

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

TREVOR RUSTAD,)	
)	
Plaintiff/Appellant,)	Supreme Ct. Case No. 20180080
)	
vs.)	
)	Stark County District Court
MARY BAUMGARTNER,)	Case No. 45-2017-DM-00103
)	
Defendant/Appellee.)	

APPELLEE'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SOUTHWEST JUDICIAL
 DISTRICT THE HONORABLE WILLIAM H. HERAUF PRESIDING

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STATEMENT OF ISSUES

¶ 1. Whether the District Court's award of primary residential responsibility to Mary was clearly erroneous. Specifically, whether the court erred in its findings regarding factors a, c, d, e, f, g, and h.

¶ 2. Whether the District Court's failure to award the parties joint, equal residential responsibility was clearly erroneous.

¶ 3. Whether the District Court's adoption of the Appellee's proposed parenting plan was clearly erroneous.

STATEMENT OF THE CASE

¶ 4. This case was initiated by a Complaint filed by Trevor Rustad (hereinafter "Trevor"), on April 13, 2017, regarding parenting responsibility. App. 005. The case was originally improperly venued in Cass County, so the parties entered into a Stipulation to Change Venue to Stark County on April 19, 2018. App. 009. An Order for Change of Venue to Stark County was entered on April 20, 2017. App. 010. Mary filed her Answer and Counterclaim on May 5, 2017. App. 011.

¶ 5. Mary filed a Notice of Motion and Motion for Discovery Sanctions, Brief in Support of Motion for Discovery Sanctions, Exhibits 1-6, Motion to Shorten Time to Respond to Defendant's Motion for Discovery Sanctions and Motion for Expedited Ruling, Motion for Expedited Ruling: Defendant's Motion for Discovery Sanctions, and proposed Orders on October 9, 2017, seeking discovery sanctions for Trevor's failure to answer interrogatories and produce requested documents. App. 014 – 019. Orders denying Defendant's Motion to Shorten Time and Motion for Expedited Ruling were entered on October 10, 2017. App. 020 – 021.

¶ 6. Mary filed her Pretrial Brief on October 10, 2017, along with Exhibit 1 – Child Support Guidelines Worksheet. App. 022 – 038. Trevor filed his Pretrial Brief on October 11, 2017 (App. 039), and Mary filed an Objection to Plaintiff’s Pretrial Brief that same day (App. 048). Trevor filed a Response to Defendant’s Objection to Plaintiff’s Pretrial Brief on October 13, 2017. App. 050.

¶ 7. Trevor filed a Motion for Telephonic Testimony on October 16, 2017, requesting to allow Sammy King, a witness whom was not listed in Trevor’s discovery responses or Witness lists, to testify telephonically. App. 052.

¶ 8. A Pretrial Conference was held on October 17, 2017. App. 003. At that time, the court denied Trevor’s Motion for Telephonic Testimony and excluded Ms. King was testifying due to untimely disclosure. Pretrial Trans. 6:16 – 9:1. The court also denied Mary’s request to exclude Plaintiff’s Pretrial Brief at that time. Pretrial Trans. 9:9-11. Finally, the court ruled on Mary’s Motion for Discovery Sanctions, ordering that Trevor provide supplemental answers to certain interrogatories and requests for production of documents, but declining to exclude items or assess any sanctions. Pretrial Trans. 9:6-9, 9:21 – 17:2.

¶ 9. The matter came before the Honorable William Herauf, Stark County District Court, for a bench trial on October 23, 2017. App. 003. Mary filed her Post-Trial Brief (App. 216) and Trevor filed his Closing Argument (App. 241) on November 13, 2017.

¶ 10. The court’s Order was entered on December 1, 2017. App. 252. The Findings of Fact, Conclusions of Law, and Order for Judgment (App. 291) and Judgment

(App. 309) awarding Mary primary residential responsibility of the minor children were entered on December 29, 2017.

¶ 11. The Notice of Entry of Judgment was entered on January 2, 2018. App. 315. Trevor filed his Notice of Appeal on March 7, 2018. App. 316.

STATEMENT OF FACTS

¶ 12. The parties are not married, but were previously in a romantic relationship. They have two children together, namely L.B.R., born 2015, and L.J.B., born 2017. Trial Trans. 37:14-22 and 117:3-4.

