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In the Supreme Court
State Of North Dakota

February 24, 2020

Supreme Court No. 20190331

Cass County Number: 09-2018-DM-01200

Abbey Lynn Gifford,

Defendant and Appellant,

v.

Brian Lee Woelfel Jr.,

Plaintiff and Appellee.

APPEAL FROM FINAL JUDGMENT OF
THE DISTRICT COURT OF CASS COUNTY,
NORTH DAKOTA, EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE TRISTAN VAN DE STREEK PRESIDING

INITIAL BRIEF OF DEFENDANT AND APPELLANT ABBEY GIFFORD

ORAL ARGUMENT REQUESTED

Jacey Johnston
JOHNSTON & COLEMAN
221 SOUTH 4TH STREET
GRAND FORKS, N.D. 58201
Phone: (701) 757-1404
jacey@wedefendyou.net
(ND ID #06214)

Olivia Jureidini
JOHNSTON & COLEMAN
221 SOUTH 4TH STREET
GRAND FORKS, N.D. 58201
Phone: (701) 757-1404
olivia@wedefendyou.net
(ND ID #09058)

Counsel for Appellant

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[¶1] JURISDICTIONAL STATEMENT

The order for judgment of the District Court for the East Central Judicial District, County of Cass, State of North Dakota was entered on September 27, 2019. (App. 232-58). Appellant gave timely notice of the appeal on October 30, 2019. N.D.R.App.P. 4(a)(1). (App. 259-60). This order may be reviewed by the Supreme Court of North Dakota because it falls within the purview of N.D.C.C. 28-27-02 as an order affecting a substantial right. An order in a civil action in any district court may be removed to the Supreme Court by appeal as provided by law. N.D.C.C. 28-27-01.

[¶2] STATEMENT OF THE ISSUES

I. The District Court erred as a matter of law by failing to consider relevant evidence that favored Defendant Abbey Lynn Gifford (hereinafter "Abbey") and disregarding relevant evidence that disfavored Plaintiff Brian Lee Woefel, Jr. (hereinafter "Brian") pursuant to in its determination that N.D.C.C. §14-09-06.2(1) factors d, e, h, k, and m favored Brian.

II. The District Court erred as a matter of law in determining N.D.C.C. §14-09-06.2(1) factors a, b, c, f, g, and j to be neutral when a consideration of all evidence supports a finding these factors weight in Abbey's favor.

III. The District Court erred as a matter of law by ordering an automatic change of custody should Abbey move more than forty-five miles from Fargo. An automatic change of custody circumvents the post-judgment limitations on modification of custody under N.D.C.C. §14-09-06.6. An automatic change of custody is unenforceable

IV. The District Court improperly imputed underemployment wages upon Brian when evidence reflected a much greater earning capacity, personal budget, and cash flow.

[¶3] STATEMENT OF THE CASE

[¶4] This case originated by summons and complaint, on or about December 1, 2018, in Cass County, North Dakota concerning domestic matters relating to K.L.W., born

2016. [Docket 1-2] [hereinafter "Doc."]. The parties participated in the Court Sponsored Mediation Program but were unable to reach agreement. [Doc. 19].

[¶5] On or about February 14, 2019, Abbey filed her motion for interim relief. [Doc. 21-35]. Brian responded and sought counter-relief. [Doc. 39-96]. Abby replied to Brian's motion. [Doc. 96-126, 143]. The interim hearing was scheduled for February 28, 2019. The parties appeared for hearing with their respective counsel. Counsel visited in Chambers with the presiding Judge. No hearing was held, no agreement was placed on the record, and no interim order was docketed.

[¶6] In April of 2019, attorney Jacey Johnston substituted in for attorney Jason McLean as Abbey's legal counsel. [Doc. 157].

[¶7] Trial was held July 31, August 1, and August 28, 2019 in Cass County, North Dakota.

[¶8] STATEMENT OF THE FACTS

[¶9] Abbey and Brian began a relationship in May of 2015, which initially only lasted a few months. [Tr. 7/31/19 pg. 101 ln.7-9]. On September 2, 2015, Abbey learning she was pregnant immediately reached out to Brian. [Tr. 8/28/19 pg. 89 ln. 19-23]. Brian questioned the pregnancy and repeatedly requested paternity testing. Id. [Tr. 08/28/19 pg. 89 ln. 19-25; pg. 90 ln. 1-18].

[¶10] Following the news of the pregnancy, the parties decided to resume their relationship with Abbey quitting her employment at Altru in Grand Forks and moving to Fargo to reside in Brian's home. [Tr. 07/31/19 pg. 115 ln. 19-22]. Abbey had no immediate connection to Fargo, other than Brian. Id. Abbey immediately secured a job. [Tr. 07/31/19 pg. 99 ln. 14-24). K.L.W. was born thereafter in 2016. [Tr. 7/31/19 pg.

170 ln. 1-3]. Abbey took leave from employment to provide care for K.L.W. [Tr. 08/28/19 pg. 69 ln 14-25; pg. 70 ln. 1-6].

[¶11] In May of 2017, the parties separated again, for good, with Abbey and K.L.W. moving out of Brian's home and into an apartment in Fargo. [Tr. 7/31/19 pg. 31 ln. 13-14]. From May of 2017, until the Court's directive concerning parenting time at the interim hearing in February of 2018 of equal time with each parent, Brian exercised primarily every weekend with K.L.W., Friday to Sunday. [App.71-81; Tr. 08/28/19 pg. 57 ln. 22-25]. Although Brian disputes that he was not exercising equal time, Brian's new girlfriend Sarah admitted that when she began seeing Brian in May of 2018, Brian exercised parenting time with K.L.W. primarily Friday evening through Sunday. [08/01/19 pg. 56 ln. 17-24].

[¶12] Abbey requested that the District Court award the primary parent role for K.L.W. in her favor. Brian opposed Abbey's request testifying that he agreed to a equal schedule but only if Abbey and K.L.W. were required to remain in Fargo.

[¶13] STANDARD OF REVIEW

[¶14] A District Court's original determination of custody is reviewed under the clearly erroneous standard. Hanisch v. Osvold, 2008 ND 214 ¶4, 758 N.W.2d 421. Under the standard, "a finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the entire evidence is left with a definite and firm conviction a mistake has been made." Burns v. Burns, 2007 ND 134 ¶9; 737 N.W.2d 243.

[¶15] Child support determinations are reviewed under the de novo standard of review. Bye v. Robinette, 2015 ND 276 ¶3; N.W.2d 432. The trial court must clearly establish how it reached the level of ordered support. Id.

[¶16] LAW & ARGUMENT

[¶17] The District Court abandons its judicial function if the parent who serves to best promote the child is not determined first and foremost. Seay v. Seay, 2012 ND 179 ¶5; 820 N.W.2d 705. If a primary residential responsibility matter has never been brought before the Court, the Court ***is required*** to consider all relevant evidence in making a considered and appropriate decision. Wetch v. Wetch, 539 N.W.2d 309, 312-313. (emphasis added). Further, "it is not enough for the District Court merely to recite or summarize testimony presented at trial to satisfy the requirement that findings of fact be stated with sufficient specificity." Haroldson v. Haroldson, 2012 ND 44, ¶20; 213 N.W.2d 539. The District Court may not wholly ignore, fail to acknowledge or explain significant evidence clearly favoring one party. Law v. Whittet, 2014 ND 69 ¶10; 844 N.W.2d 885, 887.

[¶18] Neither the fitness of the parents nor fairness to the parents is the appropriate test for determining custody, but rather the predominant consideration is the best interests of the child. Klein v. Larson, 2006 ND 236 ¶7; 724 N.W.2d 236. The District Court's discretion must be exercised in a manner which comports with substantial justice as a "trial is a search for truth." Steckler v. Steckler, 492 N.W.2d 76, 79 (N.D. 1992). Vandal v. Leno, 2014 ND 45, ¶26; 843 N.W.2d 313, 324.

[¶19] Like in Datz v. Dosch, which is determinative under the facts of this current appeal, the lower Court failed to conduct a proper analysis under N.D.C.C. § 14-09-06.2

when it did not acknowledge evidence that clearly favored Abbey, and disfavored Brian. 2013 ND 148 ¶12; 836 N.W.2d 598.

