In the Supreme Court
State of North Dakota

Supreme Court No. 2018- 0388
Stark County District Court No. 45-2013-DM-00253

Nathan Richard Miles,
Plaintiff/Appellee,

vs.

Sierra Marie Holznagel
Defendant/Appellant

and

State of North Dakota
Statutory Real Party in Interest

Appeal from the Memorandum Opinion on Motion to Amend Primary Residential Responsibility dated March 21, 2018; Order Granting Change Primary Residential Responsibility dated April 5, 2018; and Memorandum Opinion and Order Denying Motion for Reconsideration or In the Alternative a New Trial dated August 31, 2018, all issued by the Honorable James D. Gion, District Court Judge, Stark County, South West Judicial District

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

[¶1] Whether the Stark County District Court ("District Court") incorrectly found that Nathan Miles, Plaintiff/Appellee, ("Nathan") had established from his moving papers and supporting affidavits, both of which were reliant almost exclusively on hearsay, a prima facie case of a material change in circumstances.

[¶2] Whether the District Court was clearly erroneous when it determined, after an evidentiary hearing, that Nathan had proven a material change in circumstances.

[¶3] Whether the District Court was clearly erroneous in its statement of the facts, application of the law, and conclusions as to the best interest factors.

[¶4] Whether the District Court abused its discretion when it scheduled the hearing for only a half day.

[¶5] Whether the District Court abused its discretion when it denied Sierra Marie Holznagel, *n.k.a* Sierra Shellman's, Defendant/Appellant, ("Sierra") motion for a continuance.

[¶6] Whether the District Court abused its discretion when it determined prior to the beginning of the evidentiary hearing that Nathan was allowed to call witnesses contrary to its own previous order.

[¶7] Whether the District Court abused its discretion when it denied Sierra's timely Motion for Reconsideration and Amendment or, in the Alternative, a New Trial ("Reconsideration Motion").

STATEMENT OF THE CASE

[¶8] This appeal arises out of an adjudication of a motion for modification of primary residential responsibility of the minor child ALM by Nathan Richard Miles,

Plaintiff/Appellee, ("Nathan"), ALM's biological father.

[¶9] Sierra Marie Holznagel, *n.k.a* Sierra Shellman, Defendant/Appellant, ("Sierra") was initially awarded primary residential responsibility of the ALM by the Stark County District Court via a judgment entered on September 13, 2013 in case number 45-2012-DM-00059. The case was subsequently reassigned to case number 45-2013-DM-000253.

[¶10] On October 18, 2017, Nathan motioned the District Court for an emergency ex parte interim order granting Nathan 100% parenting time and Sierra supervised parenting time on the basis that ALM was in imminent danger and an order was required to protect ALM. Index #25. Nathan's motion was premised on the allegation that September 27, 2017 ALM had arrived at school 50 minutes late after walking himself to school and that he was inappropriately dressed for the weather. *Id.*

[¶11] Nathan simultaneously filed a motion requesting modification of the primary residential responsibility. Appx. 94.

[¶12] Despite Nathan himself acknowledging in his brief in support of the ex parte order that "[...] primary residential responsibility cannot be granted via an ex parte order [...]," Index #26, the District Court granted the Nathan's motion on October 20, 2017. Appx. 95. Said order was silent on whether Sierra would have parenting time with ALM.

[¶13] Nathan filed a proposed amended ex parte order on October 23, 2017 which added an unspecified amount of supervised parenting time. Index #45. The proposed order was filed sans any accompanying documents and the record is devoid as to whether Sierra was actually served. The District Court adopted the order to on October 24, 2017 without a motion by Nathan, and no reasoning was provided for the modification. Appx. 96.

[¶14] On November 8, 2018, Sierra filed a Motion to Vacate Amended Emergency Interim Order and supporting brief, arguing that the District Court lacked the authority under Rule 8.2 to enter an interim order amending primary residential responsibility. Index #121, 122. On November 13, 2017, the District Court rescinded the emergency interim order, stating "[t]he Court accepts its share of the responsibility in issuing the order contrary to Rule 8.2(a)(8), but agrees with Sierra that the Amended Emergency Interim Order, and the initial Emergency Interim Order, were improvidently granted." Appx. 149.

[¶15] On December 27, 2017 the District Court granted Scott Rose's motion to withdraw as Sierra's counsel. Appx. 195.

[¶16] On January 1, 2018, the District Court entered a memorandum opinion finding that Nathan had established a primary facie case that there had been a material change in circumstances had occurred, justifying a hearing on the merits. Appx. 240. Said opinions is completely silent as to the basis or facts the District Court relied in reaching this conclusion. *Id.*

[¶17] On January 9, 2018, the District Court issued a Notice of Hearing setting the matter for February 26, 2018 as a one day hearing at 1:30pm Mountain Time. Appx. 198. The Notice of Hearing expressly stated "[u]nless this Court otherwise orders, evidence either in support of, or in opposition to the relief requested must be presented by affidavit." *Id.*

[¶18] On February 12, 2018, Mary DePuydt filed a notice of appearance for Sierra, Appx. 202, along with a motion for continuance and supporting brief, Index #265-66. The District Court denied Sierra's motion for continuance on February 20, 2018 with the single

sentence added to the end of Sierra's motion that reads in full "[t]he Defendant's Motion is denied." Appx. 203.

[¶19] Nathan raised the issue of his intent to call witnesses for whom he did not have affidavits for the first time at the hearing. Hearing Trans. at 6-13. Despite its order and over the objection of Sierra, the District Court permitted testimony from several of these individuals. *Id.* at 12.

