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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Leah Grace Taylor, Plaintiff / Appellee, vs. Aaron James Taylor, Defendant / Appellant. and State of North Dakota Statutory Real Party in Interest and Appellee	)	Supreme Court No. 20210214 Grand Forks County Case No. 18-2018-DM-00355

ON APPEAL FROM THE THIRD AMENDED JUDGMENT ENTERED MAY 28, 2021; AND FINDINGS, CONCLUSIONS, AND ORDER FOR THIRD AMENDED JUDGMENT ENTERED MAY 26, 2021, FROM THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT GRAND FORKS COUNTY, NORTH DAKOTA, THE HONORABLE JAY KNUDSON, PRESIDING.

BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

Benjamin Freedman (ND ID 08670)
SW&L ATTORNEYS
4627 44th Ave S, Ste 108
Fargo, ND 58104
Phone: (701) 297-2890
Fax: (701) 297-2896
benjamin.freedman@swlattorneys.com
ATTORNEYS FOR DEFENDANT/APPELLANT

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STATEMENT OF THE ISSUES

[¶1] Whether the District Court erred in finding that Leah Taylor met her burden of proof to show by a preponderance of the evidence a detailed demonstration of the physical or emotional harm likely to result from Aaron Taylor's parenting time with A.G.T. born 2008.

[¶2] Whether the District Court erred in finding that Leah Taylor met her burden of proof to show by a preponderance of the evidence a detailed demonstration of the physical or emotional harm likely to result from Aaron Taylor's parenting time with L.A.T. born 2011.

[¶3] Whether the District Court erred in finding that the proper restriction of Aaron Taylor's parenting time is a total suspension of his in-person visits and telephone contact with the children, without a graduation beyond supervised parenting time in the future.

[¶4] Whether the District Court erred in failing to grant Aaron Taylor such rights of parenting time as will enable the children to maintain a parent-child relationship that will be beneficial to the children.

[¶5] Whether the District Court erred in authorizing Leah Taylor to end Aaron Taylor's future contact and parenting time with the children at Leah Taylor's discretion.

STATEMENT OF THE CASE

[¶6] This is an appeal arising from the trial court's Findings, Conclusions, and Order for Third Amended Judgment and Third Amended Judgment denying the motion of Plaintiff/Appellee Aaron Taylor ("Aaron") for modification of his parenting time and granting the countermotion of Defendant/Appellant Leah Taylor ("Leah") to restrict Aaron's parenting time.

[¶7] On July 27, 2018, a Judgment was entered which first established the parties' parental rights and responsibilities regarding their two joint minor children, A.G.T. born 2008 and L.A.T. born 2011. (Index #16; Appendix 18-31) Leah was granted primary residential responsibility of the children. Aaron was granted parenting time which gradually increased upon his progress through chemical dependency treatment, aftercare requirements, and maintaining sobriety. He was to start with one weekend day visit from 8:00 a.m. to 7:30 p.m., and two midweek visits from 4:00 p.m. to 7:30 p.m. Ultimately, he was to have every other weekend from Friday at 3:30 p.m. until Sunday at 7:00 p.m., the two midweek visits, and various other visits with the kids (one week of vacation time, etc.). Aaron and Leah were granted joint decisionmaking, with Leah having the ultimate authority to make decisions when the parties disagreed, and Aaron and Leah were granted the right to reasonable access to the children by phone and other means.

[¶8] On December 23, 2019, an Amended Judgment was entered, which maintained primary residential responsibility in Leah, and gave Aaron the same graduated parenting schedule, subject to the same restrictions, except that he was also required to take drug tests. (Index #133; Appendix 32-46) Aaron and Leah still were granted joint decisionmaking, with Leah having tie-breaking authority, and Aaron was granted telephone communication through Leah's home phone, which was allowed to be supervised by Leah.

[¶9] On June 8, 2020, a Second Amended Judgment was entered, which again afforded Leah primary residential responsibility. (Index #235; Appendix 47 - 59) However, Aaron's parenting was to be supervised for four hours per week. Aaron was granted the right to move the Court to modify his parenting time upon completion of a treatment

program. Aaron and Leah still were granted joint decisionmaking, with Leah having tie-breaking authority. Aaron retained the right to telephone communication with the kids through Leah's home phone, which was allowed to be supervised by Leah, and Leah had the authority to terminate the calls if Aaron involved the kids in parenting disputes during the calls.

[¶10] After completing treatment at The Village: First Step Recovery, Aaron moved the Court on December 23, 2020, to modify his parenting time. (Index #254; Appendix 62-63) He requested every other weekend, two evenings per week, and summer vacation time.

[¶11] Leah countermoved, asking that Aaron be held in contempt and seeking modification of the Second Amended Judgment; specifically, that she be granted sole decisionmaking authority, that Aaron's parenting time be completely suspended, and other restrictions on Aaron's parental rights. (Index #272; Appendix 139-40)

[¶12] The parties appeared for a hearing on their competing motions on April 14, 2021.

[¶13] The district court entered its Findings, Conclusions, and Order for Third Amended Judgment on May 26, 2021 (Index #331; Appendix 564-76), and its Third Amended Judgment ("the Judgment") on May 28, 2021 (Index #334; Appendix 577- 89), which, in relevant part, granted Leah sole decisionmaking authority of the children, and suspended Aaron's parenting time and telephone contact with the children for six months. After six months, the Judgment afforded Aaron one telephone call per week with the children. After an additional six months, Aaron was granted supervised parenting time for four hours every two weeks. If Aaron were to fail to comply with any of the terms of the Judgment, he is not allowed to graduate to the next stage of his graduated parenting plan,

and/or his parenting time and communication with the children can be terminated or suspended, over which sanction Leah was granted total discretion.

[¶14] Aaron commenced this appeal by filing a Notice of Appeal with the Clerk of the Supreme Court on July 22, 2021.

STATEMENT OF THE FACTS

[¶15] Aaron and Leah have two minor children, A.G.T. born 2008 and L.A.T. born 2011. (Register of Actions Index ("Index"), Appendix to Brief of Appellant ("Appendix"), 4). From the time of the initial judgment until the Second Amended Judgment, Aaron was granted unsupervised parenting time with the children. (Judgment ¶¶4(A)-(F), pp. 3-5, July 27, 2018, Appendix 20-22; Amended Judgment ¶¶4(A)-(F), pp. 3-5, December 23, 2019, Appendix 34-36). As Leah has herself admitted, Aaron loves the children a great deal, and they love him a great deal. (Transcript of Proceedings ("Transcript"), April 14, 2021, 128:13-20, Appendix 611). Leah has further agreed that A.G.T. is very strongly bonded with Aaron (Transcript 137:22-24; Appendix 620), and that A.G.T. is a "daddy's girl" (Id. at 152:17-18; Appendix 631).

[¶16] Despite Aaron's strong bond with the children, in January of 2020, Leah brought a motion to modify Aaron's parenting time, requesting, among other things, that his parenting time be supervised until he completed an alcohol treatment program. (Motion, Index #140-42). The district court granted Leah's motion in the Second Amended Judgment, which required Aaron to complete a treatment program, after which he could bring a motion to modify his parenting time. (Second Amended Judgment ¶4(B), June 8, 2020; Index #235, Appendix 49). Aaron proactively started treatment on April 30, 2020, before the Second Amended Judgment was entered. (Transcript 32:5-8; Appendix 599).

He started a second treatment program at The Village: First Step Recovery on August 30, 2020, and completed it on November 14, 2020. (Id at 12:7-15; Appendix 594). In Aaron's second treatment program, he attended all sessions with the exception of one-half of one day (to attend to a dying family member), which sessions were for nine hours per week. (Id.). Although not a requirement of the Second Amended Judgment, Aaron even engaged in aftercare, AA meetings, and Celebrate Recovery in the months subsequent. (Id. at 14:13-15:25; Appendix 595-96).

