

In the Supreme Court State Of North Dakota

November 9, 2022

Supreme Court No. 20220192

Grand Forks County Number: 18-2020-DM-00597

Michael Allen Brockmeyer,

Plaintiff and Appellant,

v.

Angela Joy Brockmeyer,

Defendant and Appellee,

And

State of North Dakota,

Statutory Real Party in Interest and Appellee.

APPEAL FROM FINAL ORDER DENYING MOTION TO MODIFY JUDGMENT
ENTERED MAY 9, 2022, OF THE DISTRICT COURT OF GRAND FORKS
COUNTY, NORTH DAKOTA, NORTHEAST CENTRAL JUDICIAL DISTRICT, THE
HONORABLE JAY KNUDSON PRESIDING

INITIAL BRIEF OF PLAINTIFF AND APPELLANT MICHAEL ALLEN
BROCKMEYER

ORAL ARGUMENT REQUESTED

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[¶1] JURISDICTIONAL STATEMENT

[¶2] The Order denying Plaintiff's motion was entered on May 9, 2022 by a District Court Judge in the Northeast Central Judicial District. (R200). 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.

[¶3] STATEMENT OF THE ISSUES

- I. Whether the District Court erred as a matter of law when stating it was “not clear” if the parties could stipulate to waive the statutory provisions in N.D.C.C. § 14-09-06.6(3) to a best interest standard instead of the endangerment standard and further when it made a finding that Plaintiff failed to meet his burden of proof under the endangerment standard.
- II. Whether the District Court erred as a matter of law when it found N.D.C.C. § 14-09-06.2(1) factors a, b, d, f, g, and k were neutral when a consideration of all the evidence supports a finding these factors weigh in Plaintiff's favor.
- III. Whether the District Court erred as a matter of law when it impermissibly declined to modify residential responsibility because of facts known to the parties at the time of their stipulated agreement.
- IV. Whether the District Court erred in its credibility determination when it erroneously gave great weight to Angela's testimony, while also finding

Angela to be evasive, and less credible than Michael and impermissibly allowed Angela and other witnesses to assert a 5th Amendment privilege to shield facts that supported Michael's motion to change residential responsibility.

[¶4] STATEMENT OF THE CASE

[¶5] This is an appeal by Michael Allen Brockmeyer (hereinafter "Michael") from an Order denying his motion to modify custody which was filed on August 13, 2021 and Judgment entered on May 9, 2022, in the Northeast Central Judicial District, Grand Forks County, North Dakota. (R200). The Court denied Michael's request to modify joint residential responsibility to primary residential responsibility in his favor. Id.

[¶6] The parties' divorce action was initiated by Michael on November 25, 2020, when Michael served Angela Brockmeyer (hereinafter "Angela") with a Summons and Complaint. (R1-2). On January 26, 2021, the parties entered into a Marital Termination Agreement. (R57). Both parties agreed to equal residential responsibility of their children, S.A.B. born in 2006 and B.W.B. born in 2017. Their oldest daughter, Lauren Brockmeyer (hereinafter "Lauren") was not included in the parenting plan as she was nearing the age of 18 at the time. On February 3, 2021, the Court entered Judgment consistent with the parties' agreement. (R63).

[¶7] On August 13, 2021, Michael motioned to modify custody and motioned for an interim order requesting expedited review. (R74-80). On September 1, 2021, a hearing was held concerning the interim motion. The Court entered an order denying the motion for interim order. (R119). The Court also entered an order finding Michael established a

prima facie case for changing residential responsibility and an evidentiary hearing would be set. (R121).

[¶8] On March 29, 2022, the Court held an evidentiary hearing concerning Michael's motion to modify residential responsibility. Judgment denying Michael's motion was entered on May 9, 2022. (R200). Plaintiff's Notice of Appeal was timely filed on July 5, 2022. (R201).

[¶9] STATEMENT OF THE FACTS

[¶10] Michael and Angela married on August 7, 2010 and were divorced on February 2, 2021. (R. 62). At the time of the evidentiary hearing, Lauren was 19 years old, S.A.B. was 15 years old and B.W.B. was 5 years old. (Transcript of Motion Hearing on March 29, 2022, pg. 34 ln. 11-12) (hereinafter "Tr.").

[¶11] S.A.B. attends high school in Grand Forks and only has two years left before he graduates. (Tr. pg. 65 ln.12-14), B.W.B. has attended the same daycare for nearly two years, in Grand Forks (Tr. pg. 82 ln. 4-6). B.W.B. is set to start Kindergarten next year. (Tr. pg. 185 ln. 20).

[¶12] Michael and Angela's marriage is described as being toxic. (Tr. pg. 181 ln. 17-18). Angela had an affair during the marriage which resulted in the divorce. (Tr. pg. 147 ln. 8-21). Since the divorce Michael and Angela's relationship has declined. (Tr. pg. 181 ln. 13-18).

[¶13] Michael and Angela stipulated in their original divorce judgment that neither party was to consume alcohol 24 hours before or during their parenting time, each party was to abstain from illegal drug use at all times, and each party shall ensure proper supervision of the children at all times during parenting time (R57:8:¶32). Angela

admittingly violated all three provisions of the parties stipulated agreement. (R102:7-8:¶16, Tr. pg. 42 ln. 9-15, Tr. pg. 57 ln. 6-20).

[¶14] On March, 24, 2021, Angela was arrested for actual physical control after Officer Fladland responded to a reckless driving call and found Angela in the driver's seat of her vehicle, exhibiting signs of intoxication. (Tr. pg. 11 ln. 4-5). Officer Fladland observed Angela's speech was slurred and thick-tongued. (Tr. Pg. 11 ln. 10-12). Angela told Officer Fladland she did not have any medical conditions and she was not taking any prescription medications. (Tr. Pg. 11 ln. 16 – pg. 12 ln. 6). Angela submitted to a field sobriety test, at which time Officer Fladland noted she had difficulty maintaining balance, remembering directions, and following the stimulus. (Tr. pg. 12 ln. 7-11; R180:5-6). When Angela was taken to the police station, her chemical breathalyzer test showed her blood alcohol level was at 0.142 BAC. (Tr. pg. 13 ln. 2-3; R180:6). The younger children were not in Angela's care on March 24, 2021; however, Lauren was at Angela's home and witnessed her mother being arrested and taken to jail. (Tr. pg. 15 ln. 13-23, Tr. pg. 249 ln. 15).

[¶15] On April 18, 2021, Angela went out to a restaurant and consumed a few beers with her brother and sister-in-law, while her mother was home caring for B.W.B. and S.A.B. was at a friend's house. (R102:7-8:¶16).

[¶16] In June of 2021, Angela left S.A.B. alone overnight, after she spent the day at Golden Lake with her brother's family, returned to Grand Forks and stayed at her brother's home for the night. (Tr. pg. 57 ln. 17-25). S.A.B. was home with two other teenagers and no adult supervision. (Tr. pg. 57 ln. 6-20). That night S.A.B. messaged Angela to come home. Id. Angela did not come home that night. (Tr. pg. 57 ln. 21-24).

