.” *Id.*; see also *Sonnenberg*, 2010 ND 94, ¶ 17, 782 N.W.2d 654; *Krizan v. Krizan*, 1998 ND 186, ¶ 11, 585 N.W.2d 576.

*Jacobs-Raak v. Raak*, 2020 ND 107, ¶ 30, 942 N.W.2d 879 (N.D. 2020).

32. Tim made a motion to stay child support in July 2020 but did not move to change residential responsibility at that time. At that time, TLH had been living in his home for almost a year. Kim argues that in order for him to be able to receive prior period child support, he should have requested that he be granted primary residential responsibility for TLH at that time, or at least sooner than he did. By not doing so, he essentially waived his right to request child support from the time the minor child went to live with him.

33. This Court agreed in *Brakke*: “where the parties recognize that the change will be

of long duration, a prompt motion to modify should be made.” *Brakke*, at 690. In that case as in this one, the child had been living with the noncustodial parent for several years prior to him requesting a change in residential responsibility. However, the cases differ in that, in *Brakke*, the father refrained from making a request to the court for the change at the insistence of the mother. In this case, it is unclear why Tim did not request a change in residential responsibility at the time he requested a stay in his child support. In fact, the trial court specifically addressed this in its memorandum opinion on the issue: “The Court cannot discern any valid reason for Tim to wait for 20 months to request the change in primary residential responsibility....” (R338:7:¶ 14).

34. Child support and primary residential responsibility go hand in hand. Because Tim did not previously request a change in residential responsibility, he cannot now request the trial court to retroactively grant him primary residential responsibility in order to award him prior period child support for a time when he was not the primary residential parent.

35. The trial court did not abuse its discretion when it refused to order Kimberly to pay prior period child support.

**III. The trial court did not abuse its discretion when it denied child support from the time that Tim filed a motion on May 5, 2021 until TLH moved out.**

36. Tim filed his Motion for Change of Custody on May 5, 2021. (R202). TLH left for boot camp on June 7, 2021 and returned to North Dakota on September 2, 2021. He then moved into his own apartment on September 24, 2021. (R258:1:¶ 2-3). That amounts to approximately fifty-four (54) days from May 5, 2021 through September 24, 2021 in which TLH resided with Tim.

37. Tim argues that when he moved for a change in residential responsibility for

TLH, he had been the acting primary residential parent for eight (8) months. (Aplt's Brief 20 ¶ 33). It is unclear which date he is using to calculate that time period as the incident between Kimberly and TLH had occurred in 2019, which would mean that TLH had actually been staying with Tim longer than eight (8) months. (R203:2:¶ 3).

Regardless of the length of time TLH stayed with him, Tim did not move for a change in residential responsibility until May 5, 2021, approximately only six (6) months prior to the TLH turning eighteen (18), and only about four (4) months prior to TLH moving out on his own.

38. Prior to the hearing on Tim's motion to amend his previous motion, the trial court provided direction to the parties through email, that it would not be deciding the issue of residential responsibility as the child turned eighteen (18) on November 16, 2021 and thus that issue had become moot. (R321:2-3:¶ 7). Tim's argument that he should be awarded child support for the summer of 2021, and so be determined to be the primary residential parent for that time period as well is clumsy at best.

39. Tim cites the North Dakota Child Support Guidelines to prove that he was the primary residential parent:

“Parent with primary residential responsibility” means a parent who acts as the primary caregiver on a regular basis for a proportion of time greater than the obligor, regardless of descriptions such as “shared” or “joint” parental rights and responsibilities given in relevant judgments, decrees, or orders.

N.D.Admin.C. § 75-02-04.1-01(9). This is correct. However, Tim was not the parent with primary residential responsibility during the time he is seeking child support. In fact, he was never determined to be the primary residential parent, so he is not entitled to child support for any period of time. (R338:4:¶ 8).

40. It is evident throughout the status conference held on November 1, 2021, that

there was confusion on Tim’s part about the status of residential responsibility in this case. Tim argued at that time that since social services temporarily removed TLH from Kimberly’s home, either he or Roughrider North Human Services Zone had “custody” of him. (Tr 11-18). The trial court attempted multiple times to explain that there had been no court order in this case, nor any other case, that transferred primary residential responsibility from Kimberly to Tim. *Id.*

41. So, in order for Tim to receive child support from May 5, 2021, when he filed his motion to modify, through September 24, 2021, when the minor child moved out, the trial court would have had to retroactively grant him primary residential responsibility for those fifty-four (54) days. As this Court has previously held, “vested support rights cannot be retroactively modified.” *Jacobs-Raak* at ¶ 30. The trial court could not have done what he was asking it to do. It could not retroactively modify his rights.

42. Because the trial court could not have retroactively modified Tim’s residential rights, it did not err in denying him child support from May 5, 2021 through September 24, 2021.

**IV. The trial court did not abuse its discretion by denying Tim an evidentiary hearing.**

43. In Tim’s Notice of Appeal and in his Appellant’s Brief, he lists the denial of an evidentiary hearing as an issue before this Court. However, he does not specifically argue it in his Brief. He correctly states in his Brief of Appellant that an evidentiary hearing was scheduled for November 5, 2021. (Aplt’s Brief 17 ¶ 28). However, he then alleges that his motion for summary judgment created a “timing problem” which caused a need for the evidentiary hearing to be rescheduled to December 22, 2021. (Aplt’s Brief 17 ¶ 28). This is incorrect. After the status conference was held on November 1, 2021,

the parties stipulated to continuing the November 5, 2021 hearing as a result of Tim's motion to amend his previous motion and Kimberly's need to respond to such. (R296).

