

**IN THE SUPREME COURT OF THE  
STATE OF NORTH DAKOTA**

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<b>Christopher Gietzen,</b>	)	
	)	
<b>Plaintiff and Appellant,</b>	)	
	)	<b>BRIEF OF APPELLEE</b>
<b>vs.</b>	)	
	)	
<b>Jessica Gabel, n/k/a Jessica Bay,</b>	)	<b>Supreme Court File No. 20050268</b>
	)	
<b>Defendant and Appellee,</b>	)	
	)	

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**Appeal from Judgment and Decree  
from the Cass County District Court**

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## STATEMENT OF THE ISSUES

The issues presented for review are:

- I. Is the Trial Court's Award of Custody to Jessica Supported by the Facts and the Law?**
  - A. Standard of Review**
  - B. Is Finding of Fact #6 clearly erroneous?**
  - C. Is Finding of Fact #12 clearly erroneous?**
  - D. Is Finding of Fact #13 clearly erroneous?**
  - E. Is Finding of Fact #14 clearly erroneous?**
  - F. Is Finding of Fact #16 clearly erroneous?**
  - G. Is Finding of Fact #19 clearly erroneous?**
    - 1. Is The trial court's finding in reference to factor b clearly erroneous?**
    - 2. Is the trial court's conclusion in reference to factor c clearly erroneous?**
    - 3. Is the trial court's finding in reference to factor e clearly erroneous?**
    - 4. Is the trial court's finding in reference to factor f clearly erroneous?**
    - 5. Is the trial court's finding in reference to factor h clearly erroneous?**
    - 6. Is the trial court's finding in reference to factor j clearly erroneous?**
    - 7. Is the trial court's finding in reference to factor k clearly erroneous?**
  - H. Is Finding of Fact #20 clearly erroneous?**

- I. Is Conclusion of Law #6 supported by the Findings of Fact?**
- J. Did the trial court address the issue concerning evidence of domestic violence?**

**STATEMENT OF THE CASE**

Plaintiff, Christopher Gietzen ("Christopher") and Defendant, Jessica Gabel, n/k/a Jessica Bay ("Jessica"), are the biological parents of Justice Gietzen ("Justice"), born February 8, 1996. (App. 2). Christopher and Jessica were never married. (Supp. App. 2).

An Interlocutory Order dated February 8, 2002, removed Justice from the custody of both Christopher and Jessica and placed the legal care, custody and control of Justice with the director of the Cass County Social Service Board for a period of six months. (App. 35). The Interlocutory Order did not award permanent custody of Justice to either Christopher or Jessica. (App. 32-36).

Christopher commenced an action against Jessica requesting that he be awarded the care, custody and control of Justice. (Supp. App. 1-3). Christopher obtained an Ex Parte Interim Order awarding him custody on August 27, 2003. (App. 25-26). Jessica submitted an Answer and Counterclaim on February 4, 2004, requesting that she be awarded sole physical and sole legal custody of Justice. (Supp. App. 4-6).

On April 24, 2004, an Interim Order was signed appointing Chuck Durkee ("Durkee") custody investigator. (Supp. App. 7-10). On September 1, 2004, Durkee authored a report in which he addressed the statutory best interest factors. (Supp. App.

11-32). Durkee recommended that Jessica have sole physical custody, that the parties share joint legal custody and that Christopher receive visitation. (Supp. App. 29-30).

Trial was held on January 25 and 26, 2005 and on February 28, 2005. (App. 9). Findings of Fact, Conclusions of Law and Order for Judgment was entered on May 20, 2005. (App. 9-24). Judgment was entered on June 3, 2005 (App. 2-8). Christopher filed a Notice of Appeal on August 8, 2005. (App. 1).

### **STATEMENT OF THE FACTS**

Justice was born on February 8, 1996. (Trans. p. 16, ll. 6-14). From February of 1996 until January of 1997, both Jessica and Christopher lived together in Bismarck with Justice. (Trans. p. 162, ll. 8-13). From January of 1997 until April of 1998, the parties were physically separated. (Trans. p. 162, ll. 14-20). During this period of time, Justice resided solely with Jessica. (Trans. p. 162, ll. 22-24). From April 1998 through June 1999, the parties reunited and lived together in Bismarck with Justice. (Trans. p. 163, ll. 6-8).

