20190106
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 14, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No.: 20190106

Mercer Co. Case No.: 29-2018-DM-00006

Jason P. Stevenson,	)
	)
Plaintiff/Appellant,	)
	)
v.	)
	)
Rhonda S. Biffert,	)
	)
Defendant/Appellee.	)

APPELLANT'S BRIEF

APPEAL FROM THE MERCER COUNTY DISTRICT COURT MEMORANDUM DECISION AND ORDER DATED OCTOBER 12, 2018 AND JUDGMENT DATED FEBRUARY 1, 2019

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ii. *The district court failed to afford Jason due process.*

iii. *The district court erred by ignoring and misstating substantive and uncontroverted evidence.*

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v. *If this Court finds the district court had proper subject-matter jurisdiction to partition the home, the district court still erred in failing to make adequate findings regarding the partition and erred in its distribution of equity.*

II. STATEMENT OF CASE

[2] On January 12, 2018, Appellant (hereinafter "Jason") commenced a parenting rights and responsibilities action, requesting primary residential responsibility of the parties' child, K.S. born in 2010. Appellant's Appendix (hereinafter "App.") 7-11. Appellee (hereinafter "Rhonda") filed her Answer and Counterclaim on January 30, 2018. App. 12-15. Jason timely filed a Reply to Rhonda's Counterclaim on February 1, 2018. App. 16-17. Jason filed a Motion for Interim Order and supporting documents on February 26, 2018. App. 18-51; Doc. ID #12-25. Rhonda filed a Cross Motion for Interim Order, along with supporting documents, on March 20, 2018. App. 52-73; Doc. ID #34-46, 48. The parties entered into a Stipulation for Interim Order, which was filed on April 13, 2018. Doc. ID #53. Prior to the Interim Order being entered on April 16, 2018, Rhonda retained alternate counsel. App. 74. The Interim Order awarded Rhonda primary residential responsibility. App. 75-81.

[3] Rhonda's Answers to Plaintiff's Interrogatories to Defendant was served on Jason on June 15, 2018. App. 219-231. On June 18, 2018 Jason filed a Motion to Appoint Parenting Investigator with a supporting brief. Doc. ID #68-70. Rhonda filed a brief in response to the motion on June 25, 2018. Doc. ID #78. The parties ultimately entered into a stipulated agreement on the issue. Doc. ID #82. On June 27, 2018, Sara Steffan (hereinafter "Ms. Steffan") was appointed as the parenting investigator. Doc. ID #85. The parenting investigator's report was filed on August 28, 2018. Doc. ID #102. On September 5, 2018, Rhonda retained alternate counsel. App. 82. Ms. Steffan filed a revised report on September 20, 2018. App. 83-121; Doc. ID #152.

[4] Trial occurred on September 28, 2018, at 9:00 a.m. Both parties presented evidence in support of their respective positions. App. 135-248; Doc. ID #165-190. The parties had agreed to various provisions prior to trial, which were stated on the record and later incorporated into a stipulation. App. 122-134; Doc. ID #163. The Memorandum Decision and Order (hereinafter "Memorandum") was filed on October 12, 2018. App. 249-272. A stipulation for additional terms was filed on January 30, 2019, and was incorporated into an Order. App. 273-275; Doc. ID #193. The final Order and Judgment were entered on February 1, 2019. App. 276-290; Doc. ID #197-198. The Notice of Appeal was timely filed on April 2, 2019. Doc. ID #201.

III. STATEMENT OF FACTS

[5] The parties in this case have never been married. Their relationship began in late summer 2009, and continued for approximately eight years. September 28, 2018 Trial Transcript (hereinafter "Tr.) 80:16; 88:20-89:8. One child, K.S., was born of the parties' relationship in 2010. Tr. 80:18-19.

[6] Jason and Rhonda have both been active, loving parents for K.S. since his birth. Jason's involvement while K.S. was an infant included changing diapers, comforting him, putting him to bed, and other parenting tasks. Tr. 81:8-21. As K.S. grew older, Jason began coaching T-ball, playing with him in the backyard, playing video games with him, attending hockey and soccer practices, and helping with homework. Tr. 81:1-21. During the relationship, in addition to making mortgage payments, Jason also paid the utilities, phone bill, child's insurance and deductibles, purchased fuel, clothing, and groceries for the family. App. 28 at ¶ 27; App. 66 at ¶ 44; Tr. 166:25-14. While the parties were together, Rhonda set and attended most medical appointments, although Jason attended the appointments when his work schedule allowed, including taking K.S. into the operating room when K.S. was having ear tubes placed because Rhonda did not want to see the child put under anesthesia. App. 55 at ¶ 11; App. 62 at ¶ 29; Tr. 81:14-18. After their relationship ended, Jason began regularly setting and attending medical appointments. Tr. 112:24-113:15.