¶ 13. Both parties love the minor children and are able to provide the children with nurture, love, affection, and guidance; however, the emotional ties existing between Mary and the minor children are much stronger than those with Trevor, as Mary has always been the primary caretaker for both children. Trial Trans. 76:5-7 and 134:5-15.

¶ 14. Both parties testified that Mary has breastfed both children, and once L.B.R. was on solid foods, Mary usually planned and prepared her meals. Trial Trans. 76:15-17.

¶ 15. Both parties testified that Mary has always bathed, groomed, and dressed the children. Although Trevor testified that he helped bathe L.B.R. during the time that they lived together (Trial Trans. 76:12-14), Mary testified that Trevor was only around the first three months and then started bowing out or was distracted with other things (Trial Trans. 118:15-119:3). Additionally, both parties testified that Trevor has changed the children's diapers infrequently. Trial Trans. 76:18-20 and 119:6-9.

¶ 16. Both parties testified that Mary has scheduled all of the children's medical appointments. Although Trevor attended a couple of L.B.R.'s appointments with

specialists, Mary has taken the children to all medical appointments. Trial Trans. 76:21-77:8 and 119:10-22.

¶ 17. Mary takes L.B.R. to activities weekly for social interaction among peers including library story time, play time at church, and other activities with family and friends. Trial Trans. 101:20-25 and 137:17-138:8; see also Calendar, Doc. ID# 89.

¶ 18. The parties testified that Trevor helped at bedtime when they were living together, but that Mary is more involved in putting the children to bed, as they breastfeed at bedtime.

¶ 19. Both parties provided testimony about Mary being the parent that disciplines and teaches manners and rules to L.B.R. Trevor testified that Mary coaches L.B.R. by saying things like “don’t talk to Mom like that” or “are you supposed to be doing that,” and also positively talks to L.B.R. when she is doing things right. Trial Trans. 69:20-70:13.

¶ 20. Mary testified that even when the parties were together, Trevor was not around enough to form as strong of an emotional tie, as he spent the majority of his time at work, drinking, or doing activities with friends, rather than spending time with L.B.R.

¶ 21. Mary lives with the children in Glasgow, MT, which is a very safe, small town, where they have lots of family and friends. Mary testified that the home has been remodeled to fit their needs, as well as for child safety. Trial Trans. 136:9-137:5.

¶ 22. Mary moved to Glasgow with the permission and assistance of Trevor. Trial Trans. 52:1-3 and 125: 6-127:2.

¶ 23. Both parties testified that Trevor has always deferred to Mary for caring for the children. Trial Trans. 118:11-13 122:8-11. Since their split, Trevor has not provided

any clothing, diapers, wipes, or other necessary items for the children. Trevor tried only one time since their split to give Mary money (Trial Trans. 133:8-23), and Trevor testified that he didn't buy diapers because the children grew too fast to keep up with the size (Trial Trans. 88:13-16).

¶ 24. Trevor testified that he began a new relationship in April, and that by May, his girlfriend and her three-year-old daughter were staying over at his house the majority of the time from May until just before trial. Trial Trans. 88:19-23, 89:4:10, and 90:3-5.

¶ 25. Both parties testified that Mary initiates FaceTime calls from the children to Trevor on a daily basis, and holds the device up so that Trevor can see L.J.B. and L.J.B. can hear Trevor's voice. Trial Trans. 63:1-15, 94:20-22, and 140:11-13. She has also sent birthday and Father's Day cards from L.B.R. to Trevor. Trial Trans. 97:24-98:3; see also Exhibit H, Doc. ID# 81, and Exhibit I, Doc. ID# 82.

¶ 26. Both parties further testified that Mary allows Trevor and his family to visit whenever they desire (Trial Trans. 30:12-14 and 94:23-24), invites Trevor to attend any and all activities they attend (Trial Tran. 140:13-21), has brought L.J.B. out to Dickinson to visit Trevor (Tran. 83:23-84:1 and 140:22-24), and that Mary has never told Trevor she didn't want him around the kids or asked him to leave (Tran. 94:25-95:11).