Jessica and Justice lived in Hazen, North Dakota with her parents from July of 1999 to September of 1999. (Trans. p. 163, ll. 13-15). Christopher continued to live in Bismarck. (Trans. p. 163, ll. 16-17). During this period of time Jessica was Justice's primary caretaker. (Trans. p. 163, ll. 18-21). Christopher had limited contact with Justice during this period of time. (Trans p. 369, ll. 20-25; p. 370, ll. 1-3.).

From September of 1999 to July of 2000, the parties reunited and lived in Bismarck. (Trans. p. 163, ll. 22-25). In July of 2000 they moved to Fargo. (Trans. p. 164, ll. 1-3). Both Jessica and Christopher were employed. (Trans p. 370, l. 25; p. 371,

ll. 1-7). Christopher worked for an insurance company and, as part of his employment, traveled from Sunday through Friday. (Trans. p. 371, ll. 5-13). Jessica was employed at Sykes. (Trans. p. 371, ll. 3-4). During this period of time Jessica was Justice's primary caretaker. (Trans. p. 164, ll. 23-25).

The parties again separated in October of 2001. (Trans. p. 165, ll. 1-4). From October of 2001 until January of 2002, Justice resided with Jessica. (Trans. p. 165, ll. 5-7). From January 7, 2002 to February 8, 2002, Justice was placed in protective custody by Cass County Social Services. (Trans. p. 165, ll. 12-16). Justice lived with Jessica's parents. (Trans. p. 374, ll. 21-23). During this period of time Jessica had much more contact with Justice than Christopher had. (Trans. p. 375, ll. 1-14).

From February 8, 2002 until June of 2003, Justice lived with Christopher and Jessica had extended visitation with Justice. (Trans. p. 378, ll. 1-25; p. 379, ll. 1-21; p. 380, ll. 1-20).

From June 2003 through August 2003, Christopher and Jessica shared parenting time with Justice on an equal basis, rotating weekly. (Trans. p. 380, ll. 25; p. 381, ll. 1-9). Justice resided with Christopher in Halliday, North Dakota from September of 2003 until trial. (App. 13). During the school year, Jessica had visitation from Thursday after school until Monday before school every other weekend. (Trans. p. 166, ll. 24-25; p. 167, ll. 1-2). During the summer of 2004, the parties rotated custody on a weekly basis. (Trans. p. 384, ll. 11-14).

Justice attended school in the Fargo-Moorhead area for Kindergarten and 1<sup>st</sup> grade. (Trans. p. 132, ll. 14-21). Justice attended school in Kildeer, North Dakota for 2<sup>nd</sup>

grade. (App. 12). Justice has done well in school. (App. 12). In the fall of 2003, Jessica expressed concern to Dunn County Social Services that Christopher was leaving Justice alone after school when he was at work. (2/28/05 Trans. p. 42, ll. 17-25). Dunn County Social Services investigated the concern and determined that services were required, to ensure that Justice was supervised at all times. (Supp. App. 33).

Jessica has two other children, Jadyne Gable ("Jadyne") and Aleyna Bay ("Aleyna"). (Trans. p. 331, ll. 14-16, ll. 22-24). Christopher is not the biological father of either Jadyne or Aleyna. (App. 9-10). Jessica is married to David Bay ("David"). (2/28/05 Trans. p. 9, ll. 11-14). David earns approximately \$60,000 per year. (2/28/05 Trans. p. 9, ll. 24-25; p. 10, l. 1).

Christopher is employed on a full time basis. (Trans. p. 10, ll. 8-15). He works Monday through Friday from 8:00 a.m. to 5:00 p.m. and every other Saturday from 8:00 a.m. to noon. (Trans. p. 128, ll. 17-25). Christopher has had two convictions for DUS. (Trans. p. 14, ll. 5-9). The first conviction was in early 2000 and the second one was in May of 2003. (Trans. p. 14, ll. 10-13). Christopher did not have a valid drivers license at the time of trial. (Trans. p. 130, ll. 9-11). Christopher testified that even though he did not have a drivers license he still did drive on occasion. (Trans. p. 130, ll. 12-14). Christopher also testified that he had driven to a visitation exchange without a drivers license. (Trans. p. 131, ll. 4-6).

Jessica is a stay at home mother. (Trans. p. 329, ll. 19-22). She does daycare out of her home. (Trans. p. 329, ll. 19-22). Christopher used inappropriate language in Justice's presence when the custody investigator was at his home. (2/28/05 Trans. p. 182,

ll. 3-7). Christopher conceded that he often uses inappropriate language. (2/28/05 Trans. p. 173, ll. 8-13).