Angela did not inform the other children's parents that the three boys would be home alone for an overnight time period. (Tr. pg. 57 ln. 14-16). Angela and Michael were messaged by one of the children's parents who was displeased that three teenagers were unsupervised. (Tr. pg. 85 ln. 23 to pg. 86 ln. 14).

[¶17] On August 7, 2021, Angela threw a birthday party for her brother while her children were in her care. (Tr. pg. 60 ln 13 - pg. 61 ln 7). Alcohol was present at the party and Angela consumed at least two beers. Id. Later that night, S.A.B. called his sister Lauren in hysterics because his mother was yelling at him. (Tr. pg. 19 ln. 2-11, R181). Lauren called the police to conduct a welfare check on S.A.B. and B.W.B. Id. Officer Muller responded, and observed Angela had a flushed red face, watery and red eyes, and that the smell of alcohol was emanating from her. (Tr. pg. 19 ln. 15-18; R181). S.A.B. refused to speak to Officer Muller other than saying that he was okay. (Tr. pg. 19 ln. 24 – pg. 20 ln. 2). Officer Muller filed a 960 report of the incident. (Tr. pg. 21 ln. 4-6, exhibit 18).

[¶18] Lauren found marijuana in Angela's bedroom in a Vera Bradley purse, edibles in Angela's closet, and pictures of copious amounts of marijuana and cash on Angela's computer. (R170; R172; R189). Angela admitted the pictures evidenced in exhibit 4 and 27 that depict pills and sizeable bags of marijuana were pictures on her phone. (Tr. pg. 38 ln. 2-6; R170; R189). Additionally, Angela has taken her son's ADHD medication. (Tr. pg. 53 ln. 5-7, pg. 62 ln. 15-18).

[¶19] Angela has spoken poorly to her children. Angela made threats to S.A.B., stating she will kick him out of the house and take away his keys. (Tr. pg. 50 ln. 19-21, pg. 149 ln. 15-18, pg. 254 ln. 16-18). In addition to making threats, Angela has screamed at

S.A.B. and has called Lauren names, including “dumb cunt”, and a “shitty 15-year-old” while also stating that Lauren is dead to her and that she no longer considers her as her daughter. (Tr. pg. 49 ln. 15-17, pg. 50 ln. 4-6, pg. 79 ln. 2-4; R174; R186:1).

[¶20] Angela has had men who are unfamiliar to the children, in the home while she is caring for the children. (Tr. pg. 50 ln. 15-18). Lauren observed a strange man in Angela’s bedroom wearing only underwear, on a school night. (Tr. pg. 56 ln. 3-5, pg. 249 ln. 15-pg. 250 ln. 5). When questioned at trial who she was dating, Angela initially pled the Fifth Amendment, but eventually admitted to having a relationship with Nicholas Johansson, who resides in Fargo. (Tr. pg. 58 ln. 4-pg. 59 ln. 8). Angela is still romantically seeing Nicholas and visits his residence frequently. (Tr. pg. 59 ln. 13-18). Angela expressed a wish to relocate to Fargo. (Tr. pg. 63 ln. 16 - pg. 64 ln. 15).

[¶21] Grand Forks County Social Services (hereinafter “Social Services”) have been contacted on two occasions since the parties original judgment. (Tr. pg. 71 ln. 2-4, Tr. pg. 72 ln. 18-24). The first occasion occurred in April 2021 for neglect due to Angela’s use of alcohol and drugs. (Tr. pg. 71 ln. 2-14). The report also included information about the parties then four-year-old not being potty trained, the children not being fed, and Angela using a child’s Adderall prescription. (Tr. pg. 71 ln. 9-17). Another report was made in August 2021 due to Angela being under the influence of alcohol and regarding her supervision of the children. (Tr. pg. 72 ln. 18-24).

[¶22] Recommendations were made to Angela by Social Services to include maintaining a clean and safe home free from drug usage, and for the children to be cared for by a sober caregiver. (R184:2).

[¶23] Angela tested positive for marijuana in October 2021 after submitting to a hair follicle drug test, at the request of Michael based on his suspicion that Angela was using drugs. (Tr. pg. 42 ln. 9-15) Angela admitted she knew the test would be positive for marijuana. (Tr. pg. 87 ln. 5-7).

[¶24] On the day of trial Angela disclosed she received a job offer in Fargo and was inclined to take the position. (Tr. pg. 63 ln. 16 - pg. 64 ln 12). Angela proposed S.A.B. remain in Grand Forks to finish high school and B.W.B. move with her to Fargo. (Tr. pg. 81 ln. 2-11). At the end of trial Angela changed her position to no longer wanting to move to Fargo and instead requested the custody arrangement remain as joint. (Tr. pg. 238 ln. 15-20). Michael remained firm in his requested relief throughout trial, requesting the Court grant primary residential responsibility of S.A.B. and B.W.B. to him in order to protect the children. (Tr. pg. 122 ln. 15-18).

[¶25] **STANDARD OF REVIEW**

[¶26] The District Court's award of primary residential responsibility is treated as a finding of fact, which the Supreme Court reviews under the clearly erroneous standard of review. Schlieve v. Schlieve, 2014 ND 107, ¶8, 846 N.W.2d 733 (citing Rustad v. Rustad, 2013 ND 185, ¶5, 838 N.W.2d 421; Wolt v. Wolt, 2010 ND 26, ¶7, 778 N.W.2d 786). A finding of fact is clearly erroneous when it is induced by an erroneous view of the law, if no evidence exists to support it, or, if after reviewing all of the evidence the Supreme Court is left with a definite and firm conviction that a mistake has been made. Schlieve, (citing Doll v. Doll, 2011 ND 24, ¶6, 794 N.W.2d 425). The District Court has substantial discretion in making a custody determination, but it must consider all of the best-interest factors. Id. at ¶9. "Although a separate finding is not required for each

statutory factor, the court's findings must contain sufficient specificity to show the factual basis for the custody decision." Schlieve, at ¶8 (citing Wolt, at ¶9).

[¶27] **LAW & ARGUMENT**

[¶28] Post Judgment modifications of residential responsibility are governed by N.D.C.C. §14-09-06.6. Under subsection (1) “unless agreed to in writing by the parties, or if included in the parenting plan, no motion for an order to modify primary residential responsibility, may be made earlier than two years after the date of entry of an order establishing primary responsibility unless in accordance with subsection 3.” Id. Subsection 3 states the two-year time limit does not apply if “(a) the persistent and willful denial or interference with parenting time; (b) the child’s present environment may endanger the child’s physical or emotional health or impair the child’s emotional development; or (c) the primary residential responsibility of the child has changed to the other parent for longer than six months.” Id.

[¶29] If a party moves to modify residential responsibility more than two years after the initial determination, they must show a material change of circumstances has occurred and modification is in the best interest of the child. Id. at subsection 6.

[¶30] An environment that endangers the child's physical or emotional health is considered a material change in circumstances. Glass v. Glass, 2011 ND 145, ¶13, 800 N.W.2d 691. Conflict and lack of agreement between parents regarding the initial parenting plan may also constitute a material change in circumstances warranting modification of parenting time. Hoverson v. Hoverson, 2015 ND 38, ¶22, 859 N.W.2d 390.

