

ORIGINAL

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. ~~20060228~~ 20080114

Burleigh County Civil No. 08-06-2214

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

Curtis L. Sailer
Plaintiff/Appellee,

NOV 21 2008

STATE OF NORTH DAKOTA

v.

Sandra K. Sailer,
Defendant/Appellant.

BRIEF FOR THE APPELLEE

AN APPEAL FROM A SOUTH JUDICIAL DISTRICT COURT'S FINDINGS
OF FACT CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT AND
JUDGMENT FILED ON MARCH 18, 2008 FROM A TRIAL FOR
DIVORCE, THE HONORABLE THOMAS J. SCHNEIDER, PRESIDING.

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QUESTION PRESENTED FOR REVIEW

I.

WHETHER THE TRIAL COURT ERRED IN FINDING THE PARTIES' PRENUPTIAL AGREEMENT WAS CONSCIONABLE AND ENFORCEABLE.

II.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT IT WAS IN THE CHILDREN'S BEST INTERESTS THAT CURTIS SAILER WAS GRANTED CUSTODY OF THE PARTIES' THREE CHILDREN.

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I. STATEMENT OF THE CASE.

This case was commenced by Summons and Complaint filed on November 13, 2006. **Register of Actions at 1 and 2 [hereinafter ROA __.]**. The Answer and Counterclaim were filed on December 8, 2006. **ROA 11.**

Also, on December 8, 2006, Sandra Sailer filed a motion and brief in support of motion for an interim order. **ROA 10-14.** On December 26, 2006, Curtis Sailer filed his response to Sandra Sailer's motion and included supporting affidavits. **ROA 24-34.**

A hearing was held on the interim order on December 29, 2006. **ROA 51.** A custody investigation order was filed on January 9, 2007. **ROA 45.** The corrected interim order was filed on January 30, 2007. **ROA 53.**

Trial was held on December 20 and December 21 of 2007. **ROA 66, Transcript Cover pages [herein after Tr. ____].** On February 5, 2008, the court filed its Memorandum Opinion and Order. **ROA 79.** On March 18, 2008, the Findings of Fact, Conclusions of Law and Order for Judgment and the Judgment were filed. **ROA 83-83.** On March 24, 2008, the Notice of Entry of Judgment was filed. **ROA 86.**

On April 18, 2008, Sandra Sailer petitioned the district court to waive filing fees, the cost of a bond and transcript fees. **ROA 87.** The district court granted Sandra's petition, except for the waiver of the transcript fees. **ROA 88.**

On May 16, 2008, Sandra filed her Notice of Appeal with the district court. **ROA 89.** On this date, she also filed her request for transcript. **ROA 90.**

II. STATEMENT OF THE FACTS.

In 1989, Curtis and Sandra Sailer met at the twenty-year reunion of the Zip-to-Zap. **Tr. 19.** They dated for five years before they married. *Id.* At that time, Sandra was on welfare and had one child, Renae who was six years old at the time. *Id.* Sandra also received child support from Renae's father. **Tr. 30-31, 65, 100-02 173, 183, 227-28, 310.**

Two and a half years after the parties met, Curtis proposed marriage to Sandra. **Tr. 20.** Additionally, the parties promised to be faithful to one another. *Id.* Curtis didn't think it was proper for either Sandra or him to be playing the field if they were engaged. *Id.*

However, certain things happened that caused Curtis to begin to suspect that Sandra was not living up to her promise. **Tr. 20-21.** In April of 1992, Curtis confronted Sandra with his suspicions at the Ground Round. **Tr. 21-23.** At that time, Sandra had his bags packed so he could take his property back with him when he left for good. **Tr. 23.** At supper, Curtis asked for his ring back. *Id.* Sandra refused. *Id.* Sandra got upset and said, "I supposed you won't marry me unless I signed a prenup." *Id.* Curtis that asked, "Oh, you would sign a prenup?" *Id.* She said she would. *Id.*

In July, Curtis went to see about a prenuptial agreement [hereinafter "agreement"]. **Tr. 24.** The attorney, John Olson, told Curtis to come in after the first of the year. *Id.*

During that period when the parties were discussing the agreement, it was Curtis's belief that Sandra was seeking legal advice from an attorney and he recalls that he thought it was Mr. Richard Baer. **Tr. 25-26.** When Curtis was asked how he knew that Mr. Baer was Sandra's attorney, Curtis stated that Sandra had talked about it because she had received one

of the draft agreements. **Tr. 26.**

In her trial brief, Sandra argued that she signed the agreement alone. *Id.*, **ROA 69.** However, Curtis testified that he went to Olson's office first. **Tr. 26.** Then Sandra called Curtis to tell him to tell him she would be 10 or 15 minutes late. *Id.*