Christopher testified that he relies upon his mother to provide meals and for some of the transportation involving Justice. (Trans. p. 17, ll. 22-24, p. 22, ll. 9-13, 22-24). Jessica, on the other hand, has historically been the one that has provided Justice with appropriate clothing, food, school needs and daycare care for the majority of his life. (Supp. App. 15-17).

Christopher testified that he began using marijuana in the summer of 1994. (Trans. p. 16-18). Christopher testified that marijuana was his drug of choice. (Trans. p. 115, ll. 8-9). Christopher testified that he used marijuana in the morning when he woke up and in the evening before he went to sleep. (Trans. p. 156, ll. 16-21). Christopher also admitted using methamphetamine, cocaine, opium and LSD. (Trans. p. 115, ll. 4-5; p. 158, ll. 3-14). Christopher also conceded that he not only used drugs but sold drugs. (Trans. p. 158, ll. 15-19, 22-24).

Jessica testified that in July of 2001, Christopher began using methamphetamine on a regular basis. (Supp. App. 19). Jessica witnessed Christopher use methamphetamine up until the time they separated in January of 2002. (Supp. App. 19). Christopher claims that he stopped using illicit drugs in 2002. (2/28/05 Trans. p. 173, ll. 14-16). Even though he claims he is currently clean from narcotics, he concedes that he is still consuming alcohol. (Trans. p. 153, ll. 10-11). Christopher's allegation that he stopped using illicit narcotics is refuted by his former girlfriend, LaCota. (Trans. p. 267, ll. 3-17).

Jessica stated that Christopher abused her physically and intimidated her emotionally on a regular basis from when she graduated from high school in 1995, until the parties finally separated in 2002. (Supp. App. 19).

Jessica testified that the physical abuse involved Christopher punching , shoving her and pinching her. (2/28/05 Trans. p. 25, ll. 16-25; p. 26, ll. 1-17; p. 27, ll. 5-11). Jessica testified that the physical abuse also involved Christopher snapping his finger against her head and grabbing her hands and forcing her to hit herself and choking her. (2/28/05 Trans. p. 27, ll. 12-20; p. 28, ll. 1-7; p. 30, ll. 18-22). Jessica stated that Christopher abused her emotionally which included degrading and demeaning comments. (Supp. App. 19). Jessica stated that the verbal, physical and emotional abuse occurred in Justice's presence. (Supp. App. 12). Jessica sought counseling at the Rape and Abuse Crisis Center. (2/28/05 Trans. p. 16, ll. 9-17).

Jessica testified that in December of 2001, following an argument, Christopher grabbed her by the throat, pushed her against the wall and lifted her up in the air, choking her until she passed out. (2/28/05 Trans. p. 31, ll. 10-13). Christopher admitted choking Jessica until she passed out. (Trans. p. 139, ll. 23-25; p. 140, ll. 1).

On January 4, 2002, Jessica called the authorities and informed them that Christopher had been threatening her with a pocket knife. (App. 59). Christopher's version of the incident was that he pulled the knife to clean his fingernails. (App. 59).

On January 6, 2002, Jessica went on a date with David, who is now her husband. Christopher called Jessica 6 or 7 times in a twenty minute time span on the evening of January 6, demanding that she give him a haircut. (2/28/05 Trans. p. 34, ll. 2-4). Jessica

offered to give him \$20 to get a haircut elsewhere. (2/28/05 Trans. p. 33, ll. 15-16). Christopher refused. (2/28/05 Trans. p. 33, ll. 19-22). Jessica eventually went to Christopher's home to give him a haircut. (2/28/05 Trans. p. 34, ll. 17). Jessica and Christopher argued about the fact that Jessica had been on a date with David. (2/28/05 Trans. p. 35, ll. 22-24). At one point during the argument, Christopher grabbed Jessica by the neck. (2/28/05 Trans. p. 37, ll. 11-12). Jessica had a scissors in her hand which she was using to cut Christopher's hair. (2/28/05 Trans. p. 37, ll. 11-12). The scissors struck Christopher. (2/28/05 Trans. p. 37, ll. 18-19). Jessica told Christopher she would take him to the emergency room. (2/28/05 Trans. p. 38, ll. 11-13). Christopher's response was that if she called David and broke up with him he would go to the hospital and tell the hospital staff and police that he had cut himself. (2/28/05 Trans. p. 38, ll. 14-16).