¶ 27. Mary has encouraged a continuing relationship between the children and Trevor's family. Trial Trans. 142:1-19. She has L.B.R. FaceTime with Trevor's mother, Renee Lietzke. Trial Trans, 30:15-18; see also Exhibit J, Doc. ID# 83. She also had L.B.R. send thank you and birthday cards, other pictures, and L.J.B.'s birth announcement to Renee. Trial Trans. 30:19-22 and 31:21-32:7; see also Exhibit K, Doc. ID# 84, and Exhibit L, Doc. ID# 85.

¶ 28. Mary gave Trevor as much notice as possible regarding L.J.B.'s birth. Trial Trans. 85:5-86:6; see also Exhibit B, Doc. ID# 75, and Exhibit C, Doc. ID# 76. She also involved him in the decision regarding circumcision (Trial Trans. 95:15-21 and Exhibit D, Doc. ID# 77), continued breastfeeding and co-sleeping (Trial Trans. 78:24-79:21 and 95:22-96:2; see also Exhibit F, Doc. ID# 78), and the children's health (Trial Trans. 96:3-5 and Exhibit G, Doc. ID# 80). Further, Trevor testified that Mary communicates with him regularly about the children. Trial Trans. 95:12-14.

ARGUMENT

A. Standard of Review

¶ 29. An award of primary residential responsibility is a finding of fact that will not be reversed on appeal unless it is clearly erroneous. Molitor v. Molitor, 2006 ND 163, ¶ 6, 718 N.W.2d 13. A finding of fact is clearly erroneous if it "is induced by an erroneous view of the law, there is no evidence to support it, or, though some evidence supports it, on the entire record we are left with a definite and firm conviction a mistake has been made." Id. "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 [parenting schedule] decision merely because we might have reached a different result." Wolt v. Wolt, 2010 ND 26, ¶ 7, 778 N.W.2d 786.

¶ 30. In making a custody determination, a trial court must make the decision based on the best interests and welfare of the child and consider all of the factors under N.D.C.C. § 14-09-06.2(1). Reeves v. Chepulis, 1999 ND 63, ¶ 10, 591 N.W.2d 791, 794. The court need not make separate findings for each factor, but "its findings must be stated with sufficient specificity to enable a reviewing court to understand the factual basis for

the court's decision." *Id.* "The district court has substantial discretion in making a custody determination." *Zuraff v. Reiger*, 2018 ND 143, ¶ 11, 911 N.W.2d 887.

B. The District Court's Award of Primary Residential Responsibility to Mary was Not Clearly Erroneous

¶ 31. The District Court's award of primary residential responsibility to Mary was not clearly erroneous, as the decision was based on the best interests and welfare of the child. The Court considered all of the factors under N.D.C.C. § 14-09-06.2(1), and the factual support for each factor was stated with sufficient specificity. Further, the majority of the factors were correctly found to favor Mary or neither party. As such, the District Court's Judgment should be affirmed.

i. Factor a was correctly found to favor Mary

¶ 32. The District Court correctly found that factor (a), "the love, affection, and other emotional ties existing between the parents and child and the ability of each parent to provide the child with nurture, love, affection, and guidance," weighs in favor of Mary. Although both parents love the children, Mary has a closer bond with both children. Further, Mary has always been the primary caretaker for both children, pursuant to the parties' agreement (Trial Trans. 76:5-7, 103:18-20, and 134:5-15), and has a greater ability to provide the children with nurture love, affection, and guidance. As such, the District Court's decision was not clearly erroneous.

¶ 33. "Although the primary caretaker rule has not been given presumptive status in this state, it remains a relevant factor to be considered by the trial court in its review of the statutory factors." *Reeves v. Chepulis*, 1999 ND 63, 591 N.W.2d 791. "The primary caretaker is generally the parent who provides the child with daily nurturance, care and

support.” Id. Some activities have been held to indicate primary caretaker status, including:

1) preparing and planning meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothing; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers; (6) arranging alternative care, i.e., babysitting, day-care; (7) putting child to bed at night, waking child in the morning; (8) disciplining child, i.e., teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; [or] (10) teaching elementary skills, i.e., reading[,], writing and arithmetic.