[¶31] For the Court to hold an evidentiary hearing on a motion to modify residential responsibility, the moving party must establish a prima facie case, “a prima facie case only requires facts which if proved at an evidentiary hearing would support a change of custody. . .” Dufner v. Trotter, 2010 ND 31, ¶16, 778 N.W.2d 586. The District Court determined Michael met his prima facie burden and set an evidentiary hearing.

I. The District Court erred as a matter of law when stating it was “not clear” if the parties could stipulate to waive the statutory provisions in N.D.C.C. 14-09-06.6(3) to a best interest standard instead of the endangerment standard and further when it made a finding that Plaintiff failed to meet his burden of proof under the endangerment standard.

[¶32] This Court has encouraged settlement agreements in divorce and child custody cases. Hageman v. Hageman, 2013 ND 29, ¶36, 827 N.W.2d 23. In Hageman the parties stipulated agreement included a provision that if either party relocates from the Grand Fork/East Grand Forks area, that would constitute as a material change of circumstances allowing either party to motion for a modification of residential responsibility. Id. at ¶2. The reviewing Court upheld the Hageman stipulation. Id. at paragraph 37.

[¶33] In the present case the parties Marital Termination Agreement included a provision titled “Waiver of Threshold Requirements”. (R57:8:¶33). Under this paragraph the parties agreed to waive the threshold requirement of N.D.C.C. §14-09-06.6 subsections (5) and (6) and any motion to modify residential responsibility shall be determined on a best interest standard. Id. The Court adopted the parties stipulation and incorporated it into a Judgment. (R63). Michael explained he agreed to the provision because Angela had made promises to him concerning her past behaviors, but he wanted a safety net in the event Angela did not uphold her end of the agreement. (Tr. pg. 152 ln

1-15). It is a strong public policy for parties in a divorce to enter into stipulated agreements. Hageman, 2013 at ¶36.

[¶34] Additionally, N.D.C.C. §14-09-06.6 subsection 2 allows for parties to waive the statutory requirement for a motion to modify residential responsibility, if the parties agree to such stipulation in writing or it was included in the parenting plan, as was the case here. The District Court concluded it is “not clear” if the parties can agree to waive the statutory requirement to modify custody within two years of a judgment being issued and therefore, should only have used a best interest analysis. The Court further erred when it conducted an analysis on the endangerment standard, finding that Angela’s actions did not amount to endangerment of the child. (R200:22-23:¶ 77).

II. The District Court erred as a matter of law when it found N.D.C.C. § 14-09-06.2(1) factors a, b, d, f, g, and k, were neutral when a consideration of all the evidence supports a finding these factors weigh in Plaintiff’s favor.

[¶35] In its determination of residential responsibility, the Court must consider the best interest factors enumerated in N.D.C.C. § 14-09-06.2(1). A Court is not required to make a separate finding on each factor, and the Court’s findings on one factor may be relevant to another. Dieterle v. Dieterle, 2013 ND 71, ¶7, 830 N.W.2d 571.

A. Factor (a) requires the consideration of 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.

[¶36] The Court erred in finding factor (a) to be neutral. Angela has blatantly failed to provide nurture, affection and guidance to the minor children. The record included numerous instances in which Angela’s behavior did not promote nurture, affection or guidance to her children. The same was not evident for Michael.

[¶37] The evidence reflected Angela failed to provide nurture and affection to S.A.B. when she screamed at him and threatened to take away his house keys, threats to kick him out of the home, and telling him not to come back. (Tr. pg. 50 ln. 19-21). S.A.B. was scared and distraught with Angela's threat to take his keys away. (Tr. pg. 149 ln. 14-21; pg. 254 ln. 16-18). Angela also failed to provide nurture, and affection to S.A.B. when she left him home alone with two other teenagers while Angela slept at her brother's home. (Tr. pg. 57 ln. 4-16). Angela admits that S.A.B. texted Angela asking her to come home. Id. Angela neglected to inform the other children's parents that the teenage boys would be left unsupervised for the overnight. Id.

[¶38] Angela has made vile comments to her oldest daughter Lauren. Angela admits to calling Lauren a "dumb cunt", stating she is "dead to me" and "she is not my daughter". (Tr. pg. 49 ln. 15-17, pg. 50 ln. 4-6, pg. 79 ln. 2-4). While Lauren was an adult at the time, she is Angela's child and Angela's behavior towards one child has shown to be a pattern she has used on her younger children. Dieterle, 2013 ND at ¶8.

[¶39] Angela has failed to provide proper guidance to the children. Angela has been reported to Social Services on two separate occasions for her inability to supervise the children and her continued use of both legal and illegal substances, which will be discussed in further detail below. (Tr. pg. 71 ln. 2-14; Tr. pg. 72 ln. 18-24). On August 7, 2021, Angela was consuming alcohol in the backyard while the minor children were inside. (Tr. pg. 60 ln. 13-22). When Officer Muller came to the home later that evening for a welfare check he noticed, "an odor of alcohol coming off of her [Angela]. She had a flushed red face, she also had watery and red eyes which to me is an indicator of impairment." (Tr. pg. 19 ln 16-20; R181). The Court in its Findings stated, "[w]hen the

parties have used alcohol, the children are not around or are otherwise cared for. There was very little testimony about how the substance abuse has affected the children in any way.” (R.200:25:¶81).

[¶40] Contrary to the Court’s analysis, there is information in the record that Angela’s substance abuse impacts the children. Lauren testified her relationship with her mother declined due to her mother’s behavior and further that her brothers’ needs were being neglected:

MS. JOHNSTON: what has affected your relationship with your mother since the divorce in February 2021?

LAUREN: Um, just kind of her actions and how she’s kind of just, she kind of just started acting like a teenager, like someone in college right after the divorce and just acting crazy. Like, not like a mom.

MS. JOHNSTON: Okay. And I need you to explain to the Court what you saw your mother doing as it pertains to the children or your brothers in her home?

LAUREN: Mm-hmm. Well, when I first, like, kind of started living with her after my dad sold the house, yeah, around then, she would go out like every night even if it was like a work night, school night for me ‘cause I was still in high school, and go to drink or do whatever, I wasn’t really sure. I didn’t ask that many questions ‘cause I didn’t care.

Kind of was just quiet and, like, didn’t really pay attention to my brothers almost. Like would always, like, just stand in the kitchen while B.W.B. was in the living room, let’s say, and she was just on her phone, just sitting there on her phone just texting whoever. Like wasn’t, just not paying attention to my brothers whatsoever. (Tr. pg. 246 ln. 6 – 247 ln. 3).

[¶41] There was further testimony from Lauren that when S.A.B. called her on August 7, 2021, he appeared to be having an anxiety attack. (Tr. pg. 250 ln. 6-20). Lauren tried to calm S.A.B. down and indicated to him she would be calling the police. Id. Lauren stated:

MS. WEBER: When you made the report to law enforcement, you didn’t in fact know that there were circumstances present in the house that would rise to the level of a call to law enforcement being necessary?

