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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20160442
Morton County Case No. 30-2012-DM-00220

Tara Dawn Ritter, n/k/a Tara McDonald

Plaintiff/Appellee,

v.

Joshua Daniel Ritter

Defendant/Appellant,

and

State of North Dakota, Statutory Real Party in Interest.

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

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Cases

II. Statutes

III. Secondary Sources

STATEMENT OF THE CASE

[¶ 1] The inclusion of a Statement of the Case is to give the reviewing court "an unbiased, impartial, and factual overview and synopsis of the nature of the case and the proceedings below." See First State Bldg. & Loan Ass'n v. Arkansas Sav. & Loan Ass'n Bd., 549 S.W.2d 274, 276 (Ark. 1977). "It is not the place for argument." Id.

[¶ 2] In the Brief of Appellant, Joshua uses the impartial forum of the Statement of the Case to make unsubstantiated and contested factual claims (i.e., claiming that Tara did not respond to multiple requests regarding mediation to change the parties' parenting plan), and deliberately misstates the legal conclusions this Court set forth in its previous Opinion in this matter (intimating – and he would throughout his Brief of Appellant – that the Court made a final determination on the best interests of the children, rather than the Court's actual determination that Joshua had merely made a prima facie case which entitled him to an evidentiary hearing). See (Brief of Appellant ¶¶ 4, 6). Tara generally agrees with the adoption of the objectively true and uncontested facts set forth in Joshua's Statement of the Case, but explicitly rejects those which fail such classification.

STATEMENT OF THE FACTS

[¶ 3] Tara Ritter n/k/a Tara McDonald ("Tara") and Joshua Ritter ("Joshua") were involved in a long-term relationship which involved the birth of two children – H.R.R., born in 2005, and G.R.R., born in 2008 – and their marriage in 2007. (App. 50, 60). They were married in 2007, and over the next three years Tara was the primary caregiver for the children. (Tr. 369-370). Tara and Joshua separated in 2010 due to multiple affairs that Joshua, who was a pilot, had with flight attendants. (Tr. 373-74). Tara moved from their marital home and, with no protest by Joshua, both children went with her, and she continued to be their caregiver. (Tr. 373-74).

[¶ 4] After their separation, Joshua would occasionally ask to see the children for a day or two at a time, and Tara would accommodate, encouraging his relationship with the children. (Tr. 374). Tara and Joshua continued to have a relatively positive relationship which only truly became contested when Joshua opted to pursue the present litigation. See (Tr. 213).

[¶ 5] By Judgment of the South Central District Court on September 13, 2012 ("September 2012 Judgment"), Tara and Joshua were divorced by stipulated action. (App. 43). By and through the stipulated parenting plan incorporated into the divorce judgment, Tara was awarded primary residential responsibility of the children. (Id. at 50, 60). Tara and Joshua agreed that Joshua's parenting time "be determined by mutual agreement of the parties," but would generally consist of two successive days per week. (Id. at 60-61).

[¶ 6] Joshua has not always exercised the parenting time provided for in the September 2012 Judgment, and at times would go for weeks without seeing the children. (Tr. 377). Even after Joshua switched employers, which he has alleged gives him more time to spend with the children, he has had to cancel or change planned time he was to spend with or take care of the children. See (Tr. 386, 391-92, 411-12, 418-19). Tara would, however, also give Joshua extra time with the

children when possible and reasonable, and eventually both parties agreed to Joshua taking the children every third weekend to ease the children into spending more time with him. (Tr. 379-80; 394-397). Joshua acknowledged his relationship with the children has been allowed to flourish while Tara has been primary caregiver. (Tr. 237, 253, 258, 266, 277).

[¶ 7] It was uncontested during the hearing that, throughout the children's lives, Tara has been their primary caregiver; in fact, while Joshua objects to Tara's interactions with him, absolutely no allegation was made or evidence raised that she has ever been less than an exemplary mother. In addition to providing for the children's physical needs, she has continuously fostered their emotional, spiritual and educational development. (Tr. 476-86). The children live in a stable and healthy environment in which they are thriving. See (Tr. 489). Their home is also shared by Tara's husband of five (5) years, Andy McDonald, and the children's two half-sisters, all of whom have close relationships with the boys. (Tr. 436-37; 509-10).

[¶ 8] On February 20, 2015, Joshua filed a Motion to Modify Primary Residential Responsibility under N.D.C.C. § 14-09-06.6, citing his change of work schedule as a material change in circumstances. (App. 64). Tara responded by filing a Brief in Opposition, and argued Joshua had failed to establish a prima facie case justifying modification. (Id. at 76; Doc ID # 30-31). Joshua did not file a motion to modify parenting time should his Motion to Modify Primary Residential Responsibility be denied.