When Sandra arrived, Curtis, Sandra, John Olson, and Tracey Albers went into the conference room. *Id.* Curtis stated that Sandra and he had reviewed the agreement in April. *Id.* Mr. Olson reviewed the whole agreement with both parties. *Id.* He read through every paragraph. *Id.*

Sandy stated she was concerned about inheriting some land south of Mary College. *Id.* However, Mr. Olson showed where it was covered in the agreement. *Id.*

Curtis stated that at no time during their consultations with Mr. Olson was Sandra forced to sign the agreement. **Tr. 28-29.** He also stated that Sandra was given plenty of time to sign the agreement. **Tr. 29.** Sandra was given the option not to sign the agreement. *Id.*

During the visit to Mr. Olson's office on May 13, 1993, Mr. Olson asked where Sandy's attorney was. **Tr. 127.** She stated that she didn't have one and to this Mr. Olson stated that he could not represent her and that he was Curt's attorney. **Tr. 127.** He went on to state that he would reschedule the meeting so she could find counsel. *Id.* However, Sandra declined the offer and said she was fine in signing it. **Tr. 128.**

In response to this, Mr. Olsen then stated that he was going to review the whole document. *Id.* So, Mr. Olson went through the agreement "step by step" and asked both of the parties if they had any questions. *Id.*

The parties were married on May 29, 1993 as stated in the agreement. **Appendix at 3 and 6 [hereinafter App. __]**¹. The move into Curtis's home located which was located on the same property where his parent's also have their home at Hazen, North Dakota. **Tr. 29, 159.**

The parties have three children, C. will be eight in January 2009. **App. 4, Tr. 29.** They also have twins, M. and K. born in July of 2004. **Tr. 30.** Additionally, Sandra's daughter, Renae, from a previous relationship lived with the parties from about age six to age 18 when she graduated from high school. *Id.*

Curtis took care of all of the finances for the family, the basics, the telephone bill, the utility bills, and the food bills. **Tr. 30.** He had no outstanding debts. *Id.*

The parties did not have any joint bank accounts. *Id.* There were no joint finances. *Id.* All accounts were kept separately. *Id.* At no time were there ever any joint accounts. *Id.* Sandra received income for Renae in the form of child support. **Tr. 30-31, 65, 100-02 173, 183, 227-28, 310.**

Curtis was asked if Sandra ever supplied the home with the basic necessities. **Tr. 31.** Curtis stated that when Sandra would purchase food, she would bring it home and demand that Curtis reimburse her. *Id.* He also stated that Sandra never used the child support for anything related to the home, food or anything else. *Id.*

Curtis testified and by exhibit showed that Sandra had numerous job and also had numerous job opportunities. **See Exhibit Number 23, Tr. 31 -35.** For one reason or another, she refused all of the jobs, no matter what they were. **Tr. 31-35, 128-129, 214.**

¹Appellant's Appendix is missing the signature page to Curtis's Complaint. **See App.3-5.**

Either she could do the math of the job started too early in the morning. *Id.* However after she left Curtis, she found employment at Aetna for about \$25,000.000 per year. *Id.*

In describing his home life, that is, what the arrangements for the duties around the house were, Curtis stated that he did most of the chores, including the food preparation and cooking. **Tr. 32.** He would even bring food home from the cafeteria at his place of work.

Id.

III. JURISDICTION.

The district court has jurisdiction under N.D. Const. Art. VI, §8 and N.D.C.C. §27-05-06(1). The appeal from district court was timely filed under N.D.R. App. P. 3 and 4(a). This Court has jurisdiction under N.D.Const. Art. VI, §6, N.D.C.C. § 29-01-12 and N.D.C.C. §29-28-06.

IV. ARGUMENT

A. Introduction

Sandra Sailer's brief specifies four issues on appeal. The four issues are whether the trial court erred in deciding that the parties' prenuptial agreement was enforceable, whether the trial court erred in failing to grant Sandra spousal support, whether the trial court erred in failing to distribute the parties' assets equitably, and whether the trial court erred in granting custody of the parties' three children to Curtis.