[7] Rhonda has a large family but is estranged from all but her daughter and a few siblings due to sexual abuse which occurred when Rhonda was a child. App. 60 at ¶ 24; Tr. 262:9-13. She has a relationship with her adult daughter (hereinafter "TiAnna") from a different relationship; however, Rhonda and K.S. do not see TiAnna very often. Tr.

255:14-16. Rhonda does have friends in the community she considers family. Tr. 263:11-12.

[8] Jason has a smaller family and is close with them. App. 20 at ¶¶ 7-9; App. 59 at ¶¶ 20-22. His parents live in Devils Lake and his siblings live in the Fargo area. Tr. 86:16-20. During the parties' relationship, there was strain that developed between Jason's family and Rhonda. App. 58 at ¶¶ 20-22; Tr. 86:8-15. Since Jason and Rhonda's relationship ended, Jason and K.S. now see Jason's family more frequently, and K.S. has developed a warmer, more loving relationship with them. App. 21 at ¶¶ 8-9; Tr. 87:15-88:5. Although Rhonda did not get along with Jason's family, her affidavit is full of details involving interactions between Jason's family, Rhonda, and K.S., showing that they have always been an active part of the child's life. App. 52-60 at ¶¶ 12, 20, 21, 22.

[9] Overall the parties are both in good health. Tr. 110:25-111:5; 111:23-112:14. Jason sees a therapist for anxiety and depression. Tr. 111:2-112:11. Rhonda made a comment that if she would lose K.S. she would not have any reason to live and that she would kill herself; however, Michelle Anderson (hereinafter "Ms. Anderson"), a social worker and deputy with the Mercer County Youth Bureau, stated she didn't believe Rhonda was suicidal and that it was said during a period of "emotional desperation." Tr. 62:10-16. Ms. Anderson recommended that Rhonda seek individual counseling at one point. Tr. 63:17-20. K.S. does not have any special medical needs. Tr. 112:15-17.

[10] Currently, Jason lives in a home in Hazen, North Dakota that he owns. Tr. 78:23-25. The home is close to the only elementary school in Hazen and K.S. has his own room. Tr. 79:3-4, 12-14; 266:17. He takes the child to the same daycare Rhonda uses. Tr. 266:19-21. Jason has a full-time job with Otter Tail Power Company, where he has

worked for approximately ten years. Tr. 70:11-72:9. His job allows for flexible hours and provides health, vision, and dental insurance. *Id.*

[11] After the parties separated, Rhonda remained in the home the parties had lived in during their relationship. App. 62-63 at ¶ 31. She cleans houses for various families in the area and does various tasks for a local rancher. App. 52 at ¶ 1. Health insurance is not available to Rhonda through her employment. App. 54 at ¶ 7.

[12] Towards the end of the relationship, in late 2017, the parties sought counseling but ultimately decided to split. Tr. 88:20-89:8. During their final counseling session, the parties agreed to a slow transition, to make the breakup easier for K.S. Tr. 89:9-21. They planned for Jason to live in the basement to give K.S. time to adjust to the changes. *Id.* Upon returning home from the counseling session, Jason moved into the basement. Tr. 90:2-5. The next morning, Rhonda told him he had to leave his home and child that same day, in the middle of winter and with no place to stay. Tr. 90:2-5,17-91:18. When Jason explained he had nowhere to go but he would find a place soon, Rhonda started to pack bags for herself and K.S. *Id.* A few minutes later, she left with K.S. *Id.*

[13] Rhonda refused to let Jason see his child for parenting time for the next week, refused overnight parenting time for the next couple of weeks, and limited his parenting time overall, despite numerous requests from Jason. App. 25 at ¶ 20; App. 211-214; Tr. 92:17-23. Finally, a few weeks after Rhonda had abruptly left with K.S., Jason received occasional overnights. Tr. 95:9-23. However, even after the parties agreed to a parenting schedule in mediation which would allow Jason substantially more time with K.S., Jason did not receive all of the parenting time agreed upon. Tr. 96:9-23; 273:9-13.

