20180080

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT,
STATE OF NORTH DAKOTA

Trevor Rustad,	)	
	)	
Plaintiff/Appellant,	)	**Supreme Court No. 220180080**
	)	
vs.	)	
	)	**Stark County District Court**
Mary Baumgartner,	)	**Civil No. 45-2017-DM-00103**
	)	
Defendant/Appellee.	)	

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

BRIEF OF APPELLANT

/s/ Joshua Nyberg
August 3, 2018
Date

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[¶12]STATEMENT OF THE CASE

[¶13]This is an appeal from the Stark County District Court from the Order entered on December 1, 2017 (App. 252), and the Judgment entered on December 29, 2017. (App. 309).

[¶14]The Appellant ("Trevor") filed a Summons and Complaint on April 14, 2017, seeking to establish parental rights and responsibilities for the minor child, namely L.B.R., born 2015, and the then unborn child, L.J.B., born 2017. (App. 5,8). This matter was originally venued in Cass County, and the parties entered into a Stipulation to Change Venue to Stark County on April 19, 2017 (App. 9). An Order for Change of Venue to Stark County was entered on April 20, 2017. (App. 10). The Appellee ("Mary") filed her Answer and Counterclaim on May 5, 2017. (App. 11).

[¶15]Mary filed a Motion for Discovery Sanctions (App. 14), a Motion for Expedited Ruling on Defendant's Motion for Discovery Sanctions (App. 18), and a Motion to Shorten Time to Respond to Motion for Discovery Sanctions and Motion for Expedited Ruling (App. 16) on October 9, 2017. An Order Denying Motion to Shorten Time (App. 20), as well as and Order Denying Motion for Expedited Ruling (App. 21) were entered on October 10, 2017.

[¶16]Mary filed her Pretrial Brief on October 10, 2017. (App. 22). Trevor filed his Pretrial Brief on October 11, 2017. (App. 39). Mary filed an Objection to Trevor's Pretrial Brief on October 13, 2017. (App. 48). Trevor filed a Response to Mary's Objection on October 13, 2017. (App. 50). Trevor filed a Motion for Telephonic Testimony to allow Sammy King to testify on October 16, 2017. (App. 52). A Pretrial Conference was held on

October 17, 2017 (App. 3), wherein the District Court denied Trevor's Motion for Telephonic Testimony. (PC Tr. 8:25;9:1).

[¶17]A bench trial was held on October 23, 2017. (App. 3). Mary filed her Post-Trial Brief (App. 216), and Trevor filed his Closing Argument (App. 241) on November 13, 2017. The court's Order was entered on December 1, 2017. (App. 252). Findings of Fact, Conclusions of Law, and Order for Judgment were entered on December 29, 2017. (App. 291). Judgment was entered on December 29, 2017. (App. 309). Notice of Entry of Judgment was entered on January 2, 2018. (App. 315). Trevor filed his Notice of Appeal on March 7, 2018. (App. 316).

[¶18]STATEMENT OF FACTS

[¶19]The parties in the current action were never married. (App. 253). The parties met online in March 2014. (Tr. 36:24). The parties moved in together; in Dickinson, North Dakota; in July 2014. (Tr. 36:25;37:1). Trevor is a journeyman electrician, and he has been employed by Industrial Electric for seven (7) years. (Tr. 49:4-22). Mary has been unemployed since approximately May 2015. (Tr. 50:20). The parties' first child, L.B.R., was born in 2015. (App. 116:18).

[¶20]Trevor is an attentive and caring father. (Tr. 9:20-25;10:1). Trevor has a strong bond with the children, but a bond that is limited by Mary's alienation. (Tr. 21:17-25). Mary is very controlling. (Tr. 15:20-23;23:10-18;33:21-25;38:2-21), and has an aggressive parenting style. (Tr. 98:17-19). Mary rarely allowed Trevor to care for L.B.R. without she herself being present. (Tr. 46:15-25;47:1-5). Trevor was not allowed to do anything with L.B.R. without Mary's permission. (Tr. 27:7-9).

[¶21]Mary is intimidating, and Mary does not react well when someone disagrees with her. (Tr. 33:5-15). Trevor and his family operate under the fear that Mary will take away time with the children if they do not follow Mary's many rules. (Tr. 23:19-25;24:1). Trevor went along with Mary's controlling behavior so he could continue having a relationship with L.B.R., as well as in hopes that Mary would not move. (Tr. 38:25;39:1-12).