Id. quoting Hogue v. Hogue, 1998 ND 26, ¶ 16, 574 N.W.2d 579

¶ 34. The testimony at trial established the following activities, which indicate Mary’s status as primary caretaker:

- a. Preparing and planning meals – Both parties testified that Mary has breastfed both children, and once L.B.R. was on solid foods, Mary usually planned and prepared her meals (Trial Trans. 76:15-17);
- b. Bathing, grooming and dressing – Both parties testified that Mary has always bathed, groomed, and dressed the children. Although Trevor testified that he helped bathe L.B.R. during the time that they lived together (Trial Trans. 76:12-14), Mary testified that Trevor was only around the first three months and then started bowing out or was distracted with other things (Trial Trans. 118:15-119:3). Additionally, both parties testified that Trevor has changed the children’s diapers infrequently (Trial Trans. 76:18-20 and 119:6-9);
- c. Medical care, including nursing and trips to physicians – Both parties testified that Mary has scheduled all of the children’s medical appointments. Although Trevor attended a couple of L.B.R.’s appointments with

specialists, Mary has taken the children too all medical appointments (Trial Trans. 76:21-77:8 and 119:10-22);

- d. Arranging for social interaction among peers – Mary takes L.B.R. to activities weekly for social interaction among peers including library story time, play time at church, and other activities with family and friends (Trial Trans. 101:20-25 and 137:17-138:8; see also Calendar, Doc. ID# 89;
- e. Putting child to bed at night, waking child in the morning – The parties testified that Trevor often helped at bedtime when they were living together, but that Mary is more involved in putting the children to bed, as they breastfeed at bedtime;
- f. Disciplining child, i.e., teaching general manners and toilet training – Both parties provided testimony about Mary being the parent that disciplines and teaches manners and rules to L.B.R. Trevor testified that Mary coaches L.B.R. by saying things like “don’t talk to Mom like that” or “are you supposed to be doing that,” and also positively talks to L.B.R. when she is going things right (Trial Trans. 69:20-70:13); and
- g. Educating, i.e., religious, cultural, social, etc. – Mary takes the children weekly to church, story time, library activities, and focuses on educating the children. Trial Trans. 101:20-25 and 137:17-138:8; see also Calendar, Doc. ID# 89.

¶ 35. L.B.R. has never been apart from Mary for longer than six hours in her entire life. They are closely bonded through continued breastfeeding and doing all activities together, including church, coloring, playing, and going to the park, among other

things. Separating her from Mary at this young age would cause trauma to her, as she has never been away from Mary for more than a few hours, and would be unable to understand why Mary was not there.

¶ 36. While Trevor and L.B.R. have a good relationship, Mary testified that even when the parties were together, Trevor was not around enough to form as strong of an emotional tie, as he spent the majority of his time at work, drinking, or doing activities with friends, rather than spending time with L.B.R. Trevor has always been the fun-time parent. When describing his relationship with L.B.R., he said it was very good, they “have a lot of fun.” Trial Trans. 46:15. While this is important in a relationship between a child and parent, children need nurture and guidance at all times, not just the fun times.

¶ 37. L.J.B. has never been away from Mary for longer than a couple of hours. As a three-month-old infant, he breastfeeds every 1-3 hours, and depends on Mary for everything. At this early time in his life, the nurture and love he needs can best be provided by Mary, as his primary caregiver.

¶ 38. Though being the primary caregiver does not give Mary presumptive status, it has given her a stronger bond with the children. She has a greater ability to provide the children with nurture, love, affection, and guidance. As such, the Court correct found that factor (a) weighs in favor of Mary.

ii. Factor c was correctly found to favor Mary

¶ 39. Mary and Trevor could both likely meet the developmental needs of the children in the present and in the future. Nevertheless, Mary is more in tune with the children’s needs, has the time to focus on those needs, and is therefore better able to meet those needs. Hence, the court’s decision was not clearly erroneous, as it correct found that

factor c, “the child's developmental needs and the ability of each parent to meet those needs, both in the present and in the future,” favors Mary.

¶ 40. As previously set forth herein, Mary has been the primary caregiver for the children since their births. Both parties testified that she has breastfed, and changed her diet throughout, to ensure that the children received the best nutrition and stayed within their dietary restrictions. As a stay at home mother, Mary is able to teach the children and provide for their needs at all times. Even when she returns to work in a year or so, as a teacher, she will have shortened days, long holiday breaks, and summers off. This will allow her to focus more on the children, and their developmental needs.