[14] Rhonda was difficult to work with after the parties separated. For example, K.S. was having stomach issues and Rhonda started giving him a supplement. Tr. 110:11-12. Rather than tell Jason the brand and dosage of the supplement, Rhonda would tell him he ought to already know what it was, despite numerous reasonable requests from Jason. Tr. 110:14-18. It took a couple of months for Rhonda to finally provide this information. Tr. 110:22-24.

[15] After the parties separated, Rhonda had K.S. baptized without first consulting Jason and without Jason's consent. Tr. 106:1-6. Jason learned of the baptism on the day prior after a mutual friend informed him of the event, and asked Rhonda about it the same day. App. 68 at ¶ 48; App. 209; Tr. 106:5-8. Rhonda ultimately informed Jason at 4:54 p.m. on February 28, 2018, that the baptism was at 6:00 p.m. App. 209; Tr. 107:3-8. When asked at trial if she understood that Jason would have liked to be part of the event, Rhonda responded, "Yes." Tr. 259:9-11. Interestingly, the baptism occurred two days after Jason filed a motion requesting an interim order. Doc. ID #12-25.

[16] In addition to making major decisions regarding K.S. without consulting Jason, Rhonda would disparage Jason or act inappropriately towards him while they were in public, with the child present and nearby. On one occasion, after the parties separated, Rhonda came up behind Jason and started to rub his back and shoulders while sarcastically calling him honey, with K.S. just feet away. Tr. 101:20-102:1. On another occasion, Rhonda "flipped [Jason] the loser sign" in front of other parents during a hockey tournament. Tr. 102:14-20. Later that same day, she entered a restaurant with some friends and began berating Jason, claiming he was a deadbeat father, that he did not take care of his family, and that he never took care of her family, again using the "loser

sign" on her head. This was done with K.S., other parents, and other children nearby. Tr. 102:22-103:14; 271:22-272:1. On yet another occasion, the parties were at a T-ball game with K.S.; Jason was coaching. When the other coach walked in, Rhonda said, "Oh, here comes the good coach," with parents, children, and K.S. all nearby. App. 178. Tr.103:22-104:3. When Jason confronted Rhonda about this, her response was, "I didn't do anything..I can talk to my friends..that other coach is really good." App. 178.

[17] These inappropriate and unnecessary comments occurred even around professionals. During counseling sessions with Heather Mattheis (hereinafter "Ms. Mattheis"), a therapist at the Kid's Therapy Center, Rhonda made disparaging remarks about Jason in front of Ms. Mattheis and K.S. App. 233 at ¶ 9; Tr. 27:6-11. Similarly, during a family session with Michelle Anderson, Rhonda made multiple sarcastic comments and a "snide remark . . . [which] took a sarcastic tone and you could see [K.S.'s] face just kind of be disappointed." Tr. 59:22-25. Ms. Anderson testified, "What concerned me is the look on [K.S.]'s face, the look of disappointment on [K.S.]'s face when she made those sarcastic remarks, and that's why I addressed it with her." Tr. 64:13-15. She had to remind Rhonda on multiple occasions to stay neutral and not be sarcastic towards Jason in front of K.S. App. 218, 235. In May 2018, Rhonda also told Ms. Anderson that she would kill herself if she lost custody, or even if equal residential responsibility were awarded. Tr. 62:7-16; 65:18-19.

[18] Most concerningly, Rhonda has repeatedly alleged Jason inappropriately touched K.S. For example, Rhonda brought up concerns that Jason was inappropriately touching the child to Ms. Mattheis, during the intake process in March 2018. Tr. 16:8-14; 33:19-24. Although Rhonda did not use the words "sexual abuse" with Ms. Mattheis, Ms.

Mattheis treated these allegations as sexual in nature. Tr. 17:5-8. Ms. Mattheis also staffed the situation with her two clinical supervisors, and they suggested asking Rhonda if she had been a victim of abuse herself. Tr. 28:10-20. Ms. Mattheis reported that there was no indication from the child during the sessions that there was any sort of abuse or inappropriate touching going on. Tr. 20:21-24.

[19] Similarly, when Rhonda spoke with Michelle Anderson, Ms. Anderson felt the concerns of inappropriate touching were not something that required a report or any legal follow up. Tr. 57:11-16. In her words, "it was just a perception issue." Tr. 57:23-58:1. In the questionnaire she filled out for the parenting investigator, under concerns, Rhonda put "[s]exual behavior Jason has touched [K.S.] also plays with himself at nights." App. 246. These unfounded allegations continued throughout the legal process.

