

Case No. A-19-0993

IN THE NEBRASKA COURT OF APPEALS

KRISTEN K. YEUTTER,
Plaintiff/Appellee,

vs.

JESSE D. BARBER,
Defendant/Appellant

APPEAL FROM THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA

THE HONORABLE NATHAN COX
DISTRICT COURT JUDGE

BRIEF OF APPELLANT

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II. The Trial Court erred in ordering terms of visitation that are unreasonable, in that they give complete discretion to the Appellee mother in allowing the specific visitation set-out in the Court’s parenting plan where the mechanism for resolving disputes regarding that visitation must be done by mediation. Mediation as described in the parenting plan and order are not available to the Appellant due to his incarceration.

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STATEMENT OF BASIS OF JURISDICTION

A. Basis of Jurisdiction.

“A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.” Neb. Rev. Stat. § 25-1911 (Reissue 2008). “[A]n appeal will be deemed perfected and the appellate court will have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court.” *Id* at § 25-1912.

The Nebraska Court of Appeals has jurisdiction over this matter because a final order was entered on September 18, 2019, a notice of appeal was timely filed, and a docket fee was properly deposited.

B. Dates of Final Orders Sought to be Reviewed.

The Appellant seeks review of the Opinion and Order entered on September 18, 2019.

C. Date of Notice of Appeal and Deposit of Docket Fee.

The Appellant filed the Notice of Appeal and deposited the docket fee on October 17, 2019 as required by Neb. Ct. R. App. P. § 2-109(D)(1)(c)(1)(iii).

STATEMENT OF THE CASE

A. Nature of the Case.

The Defendant, Jesse Barber, petitioned the Court for joint legal and joint physical custody and the creation of a parenting plan regarding the parties’ minor child, Jace B. Barber. (T1-6) The Plaintiff, Kristen Yeutter, petitioned the Court for sole legal and sole physical custody of the parties’ minor child and the determination of child support and the allocation of expenses related to the minor child. (T17-19) During the pendency of the action, Jesse was convicted of First

Degree Sexual Assault and was sentenced to serve 10 to 12 years on November 20, 2018. (T__)
At trial, the Court heard argument and received evidence on the issues of support and visitation.

B. Issues Actually Tried to the Court.

The issues actually tried to the Court are as follows: establishment of a specific visitation schedule and modification of the parties' support order, and the establishment of prospective child support and retroactive child support.

C. Determination of the Issues and Orders by the Trial Court.

The Trial Court denied the Appellant's Complaint finding no change in circumstances in regards to Jesse's visitation requests, though ultimately entering a parenting plan setting-out a visitation schedule. The Trial Court awarded Appellee the permanent legal and physical custody of the minor child of the parties. The Court found a change in circumstances such that the Court ordered Jesse to pay retroactive child support in the amount of \$516.00 per month from August 1, 2017 to December, 2018. Jesse is also ordered to pay child support in the amount of \$50.00 per month effective January 1, 2019. The Court created a parenting plan setting-out provisions for visitation and remediation. (T67-76)

D. Standard of Review.

These types of custody determinations are reviewed de novo on the record, and the trial court's determination will normally be affirmed absent an abuse of discretion. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Brown v. Brown*, 260 Neb. 954, 624 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Brown v. Brown*, 260 Neb. 954, 624 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

ASSIGNMENTS OF ERROR

I. The Trial Court erred in finding a change in circumstances in modifying the support provision of the November 17, 2016 Paternity Decree such that Mr. Barber is obligated to pay prospective child support, obligated to pay retroactive child support, and ordering Mr. Barber to pay support (retroactive and prospective) while being involuntarily unemployed by virtue of his incarceration.

II. The Trial Court erred in ordering terms of visitation that are unreasonable, in that they give complete discretion to the Appellee mother in allowing the specific visitation set-out in the Court's parenting plan where the mechanism for resolving disputes regarding that visitation must be done by mediation. Mediation as described in the parenting plan and order are not available to the Appellant due to his incarceration.

PROPOSITIONS OF LAW

1. In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012).
2. In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include (but not be limited to) the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; the general health, welfare, and social behavior of the minor child; and credible evidence of child abuse or neglect or domestic intimate partner abuse. Neb. Rev. Stat. § 43-2923 (2010).
3. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Brown v. Brown*, 260 Neb. 954, 624 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).
4. When making a determination of child support under this section, the court must take into account and give effect to an existing order of support under section 43-512.04. The court may order the existing order to remain in effect without modification after considering whether modification is warranted. *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018).

