

## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

Tara Dawn Ritter, n/k/a Tara McDonald,	)	
	)	
Plaintiff / Appellee,	)	
	)	Supreme Court No.: 20160442
v.	)	
	)	Morton Co. Case No.:
Joshua Daniel Ritter,	)	30-2012-DM-00220
	)	
Defendant / Appellant,	)	
	)	

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APPEAL FROM SECOND AMENDED JUDGMENT, DATED OCTOBER 21, 2016,  
ISSUED BY HONORABLE BRUCE ROMANICK, SOUTH CENTRAL JUDICIAL  
DISTRICT, MORTON COUNTY, NORTH DAKOTA, CASE NO. 30-2012-DM-00220

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**BRIEF OF APPELLANT**

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Suzanne M. Schweigert (ID #05480)  
SMITH PORSBORG SCHWEIGERT  
ARMSTRONG MOLDENHAUER & SMITH  
122 East Broadway Avenue  
P.O. Box 460  
Bismarck, ND 58502-0460  
sschweigert@smithporsborg.com  
(701) 258-0630  
*Attorneys for Defendant and Appellant, Joshua Ritter*

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## **Statement of the Issues**

- [¶1] I. Whether the district court erred by not granting Joshua's motion to modify primary residential responsibility and not awarding Josh equal residential responsibility.
- [¶2] II. Whether the district court abused its discretion by not clarifying the Findings.

### **Statement of the Case**

[¶3] This case was initiated by the plaintiff/appellee (“Tara”) as a divorce from defendant/appellant (“Josh”) on September 5, 2012. App.10-13. On September 11, 2012, Tara and Josh stipulated to an absolute divorce on the grounds of irreconcilable differences. App.15-30. By stipulation, Tara received primary residential responsibility of the parties’ two children, H.R.R., born in 2005, and G.R.R., born in 2008. App.22. Josh’s parenting time consisted of 48 hours weekly of uninterrupted parenting time, to be determined by mutual agreement, unless the parties agreed otherwise. App.32,35. The district court entered its Findings of Fact, Conclusions of Law, and Order for Judgment [“Findings”] on the Stipulation on September 13, 2012. App.40-42. The clerk of court signed the Judgment for divorce on the same day. App.63.

[¶4] In September 2014, Josh contacted legal counsel and Tara regarding mediation to change the parenting time plan based on his change of employment. App.67. Tara did not respond to multiple requests. *Id.* Six months later, on February 20, 2015, Josh brought a Motion to Modify the Judgment and Parenting Plan. R.16-19. On March 5, 2015, the parties stipulated to an extension of time for Tara to respond. R.24. On March 18, 2015, Tara filed a Response and Affidavit in Opposition to Josh’s Motion to Modify Primary Residential Responsibility. R.30-31. Josh replied to Tara’s Response through Brief and Affidavit on March 25, 2015. R.33-40. The next day, on March 26, 2015, Tara filed an Expedited Motion to strike portions of Josh’s Reply Brief, or in the Alternative, for Leave to File Supplemental Brief, and Brief in Support. R.47. Josh filed a Response to the Expedited Motion the same day. R.49. On April 8, 2015, the district court granted Tara’s request for

an Extension to File her Response Brief.R.53. Tara filed her Brief in Response to Josh's Reply and Second Affidavit on April 17, 2017.R.53.

[¶5] On May 14, 2015, the district court denied Josh's Motion to Modify Primary Residential Responsibility.App.141-46. The Order characterized Josh's position that "his new work schedule, Tara's remarriage, and the inconsistency in the parenting schedule [were] a material change in circumstances" and Tara's position as disputing a material change.App.142. The court found that a parent's work schedule change was sufficient to modify visitation but not primary residential responsibility and second, that remarriage alone is not sufficient to be a material change, but the remarriage also needs to "attempt to alienate the child[ren]'s affection" toward the other parent or "when hostility between the parents negatively affects the child[ren]."App.145. The Order stated that Josh "failed to establish a prima facie case and his request for an evidentiary hearing as it relates to his motion to change primary residential responsibility [was] denied."App.145.

[¶6] On July 13, 2015, Josh filed a Notice of Appeal with a preliminary statement to the Court: "[w]hether the District Court erred in finding that Joshua failed to establish a prima facie case justifying a modification of primary residential responsibility since Judgment was previously entered on September 13, 2012, thereby denying Joshua's Motion to Modify Primary Residential Responsibility and his request for an evidentiary hearing."App.148. Oral arguments were heard and this Court issued an Opinion and Judgment on February 5, 2016 reversing and remanding the case for an evidentiary hearing because Josh had met the burden of a prima facie case and "shar[ing] parenting responsibility" was in the best interests of the children.App.151-159. A material change in circumstance was established by his change in employment that resulted in a significant

increase in availability for his children and his affidavit provided sufficient evidence that modification was in the best interests of the children.App.155-156. In this Court's Judgment dated 2/5/2016, the Court concluded "[e]vidence exists [Josh] and [Tara] are both capable of parenting their children and that it is in the best interests of the children that [Josh] and [Tara] share such responsibility."App.157.

[¶7] On May 27, 2016, Tara filed a Motion to Modify Parenting Time Schedule, supported by Brief and Affidavit in Support. Josh filed a Response to Tara's Motion to Modify and Affidavit in Support on June 13, 2016. Tara filed a Reply Brief and Affidavit on June 22, 2016. On June 28, 2016, the district court issued an Order setting a hearing for both motions for July 27-28, 2016.R.92. On July 13, 2016, Josh and Tara filed a Partial Stipulation to Modify Vacation Parenting Time, Holiday Parenting Time, and Communication.R.105. An updated Partial Stipulation, amending 3 words at Tara's request, was filed on July 26, 2016.R.115. Trial on this matter was held on July 27-28, 2016. On August 25, 2016, both filed Proposed Findings.R.250,253. The court entered its Findings on September 2, 2016, finding that a material change in circumstance had occurred with Josh's change in employment but finding it was in the best interests of the children for Tara to continue to have primary residential responsibility.App.623,632. On September 19, 2016, Josh filed a Motion for Clarification and/or Modification with supporting Brief and Affidavit.R.265-67. On October 3, 2016, Tara filed a Response/Objection to Josh's Motion for Clarification and/or Modification with supporting Affidavit.R.271-72. On October 13, 2016, Josh filed a Reply to Tara's Response with Affidavit in Support.R.274,276. On October 17, 2016, Tara filed a Response Objection to Josh's Reply.R.278. On October 19, 2016, the court entered an Order Denying



Motion for Clarification and/or Modification.R.280. The Second Amended Judgment in this matter was filed on October 21, 2016. Notice of Entry of Judgment was filed on October 24, 2016.R.284. Josh timely filed a Notice of Appeal on December 27, 2016.R.291.