[¶ 9] The district court entered its Order Denying Motion to Modify Primary Residential Responsibility on May 14, 2015. (App. 141). The district court found Joshua had failed to establish a prima facie case and found a change in work schedule, without more, does not constitute a material change in circumstances. (Id. at 144-45). Joshua appealed, and on January 14, 2016 this Court reversed and remanded. (App. 151). The Court assumed Joshua's assertions regarding his

change in work schedule were true for the sake of establishing a prima facie case, and stated that, under the facts of this case, the asserted schedule change constituted a material change of circumstances for the purpose of establishing a prima facie case for modification. (App. 155-56). The Court also noted that, for the purpose of establishing a prima facie case, Joshua had set forth sufficient assertions that modification would be in the best interests of the children. (App. 156-57). However, this Court was careful to note that this was a prima facie determination, and was "not a final determination of any issue in the case, but merely allows the case to proceed to a full presentation of the evidence at a hearing with a full and final determination of the issues on the merits." (App. 157). In the end, the Court's opinion permitted Joshua the opportunity to present evidence to support modification of residential responsibility, but made no determination on the final merits of such an argument. (App. 156-57).

[¶ 10] After this Court questioned the absence of an alternative motion to modify parenting time during oral argument, Tara filed such a motion after the Court issued its opinion. (App. 160). The district court held a full evidentiary hearing on July 27-28 2016. (Id. at 616). In its Findings of Fact, Conclusions of Law and Order for Second Amended Judgment, the court noted the evidence confirmed Joshua's prima facie case that his change in schedule constituted a material change of circumstances, which then required application of the best interest factors under N.D.C.C.§ 14-09-06.2.[1] (Id. at 623). The Court found Joshua and Tara were equal on three factors, five factors did not apply, and five (5) factors favored Tara, and therefore primary residential responsibility would remain with Tara. (Id. at 624-31). The court did agree with Tara that a set parenting time schedule would be beneficial for the children, and approved a schedule that afforded Joshua pre-arranged parenting time of approximately 48 uninterrupted hours each week, as well

[1] As each factor will be explored in-depth infra, in the interest of judicial economy the district court's analysis of each individual factor will not be repeated here.

as a detailed schedule for holidays (Id. at 631-32). The schedule was based on proposed plans submitted by the parties. See (Id. at 477-493).[2]

[¶ 11] Shortly after the district court issued its Second Amended Judgment in this matter, Joshua filed a motion for clarification/modification, largely on issues concerning scheduling. (Id. 648-56). The court denied Joshua's motion, noting the Judgment included sufficient on scheduling, and the court does not provide "detailed instructions to attempt to regulate every aspect of the parenting times between the parties." (Id. at 681). The court also noted Joshua was asking for clarification on summer parenting time, when such a schedule had not been requested, nor the issue raised, prior to the Judgment. (Id. at 682).

LAW AND ANALYSIS

[¶ 12] The district court did not err in its analysis of the statutory best interest factors, and properly found that primary residential responsibility should remain with Tara. Further, the district court did not fail to follow an order of the Supreme Court, and thus did not violate the "mandate rule." Finally, the district court did not abuse its discretion by declining to provide Joshua's requested clarification/modification of its primary residential responsibility judgment.

I. THE DISTRICT COURT DID NOT ERR IN ITS ANALYSIS OF THE STATUTORY BEST INTEREST FACTORS

[¶ 13] The district court did not err in its analysis of the statutory best interest factors, and therefore did not err when it held that Tara maintain primary residential responsibility over the

[2] As Tara was not consulted regarding the composition of the Appendix filed with the Court by Joshua as contemplated by N.D.R.App.P. 30(b), and the Appendix so filed includes only Joshua's exhibits, Tara's proposed plan is not readily citable to the appendix. Given the already mammoth nature of the appendix, Tara has opted not to supplement it with even more documents. However, her exhibits – including her proposed parenting plan – are readily available in the record for the Court's review; upon request Tara would be pleased to file a separate appendix for the Court's convenience.

parties' minor children. An award of primary residential responsibility is a finding of fact which the Supreme Court will not disturb unless the decision by the district court was clearly erroneous. Mardsen v. Koop, 2010 ND 196, ¶ 8, 789 N.W.2d 531. A finding of fact is clearly erroneous "only if it is induced by an erroneous view of the law or, although there is some evidence to support it, on the entire record [if the Court is] left with a definite and firm conviction a mistake has been made." Id. In the context of primary residential responsibility matters, this Court has held:

> Under the clearly erroneous standard of review, we do not reweigh the evidence or reassess the credibility of the witnesses, and we will not retry a custody case or substitute our judgment for a district court's initial custody decision merely because we might have reached a different result. This is particularly relevant for custody decisions involving two fit parents.

Heinle v. Heinle, 2010 ND 5, ¶6, 777 N.W.2d 590 (emphasis added).

[¶ 14] The present matter involved a decision regarding the modification of primary residential responsibility which may only be granted if (a) there has been a material change in the circumstances of the child or the parties, and (b) the modification is necessary to serve the best interests of the children. N.D.C.C. § 14-09-06.6. When contemplating a modification matter, the court utilizes the best interest factors enumerated in N.D.C.C. § 14-09-06.2:

> a. The love, affection, and other emotional ties existing between the parents and child and the ability of each parent to provide the child with nurture, love, affection, and guidance.
> b. The ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment.
> c. The child's developmental needs and the ability of each parent to meet those needs, both in the present and in the future.
> d. The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community.