As will be argued below, it is Curtis's position that the district court correctly ruled that the prenuptial agreement was conscionable and enforceable, thereby addressing Sandra's first three issues. Further, the district court correctly ruled that it was in the best interests of the children that Curtis is awarded custody, thereby addressing Sandra's final issue.

B. The Prenuptial Agreement was Conscionable and therefore Enforceable

Section 14-03.1-03 of the North Dakota Century Code states:

1. Parties to a premarital agreement may contract with respect to:
 - a. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.
 - b. The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.
 - c. The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.
 - d. The modification or elimination of spousal support.
 - e. The making of a will, trust, or other arrangement to carry out the provisions of the agreement.
 - f. The ownership rights in and disposition of the death benefit from a life insurance policy.
 - g. The choice of law governing the construction of the agreement.
 - h. Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.
2. The right of a child to support may not be adversely affected by a premarital agreement.

N.D.Cent. Code 14-03.1-03 (1985).

The parties' agreement covered every element of this of this statute. **App. 14-20.**

Child support was not addressed in the agreement. *Id.*

Sandra first argues that it was "significant and telling is that Curtis had neither John Olson nor Tracy Albers, the paralegal, to testify at trial to shed any objective light on the issue." **Brief for the Appellant at ¶ 9.** What is even more significant and telling is that Sandra did not call John Olson or Tracy Albers. In any event, the burden is on Sandra to prove the agreement is unconscionable.

Moreover, it is entirely consistent with section 14-03.106(1) of the North Dakota

Century Code which states,

1. A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
 - a. That party did not execute the agreement voluntarily; or
 - b. The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
 - (1) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
 - (2) Did not voluntarily sign a document expressly waiving any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
 - (3) Did not have notice of the property or financial obligations of the other party.

N.D. Cent. Code §14-03.1-06(1) (1985).

In *First American Bank West v. Michalenko*, 501 N.W.2d 330, 333-34, this Court stated:

* * *

[The appellant] asserts that the trial court erred in instructing the jury that she had the burden to prove that the premarital agreement was invalid. [She] claims that, under *Carlson v. Carlson*, 50 N.D. 677, 197 N.W. 778 (1924), the party relying upon a premarital agreement bears the burden of proving its validity.

The trial court presented its written jury instructions to counsel and afforded an opportunity for objections. [Appellant] did not object to the instruction on burden of proof. Under **Rule 51©, N.D.R.Civ.P.**, an instruction not objected to becomes the law of the case, and appellate review is inappropriate. See, e.g., *Dewey v. Lutz*, 462 N.W.2d 435 (N.D.1990); *Erickson v. Schwan*, 453 N.W.2d 765 (N.D.1990); *In re Estate of Honerud*, 294 N.W.2d 619 (N.D.1980). Accordingly, the instruction on the burden of proof became the law of the case.

Moreover, she has mischaracterized the holding in *Carlson*. The *Carlson* court did not hold that the burden of proof in all actions challenging a premarital agreement is upon the proponent of the agreement. Rather, the court implicitly recognized that the burden of proof is upon the opponents of the agreement, but noted that a presumption of fraudulent concealment may arise, shifting the burden, where "the provision made for the wife is grossly

disproportionate to the value of the estate." *Carlson*, supra, 197 N.W. at 781. [36] The trial court's instruction in this case, placing the burden of proof upon [The appellant] in the first instance, is entirely consistent with *Carlson*. [footnote omitted] It is also entirely consistent with Section 14-03.1-06(1), N.D.C.C., which places the burden of proving invalidity of a premarital agreement upon "the party against whom enforcement is sought." [footnote omitted]

* * *

First American Bank West v. Michalenko, 501 N.W.2d 330, 333-34 (N.D. 1993).

Sandra next argues that her Exhibit A is proof that Mr. Olson should have made a stronger insistence that Sandra needed legal counsel. **Brief for the Appellant at ¶ 10**. She states that Mr. Olson was "clearly an advocate for Curtis." *Id.*

This argument puts Curtis in a catch-22 situation. On the one hand Mr. Olson is to shed an objective light on the issue and on the other hand Mr. Olson was Curtis's advocate. Mr. Olson could not give Sandra any advice without there being a clear conflict of interest.

Sandra also cites *Lutz v. Schneider*, 1997 ND 82, 563 N.W.2d 90, for the proposition that for Curtis to prove that Sandra was properly advised to seek outside counsel for advice. **Brief for the Appellant at ¶ 10**. The *Lutz* case was an appeal from a summary judgment. *Lutz*, 1997 ND 82, ¶ 1.