### **Statement of the Facts**

[¶8] Josh and Tara were married on October 6, 2007.App.15. They have two children together, H.R.R., born in 2005, and G.R.R., born in 2008.App.15. At the time of the parties' divorce, they stipulated to Tara having primary residential responsibility and parenting time for Josh "determined by mutual agreement of the parties" and unless agreed otherwise, at least 48 hours parenting time per week for Josh.App.35. The parenting responsibility and time was based solely on Josh's intense and unpredictable work schedule at the time as a commercial pilot.

[¶9] The agreed upon parenting time had been agreed to by Josh due to his considerably varied work schedule as a pilot with SkyWest Airlines, based out of Denver, to which he commuted from their home in Mandan.App.65. At the time of the stipulation, Josh was out of town 3-4 nights a week, and while he wanted joint residential responsibility, he agreed to Tara having primary since he was away from home so much at that time.App.65-67. While the parenting agreement specified at least two days (48 hours) a week parenting time for Josh, he continued to take active roles in their lives by coaching their sporting activities and taking them on vacations.App.66.

[¶10] In September 2013, Josh left his employment with SkyWest and joined Basin Electric as a full-time corporate pilot.Id. After moving to Basin Electric, Josh's work hours generally tracked regular business hours as he works Monday through Friday from 7:30

a.m. to 5:30 p.m. allowing him to be home regularly, most every evening.Id. This schedule also gave Josh flexibility to be available for his kids' medical or other needs on a daily basis and was out of town only 10-15 nights per year.Id. His director of aviation at Basin Electric, Ryan Anderson, testified at trial that they worked with employees to accommodate family needs and responsibilities.Tr.32:18-22.

[¶11] At the time of Josh's Motion to Modify, Tara had re-married, had one daughter with her new husband, and was expecting another daughter in May 2015.App.76. According to Tara, she separated from Josh in 2010 and they started discussing divorce at that time.App.135. Andy McDonald, Tara's new husband, has been in Tara, H.R.R. and G.R.R.'s lives since 2010.App.137. Tara and Andy moved in together in February 2011 and had their daughter, K.M., in April 2011.App.136. They were engaged in May 2012 and Tara hired her attorney for her divorce from Josh in July 2012.App.136.Tara married Andy on February 16, 2013, 5 months after her divorce from Josh was finalized.App.136-137.

[¶12] In his Motion to Modify, Josh proposed a parenting plan with a 2-2-3 schedule.App.66. One parent would have the boys Monday and Tuesday, the other on Wednesday and Thursday, and the first parent would have them Friday, Saturday, and Sunday.Id. The next week the schedule would rotate so the parent that did not have weekend parenting time would have it the next weekend.Id. Josh also proposed amending the holiday time to a set alternating schedule to provide for planned extended family holidays for the kids and setting the right of first refusal language for any time a parent is unable to care for the kids on their scheduled day.App.68. Josh's modification went on to address the best interest factors, weighing many equally, and addressing the factors in terms of what was best for the children.App.68-72.

[¶13] Tara responded to Josh's Motion by pointing out what she believed were inaccuracies in Josh's affidavit, how wonderful of a mother she was, all the things she did not bring up against Josh, defended their schedule and holiday plan and generally resisted the modification.App.76-88. Josh quickly responded with a Reply Affidavit to Tara's denial that a material change occurred with his change of employment.App.89-132. On April 17, 2015, Tara submitted a Second Affidavit to the court which focused on her relationship with her second husband, Andy McDonald.App.135-140.

[¶14] While Josh testified that the boys "did great" with the 48 hour notice schedule originally stipulated to, in September 2015, Josh and Tara reached an agreement that set parenting time on a schedule of 48 hours that alternated every other Wednesday and Thursday night with every other Friday and Saturday night.Tr.62:13-16;23-25;63:1-6. Since this schedule, Josh has made a scheduling effort and had "nearly all" days off from flying. Tr.72:19-22. Some of his Friday flights have left at noon and he has also been available to take the boys to school on Friday morning at the end of his parenting time. Tr.73:11-13.

[¶15] This matter was remanded for an evidentiary hearing on July 27-28, 2016.App.183. On May 27, 2016, Tara entered a Motion to Modify Parenting Time Schedule.App.183. In her affidavit supporting the motion, Tara requested a set parenting time schedule, default holiday schedule, addition of a vacation schedule to the parties' Parenting Plan, and a nightly communication time for the parent not exercising parenting time.App.160-163. In his Response Affidavit to Tara's Motion to Modify, Josh generally agreed to Tara's request that a set schedule being in the best interest of their children.App.164. He went on to stress the importance of that schedule being based on equal parenting time as acknowledged by

the Court on appeal.App.165. After receiving leave to Reply from the district court, Tara then Replied to Josh's affidavit informing the court that they both agreed that they needed set schedules, but Tara noted her disagreement that an equal schedule would be best.App.180-82. The district court granted Tara's request that her Motion be heard in conjunction with the evidentiary hearing on Josh's Motion to Modify.App.183.

[¶16] Per court Order, Josh and Tara attended mediation and entered a Partial Stipulation setting forth a vacation parenting time schedule, holiday schedule, and addressing communication.App.185-186. After the Stipulation was signed and filed, Tara took issue with three words and a new Stipulation was signed and filed removing language regarding the children's birthday parties.App.190;198. Tara and Josh went to trial on the remaining issues of residential responsibility, parenting time, child support, health insurance, and the income tax exemptions, on July 27-28, 2016.App.623. Following trial, both submitted proposed Findings.App.540-615.