¶ 41. Conversely, Trevor has never spent more than six hours alone with either child, has not played an integral part in their care, even when the parties were living together, and has a very busy schedule with both work, and other activities such as softball, golf, and going out to bars. Trevor testified that he works fifty to sixty hours a week, working five days a week from 6:00 am until it gets dark. Trial Trans. 50:7-22. His hours are longer in the summer and shorter in the winter, but average twelve hours a day. Trial Trans. 50:21-23 and 91:14-18. Further, he testified that he is on-call every other weekend, and travels more than occasionally on weekends for activities. Trial Trans. 91:11-13 and 91:22 – 92:1. Trevor’s schedule will hinder his ability to meet the children’s developmental needs. This schedule is “an appropriate consideration in deciding primary residential responsibility.” See Hammerman v. Hammerman, 2012 ND 225, ¶ 14, 823 N.W.2d 482, 490.

¶ 42. Appellant attempts to confuse the issues by arguing that Mary has a history of obsessive compulsive tendencies and has little capacity to accept opinions of others;

however, no explanation is provided as to how this relates to the factor of meeting the children's developmental needs. As such, such arguments do not have any bearing on the analysis of this factor.

¶ 43. Based on the above, the evidence provides that Mary will better be able to meet the children's developmental needs at this time, and in the future. As such, the District Court correctly found that factor (c) weighs in favor of Mary.

iii. Factor d was correctly found to favor Mary

¶ 44. The overwhelming evidence presented at trial supports the District Court's decision that this factor weighs in Mary's favor. The children have a stable home with Mary in Glasgow, a community they are active in, and have significant extended family interaction. Further, as the primary caretaker, Mary has provided the one constant, stable thing in the children's life.

¶ 45. Since the update to N.D.C.C. § 14-09-6.2(1), factor (d) combined the previous factor (d) and (e). It now "incorporates consideration of both of the length of time the child has lived in a stable home as well as the permanence or stability of the home environment and adds the forward-looking consideration of 'the desirability of maintaining continuity in the child's home and community.'" Deyle v. Deyle, 2012 ND 248, ¶ 8, 825 N.W.2d 245, 249-250. "A child's interaction and interrelationship with relatives and others may assist in determining the desirability of maintaining a stable satisfactory environment to the extent possible and in assessing a child's prospects for a stable family environment." Schmidt v. Schmidt, 2003 ND 55, ¶ 13, 660 N.W.2d 196, 202-203.

¶ 46. "[C]ommentators, legislators and the courts have recognized the importance to the child of maintaining stability and continuity to the greatest extent possible." Schmidt

v. Schmidt, 2003 ND 55, ¶ 11, 660 N.W.2d 196, quoting 2 Sandra Morgan Little, Child Custody and Visitation, § 10.09[2]. “It is generally thought that the child’s best interest is served if his or her accustomed mode of living or home environment is not abruptly changed.” Id.

¶ 47. Both children have lived with Mary their entire lives, and have depended on Mary as their primary caregiver. This has been their one constant throughout their lives. Further, breastfeeding has been a constant, consistent comfort for the children. Mary testified that she moved back to Glasgow, MT in January to be closer to family. Trial Trans. 124:3-12. She has significant family in Glasgow, with whom the children interact with on a weekly basis. Trial Trans. 137:17-138:2. This includes Mary’s mother, grandmother, and multiple aunts, uncles and cousins who see the children often. Trial Trans. 137:17-138:2; see also Calendar, Doc. ID# 89. They are very active within the community attending church, the library, and other functions weekly, and L.B.R. has recently began taking piano lessons. See Id. Maintaining this continuity in the child’s home and community favors the children staying in Glasgow with Mary.

¶ 48. While Trevor has lived in Dickinson for the entirety of the children’s lives, and has a steady job, there is concern that he would be able to provide a stable environment for the children. Further, the only extended family interaction that the children have in Dickinson is with Trevor’s mother. Trial Trans. 142:20-143:4. If Trevor were to have custody, the children would be abruptly taken out of the home environment and mode of living that they have been accustomed to. It would disrupt the stability and continuity they have maintained with Mary.