Jessica refused to break up with David. (2/28/05 Trans. p. 39, ll. 11-19). Accordingly, the West Fargo Police were contacted. (2/28/05 Trans. p. 40, ll. 21-22). A copy of the police report regarding this episode was received into evidence as exhibit number 7. (App. 45-52). Christopher conceded that during this period of time he was using not only marijuana but other drugs. (2/28/05 Trans. p. 175, ll. 24-25; p. 176, ll. 1-2). Jessica was charged criminally and eventually entered into a plea agreement, pursuant to which she pled guilty to assault, a misdemeanor. (App. 73-75). Following this episode Jessica received counseling at Valley Christian and went through an anger management program. (2/28/05 Trans p. 83, ll. 12-15).

The parties entered into a stipulation for a mutual disorderly conduct restraining order in 2002. (App. 83-85). A copy of the stipulation was received into evidence as exhibit 52. (App. 83-85).

Jessica married David on October 19, 2002. (Trans. p. 330, ll. 12-13). Jessica and David have a loving, committed relationship. (Trans. p. 331, ll. 11-13). Jessica and David have never had any domestic problems of any kind. (Trans. p. 330, ll. 20-25). Jessica's other two children, Jacy and Aleyna, also reside in the household. (Trans. p. 331, ll. 15-24). Justice appears happy and content in David and Jessica's home. (Supp. App. 21). Christopher admitted to the custody investigator that he feels Justice belongs in the same home with his siblings. (Supp. App. 21, 24, 26).

Following termination of Christopher's relationship with Jessica, Christopher began a romantic relationship with LaCota R. Domine ("LaCota"). (Trans. p. 263, ll. 20-21). LaCota testified that she resided with Christopher from January of 2004 to May of 2004. (Trans. p. 264, ll. 5-8). LaCota testified that she was the main caregiver for Justice during the time she was residing with Christopher. (Trans. p. 264, ll. 17-19). LaCota testified that during this period of time, she observed Christopher using drugs on a regular basis. (Trans. p. 267, ll. 3-17). LaCota also testified that Christopher was selling drugs during this time. (Trans. p. 267, ll. 23-25). LaCota testified that she suffered physical abuse from Christopher during the period of time they were dating. (Trans. p. 269, ll. 1-4). LaCota obtained a disorderly conduct restraining order against Christopher on June 22, 2004. (Trans. p. 270, ll. 11-13). A copy of the restraining order was received into evidence as exhibit 62. (App. 88-91).

Christopher used corporal punishment to discipline LaCota's one year old child. (Trans. p. 142, ll. 19-21). Social Services investigated the punishment. (Trans. p. 142, ll. 22-24). A copy of the report from Dunn County Social Services was received into evidence as exhibit 63. (Supp. App. 38-45). The report from Social Services evidenced that the one year old had welts on her hands and bruises on her buttocks from being slapped by Christopher. (Supp. App. 38-45).

On September 1, 2004, Durkee authored a report in which he addressed the statutory best interest factors. (Supp. App. 11-32). Durkee recommended that Jessica have sole physical custody, that the parties share joint legal custody and that Christopher receive visitation. (Supp. App. 29-30).

Following a three day trial, the trial court issued Findings of Fact, Conclusions of Law and Order for Judgment in which it concluded it was in Justice's best interests for Jessica to have primary physical custody. (App. 9-24).

## **LAW AND ARGUMENT**

### **I. The Trial Court's Award of Custody to Jessica is Supported by the Facts and the Law.**

#### **A. Standard of Review**

This court exercises a limited review of a child custody award. Stoppler v. Stoppler, 2001 ND 148, ¶ 7, 633 N.W.2d 142. A finding on custody is a finding of fact that will be upheld unless it is clearly erroneous. Schmidt v. Schmidt, 2003 ND 55, ¶ 5, 660 N.W.2d 196. A finding is not clearly erroneous unless it is induced by an erroneous view of the law, if there is no evidence to support it, or if the reviewing court is left with a

definite and firm conviction that a mistake has been made. Hentz v. Hentz, 2001 ND 69, ¶ 6, 624 N.W.2d 694. Just because this court might have viewed the facts differently does not entitle the court to reverse the trial court. Larson v. Larson, 234 N.W.2d 861, 865 (N.D. 1975). The trial court's findings are presumptively correct and this court is to view the evidence in a light most favorable to those findings. Schmidt, at ¶ 5.