5. When earning capacity is used as a basis for an initial determination of child support under Nebraska Child Support Guidelines, there must be some evidence that the parent is capable of realizing such capacity through reasonable effort. *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000).
6. A noncustodial parent's access to her children should not be denied unless the court is convinced that visitation would be detrimental to the children's best interests and, in any case, only under extraordinary circumstances. *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980).
7. Generally, visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor child or children of the marriage. *Heyne v. Kucirck*, 302 Neb. 59, 277 N.W.2d 439 (1979).
8. Trial court did not abuse discretion in limiting visitation rights of father, who was serving life sentence, by denying father's application for order requiring former wife to make minor children available for visitation. *Casper v. Casper*, 198 Neb. 615, 254 N.W.2d 407 (1977).
9. In the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent does not have the ability to pay the retroactive support and still meet current obligations. *Cooper v. Cooper*, 8 Neb. App. 532, 598 N.W.2d 474 (1999).

STATEMENT OF FACTS

Ms. Kristen Yeutter, Plaintiff/Appellee (hereinafter “Kristen”), is 44 years old. Mr. Jesse Barber, Defendant/Appellant (hereinafter “Jesse”), is 33 years old. They have one son, Jace, who is 4 years old. (T4) A Decree of Paternity was entered on November 17, 2016 wherein the Court stated, relevant to support, that “*due to the relative economic circumstances of the parties, and the division of other expenses related to the minor child, neither party shall pay child support to the other*” and further that “*the parties stipulate and agree that pursuant to Neb. Ct. R. §4-214, any and all childcare expenses, which are due to employment of either parent or to allow the parent to obtain training or education necessary to obtain a job or enhance earning potential, shall be allocated between the parents, such that the Plaintiff shall be responsible for fifty percent (50%) and the Defendant shall be responsible for fifty percent (50%) of these costs*”, and wherein Mr. Barber’s visitation with Jace would be “*by mutual agreement of the parties.*” (___)

Unwilling to continue to have his time with his son be at the lone discretion of Ms. Yeutter, Mr. Barber filed a Complaint for Modification on June 22, 2017 asking for a specific schedule. Ms. Yeutter filed an Answer to Complaint and Cross Complaint on July 24, 2017 asking for a modification of child support. On July 24, 2017 Judge Zastera ordered that Jesse be allowed a specific visitation with his son which, his own mother testified, he never missed. (T20)

Mr. Barber was convicted of First Degree Sexual Assault on September 7, 2018. On November 20, 2018, he was sentenced to ten to twelve years in prison. He is currently serving his sentence at the Omaha Corrections Center in Omaha, Nebraska while the decision of the criminal Court is under appeal to this Court. It is worthy of note that the alleged assault for

which he stands convicted took place five years prior to the reporting of that crime by Ms. Yeutter's twenty three year old daughter after Mr. Barber filed his custody suit. Mr. Barber maintains his innocence. Given the circumstances, Mr. Barber at trial had his counsel and his own mother argue for a modest visitation schedule taking into consideration his incarceration. He requested, by way of Exhibit No. 12:

That he be allowed weekly phone calls with his son;

That the Plaintiff provide a recent photograph of the child at least one time per month;

That the Plaintiff send him grade reports once the child starts school;

That when the Defendant writes letters or sends cards to the child, that the Plaintiff publish them to the minor child.

A provision that the Plaintiff not disclose the details of Defendant's criminal case to the child until he is sufficient age and after the Defendant has been released.

In her suggestions to the trial Court and by her testimony, Ms. Yeutter requested "*A very specific Parenting Plan, if any, should be incorporated into the order of the Court given the ... incarceration of the Defendant[.]*" She did not, however, publish any specific plan to the Court. (E19, 84:21-25) Under cross examination Ms. Yeutter was not clear what the clause "if any" meant in the context of an assertion that a specific plan should be incorporated in the Court's order.

The parties concluded their evidence on March 26, 2019 and the Trial Court issued its Order on September 18, 2019, which in relevant part states:

"... the Court finds that with respect to Defendant's Complaint to Modify, he has failed to meet his burden in establishing a material change in circumstances.

