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STATE OF NORTH DAKOTA

IN THE SUPREME COURT,
STATE OF NORTH DAKOTA

Amanda J. Weston,	)	
	)	**Supreme Court No. 20140421**
Plaintiff/Appellant,	)	
	)	**Cass County District Court**
vs.	)	**Civil No. 09-2014-DM-00217**
	)	
Thomas L. Crummy,	)	
	)	
Defendant/Appellee.	)	

APPEAL FROM THE
DISTRICT COURT OF THE EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN L. MARQUART PRESIDING

BRIEF OF APPELLEE

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Date

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1. [¶5]The trial court is in the best position to judge the credibility of witnesses and the evidence, and as such the trial court's Findings should be affirmed.
2. [¶6]The trial court made detailed findings, supported by the evidence and testimony presented, for each of the relevant best interest factors enumerated in N.D.C.C. 14-09-06.2(1).
    a) [¶7]Factor a. – Love, affection, and other emotional ties.
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3. [¶12]The trial court properly found that given the domestic violence perpetrated by the Appellant, Factor j. favored the Appellee.

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[¶13]STATEMENT OF THE CASE

[¶14]

with the argument regarding the Appellant's parenting time, and paragraph 6. The Appellee would note that included within the Appellant's Appendix are exhibits that were objected to and not received at trial including: Plaintiff's Exhibit 15 and Defendant's Exhibits 104, 105B, and 117. The Appellee would respectfully request that these exhibits be removed from this court's record in this matter.

[¶15]STATEMENT OF FACTS

[¶16]The Appellant, Amanda J. Weston ("Weston"), and the Appellee, Thomas L. Crummy ("Crummy"), were never married but had a relationship from approximately November 2012, until February 2014. (Doc ID #16). One child was born out of the relationship, namely N.J.W, born in 2013. (App. 337). For the first couple months of N.J.W.'s life, both of the parties were involved in the child's every day care, but there were times when Crummy would still do more of the caregiving. (Tr. I 136, 9-14; I 233:14-22). During the month of February 2014, Crummy took paternity leave to care for N.J.W. during the day while Weston was at work, which also helped Crummy form a strong bond with N.J.W. (App. 338).

[¶17] The parties' relationship was volatile, and Crummy was a victim of multiple incidents of domestic violence at the hands of Weston. (App. 341-342)(Appellee 14-20). The trial court found Crummy's testimony regarding the domestic violence inflicted upon him to be credible. (App. 342).

[¶18]After the parties' relationship ended in February 2014, Crummy only had two nights of overnight parenting time the rest of that month (Tr. II 140, 16-19). Crummy

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had little, if any parenting time in March 2014, prior to the entry of the Stipulation as to Parenting Time, entered on March 14, 2014. (Tr. II 47:9-25). Crummy agreed to the stipulation so that he would have some parenting time with N.J.W. (Tr. II 47:9-25).

[¶19]Following a hearing on Crummy's Motion for Interim Relief on April 24, 2014, Amanda was granted primary residential responsibility, with the court maintaining the same parenting time schedule as in the existing stipulation. (App. 24).Pursuant to the stipulation, Crummy had parenting time every week from Friday at 6:30 p.m. until Monday at 6:30 p.m. (App. 24). Multiple witnesses testified that during his parenting time, Crummy is N.J.W.'s primary caregiver. (Tr. I 128:3-12; I 215:12-25; I 216:1-11; I 232:2-21).

[¶20]After a two day trial in September 2014, the trial court entered its Findings of Fact, Conclusions of Law and Order for Judgment on October 7, 2014. (App. 337). Crummy was awarded primary residential responsibility for N.J.W., subject to Weston's reasonable parenting time. (App. 343). The trial court evaluated all of the evidence and testimony, and provided specific, reasoned findings for each of the best interest factors. (App. 338-343). The trial court found that the majority of the factors favored neither party, but those factors that did not favor either party favored Crummy.

[¶21]SUMMARY OF THE ARGUMENT

[¶22]In an appeal regarding primary residential responsibility the Appellant has the burden of showing that the findings of the trial court were clearly erroneous, that the findings were based on an erroneous view of the law, that no evidence existed to support the trial court's findings, or that a clear mistake was made. The Appellant fails to meet her burden with respect to every issue on appeal.

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[¶23]The trial court made specific findings for each best interest factor based on the evidence and testimony received throughout the pendency of this matter. The arguments of the Appellant illustrate her belief that an analysis of the best interest factors should be a zero-sum competition, wherein only one parent can win. While the Appellant repeatedly argues that trial court ignored evidence favorable to her, it is clear from the trial court's findings that it found most of the relevant best interest factors favored neither party. Whereas had the trial court ignored the evidence favorable to the Appellant all of the relevant best interest factors would have favored the Appellee.

[¶24]This court has said repeatedly that the trial court is in the best position to judge the credibility of the witness and evidence. In its findings the trial court specifically noted its credibility determinations with respect to several of the best interest factors. With respect to the factors that the trial court found favored Crummy, there is clear evidence and testimony to support the trial court's findings. The trial court's findings awarding primary residential responsibility of N.J.W. to Crummy should be affirmed in all respects.

[¶25]ARGUMENT

[¶26]A. The Appellant has failed to meet her burden in that the trial court's Findings are not clearly erroneous, and are supported by the evidence and testimony received.