[¶17] Aaron's performance in the program was admirable and Aaron's primary therapy administrator, Paul Schumm, LAC, noted that Aaron was compliant with all treatment recommendations and achieved the goals articulated in his treatment plan. (Defendant's Exhibits 1-2; Index # 246-47; Appendix 60-61). All of Aaron's treatment records, including progress notes, were received by the district court. (Plaintiff's Exhibit 23; Index # 314; Appendix 418-563). The district court determined that Aaron did complete the treatment program. (Findings, Conclusions, and Order for Third Amended Judgment ¶9, p. 2, May 26, 2021; Index # 331; Appendix 565).

[¶18] While Aaron was attending treatment, he was exercising his parenting time and telephone contact with the children (when afforded to him), as well as working 65 hours per week with a commute from Fargo to Detroit Lakes, Minnesota. (Transcript 23:14-19; Appendix 597).

[¶19] Per the Second Amended Judgment, Aaron's parenting time was to be supervised at Kids First. (Second Amended Judgment ¶4(A), June 8, 2020; Index #235, Appendix 49). Aaron immediately arranged for enrollment at Kids First, and had his first virtual visit a week after the entry of the judgment. (Plaintiff's Exhibit 17, p. 130; Index #288 ;

Appendix 310). Aaron engaged in in-person visits and telephone/video calls with the children from June 15, 2020 to January 5, 2021, for a total of 106 visits/calls. (Id.). Aaron only missed four scheduled phone calls. (Id. at pp. 48-49, 110, and 119; Appendix 228-229, 290, and 299). Leah cancelled six visits for various reasons. (Id. at pp. 36-38, 71, 99, and 103; Appendix 216-218, 251, 279 and 283).

[¶20] However, for the majority of the time of Aaron's visits at Kids First, he was prevented from exercising his court-ordered right to in-person visits because the facility shut down due to the pandemic, and Aaron was only able to have about five hours of parenting time with the children during the roughly one-year period prior to the April 14, 2021 hearing. (Transcript, 130:16-35; Appendix 613). With no other option, and as allowed under the Second Amended Judgment, Aaron wrote letters to the children every week. Id. at 23:25-24:4; Appendix 597-598. Id. at 129:10-130:6; Appendix 612-613. The children have written him back as well, and the letters from the children and Aaron contain strong affectionate communication. Id.

[¶21] At Kids First, Aaron's visits were suspended on two occasions, in June and October 2020. (Id. at 62:8-13; Appendix 600). Sheila, the program director for Kids First, testified that Aaron was suspended for repeatedly violating Kids First policies (although the policies of Kids First are not consistent with the provisions of the Second Amended Judgment). Id. Further, the Kids First records show that many of the "critical incidents" reported were things like Aaron trying to allow the kids' grandmother (Aaron's mother) to video call the children during his visits (Plaintiff's Exhibit 17, pp. 42, 128-30; Index #287-88; Appendix 222 and 308-310), other people appearing on camera during Aaron's calls sometimes without speaking or for a brief moment (Id. at 20, 29, and 60; Appendix

200, 209 and 240), and Aaron and the children lowering their masks during a visit (Id. at 81; Appendix 261). Occasionally, Aaron would speak with the children about parenting time, which appears to have occurred roughly four occasions over the 106 visits/calls (Id. at 27, 86, 105, and 127; Appendix 207, 266, 285, and 307). Aaron was not allowed any telephone contact with the children around the start of the Covid pandemic (the last call through Kids First was January 5, 2021, per Plaintiff's Exhibit 17). (Transcript 10:16-11:1; Appendix 592-593).

[¶22] Aaron violated the Second Amended Judgment by talking with the children about parenting time or the court proceedings outside of Kids First, including in text messages and other electronic communications. (Plaintiff's Exhibits 10 and 12; Index #269, 270 & 286; Appendix 64 and 110). Some of the communications were relatively innocuous, including telling A.G.T. "Not too much longer sweetheart," when A.G.T. asked him "how much longer till the court." (Plaintiff's Exhibit 7, p. 1; Index #284; Appendix 177). Or expressing frustration that he didn't have any input into A.G.T.'s orthodontic treatment. (Plaintiff's Exhibit 10, p. 11; Index #269; Appendix 74). Or expressing sadness that Leah wouldn't allow him to see the kids for Thanksgiving. (Id. at 2; Appendix 65). Some of the communications were more direct, emotional, and detailed, as when Aaron told A.G.T. that Leah "doesn't even think of me as your dad anymore" (Id. at 12; Appendix 75); or "your mom wants me to just be someone you talk on virtual chat with" and "she wants me completely out of your lives." (Id. at 39; Appendix 102). Leah admitted that one of the top negative remarks Aaron made about her to the children was that she wouldn't let Aaron see the children, and the primary way he involved the children in the conflict of the case was by communicating a hope to return to court soon to resume

parenting time. (Transcript 143:22-145:10; Appendix 626-628).

[¶23] Aaron delivered to A.G.T. a page of the judgment with his handwritten notes, informing her that Leah could allow him to have parenting time and that he had completed treatment. (Plaintiff's Exhibit 22, p. 1; Index #313; Appendix 415). In October 2020, Aaron delivered a cell phone to A.G.T. so the two could talk, after more than six month without seeing the children due to the closure of Kids First. (Transcript 161:3-8; Appendix 637). Leah obtained a restraining order against Aaron in a separate case, due to his communications with the children, which he later violated by dropping off Easter baskets for the children on Leah's front porch. (Transcript 131:9-16; Appendix 614).

[¶24] Aaron has admitted that it was a poor decision to violate the Second Amended Judgment by communicating with the children and speaking negatively about Leah to the children (Id. at 163:2-8; Appendix 638). Although he affirmed that it was bad parenting on his part, and there was no excuse for it, Aaron offered some softening context by explaining the desperation for contact with his children that he experienced in the many months he was not allowed to see the children or talk to them on the phone, including only being allowed to see the children in-person for six hours since late 2020. (Id at 23:23-24; 179:11-181:7; Appendix 597 and 640-42). Aaron believed that out of all his communications with the children, less than two percent contained negative comments about Leah or were otherwise improper. (Id at 169:13-17; Appendix 639).

[¶25] In December 2020, Leah discovered the phone that Aaron provided to A.G.T. (Id. at 76:5-77:2; Appendix 601-02). A.G.T. tried to break the phone, but Leah got possession of it, which distressed A.G.T. who went into the bathroom and said she wanted to die. (Id.). Leah called the police and transported A.G.T. to Altru hospital on December 2,

2020. (Id.). While at Altru, according to the medical records, A.G.T. stated that has struggled with depression since her parents' divorce, three years prior. (Plaintiff's Exhibit 19, p. 17; Index #303; Appendix 410). A.G.T. reported to Altru care providers that she wanted to live with Aaron. (Id. at 27). After reviewing all the messages on A.G.T.'s phone (which are depicted on Plaintiff's Exhibit 10), Leah reported that she was only "somewhat alarmed, somewhat not." (Id. 78:7-12; Appendix 603).