[¶20] Here, the District Court erroneously found factors d, e, h, k, and m, to favor Brian. [Doc. 577 ¶17]. In doing so, the District Court ignored testimony, exhibits, corroborating evidence, and in many instances unrefuted evidence presented by Abbey with the District Court instead maintaining its interim determination—based upon the informal interim Court directive—that equal residential responsibility shall continue.[1] Following trial, the District Court found that Abbey ***failed to carry the day on even one of the best interest factors*** but still, more incredulously, awarded equal residential responsibility and equal decision making to the parties, so long as the child remains in Fargo, North Dakota. Id. at ¶¶18, 36.

[¶21] While Abbey aptly points out and requests as relief from this Court, in the form of a remand with direction to award residential responsibility of the child to her, she as an alternative demur states that it was error to enter an award of equal residential responsibility through insistence that a three-year old child must be raised in Fargo, and alternatively requests that the matter be remanded to the District Court to properly weigh all the evidence and make proper findings with neutral and unbiased consideration based

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[1] The District Court's bias in favor of a equal responsibility finding can be found in the following text:

> … "it is in K.L.W.'s best interest for him [sic] to continue to reside in Fargo and for Abbey and Brian ***to continue with equal residential responsibility*** and shared parenting time. ***K.L.W. has thrived under this arrangement***". [App. 243-Findings of Fact, Conclusions of Law, and Order for Judgment at [¶18]. (emphasis added)

The District Court failed to acknowledge or consider that the period of "equal residential responsibility" from the February 28, 2019 interim hearing date to the last day of testimony on August 28, 2019 or six (6) months was the sole product of an informal court directive—

upon N.D.C.C. §14-09-07. In fact, counsel for Abbey, already sensing an issue of fairness, specifically requested as much before the evidentiary portion of the trial began:

> THE COURT: … The mediation form indicated that there was some agreement reached. Is there anything that we can knock out as far as what's agreed to? Or do you folks just want to dive right in now?
>
> MS. JOHNSTON: You know, I think that in general, the alternating weekends and stuff, we have an agreement on. We both proposed similar parenting plans, and so, I don't know that I'm going to get real deep into that because you'll have the proposal of each of the parties. I think that the main contested issue here is the custody and the parenting time.
>
> MS. DUCHARME: ***Well, I don't know that we have any, you know -- I thought we had reached a resolution on joint legal custody***. It doesn't appear to that, based on your proposal, for having decision-making. So, I think that is still an issue. I think parenting time; I think residential responsibility, child support, health insurance. I'm not sure what we have agreement on.
>
> THE COURT: Well, maybe it's wise to just get started, and start presenting the evidence, and take care of things.
>
> ***
>
> MS. JOHNSTON: And Your Honor, on one other note, there has been a lot of talk about we've had agreements, we've done this. There have been no agreements since I've come into this case in April. ***I cannot be responsible for what happened before I came on, and I just feel like we're starting out the day with a lot of finger-pointing that I shouldn't be here, and we shouldn't be here. But I think the Court needs to hear the evidence and we go from there. I just want to present the evidence and have a good day, and a fair couple of days***.
>
> THE COURT: Yes. Exactly. I have no pre-determined notions about anything at this point. I don't take umbrage with anything that you've done in the case. Certainly, I don't take umbrage with anything Ms. duCharme has done. I want to just get started, and hear the evidence, and you know, be as fair and calm as we can be during this day, these couple days.
>
> ***
>
> MS. DUCHARME: I do, Your Honor. Thank you. And I wouldn't say this in most cases, ***but I am sorry we are here***. And I don't think that this is a case that should be tried in front of the Court. ***The Court is not going to learn much that it hasn't already received into evidence. We had a huge***

interim hearing, if the Court will recall, with hundreds of pages of exhibits. We have had conversations with the Court at the interim hearing. Not a lot has changed since then.

MS. JOHNSTON: … ***From my understanding and from what I can tell of the docket, there were multiple pleadings filed in the interim motion, but no interim motion was held***…..

…..I understand that an interim hearing never took place, and I have not seen an interim order entered on the docket. ***Despite that, my client unhappily left the courtroom that day and has followed what she believed were your directives that she better follow a joint schedule. And she has done that. It hasn't worked so well, but that's what she has done***. [Tr. 07/30/19, pg. 19-22, 24-25]. (emphasis added).

[¶22] Young children have special needs. Botnen v. Lukens (In Interest of Lukens), 1998 ND 224 ¶1; 587 N.W.2d 141, 143. Court decisions rotating the residence of young children are presumptively not in the child's best interests and absent justification will be reversed. Id. *See also*, Fonder v. Fonder, 2012 ND 228 ¶23; Peek v. Berning, 2001 ND 34 ¶19; 622 N.W.2d 186 (*citing* Kasprowicz v. Kasprowicz, 1998 ND 68 ¶5; 575 N.W.2d 921)(finding an award of equal residential responsibility is generally not in a child's best interest). Equal residential responsibility is in a child's best interest **only when** the parents can effectively cooperate and communicate. (emphasis added). Jarvis v. Jarvis, 1998 ND 163 ¶36; 584 N.W.2d 84 *citing* Peek v. Berning, 2001 ND 34, ¶27; 622 N.W.2d 186 [*cf*. App. 133, Brian using words such as "retarded" and "cunt" in communicating with Abbey].

I. The District Court erroneously found N.D.C.C § 14-09-06.2(1) factors d, e, h, k, and m, to favor Brian.

[¶23] Factor (d). The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community.

[¶24] The District Court found factor (d) favored Brian because Abbey's proposed move to Grand Forks would not serve K.L.W.'s best interests. [App. 236]. At the time of trial, K.L.W. was three years of age and had no independent continuity in the community. *See* Vandal v. Leno, 2014 ND 45 ¶12; 843 N.W.2d 313 (affirming decision reflecting a two year old child had not established continuity in the community). Neither Brian nor Abbey have any family or extended family residing in the Fargo area. [Tr. 07/31/19 pg. 122 ln. 5-14]. Exhibits received into evidence reflect that since the parties separated, and until the District Court directed an equal parenting schedule, Abbey exercised the majority of overnights with K.L.W. [App. 71-81]. Brian never refuted the accuracy of Abbey's calendars with any specificity, although he was asked and had plenty of opportunity and time to do so. [Tr. 08/28/19 pg. 154 ln. 21-25; pg. 155 ln. 1-13]. *See also*, [App. 31; 195-207].

[¶25] For stability, the District Court did not consider the effect of Brian's out-of-town construction business, local early hour snow removal business or head coach wrestling responsibilities when assessing stability as they relate to availability to parent. *See* Hammeren v. Hammeren, 2012 ND 225 ¶23; 823 N.W.2d 482 (stating father's frequent schedule changes due to construction employment was too disruptive).[App.153-194]. A party's work schedule may be an appropriate consideration in deciding primary residential responsibility for a child. Hageman v. Hageman, 2013 ND 29 ¶1; 827 N.W.2d 23, 26.

[¶26] The District Court began the trial operating under the assumption that the parties had always shared equal residential responsibility [App. 233 ¶11]. Trial evidence which rebutted that assumption were ignored. Id. Brian's girlfriend, Sarah, testified that when

she began seeing Brian in May of 2018, Brian was exercising parenting time with K.L.W. primarily Friday evening through Sunday. [Tr. 08/01/19 pg. 56 ln. 17-24]. Sarah testified that all of Brian's work for the summer of 2019 were out of town jobs. [Id. at, pg. 59 ln. 4-9]. Sarah testified that Brian is the "boss", working over 40 hours per week and going from the moment he wakes up until he goes to bed each evening. Id. at pg. 55 ln. 17-25; pg. 56 ln.1-6. Brian's phone records reflect a schedule that is very much outside of the Fargo area. [App. 195-207][2] Brian testified at trial that **he would be working more**, in the future, to pay off his debt. [Tr. 08/28/19 pg. 173 ln. 18-24](emphasis added).