This court generally does not retry custody issues or reassess witness credibility. Corbett v. Corbett, 2001 ND 113, ¶ 6, 628 N.W.2d 312. Furthermore this court has given great deference to the trial court's opportunity to observe the witnesses and determine credibility. Frieze v. Frieze, 2005 ND 53, ¶ 8, 692 N.W.2d 912.

**B. Finding of Fact #6 is not clearly erroneous.**

Christopher argues that the last three sentences of Finding of Fact #6 are unsupported by the evidence. Specifically, Christopher argues that the finding that the parties separated in October of 2001 is unsupported by the evidence. Even though Christopher argues that this finding is unsupported by the evidence, he concedes, in his brief, that the parties did separate in October of 2001. Christopher has not provided any support for his allegation that a portion of Finding of Fact #6 is clearly erroneous. Accordingly, this argument is without merit.

**C. Finding of Fact #12 is not clearly erroneous.**

Christopher claims that Finding of Fact #12 is clearly erroneous. In Finding of Fact #12, the trial court did not make a factual determination as to who choked Jessica with the telephone cord. Rather, the finding recites the differing version of the episode. The custody investigator, in his report, stated that Jessica related to him that Christopher

had choked her with a telephone cord. (Supp. App. 19). The trial court did not make a finding as to which version of this episode it accepted as accurate. Rather, the trial court simply noted there were conflicting accounts as to what occurred in reference to the telephone cord. Since the trial court's finding in reference to the telephone cord episode simply notes that there is a dispute as to what actually occurred and since there is evidence, in the record, to support the fact that the events surrounding this episode are disputed, Christopher's claim that Finding of Fact #12 is clearly erroneous must fail.

**D. Finding of Fact #13 is not clearly erroneous.**

Christopher argues that Finding of Fact #13 in which the trial court commented on an episode in which the police were called to investigate Jessica's claim that Christopher threatened her with a pocket knife is clearly erroneous.

Even though Christopher argues that Finding of Fact #13 is clearly erroneous, he concedes in his brief that "Everything stated in this finding is correct." Since, by Christopher's own admission, the finding is correct, Christopher's claim that the Finding is clearly erroneous must fail.

**E. Finding of Fact #14 is not clearly erroneous.**

Christopher claims that Finding of Fact #14 is clearly erroneous, by arguing that the haircut episode did not occur at his home. This argument is contrary to Christopher's own testimony. Christopher testified as follows:

- Q. Three days later you go to her place to get your hair cut.  
A. Well, it was our place.  
Q. But you went there to get your hair cut.  
A. Yes.  
Q. You weren't living there at the time.

A. I stayed there the night before, yes.

(Trans. p. 136, ll. 3-9).

Christopher next argues that Finding of Fact #14 is clearly erroneous because there is no evidence that Jessica refused to give him a haircut. Jessica testified as follows:

Q. Can you tell the Judge what happened on the haircut episode?

A. He dropped me off at my mom and dad's. I think it was - - I don't even remember. I think it was 6:30 or 7:00. He dropped me off at my mom's and asked me again about the haircut. And I said, you know, 'Here, just take \$20.00, go and get a haircut.' You know, I had this date. 'Forget it, or either that I'll do it tomorrow.'

(2/28/05 Trans. P. 33, ll. 2-17).

Since there is evidence to support the allegation that the haircut episode occurred at Christopher's home and that Jessica had refused to give him a haircut, Christopher's argument that Finding of Fact #14 is clearly erroneous is without merit.

**F. Finding of Fact #16 is not clearly erroneous.**

Christopher argues that the chronology of events contained in Finding of Fact #16 is unsupported by the evidence.

Christopher, in his brief, concedes that "It's true that both children were initially placed by Cass County with Jessica's mother." Christopher also concedes that the trial court adopted the chronology contained in the custody investigator's report, which was also summarized by Jessica in her Pretrial Brief. Since there is ample evidence to support the chronology of events contained in Finding of Fact #16, it is supported by the evidence and is not clearly erroneous.