[¶20] On March 21, 2018, the District Court issued a memorandum opinion granting Nathan's motion for modification of primary residential responsibility and awarding Sierra parenting time. Appx. 221-28.

[¶21] In the memorandum opinion, the District Court addressed a material change of circumstances with specificity for the first time, pointing to the September 26, 2107 walking incident, that Sierra has married and that ALM now has half siblings. Appx. 225

[¶22] After finding that a material change of circumstance, the District Court moved to a determination on the primary interest factors and concluded that factors (b) (d), (e), (m), favored or strongly favored Nathan; factors (f), (g), and (h) favored neither party; factors (i), (j), and (l) did not apply; and did not address factors (a), (c), and (k). Appx. 226-28.

[¶23] On May 3, 2018, Sierra filed the Reconsideration Motion, along with a supporting brief. Index #315-16.

[¶24] The District Court denied the Consideration Motion in its entirety by a memorandum opinion dated over three months later, i.e. August 31, 2018. Appx. 231-36.

STATEMENT OF THE FACTS

[¶25] ALM is a minor male born 2011. Sierra had been ALM's primary caretaker from birth, until the District Court's erroneous ex parte motion. Appx. 116. Sierra and Nathan were never married. *Id.*

[¶26] At the time of Nathan's motion for modification of primary residential responsibility, Sierra and ALM resided in Glen Ullin, North Dakota, in a house owned by her and her husband, Jonathan Shellman. ALM resided with two half-brothers, with whom he had a close and meaningful relationship. Appx. 123-24. ALM was a first grader at Glen Ullin Public School. Appx. 147-48. Nathan resided at an apartment in Dickinson, ND, along with his fiancé Lacy Martin. Appx. 187.

[¶27] ALM has been diagnosed with Keratosis Pilaris, a skin disorder characterized by small, pointed pimples that usually appear on the upper arms, thighs, and buttocks. Appx. 215. The condition typically worsens in the winter, but is harmless. *Id.* There is no special treatment for Keratosis Pilaris. *Id.*

LAW AND ARGUMENT

I. JURISDICTIONAL STATEMENT

[¶28] Sierra timely filed a notice of appeal in accordance with Rule 4 of the North Dakota Rules of Appellate Procedure.

[¶29] The District Court had jurisdiction to hear this matter under N.D.C.C. § 27-05-06(2). This Court has jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 28-27-01.

II. NATHAN FAILED TO ESTABLISH A PRIMA FACIE CASE JUSTIFYING MODIFICATION AND, CONSEQUENTIALLY, NO HEARING ON THE MERITS SHOULD HAVE BEEN PERMITTED.

a. Standard of Review.

[¶30] Whether a party has established a prima facie case for a change of primary residential responsibility is a question of law which this Court reviews de novo. E.g., *Sweeney v. Kirby*, 2013 ND 9, ¶ 3, 826 N.W.2d 330; *Thompson v. Thompson*, 2012 ND 15, ¶ 6, 809 N.W.2d 331; *Wolt v. Wolt*, 2011 ND 170, ¶ 9, 803 N.W.2d 534. "The term "de novo" has in law a well defined meaning. It means fresh; anew. [...] A second time." *In re Heart Irrigation Dist.*, 49 N.W.2d 217, 225 (N.D. 1951) (internal citations omitted).

b. Hearsay is Not a Permissible Basis For a Finding of a Prima Facie Case.

[¶31] "A material change in circumstances is defined as important new facts that were unknown at the time of the initial custody decree or initial parenting time order. *E.g. Wolt v. Wolt*, 2011 ND 170 ¶19, *803 N.W.2d 534.*

[¶32] "A prima facie case is a bare minimum and requires facts which, if proved at an evidentiary hearing, would support a change of custody that could be affirmed if appealed." *Schumacker v. Schumacker*, 2011 ND 75 ¶7, 2011 ND 75 (citations omitted). "Allegations alone do not establish prima facie evidence requiring an evidentiary hearing. Affidavits must be competent in order to establish a prima facie case; competence usually requires that the witness have first-hand knowledge, and witnesses are generally not competent to testify to what they suspect the facts are. Affidavits are not competent when they fail to show a basis of actual personal knowledge or if they state conclusions without the support of evidentiary facts." *Frueh v. Frueh*, 2008 ND 26 ¶7, 745 N.W.2d 362 (citing *Lagro v.*

Lagro, 2005 ND 151 ¶17, 703 N.W.2d 322)(internal citations omitted); *also, e.g.*, *Schumacker v. Schumacker*; 2011 ND 75 ¶7 796 N.W.2d 636; *Joyce v. Joyce*, 2010 ND 199, ¶ 13, 789 N.W.2d 560; *Green v. Green*, 2009 ND 162, ¶ 7, 772 N.W.2d 612.

c. Only Those Affidavits and Exhibits Filed Prior to The Brief Deadlines May Be Considered for A Prima Facie Determination.

[¶33] "A party seeking modification of an order concerning primary residential responsibility shall serve and file moving papers and supporting affidavits [...]. The court shall consider the motion on briefs and without oral argument or evidentiary hearing and shall deny the motion unless the court finds the moving party has established a prima facie case justifying a modification." N.D.C.C. § 14-09-06.6(4). Upon the filing of briefs, or upon expiration of the time for filing, a motion for modification of primary residential responsibility is considered submitted to the court. *See* N.D.R.Ct 3.2(a)(1).

d. The Evidence Was Devoid of Sufficient Non-Hearsay Evidence For a Finding of a Prima Facie Material Change In Circumstances and, Therefore, The District Court Errored In Finding That a Prima Facie Case Had Been Established and Setting the Matter for a Full Evidentiary Hearing on the Merits.