With respect to Plaintiff's Cross Complaint to Modify, the Court finds that she has established a material and substantial changes in circumstances since the entry of the November 17, 2016 Decree. Specifically, Defendant was convicted of First Degree Sexual Assault on September 7, 2018. On November 20, 2018, he was sentenced to serve 10 to 12 years in prison. He is currently serving his sentence at the Nebraska State Penitentiary in Lincoln, Nebraska."

"Custody: Plaintiff shall be awarded the permanent legal and physical custody of the minor child of the parties. A Court-Created Parenting Plan is incorporated herein by this reference as Exhibit 'A'

Child Support: Commencing January 1, 2019, defendant shall pay to Plaintiff pursuant to the Nebraska Child Support Guidelines, which is attached hereto as Exhibit 'B', through the Nebraska Child Support Payment Center, through wage withholding, the sum of FIFTY DOLLARS (\$50.00) per month for the support and ..."

"Defendant is ordered to pay retroactive support as determined by the Nebraska Child Support Guidelines from August 1, 2017 to December 1, 2018 in the amount of FIVE HUNDRED AND SIXTEEN DOLLARS (\$516.00) per month, which is attached hereto and incorporated herein as Exhibit 'C'. Said amount is ordered as a judgment, and will remain as a judgment, against Defendant to be paid to Plaintiff.

Tax Exemptions: Plaintiff shall be entitled to take both the state and federal tax exemption of the minor child every tax year commencing with the 2017 tax year and continuing every year thereafter."

Though His Honor never makes a specific finding regarding the actual or imputed incomes or income potentials of either party, the Court's implied findings may be derived from

the Court's child support calculators attached to the order, those being "Exhibit 'A' - CHILD SUPPORT CALCULATION ... Total Monthly Income, Mother \$7,193.33, Father \$30.00, Net Monthly Income, Mother \$4,837.31, Father \$30.00, Each Parents Final Share (1 Child rounded) Mother \$1,007.00, Father \$8.00." And in calculating retroactive support, "Exhibit 'A' - RETROACTIVE CHILD SUPPORT CALCULATION ... Total Monthly Income, Mother \$5,500.00, Father \$3,000.00, Net Monthly Income, Mother \$4,165.74, Father \$2,366.14, Each Parents Final Share (1 Child rounded) Mother \$709.00, Father \$516.00." (T74-76)

There were then two disputed matters argued at trial; may the Court order that Mr. Barber pay support pursuant to the Nebraska Child Support Guidelines given the fact of his incarceration and in the face of there not being a 10% difference (increase) when comparing the previous support amount (\$0) and the Court's new award (\$516.00 and \$50.00) (retroactive or otherwise), and what sort of visitation schedule may the Court order given that It found Jesse "failed to meet his burden in establishing a material change in circumstance". Both portions of the order are the subject of this appeal.

SUMMARY OF ARGUMENT

I. The Trial Court erred in finding a change in circumstances in modifying the support provision of the November 17, 2016 Paternity Decree such that Mr. Barber is obligated to pay prospective child support, obligated to pay retroactive child support, and ordering Mr. Barber to pay support (retroactive and prospective) while being involuntarily unemployed by virtue of his incarceration.

At trial, Mr. Barber (via the testimony of his mother, DeeAnn Barber) asserted that he is not gainfully employed by virtue of his incarceration, has no other income and no property of value.

Kristen testified that in 2016 to 2017, she estimated his past income to be \$18.00 per hour. It was during this time period that the order of November 17, 2016 was entered. That order contained no recitation of the parties' income nor was a child support calculator attached to it. Pursuant to that Order, Jesse and Kristen shared equally in the payment of daycare expenses, and neither paid the other child support. The most one can conclude by the terms of the order is that the parties had roughly equivalent incomes. If that is the case, Mr. Barber's income was thousands of times greater than what he now earns.

Moreover, by the terms of their Decree, both parties were required to "*annually exchange W-2s, 1099s and K-1s and Federal tax returns for the previous year no later than May 15th in order to revisit the matter of child support*" Ms. Yeutter offered no evidence of such an exchange. Applying the rule that "*A recalculation of support obligation would yield, at least, a 10% difference between the current obligation and the recalculated amount.*" Ms. Yeutter fails to meet her burden of a material change in circumstances such that an award is warranted.