[¶17] In the September 1, 2016 Findings, the district court found a material change had occurred but weighed best interest factors (a), (b), (c), (d), and (h) in Tara's favor and awarded primary residential responsibility with her.App.616-631. On September 19, 2016, Josh moved the district court for Clarification on the following issues: first refusal language, access to daycare records, notification of doctor's appointments, and addressing transportation issues involving Tara's continued issues with Josh's mother, Donna Ritter.App.648-655. Tara responded to Josh's Motion for Clarification, characterizing Josh's factual affidavit as "allegations" and claiming they are "false" without offering any supporting facts.App.666-668. Josh replied to Tara's Response that Clarification was clearly necessary if they were having issues already.App.669-676. The district court denied

the Motion for Clarification/Modification.App.681-682. Josh appealed the district court's Second Amended Judgment, dated October 21, 2016.App.702-703.

### **Law and Argument**

#### **I. The district court erred by not granting Josh's motion to modify primary residential responsibility and not awarding Josh equal residential responsibility.**

##### **A. The standard of review is clearly erroneous.**

[¶18] The North Dakota Supreme Court has stated “[a] trial court's award of primary residential responsibility is a finding of fact that this Court will not reverse on appeal unless it is clearly erroneous.” Fonderv.Fonder,2012N.D.228,¶16,823N.W.2d504,509(N.D. 2012). “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or, although there is some evidence to support it, on the entire record, we are left with a definite and firm conviction a mistake has been made.” Dollv.Doll,2011ND24,¶6,794N.W.2d425.

##### **B. The district court improperly weighed the best interest factors.**

[¶19] Once the district court found that a material change in circumstances existed, the next step in determining whether a change in primary residential responsibility is necessary was for the district court to analyze the best interest factors and determine whether a change in primary residential responsibility was necessary to serve the best interests of the child. N.D.C.C. §14-09-06.6(6)(b). In awarding Tara primary residential responsibility, the district court ultimately found Tara and Josh equal on factors (e),(f),and(g).App.631. Tara was favored in factors (a),(b),(c),(d),and(h). Factors (i),(j),(k),(l),and(m)were found not applicable.App.631. Josh argues that equal residential responsibility was more appropriate

in this case and factors (a),(b),(c),(d),and(h)favor Josh and Tara equally and factors(e)and(f)favor Josh.

[¶20] The district court erred in finding Factor(a)to “slightly” favor Tara.App.624. Tara may have been the more involved parent due to Josh’s old work schedule, but that changed in September 2013 and Josh’s new work schedule allows him the flexibility of attending doctor appointments, supporting the children in their activities, school programs, parent/teacher conferences, and taking an active role in coaching his children’s baseball and hockey teams.App.66-67. Tara has, however, refused to co-parent with Josh numerous times. The district court chastises Josh for not “making sure he is involved in [ ] matters” that Tara never informs him are happening, such as the annual sports physicals and doctor’s appointments. Tr.82:4-5;12-14;15-16. The district court erred in finding “[t]he ability to nurture and guide the children” favors Tara. The supporting evidence shows that Josh has tried and is thwarted time and again by Tara from participating in his children’s care.App.97-98. The district court failed to place any burden on Tara to include Josh in the many matters at issue and basically rewarded her for not including Josh, even though they share joint decision making.

[¶21] A similar argument applies to the district court’s finding that Factor(b)favors Tara.App.625. Tara has historically been the parent responsible for the children’s medical appointments, solely due to Josh’s past employment, which the district court concedes is a change in circumstance, and Tara’s refusal to include Josh in the appointments. Josh testified that while he had joint decision making regarding medical issues for the children, at least half the time she does not tell Josh about their appointments and the other half she only tells him after the fact.Tr.69:13-19.

[¶22] Josh testified that he knew H.R. would need a sports' physical before football.Tr.82:4-5. When he asked Tara about setting up the appointment, he found out that she had already handled it during an appointment for one of her other children.Tr.82:15-16. Without making a separate appointment, Tara made it impossible for Josh to participate or jointly make this decision with her. This is another example of her intentional exclusion of Josh from their children's lives and a violation of their original Judgment.Tr.82:4-5;12-14;15-16.

[¶23] Josh wants to be involved in the day-to-day responsibilities and raising of his children.Tr.108:10-25;109:1. Tara's continued manipulations also has put their children at unnecessary risk of harm. Josh testified to a specific example of when H.R. was diagnosed with asthma and Tara's lack of including Josh in that appointment, which ultimately put H.R. in an unsafe situation.Tr.80:1-17. When H.R. was diagnosed with asthma, Tara did not tell Josh until after the appointment, not giving Josh the opportunity to talk to the doctor about H.R.'s asthma and what H.R. needed.Tr.80:1-7. When H.R. started coughing and wheezing at a hockey game, as his coach and his dad, Josh was not aware of what to do to help H.R. and Tara had his inhaler.Tr.80:11-17. Tara's continued exclusion of Josh in their children's lives is not in their best interests and is an actual detriment to the children. Josh also could not take the children to doctor's appointments or receive emergency medical care because Tara refused to give him their insurance card, further putting their children at unnecessary risk.Tr.78:11-24.

[¶24] The district court noted that both parents have the ability to "assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment" and did not find that Josh did not have the ability, only that he has not had the opportunity to be

involved in their children's medical care, which is in part due to Tara's manipulations. The district court has unfairly held Josh to a standard that this factor does not favor him because in the past he has not been able to participate in his children's medical care due to the circumstance that have now changed and due to Tara refusing to keep him informed of the medical appointments. Given the opportunity by the court for equal parenting, Josh is now in a position to set and attend for the boys' medical appointments just as much as Tara is. He has always had the ability to; the district court never found otherwise. The district court erred in not considering Josh's change in his work circumstances effect on this factor and Tara's manipulations and lack of sharing information that precluded Josh from being involved, deceitfully.