> e. The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.
> f. The moral fitness of the parents, as that fitness impacts the child.
> g. The mental and physical health of the parents, as that health impacts the child.
> h. The home, school, and community records of the child and the potential effect of any change.
> i. The preference of a mature child.
> j. Evidence of 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.
> 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 N.D.C.C. § 50-25.1-02.
> m. Any other factors considered by the court to be relevant to a particular parental rights and responsibilities dispute.

As long as the court considers all the factors, and provides the factual basis for its holding on primary residential responsibility, the court has "substantial discretion" and its holding will not be disturbed on appeal. Miller v. Mees, 2011 ND 166, ¶ 12, 802 N.W.2d 153.

[¶ 15] However, when the residential responsibility decision under review by the Court is a proceeding to modify primary residential responsibility, as it is here, the district court must analyze the best interest factors in light of two considerations not required in an original primarily residential responsibility decision:

> First, the best interests of the child factors must be gauged against the backdrop of the stability of the child's relationship with the

> custodial parent, because that stability is the primary concern in a change of custody proceeding. Second, after balancing the child's best interests and stability with the custodial parent, the trial court must conclude that a change in the status quo is required. A child is presumed to be better off with the custodial parent, and close calls should be resolved in favor of continuing custody. A change should only be made when the reasons for transferring custody substantially outweigh the child's stability with the custodial parent.

Vinning v. Renton, 2012 ND 86, ¶ 17, 816 N.W.2d 63 (emphasis added).

[¶ 16] Modification of a current primary residential responsibility decision should only be made when the reasons for transferring custody substantially outweigh the child's stability with the custodial parent. Myers v. Myers, 1999 ND 194, ¶ 10, 601 N.W.2d 264. Further, a modification of primary residential responsibility must be "compelled" or "required" by the change in circumstances in order to ensure the stability of the children, and to prevent the children from being "bounced back and forth between parents as the scales settle slightly toward first one parent and then the other." State v. Neustel, 2010 ND 216, ¶ 12, 790 N.W.2d 476.

[¶ 17] At the heart of his appeal, Joshua is asking the Court to reweigh all of the evidence, best interest factor by best interest factor, and reverse nearly all of the court's findings – including every finding that weighed in Tara's favor - until the factors have contorted themselves to achieve the ends he seeks – a request that is barred by the clearly erroneous standard. See (Brief of Appellant at ¶ 19). That a court would be so manifestly wrong strains credulity, and such request is blatantly antithetical to the notion that courts possess substantive discretion in making residential responsibility decisions.

[¶ 18] Moreover, Joshua neglected to contemplate the best interest factors under the necessary prism for modification matters: each factor must be viewed against the children's stability with Tara. Vinning, 2012 ND 86, ¶ 17, 816 N.W.2d 63. It is not enough that Joshua may argue he can provide an environment comparable to that afforded by Tara; his burden requires him

to prove that a disruption to the lives of his children is necessary for their well-being. Neustel, 2010 ND 216, ¶ 12, 790 N.W.2d 476; Myers, 1999 ND 194, ¶ 10, 601 N.W.2d 264. As will be clear upon analysis, Joshua fails to carry this burden.

A. The Love, Affection, and Other Emotional Ties Existing Between the Parents and Children and the Ability of Each Parent to Provide the Children with Nurture, Love, Affection, and Guidance.

[¶ 19] The district court found that while both parties have love, affection and emotional ties to and for the children, Tara has always been the more-involved parent who has provided the children with a stable and loving home throughout their entire lives. (App. 624). The evidence adduced at trial bore out that Tara's relationship with the children is closer than that between Joshua and the children, and the district court correctly noted that Tara has a proven track record of providing the children with nurturing and guidance, while Joshua's ability to do so is unknown, largely because he has focused his time with the children on more "fun" activities rather than the "not-so-fun duties of a parent." (Id. at 619, 621, 624).

[¶ 20] Joshua himself does not contest Tara's history of being the caregiver for the children, acknowledging that Tara has been the more involved parent. (Brief of Appellant at ¶ 20). He does argue he is willing to take on a larger role, and – as he is wont – blames Tara for not taking on more responsibilities in his relationship with his children, accusing her of "thwart[ing]" his efforts and accosting the court for "rewarding" Tara for "not including [him]." (Id.)

[¶ 21] That Tara has been the primary caregiver for the children's entire lives is essential to the best interest analysis in modification matters. As the Vinning Court, noted, all best interest factors must be gauged against "the backdrop of stability" in a modification matter, and the children are presumed to be better off with their current custodial parent, with close calls favoring

continuing the current status, unless there are substantial factors that dwarf the interruption to the children's lives. See 2012 ND 86, ¶ 17, 816 N.W.2d 63.