[20] Throughout the parties' breakup and the subsequent legal process, Jason has attempted to remain cordial and work with Rhonda. App. 212-216; Tr. 124:13-21. However, due to Rhonda's behavior, the parties continue to have difficulty coordinating even simple aspects of co-parenting. For example, when asked, "What can make your communication better?" Rhonda replied, "I don't know. What's there to communicate about?" Tr. 274:14-20.

[21] Due to the increasing conflict between the parties and the allegations of inappropriate touching, Jason requested a parenting investigator, suggesting Barb Oliger, an experienced parenting investigator in the area. Doc. ID #68-70. Rhonda initially disagreed with the appointment of a parenting investigator. Doc. ID #78. After additional negotiations, the parties agreed to the appointment of Sara Steffan (hereinafter

Ms. Steffan) as parenting investigator, who was appointed on June 28, 2018. Doc. ID #82, 85.

[22] Ms. Steffan is a licensed social worker who was new to parenting investigation. Tr. 174:24-25; 175:21-23. Although she was new to the practice of parenting investigation, Ms. Steffan had been a court visitor for guardianship proceedings for about 20 years, handling 300 cases, approximately. Tr. 175:10-20. During her investigation, Ms. Steffan interviewed the parties, interviewed collateral witnesses and reviewed over a thousand pages of records, including bank records, emails, affidavits, deposition transcripts, and medical records, using this information to draft a report which was filed on August 28, 2018. App. 83-121; Tr. 179:5-20; Tr. 203:20-204:7. The report was updated to include paragraphs and page numbers and some minor, non-substantive changes were made. Doc. ID #152; Tr. 179:23-180:10. In her report, the parenting investigator expressed concern regarding Rhonda's behavior towards Jason, particularly her accusations of inappropriate touching and her newly raised allegations of animal abuse. App. 112-113. Given the totality of her investigation, Ms. Steffan recommended that Jason have primary residential responsibility with liberal visitation for Rhonda, that all communication between the parties be through a family communication app or text message, and that the parties and the child participate in ongoing therapy, among other recommendations. App. 114-119.

[23] Due to her inexperience, the parenting investigator made multiple missteps in conducting the investigation and her report contained errors, most notably in her conclusion that Factor (j) weighed in favor of Jason. App. 111 at Factor (j). However, at no point had Jason alleged that Rhonda's actions in the case at hand met the legal

definition of domestic violence, and he has never alleged that Rhonda has been physically abusive towards him. *Id.*; Tr. 136:7-9. Beyond an isolated incident when Rhonda slapped K.S., and caused a bloody nose or lip, there were no allegations of physical abuse. Tr. 117:15-118:1; 136:10-21.

[24] Early in the parties' relationship, in mid-2010, Rhonda either gave or loaned Jason money to pay for a delinquent loan. Jason contends that Rhonda gave him approximately $2,800.00, while Rhonda contends she loaned him $5,000.00. Tr. 154:19-155:8; 169:19-170:16. Jason did not use the word "loan" to describe the transaction. *Id.* Jason stated that they both did things for each other financially without an expectation that either of them would pay the other back. Tr. 171:6-12. This issue was not raised in Rhonda's Counterclaim, nor properly raised at any point during litigation. App. 12-15.

[25] In addition, at some point during the parties' relationship, around 2016, Jim Roers, employer of Rhonda and Jason, gave Rhonda a truck. Tr. 242:7-8. Rhonda did not like the truck because of its size and lack of fuel efficiency. Tr. 157:19-22. The truck was sold and the money was placed in Jason's account. Tr. 158:5-10. Jason contends the money was to pay him for work he did for Mr. Roers. Tr. 158:17-19; 171:18-19. During the parties' relationship, Jason worked for Mr. Roers. He was reimbursed in a variety of ways—with vacations, gifts, and other non-monetary reimbursement. Tr. 246:9-13. At the time the truck was sold, the Roers still owed Jason for work he performed in 2015 and 2016, in approximately the amount the truck was worth. Tr. 171:18-24. Jason's position is that the proceeds from the sale were payment for the work he did in 2015 and 2016. Tr. 171:20; 243:1. Although Mr. Roers testified that he did not tell Jason he could keep the money, he goes on to say, "I actually asked Jason if I owed him anything above and

beyond the truck, and he said no," and, "[w]e specifically talked about did I owe Jason anything in addition to the truck, and the answer was no, because we had done other things." Tr. 243:9-14; 244:5-7. At no point had Rhonda requested reimbursement from Jason until after this action was commenced. Tr. 172:11-13.