[¶27]In Mowan v. Berg, 2015 ND 95, this court recently described how it reviews an award of primary residential responsibility. Mowan states in part:

> *An award of [primary residential responsibility] is a finding of fact which this Court will not disturb unless it is clearly erroneous.*
>
> *Under N.D.R.Civ.P. 52(a), a finding of fact is clearly erroneous only if it is induced by an erroneous view of the law or, although there is some evidence to*

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> *support it, on the entire record we are left with a definite and firm conviction a mistake has been made.*
>
> *"Under the clearly erroneous standard, we do not reweigh the evidence nor reassess the credibility of witnesses, and we will not retry a custody case or substitute our judgment for a district court's initial [primary residential responsibility] decision merely because we might have reached a different result."*
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> Mowan at ¶5.

[¶28]"A choice between two permissible views of the weight of the evidence is not clearly erroneous." Dronen v. Dronen, 2009 ND 70, ¶7, 764 N.W.2d 675, 681. "[T]his court will not retry the case or substitute its judgment for that of the district court when its determination is supported by the evidence," and that "the complaining party bears the burden of demonstrating on appeal that a finding of fact is clearly erroneous." Dronen at ¶ 7.

[¶29]The Appellant argues throughout her brief that the trial court had "no evidence" to support its findings in this matter. A bold statement that is itself not supported by the record. The record is replete with evidence and testimony that supports the trial court's conclusions and findings. As will be demonstrated in the subsequent sections dealing with the relevant best interest factors, evidence and testimony was received from both parties with regards to each factor. Distilling out the essence of Weston's argument, this is not a situation where no evidence was presented, rather Weston does not agree with the trial court's determinations with regards to the weight and credibility given to the evidence and testimony received.

[¶30]A recurring theme throughout Weston's testimony and brief is Weston contradicting her own testimony and argument. For example, at multiple points in her brief, Weston argues that the amount of parenting time awarded to her is evidence of

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some sort of punishment, and that the amount of parenting time awarded to her is somehow "less than the typical amount" awarded to non-custodial parents. This is an interesting argument for Weston to make, given that she testified and presented a similar parenting time schedule for Crummy if she had been awarded primary residential responsibility. (App. 28-29). This is far from the only contradiction to be found in Weston's testimony and arguments in this matter.

[¶31]1. The trial court is in the best position to judge the credibility of witnesses and the evidence, and as such the trial court's Findings should be affirmed.

[¶32]In Mowan, this court stated, "We give great deference to the court's observation and assessment of witnesses' credibility." Mowan at ¶17. In this matter, the trial court specifically noted when it did and did not find certain testimony and evidence credible or persuasive. (App. 338-343). The court in Mowan further stated in part:

> *A choice between two permissible views of the weight of the evidence is not clearly erroneous, and our deferential review is especially applicable for a difficult child custody decision involving two fit parents. [T]he district court's choice for custody between two fit parents is a difficult one, and this Court will not retry the case or substitute its judgment for that of the district court when its determination is supported by the evidence. The complaining party bears the burden of demonstrating on appeal that a finding of fact is clearly erroneous.*
>
> Mowan at ¶17.

[¶33]The trial court noted throughout its findings regarding the best interest factors that it did not find Weston's testimony and evidence credible nor persuasive. (App. 338, 340-341). The Appellant cites to the criminal case of State v. Nelson, 488 N.W.2d 600 (N.D. 1992), and this court's analysis that, "[w]hile credibility of witnesses is normally the province of the trial court, a trial court cannot disregard testimony that is uncontradicted and unchallenged where no basis for doing so appears in the record."

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Nelson at 604. While the Appellant would have this court believe that the trial court chose to ignore "uncontradicted and unchallenged" testimony favorable to Weston that is simply not the case.

[¶34]Weston's frequently conflicting testimony naturally affected the trial court's opinion regarding her credibility. Easter 2014 was one of Crummy's holidays for parenting time. On direct, Weston testified that she asked Crummy if she could go to Easter mass with Crummy, his family, and N.J.W., but Crummy refused. (Tr. I 88:6-13). However, on cross-examination Weston admitted that Crummy had in fact told her when his family was going to mass, and told Weston that she was more than welcome to come. (Tr. I 163:8-25). Weston admitted that she did believe the time Crummy and his family were going to mass was "appropriate," and wanted Crummy and his family to go to an earlier mass. (Tr. I 163:8-25). Crummy did not refuse to let Weston attend mass with his family and N.J.W., rather he did not acquiesce to Weston's demand that he alter an important family tradition.

[¶35]At the interim hearing in April 2014, Weston testified that she had a "diagnosis of generalized anxiety disorder," but then at trial, in September 2014, Weston testified that she had no such diagnosis. (Tr. I 146:15-25;147:1-10). On direct, Weston testified that during an exchange at Kids First on September 8, 2014, when she received the child, N.J.W.'s clothes were soaking wet. (Tr. I 36:20-24). However, on cross-examination Weston confirmed that Kids First keeps observation forms for each exchange they conduct. (Tr. I 157:4-8). Weston was provided with the observation form for September 8, 2014 on cross-examination (Appellee 3). Weston confirmed that the

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observation form notes the type and color of N.J.W.'s clothing, but mentions nothing about N.J.W. being soaking wet. (Tr. 157:12-18).