[¶ 22] In Blotske v. Leidholm, the Court contemplated a modification request where the mother had physical custody of the parties' child and had been providing the child with love, affection, food, clothing, medical care and other needs for years. 487 N.W.2d 607, 611 (N.D. 1992). The Court noted that, even where evidence indicated the non-custodial parent may exceed the custodial parent in their love and affection for the child, in a modification proceeding where the child is not lacking in love, affection and guidance with the custodial parent, the strong interest in maintaining the stability of the child weighted so heavily toward the custodial parent that weighing the factor toward the non-custodial parent would be a reversible error and leave the Court with a "definite and firm conviction that the trial court made a mistake." Id.

[¶ 23] Therefore, even though Joshua may have every interest in providing the children with love and guidance, Tara's history providing the children with daily love and nurture carries immeasurably more weight, and cannot be disrupted absent substantial factors that simply do not exist in this matter. Joshua has argued he could have provided even more love and affection if his relationship with Tara was better, and the district court did acknowledge hostility between Joshua and Tara; however, the court did not give much weight to Joshua's argument that all fault for the hostility lay with Tara, as the facts clearly showed the hostility manifested from both parties, and both should work toward a better relationship for the benefit of the children. (App. 621). This is supported by Tara's testimony, which the court gave appropriate weight to, that she believed Joshua to be a good parent and that she "does and continues to want to facilitate the boys' relationship with" their father. (App. 621).

[¶ 24] Moreover, the evidence shows Joshua bears responsibility for not having a more regular role in the children's lives. Joshua did not always take advantage of opportunities to spend time with the children, and Joshua has spent years resisting the responsibilities inherent in the day-to-day reality of parenting, choosing instead to focus squarely on the more "fun" aspects of parenthood. (App. 619, 621).

[¶ 25] The facts clearly support the court's finding that factor (a) weighs in favor of Tara.

B. The Ability of Each Parent to Assure the Children Receive Adequate Food, Clothing, Shelter, Medical Care, and a Safe Environment.

[¶ 26] The district court found that while both parties have the ability to assure the children receive food, clothing, medical care, shelter and a safe environment, "Tara has historically been the parent" which has provided for the children. While Joshua opted for "fun" activities with the children rather than day-to-day parental duties, Tara had grasped this responsibility. (App. 625). As noted supra, Tara's role in historically accepting this role is extremely important when weighing the best interest factors in a modification matter, and inherently weights factor (b) in her favor. See Vinning, 2012 ND 86, ¶ 17, 816 N.W.2d 63; Blotske, 487 N.W.2d at 611.

[¶ 27] Joshua again points a ragged, accusatory finger at Tara, insinuating he would be her equal in providing such daily care if she had not "precluded Josh from being involved." (Brief of Appellant at ¶ 24). As argued supra, the district court considered Joshua's arguments that Tara stymied his parenting responsibilities and did not assign much weight to such contentions, particularly as raised by Joshua to excuse the fact that Tara was indisputably the more-involved parent. While the court noted both parents needed to communicate better, it considered Joshua's absence in the children's daily lives and put more weight in the evidence that Joshua had

voluntarily acquiesced to Tara becoming the primary caregiver without raising any issue with the arrangement for years.

[¶ 28] Joshua's lack of involvement – and his penchant for covering up for this shortcoming by making factual assertions not based in actual fact – is borne out by his continued assertion that one of his children has asthma, (Brief of Appellant at ¶ 12), even though he testified he did not actually know it to be true, and the only firm evidence on the question at trial was that the child did not have asthma. (Tr. 250, 480). While no one would fault a parent who states they want to provide for their children, the path to prove that desire lies in action, and not in blindly guessing as to a child's medical conditions, which only supports the finding that Joshua is not the parent most attuned to providing for the child's needs.

[¶ 29] The district court did not err in finding factor (b) favors Tara.

C. The Children's Developmental Needs and the Ability of Each Parent to Meet Those Needs, Both in the Present and in the Future.

[¶ 30] The court found that factor (c) favored Tara, again noting that Tara has zealously assumed the primary caregiver role for the children's lives thus far, the need for stability as it pertained to their development needs was particularly important, and such need heavily favored the children remaining in their current environment with Tara.

[¶ 31] The court also specifically noted Tara's undisputed testimony that one of the children – G.R.R. – is sensitive, particularly thrives on routine, and has a hard time adjusting when routine is disrupted. (Tr. 638). While Joshua attempts to downplay the effect such a condition can have on a developing child, evidence of G.R.R.'s sensitivity and problems breaking with routine was not actually disputed by Joshua, and serves to buttress the overarching consideration relevant to each

factor in a modification matter: the deference to stability and maintaining the children's current, healthy environment. Vinning, 2012 ND 86, ¶ 17, 816 N.W.2d 63.

[¶ 32] The court did not err in finding that factor (c) weighs in Tara's favor.

D. The Sufficiency and Stability of Each Parent's Home Environment, the Impact of Extended Family, the Length of Time the Children Have Lived in Each Parent's Home, and the Desirability of Maintaining Continuity in the Children's Home and Community.