[¶34] In support of his motion for modification of primary residential responsibility, Nathan offered his own affidavit, and three exhibits, namely, a Morton County criminal complaint, an affidavit by Morton County Deputy Richard Olson, and a text message sent by Sierra. While subsequent documents and affidavits were submitted into the case, these documents could not be considered by the District Court as they were all submitted after the expiration of Nathan's reply to Sierra's response to his motion for modification on November 14, 2017, at which point the matter was under advisement.

[¶35] Each of the documents provided by Nathan in support of his motion are either completely dependent on hearsay or lack reliability and, as a matter of law, on either

account not competent for a prima facie showing.

[¶36] The criminal complaint alleges illegal acts by Sierra. Appx. 86-88. The author, Rikki Berreth, makes no claim of being present during the alleged events nor makes any suggestion of firsthand knowledge or concrete facts as on which the conclusions were based. *Id.* Furthermore, a criminal complaint is only an allegation of suspected facts without any adjudication, and therefore, lacks the quality of concreteness of fact required for a prima facie case. For these reasons, the complaint inherently provides no basis for a finding of a prima facie case.

[¶37] Deputy Richard Olson's affidavit, Appx. 89-81, is riddled with incompetent evidence and hearsay statements. A honest and zealous dissection of the affidavit provides that only the following attestations are non-hearsay and based on firsthand knowledge and, therefore, competent for a prima facie determination:

1. That affiant used the internet to looked up the temperature records via an unspecified website on Wednesday, September 27th, 2017;
2. The affiant used the internet to look up the distance between Nathan's address and Glen Ullin School via an unspecified website on Wednesday, September 27th, 2017; and
3. That the affiant went to Glen Ullin School on Wednesday, September 27th, 2017.

Looking solely at competent evidence, none of the attestations individually nor in the aggregate is an important new fact relevant to modification of primary responsibility. For that reason, this affidavit does nothing to establish a prima facie case for material change in circumstances.

[¶38] Sierra's text message reads "[w]e choose when and if our kids walk to school. When we are done fighting these absurd charges, we will be filing harassment charges. Also either you can explain to [ALM] what is going on, or we can. I am done with your

games." Appx. 92. On its face, there is nothing in this message or accompanying photo which is an important new fact as each parent is authorized to make decisions regarding the day-to-day care and control of the child while the child resided with that parent.

[¶39] Nathan's Affidavit, Appx. 82-86, is almost entirely composed of hearsay and, likewise, must first be dissected into before analysis as to whether a prima facie case has been met. The following attestations are the only non-hearsay and competent statements contained in the affidavit:

> 1. That the Nathan spoke with Deputy Olson on Wednesday, September 27, 2017;
> 2. That Sierra was charged with some criminal offenses; and
> 3. The Nathan received the text message found in Exhibit C.

When looking at solely the non-hearsay and competent evidence in Nathan's affidavit, it is, likewise woefully devoid of any basis for finding a material change of circumstance.

[¶40] Not only does a second look at this evidence show the that the prima facie requirement simply was not met, but the District Court's Memorandum Opinion on Motion to Amend Primary Residential Responsibility and Memorandum Opinion Denying Motion for Reconsideration or in the Alternative a New Trial tacitly concede this point. None of the basis on which this Court found a material change in circumstances in the former memorandum opinion can be found in the initial filings by Nathan, even if the incompetent evidence were (inappropriately) considered. This Court, instead, relies on evidence of a material change which was presented subsequent to its finding of a prima facie case, namely:

> 1. That Nathan's employment has changed to allow for a regular schedule[1]

[1]Which is untrue, as discussed later in the brief.

which was first asserted in ¶18 of Plaintiff's third affidavit filed December 18, 2017, Appx. 188;

2. That Sierra has remarried and ALM now has half siblings was first raised in ¶19 Nathan's third affidavit, *Id.*; and
3. Alleged exposure of ALM to "deleterious weather conditions" assumedly referring to alleged events on February 7, 2018, which was first raised in Plaintiff's fourth affidavit filed on February 12, 2018, Appx. 198-200.

In responding to Sierrra raising of this issue in her Reconsideration Motion, the District Court still declined to point to any basis in the initial pleadings, stating vaguely that "the affidavits contained enough evidence to warrant the matter to continue to an evidentiary hearing, and the prima facie case was established." Appx. 233.

[¶41] Because this issue is reviewed De Novo, this Court has the opportunity to take a fresh look at the evidence and make an independent determination as to whether Nathan had met his prima facie obligation. Because Nathan has clearly failed to do so, this Court should reverse and remand to the District Court with directions for a findings that no prima facie case has been established.

III. NATHAN FAILED TO ESTABLISH A MATERIAL CHANGE IN CIRCUMSTANCES AND, THEREFORE, IT WAS INAPPROPRIATE FOR THE DISTRICT COURT TO MODIFY PRIMARY RESIDENTIAL RESPONSIBILITY.

a. Standard of Review

[¶42] Whether a material change in circumstances has occurred is a finding of fact, subject to the clearly erroneous standard of review" *Siewert v. Siewert*, 2008 ND 221, ¶ 16, 758 N.W.2d 691. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after review of the entire record, we are left with a definite and firm conviction a mistake has been made." *Schulte v. Kramer*, 2012 ND 163, ¶ 5, 820 N.W.2d 318 (citing *Leverson v. Leverson*, 2011 ND 158, ¶ 7, 801 N.W.2d 740" "In determining whether a finding is clearly erroneous the rule

requires that due regard be given to the opportunity of the trial court to judge the credibility of the witnesses." *Kleinjan v. Knutson*, 207 N.W.2d 247, 255-6 (N.D. 1973).

b. A Material Change in Circumstances Sufficient to Support a Modification of Primary Residential Responsibility Requires a Showing of More Than Just Some Fact Has Changed Since the Date of the Initial Order.