LAUREN: Not necessarily, but she's freaking out and I'm very protective over my brothers. They mean the world to me.

MS. WEBER: Okay. Well, you indicate that your mom was freaking out but you also just said that you didn't have any contact with her, correct?

LAUREN: No, I could hear her in the background screaming.

MS WEBER: Could S.A.B. have been distraught over the communication he was having with his mom at the time?

LAUREN: Yeah.

MS. WEBER: Okay.

LAUREN: **I mean when a kid's told to leave their parent's house and not come back and leave their key there, obviously, they're going to freak out.** (Tr. pg. 253 ln. 19 – 254 ln. 18). (emphasis added).

[¶42] Angela screaming at S.A.B. on the same night an officer found her to be intoxicated illustrates that her substance use negatively impacts her children. Angela's behavior that night did not show S.A.B. love and affection.

[¶43] The parties stipulated in the termination agreement, "neither party shall consume alcohol twenty-four (24) hours before or during their parenting time." (R63:5-6:¶7).

Angela admittedly violated this provision. Further, the parties also agreed, "each party shall assure the children are appropriately supervised at all times during their parenting time." Id. Angela also violated this provision. Angela's lack of judgment and inability to follow the Court's order that she stipulated to, impacts her ability to guide her children. Angela is clearly not leading by example.

[¶44] Angela's run ins with law enforcement, two Social Services investigations, her verbal abuse to the oldest two children, leaving a teenager unsupervised, and her substance use impacts her ability to provide proper love, affection, nurture and guidance

to the minor children. The same cannot be said for Michael, and as such this factor should have favored Michael.

B. Factor (b) requires consideration of the ability of each parent to assure the child receives adequate food, clothing, shelter, medical care, and a safe environment.

[¶45] This factor should have favored Michael as the evidence illustrated Angela had financial difficulties which impacted the children. Angela acknowledged her account was overdrawn and she needed to borrow money from Michael. (Tr. pg. 79 ln. 7-13). Angela has also borrowed money from her mother. (Tr. pg. 184 ln. 13-17). Angela did not have the funds to pay her utilities resulting in her power being cut off. (Tr. pg. 223 ln 2-7). Angela stated the children were with her when the power was shut off but they went over to Michael's. Id. Conversely in the Courts Findings at ¶83, it was implied that it was Michael's parenting time when the power was shut off. (R200:26:¶83). That is incongruent with Angela's own testimony. The children were with Angela for parenting time and they went over to Michael's home because her power was shut off. This is further corroborated by the parties affidavits in support of and in opposition to Michael's motion. (R79:5-6:¶18; R102:10:¶20), and Angela's discovery responses. (R185:9:¶26). The power being shut off negatively impacted the minor children. The parties affidavits indicate that S.A.B. was upset due to Angela's power being shut off and further that Michael was the one to give Angela the funds to get her power back up and running. (R79:5:¶18; R102:10:¶20).

[¶46] Angela's bank records indicate she was gravely mismanaging her funds. Angela's Alerus bank account had a balance of \$18,313.55 on February 15, 2021. (R188:2). Angela received a settlement check from Michael in the sum of \$17,877 on February 5,

2021. Id. January 18 to February 15, 2021, Angela's transactions indicate she went to numerous restaurants, Palm Beach Tan, Avant Hair, and Total Skin Dermatology.

(R.188:3-4).

[¶47] The very next month, Angela's account balance dropped by over \$14,439 to a new balance of \$3,437.97 on March 15, 2021. (R188:5). February 16 to March 15, 2021, Angela's transactions reflect numerous fast-food restaurants, five visits to Happy Harry's Bottle Shop (February 17, February 22, February 23, March 8, March 10), clothing, two visits to Avant Hair (February 18, March 4), Tinder dating application, Grand Forks Smoke Shop, four visits to the Bun Lounge (February 25, February 26, March 1, March 11), Total Skin Dermatology, Level 10 Nightclub, three visits to Palm Beach Tan (March 1, March 8, March 12), and the Loft Bar. (R188:6-9).

[¶48] The very next month, Angela's balance dropped again to \$1,262.04 (R188:10). From March 15 to April 15, 2021, Angela spent her funds on Elite Single Dating, Happy Harry's Bottle Shop (March 24, March 29, April 5, April 9), Level 10 Bar, Palm Beach Tan, Joe Black's Bar (April 5, April 14), Angel Nail Salon, and the Bun Lounge. (R188:11-13).

[¶49] From April 15 to May 16 2021, Angela received \$625 in overdraft fees. (R188:14). That month Angela spent her funds at Joe Black's Bar (May 3, May 10), Grand Forks Smoke Shop, Palm Beach Tan, Happy Harry's Bottle Shop, and The Raddison Hotel in Fargo. (R188:15-17).

[¶50] From May 16 to June 15, 2021, Angela's account balance increased to \$12,760.25. That month Angela spent funds at Southgate Casino, Joe Blacks Bar, Palm Beach Tan, Hugo's Wine and Spirit, The Bun Lounge (June 3, June 4), and Happy

Harry's Bottle Shop. Angela continued to received overdraft charges in June. (R188:19-21).

[¶51] Angela testified that money was tight because of her car payment, and \$1,500 rent payment on a single income. (Tr. pg. 227 ln. 9-16). This testimony is incongruent with Angela's bank statements which show that she is prioritizing drinking and her personal needs, over that of her children. Angela consistently over drafting her checking account has a direct impact on her children, evident by her inability to pay her utility bill.

[¶52] Social Services received a report that Angela was neglecting the children and not properly feeding the children. (Tr. pg. 71 ln. 6-13). The same report was not made for Michael during his parenting time.

[¶53] Angela failed to provide the children with a safe environment by having drugs in the home, within reach of the minor children. Angela admits to consuming illegal drugs since the divorce judgment was entered. (Tr. pg. 51 ln 22-24). Lauren found marijuana and edibles in her mother's closet whereby her younger brothers could have just as easily found. (Tr. pg. 247 ln. 16 – pg. 249 ln. 8).

[¶54] There was nothing in the record indicating Michael had any financial troubles that impacted the children, or further that Michael's home was unsafe for the children. As such, this factor should have favored Michael.

C. Factor (d), the Court looks at 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.

[¶55] In Sweeney v. Kirby, the court noted that "...the sufficiency and stability of each parent's home environment, was 'the most important factor in [the] analysis of whether

primary residential responsibility should be changed.” 2015 ND 148, ¶24, 864 N.W.2d 471

[¶56] The District Court erred when determining that this factor favored neither party. The Court essentially found that both homes were equal in terms of stability and sufficiency for the children. Michael’s home is clearly more stable and sufficient for the children. This is evidenced by the two Social Services investigations due to reports of Angela’s care of the children, Angela’s two interactions with law enforcement following her substance use, the drugs that have been found in Angela’s closet, Angela having unfamiliar men in the home, and Angela’s poor management of money which led to utilities in her home being shut off. (Tr. pg. 79 ln. 10-18). S.A.B. has been impacted by Angela’s behavior. Angela testified to the impact the divorce has had on S.A.B. and further that S.A.B.’s grades have been up and down. (Tr. pg. 223 ln. 24 – 224 ln. 8).