[¶22]The parties ended their romantic relationship in September 2016, but continued to reside together. (Tr. 123:6-7). The parties, despite the end of their relationship, did engage in further sexual contact and in approximately November 2016, Mary revealed to Trevor that she was once again pregnant. (Tr. 123:25;126:1). Mary made the unilateral decision to move to Glasgow, Montana in January 2017. (Tr. 82:18-20). Trevor did not agree to Mary's move, rather he acquiesced as he felt he had no other choice. (Tr. 51:20-25;52:1-2).

[¶23]During her second pregnancy, Mary rarely, if ever, notified Trevor of her pregnancy related doctor's appointments, even when said appointments occurred in Dickinson. (Tr. 53:2-18). At the end of her second pregnancy, Mary was restricted to bed rest. (Tr. 59:15-17). Trevor offered to care for L.B.R. while Mary was on bed rest, but Mary refused, choosing to have her mother care for L.B.R. rather than Trevor. (Tr. 59:18-25). The parties second child, L.J.B., was born in July 2017. Trevor was not allowed to have any input with respect to the L.J.B.'s name, and the child was not given Trevor's surname. (Tr. 107:12-16).

[¶24]Mary did not discuss a parenting time schedule with Trevor before she moved to Montana. (Tr. 126:15-17). Trevor has had no overnight parenting time since Mary

moved to Montana. (Tr. 54:16-18). Trevor has repeatedly asked for overnight parenting time, but Mary has refused each and every request. (Tr. 58:20-24). Mary controls all of Trevor's interactions with the minor children. (Tr. 32:12-15). Trevor talks to the children via FaceTime virtually every day, but given the children's ages this is type of interaction offers little opportunity for Trevor to bond with the children. (Tr. 62:14-25:63:1-7). Mary testified that she would not be satisfied with have the same limited interaction with the children as she allows Trevor, yet Mary sees no problem in limiting Trevor's interaction with the children. (Tr. 151:16-25;152:1-4).

[¶25]One of Mary's arguments for limiting Trevor's parenting time is that Mary is still breastfeeding L.B.R. (Tr. 43:17-19). Mary testified that breastfeeding L.B.R. is just for comfort. (Tr. 164:7-8). Trevor has repeatedly attempted to discuss weaning L.B.R., but Mary refuses. (Tr. 43:22-25). Mary lives in a two-bedroom house in Glasgow, owned by her grandmother, wherein in both children sleep with Mary. (Tr. 25:14-20). Trevor owns his own home in Dickinson where both children have their own rooms, and their own beds. (Tr. 45:17-25;46:1-3).

[¶26]Trevor has travelled to Montana approximately seventeen (17) times between January 2017 and October 2017. (Tr. 55:3-5, App. 72). When Trevor travels to Glasgow he is only allowed to have approximately twelve (12) hours of parenting time per trip. (Tr. 63:8-20). Trevor must exercise is parenting time at Mary's home, or at an outside location approved by Mary. (Tr. 60:15-25;61:1). The current Judgment arguably does not allow Trevor to have any overnight parenting time until L.J.B. is three (3) years old, or approximately July 2020. (App. 309-310).

[¶27]SUMMARY OF THE ARGUMENT

[¶28]An appeal with respect to primary residential responsibility, as well as parenting time is governed by the clearly erroneous standard. The Appellant must demonstrate that the district court's findings were induced by an erroneous view of the law, that no evidence exists to support the findings, or, although there is some evidence to support the findings, on the entire record, the appellate court is left with a definite and firm conviction a mistake has been made.

[¶29]The district court made specific findings for each of the relevant statutory best interest factors, but the district failed to acknowledge or explain evidence that clearly favored the Appellant, as well as evidence that was clearly detrimental to the Appellee. Overall, the district court rewarded the Appellee for her alienation of the Appellant, and gave undue weight to the Appellee's role as primary caretaker even though she maintained said role by all but completely excluding the Appellant from the lives of the minor children.

[¶30]It is clear from the evidence and testimony received that the Appellant should have been awarded primary residential responsibility, or alternatively the parties should have been awarded joint, equal residential responsibility. Additionally, the parenting plan adopted by the district court provides such a limited amount of parenting time to the Appellant such that the Appellant's relationship with the minor children will be irremovably harmed.