[¶ 33] The requirement that stability be measured against each best interest factor in a modification matter is perhaps most transparently relevant with best interest factor (d), which specifically contemplates the stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity. It is easy to see how the court weighed this in favor of Tara, the primary caregiver for the children throughout their lives with whom the children have always lived.

[¶ 34] Joshua claims this factor should favor he and Tara equally, asserting he has lived in his current home roughly the same amount of time as Tara has resided in her current home, ignoring that the most important factor is where – and with whom – the children have lived. Joshua also argues Tara has "only" been remarried for four (4) years – apparently insinuating the children's daily experiences with their stepfather Andy and two half-sisters cannot become meaningful until more time has passed than a Presidential term in office – and that Tara's extended family lives a bit farther away than Joshua's extended family.

[¶ 35] Joshua all but ignores the role of stability in modification matters throughout his entire Brief, and certainly hides from its applicability in factor (d), where maintaining stability is literally imprinted within the language of the factor. That Tara has been the children's primary caregiver through their lives alone weighs factor (d) in her favor; however, their stability with Tara

was supported by the undisputed evidence of their close relationship with Andy and their half-sisters, and that they have thrived "academically and socially" in this environment. (Tr. 436-37; 509-10; App. 626). As the court found, Andy's family – including his parents and siblings – live in the same city as the children, consider the children to be part of their own family and are constantly involved with the children, including attending their activities. (App. 626). Meanwhile, while Joshua has a home in Bismarck, and has extended family in North Dakota and neighboring states, his history of being less available for the children "and Tara being the primary residential custodian," has unequivocally led to "Tara…provid[ing] the stability for the children to thrive." Id.

[¶ 36] The court did not err in finding factor (d) favors Tara.

E. The Willingness and Ability of Each Parent to Facilitate and Encourage a Close and Continuing Relationship Between the Other Parent and the Children.

[¶ 37] The court found that factor (e) favored both parents equally. While Joshua has exerted nearly his entire legal energy in painting Tara as a vindictive person, and again here shirks any personal responsibility by blaming Tara for every crack and seam in their relationship, the court found, based on exhaustive evidence provided by both parties at trial, that both parents bear responsibility for not having an ideal relationship. Even so, the court found that regardless of such issues, they have worked together to ensure the children were being raised well and parenting time was accomplished. (App. 627-28).

[¶ 38] Joshua asserts that Tara "unreasonably limits Josh's parenting time to exactly 48 hours" per week, conveniently ignoring that this schedule was both what he had agreed to and in keeping with the current parenting plan effective between the parties. (Tr. 374; App. 60-61). Moreover, he ignores the undisputed testimony that Tara indeed worked to give Joshua additional

time with the children when reasonable and possible, and that – prior to his initiation of litigation - Tara had readily agreed to Joshua having adding additional parenting time, beginning with every third weekend, to ease the children into spending more time with their father. (Tr. 379-80; 394-397).

[¶ 39] As the court found that both parents bear responsibility for problems in their relationship, but that they nevertheless worked to ensure "cooperat[ion] in sharing the boys and raising the boys even though apart" and thus "the isolated incidences do not outweigh the body of work over the years," the court did not err in finding that factor (e) favored both parties equally. (App. 628).

F. The Moral Fitness of the Parents, as that Fitness Impacts the Children.

[¶ 40] The court found factor (f) favored neither party, as there was no information that any moral issues of the parents were "directly applicable to harming the children." (App. 628). Nevertheless, Joshua was compelled to argue that Tara's relationship with her current husband "led to the breakup of her marriage with Josh," and insinuates that her having another child with Andy was morally suspect. (Brief of Appellant at ¶ 15). Joshua also argues there was no evidence of his own moral unfitness, even though evidence was provided at trial that he had several affairs while married to Tara, and that these affairs were the primary force behind the dissolution of their marriage. (Tr. 373-74).

[¶ 41] Joshua's contentions are an intentional befuddling of the facts presented at trial. While he characterizes Tara has having had an "affair" with her future husband, and while their relationship did begin before her divorce with Joshua, Tara and Josh had separated in 2010 – over two years before they eventually obtained a divorce. (Tr. 368). His insinuation that Tara's

relationship with Andy began before Tara and Joshua separated is, at best, conjecture not supported by actual evidence. Moreover, while Joshua currently cries moral foul over Tara and Andy's relationship and her subsequent pregnancy, he was fully informed of the relationship and her pregnancy when he initially agreed to her having primary residential responsibility, both at the time of separation and again in the stipulated divorce agreement. (Tr. 576). Either Joshua agreed to primary residential responsibility for his children with a woman he thought was morally compromised, or he has only now found these matters morally dubious when it benefits him legally.

[¶ 42] Moreover, regardless of Joshua's attempts at passing moral judgment and his skewing of facts to serve his argument, the court found there was no evidence that any actions of the parties had an impact on the children. In Klein v. Larson, this Court reviewed evidence offered against each parent to speak to their respective morality, including association with people who use methamphetamine, a "collection" of criminal and traffic matters, and that the father's very act of having sex with the mother when their child was conceived was a crime due to her status as a minor. 2006 ND 236, ¶ 15, 724 N.W.2d 565. Nevertheless, the Court noted that the issue was not whether their "conduct constitut[ed] crimes of moral turpitude, but whether [their] moral character might be detrimental to the best interests of the child." Id. at ¶ 16.