The Nebraska Court of Appeals case *Rouse v. Rouse*, 775 N.W.2d 457, 18 Neb. App. 128 (2009) is instructive of whether or not the Court may grant an application to modify Mr. Barber's child support obligation under the circumstances of his incarceration. The reasoning of the *Rouse* court is perfectly consistent with Jesse's resistance to the establishment of a support obligation while he is incarcerated. If an incarcerated person may prevail in a modification action to reduce support based on his being unemployed by virtue of his incarceration, that reasoning argues against support being established while one is incarcerated.

Like Mr. Rouse, Mr. Barber is incarcerated and will be for a number of years, earns less than two dollars per day, and was current in his support obligation (to pay half of daycare) at the time of his incarceration and has no assets or investments. The Court should further note that it is uncontested that Mr. Barber is not in prison for failure to pay support, or for a crime against the child at issue or Ms. Yeutter.

II. The Trial Court erred in ordering terms of visitation that are unreasonable, in that they gave complete discretion to the Appellee mother in allowing the specific visitation set-out in the Court's parenting plan where the mechanism for resolving disputes regarding that visitation must be done by mediation. Mediation as described in the parenting plan and order are not available to the Appellant due to his incarceration.

In regards to visitation, the Trial Court found:

"The court is not aware of any facts that would make the noncustodial parent an unfit or improper person to be involved in the parenting of the minor child(ren)..."

"2. The noncustodial parent may have parenting time with the minor child(ren) ... provided that the noncustodial parent provides reasonable notice and advance request to

the custodial parent and the custodial parent agrees with the noncustodial parent's request. If there is not an agreement, the parents shall follow the provisions of remediation below.

"... the parties shall attempt to mediate their disagreements by talking to a third person or persons who may be able to help the parties come to an agreement."

DeeAnn Barber, Mr. Barber's mother, testified that Mr. Barber never missed a visit. This testimony was not challenged by Ms. Yeutter.

Mr. Barber's request for visitation is reasonable, in the child's best interest, is not unduly burdensome, and was not, really, objected to by Ms. Yeutter (except that she thought it a hassle). Accordingly, the Court should have granted Mr. Barber the visitation set-out at page 12 of this Brief and the Trial Court's parenting plan amended such that the visitation *schedule* by the Court be made non-optional and not subject to a mediation provision that Mr. Barber could not possibly exercise.

ARGUMENT

I. The Trial Court erred in finding a change in circumstances in modifying the support provision of the November 17, 2016 Paternity Decree such that Mr. Barber is obligated to pay prospective child support, obligated to pay retroactive child support, and ordering Mr. Barber to pay support (retroactive and prospective) while being involuntarily unemployed by virtue of his incarceration.

At trial, Mr. Barber (via the testimony of his mother, DeeAnn Barber) asserted that he is not gainfully employed by virtue of his incarceration, has no other income and no property of value and that because of this his child support obligation should be set at \$1.00 per month, and that he should not be required to pay daycare.

Kristen testified that while she and Jesse were living together, and for a period thereafter in 2016 to 2017, she estimated his past income to be \$18.00 per hour. (74:13-16) It was during this time period that the order of November 17, 2016 was entered. That order contained no recitation of the parties' income nor was a child support calculator attached to it. Pursuant to that Order, Jesse and Kristen shared equally in the payment of daycare expenses, and neither paid the other child support. The most one can conclude (if one can conclude anything at all) by the terms of the order that "*... due to the relative economic circumstances of the parties, and the division of other expenses related to the minor child, neither party shall pay child support to the other*" is that the parties had roughly equivalent incomes. If that is the case, Mr. Barber's income was thousands of times greater than what he now earns - - that number being less than \$2.00 per day.