[¶31]The district court's findings with respect to residential responsibility, parenting time, and all related issues should be reversed, and if necessary remanded back to the district court.

[¶32]ARGUMENT

[¶33]I. The District Court's Award of Primary Residential Responsibility to the Appellee, Was Clearly Erroneous

[¶34]In Zuraff v. Reiger, 2018 ND 143, 911 N.W.2d 887, this court clearly articulated the standard of review on appeal with respect to primary residential responsibility:

> *[The district] court's award of primary residential responsibility is a finding of fact, which will not be reversed on appeal unless it is clearly erroneous or it is not sufficiently specific to show the factual basis for the decision. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or, although there is some evidence to support it, on the entire record, we are left with a definite and firm conviction a mistake has been made. Under the clearly erroneous standard, we do not reweigh the evidence nor reassess the credibility of witnesses, and we will not retry a custody case or substitute our judgment for a district court's initial custody decision merely because we might have reached a different result. The district court has substantial discretion in making a custody determination, but it must consider all of the best-interest factors. Although a separate finding is not required for each statutory factor, the court's findings must contain sufficient specificity to show the factual basis for the custody decision.*
>
> Zuraff at ¶11.

[¶35]In determining residential responsibility for the minor children, the court's decision "must be made in light of the child's best interests, considering the relevant best interest factors under N.D.C.C. § 14-09-06.2(1)." Gagnon v. Gagnon, 2017 ND 67, ¶4, 891 N.W.2d 742. A district court must award primary residential responsibility to the parent who will better promote the child's best interests." Harvey v. Harvey, 2014 ND 208, ¶8, 855 N.W.2d 657, 660. "There is no gender bias in deciding issues related to parental rights and responsibilities regardless of the child's age. See N.D.C.C. § 14-09-29(1) ("Between the mother and father, whether married or unmarried, there is no presumption as to whom

will better promote the best interest and welfare of the child.")" Rustad v. Rustad, 2014 ND 148, ¶12, 849 N.W.2d 607, 611.

[¶36]There is no presumption between a mother and father, "as to who will better promote the best interests and welfare of the child." Bernhardt v. Harrington, 2009 ND 189, ¶6, 775 N.W.2d 682,685. A fit father has as much right to raise a child as a mother. Hammeren v. Hammeren, 2012 ND 225, ¶25, 823 N.W.2d 482, 490. There is no presumption in favor of the primary caretaker, rather it is merely a relevant fact to be considered in the analysis of the best interest factors. Reeves v. Chepulis, 1999 ND 63, ¶17, 591 N.W.2d 791, 796.

[¶37]This court as stated that the district court "is not required to make a separate finding on each statutory factor, the court must consider all of the factors and make findings with sufficient specificity to demonstrate the factual basis for its decision." Law v. Whittet, 2014 ND 69, ¶9, 844 N.W.2d 885, 888. "[T]he district court is neither required to make a separate finding on each best interest factor nor to address each minute detail presented in the evidence, the court may not wholly ignore and fail to acknowledge or explain significant evidence clearly favoring one party. (emphasis added). Law at ¶10. Throughout its Order the district court failed to address evidence and testimony favoring Trevor while ignoring evidence detrimental to Mary.

[¶38]A. Factor a. – Love and Affection

[¶39]In reviewing Factor a., the district court found that both Trevor and Mary "deeply love their children," but the district court continued its analysis of Factor a. in discussing the fact that Mary has been the children's primary caretaker, and that the children have never been apart from Mary "for longer than six (6) hours." However, the

only reason the children have never been away from Mary is due to her alienation of Trevor. Mary has refused to allow Trevor any overnight parenting time, nor any significant time alone with the children since either child was born.

[¶40]In the span of approximately ten (10) months, Trevor drove to Glasgow, MT approximately seventeen (17) times, a five-hundred (500) mile round trip. Trevor testified that Mary only allowed him, at most, twelve (12) hours of parenting time per trip. Thus, Trevor drove approximately 8,500 miles in ten (10) months just to spend approximately 204 total hours with his children. Trevor also talks to the children virtually every day via FaceTime. Trevor clearly loves his children, and clearly cares about maintaining his bond with the children. Factor a. favors neither parent.