[26] In December 2013, Jason and Rhonda purchased a home in Hazen, ND, for $221,702.52 (the home purchase price was $215,000.00, the total amount borrowed was $221,702.52). App. 152; Tr. 73:22-25. Rhonda contributed a total of $120,000.00 to the home. Tr. 74:4-9; 75:3-6. Jason made the monthly mortgage payments on the home, including taxes and interest on the mortgage. Tr. 74:22-25. Even though Jason's name was on the mortgage and the deed, he never disputed Rhonda was entitled to a portion of the equity. App. 17; Tr. 168:20-23; 169:13-18. The parties lived together in this home until they broke up in late 2017. App. 25 at ¶ 18. At trial, Jason stated that he was fine with Rhonda keeping the home; he asked only that he receive the difference between what was paid for the home and what Rhonda paid, which was $101,702.00. Tr. 78:14-18.

[27] Trial was held on September 28, 2018, and the district court entered its Memorandum Decision and Order on October 12, 2018. The Memorandum failed to include a parenting time schedule for Jason. Because the district court did not include a specific parenting schedule for Jason, the parties entered into a stipulation providing a schedule. App. 249-275. The stipulation, which was incorporated into an Order, also addressed additional terms as they related to the sale of the home, along with a payout for the truck. App. 273-275. Judgment was issued in accordance with the Stipulation and Order. App. 276-290.

IV. LAW AND ARGUMENT

A. STANDARD OF REVIEW

[28] On appeal of an initial determination of primary residential responsibility the standard of review is well-established:

> 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 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. 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.

Brouillet v. Brouillet, 2016 ND 40, ¶ 7, 875 N.W.2d 485 (Internal citations omitted).

i. The district court erred as a matter of law by indicating Jason failed to provide credible evidence to "shift primary residential responsibility," when no such burden existed requiring a "shift."

[29] In making an initial residential responsibility determination, the district court must consider the best interests of the child, using the factors outlined in N.D.C.C. § 14-09-06.2(1)(a)-(m). There is no presumption, nor is there a burden placed on either party (absent a finding of domestic violence). N.D.C.C. § 14-09-29(1). The applicable and deferential standard of review is "especially applicable for a difficult primary residential responsibility decision involving two fit parents." *Purdy v. Purdy*, 2019 ND 75, ¶ 10, 924 N.W.2d 118. However, if the district court uses an improper legal standard in making its

initial determination, it will be overturned on appeal. *Lovin v. Lovin*, 1997 ND 55, ¶ 1, 561 N.W.2d 612.

[30] Although the district court did analyze each of the best interest factors, the analysis of the factors is shrouded by an inappropriate burden the district court placed on Jason. In making its residential responsibility determination, the district court stated, "…[Jason] works without credible evidence to attempt to create reasons to **shift primary residential responsibility**. The [district court] concludes he has failed to do so based upon the greater weight of the evidence." App. 258 at ¶ 38 (Emphasis added). It is not clear from the record if the district court assumed that the interim order created the special burden, if it believed that a father has a special burden a mother does not have, or if it confused the analysis for an initial award of residential responsibility with the analysis required under a motion to modify residential responsibility. Regardless of the origin of the mistake, the district court unfairly and improperly placed a special burden on Jason and Jason alone.

[31] Although a district court may consider a party's conduct after an interim order is entered, there are no presumptions arising from an interim order. While it does not appear that this Court has decided the issue dispositively, the Court has indicated that relying on a parent serving as a primary caretaker pursuant to an interim order may be improper. *Kjelland v. Kjelland*, 2000 ND 86, ¶ 10, 609 N.W.2d 100; *Peek v. Berning*, 2001 ND 34, ¶ 10, 622 N.W.2d 186.

[32] The case at hand involves an initial determination of residential responsibility and therefore the district court must determine the best interests of the child using the statutory factors in making its determination. There was nothing in the record which

would indicate that Jason had some special burden to overcome—there are no allegations of domestic violence and no founded allegations of abuse or neglect. App. 270 at Factor (j); App. 254 at ¶ 25. On the contrary, the record shows Jason has been an active, loving, and capable parent since the child was born. Tr. 81:1-21.