[¶36]On direct Weston testified that she often has someone drive her to Kids First so she can feed N.J.W. on the way home because she is often hungry and crying. (Tr. I 32:1-3). The trial court received into evidence ten (10) of the observation forms prepared by Kids First. (Appellee 1-10). On only half of the observation forms was an alternate driver noted for Weston. (Appellee 1-10). None of the forms note that N.J.W. is crying, hungry, or in any other way not properly taken care of. (Appellee 1-10). Additionally, Crummy described the process at Kids First, and he takes N.J.W. out of her car seat, plays with her, and feeds N.J.W. if she did not already eat prior to traveling to Kids First. (Tr. II 49:17-20).

[¶37]The Appellant argues in her brief that Crummy has "an ample amount of disposable income to use on alcohol, eating out, and leisure." However, on cross-examination Weston admitted that it is impossible to ascertain what Crummy was spending his money on by simply looking at his bank records. (Tr. I 169:7-23). Crummy testified that when he takes money out of ATMs, he often takes out additional money so he has money to spend at garage sales on items for his daughters. (Tr. II 72:9-20). On redirect, Crummy noted that the exhibit provided by the Appellant (App. 151), shows a transaction at JL Beers occurring at 9:26 a.m., on May 29, 2014. (Tr. II 6-21). However, even counsel for the Appellant noted that JL Beers is not open at 9:26 a.m. (Tr. II 171:8-10). The Appellant continues to base her arguments on evidence and testimony that she knows to be inaccurate, but then is surprised the trial court found issues with her credibility.

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[¶38]The Appellant's argument that the trial court wholly ignored evidence favorable to Weston is illogical. If the trial court had ignored in total the evidence favorable to Weston, then all of the relevant best interest factors would have favored Crummy, rather than the majority favoring neither party. The trial court received testimony and evidence, from both parties and their witnesses, regarding all of the best interest factors. The trial court determined the weight and credibility to apportion to the evidence and testimony received. The fact that the trial court's credibility determinations did not favor Weston does not mean that the trial court ignored the evidence favoring Weston, nor does it render the trial court's findings clearly erroneous.

¶39]Weston argues that the trial court cannot disregard uncontradicted or unchallenged testimony, but fails to offer any examples of testimony that was uncontradicted or unchallenged. On more than one occasion, Weston contradicted her own testimony when presented with evidence or testimony that questioned the credibility of her statements. The current matter is not an instance where the trial court ignored evidence and testimony, but rather a scenario wherein Weston wanted the trial court to ignore the evidence and testimony unfavorable to her. The trial court's findings should be affirmed in all respects.

[¶40]2. The trial court made detailed findings, supported by the evidence and testimony presented, for each of the relevant best interest factors enumerated in N.D.C.C. 14-09-06.2(1).

[¶41]In Lucas v. Lucas, 2014 ND 2, 841 N.W.2d 697, this court stated,

> *A district court must award primary residential responsibility to the party who will best promote the child's best interests and welfare. In addressing the child's best interests, the court must consider all relevant factors under N.D.C.C. § 14-09-06.2(1)(a) through (m).*

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Lucas at ¶11

> *A district court has broad discretion in making a primary residential responsibility decision, but the court must consider all of the relevant best interest factors under N.D.C.C. § 14-09-06.2(1).*
>
> *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. 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. The court must make specific findings explaining how the statutory factors apply.*
>
> *A court's findings are adequate if this Court is able to discern the factual basis for the court's decision, and the findings afford a clear understanding of its decision.*

Lucas at ¶12

[¶42]The trial court findings are specific as to each best interest factor, and the factual basis for the findings is clear. (App. 338-343).

[¶43]a. Factor a. – Love, affection, and other emotional ties.

[¶44]In Rustad II, 2014 ND 148, 849 N.W.2d 607, this court stated, "We have recognized "a primary caretaker enjoys no paramount or presumptive status under the best interests of the child factors…" Rustad II at ¶11. In Harvey v. Harvey, 2014 ND 208, 855 N.W.2d 657, this court further elaborated on the discussion of the primary caretaker,

> *A district court is not clearly erroneous in finding neither party is the primary caretaker when evidence in the record demonstrates both parents were involved in the role of primary caretaker based on the factors. Hogue v. Hogue, 1998 ND 26, ¶ 17, 574 N.W.2d 579. In Hogue, we held the failure to determine a primary caretaker was not clearly erroneous because the trial court did not reference or determine a primary caretaker, and the record supported a finding that extensive co-parenting existed for both parties. Id. at ¶¶ 14-17, 20.*

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[¶45]In Harvey, just as in the current matter, both of the parties were involved in the parenting roles. The Appellant argues that she has been N.J.W.'s primary caretaker since birth but that is simply not the truth. Weston testified that she "did it all by myself" with respect to baths, feedings, and diaper changes when the parties were still together. (Tr. I 25:5-8). However, this argument does comport with the evidence and testimony presented. Weston herself contradicted her testimony during rebuttal saying that both she and Crummy "were up together" at night with N.J.W., and they were both caring for N.J.W. (Tr. II 180:20-25;181:1-4).

[¶46]Weston also testified that Crummy's parents do all of the parenting of Crummy's daughters during his parenting time. (Tr. 25:14-17). However, Crummy's father (Tr. I 232:2-21), sister (Tr. I 128:3-12), former roommate (a former in-home investigator for social services)(Tr. I 215:12-25; I 216:1-11), and Crummy (Tr. II 60:12-25) all testified that it is Crummy is who cares for N.J.W. during his parenting time.