[¶27] Four witnesses testified to Brian's time commitments to work. Stephen Nienaber testified that during busy construction season it can be expected to work 35 to 50 hours per week. [Tr. 8/1/19 pg. 27 ln. 14-21]. Stephen further testified that he works on job sites out of town with Brian. Another employee of Brian's, Nicholas Stafford, was asked what Brian is like outside of work. Nicholas responded "*well it's basically for him, it seems like work is just non-stop*." [Tr. 8/1/19 pg. 85 ln. 15-20]. Nicholas further states, *"[b]ecause owning a business, like that's another thing he's taught me is how to, basically run a business. And it's just, that is non-stop work*." [Tr. 8/1/19 pg. 92 ln. 13-15].

[¶28] Brian's credit cards, Verizon telephone records, and Brian's own trial witnesses established that Brian is out of town and/or working constantly. [App. 28-31[3]; 39-44; 195-207](Summary of trial exhibits 110 reflecting towers Brian's cell phone reached

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[2] Summary of trial exhibit 110 which corroborates trial exhibit 131[App.71-98] [doc. 501-539]

[3] Trial exhibit 108 is a summary of Brian's purchases made through his debit/credit cards [doc. 311-353; 540]

from July 2018 – July 2019 [doc. 501-539]). It is undisputed that Abbey had scheduled her employment schedule around the needs of K.L.W. and avoids daycare by parenting K.L.W. on her days off. [Tr. 08/28/19, pg. 40, ln. 18-25].

[¶29] Several text messages were provided to the Court demonstrating that Abbey worked around Brian's needs and demands:

a. App. 153: Brian on his way to Abbey's home from Buxton 8:07 p.m.
b. App. 153: Brian on his way to Abbey's at 9:00 p.m.
c. App. 154: Brian relying on Abbey to provide babysitter's name
d. App. 155: Brian changing exchange times
e. App. 156: Brian working in LaMoure for week, unable to commit to pick-up time
f. App. 156: Brian thanking Abbey for working with him on his schedule
g. App. 157: Brian accepting wrestling position and Abbey commenting Brian will get through his busy season and start with wrestling.
h. App. 158: Brian asking Abbey to watch K.L.W. for him in afternoon, babysitter unavailable
i. App. 159: Brian indicating that most of his work for rest of season will be out of Fargo. Abbey trying to receive confirmation on when he will have parenting time
j. App. 160: Brian hiring babysitters so he can work
k. App. 161: Brian asking for babysitter name "black haired girl"
l. App. 162: Brian admitting K.L.W. doesn't love being with him at work too long
m. App. 163, Brian working 6 a.m. to 8 p.m.
n. App. 163: Brian cannot find babysitter
o. App. 164: Brian indicating he has wrestling tournaments all through December/January, wants Abbey to change her work schedule
p. App. 165: Brian scheduling his deer hunting
q. App. 165: Brian running late, will not arrive until 9 p.m. Abbey indicating she will provide the bath for K.L.W.
r. App. 166: Brian making sure Abbey is covering his deer hunting plans
s. App. 167: Brian's mom covering so he can attend wrestling in Devils Lake
t. App. 168: Brian looking for Abbey's mom to provide care on his Saturday
u. App. 169: Brian picking K.L.W. up after wrestling at 8 p.m.
v. App. 170: Brian has wrestling
w. App. 171: Brian arranging late pickup following wrestling or having Abbey keep K.L.W.
x. App. 172: Brian hoping to make a 8:30 p.m. pickup
y. App. 173: Brian scheduling pickup at 8:30 p.m. after wrestling.
z. App. 174: Brian on his way at 9:08 p.m.;
aa. App 175: Brian scheduling pickup for 8:30 p.m. or later

bb. App. 176: Brian skipping an overnight due to wrestling
cc. App: 177: Brian asking about Abbey's daycare availability
dd. App. 178: Brian's snow removal business demands, asking what time he can bring K.L.W. to daycare.
ee. App. 179: Brian asking to notify daycare lady for him
ff. App. 180: Brian's jobsite four hours away from Fargo in S.D.
gg. App. 181: Brian's deer hunting planning
hh. App. 182: Abbey retrieving K.L.W. early from Brian's home
ii. App. 182: Brian busy with work, skipping the week
jj. App. 183: Brian missing K.L.W.'s birthday, leave Sunday for South Dakota
kk. App. 184: Brian working Memorial Day holiday
ll. App. 185: Brian planning ice fishing trip
mm. App. 186: Brian has a few weeks left of out of town work
nn. App. 187: Brian arranging pickup for 10 p.m. due to trying to finish a job
oo. App. 188: Brian saying he's getting into his busy season until deer hunting starts
pp. App. 189: Brian deer hunting
qq. App. 190: Brian super busy with work
rr. App. 191: Brian double checking deer hunting dates
ss. App: 191: Brian not available for daycare pickup
tt. App. 191: Brian asking to change parenting time schedule now that his wresting schedule has started
uu. App. 193: Brian asking Abbey to change her work to accommodate his wrestling and work commitments
vv. App. 194: Brian's mom left. Brian telling Abbey he will have Tuesday/Wednesday night wrestling commitments

See Trial Exhibit 167.

[¶30] Brian's second job as a school wrestling coach presents a demanding work schedule. [App. 41-44]. Brian's co-head wrestling coach Harvey Kruckenberg testified that a position as a wrestling coach requires close to 30 hour work weeks. [Tr. 8/1/19 pg. 80 ln. 15-17]. Brian's wrestling position also includes out of town travel for tournaments. [Tr. 8/1/19 pg. 80 ln. 5-7; App. 39-44].

[¶31] The District Court focused on a potential move of Abbey to Grand Forks as to why Brian should prevail on this factor:

> "*Moving K.L.W. to Grand Forks does not serve his best interests*." and "… a *move to Grand Forks* ***is likely to negatively impact K.L.W.'s relationship with Brian and Brian's extended family***…". (emphasis added). [App. 238].

The District Court also found that:

> *"****Abbey argues that if she moves with K.L.W. to Grand Forks that her extended family will have a greater impact on K.L.W.'s life. This testimony was mostly speculative and theoretical.***". (emphasis added). [App. 236].

The District Court dismissed Abbey's testimony that her family will be more involved as "*speculative and theoretical*", but then speculated and theorized that any move would negatively impact Brian's family, who reside in the Minneapolis area and visited with K.L.W. approximately once per month. Id. [Tr. 8/1/19 pg. 101 ln. 22-102 ln. 5]. The unrefuted evidence establishes both families visited for K.L.W.'s birthday and other special events. [Tr. 8/28/19 pg. 79 ln. 8-12]. Abbey's mother, Deanne, did provide care for K.L.W. whenever Abbey needed, including overnights. [Tr. 8/1/19 pg. 189 ln. 2-8 & Tr. 8/28/19 pg. 37 ln. 18-21]. There was no evidence to suggest that any familial relationship would be frustrated, regardless of which community K.L.W. resided in.

[¶32] The District Court also found that K.L.W. had spent the most time in Brian's home but ignored its finding of fact that Abbey had resided in the home with Brian and K.L.W. during the same period of time. [Tr. 7/31/19 pg. 144 ln. 2-3][App. 233 ¶9]. If the District Court considered all relevant evidence, this factor favors Abbey.

[¶33] Factor (e), the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

[¶34] The District Court found factor (e) to favor Brian and at paragraph 15, Abbey attempted to terminate Brian's parental rights. [App. 238]. There is no evidence to

suggest that Abbey ever attempted to terminate or wished to terminate Brian's parental rights, at any time following K.L.W.'s birth.

[¶35] Abbey testified to an incident in March of 2018 in which Brian intentionally left Abbey at home, and departed to the Minneapolis area with K.L.W. [Tr. 8/28/19 pg. 75 ln. 12-24][App. 115-118][4]. Brian, again, had accused Abbey of cheating on him. Id. After Brian left, Abbey unplugged the video cameras that were in the home. [Tr. 8/28/19 pg. 76 ln. 2-8]. Upon Abbey unplugging the cameras, Brian began angrily texting Abbey, "*who are you fucking while I'm gone. Did you unplug the cameras? You need to leave my shit alone at my house*." [App. 115]. Abbey believed Brian was watching her on camera while driving with K.L.W., and was also texting Abbey while driving with K.L.W. [Tr. 8/28/19 pg. 76 ln. 2-8]. K.L.W. was ten months old at the time. Id. This incident shows Brian's propensity for anger which affects his ability to provide safety for K.L.W. It also supports Abbey's claims of Brian's reckless driving. The District Court did not include or address this evidence. The District Court also ignored evidence that Brian left the home with K.L.W. and worse without K.L.W.'s basic necessities while admonishing Abbey for the same conduct. [Tr. 08/28/19 pg. 75 ln. 4-25; pg. 76 ln. 1-10]. [App. 115]. The District Court's finding at Paragraph 10, indicate that Abbey left Brian's home for three weeks. [App. 233]. Texts between the parties reflect that Brian expected Abbey to come to his home the very next evening. [App. 128]. This supports Abbey's version of the testimony. The District Court also ignored the unrefuted evidence that Brian would not allow Abbey to return home until she signed his "contract" saying he would have equal parenting time in front of a recording camera. [Tr. 08/01/19 pg. 211 ln. 3-22].