[¶57] Contrary to Angela, drugs have not been located in Michael’s home, Michael has never had utilities shut off in his home due to his irresponsibility with his finances, the police have not been called to his home, Social Services has not conducted an investigation on him, and per Angela’s own testimony, she is not concerned with Michael using drugs or overconsuming alcohol while caring for the children. (Tr. pg. 101 ln. 23 – pg. 102 ln. 4).

[¶58] Further evidence of Angela’s instability is the fact she could not even discern at trial if her residence would change in the near future. On direct examination in Plaintiff’s case Angela stated she was moving to Fargo for a job and would be ok with leaving S.A.B. behind to primarily reside with Michael. (Tr. pg. 65 ln. 20- pg. 66 ln. 6). By the time it was Defendant’s case in chief Angela changed her position to declining to move

to Fargo due to the trial testimony and not wanting to lose the children. (Tr. pg. 232 ln 17- 233 ln. 25; Pg. 239 ln. 4- pg. 240 ln. 16). Angela admitted to disclosing to Michel in April 2021 a desire to move out of Grand Forks due to the fighting with Lauren. (Tr. pg. 80 ln. 15-21). Angela stated she wanted a new start. Id. Angela's unpredictability as to where she is going to live speaks directly to her instability.

[¶59] Conversely Michael testified to currently living in an apartment, and his plans to buy a home in the children's school district. (Tr. pg. 128 ln. 7-22). This would be a positive change for the children, as they would remain in their community. Angela moving to Fargo would uproot the children's lives and change their community.

[¶60] This factor should have favored Michael.

D. Factor (f) requires consideration of the moral fitness of the parents, as that fitness impacts the child.

[¶61] In its Findings under factor (f) the Court stated:

The Court does not believe Angela's testimony that she never has marijuana in the house and that she didn't know there were marijuana edibles in the house. Even more concerning than marijuana in the home is that a parent is untruthful about it. (Emphasis added). Yet, despite this deception, there was no evidence presented that either party is morally unfit. There was no evidence presented to the Court that either of the minor children have been negatively impacted by either parents drug or alcohol use. The Court finds this factor favors neither party and supports maintaining equal residential responsibility. (R200:28-29:¶90).

[¶62] While the Court acknowledged that Angela was untruthful, the Court still determined factor (f) was neutral. Angela's testimony which was evasive at times, and impeached at other times negatively impacts her morality. In Heinle, the District Court found Travis Heinle to have withheld pertinent information about property and cash gifts from Angie Heinle and the Court. Heinle v. Heinle, 2010 ND 5, ¶12-13, 777 N.W.2d 590.

The Court held that Travis' failure to disclose information reflected poorly on his moral character; the Supreme Court upheld this finding. Id.

[¶63] Similarly, here, Angela's testimony was impeached throughout trial. Angela denied keeping drugs in her home, (Tr. pg. 53 ln. 1) yet Lauren testified to finding marijuana and edibles on the bedroom floor of Angela's home (Tr. pg. 247 ln 16- pg. 248 ln. 4). Angela failed to disclose her new relationship. (Tr. pg. 58 ln. 4-25). When questioned, at first Angela stated she was not in a romantic or sexual relationship (Tr. pg. 49 ln 4-10), Angela later pled the Fifth, and finally stated the name of whom she was dating after being directed by the Court and her attorney. (Tr. pg. 58 ln. 4-25). Angela denied making a threat to take her own life in her discovery answers, and then later admitted to stating "I'm going to slit my throat." (Tr. pg. 48 ln. 21-24; pg. 242 ln. 20-24; R185:10:¶27; R186:2¶11). Angela testified to her prescriptions, stating she takes Adderall, Tramadol, Lorazepam, Wellbutrin XL regularly, and is proscribed Lorazepam but hardly uses it. (Tr. pg. 48 ln. 2-8). Officer Fladland's report from the incident in March of 2021 indicates he asked Angela if she has any medical conditions or took prescription medications and she denied both inquiries. (R180:6).

[¶64] In Angela's discovery answers executed in November of 2021, she states she never consumes alcohol when she has the children. (R185:3:¶8). Angela also testified to this at the evidentiary hearing, "I never consume [alcohol] when I have my children. If I do, it's on non-parenting, on my own." (Tr. pg. 47. ln.13-19). Angela later admitted at trial she does drink when it is her parenting time. On April 18, 2021, during her parenting time, Angela went out to a restaurant and consumed a few beers with her brother and sister-in-law, while her mother was home caring for B.W.B. and S.A.B. was at a friend's

house. (R102:7-8:¶16). On August 7, 2021 Angela drank two to three drinks during her parenting time. (Tr. pg. 60 ln. 13 – pg. 61 ln. 8). The children were inside the home at this time while Angela was drinking outside. Id.

[¶65] Angela also provided evasive answers. For instance she stated she could not remember what friend sent her an image of marijuana that was found in her phone. (Tr. pg. 55 ln. 7-16). Angela often evaded the question or failed to give a direct answer when the information was unfavorable to her position. This behavior reflects poorly on her moral fitness.

[¶66] Angela should be considered morally unfit. Angela makes decisions that have a negative and dangerous impact on her children. Lauren testified to her mother behaving like a teenager who parties and stays out late. (Tr. pg. 246 ln. 6-21). This is not someone who can be a moral example to her children or a responsible parent.

[¶67] Factor (f) should have been found to favor Michael.

E. Factor (g) considers the mental and physical health of the parents as that health impacts the child.

[¶68] In Krueger v. Tran, the court held that Tran’s mental health is difficult to assess due to his inability and refusal to acknowledge his issues relating to substance abuse. 2012 ND 227, ¶ 29, 822 N.W.2d 44. The court stated that he clearly has anger and self-esteem issues, and his denial of his issues is harmful to his child. Id.

[¶69] In Peek v. Berning, Malcolm Peek (“Peek”) and Kimberly Berning (“Berning”) had a relationship that produced one minor child. 2001 N.D. 34, ¶2 622 N.W.2d 186. When the couple split, Berning left the home and took the child with her. Id. Two weeks later, while Berning was attending an Alcoholics Anonymous conference, Peek requested an ex parte interim order alleging a threat of imminent emotional and physical danger to

the child. Id. The trial court later ruled that it was in the best interests of the child to spend as much time with both parents as possible, and awarded joint custody of the child. Id. Peek appealed the decision, stating that the factors favored him and that the trial court erred in finding the factors favored neither party. Id. Specifically, under factor (g), Peek argued that the factor should favor him as there was no evidence that his parenting was affected by his social drinking and history of substance abuse. Id. at 191. While the lower court found factor (g) to be neutral, the court opined, “...possession and use of marijuana is illegal and ‘not in the best interests of a child, **even if the child is not aware of its presence and use.**” Id. at ¶12 (emphasis added).