[¶47]Multiple witnesses testified that while after N.J.W.'s birth both parties were active in her life, there were times when Crummy would still do more of the caregiving. (Tr. I 136, 9-14; I 233:14-22). During Crummy's paternity leave in February 2014, Crummy cared for N.J.W. during the day into evening, but Weston did not allow him to have any overnights. (Tr. II 45:9-25).

[¶48]Weston argues in absolutes throughout her brief, stating that she spent "every single night with N.J.W. for the first three months of her life." Weston also argues that Crummy's bond is somehow lesser because he occasionally went golfing with his father. However, the court heard testimony that at times Weston would leave N.J.W. with her parents so she could go to the movies, or for the night so she could have a night

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alone. (Tr. II 44:15-20). Additionally, Crummy's father testified that he only golfed about sixty-percent (60%) of the weekends during the summer of 2014, and that Crummy did not join him each time he went golfing. (Tr. II 36:20-25;37:1). Each golf outing only last about an hour-and-a-half (Tr. II 36:22-23), Crummy's mother, who was more than happy to spend time bonding with her granddaughter, would typically care for N.J.W. during that time, and often N.J.W. would nap for the duration of the golf outing. (Tr. II 61:10-21).

[¶49]The Appellant appears to argue that the trial court failed to acknowledge her bond with N.J.W., but the trial court found that both parties have a close bond with N.J.W. (App. 338). Weston is committed to the idea that parental bonding is a zero-sum game, and that if she has a strong bond with N.J.W. then that means Crummy does not, and vice-versa. While the trial court took note of Crummy's ability to bond with N.J.W. during his paternity leave, it still found that both parents were well bonded with N.J.W.

[¶50]Weston also takes issue with the fact that the trial court noted that Crummy's weekend parenting time, and his decision not to work in the summer of 2014 (something not uncommon for teachers), provided him with more opportunity to bond with N.J.W. (App. 339). In her brief, Weston argues that parental bonding is a simple issue of accounting, and that analysis of the number of days the child spent with each parent should be the litmus test for parental bonding. The Appellant's argument again is puzzling since the trial court found that both parties have a close bond with N.J.W.

[¶51]The trial court received evidence of the bond between Crummy and N.J.W. (Tr. II 57-59)(App. 252-254). Crummy's father Paul testified as to the readily apparent bond between Crummy and N.J.W. (Tr. I 235:8-14). Paul testified that Crummy reads to

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N.J.W., sings to her, and gets down on the floor and plays with her. (Tr. I 235:8-14). Crummy testified regarding his efforts in bonding with N.J.W., the importance of skin-to-skin contact, and the resulting strong bond he has with N.J.W. (Tr. II 56:1-6).

[¶52]As in Harvey, the trial court in the current matter did not find that either party was a primary caretaker because the evidence is clear that both parties were involved in the role of primary caretaker. Both parents love the child, and both parents have a strong bond with N.J.W. As in Rustad I (2013 ND 185, 838 N.W.2d 421) and Rustad II, the trial court in the current matter acknowledged the differing parenting styles of the parties, but found that neither is better than the other. Rustad II at ¶10. The trial court's findings should be affirmed in all respects.

[¶53]b. Factor b. – Ability of each parent to meet the child's needs.

[¶54]The trial court found that Factor b. favored neither party. Weston offers several arguments in an effort to show that the trial court's findings were not based on the evidence received, however none are persuasive. The court received evidence and testimony regarding the suitability and sufficiency of both parties homes. The court received evidence regarding both parties current and past employment. Both parties are employed, have suitable homes, and have properly cared for N.J.W. when she is in their care. The trial court's findings are based on the record and reflect the evidence and testimony presented and thus are not clearly erroneous.

[¶55]Weston argues that Crummy has an unstable work history, and thus is unable to provide for N.J.W. Crummy provided a detailed description of his work history. Crummy was a track coach at Wayne State University from 2008 until 2010. (Tr. II 74:19-25). Crummy left Wayne State to accept a Division I coaching position at the

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University of North Dakota. (Tr. II 75:18-25). Crummy left UND when a new head track coach was hired; he then replaced the entire assistant coaching staff. (Tr. II 76:19-25). Crummy then worked as a substitute teacher and paraprofessional in East Grand Forks, until accepting a job in Thief River Falls, MN for the 2012-2013 school year. (Tr. II 78:8-17).

[¶56]Crummy could have remained in Thief River Falls, but Weston gave him the ultimatum that if he did not resign and move to Fargo, that he and Weston would no longer be together, and Crummy would never see N.J.W. (Tr. II 43:9-13). After the parties relationship ended abruptly, Crummy was forced to accept a job outside of his licensure in New Folden, MN. (Tr. II 78:20-25). Given that he was working outside of his licensure, Crummy was not retained in New Folden. Ultimately, Crummy accepted a teaching position with Sacred Heart in East Grand Forks, MN, for the 2014-2015 school year. (App. 271-272).

[¶57]All of Crummy's job transitions have been to either further his career, or as a result of circumstances beyond his control. Crummy testified that he is confident in his job security at Sacred Heart given he and his family's long relationship with the superintendent. (Tr. II 81:2-8). While Weston argues that Crummy's job history is unstable, her resume includes roughly as many different employment positions in the past five (5) years. Weston testified that since 2010 she has worked for three different schools. (Tr. I 144:6-8). As with Crummy's employment, Weston testified that her employment is not guaranteed year-to-year. (Tr. I 143:5-7).