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[4] Trial exhibit 150

[¶36] Further, the District Court found that the parties "agreed" to share equal residential responsibility, again relying upon the agreement Brian wrote up and asked Abbey sign in front of cameras, before she and K.L.W. could return to his home. [Tr. 08/01/19 pg. 210 ln. 3-25; pg. 211 ln. 1-14][App. 234 ¶15]. Abbey testified that she signed the agreement as presented because she wanted their family to work. Id. Abbey did not receive the benefit of the bargain of that agreement. The District Court should not prioritize a lay document over the statutory best interest factors. The only reason Brian was receiving equal time at the time of trial was because Abbey was told she must follow an equal schedule with Brian. [Tr. 08/01/2019 pg. 69 ln. 2-12; Tr. 08/28/19 pg. 215 ln. 1-19]. Text messages also support that Abbey involved Brian's family with K.L.W. when offering to mail a gift. [App. 170]. Abbey testified that Brian would have K.L.W. bake for Abbey, and make pictures for her. [Tr. 8/28/19 pg. 105 ln. 13-23]. Brian's motives for these actions are questionable as he only started behaving in this manner after the litigation began. [Id. at ln 17-19]. In contrast, Abbey shared pictures and information about K.L.W. with Brian and his family prior to the litigation commencing. [Tr. 8/28/19 pg. 105 ln. 24- 106 ln. 4. *See also* App. Exhibit 194].

[¶37] The District Court disregarded the unrefuted evidence that Abbey continually fashioned her work schedule to allow Brian to exercise parenting time, **every weekend**, and around Brian's construction business. (emphasis added). [Tr. 08/01/19 pg. 19 ln. 2-20]. The District Court ignored all instances of Brian's inability to maintain a schedule for the stability of K.L.W., and all instances of Abbey making continual accommodations and adjustments at Brian's request. [App. 153-194]. If the District Court would have examined all relevant evidence, factor (e) favored Abbey.

[¶38] Factor (h), the home, school, and community records of the child and the potential effect of any change:

[¶39] The District Court found factor (h) to favor Brian:

> "He [Brian] is already established and has worked to establish K.L.W. in this community. Abbey, on the other hand is not settled and wants to move K.L.W. to Grand Forks."

[¶40] A child of K.L.W.'s age is too young to have community ties. Niffenegger v. LaFromboise 2013 ND 32 ¶8; N.W.2d 324. (stating [e]vidence supports the District Court's finding that based upon S.R.L.'s age, factor (h) was inapplicable). In Niffenegger, the child was under two years old at the time of trial, did not attend school, and was not involved in the community. Id. Here, K.L.W. was only three years old at the time of trial, and does not attend school. The extent of any community involvement is based upon where K.L.W.'s parents take him in the community. The District Court found that Brian has worked to establish K.L.W. in the Fargo community by taking him to church and attending high school wrestling events. The District Court ignored Brian's own testimony that Abbey helped select and also attended the same church. [Tr. 08/01/19 pg. 99 ln. 14-22]. In addition, Abbey also took K.L.W. to community events, including a visit to the pumpkin patch and to see Santa. [Tr. 153 pg. 78 ln. 17-25; pg. 79 ln. 1-25; pg. 80 ln. 1-5][App. 129-31][5]. Due to the age of K.L.W. at the time of trial, this factor should not have favored Brian, and should have been found neutral.

[¶41] Factor (k), the interaction and inter-relationship, or the potential for interaction and inter-relationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests.

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[5] *See also*, Trial Exhibit 154

[¶42] The District Court found factor (k) favors Brian stating Brian's family contact is more consistent and because Sarah is expecting Brian's child, which will be a half sibling to K.L.W. The testimony at trial supports that Brian's family saw K.L.W. approximately once per month. [Tr. 8/1/19 pg. 101 ln. 22-102 ln. 5]. At least some of K.L.W.'s familial interactions were at Brian's request to provide care for K.L.W. when he was unable due to his wresting and construction schedule. [App. 170-198]. Abbey's mother, Deanne, testified to K.L.W. knowing her as grandma, and seeing her often. [Tr. 8/1/19 pg. 202 ln. 19-20]. Deanne further explained Abbey was unable to attend many weekend family functions with K.L.W. because Abbey was working weekends, and Brian would have parenting time every weekend. [Tr. 8/1/19 pg. 199 ln. 6-9]. Deanne testified to her belief that Brian did not want Abbey's family attending family functions hosted at Brian and Abbey's home. [Tr. 8/1/19 pg. 200 ln. 13-20]. In regards to family support, not one of Brian's family members testified over the course of the three day trial. [Tr. 08/28/19 pg. 215 ln. 12-19].

[¶43] Abbey learned at trial that Brian had entered into a new romantic relationship with Melissa in April 2017, which began prior to her and K.L.W. moving out of Brian's home. [Tr. 07/31/19 pg. 165]. During their short four month relationship, Melissa spent overnights in Brian's home with K.L.W. present and introduced K.L.W. to Melissa's child. [Tr. 07/31/19 pg. 165 ln. 3-25; pg. 166 ln. 1-23; pg. 167 ln. 4-6].

[¶44] Similarly, Brian's current girlfriend, Sarah, was introduced to K.L.W. after dating a short amount of time. [Tr. 8/1/19 pg. 61 ln. 23-25; pg 62 ln 1-7][App.141-143]. Brian's future relationship with Sarah is speculative. The end result of Sarah's pregnancy is speculative. Brian and Sarah are not married. [Tr. 07/31/19 pg. 205 ln. 15-17]. It is

speculative to assume that Sarah will remain residing in Brian's home, and speculative to assume that without equal residential responsibility, K.L.W. would not have a relationship with any future half-sibling. In this factor, the District Court rewards Brian for moving into another relationship quickly and creating another child out of wedlock. Abbey is seemingly penalized for not involving a significant other in her and K.L.W.'s lives and/or becoming pregnant. Abbey raised valid concern about Brian moving in and out of relationships very quickly, and the effect of those relationships upon K.L.W. [Tr. 08/01/19 pg. 230 ln. 2-25; pg. 231 ln. 1-25][App. 141-143]. Abbey also raised concern to Brian over K.L.W. communicating that Sarah had hurt him. [Tr. 08/28/19 pg. 182 ln. 14-16]. The District Court ignored relevant evidence and favored Brian based on speculation. Factor (k) should be neutral or favor Abbey.

[¶45] Factor (m), any other factors considered by the Court to be relevant to a particular parental rights and responsibilities dispute.

[¶46] A parent awarded primary residential responsibility by a District Court following the best interest factors is presumed to have the ability to move freely around the State of North Dakota. N.D.C.C. §14-09-07.

> "***Although Abbey is a very good mother***[6]*, reducing Brian's parental involvement in the manner that would be necessary with such a move is not in K.L.W.'s best interest" [App. 243] … K.L.W. has a clear and bright future here in Fargo*. Id. (emphasis added).

[¶47] The District Court erroneously based its rationale relative to those factors it found to favor Brian—d, e, h, k, and m—upon a desire to direct that a three year old child be raised in one city, namely Fargo, North Dakota. The District Court failed to analyze

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[6] "**very good mother**" supports a finding that Abbey would prevail in at least one best interest factor.

which parent had historically served the child's best interests, instead insisting that the parties had previously agreed to spend equal time with the child, and that is the way it would stay.