[¶70] Testimony and exhibits at trial indicate that Angela has a problem with substances, which negatively impacts her children. On March 24, 2021, Angela was arrested for reckless driving and when taken in to the station, her chemical breathalyzer test showed her blood alcohol level was at 0.142. (R180:6; Tr. pg. 13 ln. 2-5). On August 8, 2021 Officer Muller observed Angela having a flushed face, watery eyes, and the smell of alcohol emanating from Angela. (R181:6; Tr. pg. 19 ln. 16-20). Officer Muller filed a 960 report after the incident. (Tr. pg. 21 ln. 4-14). Angela admitted to testing positive for marijuana in October 2021 and also admitted to being convicted of disorderly conduct in the summer of 2020. (Tr. pg. 42 ln. 13-15; pg. 44 ln. 1-8). In addition to these incidents, Angela admitted to consuming alcohol with her prescription medication, and taking S.A.B.’s prescription for Adderall. (Tr. pg. 53 ln. 2-7). These incidents suggest a pattern by Angela. These actions and behavior inevitably have an effect on the children in her care. Although only Lauren was present for the first incident in which Angela was

charged for actual physical control, the two younger children were present for the incident in August of 2021.

[¶71] Angela has stated that she no longer consumes alcohol while the children are in her care. (Tr. pg. 46 ln 23-25). However, Angela also states that she stopped her alcohol use when Michael brought the current motion. Id. There is nothing stopping Angela from continuing her alcohol use when there is no longer active litigation. At the time of the divorce, Angela agreed to no-consumption of alcohol during parenting time and 24 hours before parenting, and has admittedly not followed this provision. (R63:7:¶7). Angela's history of alcohol suggests that she is not capable of refraining from alcohol consumption. Angela has not taken any steps to receive treatment for alcohol or drug use. All this points to Angela's inability to admit that she has a problem. Tran's denial of his issues was deemed harmful to his child by the court. Similar to Tran, Angela's denial of her problems is harmful to S.A.B. and B.W.B.

[¶72] Tammy Knudson, the Child Protection Supervisor testified to the harmful effects of Angela's substance abuse. Ms. Knudson stated:

“Well first off, drug use is illegal if it's not being prescribed by a medical doctor. The second piece of it is that if it's not properly maintained within the home and the children are aware of it, there's the factor of missed socialization. The issue can be if parents are under the influence that it can impede their ability to supervise and provide care. It's an issue of judgment for parents and I think what we know about kids that live in a home that there may be this kind of behavior, they may be at risk for having this behavior themselves as they grow up. Or just some of the other factors that can go along with witnessing or being part of a home where somebody is using. (Tr. pg. 73 ln. 21- pg. 74 ln 8).

[¶73] When Ms. Knudson was asked about her recommendation for sober caregivers she stated:

“... with B.W.B. being as young as he is, he is a child that definitely requires more supervision to provide for his safety. So, the concern if a parent is under the influence of drugs or alcohol, that that can again factor into their judgment, their supervision of children, and ultimately could be a situation where kids could be in danger.” (Tr. pg. 74 ln. 13-19).

[¶74] Angela also made a suicidal threat in the past. In September of 2020, Michael had to intervene and bring Angela to the ground in order to prevent her from self-harming. This incident is on file with Grand Forks Social Services. (Tr. pg. 70 ln. 1-23). S.A.B. was present for this incident and B.W.B was in the home. Ms. Knudson, testified when children are present for these types of suicidal threats, they will often take responsibility for the incident upon themselves, blame themselves, and become fearful for their parents' safety. Id. Angela denied making a threat to take her own life in her discovery answers, and then later admitted to stating “I’m going to slit my throat” (Tr. pg. 48 ln. 21-24; pg. 242 ln. 20-24). When communicating with Michael, Angela will use profanities and be hostile on one day and then act like nothing happened or that nothing is wrong the next day. This suggests some mental and emotional instability. (R176:3,6-7).

[¶75] Here, the Court found there is “...no credible evidence presented that the children have been negatively affected...” by Angela’s continued alcohol and drug use. (R200:29:¶92). However, as stated in Peek, the possession and use of marijuana is not in the best interest of the child, even if the child is not aware of its presence and use. Further, Angela yelling at S.A.B. and threatening to kick him out of the home, after consuming alcohol, did have a negative effect on S.W.B. as he called his sister in hysterics. (Tr. pg. 250 ln. 9-13). Lauren described S.W.B. having an anxiety attack as a result of Angela’s behavior. Id. There was a similar instance in which Angela told Lauren to leave her house and go live with Michael. (Tr 107 ln. 5-6). It appears Angela will lash

out at the children with threats when she is upset or under the influence of drugs/alcohol. This is not in the children's best interest.

[¶76] This factor should favor Michael. Angela herself admits that she is not concerned that Michael has a drug problem or is overconsuming alcohol. (Tr. pg. 101 ln. – pg. 102 ln. 7).

F. Under factor (k), the court considers the impact any person who resides in, is present, or frequents each parent's home have on the children and if maintaining those inter-relationships are in the best interests of the children.

[¶77] Jay and Sadie Gilbraith, Angela's previous neighbors were called as witnesses. Both plead their Fifth Amendment right when asked about Angela's drug use. (Tr. pg. 26 ln. 10-12; pg. 29 ln. 8-18). Angela's friend Callie Wagner also pled her Fifth Amendment right when asked whether she has been around Angela when she has used illegal drugs. (Tr. pg. 31 ln 21- pg. 33 line 2). If Angela's own friends cannot refute Angela's drug use, clearly there is an issue and concern for who she surrounds herself with.

[¶78] Angela admits to exposing the children to men in the home whom the children did not know. (R186:1). One such man was found in Angela's bedroom in only his underwear. (Tr. pg. 249 ln. 15-pg. 250 ln. 5). Angela also has a past of being in a relationship with Nathan Brickzin "Nathan" who has a lengthy criminal history to include felony drug related offenses, and domestic assault offenses. (R182). Angela denied being in a romantic relationship with Nathan; however, Angela's mother Janet Hangsleben testified to Angela having an affair with Nathan. (Tr. pg. 199 ln. 9-14).). The court noted in Rebenitsch "...a person's past behaviors may be an indicator of future behaviors." Rebenitsch v. Rebenitsch, 2018 ND 48, ¶11, 907 N.W.2d 41.

[¶79] There was no testimony to suggest that Michael associates with any individuals unknown to the children or any individual that could pose a danger to the minor children. Accordingly, this factor should have favored Michael.

[¶80] The District Court's Findings under factors a, b, d, f, g, and k were erroneous as the record, exhibits, and evidence do not support the Court's Finding.

III. The District Court erred as a matter of law when it impermissibly declined to modify residential responsibility because of facts known to the parties at the time of their stipulated agreement.

[¶81] To modify residential responsibility, “on the basis of facts that have arisen since the prior order or which were unknown to the court at the time of the prior order, a material change has occurred in the circumstances of the child or the parties; and the modification is necessary to serve the best interest of the child. N.D.C.C. § 14-09.06.6(6)(emphasis added). If the prior Judgment was based upon a stipulated agreement, the Court must consider pre-divorce conduct, and all relevant evidence in making a decision on residential responsibility. Wetch v. Wetch, 539 N.W.2d 309, 312 (N.D. 1995). *See also Mock v. Mock*, 2004 ND 14, ¶12, 673 N.W.2d 635.