The better case is *Lutz v. Schneider*, 2000 N.D. 226, 620 N.W.2d 589. In this case, the trial court found and this Court agreed that the appellant did not sign the prenuptial agreement involuntarily. *Id.* at ¶19. The trial court found and this Court agreed that the attorney involved had advised her to seek independent counsel to review the agreement. *Id.*

In this case, as well, nothing needed to be in writing. Mr. Olson advised Sandra that he would delay the signing until she had consulted with an attorney. **Tr. 127-28**. Sandra

then indicated she was fine in signing the agreement. **Tr. 128.** Even though she was fine in signing the agreement, Mr. Olson insisted on going over each and every paragraph, “step by step,” with Curtis and her. *Id.*

Sandra also argues that because Curtis used his “income and earnings” to support the family, he thereby waived his rights to use the agreement as a defense to the claim for an equitable distribution on his assets in the divorce. **Brief for the Appellant at ¶ 13.** Then in the same breath, Sandra argues that under section 14-07-03 of the North Dakota Century Code Curtis is required to support his family. *Id.*

Again, Sandra places Curtis in a catch-22 situation. The laws of this state are not written so that an unsuspecting individual cannot follow one without violating another. If Curtis wanted to set fire to his paycheck on fire and place it in a burn barrel in the back of his property, paragraph 4 of the agreement allowed him to do so. **App. 15.**

Sandra’s next argument revolves around the allegation that Curtis would only pay her a monthly allowance of \$100.00 per month. **Brief for the Appellant at ¶ 14.** To this Curtis states, that over the course of their marriage she earned from part-time work approximately \$66,000.00. **Tr. 215.** See also **Plaintiff’s Exhibit 23.** Additionally, Sandra received \$300.00 per month for 12 years while her daughter stayed with the parties, this amounted to an additional \$43,200.00. **Tr. 30-31, 65, 100-02 173, 183, 227-28, 310.** None of Sandra’s income was spent on the home and when she did buy groceries she demanded that Curtis reimburse her. **Tr. 31.**

While citing *Lutz v. Schneider*, 1997ND 82, 563 N.W.2d 90, for the proposition that this Court will review prenuptial agreements for their procedural and substantive

enforceability. Sandra argues that if the agreement is enforced Curtis will end up with some much greater assets than Sandra will. **Brief for the Appellant at ¶ 16.** And this, Sandra argues is unconscionable. *Id.* at ¶ 17-18.

At the time the agreement was signed, Curtis had more than \$400,000.00 in retirement, investments, real and personal property. **App. 14, 21-2.** At the time of the divorce, Curtis had accumulated about \$800,000.00. **App. 21-2.** It is Curtis's position that his marriage to Sandra did not end his efforts to maintain and grow his holdings he stated in the agreement. As was Sandra, she also could have made investments with her income. However, she chose to spend her income rather than save it.

Curtis testified that he wanted to retire early, at 55, so he could watch his children grow up. **Tr.132.** Keep in mind that all the time he was saving his income and earning from investments, he was also providing for all of the financial needs for the family, his children as well as Sandra's daughter, including paying for her college in Fargo. **Tr. 30-31.**

Sandra's final argument pertaining to the agreement, is that if the agreement is enforceable, then she would likely have to seek public assistance. **Brief for the Appellant at ¶ 19-20.** She states that she has been on public assistance since she was separated. *Id.* 19.

What Sandra fails to tell this Court that immediately after she left Curtis, she applied for welfare. **See ROA 20, Tr. 253.** Once Curtis was granted temporary custody of the children, Sandra was no longer eligible for welfare. *Id.* The children were the only reason she was eligible for welfare. *Id.* Additionally, Sandra now had found a good job at Aetna, bringing in very good money. **Tr. 128, 214, 226.**

In making its Finding of Fact, Conclusions of Law, Order for Judgment and

Judgment, the district court specifically found that Sandra demonstrated was self-sufficient. **App. 66.** She admitted that she had, at one time during the course of the separation, had worked for Aetna, here in Bismarck, but had been fired for cause. **Tr. 128, 214, 226.**

Curtis, in good faith, married Sandra because she signed the agreement and thought she would honor the agreement when she signed the agreement. Curtis had a good faith belief that when Sandra signed the prenuptial agreement she agreed to all of its terms. Had Sandra stated at the outset that she would not sign the prenuptial agreement or would follow the agreement if she had signed it, there would have been no marriage. Curtis had an expectation that Sandra would abide by the agreement.