[¶43] A material change in circumstances is defined as important new facts that were unknown at the time of the initial custody decree.'" *Ibach v. Zacher*, 2006 ND 244, ¶8, 724 N.W.2d 165. "A 'material change in circumstances' sufficient to amend a [parenting time] order is similar to, but is distinct from, a 'material change in circumstances' sufficient to change [primary residential responsibility]." *Young v. Young*, 2008 ND 55, ¶ 13, 746 N.W.2d 153. (finding that a change of employment could be sufficient to constitute a material change in circumstances for modifying parenting time) *C.f. Ritter v. Ritter* 2016 ND 16 ¶ 13 873 N.W.2d 899 (holding when the parties stipulated that one parent be awarded primary residential responsibility expressly because the other parent worked for an out-of-state company and was often unavailable, a change in work schedule constituted a material change in circumstances). *See, also, Dufner v. Trottier*, 2010 ND 31 ¶ 13, 778 N.W.2d 586 (stating that a finding of material change of circumstances for parenting time does not equate an automatic finding of material change of circumstances for primary residential responsibility.) Improvements in the life of a noncustodial parent seeking to modify a child custody order "would not, by themselves, constitute a significant change in circumstances." *Kelly v. Kelly*, 2002 ND 37, ¶20, 640 N.W.2d 38.

[¶44] "A material change of circumstances can occur if a child's present environment may endanger the child's physical or emotional health or impair the child's emotional development." *Glass v. Glass*, 2011 ND 145, ¶5, 800 N.W.2d 691 (citations omitted)

(finding that evidence of domestic violence between a custodial parent and her new husband, an incident were one of the step-children residing with them on account of the marriage pointed a gun at a biological child, and an investigation by the police finding the same step-child had multiple firearms and ammunition in his room along with narcotics, constituted a material change in circumstances).

c. *The District Court's Findings Relative to a Material Change In Circumstances Are Either Inconsistent With the Record or Inherently Insufficient for a Conclusion that a Material Change Has Occurred.*

[¶45] In making a determination of material change of circumstances, the District Court points to three changes, namely, that Nathan now has normal working hours, that Sierra is remarried resulting in ALM having a step-father and step-siblings, and that ALM was exposed to "deleterious weather conditions." All three of these are individually and in the aggregate insufficient to show a material change in circumstances. Furthermore, when this was argued to the District Court in Sierra's Motion for Reconsideration, the District Court declined to provide further basis for its findings, stating only "As stated in the Memorandum Opinion, the Court found that there was a material change in circumstances, based upon the facts established at the hearing" and adds reference to "three situations involving weather related incidents."

[¶46] For the reasons outlined below, this Court should reverse and remand to the District Court.

1. *Nathan's Change of Work Schedule Is Not a Material Change of Circumstances.*

[¶47] Firstly, the District Court points to changes of Nathan's work schedule as a material change in circumstance. In support thereof, the Court expressly relies on *Young v. Young*, supra, however, *Young* does not address nor support a finding of material change of

circumstances for primary residential responsibility and, therefore, the District Court's reliance on *Young* was clearly erroneous. *Young* addresses solely modification of parenting time, though it does touch briefly on the issue and state as dicta that although both a change in parenting time and primary residential responsibility require a showing of a material change in circumstances, the standards are not identical nor the results interchangeable. Instead, the District Court should have relied on *Ritter v. Ritter*, which held that when the parties stipulated to custody and an express consideration in that stipulation was the father's sporadic work schedule and how that schedule would interfere with primary residential responsibility, then a change of work schedule can constitute a material change. *Ritter* appropriately limits changes in work schedule to being material changes in very specific cases where the outcome of the case was so inextricably tied to the other parent's work schedule that it was, in and of itself, dispositive.

[¶48] In the immediate case, the initial primary residential responsibility determination was determined after a trial held on July 26, 2013. Nathan has provided no basis for believing, nor does it appear that the District Court concluded, that the outcome of that trial would have been different if Nathan had had a more consistent work schedule at the time of trial. Alternatively, a review of this the 2013 findings of fact makes it clear that this fact was of minor, if any, importance in the court's determination. Appx. 11-37. Absent such a finding, Nathan's change in work schedule, by definition, cannot constitute a material change in circumstances because his irregular schedule was facially was never a material fact in the initial determination.

[¶49] Going further, Nathan's claim of a normalized work schedule facially contradicts his previous representations to the District Court and, therefore, is dubious at best. Nathan

attested to this Court in his third affidavit that he is "no longer working the long hours [he] used to and have weekends off." Appx. 188. Nathan neither states that he had a change of job title nor job description and presents nothing in the way of evidence to support his allegedly regular work schedule even though doing so would not have been onerous. Alternatively, a sworn financial affidavit by Nathan in dated April 2017 was filed earlier into the case and which outlined with specificity his work hours for every month over the last 24 months. Appx. 69. Nathan's average overtime during that period was far from nominal; Nathan worked an average of 48.625 hours per month of overtime with a range of 8 to 124 hours per month. *See, Id.* Nathan further indicated on the same affidavit that he intends to continue to have similar overtime for the next 12 months and that in the last 36 six months he has received unemployment compensation. *Id.* In essence, Nathan's financial affidavit irrefutably establishes that there is absolutely nothing consistent about Nathan's work schedule despite whatever favorable sounding vague words he may use to categorize it.