¶ 49. Appellant attempts to claim that Mary “unilaterally decided to rip L.B.R. from the only home she had ever known, as well as away from her father.” See Brief of Appellant at ¶ 48. However, he wholly ignores the fact that Mary moved to Glasgow with the permission and assistance of Trevor. Trial Trans. 52:1-3 and 125: 6-127:2.

¶ 50. Maintaining continuity and stability in the children’s lives can only be done by them primarily residing with Mary. As such, the District Court correctly found that factor (d) weighs in Mary’s favor.

iv. Factor e was correctly found to favor Mary

¶ 51. Although there was some concern expressed regarding this factor by both parties, the evidence and testimony provided at trial shows that both parties are likely to facilitate and encourage a close and continuing relationship between the other parent and the child. There was no evidence presented to support Trevor’s alienation claim. Therefore, the District Court’s decisions that this factor does not favor either party is not clearly erroneous.

¶ 52. A parent “who willfully alienates a child from the other parent may not be awarded [residential responsibility] based on that alienation. Wolt v. Wolt, 2010 ND 26, ¶ 10, 778 N.W.2d 786. “However, not all facts indicating parental alienation are sufficient to preclude a parent from having primary residential responsibility.” Rustad v. Rustad, 2014 ND 148, ¶ 14, 849 N.W.2d 607, 612.

¶ 53. The overwhelming weight of the evidence shows that there has been no willful alienation in this case. Mary has always encouraged a relationship with the children and Trevor. Both parties testified that Mary initiates FaceTime calls from the children to Trevor on a daily basis, and holds the device up so that Trevor can see L.J.B. and L.J.B.

can hear Trevor's voice. Trial Trans. 63:1-15, 94:20-22, and 140:11-13. She has also sent birthday and Father's Day cards from L.B.R. to Trevor. Trial Trans. 97:24-98:3; see also Exhibit H, Doc. ID# 81, and Exhibit I, Doc. ID# 82. Since they have been living in Glasgow, Mary has made sure to provide a room for Trevor to stay in for free, in the same home that she and the children are in so that Trevor can be around the children as much as possible during his stays. Trial Trans. 145:17-21. She testified that she encourages doing things together as a family (Trial Trans. 140:10-21), but also makes sure to run errands or visit people so that he also has alone time with the children. Both parties further testified that Mary allows Trevor and his family to visit whenever they desire (Trial Trans. 30:12-14 and 94:23-24), invites Trevor to attend any and all activities they attend (Trial Trans. 140:13-21), has brought L.J.B. out to Dickinson to visit Trevor (Tran. 83:23-84:1 and 140:22-24), and that Mary has never told Trevor she didn't want him around the kids or asked him to leave (Tran. 94:25-95:11).

¶ 54. Additionally, Mary has encouraged a continuing relationship between the children and Trevor's family. Trial Trans. 142:1-19. She has L.B.R. FaceTime with Trevor's mother, Renee Lietzke. Trial Trans. 30:15-18; see also Exhibit J, Doc. ID# 83. She also had L.B.R. send thank you and birthday cards, other pictures, and L.J.B.'s birth announcement to Renee. Trial Trans. 30:19-22 and 31:21-32:7; see also Exhibit K, Doc. ID# 84, and Exhibit L, Doc. ID# 85.

¶ 55. Trevor seems to argue that, because Mary has not wanted him to have overnights with the children away from her, that this somehow amounts to alienation. As Mary testified, this was not to keep the children from him, but rather to maintain the stability and continuity for the children. Trial Trans. 149:17-22. Further, Trevor testified

that he only asked to have overnights with the children a few times, randomly. Trial Trans. 59: 4-6. Both children breastfeed at bedtime and co-sleep with Mary. They need time to adjust to any change, rather than being abruptly thrown into something new, which Trevor himself acknowledges. Trial Trans. 101:14-19. This does not amount to alienation.