[¶ 43] Joshua cites to Marsden v. Kopp, 2010 ND 196, 789 N.W.2d 531, for the contention that Tara's relationship with Andy prior to her divorce with Joshua requires a finding that factor (f) weighs in Joshua's favor. However, as Joshua himself notes, the district court in Marsden made a specific finding that extramarital behavior had negatively impacted the lives of the children due to the specific circumstances in that case. (Brief of Appellant at ¶ 34) (citing Marsden, 2010 ND 196, ¶ 36, 789 N.W.2d 531). The present case is distinguishable, as – even if Joshua's perversions

of the facts are taken as true – there was no finding (and, indeed, no evidence presented) that the cited behavior had a negative impact on the children. In fact, Joshua testified that he is supportive of the boys' relationship with Andy. (TR 176: 2-4). Therefore, Joshua's reliance on Marsden is both misplaced and unpersuasive.

[¶ 44] For all of his allegations and accusations, Joshua did not even attempt to prove or argue that the behavior he complained of had a detrimental impact on the children. As impact is a clear requirement for factor (f) to favor one party over the other, the court did not err in finding factor (f) favored neither.

H. The Home, School, and Community Records of the Children and the Potential Effect of Any Change.

[¶ 45] The court noted that both Tara and Josh are involved with the children, their educational well-being and extracurricular activities. (App. 628-29). Nevertheless, the court noted that the children's current neighborhood was safe, filled with friends and opportunities for positive childhood development, and that the "stable home as provided by Tara" led to the children having "happy, active…good lives." Id. Thus, the court found that factor (h) weighed in Tara's favor.

[¶ 46] Joshua focuses his entire argument on factor (h) on the court's finding that Joshua did not know what elementary school his home was districted for, and therefore what school the children would attend if his home became their legal residence, claiming he had not expressed an intent to change their school at trial. See (App. 629). First, this contention is misleading, as his proposed parenting plan stated their school would be chosen in the future and based on the options available. (App. 481). More importantly, while the potential school change is the sole focus of Joshua's argument that the court erred on factor (h), it was far from the only factor in the court's determination that factor (h) weighed in Tara's favor. As with every other best interest factor, the

home, school and community records of the children are weighed against the stability of the children's current home and caregiver in a modification matter. Vinning, 2012 ND 86, ¶ 17, 816 N.W.2d 63. The court specifically found the children live in a stable, nourishing environment at home and community, and that Tara's raising of the children in this environment has allowed them to thrive and excel in school. Maintaining this stability is paramount, and the court's findings clearly support weighing factor (h) in Tara's favor.

J. and K. Evidence of Domestic Violence and the Interaction and Interrelationship – or Potential Therefore – of the Children With any Person Who May Affect the Children's Best Interests.

[¶ 47] The court found that factor (j) did not apply, as there was no evidence of domestic violence. (App. 630). Further, the court noted there was no evidence that either party associate with persons who pose any danger to the children, and therefore neither Tara nor Joshua was disfavored by factor (k). Id.

[¶ 48] Joshua claims, without reference to any legal authority or attempt at logically explaining his position, that the absence of evidence regarding domestic violence or harm to the children should somehow weigh in his favor. In fact, based on the presumption in favor of stability and a child remaining with their current primary residential caregiver, if the absence of domestic violence or threat to the children favored any party it would be the custodial parent (i.e., Tara). The presumption in favor of the parent currently possessing primary residential responsibility is only overcome when circumstances exist which substantially outweigh a child's stability with the custodial parent. Vinning, 2012 ND 86, ¶ 17, 816 N.W.2d 63. If domestic violence or a threat to the children did exist in a custodial parent's home, it could outweigh that stability. But, as is the

case here when no such factor exists, it supports the finding that no substantial reason exists to deviate from the presumption in favor of the child remaining in their current, stable environment.

[¶ 49] While an argument could therefore be made that the lack of circumstances contemplated in (j) and/or (k) favored Tara, they most certainly did not favor Joshua. Therefore, for the purposes of his appeal, the district court did not err when it found factors (j) and (k) favored neither party.

L. False Allegations, Not Made in Good Faith, By One Parent Against the Other, of Harm to the Children as Defined in N.D.C.C. § 50-25.1-02.

[¶ 50] The court found that there was no testimony or evidence presented that either Tara or Joshua had made false allegations that the other had harmed the children, and therefore factor (l) favored neither party. (App. 631). Regardless of the clear and unambiguous wording of the factor, Joshua argues factor (l) should weigh in his favor, claiming that Tara is "mean" to him by making comments about Joshua around the children, and that this has caused them harm (Brief of Appellant at ¶ 37).