[¶48] Also in factor (m), the District Court found that a HIPAA violation against Brian's girlfriend, Sarah, by Abbey's friend Hannah Noll had a negative impact on Abbey's credibility. Conversely, evidence supported that Brian's past girlfriend Melissa impermissibly used her employment position at the United States Postal Service to look up whether there was a forward of mail from Brian's residence to Abbey's new apartment. [Tr. 8/28/19 pg. 82 ln. 9-20][App. 138-140]. Brian admits this in text messages. Id. When the reverse situation was presented, and Brian's creditability should have been called into question, the District Court ignored the evidence that favored Abbey and ignored evidence the disfavored Brian. Id.

II. The District Court erroneously found N.D.C.C § 14-09-06.2(1) factors a, b, c, f, g, and j to be neutral by disregarding relevant evidence.

[¶49] Factor (a), the love, affection, and other emotional ties existing between the parents and child and the ability of each parent to provide the child with nurture, love, affection, and guidance

[¶50] The District Court found factor (a) neutral. Although that both parents agree there is love, affection and emotional ties between K.L.W. and each parent, Abbey did not agree that Brian would provide appropriate guidance. Abbey raised concern about Brian's use of alcohol while parenting K.L.W. and Brian's propensity for anger and abusive behavior as discussed in factors c, f, and j. The District Court did not consider all relevant evidence in finding this factor neutral. [Tr. 08/01/19 pg. 230 ln. 2-24; pg. 231; pg. 232 ln. 1-17]. This factor favors Abbey.

[¶51] Factor (b), the ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment.

[¶52] The District Court found factor (b) neutral. In doing so, relevant evidence of Brian's financial circumstances and providing a safe environment were not considered. Evidence of Abbey's financial stability, routine care for K.L.W.'s medical needs, and responsibility to K.L.W.'s everyday needs and care were ignored. [App. 104-06; 136; 144-52; 230-31].

[¶53] The District Court failed to credit Abbey for her steady employment income, while deeming Brian to be underemployed. [Doc. 577 at ¶22]. Abbey earns approximately $55,390 per year as a licensed registered nurse. Id. at ¶20. In 2018, Brian earned $19,540. [Doc. 577 at ¶23]. *See*, P.A. v. A.H.O., 2008 ND 194 ¶13; 757 N.W.2d 58. (although greater earning capacity alone is not the totality of factor (c), other relevant financial circumstances may be considered within factor (c).

[¶54] Brian has considerable debt in relation to his income. Brian's Bank of America credit card has a balance of nearly $7,000. [Doc. 340; Tr. 8/28/19 pg. 145 ln. 16-19]; a Costco credit card with a balance of $323 [Doc. 341; Tr. 8/28/19 pg. 145 ln. 20-23]; a Wells Fargo Visa with a balance of $14,861 [Doc. 342-49; Tr. 8/28/19 pg. 145 ln. 24-146 ln. 1-2]; a Chase Inc. credit card with a balance of $12,596 [Doc. 350, 352; Tr. 8/2819 pg. 146 ln. 3-5]; a Bell Bank visa with a balance of $11,750 [Doc. 353; Tr. 8/28/19 pg. 146 ln. 7-9]; and finally a debt to his parents for legal fees in the amount of $80,000 [doc. 308] [Tr. 8/28/19 pg. 147 ln. 20-23]. Brian did not provide a direct answer when asked how he intended on paying $40,000 in credit card debt, and an $80,000 loan, making only $20,000 a year, other than working more. [Tr. 8/28/19 pg. 152 ln. 20-25; pg. 153 ln.1; pg. 173 ln. 15-24]. Brian was soliciting donations on gofundme.com for his legal expense reflecting a lack of available resources. [App. 45-46]. In contrast, Abbey's only debt is

her student loan in the amount of $47,485. [App. 99-103][Doc. 421]. The District Court disregarded the financial position of each parent in looking at this factor.

[¶55] Abbey is the parent who has always provided health insurance for K.L.W. [Tr. 7/31/19 pg. 134 ln. 20-25; 8/1/19 pg. 214 ln. 16-23; App. 132-34; 228-29; Doc. 389-90]. Brian does not have medical insurance for himself. [Tr. 08/28/19 pg. 175 ln. 18-23]. Abbey historically has brought K.L.W. to the doctor, even during Brian's parenting time. [App. 104-07; Doc. 397]. Brian made one payment towards a medical bill for K.L.W., in May of 2018 after the litigation was initiated. [Tr. 8/28/19 pg. 60 ln. 20-61 ln. 4; pg. 177 ln. 23-25; pg. 178-79]. Brian did not know who K.L.W.'s primary physician was in May of 2018. [App. 208]. Brian borrowed Abbey's car seat for K.L.W. for months prior to purchasing his own, because Abbey was the parent who had purchased the car seat. [Tr. 08/28/19 pg. 104 ln. 23-25; pg. 105 ln. 1-12].

[¶56] Brian's use of alcohol is discussed in factor f, and his propensity for anger in violence in factor j. The District court should not negate evidence that "may" impact a child. Jelsing v. Peterson, 2007 ND 41 ¶16; 729 N.W.2d 157, 163. The District Court ignored evidence and failed to make specific findings of the relevant evidence provided. Factor B favors Abbey.

[¶57] Factor (c), the child's developmental needs and the ability of each parent to meet those needs, both in the present and in the future

[¶58] The District Court found factor (c) neutral. Abbey raised concern to Brian of introducing K.L.W. to girlfriends too quickly as discussed previously in factor (k). [Tr. 08/01/19 pg. 230 ln. 2-25; pg. 231 ln. 1-25; pg. 232 ln. 1-17]. Brian disregarded

Abbey's concerns. The District Court ignored this evidence as it relates to K.L.W.'s psychological well-being.

[¶59] Abbey was the parent to plan for special events for K.L.W. Abbey planned a birthday party for K.L.W., which upset Brian because he had to clean up the garage and set up for the party. [App. 129-31]. Brian told Abbey that the only reason he cooperated with the birthday party and going to the pumpkin patch was for Abbey, and that Abbey should be grateful to him. Id. Brian did not see any need for K.L.W. to experience these milestone events. Id. Abby was the parent who primarily took the pictures. [Tr. 08/29/19 pg. 34 ln 25; pg. 35, ln 1-25; pg. 36 ln 1-2]. The Court also did not consider Brian's lack of availability to parent in this factor, as discussed in factor (d). The District court ignored evidence that favored Abbey and disfavored Brian. Factor (c) favors Abbey.

[¶60] Factor (f), the moral fitness of the parents, as that fitness impacts the child.

[¶61] The District Court found both parents to be morally fit. Abbey presented evidence concerning Brian's criminal history in both Minnesota and North Dakota, including numerous and traffic citations which affect safety. [App. 47-68]. Abbey testified of her concern of Brian's reckless driving behavior, propensity for anger, and excessive use of alcohol. [Tr. 08/28/19, pg. 52 ln. 11-25; pg. 53 ln. 1; pg. 74 ln. 4-21; pg 98 ln. 24-25; pg. 99 ln 1-13]. No criminal history or traffic citations concerning Abbey were received into evidence. The District Court ignored this relevant evidence.

[¶62] Abbey testified to Brian giving K.L.W. a buzz cut, in anger and out of spite, after she had K.L.W.'s hair professionally trimmed for her graduation ceremony. [Tr. 8/28/19 pg. 72 ln. 20-25]. K.L.W. is fearful of automatic hair clippers. [Tr. 8/28/19 pg. 74 ln. 1-

14][doc. 431]. Text messages reveal that Brian did not like when Abbey trimmed K.L.W.'s curls, which supports that Brian's decision to suddenly buzz cut K.L.W.'s hair was out of anger and irrational. [Tr. 8/28/19 pg. 74 ln. 15-19; App 107-111]. Text messages reflect Brian's anger calling Abbey "*dumb fuck Abbey*" and stating "*DON'T CUT HIS FUCKING HAIR*" [App. 112]. Abbey confided in her friend Hannah, in text message, following the hair incident. [App. 113-114]. Abbey was very upset over this incident. [Tr. 8/27/19 pg. 74 ln. 22-25]. K.L.W. has not had a buzz cut since. [Tr. 08/28/19, pg. 74, ln. 15-21]. This incident had direct effect on K.L.W. due to Brian's anger issues. The evidence was not addressed or acknowledged by the District Court.