[¶41]B. Factor c. – Development Needs

[¶42]In reviewing Factor c., the district court took issue with the fact that in the past that Trevor chose to play softball, or occasionally go out with friends. Trevor testified as to his willingness to forego any such activities in the future, but it is not unusual or uncommon for parents to spend some time away from their children. Mary testified as to how she has never been away from the children, but that is her choice. While the district court stated that neither parent's parenting style is superior to the other, the district court rewarded Mary for "sacrificing her time to make sure she is there for the children." However, it was Trevor who spent approximately seventeen (17) weekends, or approximately 576 hours just to have approximately 204 hours of strictly controlled parenting time. The district court in its Order endorses Mary's efforts to limit Trevor's role in the children's lives, while giving no credence to Trevor's efforts to maintain his relationship with the children.

[¶43]Mary has a history of Obsessive Compulsive tendencies and those have manifested in both her personal and professional interactions. Trevor testified that he is concerned about what will happen when the children are old enough to question their mother's directives, or pushback against her schedule. Throughout their relationship, a heated argument would almost always occur anytime Trevor would deviate from the behavior prescribed by Mary. Mary controlled all aspects of the parties' relationship, as well as Trevor's relationship with L.B.R.

[¶44]Mary has demonstrated very little capacity to accept opinions other than her own, and is often manipulative and condescending. Mary is steadfast in her belief that L.B.R. should continue to breastfeed despite the child's age, and has used that belief has one of the reasons Trevor cannot have more parenting time. Mary testified that although the child does not rely on breastfeeding for nutrients, only for comfort, that the breastfeeding should continue indefinitely. Mary also insists L.B.R. continuing to sleep with her, despite the issues creates with Trevor having overnight parenting time.

[¶45]Trevor has the ability to provide for all of the children's development needs and Trevor testified as to his efforts to find a suitable preschool for L.B.R., as well as other community activities in which the children could participate. Trevor was never allowed the opportunity to demonstrate his ability to nurture or provide direction to the children because any such efforts were met with vehement opposition. The district court is in essence rewarding Mary for being aggressive, controlling, and refusing to allow Trevor to fully participate in the raising of their children. Factor c. favors neither parent.

[¶46]C. Factors d. and h. – Stability

[¶47] When evaluating Factor d. the trial court must look back at the "length of time the child has lived in a stable home, as well as the permanence or stability of the home environment," as well as look forward to "the desirability of maintaining continuity in the child's home and community." Deyle v. Deyle, 2012 ND 248, ¶8, 825 NW 2d 245. In reviewing Factor h. the "findings regarding one factor may be applicable to another....a district court's finding under Factor d. also may be applicable to Factor h." In Interest of SRL, 2013 ND 32, ¶7, 827 N.W.2d 324, 327. When analyzing the facts with regards to Factor h., the trial court must "consider the potential effects of change," and look forward to, "determine whether foreseeable changes could impact a child's life in the home, school and community." Deyle at ¶12.

[¶48]In its Order the district court lauds Mary for moving back to Montana to be near her support system while glossing over the fact that Mary unilaterally decided to rip L.B.R. from the only home she had ever known, as well as away from her father. The district court while extolling the virtues of Mary's home, and that Mary will arguably able to live there well into the future, gives no consideration to the stable environment that Trevor is able to provide. The children have never been in Trevor's home due to the fact that since her move to Montana, Mary has never allowed Trevor to bring the children back to Dickinson.

[¶49]Mary testified that the children have been subjected to significant change in the last nine (9) months, and as a result Trevor should not have more parenting time. However, it was Mary who has precipitated the majority of the changes in the children's lives. Trevor has lived in Dickinson, ND for the entirety of the children's lives. Trevor

recently purchased a new home wherein the children will both have their own rooms, near Trevor's extended family, and the children will have the opportunity to grow and thrive.

[¶50]Trevor has worked for the same employer for the last seven years, whereas in the last four (4) years Mary has been employed by three separate employers, and has not had full-time employment since approximately August 2015. Trevor testified about his desire to have the children involved in extracurricular activities (including regular church attendance), and the availability of those activities in Dickinson. Trevor has demonstrated his ability to provide a safe, stable environment for the children, whereas Mary has only demonstrated her ability to introduce constant change into the children's lives. Factors d. and h. favor Trevor.