[¶58]The record is clear that the parties are on equal footing with respect to their employment. Both parties are employed in education, and both have contracts that are

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likely, but not guaranteed to be renewed. There is nothing in the record that would lead the trial court to believe that Factor b. should favor one party over the other.

[¶59]Weston argues that the trial court's finding that her attempt to shift this factor to her favor because Crummy did not reimburse her for uninsured medical and daycare expenses was unpersuasive is clearly erroneous. The stipulation that Weston voluntarily executed did not require either party to pay child support, nor that either party would be responsible to the other for uninsured medical nor daycare expenses. (App. 17-19). The interim order entered in this matter largely mirrored the parties' stipulation. (App. 23-24).

[¶60]The record is clear that neither party had an obligation to reimburse the other for uninsured medical or daycare expenses. Both parties paid for N.J.W.'s expenses during their parenting time with her. Thus, Weston's rather tenuous argument is that Crummy is delinquent in not fulfilling a duty he never had.

[¶61]In another display of contradictory brilliance, Weston argues that the trial court's finding that Crummy did in fact reimburse Weston for those uninsured medical expenses for which he was provided statements, was also erroneous. However, on the very next page of her brief, Weston admits that Crummy paid $155.00 towards N.J.W.'s uninsured medical expenses. Crummy testified that he is willing to pay his fair share of N.J.W.'s uninsured medical expenses when he receives statements for those expenses. (Tr. II 172:11-17).

[¶62]Weston's final argument with respect to Factor b. is that Crummy is not able to provide proper medical care for N.J.W. Weston's chief example is an incident on June 20, 2014, when N.J.W. had a double ear infection. Weston argues that N.J.W. had a fever

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of 103.5, and that she should have been allowed to care for her. Despite Weston's statements regarding the severity of N.J.W.'s illness, she chose to conduct the exchange in a restaurant so she could meet a friend for dinner. (Tr. 1 159:9-16).

[¶63]Crummy's father, Paul, handled the exchange. When Paul got to the restaurant, N.J.W. was smiling and happy to see him. (Tr. II 6:10-12). N.J.W. was a little fussy, but was fine on the drive home, and when Paul took her temperature at home it was under 100 degrees. (Tr. II 35:9-25). Weston admitted that N.J.W. is healthy, and has never been hospitalized. (Tr. I 159:17-20). Weston argues that Crummy does not know how to properly care for N.J.W., but yet Weston testified that she has asked Crummy for parenting advice, and that "some of it is very good." (Tr. I 153:21-25;154:1). Weston also testified that Crummy started helping her and her family eat healthier. (Tr. I 162:9-10).

[¶64]The trial court heard testimony from Crummy's former roommate Jonathan Deschene, who himself was an in-home investigator for social services for five (5) years. (Tr. I 213:12-25). While Deschene was living with Crummy he was a mandated reporter. (Tr. I 215:1-8). Deschene testified that there were no issues with Crummy's parenting style, nor his actual parenting of his daughters that ever gave him any concern. (Tr. I 216:12-17). Similar to the parents in Rustad I, the parties in the current matter have different parenting styles, but the evidence is clear N.J.W. is a happy, healthy child whose needs are met. Rustad I at ¶7. The trial court's findings should be affirmed in all respects.

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[¶65]c. Factor c. – Child's developmental needs.

[¶66]The trial court found that Factor c. favors neither party and that both parties are able to meet N.J.W.'s developmental needs now and in the future. In her brief, Weston makes the unfounded argument that there is an:

> *"utter lack of testimony and exhibits in the record, outside of the fact that he has enrolled N.J.W. in daycare, to provide proof Crummy understands and is proactive in ensuring that N.J.W. properly develops. The silent record speaks for itself.*

[¶67]Weston's argument is completely false, and can only be interpreted as an effort to mislead this court. The simple truth is that the record is far from silent regarding Crummy's efforts to meet N.J.W.'s developmental needs. Weston states that the record is clear that she reads parenting articles and magazines, that she took a parenting class, ensures N.J.W. has age appropriate toys, ensures that N.J.W. is around children her age, exposes N.J.W. to the world, and reads to N.J.W. However, the record is also clear that Crummy has done all of those things as well. Weston testified that she has no evidence that Crummy is not reading to N.J.W., and interacting with her in appropriate ways to meet her developmental needs. (Tr. I 166:10-16).

[¶68]Crummy took child development classes in college. (Tr. II 96:6-14). Crummy reads parenting articles. (Tr. II 96:15-20). Crummy took a parenting class. (Tr. II 96:24-25;97:1-6). Crummy has a giant playroom for his daughters at his house with age appropriate toys. (Tr. II 57: 6-14)(App. 247). After interviewing a few different daycares, Crummy found one that would meet all of N.J.W.'s needs. (Tr. II 131:4-16)(App. 303-305). Crummy described in detail what he looked for in a daycare for N.J.W. (Tr. II 98 7-23). Crummy plans to have N.J.W. start preschool at Sacred Heart

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when she is the appropriate age. (Tr. II 98:24-25;99:1-2). Crummy gardens with N.J.W. and takes her swimming. (Tr. II 59:1-6;65:8-10)(App. 254). Crummy reads to N.J.W., he detailed what type of books are best for her at her current stage of development, and which books are currently N.J.W.'s favorites. (Tr. II 59:7-19).