[¶63] Brian, in anger, burned K.L.W.'s baby gate in his driveway after tripping on the gate at the top of the stairs. [Tr. 8/1/19 pg. 233 ln. 4-25; pg. 234 ln. 1-3]. Brian denied the incident occurred in his initial affidavit to the District Court. [doc. 97 ¶16]. At trial, Brian admitted to burning the baby gate during a phone call with Abbey, saying he didn't see how it affect K.L.W. [doc. 231 pg. 14 ln. 6-24]. Brian denied anything had happened with the baby gate in his initial affidavit to the Court. [Tr. 08/01/19 pg. 233 ln. 12-25]. The baby gate was a safety device for K.L.W. The District Court ignored this relevant evidence.

[¶64] Brian testified inconsistently regarding his alcohol consumption. On the first day of trial Brian denied abusing alcohol. [Tr. 7/28/19 pg. 263 ln. 7-16]. Brian then testified to drinking one to three times a week. [Tr. 7/28/19 pg. 267 ln. 21-24]. Brian further testified to having one to three drinks in a sitting. [Tr. 7/28/19 pg. 268 ln. 1]. Brian also testified that the majority of alcohol charges on his bank statements were purchased for his employees. [Tr. 7/28/19 pg. 269 ln. 1-13]. Brian testified that the charges for out of

town bars, or liquor stores were made by his employees, using his credit card. [Id. at 14-21]. Brian's employees contradicted Brian's testimony. Brian's foreman Stephen Nienaber testified to buying fuel with a credit card Brian provides, but never purchasing alcohol with the card. [Tr. 8/1/19 pg. 23 ln. 3-12]. Brian's previous employee Nicholas Stafford also denied using Brian's credit card for anything other than fuel. [Tr. 8/1/19 pg. 88 ln. 8-13].

[¶65] Abbey's mother Deanne testified to her shock, upon visiting Brian's home, of the amount of empty beer boxes as well as the hard liquor in the fridge. [Tr. 8/1/19 pg. 189 ln. 12-17]. Abbey testified to Brian spending a lot of time at the liquor store when the parties were in a relationship. [Tr. 8/28/19 pg. 45 ln. 15-19]. Abbey further testified to her surprise of the amount of alcohol purchases on Brian's bank statements following their breakup, many times when he has K.L.W. in his primary care. Id. *See also* [App. 28-31; 32-38; Doc. 108-09][7]. Abbey stated it was unusual for Brian to not walk into the home with a case of beer or whiskey while they resided together. [Tr. 8/28/19 pg. 137 ln. 15-19].

[¶66] Abbey testified to an incident in which Brian drove with K.L.W. to the Twin Cities, when she believed Brian had been consuming alcohol prior to leaving. [Tr. 8/28/19 pg. 81 ln. 1-17; App.149]. Abbey testified to smelling alcohol on Brian's breath that day but Brian denying he was drunk. Id. In 2016, Abbey texted Brian her concern when he drives his motorcycle while intoxicated. [App. 216-17]. Brian received a DUI in 2012 which further shows he has the propensity to consume alcohol excessively and

[7] Exhibit 108 is a summary of Brian's expenditures towards alcohol. The summary at App. 28-31 was created by Abbey based upon Brian's bank records contained at docket 311-353.

operate a motor vehicle. [App. 60-63]. Brian would routinely asked Abbey to purchase him beer, when the two were in a relationship. [App. 218-21]. A parent's past behavior may be an indicator of future behavior. Rebenitsch v. Rebenitsch, 2018 ND 48, ¶11, 907 N.W.2d 41, 45. The District Court ignored this evidence.

The only instance in which Abbey was shown to drink alcohol was in an Instagram post dated April 1, 2019. [7/30/19 pg. 104 ln. 5-20; Doc. 267]. Abbey testified to the image being taken on March 30, 2019, an evening she did not have parenting time with K.L.W. [Tr. 7/30/19 pg. 141 ln. 3-15; pg. 142 ln. 2-3]. Tim VanGrinsven Jr., corroborated Abbey's testimony [Tr. 8/1/19 pg. 13 ln. 3-20].

[¶67] The sheer volume of testimony and exhibits illustrates Brian consumes alcohol frequently. The District Court concluded that the one instance of Abbey going out with her friends on a night she did not have K.L.W., to be comparable to the totality of evidence of Brian's alcohol usage. [App. 239]. Brian's untruthfulness in regards to his drinking is pertinent to his morality. This factor favored Abbey.

[¶68] Factor (g), the mental and physical health of the parents, as that health impacts the child.

[¶69] The District Court found this factor to be neutral. As discussed in other factors, Brian purchased and consumed alcohol frequently, sometimes on his parenting days with K.L.W. [App. 32-38[8]; 137]. There were text messages to support Brian operated motor vehicles after consuming alcohol, on one occasion with K.L.W. [App. 137]. Brian has alcohol related criminal convictions. [App. 66-68] There was evidence of Brian's

[8] 2019 Unrefuted calendars summarizing Brian's credit/debit card purchases. Green highlighting designates days Brian purchased alcohol, pink highlighting designates days Brian purchased alcohol with K.L.W. in his primary care. *See also*, Trial Exhibit 109 [doc. 355-358]

propensity for anger and violence as discussed in factor (j). The District Court disregarded the sheer volume of evidence that disfavored Brian while ignoring evidence that favored Abbey. This factor favored Abbey.

[¶70] Factor (j), evidence of domestic violence

[¶71] The District Court held "*Abbey argued that Brian engaged in domestic violence, but the evidence does not support that conclusion*". [App. 240]. Voluminous amounts of relevant evidence was ignored in reaching this opinion. Domestic violence dominates the hierarchy of best interest factors, subjecting the perpetrator to a rebuttable presumption against residential responsibility, pursuant to N.D.C.C. §14-09-06.2. Evidence of domestic violence must be considered by the Court as one of the best interest factors, even if it does not trigger the presumption:

> ***A trial court cannot simply ignore evidence of family abuse, but must make specific findings on evidence of domestic violence in making its decision on primary residential responsibility***. Helbling v. Helbling, 532 N.W.2d 650, 653 (N.D. 1995). Even if the evidence of domestic violence does not trigger the statutory presumption under N.D.C.C. § 14-09-06.2(1)(j), ***the violence must still be considered*** as one of the factors in deciding primary residential responsibility, and ***when credible evidence of domestic violence exists it "dominates the hierarchy of factors to be considered" when determining the best interests of the child under N.D.C.C. § 14-09-06.2***. Datz, 2013 ND 148, ¶18, 836 N.W.2d 598 (quoting Wessman v. Wessman, 2008 ND 62, ¶13, 747 N.W.2d 85). Law v. Whittet, 2014 ND 69, ¶¶14-17, 844 N.W.2d 885, 889-90 (emphasis added).

Further,

> "…***corroboration may make allegations of domestic violence more credible. But corroboration is not required as a matter of law to prove domestic violence under N.D.C.C. §14-09-06.2(1) (j).***" Kasprowicz v. Kasprowicz, 1998 ND 68, ¶12 ,575 N.W.2d 921 (emphasis added).

[¶72] Over the course of their relationship, Brian was abusive towards Abbey. [Tr. 7/31/19 pg. 84 ln. 9-25; 8/1/19 pg. 10 ln. 12-23]. Brian threw a full beer bottle at Abbey's head and pushed her into a bathroom sink while pregnant. Id. Abbey testified

the abusive incidents continued after K.L.W. was born. [Tr. 7/31/19 pg. 125 ln. 5-126 ln. 21; pg. 126 ln. 24-127 ln. 7; pg. 252 ln. 8-12; 8/28/19 pg. 23 ln. 19- 24][App. 132-33]. Brian broke furniture and Abbey's television while in anger. [Tr. 8/1/19 pg. 44 ln. 2-4; pg. 195 ln. 2-25; pg. 196 ln. 1-12]. Brian also was known to hide the base for the car seat to prevent Abbey leaving his home with K.L.W. [Tr. 7/31/19 pg. 126 ln. 6-15]. Brian, in anger, burned K.L.W.'s baby gate in his driveway after tripping on the gate at the top of the stairs. [Tr. 8/1/19 pg. 233 ln. 4-25].