[¶25] The Findings state "[t]estimony was presented at Trial that G.R.R. is more sensitive and struggles slightly with reading." App.625. The district court found "[b]oth parents meet these needs." App.625. At trial, Josh testified that he does indeed meet the children's developmental needs by helping them with their school work. Tr.157:18-22. G.R.R.'s reading "suffers a little bit" but Josh testified that he has worked on that with him, with sight words, and spends time reading at home with him and his last report card showed his reading had improved. Tr.157:18-22;159:14-18.

[¶26] In analyzing this fact, the district court also noted that Tara has been the primary parent and a change could adversely impact G.R.R. and his "emotional sensitivity." Thus, the district court found factor(c) to favor Tara. The only reference at trial to G.R.R.'s "emotional sensitivity" was a single question from Tara's attorney asking if G.R.R. is a sensitive child and Tara responding "G. is sensitive to the fact, like, he kind of likes routine, he strives on it. He likes things to kind of be similar and the same." Tr.486:7-10. Tara



continued that if he is away from her for “an extended period of time” he is tired, upset, and “has a hard time just of re-adjusting sometimes to the fact that it’s been a change for him and he likes routine.”Tr.486:11-15. Tara’s brief characterization of G.R.R.’s sensitivity does not even appear to be “emotional” as the district court found in this factor. Tara’s recital of G.R.R.’s moods when he returns home is that of most children his age. Her brief answer was not enough for the district court to weigh this factor in her favor, finding contrary to the evidence presented that Josh works hard with both children and their developmental needs. If both parents meet the children’s needs, this factor weighs equally. The district court’s mischaracterization of Tara’s testimony regarding G.R.R.’s sensitivities and failure to acknowledge Josh’s active role in the children’s develop is clear error.

[¶27] With regard to Factor(d), the district court found both parents provide stability.App.625-26. Josh’s mom lives here in Bismarck, providing support and stability for Josh.Tr:312:15-17. Josh’s uncle also lives in Bismarck and his grandmother and another uncle live in Dickinson.Tr:313:4-12. Josh also testified to extended family in South Dakota and Fargo.App.205:15-17. His Fargo family owns a cabin in Minnesota.Tr. 85:3-4. Tara testified that all of her family resides in Canada.Tr.489:10-16. Her siblings and parents live in British Columbia and some family lives closer in Saskatchewan.Tr.489:13-16. Her new husband, Andy McDonald’s family resides in Bismarck and they see them on a weekly basis.Tr.489:17-25. In finding this factor favored Tara, the district court noted the length of time the boys have been in her care, her new family members, and the desirability to maintain community and foundation.App.625-26. Andy and Tara have only been married since 2013, factoring the relatively new addition of Andy’s family into the children’s

stability and continuity is not appropriate analysis. The children have lived in Tara's north Bismarck home since 2013, attended the same elementary school, but their community and foundation has also been stable with Josh. Josh has lived in his home since 2012 and has been actively involved in their school work and extracurricular activities as a coach for hockey and baseball. The district court erred in not finding this factor to favor Tara and Josh equally.

[¶28] In analyzing Factor(e), the district court characterized Tara's statements of hating Josh and her lengthy history of not allowing Josh to exercise reasonable parenting time as "isolated incidents" and found this factor to favor both equally.App.626-28.Evidence was presented at trial of the numerous times Tara has expressed her hatred for Josh, with texts saying she has every right to hate him and asking if he is delusional to think she has "even an ounce of respect" for Josh.App.518. Tara even testified to hating Josh.Tr.543:18-25. Tara's utter and complete failure to display any willingness or ability to "facilitate and encourage a close and continuing relationship" between Josh and their children was completely disregarded by the court, in clear error.

[¶29] Tara unreasonably limits Josh's parenting time to exactly 48 hours even on Sundays when they have hockey practice on the south side of Bismarck, where Josh will be there coaching them.Tr.63:21-24. Tara will make Josh drive them to North Bismarck, where Tara lives, at 4:30p.m. to have her drive them back to the South side for hockey practice before 6p.m.Tr.63:12-13;63:16-25;64:1-20. Josh testified to, and exhibits were entered at trial, that Tara has even told him she does "not think it's in their best interest to spend any more time with [Josh]".Tr.64:21-25;App. 406.

[¶30] Tara will not even refer to H.R.R. and G.R.R. as “their” kids; she always references “her kids.”Tr.105:10-14. Josh testified it is “common” for Tara to threaten to take the boys away from him; she has told him so over 20 times.Tr.106:6-13. Josh also testified to, and exhibits were entered at trial, of Tara texting him things like “I will damn well make sure you never see them again” and “The boys do not have two parents. They have me and then fun-time daddy. Major difference.”Tr.105:14-17;108:5-7. Tara has referred to Josh multiple times as “fun uncle” and “fun-time daddy,” phrases that Josh finds, rightfully, insulting.Tr.108:6-10.

[¶31] Not only does Tara privately belittle and threaten Josh, she also actively publicly excludes him. In one instance, Josh testified that Tara contacted the on-ice hockey coordinator, who does not deal with parents, that H.R.R. would not be going to a hockey game, instead of telling Josh, who is their coach.Tr.115:11-23. During trial, the district court acknowledged, “they [Josh and Tara] can’t get along and about who’s doing what.”Tr.117:20-21. The district court accurately noted “the mother is the issue.”Tr.118:16. The evidence presented clearly showed that Tara is not willing and able to facilitate and encourage the relationships between Josh, H.R., and G.R. and the district court erred in finding this factor to favor Josh and Tara equally when it clearly favored Josh.