[¶51]D. Factors e. and f. – Parental Alienation and Moral Fitness

[¶52]In Rustad v. Rustad, 2013 ND 185, ¶9 838 N.W.2d 421, the North Dakota Supreme Court stated,

> *The court must award primary residential responsibility to the parent who will better promote the child's best interests. A parent's hostility toward the other parent can negatively affect the child. A healthy relationship between the child and both parents is presumed to be in the child's best interests. Parental alienation is a significant factor in determining primary residential responsibility. A parent who willfully alienates a child from the other parent may not be awarded primary residential responsibility based on that alienation.*

[¶53]When evaluating factor (e) "evidence of parental alienation is a significant factor in determining custody." Wolt v. Wolt, 2010 ND 26, ¶10, 778 N.W.2d 786, 793. "A party who willfully alienates a child from the other parent may not be awarded custody based on that alienation." Wolt at ¶10. In Miller v. Mees, 2011 ND 166, 802 N.W.2d 153, the court quoted the trial court saying, "[a] child deserves to have a parent who will recognize the need for and promote interaction with the other parent." Miller at ¶13. The

court in Miller made clear its "great concern" when one party is reluctant to promote visitation with the other. Miller at ¶ 13. Evidence of parental alienation is a moral fitness issue to be considered under factor (f). Wolt at ¶29. In Wolt the trial court found that Steve Wolt's alienation of Kathy Wolt called into question Steve's "sense of morality and of right and wrong." Id.

[¶54]In its Order the district court states, "[a]s to how Trevor would accommodate Mary is a question that unfortunately cannot be answered due to the circumstances." The circumstances being that Mary has so alienated the children from Trevor in that he is only allowed to have parenting time when Mary allows, and in the manner that Mary allows. The district court has for all intents and purposes allowed Mary to make the decision as to custody of the parties' children. The district court applauds Mary for accommodating Trevor when he is in Glasgow, but says nothing of the fact that Mary has refused to allow Trevor to have overnight parenting time with L.B.R. for almost a year, and has never allowed Trevor to have overnight parenting time with L.J.B.

[¶55]In her testimony, and in the parenting plan adopted by the district court, Mary clearly states her belief that Trevor should not have any significant parenting time with the children until they are at least five (5) years old. Mary testified that the children's comfort level should be paramount in expanding Trevor's parenting time, and that the children would not understand or adapt to significantly more parenting time with Trevor.

[¶56]Mary offered no corroborating evidence or testimony to support her claims, and it is clear that it is Mary, not the children, who would be uncomfortable with Trevor having significantly more parenting time. Mary's belief regarding the importance, or lack

thereof, of Trevor's equal involvement in the children's lives will only harm the children's emotional and psychological development.

[¶57]Mary's antiquated rationale, that mothers alone should have custody of young children, is contrary to decades of research and study on early childhood development. This rationale harkens back to the Tender Years Doctrine, a judicial touchstone that used to be the hallmark of family law jurisprudence. However, the North Dakota Supreme Court has stated unequivocally that it "no longer views the "tender years doctrine" with favor", and that "[t]here is no bias in deciding issues related to parental rights and responsibilities regardless of the child's age." (emphasis added). Rustad v. Rustad, 2014 ND 148, ¶12, 849 N.W.2d 607, 611.

[¶58]Mary has refused to allow Trevor to have any overnight parenting time, as well as little, if any, parenting time where Mary did not supervise Trevor's interactions with the children. Trevor has been forced to do all of the traveling to see the children, and despite only being allowed to spend 10-12 hours per trip with the children, Trevor has made the trip to Montana approximately seventeen (17) times. Mary made no more than a cursory effort to provide Trevor with information regarding her pregnancy with L.J.B., lied to medical providers concerning Trevor's involvement, and named the child without consulting with Trevor.

[¶59]Trevor has repeatedly asked for more parenting time. Trevor calls and talks to L.B.R. on the phone practically every day, and Trevor has made the trip to Montana at seventeen (17) times in order to spend as much time with the children as Mary has allowed him. Trevor could have brought an interim motion for more parenting time, but was asked

not to due to the added stress that would have placed on Mary's pregnancy. Mary has done all she can to all but eliminate Trevor from the children's lives.