[¶82] In its Findings under (g) the Court stated:

The Court is concerned about the allegation of Angela attempting to harm herself prior to the parties divorce, however social services investigated and made recommendations. In fact, much of the allegations asserted by each party against the other occurred prior to separation, or is behavior that was present before the parties entered into their stipulation. (R200:29:¶92).

Essentially the Court is minimizing Angela's continued substance abuse and continued decline in her mental health post-divorce because alcohol was a problem for Angela pre-divorce, Angela threatened self-harm pre-divorce, and the parties still stipulated to their

judgment. This Court's jurisprudence establishes that the District Court's reasoning of pre-divorce conduct is flawed.

[¶83] In Haag, Heather and Michael Haag stipulated to their divorce in 2009 which granted the parties equal residential responsibility of their child. Haag v. Haag, 2016 ND 34, ¶2, 875 N.W.2d 539. In 2014, Heather motioned to modify primary residential responsibility due to Michael's long history of substance abuse, an arrest for cocaine possession, a conviction for boating under the influence, and physical abuse that occurred while the parties were married. Id. The District Court denied Heather's motion to modify residential responsibility reasoning the parties knew about Michael's issues with drugs and alcohol before their stipulated divorce, and the abuse occurred during the divorce. Id. at ¶5. The Court determine Heather did not prove a material change, and therefore did not conduct a best interest analysis. Id. In its Findings, the Court found Michael had a problem with alcohol and drugs, that the parties stipulated divorce prohibited Michael from being under the influence of alcohol during his parenting time, and further that Michael was convicted of operating a boat under the influence in 2009, while the child was present. Id. at ¶11. Michael was convicted of possession of cocaine in 2014. Id. The Supreme Court reversed the District Court's order denying the motion to modify custody because the District Court was not aware of Michael's drug and alcohol use and physical abuse when it entered the order establishing residential responsibility, based upon the parties stipulated agreement. Id. at ¶3-16.

[¶84] The District Court impermissibly relied upon Michael's knowledge of Angela's behavior and concerning lifestyle, prior to entering in a stipulated divorce and parenting

plan. As the Court never heard testimony nor considered evidence of the parties' pre-divorce conduct before the present motion hearing, all such evidence is relevant. Id.

[¶85] Michael provided testimony that Angela's behavior including drinking and drug use was spiraling out of control and worse than before the divorce. (Tr. pg. 115 ln. 9-21). Michael provided testimony as to why he would agree to joint residential responsibility if Angela's behavior was a concern. (Tr. pg. 151 ln. 8-11). Michael stated that assurances were made that Angela would improve her drinking and take care of the children, and that is why he agreed to joint residential responsibility. (Tr. pg. 152 ln 1-15). Michael further stated,

“So, I guess I, and again this is, I regret this with every bone in my body, but I guess I felt if it got bad enough, we could always come back to court if need. I just didn't think, after Nate Brickzin got busted felony counts, how many ever pounds of meth it was, like this was her wake up call, I really did.

I thought him getting busted, her getting the felony, I thought she was seriously at her wake-up call. Maybe that's naïve, maybe that's rose-colored glasses. I guess I'm starting to see that, I can really, I think anyone in these situations is just trying to find some piece of light at the end here, you know.” (Tr. pg. 152 ln. 20 – 153 ln. 12).

The testimony indicated that Angela made promises to Michael that she would clean up her act and he genuinely believed her. (Tr. pg. 152 ln 1-15). Parameters in the judgment relative to no drug use, and no alcohol use during parenting time also furthers Michael's position that assurances were made to protect the minor children. Despite this, the District Court faulted Michael for stipulating to the parenting plan based upon Angela's conduct. The Court in Haag, determined this type of analysis to be impermissible.

IV. The District Court erred as a matter of law in its credibility determination when it erroneously gave great weight to Angela's testimony, while also finding Angela to be evasive, and less credible than Michael and impermissibly allowed Angela and other witnesses to assert

a 5th Amendment privilege to shield facts that supported Michael's motion to change residential responsibility.

[¶86] The Fifth Amendment protection against self-incrimination may be used in civil, criminal, or administrative proceedings. State ex rel. Gullickson v. Gruchalla, 467 N.W.2d 451, 453-55 (N.D. 1991) (citing Estate of Fisher v. C.I.R., 905 F.2d 645, 648 (2nd Cir. 1990) (citing Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)); State v. Gross, 351 N.W.2d 428, 432 (N.D. 1984)). A witness can assert this right when they believe that the testimony that they would provide may result in evidence that can lead to prosecution of a crime. State ex rel. Gullickson, at 454 (citing Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951)).

The right is not absolute:

“The right not to answer potentially incriminating questions in a civil or criminal proceeding however, is not absolute. The prohibition against compelling the testimony of a witness in any setting is predicated upon there being a real danger that the testimony might be used against the witness in later criminal proceedings. As Justice Blackmun noted in his concurrence in *Pillsbury*, ‘it is black letter law that a witness cannot assert a Fifth Amendment privilege to testify “if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness.”’ State ex rel. Gullickson, at 454 (citing Brown v. Walker, 161 U.S. 591, 597, 16 S.Ct. 644, 647, 40 L.Ed. 819 (1896)).

[¶87] Further, “the Fifth Amendment privilege against self-incrimination does not allow a blanket refusal to answer any questions in a civil matter.” State ex rel Gullickson. at 455. Additionally, it is up to the court to decide whether the refusal to answer based on the Fifth Amendment is proper. Id. (citing Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951)). The Court is to conduct a particularized inquiry of each area the question party is raising, in order to determine if the invocation of the privilege is well-founded. United States v. Melchor Moreno, 536 F/2d 1042, 1049 (5th Cir. 1976).

[¶88] A witness invoking their Fifth Amendment privilege in civil cases does not preclude an adverse inference being made against said party. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). Additionally, “the burden is upon the party claiming the privilege to specifically establish that a real and appreciable danger of incrimination exists with respect to each question. American State Bank v. Stoltz, 345 N.W.2d 365, 369 (N.D. 1984). The district court failed to direct the parties claiming their Fifth Amendment privilege to answer questions not likely to lead to evidence to prosecute in a criminal case, and further erred in not considering their refusal to answer questions adversely against them.

[¶89] Although North Dakota does not have extensive case law in the context of domestic cases, there is case law in our sister state of Minnesota which provides:

.....we held the privilege against self-incrimination must, in a civil suit, be balanced against the policy supporting discovery rules and the public interest in preventing an unfair advantage to one party. *Id.* at 83. In cases involving children, the interests of those children in safety and protection must also be balanced. Family members are frequently the best, if not the only, source of information regarding the abuse of children when such abuse occurs within the family setting. In a case where a parent or caretaker has exclusive or near-exclusive knowledge of the facts vital to establishing whether a young child is in need of protection, a different balance of interests than that reached by the court of appeals is mandated. *In re Welfare of J.W.*, 391 N.W.2d 791, 795 (Minn. 1986)(emphasis added).