[¶32] The district court stated with regard to factor(f), that while “the boys do not appear to be impacted” by the inappropriate situation of the timing of Tara and Andy’s relationship, which led to the breakup of her marriage with Josh and Tara having a child with Andy while still married to Josh, it certainly raises concerns of Tara’s moral fitness and this factor was unfairly found to factor neither.App.628. Tara’s extramarital affair

compares with no evidence of Josh's moral unfitness. The Findings state "being constantly away overnight due to work" and "having a controlling mindset as to finances for the family" are not proper considerations against Josh under this factor.App.628. The district court's listing of Josh's overnight work schedule and control of the family's finances do not relate at all to moral fitness. In fact, the only reference to Josh's "control" of the finances, was Tara testifying "money was a huge issue" leading up to their divorce.Tr.374:1. Tara only gave one example of Josh being "quite controlling with money" involving the purchase of a sweater at Baby Gap that Josh asked where she had spent the money.Tr.374:3-10. Further, any control of finances would not affect the children; they would not even know that was happening. The district court erred in finding this factor favored neither when the facts of the case clearly indicate that it should have favored Josh. Tara's affair with Andy McDonald was open and notorious to Josh's children. In March 2010, over two years before she divorced Josh, Tara had Andy and his children in the marital home while Josh was away for work overnight.Tr.148:22-25;150:1-7;App.524. Josh also testified to coming back from work trips and asking the children if they wanted to go out for a family dinner to which they responded that they had already gone out to that specific restaurant the night before with "Andrew."Tr.148:15-21. Learning from their mother that it is acceptable to have other men in the marital home, take them out for dinners, and have another man's child all while still being married to their father will of course have a lasting impact on the children. Tara put the children in inappropriate and morally unacceptable situations. The district court erred as this factor should have favored Josh.

[¶33] In Marsden v. Kopp, while still married, the mother started a relationship with another man, took trips to spend time with him, and became pregnant with his child. 2010ND196, ¶36, 789 N.W.2d 531. At trial, the district court found that the mother's "selfish decisions" did affect her children and found factor(f) to favor the father. Id. On appeal, the mother contended that she was morally fit, "there was no evidence to the contrary", and her relationship with this other man "has been a positive for the children." Id. at ¶35. This Court held that because the evidence in the record supported the district court's finding that the mother's actions negatively impacted the children's lives, the decision was not clearly erroneous. Id. at ¶36.

[¶34] The case at hand has very similar facts to Marsden. Tara began her relationship with Andy McDonald in 2010. App. 137. They moved in together in February 2011 and had their first child in April 2011. App. 136. Tara did not pursue a divorce from Josh until July 2012, two months after she became engaged to Andy. Id. Marsden's factual similarities to this case is clear precedent for this factor favoring Josh and the district court erred in not finding it in his favor with the ample evidence presented of Tara's unfitness.

[¶35] In considering factor(h), the district court extolled both parents being involved with the children's school and extracurricular activities. App. 628. Then the district court took issue with a provision of Josh's proposed parenting plan that "legal residence of the children for school purposes shall be with Tara and Josh, and that the parties shall coordinate and determine the best opportunity for school enrollment." App. 629. Josh's proposal did not ask that the legal residence be moved to his home in south Bismarck, only that Josh and Tara have the opportunity to coordinate and determine the best opportunity for school enrollment in the future. App. 629. The district court goes on to assume Josh will

change the children's enrollment and found this factor to favor Tara.App.629. The district court's reasoning is based on a misinterpretation and misapplication of the facts and this factor should favor both parties as the Court analyzed prior to deviating into the proposed parenting language. The district court committed clear error in this regard.

[¶36] Factors(i)and(j)are not applicable to this case and factor(k)does not disfavor either party. Without evidence of findings of domestic violence (factor(j)) or harm to the children (factor(k)), Josh's Motion for equal parenting time has even more merit because the district court found no serious reason to deny it.

[¶37] The district court's finding with regard to factor(l)that there has been no "making of false allegations not made in good faith" of harm to the children is another example of the court's disregard for the factual evidence presented that Tara is mean and vindictive when it comes to Josh and her words and actions around the children are absolutely in bad faith and cause them harm. On May 12, 2016, in a text message exchange between Josh and Tara over dental bills that Josh was taking care of, Tara ended the conversation with "I am not angry, Josh, I just hate you."App.410. Tara expressing hatred for Josh was not a recent development leading up to trial. Josh testified to an incident in September 2015 where he had planned to take the children out for dinner with a group of his friends and changed the plans when H.R.R. was visibly upset about going out for dinner.Tr.128:22-25;129:13-14. When Josh addressed the situation with Tara via a text message, her response was lengthy and included statements such as "do you not think I have every right to absolutely detest you and hate you for everything that you are putting me and my family through? Are you that delusional that you think after all of this I have even an ounce of respect for you?"App.518. Presumably in response to Josh asking her to come directly to

him with questions about who he is going out to dinner with Tara, stated “I do not trust you and I am not your friend so no I will not come to you to ask you anything.” App.520. These are not examples of a parent willing to cooperate and parent their children together. These were also statements and incidents that the district court failed to consider under factor(e). Tara’s continued vindictiveness, hatred, and mean allegations against Josh were ignored by the district court thus erring in finding no evidence was presented regarding false allegations. App.620-31.

[¶38] Further, this Court’s Opinion went on to review the second step for modification with analysis of the best interest factors addressed in Josh’s Motion to Modify affidavit. App.156. This Court specifically held Josh “provided sufficient evidence to support finding modification in best interest of children.” Id. On Josh’s first appeal, this Court held that Josh’s change in employment meant a “significant increase” in ability to care of his children, establishing a material change in circumstance for modification of residential responsibility. App.156. This Court noted modification would “provide added consistency and security for [the children]” and benefits them because Josh can be more involved and participate in their education, with teacher’s providing information to both parents. App.156. Modification would also reduce the risk of children being exposed to negativity with Josh and Tara having fewer disagreements. App.156. The 48 hour notice parenting time was unstable. App.156. Modification would give Josh greater responsibility and the kids would know he is an equally committed parent. App.156. The court clearly erred in disregarding that part of the Opinion of this Court and thus improperly weighed the best interest factors.