**G. Finding of Fact #19 is not clearly erroneous.**

A trial court's findings on the best interests factors are presumptively correct and the evidence is to be viewed in a light most favorable to the findings. Schmidt, 2003 ND 55, ¶ 5, 624 N.W.2d 694. A court is not required to make a separate finding on each factor but must state the findings with sufficient specificity to allow this court to understand the basis for the decision. Neidviecky v. Neidviecky, 2003 ND 29, ¶4, 657 N.W.2d 255. Thus, the question in this case is whether there was sufficient specificity in the findings for this court to understand the trial court's ruling, and whether there was evidence to support each finding. The trial court in this case analyzed each of the best interest factors before concluding that it was in Justice's best interests to live with Jessica. (App. 12-17).

**1. The trial court's finding in reference to factor b is not clearly erroneous.**

The trial court concluded in reference to factor b that Christopher's use of inappropriate language and Christopher's willingness to drive a motor vehicle while his license was under suspension were inappropriate. Christopher argues these findings are unsupported by the record. Christopher's argument is contradicted by his own brief. Christopher, in his brief, concedes that "Chris did not deny that he used profane language or that he had driven a motor vehicle on some occasions while he was under suspension." The custody investigator noted in his report that Christopher "freely used the f-- word in Justice's presence." (Supp. App. 4). Christopher testified that even though he did not have a drivers license he still drove to visitation exchanges with Justice. (Trans. p. 131,

ll. 4-6). Since, not only the fact that Christopher used profane language in Justice's presence, but also the fact that he drove a motor vehicle with Justice in the car while under suspension are conceded, Christopher's argument that the trial court's finding in reference to these issues is unsupported by the record must fail.

**2. The trial court's finding in reference to factor c is not clearly erroneous.**

The trial court's finding that both Christopher and Jessica have relied upon others to assist in providing the basic necessities of life is supported by the record. Christopher testified as follows:

Q. What about weekends?

A. Weekends we usually - - for breakfast we'll usually go out to eat at the café. I'll take both kids out to eat. We'll usually go out to eat at the café for breakfast. Dinner, lunch, stuff like that we'll have at my mom's. She's a far better cook than I am. I wouldn't - - I don't know. I consider it cruel and unusual having him eat my cooking.

(Trans. P. 22, ll. 9-15).

Q. So most evenings you're at your mom's?

A. Right. For the majority, yeah, we'll eat - - we'll have our evening meals at my mom's, yes.

(Trans. P. 22, ll. 22-24).

Since the trial court's finding in reference to factor c is supported by Christopher's testimony, Christopher's argument that the trial court's finding in reference to factor c is not supported by the record must fail.

**3. The trial court's finding in reference to factor e is not clearly erroneous.**

The trial court's finding that Justice has a close relationship with Jadyne and Aleyna is supported by the evidence. Specifically, Jessica testified as follows:

- Q. Could you describe for the Court the relationship between the siblings?
- A. They have a great relationship, and even with the distance, I've tried to maintain a continuity between them.

(Trans. p. 337, ll. 24-25; p. 338, ll. 1-2)

Christopher told the custody investigator that "he would like to end the custody dispute by having Justice live with Jessica and Jadyne." (Supp. App. 13).

The custody investigator, in his report, stated: "Chris has told me that he is not seeking sole physical custody of Justice, primarily because he believes that Justice belongs with his siblings, Jadyne and Aleyna." (Supp. App. 26). The custody investigator further stated: "Chris was very open in telling me he would like Justice to physically live with Jessica and Jadyne, as they are a stable part of Justice's life." (Supp. App. 27).

Since the appellate court does not re-weigh the evidence and since there is evidence to support the trial court's conclusion in reference to factor k, Christopher's argument that factor k is clearly erroneous is without merit.

**4. The trial court's finding in reference to factor f is not clearly erroneous.**

Christopher concedes, in his brief, that the trial court correctly noted that he admitted to using marijuana, methamphetamine and other illegal drugs. Christopher also conceded in his brief that the trial court correctly found that he not only used drugs, but also sold drugs. Christopher testified that he began using marijuana in 1994 and that he used marijuana, which he classified as his drug of choice, on a daily basis. (Trans. p. 115,

ll. 8-9). Christopher testified that he used marijuana in the morning when he woke up and in the evening before he went to sleep. (Trans. p. 156, ll. 16-21). Christopher also testified that he used methamphetamine, cocaine, opium and LSD. (Trans. p. 115, ll. 4-5; p. 158, ll. 3-14). Christopher conceded that he not only used drugs, but also sold drugs. (Trans. p. 158, ll. 15-19, 22-24). Heavy drug use and drug dealing were factored in by the trial court in reaching its decision regarding the moral fitness of the parents. Accordingly, Christopher's argument that factor e is clearly erroneous is without merit.