[¶69]While Weston argues that the record is devoid of any evidence of Crummy's efforts to ensure N.J.W.'s developmental needs are met, quite the opposite is true. Weston argues that she sacrificed by resigning from the North Dakota School Counseling Association Board because it took time away from N.J.W. Crummy also made sacrifices to be with N.J.W. as much as possible, including giving up coaching (Tr. II 63:20-25;64:1-15), and giving up directing one act plays. (Tr. II 64:16-19). Both parties have sacrificed for N.J.W.

[¶70]Weston argues that the court "blatantly" ignored evidence of the numerous things Weston has done to meet N.J.W.'s developmental needs. However, just as with Factors a. and b. the trial court did not ignore evidence favorable to Weston, but it also did not ignore the evidence that was favorable to Crummy. Parenting is not a competition and it is not zero-sum game. Crummy's efforts to meet N.J.W.'s developmental needs do not diminish the efforts of Weston and vice-versa. The trial court found, based on the evidence and testimony, that both parties are able to meet N.J.W.'s developmental needs. The trial court's findings should be affirmed in all respects.

[¶71]d. Factors. d. and h. – Stability of parent's home.

[¶72]In Deyle v. Deyle, 2012 ND 248, 825 NW 2d 245, this court stated in part:

> *When evaluating Factor d. the trial court must look back at the "length of time the child has lived in a stable home, as well as the permanence or stability of the home environment," as well as look forward to "the*

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> *desirability of maintaining continuity in the child's home and community.*
>
> Deyle at ¶8.
>
> *Factor (d) no longer restricts the district court's analysis to past events.*
>
> Deyle at ¶9.
>
> *In reviewing Factor h. the "findings regarding one factor may be applicable to another....a district court's finding under Factor d. also may be applicable to Factor h."*
>
> In Interest of SRL, 2013 ND 32, ¶7. 827 N.W.2d 324, 327.
>
> *When analyzing the facts with regards to Factor h., the trial court must "consider the potential effects of change," and look forward to, "determine whether foreseeable changes could impact a child's life in the home, school and community."*
>
> Deyle at ¶12.

[¶73]Weston's argument regarding Factors d. and h., and tangentially Factor k. demonstrates a fundamental misapplication of the applicable law. Weston's argument focuses almost entirely on past events. However, this court has been clear that the trial court must look at both past events, as well as look to the future. The trial court examined all of the testimony and evidence received, and found on balance that Factor d. favored Crummy, and that Factor h. favored neither party. As with the rest of the trial court's analysis in this matter the trial court did not ignore the evidence favorable to Weston, but rather balanced that with the evidence favorable to Crummy.

[¶74]Weston argues that the court should give deference to the fact that she was awarded primary residential responsibility for N.J.W. in the trial court's interim order. However, as already discussed the parties entered into a stipulation with regards to parenting time, (App. 17-19), and the interim order entered in this matter largely mirrored

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the parties' stipulation. (App. 23-24). Weston cites to the trial court's interim order where the trial court found that Crummy did not have increased parenting time with N.J.W. until March 14, 2014. However, this was a result of Weston's actions.

[¶75]Crummy only had two nights of overnight parenting time after the end of the parties' relationship in February 2014. (Tr. II 140, 16-19). Weston only allowed Crummy little, if any parenting time in March 2014, prior to the entry of the stipulation on March 14, 2014. (Tr. II 47:9-25). Crummy agreed to the stipulation so that he would begin having some parenting time with N.J.W. (Tr. II 47:9-25). A parent that willfully alienates a child from the other parent may not be awarded primary residential responsibility as a result of that alienation. Rustad I, 2013 ND 185, 838 N.W.2d 421.

[¶76]The record is clear that Crummy had parenting time in the interim every week from Friday at 6:30 p.m. until Monday at 6:30 p.m. Thus, the majority of Crummy's parenting time occurred when he did not have to be at work. This afforded Crummy more time to bond with N.J.W. Crummy was able to spend virtually all of his parenting time actually with N.J.W.

[¶77]Weston cites to Marsden v. Koop, 2010 ND 196, 789 N.W.2d 531, and in Marsden the trial court noted the frequent contact the children had with their grandparents, and the adverse effects of decreasing that contact. Marsden at ¶37. When Crummy was at work on Mondays, it was his father, N.J.W.'s grandfather, who often cared for her. Crummy and N.J.W. interact with Crummy's parents on an almost daily basis. (Tr. II 60:4-11).

[¶78]Weston makes the argument that Crummy was rewarded for not working during the summer of 2014, and that a precedent is being set for rewarding parties for not

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having a job. Weston's argument demonstrates the classic logical fallacy of *reduction ad absurdum*. The trial court did not reward Crummy for not having a job, but rather recognized that as a teacher he does not work during the summer months. Crummy did not quit his job, rather he chose not to pursue additional employment for the summer so that he could spend more time with both of his daughters.

[¶79]Weston also argues that the fact that she owns her home makes her residence more stable than Crummy's. However, Weston fails to address the fact that she has had five residences in the last year-and-a-half. (Tr. I 145:4-6). In contrast, other than the aborted attempt to live with Weston in Fargo, Crummy has lived in the same house for almost three (3) years. (Tr. II 100:8-15). Crummy's family has lived on that land since 1958, or almost sixty (60) years (Tr. I 229:11-23). Crummy's home has been N.J.W.'s home since she was born. N.J.W. has her own room, and the house is childproofed. (Tr. I 68:3-20)(Appellee 116). Crummy chooses to live in Argyle so that he can be close to his other daughter, N.J.W.'s sister, and be near his support system. (Tr. II 69:1-11).