[¶26] A.G.T. was discharged from Altru on December 4, 2020, and Leah brought A.G.T. to Prairie St. John's for psychological care. (Transcript 78:3-6; Appendix 603). A.G.T. was diagnosed with depression, suicidal ideation, generalized anxiety disorder, and "other legal circumstances, court-ordered supervision with father." (Plaintiff's Exhibit 1, p. 29 (Exhibit 1 is not comprehensively paginated, but the page referenced above is the twenty-ninth page of the exhibit); Index #278; Appendix 170-71). Although Leah has inferred that A.G.T.'s mental health issues stem from Aaron, the medical records show that there is family history of significant depression and anxiety, including Aaron's parents and grandparents, and Leah herself. (Id. at p. 27; Appendix 169). Further, Leah admitted the same in her testimony before the district court. (Transcript 132:8-14; Appendix 615). Leah admitted that she is not qualified to determine the cause of A.G.T.'s mental health issues (Id. at 132:19-22; Appendix 615), and that A.G.T.'s mental health issues have persisted for at least three or four years prior to A.G.T.'s admission to the hospital, at which time the parties were still married, and that seemingly, A.G.T.'s issues spring at least in substantial part from the trauma of the divorce (Id. at 133:1-15; Appendix 616). The fact that A.G.T.'s mental health problems predate any of the issues alleged by Leah in support of her countermotion before the district court by a period of

years is well-documented throughout the medical reports. (Plaintiff's Exhibits 1, 1(A), and 19; Appendix 143-76, 319-393, and 394-414).

[¶27] A.G.T. was discharged from Prairie St. John's on December 11, 2020. (Plaintiff's Exhibit 1, p. 2; Index #278; Appendix 144).

[¶28] Several weeks later, A.G.T. was hospitalized again. (Transcript 83:14-23; Appendix 604). At trial, Leah claimed that the preceding events to the second hospitalization were that A.G.T. was having a phone conversation with Aaron, Aaron's voice was elevated, he was talking about an upcoming visit, and when Leah confronted A.G.T. about it, A.G.T. got upset and locked herself in the bathroom. (Id. at 83:24-85:6; Appendix 604-06). Later, Leah testified that Aaron was actually telling A.G.T. to call him and if Leah wouldn't allow it, then she should call the police. (Id. at 154:17:155:19; Appendix 633-34). However, Leah reported to Altru something different; she reported to Altru that Aaron was telling A.G.T. about an upcoming court date. (Plaintiff's Exhibit 19, p. 1; Index #303; Appendix 394). A.G.T. was transferred back to Prairie St. John's where she stayed from December 31, 2020 to January 13, 2021.

[¶29] Leah did not call any medical, mental health, or other experts to testify at the hearing regarding A.G.T.'s mental health or any relation of the same to Aaron's conduct. (Transcript 138:15-21; Appendix 621). Even when directly asked if she believed that Aaron's conduct caused A.G.T.'s mental health issues, Leah denied Aaron being the cause, stating that A.G.T. "has suffered with depression and anxiety prior to that," including multiple years prior. (Id. 131:21-143:14; Appendix 614-26). This was independently reported by A.G.T. to staff at Altru, where she stated that has struggled with depression since her parents' divorce, three years prior. (Plaintiff's Exhibit 19, p.

17; Index #303; Appendix 410). A.G.T. didn't report to medical staff at Altru or Prairie St. John's that she was experiencing issues because of Aaron, but rather, that it was because Leah was interrupting visitation with Aaron (Plaintiff's Exhibit 19, p. 9; Appendix 402), that she still recalled loud verbal fights between Aaron and Leah during their marriage (Id., p. 10; Appendix 403), that she wanted more time with Aaron (Id., p. 11; Appendix 404), she's experienced bullying at school (Plaintiff's Exhibit 1(A), p. 31 (pagination in top right corner of pages in Exhibit 1(A)); Index #301; Appendix 346); she wants to live with Aaron (Id., p. 38; Appendix 353); and that she's sick of being forced to talk to Leah (Id. pp. 41, 43, and 45; Appendix 356, 358 and 360). A.G.T.'s mental health improved at Prairie St. John's after being allowed to talk with Aaron on the phone, including that her mood improved, she was more polite with staff and peers, and started eating all her meals and snacks (Id., p. 65 Index #301; Appendix 380). She then regressed after her phone calls with Aaron were terminated, (Id., p. 55 Index #301; Appendix 319; Appendix 370), to the point where she started hiding a fork prong, presumably for the purpose of self-harm and started fighting with peers and staff. (Id., p. 51; Appendix 366).

[¶30] Throughout the Prairie St. John's records, it is reported that one of A.G.T.'s diagnoses is "Parent-child relational conflict with mother." (See, e.g., Id. at pp. 8, 30, 33, 35, and 37; Appendix 324, 345, 348, 350 and 352). On A.G.T.'s intake, a primary attitude/behavior targeted for treatment was the child's "conflict with mother." (Id. at 77; Appendix 392). A.G.T. reported her parents' divorce as the top reason she's overwhelmed. (Id. at 6; Appendix 322).

[¶31] Leah admitted in her testimony that the medical records, where they mention "parental distress" as an issue for A.G.T., do not specify whether it is primarily caused by

either parent. (Transcript 157:14-158:2; Appendix 635-36).

[¶32] When Leah was asked about any negative impact on L.A.T. to support a restriction of parenting time, Leah stated that L.A.T. "picks up on the attitudes of anybody around her," and would be "mad with A.G.T." (Transcript 150:6-19; Appendix 629). With both children, Leah noted that after their visits with Aaron, they often showed no issues at all, sometimes A.G.T. would get quiet, but only became upset on the occasion of the phone call prior to the hospitalization, when Leah took the phone from A.G.T. (Id. 103:18-104:23; Appendix 609-10).

[¶33] Leah's concern about Aaron's communications with the children was that it showed the court order "doesn't need to be followed" and that he asked the girls "to lie to mom." (Id. 95:16-24; Appendix 607). Further, Leah was concerned that Aaron is making promises to the girls and not keeping them. (Id. 96:1-9; Appendix 608).

[¶34] In support of her request that she be granted sole decisionmaking authority, Leah cited to Aaron's "interference" in A.G.T.'s medical care at Prairie St. John's, but when asked if she had final decisionmaking authority to overrule any input by Aaron, she agreed that she does hold that authority. (Id. 153:8-154:16; Appendix 632-33).

[¶35] On December 23, 2020, Aaron moved the court to modify his parenting time. Index #254; Appendix 62-63. Leah countermoved for sole decisionmaking authority, a suspension of Aaron's parenting time, and other restrictions on Aaron's parental rights.

STANDARD OF REVIEW

[¶36] A district court's decision regarding parenting time is a finding of fact subject to the clearly erroneous standard of review. Curtiss v. Curtiss, 2017 ND 60, ¶ 6, 891 N.W.2d 358.

REQUEST FOR ORAL ARGUMENT

[¶37] Oral argument will be helpful to the Court in this matter. Aaron Taylor argues that the district court erred in restricting his parenting time with the two minor children of the parties. The decision by the Supreme Court on this issue will have a critical and lasting impact on the children, Mr. Taylor's parental rights, and Mr. Taylor's relationship with the children, as well as future cases involving district courts' decisions on similar issues. Further, the case from which this appeal arises involves extensive and detailed testimony and documentary evidence, for which oral argument might be beneficial to parse.

ARGUMENT

I. The Trial Court Erred In Finding that Leah Met Her Burden of Proof to Show by a Preponderance of the Evidence a Detailed Demonstration of the Physical or Emotional Harm Likely to Result from Aaron's Parenting Time with the Children.

[¶38] Leah requested, and the trial court granted, a suspension of Aaron's parenting time and telephone communication with the children for six months, followed by supervised parenting time. Aaron's parenting time under the Third Amended Judgment doesn't graduate to unsupervised parenting time at any point. Suspended or supervised parenting time is a "restriction on visitation," for which a high burden of proof must be met. The exceptionally high burden of proof for a restriction of parenting time is supplied by statute and case law:

> [U]pon request of the other parent, [the court] shall grant such rights of parenting time as will enable the child to maintain a parent-child relationship that will be beneficial to the child, unless the court finds, after a hearing, that such rights of parenting time are likely to endanger the child's physical or emotional health.