[¶73] Abbey described Brian's abusive conduct as a "pattern" and that Brian would tell Abbey often to leave his home but without K.L.W. [Tr. 7/31/19 pg. 125 ln. 14-20]. In September, 2016 following an incident in which Brian had been consuming alcohol all day, Abbey left Brian's home with K.L.W. after calling law enforcement. [Tr. pg. 7/31/19 pg. 183 ln. 1-9]. As background, Abbey had been to a Blake Shelton concern with her mom and friends the evening prior. [Tr. 07/31/19 pg. 125]. After church the next morning, Brian accused Abbey of cheating on him, even though Abbey had pictures she had taken at the concert and was able to produce those photos to Brian. Id. Brian's behavior towards Abbey presented as enraged, erratic, and lead to Brian physically pushing Abbey around the home with two-hands. Id. Abbey called police due to being fearful and wanting to leave with K.L.W.; however, the base for the car seat, again, had been removed from her vehicle. [Tr. 7/31/19 pg. 126 ln. 6-15][App. 64-65]. Law enforcement assisted with securing the car seat without the base. Id. Abbey was able to leave and reach the safety of her mother's home in Grand Forks. [Tr. 8/1/19 pg. 194 ln. 2-23]. Upon arriving at Deanne Gifford's home in Grand Forks, Abbey presented as

crying, upset and scared. Id. Brian was incessantly texting Abbey upon her arrival. Id. Abbey testified to being fearful of Brian. [Tr. 7/31/19 pg. 126 ln. 22-23].

[¶74] The District Court concluded that "…*none of the hundreds of contemporaneous text messages between the parties credibly support Abbey's assertion of domestic violence*." [App. 241]. However, Brian has acquiesced to claims of abuse in text message. [App. 119]. In a text message communication, Abbey stated "*I just wish things could just be verbal and nothing physical*." Id. Brian responded "*nothing else is going to happen, I know why you're scared about it but trust me, your safe with me ….*" Id. Further, Abbey texted Brian "…. *You've physically pushed me and grabbed me over other fights, so I thought you'd do something far worse*." [App. 125]. Abbey telling Brian "

> *… I just can't trust you Brian. Not right now. You just don't think anything you do is wrong..how (sic) you act or what you say. I don't enjoy any of this. I wanna (sic) be at home, but some day (sic) I think something bad is going to happen…K.L.W. can't be put through that*." [App. 128].

[¶75] Corroboration of several incidents, by several witnesses, was provided through testamentary evidence. Tim VanGrinsven Jr., ("Tim") testified to Abbey telling him that Brian was physically and emotionally abusive towards her. [Tr. 8/1/19 pg. 10 ln. 12-23][App.261-63]. Tim particularly recalls Abbey stating Brian threw a full beer bottle at her head. Id. Hannah Noll, Abbey's friend testified to Abbey sharing with her, fights with Brian, Brian damaging property, Brian pushing Abbey into a sink when she was pregnant, and throwing a closed beer can at Abbey while she was pregnant. [Tr. 8/1/19 pg. 154 ln. 13-155 ln. 1-2][App. 264-270]. Hannah also testified to Abbey confiding in her about an incident in which Brian physically prevented her from leaving the home through the removal of the child's car seat from Abbey's vehicle. Id. Hannah testified to

her belief that Abbey was scared at the time. Id. In 2016, Abbey expressed to Hannah in texts messages threats that Brian made to "beat the shit" out of her. [App. 120].

[¶76] Abbey's mother Deanne Gifford testified to an incident in 2016 in which Abbey drove to her home in Grand Forks, from Fargo, late at night, following an argument with Brian. [App. 271-75]. Deanne stated Abbey was upset, crying, and scared Brian was following her. Id. Deanne also testified to Abbey sharing that Brian pushing Abbey into a sink, a wall, and threw a beer bottle at her head. Id. Abbey's friend Katie Hess testified to a time at a coffee shop where Brian continuously messaged Abbey to find out who she was with. [App. 276-80]. Katie testified to her concern of Brian being restrictive, overbearing, and controlling. Id. Abbey's friend Ashley Lommen testified to accompanying Abbey to parenting time exchanges because Abbey was scared. [App. 281]. Finally, Abbey's friend Evan Bertsch testified to witnessing a phone call between Abbey and Brian in which she could hear Brian screaming names such as "cunt" and "bitch" at Abbey. [App. 282-83]. Evan also testified to Abbey frequently expressing fear of Brian. Id.

[¶77] Brian has a history of engaging in physical altercations with others. Brian bragged to Abbey's friend, Katie Hess, about being expelled from high school for beating another individual up. [App. 278]. During the period of time when Abbey resided with Brian, Brian shared with Abbey a physical incident that occurred with his ex-girlfriend Kim. [Tr. 7/31/19 pg. 127 ln. 1-25; pg. 128 ln. 1-2]. Brian told Abbey that following the prior break-up with Kim, he choked Kim until her eyes bled which resulted in him spending a few nights in jail. Id. Abbey silently questioned the reason for Brian sharing the incident with her, whether or not the statement was meant to demonstrate to her what

Brian was capable of. Id. [App. 47-59]. The police report states that Brian admitted to choking Kim although Brian denied that at trial. [Tr. 08/28/19 pg. 187 ln. 23-pg. 188 ln. 25]. Brian indicated in his sworn affidavit to the Court for the interim proceeding that he has "never physically assault a woman in my [his] life". [App. 290-92]. Also previous to his relationship with Abbey, Brian assaulted a co-worker at Dempsey's in Fargo. Id. Although Brian claimed he could recall what he told police, in detail, regarding the earlier incident with Kim, the incident at Dempsey's was very difficult for Brian to recall with any detail. Id. Rebenitsch v. Rebenitsch, 2018 ND 48, ¶11; 907 N.W.2d 41, 45. *See also*, Interest of A.B., 2010 ND 249 ¶16; 792 N.W.2d 539; Kienzle v. Selensky, 2007 ND 167 ¶17; 740 N.W.2d 393 (stating a person's past behavior may be an indicator of future behavior). Brian's own witness, Stephen Nienaber, ("Stephen") testified as to Brian's reputation and stated he has heard a story or two. [Tr. 08/01/19 pg. 25 ln.19-25; pg. 26 ln. 1-13]. Stephen also testified that Brian was a wrestler and that wrestlers are more competitive and rowdy than the average person. [Id. at pg. 25 ln. 7-10]. Brian was not forthcoming with the Court concerning previous incidents of physical altercations with others. There is no evidence to suggest that Abbey has been physically aggressive with others, in the past or at the time of trial.

[¶78] Given the foregoing, the District Court found:

> *Abbey also alleged that Brian was abusive and aggressive towards her. For the most part,* ***these claims were vague and uncertain***. ***There are no contemporaneous police records or photographs supporting her allegations***. *Because domestic violence is serious and victims are often reluctant to disclose, the Court allowed Abbey to present hearsay testimony from her witnesses about statements that Abbey made about the allegations while Brian and Abbey were together. Even this hearsay evidence did not support her allegation that there was violence*. [App. 241](emphasis added).

[¶79] Even if the evidence did not rise to the level triggering the rebuttable presumption precluding an award of residential responsibility, the testimony and exhibits were enough to require that this factor favors Abbey and to further require the District Court to perform the requisite domestic violence analysis.

[¶80] The District Court improperly faulted Abbey for not providing any police reports or photographs, however; "…***corroboration is not required*** *as a matter of law to prove domestic violence under N.D.C.C. §14-09-06.2(1)(j).*" (emphasis added). Kasprowicz, 1998 ND at ¶12. Abbey's corroboration came in the form of testimony though six different witnesses, one of which who was attending the police academy, one employed at social services, and four whom work in the healthcare system. The only witness whose credibly was questioned is Hannah Noll, due to a HIPAA violation and the District Court failed to specifically state why the allegation surrounding HIPAA negated her testimony related to domestic violence. [Doc. 299]. The witnesses were all sequestered and none shared identical details. It was error of law and clearly erroneous for the Court to find this factor to be neutral. This factor favored Abbey.