[¶80]For reasons passing understanding, Weston attempts to engage this court in hypothetical discourse on the various scenarios that could result in Crummy being homeless. (Brief of Appellant ¶53). However, none of Weston's hypothetical scenarios are based on facts in the record. Crummy's father Paul testified that he and Crummy have a "very good father and son relationship" and that Crummy and "his mother get along very well also." (Tr. II 27:9-13). Paul testified that Crummy is honest with he and his mother, and does not try to make himself look good in his parents eyes. (Tr. II 27:917-25;28:1-3). Paul admitted that he has not been proud of everything Crummy has done, but that he has no reason to doubt anything Crummy has told him. (Tr. II 38:12-22). Crummy

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has a strong relationship with his parents based on a foundation of love, respect, and honesty. This is in contrast to the relationship that Weston has with her parents, and the relationship her parents have with one another.

[¶81]Even a cursory review of the testimony of Weston's parents, Keith and Penni Weston, as opposed to the testimony of Paul Crummy, reveals a stark contrast. Paul Crummy's testimony includes a detailed discussion of his relationship with Crummy, his relationship with N.J.W., and their interactions. Paul testified that the whole family goes to church on Sunday, bringing N.J.W., and has lunch afterwards. Crummy's bond with his parents is very strong.

[¶82]Keith Weston's testimony on direct is three pages long, in which he discusses nothing about the relationship he has with his daughter nor granddaughter, but rather focuses on the fact that he does not believe that Weston attacked Crummy, because it appeared that she used her right hand to repeatedly punch Crummy in the head, rather than her dominant left hand. (Tr. I 189-191). When Penni was asked on cross-examination about her historical relationship with Weston, she responded that it was "as good as a parent and a daughter can be." (Tr. I 208:14-16). Whereas Paul was open and honest, Keith and Penni were measured and deliberate in all of their responses, something the trial court was in the best position to observe.

[¶83]Crummy testified that during his relationship with Weston, that Keith and Penni flew to Florida two or three times to look at houses. (Tr. II 103:1-5). Crummy testified that very early in his relationship with Weston, she told him that her parents do not love each other, that adultery had occurred, and that Amanda and Penni had a very strained, abusive relationship throughout her entire life. (Tr. II 102:15-22). The trial court

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is in the best position to judge the credibility and demeanor of witnesses. The trial court had the opportunity to observe Weston's parents, and Crummy's father. While Weston draws the conclusion that the trial court favored Crummy's extended family only due to geographic proximity, the evidence and testimony clearly shows that Crummy's extended family offers a much more stable support system than that of Weston.

[¶84]Weston argues that the court ignored the fact that N.J.W. already has school and community records, but yet failed to submit of any of the alleged daycare records into evidence. (Tr. I 105:9-10). Weston speculates that N.J.W. will suffer adverse effects by having to switch daycares, but offers no evidence or precedent to substantiate her speculation. At the time of trial N.J.W. was approximately ten (10) months old, thus transitioning to a similar daycare with the same level of quality would have only minimal impact on N.J.W., if at all.

[¶85]Weston takes issue with the fact that N.J.W. is going to daycare in East Grand Forks, MN, and that Crummy intends to have her attend school there as well. Crummy testified that he intends to have N.J.W. go to daycare, participate in activities, attend school, and go for routine health appointments in East Grand Forks. (Tr. II 126:10-16). Crummy testified that East Grand Forks is a central location, roughly equidistant from both parties, which will allow both Crummy and Weston an equal opportunity to participate in N.J.W.'s life. While Weston argues that N.J.W. will suffer adverse effects from having to switch doctors, she cites to no evidence or precedent that supports her argument. The same level of schools, daycare, and medical care are all available in East Grand Forks, as are available in Fargo. Crummy is working in East Grand Forks which means he will be close to N.J.W. should she need him.

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[¶86]The record is clear that Crummy is able to provide more stable home environment for N.J.W. as he has lived in the same home for three (3) years, and his family has lived on that land for almost sixty (60) years. Whereas Weston has had five residences in the last year-and-a-half. While Weston argues that Crummy has an unstable employment history, she has had roughly as many jobs as he has in the last five (5) years. Crummy's family support system is far more stable than that of Weston's. Paul Crummy testified regarding the strong bond he and his wife have with Crummy, and with N.J.W. The daycare, educational, and medical facilities available to N.J.W. in East Grand Forks are equal to those available in Fargo. Any possible adverse effects that N.J.W. may suffer are far outweighed by the benefits of the stability Crummy can provide. The trial court's findings should be affirmed in all respects.

[¶87]e. Factor e. – Encouraging relationship with other parent.

[¶88]In Rustad I, this court stated,

> *A healthy relationship between the child and both parents is presumed to be in the child's best interests. Parental alienation is a significant factor in determining primary residential responsibility. A parent who willfully alienates a child from the other parent may not be awarded primary residential responsibility based on that alienation.*
>
> Rustad I at ¶9

[¶89] In Miller v. Mees, 2011 ND 166, 802 N.W.2d 153, this court quoted the trial court saying, "[a] child deserves to have a parent who will recognize the need for and promote interaction with the other parent." Miller at ¶13. Weston once again argues that because the trial court found that one of the best interest factors favored neither party, the trial court ignored evidence favorable to her. While Weston argues in her brief that she

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"went out of her way to facilitate a relationship between Crummy and N.J.W.," her actions speak louder than words.