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.....the protection of the privilege should [not] be expanded to shield a plaintiff who with one hand seeks affirmative relief in court and with the other refuses to answer otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action. To uphold this inconsistent position would enable the plaintiff to use the privilege as an instrument of attack.....' *Levine v. Bornstein*, 13 Misc. (2d) 161, 174 N.Y.S. (2d) 574, affirmed, 7 App. Div. (2d) 995, 183 N.Y.S. (2d) 868, affirmed, 6 N.Y. (2d) 892, 190 N.Y.S. (2d) 702, 160 N.E. (2d) 921. See also, *Berner v. Schlesinger*, 11 Misc. (2d) 1024, 178 N.Y.S. (2d) 135, affirmed, 6 App. Div. (2d) 781, 175 N.Y.S. (2d) 579; *McKelvey v. Freeport Housing Authority*, 29 Misc. (2d) 140, 220 N.Y.S. (2d) 628. As cited in *Christenson v. Christenson*, 281 Minn. 507, 516, 162 N.W.2d 194, 200 (1968).

There was evidence in the record that Angela used marijuana. Angela tested positive for marijuana in October 2021 after submitting to a hair follicle drug test, at the request of Michael based on his suspicion that Angela was using drugs. (Tr. pg. 42 ln. 9-15) Angela admitted she knew the test would be positive for marijuana. Id. When questioned specifically about marijuana, Angela pled the Fifth regarding her marijuana usage, and stated she did not want to incriminate anyone. (Tr. pg. 48 ln. 9-20). The court was already aware that Angela failed a drug test for marijuana use, and the Fifth Amendment is not for Angela to use to protect people she uses marijuana with. The refusal to answer these questions should not be used as a sword against Michael and a shield to Angela. Any inference of evidence should have weighted towards Michael.

[¶90] Sadie Gilbraith, Angela and Michael's previous neighbor, testified that she has not seen or hung out with Angela in five years. (Tr. pg. 4 ln. 23- pg. 25 ln. 3). Sadie further testified that she did not give Angela permission to be in her home while Sadie was on vacation in March of 2021. (Tr. pg. 25 ln. 10-13). When presented with a picture and asked to identify whether the picture depicted her countertop and black splash in her garage, Sadie refused to answer and asserted her Fifth Amendment privilege. The Court did not direct Sadie to answer the question. Considering Sadie was out of town, did not give Angela permission to be in her home, and has not spoken to Angela in several years, it is unknown how identifying a background in a picture could lead to criminal charges against Sadie. There were no open cases or criminal charges against Sadie at the time of trial.

[¶91] Similar to his wife, Jay Gilbraith testified that he has not spent time with Angela in years. (Tr. pg. 28 ln. 23-24). Jay testified that while he was on vacation in March of

2021, he too did not grant access to their home hot tub to Angela. (Tr. pg. 28 ln. 25- pg. 29 ln. 3). When asked to identify the countertop and back splash in the picture, Jay asserted his Fifth Amendment privilege. (Tr. pg. 29 ln. 4-7).

[¶92] Angela also pled her Fifth Amendment right when asked if she went to Jay and Sadie Gilbraith's house in March of 2021. (Tr. pg. 34 ln. 20-25). Angela also pled the Fifth regarding her marijuana usage, stated she did not want to incriminate anyone. (Tr. pg. 48 ln. 9-20).

[¶93] The only time the Court intervened when a party plead the Fifth was when Angela tried to invoke her Fifth Amendment privilege when asked about who she was dating. (Tr. pg. 58 ln. 7-14). At no other time did the Court question if the testimony elicited may lead to the prosecution of a crime. The Court failed to determine if the refusal to answer was even proper.

[¶94] In its Findings the district court stated, "the testimony of Callie Wagner, Jay Gilbraith and Sadie Gilbraith was suspect because of the parties' unwillingness to answer any question substantively; however, it is their legal right to use their Fifth Amendment privilege and the Court does not use that against the parties when determining their credibility." (R200:20:¶71). The Court takes issue with the individuals' unwillingness to answer numerous questions posed at them, but failed to determine if their refusal to answer was proper. Furthermore, as is stated in Baxter, the Court can interpret an individual invoking their Fifth Amendment privilege in a civil case, adversely against the witness.

[¶95] The Supreme Court defers to the lower Court to assess a witness's credibility. Frueh v. Frueh, 2009 ND 155, ¶7, 771 N.W.2d 593. The Court's decision on witness

credibility must be supported by the evidence. Id. The District Court's determination of Angela's lesser credibility and then subsequent findings do not align with the evidence. As stated previously, Angela was impeached and testified contrary to her own witnesses. Angela denied being in a romantic relationship with Mr. Brickzen; however, Angela's mother Janet Hangsleben acknowledged she was aware of the affair between Angela and Mr. Brickzen. (Tr. pg. 199 ln. 9-14).). Angela pled the Fifth Amendment privilege when asked if she went to Jay and Sadie Gilbraith's house in March of 2021. (Tr. pg. 34 ln. 20-25). The Gilbraith's testified that they had not spent time with Angela in years, but failed to explain why Angela was in their home in 2021, while they were on vacation, instead taking the Fifth Amendment. Angela also pled the Fifth regarding her marijuana usage, stated she did not want to incriminate anyone. (Tr. pg. 48 ln. 9-20). The district court allowed Angela to evade and minimize facts to gain unfair advantage and obtain the result she wished. Conversely, the district court omitted facts which have direct and negative implications on the minor children, by not considering Angela's use of the Fifth Amendment as a shield for her defense.

[¶96] CONCLUSION

[¶97] The Court erred as a matter of law in denying Michael's motion to modify residential responsibility. The evidence establishes the children's best interest will be served with Michael as the primary parent. The District Court heavily and impermissibly relied on the parties knowledge of pre-divorce conduct when they stipulated to their agreement. The testimony was largely uncontested in that Angela has had two alcohol related incidences with police, drugs were found in Angela's home, Angela was admittedly using marijuana, and Angela's relationship with the children declined since

the parties divorce. The same improprieties were not found to occur during Michael's parenting time.

[¶98] The Court's Findings are not supported by the evidence and therefore the Supreme Court should reverse the District Court's Order.

ORAL ARGUMENT REQUESTED

Oral argument is requested by the Appellant. Oral argument will provide the Appellant an opportunity to further argue the reasons why the District Court's Findings are unsupported by the evidence, and thereby provide the Court with a sufficient basis to make its determination.

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 no more than 38 pages, including footnotes and endnotes but excluding any addendum, which is within the page limitation.

Dated this 15th day of November, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2022, the following documents:

1. AMENDED BRIEF OF APPELLANT; AND

2. CERTIFICATE OF COMPLIANCE

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

Sarah Cannon, Regional Child Support at grandforkscse@nd.gov
Suzanne Weber at service@weber-law-firm.com

Dated this 15th day of November, 2022.

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