Moreover, by the terms of their Decree, both parties were required to “*annually exchange W-2s, 1099s and K-1s and Federal tax returns for the previous year no later than May 15th in order to revisit the matter of child support*” (Decree, page 3, paragraph 6). (___) Ms. Yeutter offered no evidence of such an exchange. Nor did she offer any documentary evidence of her income, nor did she offer Mr. Barber’s tax return despite it being marked as one of the Defendant’s trial exhibits (un-offered and withdrawn at the conclusion of evidence). Remember, Ms. Yeutter is asking to have the \$0 support award modified despite the fact that at the time of the original order, Mr. Barber had an income - - something he does not now have. Applying the rule that “*A recalculation of support obligation would yield, at least, a 10% difference between the current obligation and the recalculated amount. This reduction in pay has persisted for more than three months and is expected to persist for, at least, six more months*”, Ms. Yeutter fails to meet her burden of a material change in circumstances such that an award (an increase) is warranted. What the evidence did reveal is that Jesse has no income and no resources which would create a material change in circumstances, and weighing in favor of a decrease (if he had been paying support in the first place) and weighing against such an increase. (133:14-25, 134:1-12)

In addition to his reliance upon the internal rules of the Court’s decree, and an application of the Nebraska Child Support Guidelines standards, Mr. Barber relies upon statutory and case law in resistance to the Trial Court’s findings and order: The Nebraska Court of Appeals case *Rouse v. Rouse*, 775 N.W.2d 457, 18 Neb. App. 128 (2009) is instructive of whether or not the Court may grant an application to modify Mr. Barber’s child support obligation under the circumstances of his incarceration. Though that case was brought by a payor for a *reduction* due

to incarceration, the reasoning of the *Rouse* court is perfectly consistent with Jesse's resistance to the establishment of a support obligation while he is incarcerated. Certainly, if an incarcerated person may prevail in a modification action to reduce support based on his being unemployed by virtue of his incarceration, that reasoning argues against support being established while one is incarcerated.

In the *Rouse* case, Roy Rouse filed a complaint to modify his child support obligation claiming reduced earnings as a result of his incarceration. Citing *Hopkins v. Stauffer*, 775 N.W. 2d 462, 18 Neb.App. 116, (2009), the Court concluded Rouse could personally file a complaint seeking modification of his support obligation upon the basis that his incarceration was an involuntary reduction of income. Because the record did not show that Rouse willfully failed to pay child support, at a time when he had resources to do so, the Court found that ordering that he be disallowed a support reduction was a reversible error.

Rouse's complaint to modify was made under Neb. Rev. Stat. §43-512.15. Rouse's child support obligation at the time was \$216 per month. Rouse testified that he earned \$1.21 a day and that he "*does not own any real estate or any property other than personal items,*" and that he "*up-to-date*" on child support in November 2001 and that he was put in the county jail in December. The Court went on to explain that, "*on February 1, 2009, the district court denied Rouse's complaint. The court rejected Rouse's claim that his incarceration constituted an involuntary reduction in income for two reasons: (1) The statute provides for a modification complaint to be brought by the prosecutor, and (2) the statute provides that a modification is not appropriate if the inmate has a documented record of willfully failing or neglecting to provide proper support.*"

In *Hopkins v. Stauffer*, 775 N.W.2d 462, 18 Neb.App. 116, (2009), the Court stated that “we determined that the Legislature’s interest in amending §43-512.15 was to, in effect, partially overrule decisions of the Nebraska appellate courts which declared that incarceration was considered a voluntary reduction in income for purposes of child support obligations. We concluded that the Legislature clearly intended for an incarcerated inmate to be able to file his or her own complaint to modify child support and for the incarceration to be considered an involuntary reduction of income when the conditions of §43-512.15(1)(b) are met. We held that the change of law making incarceration an involuntary reduction in income under certain conditions rather than a voluntary reduction constituted a material change in circumstances”.

And the Court went as far as to say: “For purposes of this section, a person who has been incarcerated for a period of one year or more in a county or city jail or a federal or state correctional facility shall be considered to have an involuntary reduction of income unless (i) the incarcerated individual has a documented record of willfully failing or neglecting to provide proper support which he or she knew or reasonably should have known he or she was legally obligated to provide when he or she had sufficient resources to provide such support.”

In the Rouse case, the incarcerated payor is the moving party. In the present case, the putative payee is the moving party; under this scenario the only time period that should be considered for her modification is the “3 months provision” because Jesse was not paying support at the time of his incarceration so there is not one year period to consider.

Like Mr. Rouse, Mr. Barber is incarcerated and will be for a number of years, earns less than two dollars per day, and was current in his support obligation (to pay half of daycare) at the time of his incarceration. and has no assets or investments. Mr. Barber cites, as did Mr. Rouse,

Neb. Rev. Stat. §43-512.15 as statutory precedent. The Court should further note that it is uncontested that Mr. Barber is not in prison for failure to pay support, or for a crime against the child at issue or Ms. Yeutter.