[¶ 51] First, Joshua's position on appeal is curious, as the findings Joshua proposed to the district court on this factor are actually consistent with the court's holding, finding there was no evidence of actions contemplated by factor (l) and therefore the favor favored neither party. (App. 584). Further, there was absolutely no evidence presented at trial – nor cited by Joshua in his Brief of Appellant – of actual "mean" statements made by Tara about Joshua which were witnessed by the children, let alone which caused the children harm.

[¶ 52] Most importantly, however, Joshua completely misreads factor (l); the factor does not look at whether the presence of allegations has caused harm to children, but whether there have been false allegations by one parent accusing the other of harming the children. See Doll v. Doll,

2011 ND 24, ¶ 23, 794 N.W.2d 425. More specifically, by reference to N.D.C.C. § 5-25.1-02, factor (l) requires a false accusation of child abuse or neglect. The court was correct in finding that no evidence was presented that any such allegations had been made, and therefore correctly found factor (l) favored neither party.

M. Any Other Factors Considered By the Court to be Relevant to a Particular Parental Rights and Responsibilities Dispute.

[¶ 53] In contemplating factor (m), the court noted it did "not find any other factors pertinent." (App. 631). Joshua contends that if he is awarded more time with the children his relationship with Tara will improve and the children will think of him more fondly, and that the district court should have considered those outcomes. (Brief of Appellant at ¶ 38).

[¶ 54] Joshua's claims regarding the effect a judgment in his favor could have lacks any evidentiary basis in the record, nor were they provided to the district court as arguments in favor of modification. Instead, these claims appear to be founded solely on rampant speculation for the specific purpose of buttressing his arguments on appeal. Given the sudden appearance of contentions with no support in the evidentiary record, it is not surprising that the district court would not reach into the depths of its imagination and pull out Joshua's random musings as factors to consider in its best interest analysis. The court did not err by failing to consider these "factors."

[¶ 55] On appeal from a decision denying a parent's motion to modify primary residential responsibility, the complaining party bears the burden of proving a finding of fact is clearly erroneous. Frueh v. Frueh, 2009 ND 155, ¶ 16, 771 N.W.2d 593. As Joshua has failed to carry this significant burden on any of the best interest factors he claims were improperly weighed, and as the findings of the district court are both sound and clear, Joshua's invitation to re-weigh the

evidence must be denied, and the court's decision to award Tara with primary residential responsibility of the parties' minor children must be upheld.

II. THE DISTRICT COURT DID NOT VIOLATE THE "MANDATE RULE"

[¶ 56] Joshua tries to divert the Court's attention to its previous opinion in this matter by arguing the district court failed to follow the "mandate rule." (Brief of Appellant at ¶ 42). Joshua's argument is so fallacious as to warrant swift and complete disregard. Further, given how outlandish Joshua's contention is, such argument can only be characterized as frivolous and worthy of an award of attorney's fees under N.D.R.App.P. 38.

[¶ 57] The "mandate rule" requires the trial court follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the appellate court's mandate into effect according to its terms. Inv'rs Title Ins. Co. v. Herzig, 2013 ND 13, ¶ 10, 826 N.W.2d 310. In its first opinion in this matter, this Court held that Joshua had established a prima facie case for modification of primary residential responsibility because his change of job was a material change of circumstances and "evidence exist[ed]" that shared parenting would be in the best interests of the children. (App. 157). However, the Court quickly noted that the finding of a prima facie case was "not a final determination of any issue in the case, but merely allows the case to proceed to a full presentation of the evidence at a hearing with a full and final determination of the issues on the merits." Id. (quoting Kartes v. Kartes, 2013 ND 106, ¶ 12, 831 N.W.2d 731). This holding is based on the clear legal authority governing modification of primary residential responsibility, in which the party moving for modification must first prove a prima facie case by setting forth factors which – if true – would support a modification, before advancing to an

evidentiary hearing where she or he must actually prove the facts upon which they claim modification may be based. N.D.C.C. § 14-09-06.6(4)

[¶ 58] The only "mandate" which this Court set forth as a result of Joshua's first appeal was that Joshua be given a "hearing and opportunity to present evidence to support modification of residential responsibility." Id. The district court followed that mandate, as Joshua had his opportunity to make his case for modification over a two-day hearing in this matter. The Court's reference that "evidence existed" regarding best interests was solely in relation to the support for a prima facie case, not to insinuate that Joshua could skip over his evidentiary burden and the requirements of N.D.C.C. § 14-09-06.6(4) putting to proof the contentions thus far only alleged to form that prima facie case. See Solwey v. Solwey, 2016 ND 246, ¶ 11, 888 N.W.2d 756 ("A prima facie case is a bare minimum and requires facts which, if proved at an evidentiary hearing, would support a change of custody.").

[¶ 59] The suggestion that a court finding best interests exist for prima facie purposes immediately equates to a final finding of best interests for modification would ignore the statutory requirements governing modification of primary residential responsibility, and also make the very concept of having the evidentiary hearing "mandated" by this Court irrelevant and redundant. Frankly, given the obvious misapplication of the law, and that Joshua must have clearly known he was not making a good faith "mandate rule" argument – particularly since, during the first appeal, Joshua's primary argument to the Court was how low the burden was to make a prima facie case given the latter, more strict requirements at the evidentiary hearing - makes Joshua's entire argument regarding the "mandate rule" disingenuous and frivolous.