¶ 56. Trevor also attempted to argue that Mary does not keep him informed about the children, or involve him in decisions; however, the evidence and testimony provided the exact opposite. Mary gave Trevor as much notice as possible regarding L.J.B.'s birth. Trial Trans. 85:5-86:6; see also Exhibit B, Doc. ID# 75, and Exhibit C, Doc. ID# 76. She also involved him in the decision regarding circumcision (Trial Trans. 95:15-21 and Exhibit D, Doc. ID# 77), continued breastfeeding and co-sleeping (Trial Trans. 78:24-79:21 and 95:22-96:2; see also Exhibit F, Doc. ID# 78), and the children's health (Trial Trans. 96:3-5 and Exhibit G, Doc. ID# 80). Further, Trevor testified that Mary communicates with him regularly about the children. Trial Trans. 95:12-14. Therefore, there is no basis for an alienation claim.

¶ 57. Because Trevor has never had the children for any extended time, there is no evidence to support or refute whether he would encourage a continuing relationship with Mary if he were awarded residential responsibility.

¶ 58. Each party expressed concern regarding this factor, but the evidence supports the court's finding that this factor favors Mary, as she has continually demonstrated that she is willing and able, and in fact does, promote a continuing relationship. As such, the court's decision was not clearly erroneous.

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v. Factor f was correctly found to favor neither party

¶ 59. It is unclear how Appellant is arguing the court's finding on factor f, "the moral fitness of the parents, as the fitness impacts the child," is clearly erroneous. Because it is lumped in with the argument on parental alienation, it appears that he is claiming the alleged alienation is the alleged lack of moral fitness. As discussed in detail above, there has been no parental alienation in this case. As such, the District Court's finding that both parties are morally fit, and factor (f) favors neither party, is not clearly erroneous.

vi. Factor g was correctly found to favor neither party

¶ 60. Both parties are mentally and physically healthy. Although Mary sometimes struggles with situational depression or anxiety due to past traumatic events, this has never impacted the children, nor affected her ability to work or take care of herself or the children. Trial Trans. 143:8-144:14. She has sought help through counseling to maintain a positive mental health. Further, her treatment records make it clear that her mental health does not prevent her from living independently or having the ability to work full-time, and provide no indication that it has any negative impact on the children. Trial Trans. 169:14-170:1; see also Exhibit 10, Appendix 91, and Exhibit 11, Appendix 98. As such, the district court's finding that this factor favors neither party is not clearly erroneous.

vii. Factor h was correctly found to favor neither party

¶ 61. The court's findings that factor (h) factor favors neither party are not clearly erroneous. "The court must look forward under this factor to determine whether foreseeable changes could impact a child's life in the home, school and community." Deyle v. Deyle, 2012 ND 248, ¶ 12, 825 N.D.2d 245, 250. Although Appellant included this factor in his brief, he lumped it in with factor (d) and provides no argument as to what

evidence was presented that any change in the home, school, and community records of the children would have an effect on the children. Therefore, the court's findings on this factor, are not clearly erroneous.

C. The District Court's Failure to Award the Parties Joint, Equal Residential Responsibility was Not Clearly Erroneous

¶ 62. The District Court's decision to award Mary primary residential responsibility, rather than awarding the parties joint residential responsibility, was not clearly erroneous, as the best interest factors support such a ruling.

¶ 63. "Under the clearly erroneous standard, . . . we will not retry a custody case or substitute our judgment for a district court's initial [parenting schedule] decision merely because we might have reached a different result." Wolt v. Wolt, 2010 ND 26, ¶ 7, 778 N.W.2d 786. "In awarding visitation to the non-custodial parent, the best interests of the child, rather than the wishes or desires of the parents, are paramount." Bertsch v. Bertsch, 2006 ND 31, ¶ 5, 710 N.W.2d 113. "It is generally not in the child's best interest to be bandied back and forth between parents in a rotating physical custody arrangement." Kasprowicz v. Kasprowicz, 1998 ND 68, ¶ 15, 575 N.W.2d 921. Additionally, visitation may be "curtailed or eliminated entirely if it is likely to endanger the child's physical or emotional health." Marquette v. Marquette, 2006 ND 26, ¶ 9, 719 N.W.2d 321.

¶ 64. As explained in detail above, the best interest factors support an award of primary residential responsibility to Mary. Mary has always been the children's primary caregiver. As a stay at home mother, Mary is able to be with the children at all times, while Trevor works significant hours.