**5. The trial court's finding in reference to factor h is not clearly erroneous.**

Christopher argues that the trial court's finding in reference to factor h is unsupported by the record. Specifically, Christopher argues that he, rather than Jessica, was primarily involved with furthering Justice's education. Christopher testified that Justice attended both Kindergarten and first grade in the Fargo-Moorhead area during periods of time he resided with Jessica. (Trans. p. 132, ll. 14-23).

The custody investigator, in his report, stated as follows:

However, Jessica was the primary caregiver, and at times the only caregiver, for Justice for the first 6-7 years of his life. That caregiving establishes a status quo for Justice living with and receiving care from his mother. It also represents continuity and consistency as far as where Justice lived and received care from his mother. It also represents continuity and consistency as far as where Justice lived and received care for almost 6 ½ years.

(Supp. App. 23)

Since there is significant evidence to support Jessica's involvement in Justice's education the trial court's finding in reference to factor h is not clearly erroneous.

**6. The trial court's finding in reference to factor j is not clearly erroneous.**

This Court addressed the issue of how heavy past drug use effects custody in Carver v. Miller, 1998 ND App 12, 585 N.W.2d 139. In Carver, the mother had a history of past heavy drug use. Carver, at ¶ 15. This court concluded this placed the parties' minor child in serious danger, even though Carver alleged she had been drug free for a period of time. In Carver the trial court concluded that the mother's history of exposing the child to a drug related atmosphere rendered the mother "unfit - pure and simple". Id. at ¶ 16. The trial court in Carver awarded custody to the father and the mother appealed. Id. at ¶ 1. On appeal the mother contended that the district court erred in awarding custody to the father since she had been a victim of domestic violence. Id.

In addressing this issue this Court in Carver noted that if the court finds credible evidence that domestic violence has occurred there exists a rebuttable presumption that the parent who has perpetrated domestic violence may not be awarded custody. Id. at ¶ 11-16. This presumption may be overcome by clear and convincing evidence. Id. This court explained that the perpetrator of domestic violence cannot be awarded custody of a child unless the other parent is found to be an unfit parent. Id. This court in Carver concluded that the mother's history of heavy drug use rendered her an unfit parent thereby overcoming the statutory presumption. Id.

The statutory presumption against awarding custody to a perpetrator of domestic violence ceases to exist when both parties are culpable of domestic violence. Krank v. Krank, 529 N.W.2d 844 (N.D. 1995). In Krank this court stated as follows:

Thus we believe a proper construction of the statute requires that if domestic violence has been committed by both parents, the trial court measure the amount and extent of domestic violence inflicted by both parents. If the amount and extent of domestic violence inflicted by one parent is significantly greater than that inflicted by the other, the statutory presumption against awarding custody to the perpetrator will apply only to the parent who has inflicted the greater domestic violence, and will not apply to the parent who has inflicted the lesser. However, if the trial court finds that the amount and extent of domestic violence inflicted by one parent is roughly proportional to the violence inflicted by the other parent, and both parents are otherwise found to be fit parents, the presumption against awarding custody to either perpetrating parent ceases to exist. In such cases the trial court is not bound by any presumption, but may consider the remaining custody best-interests factors in making its custody decision.

Id. at 850.

In this case Jessica testified that she had been a victim of domestic violence inflicted by Christopher since 1995. Jessica testified that the physical abuse involved Christopher punching her. (2/28/05 Trans. p. 25, ll. 16-25; p. 26, ll. 1-12). Jessica testified that the physical abuse involved Christopher shoving her. (2/28/05 Trans. p. 26, ll. 13-17). Jessica testified that the physical abuse involved Christopher pinching her. (2/28/05 Trans. p. 27, ll. 5-11). Jessica testified that the physical abuse involved Christopher snapping his finger against her head. (2/28/05 Trans. p. 27, ll. 12-20). Jessica testified that the physical abuse involved Christopher grabbing her hands and forcing her to hit herself. (2/28/05 Trans. p. 28, ll. 1-7). Jessica testified that the physical abuse involved Christopher choking her. (2/28/05 Trans. p. 30, ll. 18-22). Jessica stated that Christopher abused her emotionally which included degrading and demeaning

comments. (Supp. App. 19). Jessica stated that the verbal, physical and emotional abuse occurred in Justice's presence. (Supp. App. 12). Jessica sought counseling at the Rape and Abuse Crisis Center. (2/28/05 Trans. p. 16, ll. 9-17).