III. The District Court Erred by Ordering an Automatic Change of Residential Responsibility Upon a Move by Abbey.

[¶81] The District Court erred by ordering an automatic change of custody upon the occurrence of some future event—in this case Abbey moving more than 45 miles from Fargo, ND:

> [¶18] Parenting Plan. …If Abbey relocates more than 45 miles from Fargo, it is in K.L.W.'s interests to primarily reside with Brian, in Fargo. [App. 243].

An automatic change in primary residential responsibility upon the occurrence of a future event is unenforceable. Zeller v. Zeller, 2002 ND 35, ¶1, 640 N.W.2d 53, 54. The

District Court retains jurisdiction over the rights of children and any future modification of residential responsibility rendering this provision unenforceable. Id. The automatic change of custody is also against public policy. Hagerman v. Hagerman, 2013 ND 29 ¶36; 827 N.W. 2d 23. *See* also Zarett v. Zarett, 1998 ND 49 ¶10; 574 N.W.2d 855.

IV. The District Court Erred by Imputing the Plaintiff's Wage to That of A Construction Laborer.

[¶82] The District Court errs as a matter of law if it fails to comply with the child support guidelines in determining an obligor's child support obligation. Thompson, 2019 ND at ¶7. Brian openly pled and communicated that he did not wish to pay child support to Abbey. [App. 26; 223-29; 132-35] [Tr.08/30/19 pg.144 ln. 23-25]. The District Court found Brian underemployed and imputed Brian's wages based on the statewide average earnings of a construction laborer, at a 6/10th prevailing rate. [App. 244-47].

[¶83] Determining underemployment for the purpose of imputing income pursuant to N.D. Admin. Code 75-02-04.1-07 is a two-step process. The District Court must first determine the individual's earnings as defined by N.D. Admin. Code 75-02-04.1-07(1)(a), including the consideration of in-kind income. After determining earnings, the Court may determine an obligor to be underemployed if the obligor's gross income from earnings is significantly less than North Dakota's statewide average earnings for persons with similar work history and occupational qualifications. Thompson 2019 ND at ¶1. N.D. Admin. Code 75-02-04.1-07(6) applies when a child support obligor fails to provide adequate reliable information to calculate his child support obligation and does not require a finding the obligor is underemployed. Id.

[¶84] Brian is not a laborer, he owns and manages Woelfel Contruction, LLC. [App.244 ¶21][Doc.367][Tr.08/28/19 pg. 157-175]. Brian pays the foreman for Woelfel

Construction, $25 per hour. [Tr.08/28/19 pg.144 ln. 1-14]. Brian earned approximately $50,000 at his last job. [Tr. 08/28/19 pg. 173 ln. 6-8]. Brian presented a monthly budget of $3,030 per month and testified he expected to pay an additional $1,000 per month to his parents for new debt. [App.69-70][Tr. 08/28/19 pg.5 ln. 5-15]. Brian's budget would require a **minimum net income of $48,360**. Id. (emphasis added). Brian's budget included installment payments for his credit card debt of $500 when in actuality, payments are over $900. [Doc. 341-53; 540]. The budget did not include in-kind income from Woelfel Construction which pays for his telephone, gas, vehicle, license, insurance, mortgage and other payments. [Tr. 08/28/19 pg. 150 ln. 16-25; pg. 151; pg. 152 ln. 1-7]. Brian would not provide a specific amount of income he will receive for coaching wrestling this winter, staying he didn't have his contract yet. [Tr. 08/28/19 pg. 149 ln. 12-22]. Brian did not provide reliable information to the Court for purposes of establishing his income for calculating child support.

[¶85] Further, bank statements were entered into evidence for the full year of 2018. Brian's personal Well Fargo account #910[9] reflected deposits of approximately $22,129. [Doc. 311-314]. For the Woelfel Contracting account #1544[10], deposits of approximately $249,056 were made. [Doc. 315-329].

[¶86] A District Court cannot arbitrarily ignore the guidelines simply because the obligor's tax returns do not reasonably reflect the obligor's income without ordering the parties to present more information and making specific findings of fact. Raap, 2016 ND 195, ¶7, 885 N.W.2d 777. Thompson, 2019 ND at ¶9. The Court erred by imputing a

[9] This account number is redacted down to the last three digits.
[10] This account number is redacted down to the last four digits.

laborer's 6\10th wage when the testimony clearly indicated that Brian's earns a minimum net income of $48,360 which should be used to establish a child support obligation.

[¶87] CONCLUSION

The District Court may not wholly ignore or fail to acknowledge and explain significant evidence clearly favoring one party, while dismissing evidence that disfavors another party. The District Court was tasked with finding the parent that best serves the interest of K.L.W., not tasked with enforcing lay agreements and prioritizing an in state move allowed by statute over all other best interest factors. Because of the foregoing, the case should be remanded back down to the lower Court for further analysis based on all relevant evidence.

Respectfully submitted on this 4th day of March, 2020.

/s/ Jacey Johnston
Jacey Johnston
JOHNSTON & COLEMAN
221 SOUTH 4TH STREET
GRAND FORKS, N.D. 58201
Phone: (701) 757-1404
jacey@wedefendyou.net
(ND ID #06214)

/s/ Olivia Jureidini
Olivia Jureidini
JOHNSTON & COLEMAN
221 SOUTH 4TH STREET
GRAND FORKS, N.D. 58201
Phone: (701) 757-1404
olivia@wedefendyou.net
(ND ID #09058)

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, in compliance with N.D.R. App. P. Rule 32(a)(8)(A) that the above brief contains 38 pages, including footnotes and endnotes but excluding any addendum, which is within the page limitation.

Dated this 24th day of February, 2020.

/s/ Jacey Johnston
Jacey Johnston (ND# 6214)
jacey@wedefendyou.net
Attorney at Law
221 South Fourth Street
Grand Forks, ND 58201
P: (701) 757-1404
F: (701) 775-2230
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2020, the following documents:

1. **INITIAL BRIEF OF THE APPELLANT;**
2. **CERTIFICATE OF COMPLIANCE; AND**
3. **INITIAL APPENDIX**

was filed electronically with the Clerk of Court through the ELECTRONIC FILING PORTAL OF THE NORTH DAKOTA SUPREME COUIRT, with like service of the above listed documents to the following:

Leah duCharme at leah@gjesdahllaw.com

Dated this 24th day of February, 2020.

/s/ Jacey Johnston

Jacey Johnston (ND# 6214)
jacey@wedefendyou.net
Attorney at Law
221 South 4th Street
Grand Forks, ND 58201
P: (701) 757-1404
F: (701) 775-2230
Counsel for Appellant

ORAL ARGUMENT REQUESTED:

The Appellant is requesting oral argument due to the District Court's failure to consider and address relevant evidence that favored Appellant and disfavored Appellee. The findings of the District Court are vague and in summary fashion making it impossible to determine the rationale used in reaching its decision. Oral argument will provide counsel for the Appellant to appropriately argue the law, evidence, and its relation to the District Court's order thereby giving the reviewing court, sufficient basis upon which it can make its determination. Remanding the matter to the District Court with specific instructions is the just and appropriate remedy.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, in compliance with N.D.R. App. P. Rule 32(a)(8)(A) that the above brief contains 38 pages, including footnotes and endnotes but excluding any addendum, which is within the page limitation.

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/s/ Jacey Johnston

Jacey Johnston (ND# 6214)
jacey@wedefendyou.net
Attorney at Law
221 South Fourth Street
Grand Forks, ND 58201
P: (701) 757-1404
F: (701) 775-2230
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2020, the following documents:

1. **INITIAL BRIEF OF THE APPELLANT;**
2. **CERTIFICATE OF COMPLIANCE; AND**
3. **INITIAL APPENDIX**

was filed electronically with the Clerk of Court through the ELECTRONIC FILING PORTAL OF THE NORTH DAKOTA SUPREME COUIRT, with like service of the above listed documents to the following:

Leah duCharme at leah@gjesdahllaw.com

Dated this 4th day of March, 2020.

JOHNSTON & COLEMAN

/s/ Jacey Johnston

Jacey Johnston (ND# 6214)
jacey@wedefendyou.net
Attorney at Law
221 South 4th Street
Grand Forks, ND 58201
P: (701) 757-1404
F: (701) 775-2230
Counsel for Appellant