[¶90]While Weston argues that she asked Crummy to participate in choosing a daycare in Fargo, in reality Weston made a unilateral decision. (Tr. II 161:10-12). It was only after Weston had already accepted the daycare that Crummy took a tour of the facility in Fargo. (Tr. II 161:14-16). Weston testified that there is a specific list of people that can pick up N.J.W. from daycare, and that Crummy is not on that list. (Tr. I 84:5-16). In contrast, Crummy already has Weston on the safe pick-up list at the daycare in East Grand Forks. (Tr. II 131:21-25).

[¶91]Weston argues that Crummy allegedly alienated his other daughter from his ex-wife. However, testimony regarding Crummy's relationship with his other daughter, and with his ex-wife was objected to as irrelevant, and the court sustained the objection. (Tr. I 92-94). The Appellee would request that those portion of the Appellant's brief referencing the subject matter of the sustained objection be stricken. However, testimony regarding Weston's alienation of Crummy was received. As described above, after the end of the parties' relationship in February 2014, Crummy only had two nights of overnight parenting time. (Tr. II 140, 16-19). Weston only allowed Crummy little, if any parenting time in March 2014, prior to March 14, 2014. (Tr. II 47:9-25).

[¶92]Weston argues that Crummy was unwilling to make any effort to exchange parenting days, but evidence was presented that the parties were able to work together to exchange parenting days. (Tr. II 55:4-16)(App. 256-258). Crummy and Weston got one another father's and mother's day gifts, respectively from N.J.W. (Tr. II 106:2-13). There are times when the parties are able to get along, and despite their strained relationship,

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Crummy testified that he believes his relationship with Weston will improve, and that they will be able to co-parent. (Tr. II 106:14-24).

[¶93]It is clear from the record that both parties have struggled with their relationship and co-parenting following the end of their romantic relationship. Evidence was received regarding Weston's efforts to alienate Crummy from N.J.W. However, the trial court also received evidence and testimony by both parties regarding the improvement in their relationship, and their efforts in that respect.

[¶94] Weston's examples of Crummy's alleged alienation are not supported by the record, and are at times directly contradicted. Both parties testified that they are willing to encourage N.J.W. to have a relationship with the other parent. Evidence was received regarding the parties efforts to co-parent. As the trial court found, the parties had a difficult time transitioning from being romantic partners to only co-parenting, but improvement has been made, thus based on the evidence received Factor e. would favor neither party. The trial court's findings should be affirmed in all respects.

[¶95]3. The trial court properly found that given the domestic violence perpetrated by the Appellant, Factor j. favored the Appellee.

[¶96]This court stated in Mowan:

> *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.*
>
> *"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."*
>
> Mowan at ¶15.

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[¶97]Weston mischaracterizes the trial court's findings in the interim order. The trial court made no ultimate determination with regards to Factor j., rather the trial court only found that the rebuttable presumption had not been triggered. (App. 24). Weston's argument that the trial court's findings contradicted its earlier conclusions in the interim order demonstrate a misunderstanding of the relevant law. While the rebuttable presumption was not triggered, the evidence of domestic violence still paramount when an analysis of the best interest factors is conducted.

[¶98]While Weston continues to characterize her actions as "alleged domestic violence," the facts are clear. Crummy testified at the interim hearing regarding the incident on August 5, 2013. (Appellee 14-18). Crummy testified that the August 5, 2013, was not the only incident of domestic violence committed against him by Weston. (Appellee 18-20). After police officers spoke with both Weston and Crummy, Weston was arrested for domestic violence. (Appellee 18). A protection order was put into place. (Appellee 18). Weston pled guilty to charges stemming from her domestic violence against Crummy. (App. 342). Despite all of this evidence, Weston argues that that Crummy made "false allegations" against her regarding the May and August 2013 incidents. It is clear from the record that Weston committed acts of domestic violence against Crummy.

[¶99]Weston argues that Crummy allegedly verbally and emotionally abused her but presented no evidence of this outside of her own testimony. The trial court is in the best position to judge the credibility of witnesses and evidence. The trial court specifically noted that it found "credible Thomas' testimony that he was stuck numerous times by Amanda, resulting in bodily injury to him, and that this was an act of domestic

violence." (emphasis added)(App. 342). The trial court's findings should be affirmed in all respects.

[¶100]CONCLUSION

[¶101]Weston has failed to meet her burden in showing that the findings of the trial court were clearly erroneous. It is clear from the record that all of the trial court's findings were based on the evidence and testimony received throughout the pendency of this matter. The trial court's findings awarding primary residential responsibility of N.J.W. to Crummy should be affirmed in all respects.

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May 15, 2015
Date

IN THE SUPREME COURT,
STATE OF NORTH DAKOTA

Amanda J. Weston,	)	
	)	**Supreme Court No. 20140421**
Plaintiff/Appellant,	)	
	)	**Cass County District Court**
vs.	)	**Civil No. 09-2014-DM-00217**
	)	
Thomas L. Crummy,	)	
	)	
Defendant/Appellee.	)	

CERTIFICATE OF SERVICE
VIA EMAIL

Joshua Nyberg, being of legal age and an officer of the court, states that on the 15th day of May, 2015, he served a true and correct copy of the following document(s):

1. **Brief of the Appellee**
2. **Appendix to the Brief of the Appellee**

That copies of the foregoing were electronically served through email to the following parties:

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May 15, 2015
Date