N.D.C.C. § 14–05–22(2).

[¶39] "[A] restriction on visitation must be based on a preponderance of the evidence and be accompanied by a detailed demonstration of the physical or emotional harm likely to result from visitation." Marquette v. Marquette, 2006 ND 154, ¶¶ 9-10, 719 N.W.2d 321, 324–25. The presumption is in Aaron's favor, and Leah has the burden:

> Parenting time between a parent without primary residential responsibility is presumed to be in the child's best interests, and a court should only withhold visitation when it is likely to endanger the child's physical or emotional health; however, a restriction on visitation must be based on a preponderance of the evidence and be accompanied by a detailed demonstration of the physical or emotional harm likely to result from the visitation.

Curtiss v. Curtiss, 2017 ND 60, ¶ 11, 891 N.W.2d 358, 358.

[¶40] Leah has simply failed to meet her burden of proof, even if everything asserted by Leah were true. This is certainly true with regard to A.G.T., but nearly unquestionably true with regard to L.A.T.

A. Leah failed to meet her burden of proof to show that Aaron's parenting time will likely endanger L.A.T.

[¶41] Leah failed to even allege, much less prove, any harm likely to endanger L.A.T. as a result of Aaron's parenting time, and she certainly has not done so with a "detailed demonstration." Nearly all of Leah's presentation of evidence, both in her testimony and exhibits, regarded A.G.T., not L.A.T. The younger child, L.A.T., was not hospitalized, was not seen by or diagnosed by any medical or psychiatric providers, or otherwise shown to have suffered negative effects from her parenting time with Aaron. The only exhibit containing communication between Aaron and L.A.T. was Plaintiff's Exhibit 18, which was only a couple dozen messages about playing an online game together. (Plaintiff's Exhibit 18 Index #289; Appendix 311-18).

[¶42] In fact, Leah didn't mention any negative impact to L.A.T. on direct exam. After being challenged on her failure to cite any examples during cross-exam, Leah, on redirect, stated that L.A.T. "is a very bubbly sweet girl," is "immature for her age," and "picks up on the attitudes of anybody around her." (Transcript 150:2-13; Appendix 629). Leah also indicated that L.A.T. would sometimes mirror A.G.T.'s emotions about the case, like being "mad with A.G.T." (Id. at 150:14-19; Appendix 629). Beyond this, Leah only expressed a concern that Aaron might eventually conduct himself toward L.A.T. the same way as she's alleged he has with A.G.T. (Id. at 151:6-15; Appendix 630). This is exactly the kind of "conjecture of harm" that this Court has condemned:

> The court provided no nexus or link demonstrating how [father's] past problems would result in physical or emotional harm to the child at this time, even under the setting of supervised visitation. There are no evaluations from independent professionals detailing the harm, and the court's finding of physical or emotional harm resulting from visitation appears to be based on surmise or conjecture, which was condemned by this Court [...]. The court's decision appears to be punitive in nature. [...].

Wilson v. Ibarra, 2006 ND 151, ¶ 14, 718 N.W.2d 568, 573.

[¶43] The district court cannot "simply assume or surmise" the harm that might result to the L.A.T. It's not enough for Leah to imagine current harm that might be present, or theorize on potential harm in the future. The harm has to be demonstrated in detail, and Leah has failed to do so. The district court similarly failed to make detailed findings of harm to L.A.T. (Findings, Conclusions, and Order for Third Amended Judgment ¶¶16-33, May 26, 2021; Index #331; Appendix 567-73). The only specific reference the district court made regarding L.A.T. was that Aaron communicated with L.A.T. through the Roblox gaming application. (Id. at ¶24; Appendix 571). Throughout the rest of these findings, the district court referenced "the children," but the evidence relied upon by the

court was related only to A.G.T., with the exception, perhaps, of comments made by Aaron to the children during visits at Kids First. (Id. at ¶20; Appendix 568). There were no harmful impacts on L.A.T., however fanciful, which supported a parenting time restriction, either alleged by Leah or specified by the district court. Leah certainly did not demonstrate in detail, by a preponderance of the evidence, that parenting time with Aaron was likely to endanger L.A.T.'s physical or emotional health, nor rebutted the presumption of Aaron's parenting time being in L.A.T.'s best interests.

[¶44] To the extent that the district court assumed that Aaron's conduct toward A.G.T. would likely occur in the future with L.A.T., this is exactly the type of conjecture this Court condemned in Wilson v. Ibarra.

[¶45] In fact, this Court has addressed the issue of finding harm to one child, and then ascribing that harm to a second child without an independent detailed demonstration in Curtiss v. Curtiss, 2017 ND 60, ¶ 11, 891 N.W.2d 358. In Curtiss, the father (whose parenting time was restricted) was incarcerated, and during visits at the prison, the father would tell the children about Lucifer, which upset the children. Id. at ¶7. The father would talk extensively about his relationship with the mother and share graphic details of his imprisonment issues. Id. Importantly, the father wouldn't engage with the children during visits. Id. Instead, the father ignored the children and attempted to discuss adult topics with the mother during the visits. Id. The older child was hospitalized because of the negative impact of the visits on the child's mental health. Id. The children's counselor testified at the trial, and stated that the older child was significantly harmed, but the younger child was only upset sometimes. Id. at ¶10. The counselor made the direct connection between the father's conduct and the harm experienced by the children. Id. at

¶12. Based on these facts, this Court held that the mother failed to demonstrate in detail, by a preponderance of the evidence, that "continuing supervised visitation at the penitentiary is likely to endanger [the younger child's] physical or emotional health. Id. at ¶13. This Court held that the parenting time restriction, as it related to the younger child, was not supported by the record and was clearly erroneous, and remanded to the district court to address how the younger child's visits with the father could be facilitated. Id. at ¶16.

[¶46] The same is true in the present case: Leah has simply failed to meet her burden of proof to show the harm likely to result to L.A.T. from parenting time with Aaron, and the district court's determination of the same is erroneous and must be reversed.

B. Leah failed to meet her burden of proof to show that Aaron's parenting time will likely endanger A.G.T.

[¶47] Again, the burden of proof is on Leah, and it's a high burden. See, e.g., Marquette v. Marquette, 2006 ND 154, ¶¶ 9-10, 719 N.W.2d 321, 324–25. The "restriction" in Marquette was supervised parenting time; a lower form of restriction than the total suspension of parenting time imposed on Aaron for the first six months following the Third Amended Judgment. Any restriction is a serious derogation of a parent's fundamental rights, and must be afforded the most strict scrutiny by trial courts; but a total suspension in particular must be reserved for only the most drastic of cases. For instance, where a parent has sexually abused the child, attempted to physically harm or kill the child, serially physically abused the child, etc. Aaron's conduct in this case, his attempts to communicate with A.G.T. outside of the confines of the Judgment, his occasional disparagement of Leah to A.G.T. (although tempered and related to his desire

to see the children after a year with almost no parenting time), and his involvement of A.G.T. in the legal issues of the parties; simply do not approach the "most drastic" situations in which the highest restriction (total suspension of parenting time) are warranted.

[¶48] Leah has not shown a detailed demonstration of the harm likely to result to A.G.T. from visitation, not without a bevy of assumptions or surmising which this Court has condemned. Johnson v. Schlotman, 502 N.W.2d 831, 835 (N.D. 1993) (holding, "To justify such an onerous restriction on visitation, physical or emotional harm resulting from the visitation must be demonstrated in detail, and we will not simply assume or surmise such harm.").