She argues that she did not know what she was signing. However, she's signed many contracts before. **App. 71-72.** As stated above, Mr. Olson took her through each and every paragraph, "step by step." **Tr. 128** Take a look at the number of credit cards she has. *Id.* Each card required a contract.

If this court does not find that Curt's agreement is conscionable and enforceable, it is his belief that the section 14-09-03.1 is meaningless and will never give reliability to those who wish to protect to their assets in contemplation of marriage. However, based upon Curtis's arguments above, the agreement is conscionable and enforceable.

C. It was in the Best Interest of the Children that Curtis was Granted Custody.

This Court states that:

In an initial custody determination, a trial court must decide custody in the best interests and welfare of the child. *Reeves v. Chepulis, 1999 ND 63, ¶ 10, 591 N.W.2d 791.* In doing so, the trial court must consider all factors under the best interests statute, section 14-09-06.2(1)(a)-(m), N.D.C.C. *Id.* A separate finding is not required for each statutory factor, but "the court's

findings should be stated with sufficient specificity so that we can understand the factual basis for its decision." Id. (quoting *Severson v. Hansen*, 529 N.W.2d 167, 168 (N.D. 1995)).

Schumacher v. Schumacher, 1999 ND 149, ¶16, 598 N.W.2d 131.

Section 14-09-06.2 of the North Dakota Century Code states:

1. For the purpose of custody, the best interests and welfare of the child is determined by the court's consideration and evaluation of all factors affecting the best interests and welfare of the child. These factors include all of the following when applicable:
 - a. The love, affection, and other emotional ties existing between the parents and child.
 - b. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.
 - c. The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
 - d. The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.
 - e. The permanence, as a family unit, of the existing or proposed custodial home.
 - f. The moral fitness of the parents.
 - g. The mental and physical health of the parents.
 - h. The home, school, and community record of the child.
 - i. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
 - j. Evidence of domestic violence. In awarding custody or granting rights of visitation, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as a custodial parent. The court shall cite specific findings of fact to

show that the custody or visitation arrangement best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary to protect the welfare of the child, custody may be awarded to a suitable third person, provided that the person would not allow access to a violent parent except as ordered by the court. If the court awards custody to a third person, the court shall give priority to the child's nearest suitable adult relative. The fact that the abused parent suffers from the effects of the abuse may not be grounds for denying that parent custody. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01. A court may consider, but is not bound by, a finding of domestic violence in another proceeding under chapter 14-07.1.

- k. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.
 - l. The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02.
 - m. Any other factors considered by the court to be relevant to a particular child custody dispute.
2. In any proceeding under this chapter, the court, at any stage of the final judgment, may make orders about what security is to be given for the care, custody, and support of the unmarried minor children of the marriage as from the circumstances of the parties and the nature of the case is equitable.

N.D. Cent. Code, 14-09-06.2 (1997).

As stated in the court's Findings of Fact, Conclusions of Law and Order for Judgment, the district court found that factors a-d, h, and j were found in favor of Curtis. **App. 62, 43-58.** Factors e, f, g and k were found favorable to both parties. **App. 43-58.** Factors l, and m were considered inapplicable. *Id.* As to factor m, Ms. Stenehjen commented on the day to day interchange between the parties. *Id.*

As a result, the parties were granted joint legal custody. **App. 62.** Curtis was

awarded physical care, custody and control of the minor children. *Id.*

Sandra was granted specified visitation **App. 63**. Sandra was also granted reasonable by telephone and electronic means. *Id.*

As to the best interest factors,

- a. **The love, affection, and other emotional ties existing between the parents and child.**

Ms. Stenehjem found this to be in Curtis's favor. Her observations were correct because there were times that Sandra would call Curtis to pick the children up early. **App. 45**. There was uncontraverted testimony that Sandra asked Curtis to reverse the locks on the doors to the children's bedrooms. **Tr. 82**. This factor was correctly assigned.

- b. **The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.**

While Sandra may love her children, she has not done much to help C. With his school endeavors. **Tr. 5-16**. Sandra was informed of C.'s problems at school, but had not at the time of trial talked to C.'s teacher. **Tr. 11**. It was apparent that C.'s school teacher knew that Curtis was working with C. on his school work. *Id.* Additionally, C. had shown a decline in his ability to recall his alphabet, while he was residing in Bismarck. **Tr. 5-16, App. 46**. This problem soon disappeared when C. returned to the Hazen school system. *Id.* **Tr. 117-18**. This factor was correctly assigned.