¶ 65. Additionally, joint residential responsibility is not in the children's best interest, given the distance of the parties' homes. Appellant relies on In re SRL to support

his position that even if Mary is the primary caregiver, that joint residential responsibility should still be awarded. However, what he fails to acknowledge is that the parties' residences were ninety (90) miles apart in In re SRL (In re SRL, 2013 ND 32, ¶1, 827 N.W.2d 324), whereas the parties live approximately 250 miles apart in this case. That is a substantial difference for in distance, and traveling that distance on a weekly basis would not be in the children's best interests. The children have a difficult time traveling at their young ages. L.B.R. has always had difficulty traveling, and Mary has had to schedule travel around her nap times to make it easier on her. Additionally, given L.J.B.'s young age, he is still nursing every couple of hours, which makes it very difficult to travel with him. As such, the District Court's award of primary residential responsibility to Mary is not clearly erroneous.

D. The District Court's Adoption of the Appellee's Proposed Parenting Plan was Not Clearly Erroneous

¶ 66. The District Court's parenting plan is not clearly erroneous. The parenting plan and schedule gives the children a transition period, allowing them to be weaned from co-sleeping and breastfeeding, gradually transition to longer parenting time with Trevor, and still provides reasonable parenting time with Trevor.

¶ 67. Stability is of the upmost important in determining custody arrangements. "[C]ommentators, legislators and the courts have recognized the importance to the child of maintaining stability and continuity to the greatest extent possible." Schmidt v. Schmidt, 2003 ND 55, ¶ 11, 660 N.W.2d 196, quoting 2 Sandra Morgan Little, Child Custody and Visitation, § 10.09[2]. "It is generally thought that the child's best interest is served if his or her accustomed mode of living or home environment is not abruptly changed." Id.

¶ 68. As Mary testified, she has done countless hours of research on the effect that separation from the primary caregiver has on the children's development and well-being, which the Supreme Court has acknowledged in its custody rulings. The children have a good, stable life with Mary, who has been their only constant since birth. Abruptly taking the children away before they are capable of understanding or adjusting to not having her around, would be detrimental to the children, and cause unnecessary stress and pain. Moreover, Trevor testified at trial that he was agreeable to a transition period.

¶ 69. The parenting schedule that eases them into the changes. It will allow the children to be weaned from breastfeeding and co-sleeping over time, as well as adjusting to not having Mary around during additional parenting time with Trevor, while still providing the children continual interaction and time with Trevor to maintain their relationship with him. As such, the court's parenting plan schedule is not clearly erroneous.

CONCLUSION

¶ 70. The District Court's award of primary residential responsibility to Mary was not clearly erroneous, as the decision was based on the best interests and welfare of the child. The Court considered all of the factors under N.D.C.C. § 14-09-06.2(1), and the factual support for each factor was stated with sufficient specificity. Further, the majority of the factors were correctly found to favor Mary or neither party. As such, the District Court's Judgment should be affirmed.

¶ 71. The District Court's parenting plan schedule is also not clearly erroneous. The schedule eased them into changes, rather than abruptly changing their accustomed mode of living. As such, the District Court's Judgment should be affirmed.

Respectfully submitted this 14th day of September, 2018.


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CERTIFICATE OF COMPLIANCE

¶ 72. The undersigned, as the attorney representing Appellee, Mary Baumgartner, and the author of this Brief hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 5,812 words from the portion of the brief entitled "Statement of the Issues " through the signature block. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

DATED this 11th day of September, 2018.


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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

TREVOR RUSTAD,)	CERTIFICATE OF SERVICE
)	
Plaintiff/Appellant,)	
)	Supreme Ct. Case No. 20180080
vs.)	
)	Stark County District Court
MARY BAUMGARTNER,)	Case No. 45-2017-DM-00103
)	
Defendant/Appellee.)	

[¶ 1] I hereby certify that on September 11, 2018, a true and correct copy of the following documents were served via email:

1. Appellee's Brief
2. Certificate of Service

[¶ 2] A copy of the foregoing was sent to the following email address:

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[¶ 3] To the best of this affiant's knowledge, the email address above given is the actual email address of the party intended to be so served. That the above documents were duly served in accordance with the provisions of the North Dakota Rules of Civil and Appellate Procedure.

Dated this 11th day of September, 2018.


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