44. At the status conference on November 1, 2021, the trial court narrowed the remaining issues to those of primary residential responsibility and child support. (Tr 28 L 3-5). However, also as discussed at the status conference, TLH was going to turn 18 on November 16, 2021, and as such any decision the trial court may have made would either be moot in a short period of time or may already be moot by the time the trial court issued its decision. (Tr 4 L1-10, Tr 9-10 L25-7, Tr 26-27 L21-10). The trial court then directed via email to counsel on November 15, 2021, that the issue of residential responsibility would become moot the next day as TLH would be an adult and that the remaining issue for the hearing scheduled for December 2, 2021 would be whether Tim's May 4, 2021 motion could be amended and if that request was denied, the evidentiary hearing scheduled for December 22, 2021 would be cancelled. Tim's Motion to Amend was denied by the trial court's memorandum opinion on December 16, 2021, and subsequent order on December 21, 2022 and thus the evidentiary hearing was cancelled pursuant to the trial court's previous notice.

45. The trial court did not abuse its discretion by cancelling the evidentiary hearing when it had decided the remaining issues prior to the date of the hearing.

**V. The trial court did not abuse its discretion by not awarding attorney fees related to a contempt proceeding against Kimberly.**

46. Tim seeks to have Kimberly pay his attorney fees for his filing of an application for order to show cause to attempt to hold her in contempt for failing to repay him an overpayment of child support. (R309). The Court previously directed that this matter be resolved between the parties privately. (R200).

47. By the time the hearing on Tim's request for an order to show cause was held, Kimberly had already repaid Tim for his overpayment of child support. (R323). The issue had become moot.

48. Tim relies on Chapter 14-09-29(4) of the North Dakota Century Code as proof that Kimberly must be ordered to pay him attorney fees. He alleges that the incident between Kimberly and TLH constitutes domestic violence under the statute which requires Kimberly to pay Tim's attorney fees. This section directs that "[i]n any proceeding dealing with parental rights and responsibilities in which a parent is found to have perpetrated domestic violence...all court costs, attorney's fees...must be paid by the perpetrator of the domestic violence..." N.D.C.C. § 14-09-29(4).

49. Tim misapplies this statute. Kim has not been found to have perpetrated domestic violence in this case nor in any other case. She certainly has not been found to have perpetrated domestic violence against Tim.

50. Further, as stated by this Court in *Reiser v. Reiser*, 2001 ND 6, ¶ 15, 621 N.W.2d 348:

The district court has discretion under § 14-05-23, to award attorney fees in divorce proceedings. *Brown v. Brown*, 1999 ND 199, ¶ 36, 600 N.W.2d 869. An award of attorney fees is within the sound discretion of the trial court and will not be set aside on appeal absent abuse of discretion. *Weigel v. Weigel*, 2000 ND 16, ¶ 16, 604 N.W.2d 462.

51. The trial court did not abuse its discretion in denying Tim's request for attorney fees.

### **CONCLUSION**

52. The trial court did not err in finding that there was no agreement or acquiescence to a change of custody. It did not abuse its discretion in refusing to order Kimberly to

pay prior period child support nor in denying Tim's request for child support from May 5, 2021, through September 24, 2021. Finally, the trial court did not abuse its discretion by not awarding attorneys fees to Tim. The Order denying Tim's Motion to Amend Judgment and denying his Motion for Relief from Judgment should therefore be affirmed. Further, Kimberly should be granted an award of attorneys fees on appeal.

Signed: May 24, 2022

/s/ Jami L. Haynes

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**SUPREME COURT CASE NO. 20220051**

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**Plaintiff and Appellant**

**v.**

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**CERTIFICATE OF COMPLIANCE**

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I, Jami L. Haynes, Attorney for Appellee, Kimberly Hamburger, certify that Appellee's Brief complies with the page limitation as set forth in the N.D.R. App. P. Rule 32(e). The page count of appellee's brief is seventeen (17) pages including this Certificate of Compliance.

Signed: May 24, 2022

/s/ Jami L. Haynes

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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF STARK

SOUTHWEST JUDICIAL DISTRICT

Tim Hamburger, )  
 )  
 Plaintiff, )  
 )  
 -vs- )  
 )  
 Kimberly Hamburger, )  
 )  
 Defendant. )  
 )

**CERTIFICATE OF SERVICE**

Case No. 45-2015-DM-00255  
Supreme Court No. 20220051

Appellee/Defendant has served the following documents:

- **CERTIFICATE OF SERVICE**
- **APPELLEE’S BRIEF**

The aforementioned documents were served on the 24th day of May, 2022 by electronically filing the same with the North Dakota Supreme Court Clerk through the North Dakota Supreme Court’s Electronic File & Serve upon to the following:

Attorney for Appellant/Plaintiff, Dennis W. Lindquist: [dwlindquist65@gmail.com](mailto:dwlindquist65@gmail.com)  
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Dated this 24th day of May, 2022.

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