[¶49] Leah presented a lot of evidence of Aaron's communications with A.G.T., his negative comments to A.G.T. about Leah, and his violations of the judgment regarding contact and communication with A.G.T., but Leah did not connect that conduct to any negative mental or emotional impact on A.G.T. In fact, after reviewing all the messages Aaron sent A.G.T. on her phone (the bulk of the communications between the two) Leah reported that she was only "somewhat alarmed, somewhat not." (Transcript 78: 7-12; Appendix 603). This falls far short of a detailed demonstration of harm.

[¶50] Her primary evidence of negative impact was A.G.T.'s hospitalization, but even then, Leah did not connect A.G.T.'s mental health issues to Aaron's conduct, she only presented evidence on the hospitalization with the hope that the court would infer a connection. In fact, even when directly asked if she believed that Aaron's conduct caused A.G.T.'s mental health issues, Leah denied Aaron being the cause, stating that A.G.T. "has suffered with depression and anxiety prior to that," including multiple years prior.

(Id. 131:21 -143:14; Appendix 614-26). The Altru records showed that A.G.T.'s depression and anxiety stemmed from her parents' divorce, three to four years prior to any of the conduct indirectly alleged by Leah. (Plaintiff's Exhibit 19, p. 17; Index #303; Appendix 410). The Prairie St. John's medical records showed that there was family history of significant depression and anxiety, including Aaron's parents and grandparents, and Leah herself. (Plaintiff's Exhibit 1, p. 27; Index #278; Appendix 169). Further, Leah admitted the same in her testimony before the district court. (Transcript 132:8-14; Appendix 615). Leah also admitted that she was not qualified to determine the cause of A.G.T.'s mental health issues (Id. at 132:19-22; Appendix 615), and that A.G.T.'s mental health issues have persisted for at least three or four years when the parties were still married, and that seemingly, A.G.T.'s issues spring at least in substantial part from the trauma of the divorce (Id. at 133:1-15; Appendix 616).

[¶51] If A.G.T.'s mental health issues are from three or four years prior to Aaron's conduct, then Aaron's conduct of communicating with A.G.T., disparaging Leah, or informing A.G.T. about the custody case, likely is not the source of A.G.T.'s mental turmoil.

[¶52] Again, this is revealed in the Prairie St. John's records, where one of A.G.T.'s diagnoses is "Parent-child relational conflict with mother." (See, e.g., Plaintiff's Exhibit 1(A), pp. 8, 30, 33, 35, and 37; Index #301; Appendix 324, 345, 348, 350 and 352). According to the medical records, A.G.T.'s mental health issues resulted from her relationship with Leah, not Aaron. On A.G.T.'s intake, a primary attitude/behavior targeted for treatment was the child's "conflict with mother." (Id. at 77; Appendix 392). A.G.T. reported her parents' divorce as the top reason she's overwhelmed (Id. at 6;

Appendix 322). Leah admitted in her testimony that the medical records, where they mention "parental distress" as an issue for A.G.T., do not specify whether it is primarily caused by either parent; whether Leah or Aaron. (Transcript 157:14-158:2; Appendix 635-36).

[¶53] The medical records do contain reference to Aaron's conduct, but do not connect that conduct with A.G.T.'s mental health issues, or if so, certainly do not ascribe them to Aaron's conduct primarily or exclusively, but they do ascribe them to Leah's conduct toward A.G.T., at least in part. A.G.T. didn't report to medical staff at Altru or Prairie St. John's that she was experiencing issues because of Aaron, but rather, that it was because Leah was interrupting visitation with Aaron (Plaintiff's Exhibit 19, p. 9; Appendix 402), that she still recalls loud verbal fights between Aaron and Leah during their marriage (Id., p. 10; Appendix 403), that she wants more time with Aaron (Id., p. 11; Appendix 404), she's experiencing bullying at school (Plaintiff's Exhibit 1(A), p. 31; Index #301; Appendix 346); she wants to live with Aaron (Id., p. 38; Appendix 353); and that she's sick of being forced to talk to Leah (Id. pp. 41, 43, and 45; Appendix 356, 358 and 360). A.G.T.'s mental health improved at Prairie St. John's after being allowed to talk with Aaron on the phone, including that her mood improved, she was more polite with staff and peers, and started eating all her meals and snacks (Id., p. 65 Index #301; Appendix 380). She then regressed after her phone calls with Aaron were terminated, (Id., p. 55 Index #301; Appendix 370), to the point where she started hiding a fork prong, presumably for the purpose of self-harm and started fighting with peers and staff. (Id., p. 51; Appendix 366).

[¶54] Leah simply did not supply any evidence of a substantial connection between

Aaron's conduct and A.G.T.'s mental health issues. Leah did not call any medical, mental health, or other experts to testify at the hearing regarding A.G.T.'s mental health or any relation of the same to Aaron's conduct. (Transcript 138:15-21; Appendix 621).

[¶55] It's not enough for Leah to imagine harm, or to give her belief on the source of A.G.T.'s mental health issues. Compare Curtiss to the present case. In Curtiss, the father's conduct was of a much worse conduct than Aaron's. Aaron engages with his children and gives them ample attention; while the father in Curtiss didn't engage and ignored the children. 2017 ND 60, ¶ 11. The vast majority of Aaron's communication with the girls is positive and appropriate (as even Leah admitted in her testimony); while the father in Curtiss only talked about Lucifer, gruesome prison life issues, his relationship with mother, and other adult topics. Id. at ¶7. There has been no connection made in the present case between Aaron's conduct and any harm to A.G.T. by any medical or psychiatric expert, or even a social worker or parenting investigator; while in Curtiss, a detailed demonstration of the serious harm to the older child was made, and some emotional disturbance was noted to the younger child by a licensed, educated, qualified professional counselor. Id. at ¶12. Instead, Leah made no connection regarding L.A.T., and only opined that Aaron's conduct might have contributed to A.G.T.'s hospitalization. However, Leah admitted that throughout the records of Prairie St. Johns and Altru, the professionals disagreed with her assumptions regarding A.G.T.'s mental health issues.

[¶56] Outside of the medical record, Leah has alleged that Aaron has disparaged her to A.G.T. and involved A.G.T. in the conflict of the case. Although, Leah admitted in her testimony that the vast majority of Aaron's communications with A.G.T. are positive and don't involve disparagement or regard the parties' conflict. Further, Aaron's

disparagement and involvement of A.G.T. in the conflict, while improper, were relatively docile, compared to the truly heinous type of disparagement one can imagine. Aaron said things like:

> "I've gotten zero time with you two and mom doesn't care!!!"
>
> "I am sad though that I don't get to spend your birthday or Thanksgiving with you two girls as it's not fair!"
>
> "It's not your fault it's your mom doesn't even think of me as your dad anymore"

Plaintiff's Exhibit 10, Index #269 & 270; Appendix 64, 138, 110).

[¶57] These comments may not be appropriate, and Aaron admitted that. But on the scale of disparagement, these comments fall on the lowest end of the spectrum. It's the emotional overspill of a father who is desperate to see his children and doesn't want the children to think that he's not seeing them because he doesn't love them. It's a father trying to commandeer the children into his effort to convince mom to let him see them. It may not be appropriate, and it may violate the Court's order. But what is the appropriate remedy for this? Certainly not a suspension of parenting time or a restriction in the form of continued supervised parenting time, when there has been no detailed demonstration of harm. This is more than overkill; it exceeds even the most dilated application of the law on restricting parenting time, the case law on restrictions confirms this.