[¶60]The district court applauds Mary for opening her home to Trevor, so he can have parenting time, while completely failing to acknowledge that doing so is just another element of control. In not allowing Trevor to take the children to an environment where he feels comfortable, an environment where Trevor can freely interact and bond with the children, Mary further controls and manipulates Trevor's relationship with the children. Mary has only allowed Trevor to have parenting time in Montana, at her home, and only when Mary allows. Mary is not promoting Trevor's relationship with the children, she is dictating every aspect of Trevor's relationship with the children, and any deviation from these commandments is met with swift retribution. The district court did not analyze the best interest factors, it codified Mary's alienation of Trevor.

[¶61]This court cannot set a precedent wherein if one parent is able to alienate another parent for long enough, completely enough, while playing lip service to maintaining a bond with the other parent, then they too can be assured of being awarded primary residential responsibility.

[¶62]Trevor has done all he can to demonstrate his desire to be equally involved in the children's lives while not engaging in self-help outside of the bounds of what is appropriate. Trevor could have taken the children back to Dickinson and kept them until a court order to the contrary. However, Trevor chose to work within the judicial system, and was rewarded with virtually no parenting time for approximately the next four (4) years. Mary must not be awarded primary residential responsibility based on her alienation of Trevor. Factors e. and f. favor Trevor.

[¶63]E. Factor g. – Mental and Physical Health of Parents

[¶64]In its analysis of Factor g., the district court stated that both parties are working on their issues, and thus this factor favors neither party. However, testimony was received that Mary has refrained from taking any medication for her mental health issues since the beginning of her first pregnancy. This was roughly the same time period when Mary's controlling, manipulative behavior began to manifest. Mary continues to refuse to take any medication because she refuses to stop breastfeeding. Mary also testified that she stopped seeing her therapist because she did not want anything used against her in this matter.

[¶65]Mary's has a significant history of mental health issues. Mary has a current diagnosis of "Major Depressive Disorder, recurrent, moderate." Mary also has a history of anxiety, obsessive compulsive disorder, and has met the criteria for a severe disabling mental illness (SDMI). Mary reported, significant issues maintaining interpersonal relationships because of her mental health issues," as well as past "thoughts of self harm." Mary has significant mental health issues, refuses to resume taking her medication, and stopped seeing her therapist in order to preclude the district court from having all of the relevant information regarding her mental health issues. Mary must not be allowed to continue manipulating the judicial process to the detriment of the children. Factor g. favors Trevor.

[¶66]It is clear when evaluating all of the evidence and testimony received by the district court, that the majority of the statutory best interest factors either favor neither parent, or they favor Trevor. Awarding primary residential responsibility to Mary is a tacit endorsement of her alienation of Trevor, as well as Mary's belief that her parental rights

are superior to those of Trevor. This court refuse to adopt the precedent that parental alienation works to obtain primary residential responsibility.

[¶67]Failure by this court to reverse the district court findings, to allow Mary to retain primary residential responsibility would encourage separated parents to severely restrict the parenting time of the other parent, allow the other parent only minimal contact with the children such that they can claim they are facilitating a relationship with the other parent, and then, to the children's detriment, have their parental alienation rewarded by the court. Awarding Trevor primary residential responsibility is the only result that the law permits, and the only result that logic allows.

[¶68]II. The District Court's Failure to Award the Parties Joint, Equal Residential Responsibility Was Clearly Erroneous

[¶69]In In re SRL, this court affirmed an award of joint residential responsibility even though the parties' residences were ninety (90) miles apart. In re SRL at ¶1. The facts of In re SRL are similar to the current matter in that the mother moved away with the minor child, and the father visited every other weekend. The child in In re SRL is roughly the same age as the children in the current matter, and this court noted that the child,

> *did not attend school in Devils Lake and, beyond her ties to [her mother] and her maternal family, had no involvement in the community. In its analysis under factor (d), the district court made findings relating to S.R.L.'s relationship with her parents, the impact of extended family and the length of time S.R.L. lived in each parent's home.*
>
> In re SRL at ¶8.

[¶70]The trial court found that factor d. favored the mother, given that the child had primarily lived with her, but still awarded the parties joint residential responsibility. In re SRL at ¶10. The court also stated, "[w]e cannot say that the stability of S.R.L.'s home environment should outweigh the love both parties bear for S.R.L., which the district court

found under its factor (a) analysis." In re SRL at ¶12. The North Dakota Supreme Court also found that even though modification may be necessary in the future, "it was not legal error for the district court to award joint residential responsibility where modification may be necessary." In re SRL at ¶16.