Should Ms. Yeutter attempt to rely upon the holdings in the cases of *Longnecker v. Longnecker*, 600 N.W.2d. 544, 111 Neb.App. 773, (2003), or the related cases of *State v. Porter*, 610 N.W.2d. 23, 259 Neb.App. 366, (2000), and *Ohler v. Ohler*, 369 N.W.2d. 615, 200 Neb.App. 272, (1985), such an attempt is meritless. *Rouse*, citing *Hopkins*, specifically held that “we determined that the Legislature’s interest in amending §43-512.15 was to, in effect, partially overrule decisions of the Nebraska appellate courts which declared that incarceration was considered a voluntary reduction in income for the purposes of child support obligations.”

This writer could find no Statute or case law that would have allowed the Trial Court to modify its current order, or set a child support amount.

II. The Trial Court erred in ordering terms of visitation that are unreasonable, in that they gave complete discretion to the Appellee mother in allowing the specific visitation set-out in the Court’s parenting plan where the mechanism for resolving disputes regarding that visitation must be done by mediation. Mediation as described in the parenting plan and order are not available to the Appellant due to his incarceration.

In regards to visitation, the Trial Court found:

“The court is not aware of any facts that would make the noncustodial parent an unfit or improper person to be involved in the parenting of the minor child(ren). However, given the non custodial parent’s inability to actively participate in these proceedings due to his incarceration,

the court is uncertain of the noncustodial parent's ability or willingness to be actively involved in the parenting of the minor child(ren)."

"2. The noncustodial parent may have parenting time with the minor child(ren) during the following times: each weekend, each holiday (including all secular and religious holidays), and each summer, provided that the noncustodial parent provides reasonable notice and advance request to the custodial parent and the custodial parent agrees with the noncustodial parent's request. If there is not an agreement, the parents shall follow the provisions of remediation below.

3. The noncustodial parent shall, upon reasonable request to the custodial parent, have telephone parenting time with the minor child(ren) of no less than 15 minutes each week.

4. In the event the noncustodial parent and the custodial parent agree on a specific parenting time, the noncustodial parent shall pick up the minor child(ren) from the custodial parent at the beginning of said parenting time and shall return the minor child(ren) to the custodial parent at the end of said parenting time."

"... the parties shall attempt to mediate their disagreements by talking to a third person or persons who may be able to help the parties come to an agreement."

Before addressing what Jesse believes are incongruities in these provisions, it is helpful to take on what was Ms. Yeutter's opinion of Jesse's request, and what she thought was in Jace's best interest.

In her suggestions to the Court, Ms. Yeutter requested *"A very specific Parenting Plan, if any, should be incorporated into the order of the Court given the ... incarceration of the Defendant[.]"* (84:21-24) When questioned about this, she objected to many of the suggestions

made by Mr. Barber (84:21-24), and further went on to say that the phone communications between the child and father should take place when the child is with his paternal grandparents, but otherwise did not state a specific objection, or cite a reason, why such communication should not take place. When pressed, however, for a commitment to a “very specific” schedule, she resisted, insisting that she not be obligated to deliver the child to the paternal grandparents so that the calls could take place. (88:12-17) Stating that she does not have a problem with Mr. Barber’s parents facilitating visitation along with a statement that she is unwilling to commit to anything “specific,” except a photo of the child being published monthly to Mr. Barber’s parents, is disingenuous, and betrays a failure to put her son’s best interests ahead of her own convenience. Recall that she said the boy in his father’s absence “struggles” (65:5). and that “he doesn’t understand.” (64:8) Her testimony about how young Jace would get to visit with Mr. Barber was prompted by her own lawyer’s questions:

1 *“Q. Nonetheless, you would be willing - - or you think*

2 *it might be reasonable to have the grandparents along*

3 *with your son to communicate with your son’s father?*

4 *A. Yes.*

5 *Q. And you believe that could be accomplished?*

6 *A. Yes.*

7 *Q. You see Mrs. Barber testify here today. Now*

8 *she’s watching you - -*

9 *A. Yes.*

10 *Q. - - testify. Is this something you think you*

11 *might be able to work out to accomplish those - - those*
12 *goals?*
13 *A. Yes. It sounds like she keeps in communication*
14 *with Jesse on a weekly basis, so she - - any time that*
15 *will be arranged with Jace and his grandparents, she*
16 *would you know ahead of time and she could arrange that*
17 *to happen.*
18 *Q. And you approve of such?*
19 *Yes.” (65:1-19)*