[¶50] As a consequence of the above, the District Court clearly was erroneous in concluding that case law supported a finding that a change in Nathan's work schedule could constitute a material change in circumstances and, furthermore, errored in fact in concluding that Nathan did in fact have a regular work schedule.

2. ALM Having Half Siblings is Not a Material Change In Circumstances.

[¶51] The District Court was clearly erroneous when it concluded that Sierra's familial situation was a material change of circumstances since the last adjudication in 2013. At the time of the 2013 order on primary residential responsibility, Sierra and her fiancé were already in a committed relationship and living together and on ALM's two half-brothers had already been born. Appx. 18. Nathan argues that the change in Sierra's marital status

and addition of half-siblings is both a change and is material with any substantiation or rational basis. The District Court erroneously followed suit, either not noticing in the record that Sierra was engaged to her now husband and that ALM was already residing with a half-sibling at that time at the time of the 2013 order, or, alternatively, concluding materiality without a factual basis.

3. *The Singular Instances of ALM Walking to School and the Door to the Home Being Locked When the He Arrived Are Not Evidence of a Material Change in Circumstances.*

[¶52] It is unrefuted that on September 26, 2017, ALM walked himself to school. The Court describes ALM in being clad only in a sport coat without a shirt and concludes that he was "exposed to deleterious weather conditions." Appex. 225. This depiction, however, is not supported evidence actually presented to the District Court. The only person who testified as to having personal knowledge of ALM's full attire on September 26, 2017 was Sierra, who stated that he returned home that day wearing one of his sweatshirts over his sportscoat. Hearing Trans. at 62, 63.[2] Furthermore, Principal John Barry testified that there are children in ALM's age group that walk to school. Hearing Trans. at 41. Since that event, Sierra has taken additional precautions. The District Court clearly errored when disregarding these facts and adopted instead, a regurgitation of Nathan's flavorful language.

[2] Ms. Turcotte, ALM's teacher, did not testify whether she saw ALM immediately upon arrival or made any effort to check for additional clothing. Principal John Barry stated he had no personal knowledge of whether or not ALM was wearing a winter coat. Hearing Trans. at 43. Deputy Richard Olson stated the entirely of his knowledge was from Mr. Barry, Hearing Trans. at 19-20, but stated that Sierra had told him that ALM was wearing sufficient clothing and was his sweatshirt when he arrived home that day, Hearing Trans. at 22.

[¶53] It is unrefuted that on February 26, 2018, the door to the family home was locked when ALM was dropped off from school by the bus, however, the District Court again made findings that hyperbolized the severity of the events beyond what the evidence would allow. The school protocol is for the bus to wait and not to leave until the child gets in or returns to the bus, Hearing Trans. at 155, which the bus in fact did do, Hearing Trans. at 152. The bus would not have left without ALM entering the home. Hearing Trans. at 153. Furthermore, the delay between ALM arriving and the door being unlocked was a couple of minutes. Hearing Trans. at 152. This entire event occurred because, unbeknownst to Sierra, her 2-year old daughter had locked the door while she was taking a shower. Hearing Trans. 68.

[¶54] On one additional occasion sometime in the winter of 2016, ALM was given a ride back to the school because he was locked out of the home, but neither Party provided any significant detail regarding this event other than stating that Nathan was called by the school on account of the event.

[¶55] In addition to the hyperbolization of the details, the District Court also errored in its understanding of the time frame. The District described the three events in its memorandum opinion as occurring within "a relatively short period of time," however, these three events occurred over a period of 15 months.

[¶56] Unsurprisingly, the above errors lead the District Court to conclude that the facts "indicate a deterioration in the level of care provided by [Sierra]." The totality of the evidence, however, does not allow for that conclusion. While not ideal, these events are not outside of the bounds of the parental error and do not demonstrate a change in the

essential and environmental factors experienced by ALM. For these reasons, the District Court was clearly erroneous.

IV. THE DISTRICT COURT OVERLOOKED SIGNIFICANT FACTS IN THE BEST INTEREST OF THE CHILD DETERMINATION WHICH RESULTED IN AN INCORRECT FINDINGS OF FACT AND CONCLUSIONS OF LAW.

a. Standard of Review.

[¶57] A district court's decision whether to change custody is a finding of fact subject to the clearly erroneous standard of review. *Sweeney v. Sweeney*, 2002 ND 206, P10, 654 N.W.2d 407.

b. The District Court Inexplicably Appears to Have Treated Nathan Deferentially in Both the Facts Considered and The Interpretation of Those Facts, Resulting in Clearly Erroneous Findings in Nathan's Favor.

[¶58] When modifying primary residential responsibility, the court must account for two additional considerations:

> First, the best interests of the child factors must be gauged against the backdrop of the stability of the child's relationship with the custodial parent, because that stability is the primary concern in a change of custody proceeding. Second, after balancing the child's best interests and stability with the custodial parent, the trial court must conclude that a change in the status quo is required. A child is presumed to be better off with the custodial parent, and close calls should be resolved in favor of continuing custody. A change should only be made when the reasons for transferring custody substantially outweigh the child's stability with the custodial parent.

Vining v. Renton, 2012 ND 86, ¶ 17, 816 N.W.2d 63 (quotations omitted).