[¶39] Josh argues that factors(a),(b),(c),(d),and(h) favor Josh and Tara equally and factors(e)and(f)favor Josh. In analyzing factors(a)and(b)the district court only acknowledged the evidence that Tara has been a more involved parent and did not address the cause of that being Tara's exclusion of Josh from co-parenting. Once Josh's change in employment occurred, he was available. The district court basing its analysis on old incidents of Tara being the primary parent prior to the material change in circumstance is error. The district court's analysis of factor(c)is also error as it creates an emotional sensitivity for G.R.R. that is a mischaracterization of Tara's testimony. Further, the district court disregarded Josh's testimony that he does meet the developmental needs of the children by helping improve G.R.R.'s reading. Josh's mom lives in Bismarck and is very involved in the boys' activities. Josh and Tara both have extended family that lives out of town, however Josh's family is closer. The only family Tara has in town is through the new addition of Andy McDonald's family, thus, the district court should have found factor(d)to favor Josh or at least favor them equally. The evidence presented at trial of Tara's continued expression of hatred for Josh should have led the district court to find factor(e)to favor Josh. The district court's analysis of Tara's moral fitness as it affects the children and finding factor(f)in her favor disregards precedent and this factor should favor Josh. Lastly, Josh's cooperation and involvement with the children should have favored him in factor(h). Therefore, the district court erred in denying Josh's Motion to Modify Parenting Time for equal residential responsibility and awarding Tara primary residential responsibility.

[¶40] As discussed above, at trial, Josh presented evidence further supporting this Court's finding that modification to equally shared parenting responsibility was in the best interests of the children. By finding contrary to this Court's Opinion, the district court erred in not



recognizing these issues. Awarding Tara primary residential responsibility is not in the best interests of the children.

**C. The district court erred by not granting Josh equal residential responsibility and not following this Court's Order on remand that it is in the best interests of the children for Josh and Tara to share parenting responsibility.**

[¶41] In Josh's first appeal, this Court stated "[e]vidence exists [Josh] and [Tara] are both capable of parenting their children and that it is in the best interests of the children that [Josh] and [Tara] share such responsibility." App.157. Josh argues that the district court erred in disregarding the direction of this Court that Josh and Tara should share responsibility of their children.

[¶42] "On remand, district courts must follow the mandate rule." Lawv. Whittet, 2015 N.D. 16, ¶5, 858 N.W.2d 636, 637–38 (quoting Walstadv. Walstad, 2013 ND 176, ¶9, 837 N.W.2d 911). "The mandate rule ... requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the [appellate court's] mandate into effect according to its terms... and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms" Carlsonv. Workforce Safety & Ins., 2012 ND 203, ¶16, 821 N.W.2d 760 (citation and quotation marks omitted).

[¶43] "[I]f an appellate court has passed on a legal question and remanded the case to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same." Coppagev. State, 2013 ND 10, ¶23, 826 N.W.2d 320, 329–30, citing Statev. Burckhard, 1999 ND 64, ¶7, 592 N.W.2d 523 (quoting Tom Beuchler Constr. v. City of Williston, 413 N.W.2d 336, 339 (N.D. 1987)).

[¶44] Here, prior to the evidentiary hearing this Court stated that Josh had the ability to equally parent his children. During the trial, Josh presented ample evidence that he had both the ability and desire to equally parent his children.Tr.108:11-25;129:1. The district court's Findings completely disregarded this Court's mandate that Josh should share responsibility in raising his children and the evidence presented supported that holding. Therefore, the district court's denial of equal parenting time should be reversed as it is clearly erroneous.

## **II. The district court abused its discretion by not clarifying the Findings.**

### **A. The standard of review for clarifications is abuse of discretion.**

[¶45] The North Dakota Supreme Court has stated “[o]ur standard of appellate review for denial of a Rule60(b) motion is abuse of discretion.”Neubauer v. Neubauer, 524 N.W.2d 593, 597 (N.D.1994) (J. Neumann, dissenting), citing Clooten v. Clooten, 520 N.W.2d 843 (N.D.1994). “The same standard of review [for Rule60(b) motions] should apply to denial of a motion for clarification.”Id. “A district court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, if its decision is not the product of a rational mental process leading to a reasonable determination, or if it misinterprets or misapplies the law.”O’Harav. Schneider, 2017 ND 53, ¶10, 890 N.W.2d 831, citing Anderson v. Baker, 2015 ND 269, ¶7, 871 N.W.2d 830.

### **B. Clarification of the Findings was necessary to clear up ambiguities that had already created controversies between Josh and Tara in the past.**

[¶46] Following the denial of modification, Josh asked the district court to clarify a number of issues that were presented at trial and not addressed.App.648. The impetus for Josh’s Motion for Clarification was his concern about Tara’s continued resistance to the parties’ joint decision making; specifically regarding: right of first refusal, access to

daycare records, notice of doctor's appointments, and the difference in transportation language between the transportation section, which states it only applies to exchanges, and the decision-making section that allows each parent to make day-to-day decision for the children while in their care. Further at issue, the district court's September 1, 2016, ruling gave Josh the tax exemption for both children but Tara's Proposed Second Amended Judgment deleted a range of pages that included the "Dependent Income Tax Filing" language.R.266.

[¶47] The district court denied Josh's Motion for Clarification.App.681. The order denying the Motion framed the issues before the court at trial as it was "asked [ ] by Josh to modify the parenting plan to joint residential responsibility" and "by [ ] Tara to modify the schedule in the parenting plan."App.681. The Order further stated that the district court had addressed both issues in finding in the best interests of the children for Tara to remain the primary parent and changed the parenting plan from notice to a set schedule for parenting time.App.681. The Order acknowledged that it did not order a joint residential parenting plan and Josh's specific concerns were seen as an "attempt to regulate every aspect of the parenting times between the parties."App.681. The Order declined to address the summer parenting time issue as the district court believed it had been stipulated to, not raised at trial, and did not "see a need" to change the parenting time for summer.App.682. The Order denying the modification stated, "the tax dependent issue is one of wording" between the Order and the Judgment and directed Tara's counsel to provide an amended corrected Judgment "fixing the wording issue."App.682.