[¶58] Restrictions on parenting time have been upheld when a father allowed someone to sexually molest and take photographs of his child's private parts, and didn't do anything about it, when it was shown that his refusal to take action was harmful to the child. Jensen v. Deaver, 2013 ND 47, ¶ 3, 828 N.W.2d 533, 534. Or when a father masterbated in the presence of his teenage daughter on multiple occasions, make sexual

comments to the daughter, and pressured the daughter to recant the allegations by threatening to disinherit her and not pay for her college, and the child's psychologist testified in detail about the emotional harm suffered by the child due to father's conduct. Litoff v. Pinter, 2003 ND 172, ¶ 13, 670 N.W.2d 860, 862–63.

[¶59] These are the kinds of scenarios in which it is proper to suspend or restrict a parent's visitation with a child. The conduct in the present case is not even close to these examples.

[¶60] There are many more examples of much worse conduct by a parent, with an actual detailed demonstration of harm to a child, with supporting testimony from psychologists, psychiatrists, social workers, and other professionals, where this Court has still reversed parenting time restrictions.

[¶61] For example, in Hendrickson v. Hendrickson, 2000 ND 1, ¶ 8, 603 N.W.2d 896, the mother frustrated both the original and subsequent visitation orders and attempted to alienate the children from their father. Id. at ¶ 17. Mother removed the children from the home at father's scheduled visitation times, she refused to allow father to take the children for visitation, and refused to make visitation arrangements. Id. The guardian ad litem reported that mother's alienating behavior was "indicative of an unhealthy parental figure." Id. Mother had numerous opportunities to change her behavior and failed to do so. Id. And still, the Court reversed the district court's ruling that parenting time should be suspended.

[¶62] Aaron hasn't done anything as drastic as the mother in Hendrickson. In fact, Leah admitted that Aaron has never withheld, or attempted to withhold, A.G.T. from her, with one exception. (Transcript 141:11-20; Appendix 624). And unlike in Hendrickson, no

guardian ad litem or other professional has testified regarding any adverse connection between Aaron's conduct and A.G.T. mental health. The mother in Hendrickson violated the Judgment repeatedly, and did much worse than disparaging the father (as opposed to the present case), she actually refused father's parenting time. If the Court in Hendrickson reversed parenting restrictions, then certainly Aaron's parenting time cannot be restricted.

[¶63] In Keita v. Keita, 2012 ND 234, ¶ 14, 823 N.W.2d 726, the father spent minimal time with the child during marriage, and almost no time with the child for more than a year prior to the trial, due to not attempting to have a relationship. Id. at ¶ 8. Father had angry behaviors, including kicking in mother's apartment door, physically restraining mother from leaving the house, and harassing the mother, resulting in a DCRO, which father later violated. Id. at ¶ 9. Father was a risk of flight due to noncitizenship and bigamous relationships in Mali. Id. at ¶ 11. And still, this Court reversed the trial court's order for supervised parenting time and remanded, finding that the trial court did not sufficiently detail findings demonstrating the physical or emotional harm to the child from visitation. ¶ 13.

[¶64] Unlike the father in Keita, who chose to spend hardly any time with the child and had no relationship with the child, Aaron has undertaken a great amount of effort to be a father to his children, and has a close and deep bond with them, as Leah has admitted.. The father in Keita engaged in a lot of domestic violence, including kicking in doors, holding mother, etc., and a DCRO was entered which the father later violated. Aaron has done nothing of this kind. Aaron has snuck a cell phone to his child so he can have telephone communication. He left easter baskets for the kids on Leah's doorstep when he wasn't supposed to. He has not assaulted anyone or engaged in any domestic violence of

any kind. Aaron hasn't acted properly, which he admits, but if this Court in Keita reversed father's restrictions, then Aaron's parenting time certainly cannot be restricted.

[¶65] In Wilson v. Ibarra, 2006 ND 151, ¶ 14, 718 N.W.2d 568, the father had a history of violence, and alcohol abuse. Id. at ¶ 7. The alcohol abuse issue was unresolved at the time of trial. Id. Father engaged in four incidents of domestic violence against the mother over a five-year period in which he was charged criminally. Id. The district court found there were likely many more incidents of violence that were not reported to law enforcement. Id. Father even admitted to several episodes of violence perpetrated upon mother. Id. Father abandoned the child by his lack of care and support for her for at least three years, during which, he had no contact, did not perform any actions to ensure for her care. Id. The district court found that reintroduction of father to child's life would be a detriment to the child emotionally, and that any visitation, including supervised visitation, would be likely to endanger the child's physical or emotional health, and is not in her best interests. Id. However, this Court reversed the trial court's suspension of father's parenting time, specifically stating "The court provided no nexus or link demonstrating how [father's] past problems would result in physical or emotional harm to the child at this time, even under the setting of supervised visitation. There are no evaluations from independent professionals detailing the harm, and the court's finding of physical or emotional harm resulting from visitation appears to be based on surmise or conjecture, which was condemned by this Court [...]. The court's decision appears to be punitive in nature. [...]." Id. at ¶¶ 14-15.

[¶66] Aaron has no history of violence, unlike the father in Ibarra. The father in Ibarra had a substance abuse issue which he hadn't addressed, but Aaron has completed

treatment. That father in Ibarra committed many acts of violence, including to the mother, but Aaron hasn't done anything like this. Aaron has told the children that he's taking legal action so that he can see them again soon. The difference between the risk of harm presented by Aaron and Ibarra is staggering. The father in Ibarra abandoned the child for three years, but Aaron has remained steadfastly determined to be a parent to his children, and writes them letters every week, remodels their bedrooms in the hopes that they'll be able to visit soon, and loves the kids deeply. In Ibarra, this Court reversed the restrictions on father's parenting time, in part because there were no evaluations from independent professionals detailing the harm likely to result to the children, which is precisely the issue in Aaron's case. If the father in Ibarra cannot be restricted on parenting time, neither can Aaron.

[¶67] In Sims v. Sims, 2020 ND 110, ¶ 19, 943 N.W.2d 804, 811, the children's therapists testified that the father should have no parenting time, based on what they'd learned from the children (which was determined not to be credible testimony). Id. at ¶¶ 9 and 16. The mother didn't fully support the children's relationship with the father. Id. The children testified negatively about father, and the district court found that the children were profoundly negatively impacted by parental disputes. Id. at ¶ 15. However, this Court affirmed the trial court's decision that father's parenting time would be unsupervised, holding that the mother didn't show that suspension of parenting time was appropriate, or that the father endangered the kids' emotional health.

[¶68] The same is true in the present case. A.G.T. is suffering adverse mental issues as a result of the parties' divorce and conflict, but there has been no detailed demonstration of harm directly and solely attributable to Aaron. In fact, Leah denied Aaron being the cause

of A.G.T.'s mental health issues, stating that A.G.T. "has suffered with depression and anxiety prior to that," including multiple years prior. (Id. 131:21 -143:14; Appendix 614-26).

[¶69] There simply has not been a detailed demonstration of the harm likely to result to either child in the present case. There is none even alleged regarding L.A.T. With A.G.T. Leah has opined on the impact on A.G.T., but only generally, and without any support from a medical professional. Using the facts of this case as evidence to support a restriction would amount to "simply assum[ing] or surmis[ing] such harm," as this Court condemned in Johnson v. Schlotman, at 835. Leah has not shown, or even given more than a bald assertion, to connect A.G.T.'s hospitalization to Aaron's conduct; and in other parts of her testimony she has denied Aaron being the cause, or sole cause. Nor is Leah licensed or qualified to make such psychological diagnoses. She has simply pointed to the fact that the hospitalization occurred close in time to finding the cell phone Aaron gave A.G.T., but conjecture or surmising of this kind is not allowed.