[¶71]In its analysis of the best interest factors the district court found that had the parties resided in the same city, "they probably would have ended up with equal residential responsibility." (App. 264). However, despite said conclusion, that joint, equal residential responsibility would be appropriate but for the parties living in the same city, the district court completely ignored the possibility of joint, equal residential responsibility. Given the age of the parties' children modification would eventually be necessary once the children reach school age, but a need for future modification does not foreclose in the present an award of joint, equal residential responsibility.

[¶72]Joint, equal residential responsibility would wrest control from Mary with respect to Trevor's parenting time and relationship with the children, thus eliminating many of the co-parenting issues suffered by the parties. Joint, equal residential responsibility would allow both parties to cultivate a strong bond with the children, allow both parties to parent according to their own parenting styles, while operating from a position of innate equality. Joint, equal residential responsibility, or awarding primary residential responsibility to Trevor, both provide a co-parenting environment wherein Mary would be much less able to alienate the children from Trevor.

[¶73]III. The District Court Adoption of the Appellee's Proposed Parenting Plan Was Clearly Erroneous

[¶74]"A trial court's determination of parenting time is a finding of fact subject to the clearly erroneous standard of review." Deyle at ¶17. "In awarding visitation to the non-

custodial parent, the best interests of the child, rather than the wishes or desires of the parents, are paramount." Id. "[V]isitation between a non-custodial parent and a child is presumed to be in the child's best interests and that it is not merely a privilege of the non-custodial parent, but a right of the child." Id. [A]bsent a reason for denying it, some form of extended summer visitation with a fit non-custodial parent is routinely awarded if a child is old enough." Deyle at ¶19. "Absent an explanation or reason for the trial court's failure to grant some sort of extended summer visitation... we conclude it erred in that regard." Id.

[¶75]The district court deferred entirely to Mary's proposed parenting plan that fails to award Trevor any overnight parenting time until the children are three (3) years old. Until the children are three (3) years old all of Trevor's parenting time must occur in Glasgow, MT. Trevor is never permitted to have the children in his home, nor is Trevor's extended family able to interact with the children unless they also travel to Montana. Once the children are three (3) years old, Trevor only receives one overnight every other weekend, but the since Trevor only has parenting time from 10:00 a.m. on Saturday until 4:00 p.m. on Sunday, Trevor still must have parenting time in Glasgow, MT since Trevor has to provide all transportation for parenting time. Once the children are five (5) years old Trevor only receives forty-eight hours of parenting time every other weekend.

[¶76]Using the district court's Judgment, from the time the Judgment was entered, until L.J.B. reaches the age of three, Trevor will never have overnight parenting time with his son. From the time the Judgment was entered until L.B.J. is five (5) years old, approximately fifty-five months, or approximately 1,673 days will pass and of that total time Trevor is only allowed to have parenting time a total of approximately 4.75 percent.

[¶77]From the time L.B.J. is three (3) until he is five (5), there are twenty-four (24) months. Trevor will only be allowed to have approximately fifty-two (52) overnights in that timespan. Thus, of the approximately 730 days from the time L.B.J. turns three (3) until L.B.J. turns five (5) Trevor is allowed approximately seven-percent (7%) of the total overnights. This type of parenting time schedule does not benefit the children, it does not enable Trevor to cultivate a strong bond with the children, rather, this type of parenting time schedule seeks only to drive Trevor out of the children's lives.

[¶78]The parenting time schedule adopted by the district court offers parenting time in name only, and does nothing to ensure the bond between Trevor and the children is not irrevocably damaged. The parenting time schedule adopted by the district court gives Mary all of the control and reduces Trevor to a child support payment and an occasional visit. The parenting time schedule does not allow Trevor to be part of the children's lives, it only gives Trevor just enough parenting time such that the children may remember Trevor's name.

[¶79]Our courts have moved passed this type of antiquated, one-sided, vindictive parenting time schedules. The parenting time schedule adopted by the district highly favors Mary as the children's primary caretaker, as well as the children's mother while completely dismissing Trevor's contributions. The parties did previously agree that Mary would be a stay-at-home mother, and that Trevor would work full-time. However, when the parties' relationship ended, and Mary moved, Mary never allowed Trevor to demonstrate his ability to parent, never allowed Trevor to spend any significant time with children, and the district court has rewarded Mary for alienating Trevor.