[¶48] Further, this Court has said "if the same trial judge clarifies an original judgment, we afford the judge's clarification considerable

deference.” Neubauer v. Neubauer, 552 N.W.2d 793, 795 (N.D. 1996), citing Kostecky v. Kostecky, 537 N.W.2d 551, 552 (N.D. 1995); Anderson v. Anderson, 522 N.W.2d 476, 478 (N.D. 1994).

4). This Court also “recognizes motions for clarification without reference to any particular rule of procedure when an ambiguous provision in the judgment creates an actual controversy between the parties.” Kukla v. Kukla, 2013 N.D. 192, ¶41, 838 N.W.2d 434, 445 (citing Neubauer v. Neubauer, 524 N.W.2d 593, 595 (N.D. 1994); Anderson v. Anderson, 522 N.W.2d 476 (N.D. 1994); Sullivan v. Quist, 506 N.W.2d 394; Conitz v. Conitz, 467 N.W.2d 93 (N.D. 1991); Gross v. Gross, 466 N.W.2d 154 (N.D. 1991); Wastvedt v. Wastvedt, 371 N.W.2d 142 (N.D. 1985)). “Interpretation of a judgment is a question of law, and an unambiguous judgment may not be modified, enlarged, restricted, or diminished.” Simburger v. Simburger, 701 N.W.2d 880, 883 (N.D.

2005), quoting Greenwood v. Greenwood, 1999 ND 126, ¶8, 596 N.W.2d 317. “The question of whether a judgment is ambiguous is a question of law.” Id. “An ambiguity exists when language can be reasonably construed as having at least two alternative meanings.” Id.

[¶49] Here, the district court’s Order is ambiguous because it fails to address any of the issues regarding first right of refusal, transportation, notice of medical appointments and obtaining records. The Order only addressed summer parenting time and the income tax exemption error, stating that summer parenting time was decided by stipulation and did not need to be clarified. App. 682. This is an incorrect statement of the facts; summer parenting time was not covered. The Partial Stipulation addressed a vacation schedule, holiday parenting time, and communication, but did not address summer parenting time. App. 194. Depending on the outcome of the Motion to Modify, summer parenting time needed to be addressed. The district court’s reasoning failed to consider that the partial stipulation was

prior to trial, with pending motions for equal residential responsibility and change to the parenting schedule. Any decision based on those two motions should have provided a summer parenting time schedule and the district court abused its discretion in not addressing the lack of summer parenting time in the Motion for Clarification.

[¶50] In addition, if ambiguity exists when there are two reasonably construed alternative meanings, the district court abused its discretion by not addressing Josh's other issues in his Motion for Clarification. The affidavits filed by Josh and Tara in support of their arguments for and against the Motion for Clarification are prime examples of ambiguity.App. 648-681. There is clearly distinct differences in opinion of what the language means.

[¶51] Regarding the issue of right of first refusal, the Proposed Amended Judgment states: "If either party is unable to care for the children for four or more consecutive hours, then that parent shall provide the other parent with the right of first refusal to care for the children during that time."App.643. This was an improvement from the parties' original Judgment which stated: "[i]f schedule conflicts arise during a party's parenting time with children, the other parent shall be offered the first opportunity to have the children during that time. Alternative care arrangements with a third party shall be made only if the other party is unable to provide care during the period in question."App.62. Josh's Affidavit supporting his Motion for Clarification laid out two recent examples of the conflicts already arising with this language.App.649-652. During the few days before school resumed in 2016, Tara enrolled the boys in an art camp, during her parenting time, when she knew Josh was available, in violation of the right of first refusal provision of the parties' original Judgment and her Proposed Second Amended Judgment.App.649. Tara also continued to

make use of the drop-in service at Exploring Mind Daycare when she could not take care of their children during her parenting time, another violation.App.651-652. Tara's response to these issues was to be defensive and argue Josh was making false statements without providing supporting evidence. Tara's affidavit states the Findings do not need clarification because "[i]t is clear." If both parties find the Order to be clear, with wildly different practical interpretations, there is clearly ambiguity that the district court failed to address and instead re-enforced in its Order denying the clarification.

[¶52] Another issue raised for clarification was transportation. The Proposed Second Amended Judgment read as follows: "...The parties themselves must be present at all exchanges (other than exchanges through school/daycare), or any other third party that they mutually agree on."App.643. At all exchanges, other than exchanges through school/daycare, Tara, Josh, or a mutually agreed upon third party must be present. Josh's Affidavit supporting his Motion for Clarification also reminded the district court of the lengthy evidence presented at trial of issues between Tara and Donna Ritter that necessitated clear Transportation language.App.654-55. Tara and Josh have no authority under the Judgment to resist transportations at exchanges occurring at school/daycare. When Josh needs assistance getting the boys to or from school or daycare, he is free to choose anyone he wants, without Tara's interference per the Transportation language and, under the Decision Making portion of the Amended Judgment which states: "Each parent is authorized to make decisions regarding the day-to-day care and control of the children while the children are in each of their respective care."App.690. Tara's response affidavit to Josh's Motion for Clarification states the Findings do not need clarification because it is clear.App.667. However, her actions of not allowing the boys to ride with Josh's mom and

herself not being present for exchanges, and not asking Josh whether he agreed to Andy picking the boys up, raise questions about the clarity of both the transportation and decision making portions of their Judgment. It is clear that Donna Ritter and anyone of Josh's choosing should be able to pick the boys up from daycare and school, however Tara has continuously denied the same and made the children afraid to ride with Josh's mom.App.654-55.

[¶53] Tara's affidavit in response is also defensive on this issue, chastising Josh for his "continuing inability to care for the children during his parenting time due to his work schedule."App.667. When in fact, evidence was presented at trial that Tara's husband picked the children up 171 times between January and March 2016, showing, by her classification, her own inability to care for H.R.R. and G.R.R. during her parenting time.App.397. Reality is that parents need help raising their children and Josh and Tara both have support systems available to do that, Tara just controls Josh's and clarification was necessary on this issue.