- c. **The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.**

This factor should reflect what these parents are capable of doing for their children. However, its not the amount of money Curtis has that makes the difference. Testimony

shows that Sandra is incapable of caring for these children on a long term basis. **Tr. 141.** Uncontradicted testimony was that Sandra couldn't even get up in the morning to feed her kids. **Tr. 37-38, 139-40, 152, 154.** Sandra calls Curtis to pick the children up early or has Curtis take them to their medical appointments. **App. 45.** This factor was correctly assigned.

d. The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.

Up until the time Sandra whisked the children away from their home in Hazen, the children lived there in Hazen all of their life. **Tr. 71.** The children only know their home in Hazen because of the time they have spent there. They were in Bismarck for only two months. And now they will have lived in Hazen for 7 years and 4 years, respectively. **App. 6-8.**

e. The permanence, as a family unit, of the existing or proposed custodial home.

This factor should be given to Curtis because this factor looks beyond the parties and expands to extended family as well. In Curtis's case, his parent's live right next door. **Tr. 37-38, 139-40, 152, 154.** They are available at anytime to help. *Id.*

f. The moral fitness of the parents.

This factor is equal.

g. The mental and physical health of the parents.

This factor is equal.

h. The home, school, and community record of the child.

This factor is assigned correctly.

- I. **The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.**

The children are not of sufficient age to express a preference.

- j. **Evidence of domestic violence. In awarding custody or granting rights of visitation, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as a custodial parent. The court shall cite specific findings of fact to show that the custody or visitation arrangement best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary to protect the welfare of the child, custody may be awarded to a suitable third person, provided that the person would not allow access to a violent parent except as ordered by the court. If the court awards custody to a third person, the court shall give priority to the child's nearest suitable adult relative. The fact that the abused parent suffers from the effects of the abuse may not be grounds for denying that parent custody. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01. A court may consider, but is not bound by, a finding of domestic violence in another proceeding under chapter 14-07.1.**

This factor is not applicable. Neither side has alleged domestic violence.

- k. **The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.**

The custody investigator assigned this factor to no one. **App. 53.**

- l. The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02.**

This factor is also inapplicable.

- m. Any other factors considered by the court to be relevant to a particular child custody dispute.**

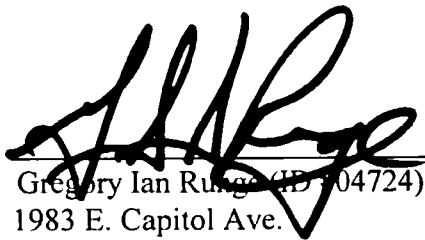
The custody investigator gave mention to several items that related to the parties, all of it relating to the interaction between them.

As it is should be, the district court correctly ruled that Curtis should be granted primary custody, care and control of the children. The district court correctly granted Sandra specified visitation, as it should be.

CONCLUSION

For the reasons stated above, Curtis requests this court to uphold the lower court's rulings that the premarital agreement was conscionable and enforceable and that granting Curtis primary custody, care and control of the children was in the best interests of the children.

Dated this 24th day of November, 2008


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Attorney for Mr. Curtis Sailer

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20060228
Burleigh County Civil No. 08-06-2214

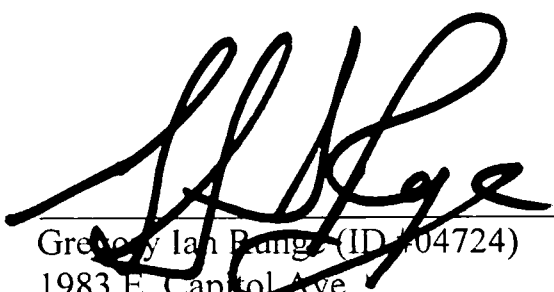
Curtis L. Sailer
Plaintiff/Appellee,

v.

Sandra K. Sailer,
Defendant/Appellant.

C E R T I F I C A T E O F S E R V I C E

I certify that I am the attorney representing the Plaintiff to this action. I made service of the **BRIEF FOR THE APPELLEE** by personally serving by this true copy to Mr. Kent Morrow, Attorney for the Defendant, 411 N. 4th St., Bismarck, North Dakota 58501 on this 24th day of November, 2008, in accordance with Rule 5(f) of the North Dakota Rules of Civil Procedure.



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