[¶70] The district court's finding of harm likely to result from Aaron's parenting time with either child, and its resulting restriction on Aaron's parenting time, must be reversed.

II. Even if a Restriction of Parenting Time Were Appropriate, the Trial Court Erred In Finding that a Suspension, Supervised Parenting Time, and Loss of Decisionmaking Authority were the Appropriate Restrictions.

[¶71] Even if Leah had successfully proven that Aaron's conduct had resulted in harm to either child, she has yet failed to show that the appropriate remedy is suspension or restriction of Aaron's parenting time. North Dakota statute presumes and requires that a parent have whatever parenting rights as will enable the parent-child relationship. N.D.C.C. § 14–05–22(2). Case law likewise presumes that parenting time between the

noncustodial parent and the child is in the child's best interests. Curtiss v. Curtiss, 2017 ND 60, ¶ 11, 891 N.W.2d 358, 358.

[¶72] Therefore, even if Leah has met her burden to prove that Aaron's conduct has directly and concretely had a negative impact on the children, Aaron's parenting time should be subject only to whatever minimal restrictions are necessary to prevent harm. In other words, there is a presumption that Aaron should have the maximum parenting time with the least restrictions that wouldn't be harmful to the children. Leah has not proven that less restrictive means might not ameliorate the harm she alleges. Lesser restrictions or conditions might include family therapy for Aaron and the children, or that supervision as opposed to suspension would eliminate the risk of harm. Or that a certain number of hours per visit, and certain number of visits per week, unsupervised, wouldn't be the least restrictive means to address the issue. Or that the suspension/supervised period shouldn't be shorter. Or that the plan shouldn't automatically graduate to unsupervised parenting time at some future date. Further, Leah has to prove that the restrictions are least intrusive with regard to each of the children. Supervised parenting time might be appropriate for one child, while not appropriate for the other; or one child's parenting time might appropriately be that contained in the Second Amended Judgment (the final step of the graduated plan), while the other should have fewer or shorter visits with Aaron.

[¶73] A parent cannot simply prove *some* level of harm to the children (or one of two children), however inconsequential, and obtain the most drastic restriction of parental rights short of termination (which is suspension of parenting time, as was ordered in the present case) for both children.

[¶74] The district court also erroneously granted Leah sole decisionmaking authority.

Leah did not meet her burden of proof to show that her requested modification should be granted. Leah did not even allege a sufficient basis.

[¶75] Leah already has tie-breaking authority regarding decisions for the children under the Second Amended Judgment. Therefore, whenever she and Aaron disagree on the children's care, Leah's decision trumps Aaron's. Leah made all decisions regarding A.G.T.'s hospitalization, even over Aaron's objections. Leah admitted that she informed the hospital of her ultimate authority, and that the hospital staff agreed and only consulted her for decisions. (Transcript 124:1-126:9). In other words, there was no issue, she was already able to accomplish what she wanted. Giving Leah sole decisionmaking would not accomplish any other proper goal that she could even hypothesize. To be granted a change regarding decisionmaking she must show that material changes have occurred which necessitate modification, and that modification is in the children's best interests. Leah has failed to prove this.

[¶76] The district court's restriction of Aaron's parenting time and decisionmaking authority, even if the finding of harm to the children is affirmed, must be vacated or amended to the least restrictive alternative on Aaron's relationship with each individual child; or that issue must be remanded to the district court.

III. The Trial Court Erred in Failing to Grant Aaron's Motion to Modify Parenting Time.

[¶77] Should this Court reverse the district court's restriction of Aaron's parenting time, then it should also reverse the district court's denial of Aaron's motion to modify his parenting time.

[¶78] A reversal of the finding of harm to the children must result in granting Aaron's

motion, since he is entitled to whatever parenting time as will enable the parent-child relationship. N.D.C.C. § 14–05–22(2); Curtiss v. Curtiss, 2017 ND 60, ¶ 11, 891 N.W.2d 358, 358.

[¶79] The restriction of Aaron's parenting time in the Second Amended Judgment was clearly a result of the district court's concern about alcohol use, because the only requirement of Aaron before moving the court for modification of his parenting time was the completion of a substance abuse program, and the district court found that Aaron did complete the program. (Findings, Conclusions, and Order for Third Amended Judgment ¶9, p. 2, May 26, 2021; Index #331; Appendix 565). The court stated:

> The fact of the matter is, folks, I think from the evidence that has been presented, Aaron completed the treatment program. He did the treatment program that the Court asked him to do. So I give him credit for getting that done. He did it. And so you can make your arguments and I will consider that, again, but it seems to me from what I have seen, he did that treatment program.

Transcript 101:9-17.

[¶80] The records from The Village: First Step Recovery (Plaintiff's Exhibit 23 Index #314; Appendix 418-563) and Aaron's treatment provider (Defendant's Exhibits 1-2, Index #246 & 247; Appendix 60 & 61), confirm that Aaron has more than complied with the requirement to attend and complete treatment.

[¶81] Having removed the only impediment to his parenting time, Aaron should be granted his request that he have the unrestricted parenting time stated in the prior judgments: every other weekend from Friday at 3:30 p.m. until Sunday at 7:00 p.m., two midweek visits from 4:00 p.m. to 7:30 p.m., and one week of additional and consecutive summer parenting time, as well as vacation time. This is what the district court found to

be in the children's best interests before the restriction was imposed, and it should be reinstituted now that Aaron has completed the only impediment to his parenting time, which was treatment.

[¶82] Aaron is not required to show a "material change in circumstances" or that "modification is in the children's best interests," which are the requirements of typical movants regarding parenting time (or if he is required, then he has met this burden), because the Second Amended Judgment specified that Aaron could seek to modify his parenting time upon completion of the program (satisfying the "material change" requirement), and because the Second Amended Judgment specified that Aaron's unrestricted parenting time would ultimately be the schedule defined in the preceding paragraph of this Brief. In doing so, the district court explicitly determined that schedule to be in the children's best interests if no restrictions were imposed. If the district court's finding of harm to the children is reversed, then all restrictions must be vacated, and the foregoing schedule would automatically be imposed since it's in the children's best interests.

[¶83] Even if Aaron were required to prove that material changes have occurred and that modification is in the children's best interests, then certainly his completion of the program is a material change, and he testified extensively about the benefit to the children in the resumption of his parenting time. And because Aaron's parenting time is currently restricted, it's not his burden to prove that he should have regular, unsupervised parenting time; that's the presumption given to Aaron by North Dakota law (See, N.D.C.C. § 14–05–22(2); and Curtiss v. Curtiss, 2017 ND 60, ¶ 11, 891 N.W.2d 358, 363); it's Leah's burden to prove that Aaron's parenting time should remain restricted.

[¶84] At the very least, should this Court not agree with the foregoing argument, then it should remand to the district court to determine what parenting schedule, free from restrictions, would be in the children's best interests.

IV. The Trial Court Erred in Conferring on Leah the Authority to End Aaron's Future Parenting Time and Telephone Contact at her Discretion.

[¶85] The Third Amended Judgment grants Leah the right to terminate Aaron's future parenting time (when his supervised parenting time resumes, one year after the entry of the judgment) or his telephone contact with the children (six months after the judgment). (Order for Third Amended Judgment, ¶ 43, May 26, 2021; Index # 331; Appendix 575-76). Leah is not required to move the court for these restrictions, she has been authorized with the sole discretion to do so, which is improper under North Dakota law:

> We do not encourage the use of visitation provisions giving one parent total control over the time and manner of the other parent's visitation. Such provisions should be reserved for the most exceptional circumstances and only when the custodial parent demonstrates a willingness to foster the parent-child relationship between the child and the other parent.