[¶80]This court cannot allow our collective jurisprudence to regress to a time when fathers were automatically deemed to be the lesser parent. Trevor has travelled to Montana seventeen (17) times in ten (10) months. Trevor did not unilaterally make decisions regarding the children. Trevor did not withhold all but a bare minimum of parenting time from Mary. The parenting time schedule adopted by the court sets a dangerous precedent as to the amount of parenting time that is acceptable and appropriate for a non-custodial parent.

[¶81]An award of primary residential responsibility for Trevor, or alternatively joint, equal residential responsibility is the appropriate outcome in this case, but save nothing else Trevor should at least be granted parenting time such that he is actually able to spend an appreciable amount of time with the children. Trevor should be able to immediately have overnight parenting time, to have significant holiday and summer parenting time, as well as additional parenting time before the children reach school age. The parenting time schedule adopted by the district court is relic of family law's past and as such should remain there.

[¶82]CONCLUSION

[¶83]It is clear from the record and testimony that the district court's findings with respect to primary residential responsibility and parenting time are clearly erroneous. The district court's findings largely reward Mary's parental alienation while giving little credence to the evidence favorable to Trevor. The findings of the district court should be reversed, and Trevor should be rewarded primary residential responsibility, or alternatively the parties should be awarded joint, equal residential responsibility. If necessary the matter should be remanded by to the district court for any further proceedings this court deems appropriate.

/s/ Joshua Nyberg
Joshua Nyberg

August 3, 2018
Date

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IN DISTRICT COURT, COUNTY OF STARK, STATE OF NORTH DAKOTA

Trevor Rustad,	)	
	)	
Appellant,	)	**CERTIFICATE OF SERVICE**
	)	
vs.	)	
	)	
Mary Baumgartner,	)	**Civil No. 45-2017-DM-00103**
	)	**Supreme Court No. 20180080**
Appellee.	)	

[1]I hereby certify that on August 3, 2018, true and correct copies of the following documents were served via email:

1. **Brief of the Appellant**
2. **Appendix to Brief of the Appelant**

[2]That copies of the foregoing were sent to the following email address:

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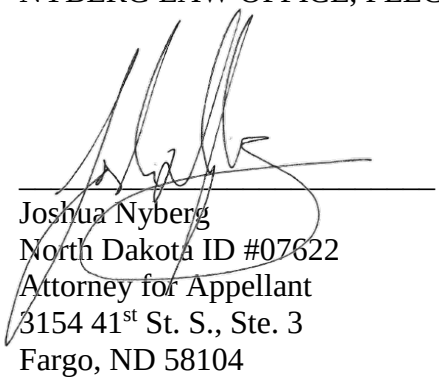
beulaw3@westriv.com

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

Dated this 3rd day of August, 2018.

NYBERG LAW OFFICE, PLLC.



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IN DISTRICT COURT, COUNTY OF STARK, STATE OF NORTH DAKOTA

Trevor Rustad, Appellant, vs. Mary Baumgartner, Appellee, and State of North Dakota, Statutory Real Party in Interest.	)	**CERTIFICATE OF SERVICE** **Civil No. 45-2017-DM-00103** **Supreme Court No. 20180080**

[1]I hereby certify that on August 8, 2018, true and correct copies of the following documents were served via email:

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

[2]That copies of the foregoing were sent to the following email address:

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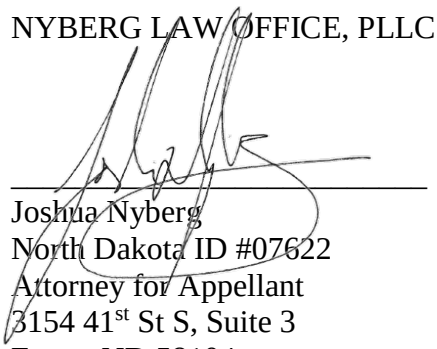
To the best of this affiant's knowledge, the email address above given is the actual email address of the party intended to be so served. That the above document was duly served in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Dated this 8th day of August, 2018.

NYBERG LAW OFFICE, PLLC.



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