Ms. Yeutter gave no testimony on the topic of whether it was good for Jace to have contact with his dad. And if consistency and dedication to having his parenting time counts for anything, it is uncontested that Jesse was an attentive parent:

12 *Q. ... actively involved in his son’s life*
13 *prior to his incarceration?*
14 *A. Yes.*
15 *Q. Always took the visitation he was allowed?*
16 *A. Yes.*
17 *Q. Always petitioned for more?*
18 *A. Yes. (49:12-18)*

Mr. Schense’s argument that “this is not a grandparents’ rights suit” is also disingenuous, (83:14-15) and I think intended to distract the Court; having the grandparents facilitate phone

visits, and the receiving of information about and from the boy, is not an issue of grandparents' rights.

In considering the question of whether or not to grant Mr. Barber's request for visitation, the Court should have kept in mind that Ms. Yeutter did not argue that Mr. Barber was unfit to have the visitation he prayed for, and that this Court has stated that "*The mere fact of incarceration is not a sufficient justification for the denial of the right of visitation even though the same may be effectively exercised only by visitation at the institution.*" *Casper v. Casper*, 254 N.W.2d. 407, 198 Neb.App. 15, (1977). What the Court should consider are the "*emotional relationship between the child and the parent*" and the "*affect on the child as a result of continuing or disrupting (an) existing relationship*" *Norris v. Norris*, 512 N.W.2d 407, 2 Neb.App. 570 (1994) and Neb. Rev. Stat. §42-364(1). That relationship with Jace along with other aspects of Jesse's dedication to his son are set-out in Exhibit 20, no portion of which was contradicted or even challenged by Ms. Yeutter:

"Jace was born on October 22, 2014. He became my priority. I was the one who got up with him each night when he was hungry, needed a diaper change, or just needed to be held." (T20)

Speaking to that relationship, DeeAnn Barber, Mr. Barber's mother, testified that Mr. Barber never missed a visit. (49:12-18) This testimony was not challenged by Ms. Yeutter. With that strong relationship now being tested, the effect on young Jace, should he not be able to speak to his dad, would be devastating. Ms. Yeutter did not present any evidence to contradict Ms. Barber's testimony.

CONCLUSION

By the very terms of the Decree, Ms. Yeutter should have been denied her request for support having not exchanged income information she was required to; *“annually exchange W-2s, 1099s and K-1s and Federal tax returns for the previous year no later than May 15th in order to revisit the matter of child support.”* By way of the Nebraska Child Support Guidelines 10% presumption, the Court should have recognized that she is similarly barred. If the rule *“A recalculation of support obligation would yield, at least, a 10% difference between the current obligation and the recalculated amount. This reduction in pay has persisted for more than three months and is expected to persist for, at least, six more months”* is applied to present facts, Kristen’s cause fails by that 10% rule. Moreover, she provided no documents (pay statements or tax returns) to prove her assertions about her income and deductions. And, examining the case law on the issue of a modification filed by an incarcerated person, implicitly more problematic than the present action, the intention of Nebraska jurisprudence is clear: incarceration is an involuntary reduction in income and ordering the incarcerated to pay support on money they don’t and can’t earn leads to absurd and unfair outcomes. His Honor’s order that Mr. Barber pay future and retroactive support is an abuse of discretion and should be overturned and vacated.

Mr. Barber’s request for visitation is reasonable, in the child’s best interest, is not unduly burdensome, and was not, really, objected to by Ms. Yeutter (except that she thought it a hassle). Accordingly, the Court should have granted Mr. Barber the visitation set-out at page 12 of this Brief and the Trial Court’s parenting plan amended such that the visitation *schedule* _____ by the Court be made non-optional and not subject to a mediation provision that Mr. Barber could not possibly exercise.

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Certificate of Service

I hereby certify that on Thursday, February 06, 2020 I provided a true and correct copy of this *Brief of Appellant Barber* to the following:

Kristin K Yeutter represented by Donald L Schense (16928) service method: Electronic Service to **Donald@SchenseLaw.com**

Signature: /s/ Higgins,Matthew,S (20081)