[¶59] "Although the district court is neither required to make a separate finding on each best interest factor nor to address each minute detail presented in the evidence, the court may not wholly ignore and fail to acknowledge or explain significant evidence clearly favoring one party." *Law v. Whittet*, 2014 ND 69, ¶ 9, 844 N.W.2d 885.

1. Factor (b) Clearly Favors Sierra and Not Nathan.

[¶60] The District Court concluded that both parents are able to provide adequate care for ALM, but questioned "Sierra's ability to provide a safe environment for ALM related to the weather related incidents. Being exposed to winter weather in February in North Dakota is not something one can dismiss as the responsibility of a two-year old." App. 226. In making this finding, the Court makes errors in four non-negligible ways.

[¶61] Firstly, the District Court entirely ignored the fact that Nathan forward any evidence (other than vague blanket statements) to establish his ability to provide for ALM. Despite this marked lack of evidence, the District Court concluded that Nathan is at least equally able to provide for ALM. The only evidence pertinent to Nathan's ability, however, establishes the contrary to be true. In his third affidavit, Nathan, states that used to own a home but now lives in an apartment, and, furthermore that he has had to push back his wedding on account of not having sufficient money "*partially* as a result of the extent of this court case." Appex. 188. In essence, the only evidence of Nathans ability establishes that he does not have the finances or financial prudence to retain ownership of a house and has other unspecified financial conditions and debts that prevent him from following through with his wedding. Consequentially, all evidence establishes that Nathan is clearly not as able to provide for ALM as Sierra, who owns her own home and does not have unexplained financial issues.

[¶62] Secondly, as discussed above, the District Court summarily conflated a few temporally spaced incidents of unideal parenting with a fully evidenced pattern of behavior which puts ALM at significant risk and inexplicably entirely ignored Sierra's statements as to changes made.

[¶63] Thirdly, this Court conflates questioning the ability of one parent to provide

adequate care with finding that a parent is unable to provide adequate care for the child. An inkling or suspicion of a fact is a far stretch from determining a fact is supported by the preponderance of the evidence. The District Court, without any reason, entirely ignored the affidavit of E.G., an individual who had recently spent significant time with ALM and Sierra in their home, App. 207-10, and, instead, supplants E.G.'s specific facts and experience with the District Court's conjectures.

[¶64] Fourthly, this Court ignores that Nathan has shown disregard for ALM's health. Nathan was entirely unaware of ALM's keratosis pilaris diagnosis and the resulting symptoms, for which he was first diagnosed with in November of 2013 and his fiancé had brought paperwork home describing. Hearing Trans. at 93-94. Furthermore, despite his rampant insistence that ALM has serious skin rashes, he has never brought ALM to the doctor. Hearing Trans. at 92. Alternatively, he has jumped immediately to vocally blaming Sierra, convincing his family members that Sierra was harming ALM, and telling the District Court the same. Appx. 183 Inexplicably, District Court did not find this maliciousness and neglect to be at off of interest in determining Nathan's abilities as a parent.

2. *Factor (d) favors Sierra and Not Nathan.*

[¶65] The District Court again showed Nathan inexplicable deference in its consideration of this factor. Nathan failed to provide any evidence whatsoever regarding the sufficiency and stability of his home, and, regardless of the marked lack of evidence on this factor, this Court concludes that the Nathan's home is at least as stable as the Sierra's. Furthermore, the District Court without explanation or justification entirely ignores each of the significant explicit components of this factor that favor Sierra. ALM has lived in Glenn Ullin for five years, i.e. since he was 2 years old, and has attended school there all

his life. ALM has significant relationships with his half-siblings as evidenced by various affidavits provided by Sierra. *E.g.* Appx. 8, 207-10. With the exception of the District Court's erroneous ex parte custody order, ALM had never lived with Nathan at any point in time. Yet, the Court never addressed any of these facts. Both holding Nathan to no evidentiary standard and ignoring ALM's life-long residence with Sierra and tenure in Glen Ullin were clearly erroneous and, furthermore, resulted in an erroneous determination that this factor favored Nathan.

3. Factor (e) Favors Neither Party, and Not Nathan.

[¶66] After the erroneously issued emergency interim order awarding Nathan with interim custody of ALM, Nathan unjustly prevented and impeded Sierra's contact with ALM by refusing to allow Sierra to speak to ALM on the phone for three days after taking custody. Appx. 123. Furthermore, even after the order was amended to allow for supervised visitation, Nathan denied visitation for five days and, when finally allowed, limited the visitation to 30 minutes. *Id.* For the two week period following having ALM removed from her care Sierra allowed Nathan only two short phone calls with ALM. *Id.* Based on the fact that Nathan demonstrated interference with Sierra's communications with ALM immediately after taking custody, both parties have room for improvement, and the District Court errored in finding that this factor favored Nathan.

4. The District Court Inappropriately Applied Factor (m) Which Favors Neither Party and Not Nathan.

[¶67] Factor (m) is intended for case-specific factors which could not be effectively contemplated by congress. See, e.g. *Hageman v. Hageman*, 2013 ND 29, ¶¶ 35-38, 827 N.W.2d 23; *Deyle v. Deyle*, 2012 ND 248 ¶ 15, 825 N.W.2d 245 (holding that it was an appropriate application of factor (m) to consider expressly contemplated future moves from

the community by one parent.

[¶68] The District Court considered applied factor (m) to whether it was "impressed" by the Party. Factor (m) is not, however, an opportunity for the Court to express whether the Court found a party to be personally likable.