[¶ 60] Joshua's argument that Court had intended to "mandate" that the district court apply a finding of best interests for a prima facie case to a final best interests determination is patently

without support in law. The district court did not violate the "mandate rule," and the Court should disregard Joshua's arguments to the contrary. In addition, the Court should consider awarding damages under N.D.R.App.P. 38.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING JOSHUA'S POST-JUDGMENT REQUEST FOR CLARIFICATION/MODIFICATION

[¶ 61] Joshua's final argument is that the district court abused its discretion by denying his motion to clarify its findings. While Joshua calls his request a "Motion for Clarification" in his brief to this Court, (Appellant Brief at ¶46-47, 50-52, 55), his actual motion was entitled a "Motion for Clarification and/or Modification," which accurately and actually describes his intent to have the court's judgment changed – even if to add previous language not previously contemplated. Regardless, by that motion, dated September 16, 2016, Joshua asked the court to either clarify or modify its judgment based on several contentions: (1) that Tara permitted the children to attend a one-week summer camp, (2) whether Tara should have to check with Joshua each time the children would attend day care to first see if Joshua was available first, (3) whether Joshua should be notified of every doctor appointment scheduled for the children so he may attend if he chooses, and (4) whether Joshua's mother may provide transportation for the children during his parenting time if he is unavailable. (App. 648-655).

[¶ 62] The court issued its order on Joshua's motion on October 19, 2016, noting that the purpose of the underlying trial was to make a decision regarding modification of primary residential responsibility and to set a schedule for parenting time. (App. 681). The court noted Joshua now sought "detailed instructions to attempt to regulate every aspect of the parenting time between the parties," and the issues raised by Joshua were covered under the common parenting

language currently in the file. Id. The court also noted that it had not been requested to set a separate summer schedule in addition to the regular parenting and vacation time requested by the parties. (App. 682).

[¶ 63] Motions for clarification are proper when they are used to clear up genuine ambiguities in the language of a court order or judgment. Neubauer v. Neubauer, 524 N.W.2d 593, 595 (N.D. 1994). However, such motions are not appropriate when they are simply to clear up meaningless ambiguities "of no material importance other than the basis for a dispute between contentious parties." Id. Further, a request for clarification must "truly be [one for] a clarification of the original judgment and not merely a…vehicle for amending or changing [the] original decree." Kostelecky v. Kostelecky, 537 N.W.2d 551, 552–53 (N.D. 1995). A clarification must be sought "only to express accurately the thoughts which the original judgment intended to convey." Id.

[¶ 64] The "clarification" Joshua sought would not actually serve to clear up any ambiguity, but rather add language beneficial to Joshua not contemplated for inclusion before the judgment was rendered. Further, as the district court noted, the Judgment contains a parenting plan – based on language submitted by both Tara and Josh – of sufficient detail to govern parenting time of the parties' children. A court need not set forth details governing every minute detail that could occur between two parents when raising children. See Thornton v. Klose, 2010 ND 141, ¶ 19, 785 N.W.2d 891 (district court did not err by simply awarding 50-50 parenting time and leaving it to parents to sort out details when judgment established an enforceable custody arrangement). Moreover, if Joshua feels the Judgment was violated in any way, his proper recourse is through an Order to Show Cause, and not to run to the district court for continuous clarification.

[¶ 65] The district court had discretion over whether clarification was required, and rightly determined it was not. Therefore, the court did not err in denying Joshua's motion. While Joshua does not actually ask for specific relief from this Court regarding this alleged point of error, the Court should deny Joshua any relief permitting unnecessary changes to the parenting plan and delaying finality not only for the parties and the children alike.

CONCLUSION

[¶ 66] Appellee Tara Ritter a/k/a Tara McDonald respectfully requests the Court uphold the district court's Order Denying Josh's Motion to Modify Primary Residential Responsibility. It is in the best interests of the children for Tara to have primary residential responsibility over the children, and the district court did not violate the "mandate rule" in making its ruling in this matter. Finally, the district court did not err when it denied Joshua's request for "clarification/modification."

Dated this 16 day of June, 2017.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface, and the total number of words in the above brief - excluding words in the table of contents, table of authorities, certificate of service and this certificate of compliance - totals 7,958.

Dated this 16 day of June, 2017.

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SUPPLEMENTAL CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

Supreme Court No. 20160442
Morton County Case No. 30-2012-DM-00220

Tara Dawn Ritter, n/k/a Tara McDonald

Plaintiff and Appellee,

v.

Joshua Daniel Ritter

Defendant and Appellant.

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

The undersigned, being first duly sworn, deposes and says that a true and correct copy of the

BRIEF OF APPELLEE

was, on June 16, 2017, served by electronic mail to the following:

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To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be so served. The above documents were emailed in accordance with the provisions of the North Dakota Rules of Appellate Procedure.

/s/ Elizabeth Elsberry
Elizabeth Elsberry