Curtiss v. Curtiss, 2017 ND 60, ¶ 11, 891 N.W.2d 358, 363 (citations omitted).

[¶86] "[A] district court generally cannot delegate to anyone the power to decide questions of child custody or related issues." Marquette v. Marquette, 2006 ND 154, ¶ 10, 719 N.W.2d 321, 324–25.

[¶87] Leah did not prove that exceptional circumstances exist in this matter, nor that she is willing to foster Aaron's relationship with the children. The district court's delegation of its authority to Leah to terminate Aaron's future parenting time and telephone contact with the children is erroneous and must be reversed.

CONCLUSION

[¶88] The trial court erred in granting Leah's motion. She has not met her burden to prove, by a preponderance of the evidence and a detailed demonstration of harm likely to result, that Aaron's parenting time should be restricted for either A.G.T. or L.A.T. The district court relied on conjecture and surmise in finding that Aaron's conduct has harmed the children. Nor has Leah proven that the restrictions imposed on Aaron's parental rights were the least restrictive means necessary to prevent harm to the children. Instead, the district court, out of frustration for Aaron's violations of the judgments, assumed that harm to the children was a result of Aaron's conduct, and imposed the greatest restrictions possible, without any future graduation to unsupervised parenting time. The district court likewise erred in granting Leah sole decisionmaking authority and delegating to Leah its authority to terminate Aaron's future parenting time and telephone contact. The district court's order must be reversed, and the Third Amended Judgment must be vacated. As a result, Aaron's motion to modify his parenting time, as specifically afforded under the Second Amended Judgment, must be granted, and his unrestricted parenting time with the children should resume immediately.

[¶89] The Appellant respectfully prays that the Court grant the relief requested.

Dated this 28th day of October, 2021.

/s/ Benjamin Freedman

Benjamin Freedman (ND ID 08670)
SW&L ATTORNEYS
4627 44th Ave S, Ste 108
Fargo, ND 58104
Phone: (701) 297-2890
Fax: (701) 297-2896
benjamin.freedman@swlattorneys.com
ATTORNEYS FOR DEFENDANT/APPELLANT

CERTIFICATE OF COMPLIANCE

[¶90] The undersigned, as attorney for Aaron James Taylor, Defendant/Appellant in the above-captioned matter, and as the author of the Brief of Appellant, hereby certifies that said brief is in compliance with N.D.R.App.P. 32(a)(8)(A) and contains 36 pages. The undersigned further certifies the Appellant's appendix complies with Rule 30 of the North Dakota Rules of Appellate Procedure.

Dated this 27th day of October, 2021.

/s/ Benjamin Freedman

Benjamin Freedman (ND ID 08670)
SW&L ATTORNEYS
4627 44th Ave S, Ste 108
Fargo, ND 58104
Phone: (701) 297-2890
Fax: (701) 297-2896
benjamin.freedman@swlattorneys.com
ATTORNEYS FOR DEFENDANT/APPELLANT

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Dated this 28th day of October, 2021.

/s/ Benjamin Freedman

Benjamin Freedman (ND ID 08670)
SW&L ATTORNEYS
4627 44th Ave S, Ste 108
Fargo, ND 58104
Phone: (701) 297-2890
Fax: (701) 297-2896
benjamin.freedman@swlattorneys.com
ATTORNEYS FOR DEFENDANT/APPELLANT

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No.: 20210214

Leah Grace Taylor, Plaintiff and Appellee, vs. Aaron James Taylor, Defendant and Appellant.	))))))))	CIVIL NO. 18-2018-DM-00355 **AFFIDAVIT OF SERVICE**

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

[¶1] Sierra Johnson, being sworn says that she is of legal age, a resident of Fargo, Cass County, North Dakota, not a party to nor interested in the action, and that she served the attached:

1. **Brief of Appellant - Oral Argument Requested; and**
2. **Appendix to Brief of Appellant (Part 1 of 3)**

upon the following persons:

Olivia Jureidini	**olivia@johnstonfamilylaw.com**
Janet K. Naumann	**fargocse@nd.gov**

via electronic means on the 27th day October, 2021, by electronically serving, through North Dakota Supreme Court E-Filing System, the same to the persons above named at the above-referenced email addresses. That she knows the persons served to be the persons named in the papers served and the persons intended to be served.

[¶2] I declare under penalty of perjury that the foregoing is true and correct. Executed on the 27th day of October, 2021.

/s/ Sierra Johnson

Sierra Johnson, Affiant
Fargo, ND

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No.: 20210214

Leah Grace Taylor, Plaintiff and Appellee, vs. Aaron James Taylor, Defendant and Appellant.	))))))))	CIVIL NO. 18-2018-DM-00355 **AFFIDAVIT OF SERVICE**

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

[¶1] Sierra Johnson, being sworn says that she is of legal age, a resident of Fargo, Cass County, North Dakota, not a party to nor interested in the action, and that she served the attached:

1. **Appendix to Brief of Appellant (Part 2 of 3)**

upon the following persons:

Olivia Jureidini	**olivia@johnstonfamilylaw.com**
Janet K. Naumann	**fargocse@nd.gov**

via electronic means on the 27th day October, 2021, by electronically serving, through North Dakota Supreme Court E-Filing System, the same to the persons above named at the above-referenced email addresses. That she knows the persons served to be the persons named in the papers served and the persons intended to be served.

[¶2] I declare under penalty of perjury that the foregoing is true and correct. Executed on the 27th day of October, 2021.

/s/ Sierra Johnson

Sierra Johnson, Affiant
Fargo, ND

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No.: 20210214

Leah Grace Taylor, Plaintiff and Appellee, vs. Aaron James Taylor, Defendant and Appellant.	))))))))	CIVIL NO. 18-2018-DM-00355 **AFFIDAVIT OF SERVICE**

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

[¶1] Sierra Johnson, being sworn says that she is of legal age, a resident of Fargo, Cass County, North Dakota, not a party to nor interested in the action, and that she served the attached:

1. **Appendix to Brief of Appellant (Part 3 of 3)**

upon the following persons:

Olivia Jureidini	**olivia@johnstonfamilylaw.com**
Janet K. Naumann	**fargocse@nd.gov**

via electronic means on the 27th day October, 2021, by electronically serving, through North Dakota Supreme Court E-Filing System, the same to the persons above named at the above-referenced email addresses. That she knows the persons served to be the persons named in the papers served and the persons intended to be served.

[¶2] I declare under penalty of perjury that the foregoing is true and correct. Executed on the 27th day of October, 2021.

/s/ Sierra Johnson

Sierra Johnson, Affiant
Fargo, ND

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 28, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No.: 20210214

Leah Grace Taylor, Plaintiff and Appellee, vs. Aaron James Taylor, Defendant and Appellant, and State of North Dakota, Statutory Real Party in Interest and Appellee	CIVIL NO. 18-2018-DM-00355 **AFFIDAVIT OF SERVICE**

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

[¶1] Benjamin Freedman, being sworn says that he is of legal age, a resident of Fargo, Cass County, North Dakota, not a party to nor interested in the action, and that he served the attached:

1. **Cover Page for Appendix to Brief of Appellant; and**
2. **Brief of Appellant**

upon the following persons:

Olivia Jureidini	**olivia@johnstonfamilylaw.com**
Janet K. Naumann	**fargocse@nd.gov**

via electronic means on the 28th day October, 2021, by serving, via email, the same to the persons above named at the above-referenced email addresses. That he knows the persons served to be the persons named in the papers served and the persons intended to be served.

[¶2] I declare under penalty of perjury that the foregoing is true and correct. Executed on the 28th day of October, 2021.

/s/ Benjamin Freedman

Benjamin Freedman, Affiant
Fargo, ND