[¶69] If the District Court meant impressed with character, this is addressed by factor (f) which deals with moral fitness. Furthermore, the District Court seemed strangely accepting of Nathan's willingness to throw out allegation after allegation without, any attempt of substantiating these assertions. For example, if for years ALM has allegedly had continuous plaque on his teeth, Appx. 184, or is always dirty when picked up, Appx. 183, how is it that the Nathan, attesting to be beside himself with fear and anguish, has not bothered to compile an iota of photographic evidence or a dentist report despite Nathan presumably having access to both a camera and a dentist? This type of behavior is a continuation of what Nathan demonstrated to the Court in 2013. *See* Appx. 16-17 ("While this Court has carefully examined the photos and considered the allegations of abuse, the Court is not persuaded that ALM has been physically abused by Sierra or her fiance.") Appx. 20 ("The Court is not persuaded that Nathan's allegations of alienation and denial of parenting time have merit."). Instead, the District Court is concerned that Sierra is "attitude, derision directed at [Nathan's] counsel and the court, and [Sierra's] flippant responses to questions about concerns [...]." Appx 227.

[¶70] Regardless of how the vague ruling of the District Court is interpreted, the District Court was clearly errored in concluding that favor (m) favored Nathan.

5. *The District Court Errored In Finding that Factor (k) Did Not Apply Instead of Finding that it Favored Sierra.*

[¶71] In addition to misapplying the above factors, this Court inappropriately

disregards factor (k), "[t]he making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02" The frequent inconsistencies between Nathan's affidavits, the evidence, and his testimony as outline throughout this Brief evidence that Nathan is willing to throw out accusations of abuse with disregard to the veracity of the claim, yet this Court did not admonish Nathan for this behavior.

V. THE DISTRICT COURT ABUSED ITS DISCRETION AT SEVERAL KEY STAGES AND, THEREFORE, ABUSED ITS DISCRETION IN BOTH THOSE DECISIONS AS WELL AS IN DENYING SIERRA'S MOTION FOR, IN THE ALTERNATIVE, A NEW TRIAL IN WHICH SHE RAISED THESE ABUSES OF DISCRETION.

a. Standard of Review.

[¶72] Determinations as to lengths of a hearing and number of witnesses, *Wahl v. Northern Improv. Co.*, 2011 ND 146, ¶ 6, 800 N.W.2d 700, motions for continuance, *Clark v. Clark*, 2006 ND 182, ¶7, 721 N.W.2d 6., admission or exclusion of evidence, *Ingalls v. Paul Revere Life Ins. Group*,1997 ND 43, ¶20, 561 N.W.2d 273, and motions for a new trial, *Okken v. Okken*, 325 N.W.2d 264, 269 (N.D. 1982), is abuse of discretion. "A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process. *Clark*, 2006 ND 182, ¶7, 721 N.W.2d 6.

b. The District Court Abused Its Discretion When It Failed to Schedule Adequate Time for the Hearing.

[¶73] "A district court has broad discretion over the presentation of evidence and the conduct of trial, but it must exercise its discretion in a manner that best comports with substantial justice." *Manning v. Manning*, 2006 ND 67, ¶ 30, 711 N.W.2d 149. "In exercising that discretion, the court may impose reasonable restrictions upon the length of

the trial or hearing and upon the number of witnesses allowed." *Hartleib v. Simes*, 2009 ND 205, ¶ 15, 776 N.W.2d 217. Procedural due process requires fundamental fairness, which, at a minimum, necessitates notice and a meaningful opportunity for a hearing appropriate to the nature of the case. *E.g. St. Claire v. St. Claire*, 2004 ND 39, ¶ 6, 675 N.W.2d 175.

[¶74] "In a judicial investigation the right of cross-examination of an adversary's witnesses is absolute, and not a mere privilege of the one against whom a witness may be called. Cross examination is a fundamental right, basic in our judicial system, and is an essential element of a fair trial and proper administration of justice. [...] It is only after the right of cross-examination has been substantially and fairly exercised that the allowance or disallowance of further cross-examination becomes discretionary." 81 Am. Jur 2d. *Witnesses* § 464 (1976). "The trial judge may not unduly limit cross-examination, since cross examination to a reasonable extent is a matter of right." *Id.* at § 472

[¶75] The District Court, without input of the parties via a pre-trial conference or otherwise, after Sierra's attorney had withdrawn, and less than two months before the hearing date, set an evidentiary hearing for a half day. It should have been facially self-evident from the scope and contents of the docket alone that that an afternoon would have been insufficient to provide for cross examination of affiants; on the date that this Court set the hearing, sixteen affidavits had already been filed. Furthermore, subsequent to setting the hearing, Nathan filed with the Court subpoenas for an additional seven people who were not affiants (which is in and of itself problematic as discussed below) with the obvious intention of calling these individuals to testimony at trial and, thus, bringing the total number of individuals whose testimony was pertinent to the hearing to eighteen.

[¶76] The implication of this under scheduling is not just theoretical. After accounting for opening and closing arguments and preliminary matters, each party was allocated 90 minutes for cross examination. Sierra's attorney expressed on the record at the onset of the hearing the intention of calling all of Nathan's affiants for cross examination but was unable to do so on account of insufficient time. While it is clearly not within the right of counsel to waste the time of opposing parties and the court, providing the District Court's decision left Sierra's attorney with eight minutes to conduct cross examination of each affiant (not including cross examination of non-affiant witnesses), a far stretch from being provided a fair opportunity to cross examine Nathan's affiants. Additionally, there were many matters which, de facto, Sierra was precluded from addressing solely on lack of time. While it is impossible to show that the result of the hearing would have been different had Sierra been provided a fair opportunity to cross examine the Nathan's witnesses, there is no ambiguity in the fact that cross-examination was unduly limited beyond what could be considered a reasonable restriction.

c. The District Court Abused It's Discretion When It Denied Sierra's Motion for A Continuance Despite the Fact that Sierra Had Not Previously Caused Any Delays in the Case, And That The Case Was Otherwise Proceeding At a Rapid Pace.