[¶54] With regard to the daycare issue, the Proposed Second Amended Judgment states: "Both parties have the parental rights and responsibilities per N.D.C.C. § 14-09-32, in addition to the following: . . . "ii. Each parent must communicate with the other parent with regard to grade reports, extracurricular activities, and any other notices from the school and **related entities** concerning the children. . . . iv. Both parents retain the right and shall notify and authorize the school, and the children's doctors **and other professionals** to communicate directly with and outside the presence of the other parent."App.644-45.

As Josh laid out in his Clarification Affidavit, Tara continues to thwart Josh's access to daycare and afterschool information.App.650-52. When Josh attempted to follow up with the daycare Tara had used on a drop-in basis for H.R.R. and G.R.R. to see if he was listed as an emergency contact, Tara showed up and caused a public scene over him being there looking for information about his own children.App.651-52. Josh has had similar problems accessing and making changes to B.L.A.S.T. records due to Tara's actions.App.652-53. Access to records is an on-going issue between Josh and Tara that was not addressed in the Proposed Second Amended Judgment and should have been clarified on Josh's Motion.

[¶55] The parties' original Judgment requires the parties to make non-emergency health care decisions jointly.App.62.Tara scheduled the boys' physicals without notifying Josh, in violation of their Judgment. As the same language appears in the Amended Judgment, and Tara already violated the original one, the language must be ambiguous since she did not follow it and clarification that medical appointments need notice and confirmation of the notice was necessary. By failing to address the issues raised in Josh's Motion for Clarification, latent with ambiguities between the parties, the district court essentially affirmed the ambiguity and clearly erred.

### **Conclusion**

[¶56] WHEREFORE, for the reasons discussed above, Joshua Ritter, respectfully requests the Court REVERSE the District Court's Order Denying Josh's Motion to Modify Primary Residential Responsibility and award equal residential responsibility to Josh consist with the last Opinion of this Court and with the facts presented at trial.



[¶57] DATED this 24<sup>th</sup> day of April, 2017.

SMITH PORSBORG SCHWEIGERT  
ARMSTRONG MOLDENHAUER & SMITH

By: /s/ Suzanne M. Schweigert  
Suzanne M. Schweigert (ID #05480)  
sschwegiert@smithporsborg.com  
122 E. Broadway Ave.  
P.O. Box 460  
Bismarck, ND 58502-0460  
(701) 258-0630  
*Attorneys for Defendant/Appellant, Joshua Ritter*

**CERTIFICATE OF COMPLIANCE**

[¶58] The undersigned, as attorney for the Appellant, Joshua Ritter, in the above matter, and as the author of the above brief, hereby certifies that the above brief was prepared in compliance with the North Dakota Rules of Appellate Procedure, with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, addendum and certificate of compliance totals 7,876.

DATED this 24<sup>th</sup> day of April, 2017.

SMITH PORSBORG SCHWEIGERT  
ARMSTRONG MOLDENHAUER & SMITH

By: /s/ Suzanne M. Schweigert  
Suzanne M. Schweigert (ID #05480)  
sschwegiert@smithporsborg.com  
122 E. Broadway Ave.  
P.O. Box 460  
Bismarck, ND 58502-0460  
(701) 258-0630  
*Attorneys for Defendant/Appellant, Joshua Ritter*

**CERTIFICATE OF SERVICE**

[¶59] I hereby certify that a true and correct copy of the foregoing **BRIEF OF THE APPELLANT**, was on the 24<sup>th</sup> day of April, 2017, served upon the following via electronic mail:

Attorneys for the Plaintiff / Appellee:

Betsy Elsberry  
Attorney at Law  
103 South Third Street, Suite 9  
Bismarck, ND 58501  
[betsy@nodaklaw.com](mailto:betsy@nodaklaw.com)

*/s/ Suzanne M. Schweigert*

Suzanne M. Schweigert

## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

Tara Dawn Ritter, n/k/a/ Tara McDonald, )

Plaintiff and Appellee, )

vs. )

Joshua Daniel Ritter, )

Defendant and Appellant, )

And )

State of North Dakota, )

Statutory Real Party in Interest and Appellee )

Supreme Court No.: 20160442

Morton Co. Case No.:  
30-2012-DM-00220

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APPEAL FROM SECOND AMENDED JUDGMENT, DATED OCTOBER 21, 2016, ISSUED  
BY HONORABLE BRUCE ROMANICK, SOUTH CENTRAL JUDICIAL DISTRICT,  
MORTON COUNTY, NORTH DAKOTA, CASE NO. 30-2012-DM-00220

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## AFFIDAVIT OF SERVICE

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STATE OF NORTH DAKOTA )  
 ) ss.  
COUNTY OF BURLEIGH )

Stacy Offerdahl, being duly sworn, deposes and says that she is over the age of eighteen, that she is not a party to nor interested in the above-entitled matter, that on the 1<sup>st</sup> day of May, 2017, she served:

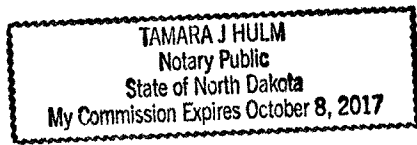
1. *Brief of Appellant*
2. *Appendix*

via electronic as follows:

*Sheila Keller*  
*Attorney at Law*  
[bismarckcse@nd.gov](mailto:bismarckcse@nd.gov)

Stacy Offerdahl  
Stacy Offerdahl

Subscribed and sworn to before me this 1<sup>st</sup> day of May, 2017.

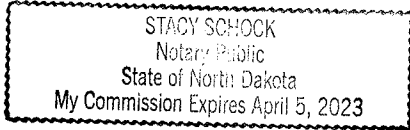


Tamara Hulm  
Notary Public  
Burleigh County, State of North Dakota

*Sheila Keller*  
*Attorney at Law*  
[bismarckcse@nd.gov](mailto:bismarckcse@nd.gov)

Stacy Offerdahl  
Stacy Offerdahl

Subscribed and sworn to before me this 1<sup>st</sup> day of May, 2017.



Stacy Schock  
Notary Public  
Burleigh County, State of North Dakota