Jessica testified that in December of 2001, following an argument, Christopher grabbed her by the throat, pushed her against the wall and lifted her up in the air. (2/28/05 Trans. p. 31, ll. 10-13). He choked her until she passed out. (2/28/05 Trans. p. 31, ll. 13). Christopher admitted choking Jessica until she passed out. (Trans. p. 139, ll. 23-25; p. 140, ll. 1). Clearly the amount and extent of domestic violence inflicted by Christopher upon Jessica is significantly greater than that inflicted by Jessica upon Christopher. Therefore there is a statutory presumption that Christopher may not be awarded custody of Justice.

Under the holding in Krank, if the court determines that the domestic violence inflicted by both parents is essentially equal the presumption is also inapplicable. Krank, 529 N.W. 2d 844 (N.D. 1995). However, even if the court concludes that Jessica inflicted the greater amount of domestic violence upon Christopher thus triggering the statutory presumption, the presumption, in this case, is overcome, since, as in Carver, Christopher's significant history of heavy drug usage for a number of years which renders him an unfit parent.

Christopher testified that he began using marijuana in 1994 and that he used marijuana, which he classified as his drug of choice, on a daily basis. (Trans. p. 115, ll. 8-9). Christopher testified that he used marijuana in the morning when he woke up and in the evening before he went to sleep. (Trans. p. 156, ll. 16-21). Christopher also testified

that he used methamphetamine, cocaine, opium and LSD. (Trans. p. 115, ll. 4-5; p. 158, ll. 3-14). Christopher's significant history of heavy drug use and drug dealing renders him an unfit parent.

**7. The trial court's finding in reference to factor k is not clearly erroneous.**

Christopher argues that the trial court's finding in reference to factor k, that Justice had a close relationship with his sister Jady, is not supported by the record. Even though Christopher makes this argument, he concedes, in his brief, that he made statements to the custody investigator and to Jessica that Justice should be with his sibling Jady. Since the Appellate Court does not re-weigh the evidence and since there is ample evidence to support the trial court's conclusion in reference to best interest factor k, Christopher's argument that factor k is clearly erroneous is without merit.

**H. Finding of Fact #20 is not clearly erroneous.**

Christopher concedes in his brief that the trial court found six of the statutory best interest factors favored neither party, five factors favored Jessica and only one factor favored him. In Finding of Fact #20, the trial court weighed the evidence and concluded that it is in Justice's best interests that his physical custody be awarded to Jessica. Since the Appellate Court does not re-weigh the evidence, Christopher's allegation that Finding of Fact #20 is clearly erroneous is without merit.

**I. Conclusion of Law #6 is supported by the Findings of Fact.**

Christopher does not argue that Conclusion of Law #6, which concluded Jessica should have custody of Justice, is unsupported by the Findings of Fact. Rather,

Christopher argues that there are mistakes or errors in the Findings of Fact which support the trial court's conclusion that Jessica be awarded sole physical custody of Justice. Since the Appellate Court does not re-weigh the evidence and since there is ample evidence to support the trial court's conclusion in reference to custody, Christopher's argument that Conclusion of Law #6 is not supported by the Findings of Fact is without merit.

**J. The trial court did address the issue concerning evidence of domestic violence.**

Christopher argues that the trial court erred as a matter of law in not considering evidence of domestic violence. Christopher's argument is without merit. The trial court spent a significant amount of time addressing the numerous episodes of domestic violence involving the parties. (App. 15-16). Since the Appellate Court does not re-weigh the evidence and since the trial court did address the issue of domestic violence, Christopher's argument that the trial court erred as a matter of law in not considering evidence of domestic violence is without merit.

**CONCLUSION**

The trial court in this matter carefully analyzed the best interest factors which apply to a custody decision. The trial court carefully weighed the evidence and reached the conclusion that it was in the minor child's best interests to be in Jessica's custody. Jessica respectfully requests that the trial court's decision be, in all respects, affirmed.

Dated this 26th day of January, 2006.

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