[¶77] "Motions for continuance shall be promptly filed as soon as the ground therefor are known and will be granted only for good cause shown, either by affidavit or otherwise." N.D.R.Ct 6.1(b). "four factors that are to be considered when determining whether a district court had good cause to continue a trial: '(1) length of delay; (2) reason for delay; (3) defendant's assertion of his right; and (4) prejudice to the [other party].'" *Everett v. State*, 2008 ND 199 ¶ 26, 757 N.W.2d 530. When considering length of delay, the court may consider the delay in granting this particular continuance as well as previous delays. *State*

v. Ripley, 2009 ND 105 ¶15, 766 N.W.2d 465.

[¶78] This matter has never been continued and moved quickly from the initial motion for modification of primary residential responsibility on October 18, 2017, Doc ID # 35, to this Court issuing a notice of evidentiary hearing on January 9, 2018 setting the hearing for February 26, 2018, Doc ID # 242. Sierra's attorney had withdraw mid proceedings and she had sought alternate counsel. Upon procuring counsel, Sierra's attorney immediately filed a motion for continuance outlining the inherent impracticability of being fully prepared for the upcoming hearing. Index #26-66.

[¶79] The District Court initially denied this motion without rational, and later clarified in its Memorandum Order on Sierra's Reconsideration Motion that it based its decision on its perception of intentional delay by Sierra and its believe that Sierra was significantly at fault for her lack of counsel. App. 235

[¶80] Review of the case record paints a different story; the record shows no duplicative filings by Sierra, and that Sierra and Nathan filed approximately the same number of motions. It is additionally of note, as painstakingly delineated in Sierra's Reconsideration motion that this matter proceeded far more quickly than similarly situated cases in the same county and year. Index #315.

[¶81] Sierra took significant efforts in finding counsel over the holiday season as evidenced by the fact that the counsel she retained a sole practitioner in a small community with only local name recognition that lives nearly 200 miles from Stark County and 150 miles from Glen Ullin, and with no history in Stark County or Sierra.

[¶82] The District Court arbitrarily and capriciously in both its application of the law and its reasoning for denying the continuance.

d. The District Court Gave Preferential Treatment to the Nathan When It Allowed Nathan to Present Testimony Contrary to Its Own Previous Order.

[¶83] The Notice of Hearing issued by this Court stated "[u]nless this Court otherwise orders, evidence either in support of, or in opposition to the relief requested must be presented by affidavit." Appx. 242.

[¶84] At the evidentiary hearing, Nathan requested that Nathan be allowed to present the testimony of non-affiant witnesses. In support of this position, Nathan argued that Sierra should not be surprised that Nathan is now asking to call witnesses who did not provide affidavits because they had been subpoenaed and, furthermore, that Sierra should have knowledge as to the scope and content of the testimony of the non-affiant witnesses based on Nathan's exhibits. This Court, over objection of Sierra, allowed Nathan to call a number of these witnesses and, furthermore, decided that Sierra would have no opportunity to call rebuttal or impeachment witnesses. It was arbitrary and capricous for this Court to issue from the bench a significant evidentiary determination which is inconsistent with a previously issued written order, especially when Nathan had more than ample time to request that the Court amend it's order prior to the hearing.

[¶85] This Court denied Sierra's motion for a continuance two weeks prior to hearing (assumedly) on the basis that it was untimely, however, the Court granted what was essentially motion for the modification of an order addressing a highly consequential evidentiary order on the afternoon of the hearing. As both matters were bought in the twelfth hour, it furthermore arbitrary and capricious for them to be treated differently.

VI. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED SIERRA'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, A NEW TRIAL.

a. Standard of Review.

[¶86] "Motions for reconsideration may be treated as motions to alter or amend judgments under N.D.R.Civ.P. 59(j) or as motions to vacate judgments under N.D.R.Civ.P. 60(b). [...] A trial court's decision on Rule 59(j) and Rule 60(b)(ii) motions will not be reversed absent an abuse of discretion." *J.B. v. M.R.*, 2002 ND 157, ¶ 1, 655 N.W.2d 84.

b. For the Reasons Outlined Herein, the District Court Abused Its Discretion When It Denied Sierra's Motion for Reconsideration or, In the Alternative, a New Trial.

[¶87] Sierra outlined each of the above arguments in comparable detail and reference to legal precedent as contained herein and the District Court was clearly erroneous in denying this motion.

CONCLUSION

[¶88] The District Court made numerous substantial errors, the aggregate of which show an unreasonable and unjust preference for Nathan. Sierra respectfully requests that the Court exercise its supervisory powers to correct the errors in the District Court's findings of fact to comport with the evidence presented or, alternatively, remand for further proceedings in accordance with the correct application of the law and principals of fairness.

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify pursuant to rule 5(f) of the North Dakota Rules of Civil Procedure that my office served the foregoing Amended Brief of Appellants along with the Appendix by e-mailing true and correct copies of the same on December 7, 2018 to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Amended Brief of Appellants complies with the type-volume limitations imposed by the North Dakota Rules of Appellate Procedure. The Amended Appellants Brief contains 7,815 words of proportionately spaced type as counted by Microsoft Word, the software used to prepare the Brief of Appellants.

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