[33] As discussed more fully below, the district court's frustration with the parenting investigator seemed to color its legal analysis and lead the district court to use the incorrect legal standard. Jason had no special burden here. This was an initial determination of residential responsibility. Both parents are presumed to be on equal footing. *Hartleib v. Simes*, 2009 ND 205, ¶ 22, 776 N.W.2d 217 (Overruled on other grounds by *State v. G.L.* (*In re G.L.*), 2018 ND 176, 915 N.W.2d 685).

[34] Although the choice between two otherwise fit parents is a difficult one, this Court should afford no deference to the district court's findings because the district court used the wrong legal standard. Accordingly, the district court's award of primary residential responsibility to Rhonda should be overturned.

ii. The district court failed to afford Jason due process.

[35] A trial court is granted significant discretion over the trial and may impose reasonable restrictions on length and number of witnesses; however, failure to afford a meaningful and reasonable opportunity to present evidence on the relevant issues is a violation of the party's due process rights. *Gullickson v. Kline*, 2004 ND 76, ¶ 16, 678 N.W.2d 138. Such reversible errors may include allowing hearsay evidence, allowing the opposing party to raise new allegations without notice, and failing to allow a meaningful opportunity to challenge or rebut that evidence. *Id*. at ¶ 12. The trial court must exercise its discretion "in a manner that best comports with substantial justice." *Id.* at ¶ 15.

[36] Although this judge is generally a fair and reasonable judge, it appears that the district court focused so heavily on the errors of the parenting investigator that Jason's due process rights were violated. The procedural and evidentiary errors outlined below deprived Jason of a meaningful opportunity to present his case fully. Although each of the errors, on their own, likely would not amount to a due process violation, the totality of the errors deprived Jason of his right to "a meaningful and reasonable opportunity to present evidence on the relevant issues." *Id*. at ¶ 16.

[37] A district court should consider a parenting investigator report, but must use its discretion in determining how much weight to give it. *Marsden v. Koop*, 2010 ND 196, ¶¶ 8-13, 789 N.W.2d 531. Here, the district court did consider the parenting investigator's report, and spent a substantial portion of its Memorandum discrediting the parenting investigator and her analysis rather than independently analyzing the evidence. App. 249-272 ¶¶14-16, 22-23, 27, 28 and generally ¶¶ 49-61, 77. While the district court has discretion to decide what weight to give the conclusions reached, to discount the entirety of the report seems extreme, as the parties rely on the district court to review the report fairly and with an open mind, even if it does not reach the same conclusion.

[38] The district court's visceral reaction to the parenting investigator's report had an effect on the trial, causing the district court to fail to afford Jason a meaningful and reasonable opportunity to present his case. Right away, the district court dictated the parties' presentation of their cases when it indicated, "I will tell you that I'm going to want to hear from the parenting investigator...I want you to factor in that part of time." Tr. 3:13-16.

[39] From there, the district court interjects during Jason's testimony, often appearing argumentative. *See e.g.* Tr. 104:12-14 (Jason testified that Rhonda made a comment in public about him not financially supporting his family and that K.S. was in the restaurant when she made the comment. The district court and Jason's interaction is as follows: "Q: So he wouldn't have seen it? A: He could have. He was around - Q: Maybe, but you don't know. A: I don't know. Q: Correct. Thank you."); *See also,* Tr. 103:5-6 Tr. 119:1-3. The district court took an active investigative role, asking probing questions, interrupting the flow of the questions, and making comments suggesting that it was skeptical of Jason and his witnesses—specifically, during the questioning of Jason, Heather Mattheis, and Sara Steffan. *Id. See e.g.*, Tr. 29:23-30:12; Tr. 185:11-20; Tr. 189:20-190:22. It took no such role when evidence favorable to Rhonda was presented, or when her witnesses testified. Tr. 50-68; 240-279. Although Rhonda did not testify as long as Jason did, the district court interjected only twice, once to notify Rhonda's attorney that her time was running out and once to clarify whether a question was related to mediation. Tr. 263:14-16; Tr. 270:15-16. At no point did the district court question Rhonda's witness Jim Roers. Tr. 241-247.

[40] Even though the district court directed that the parties would be expected to spend part of their time questioning the parenting investigator, when Jason did call the parenting investigator, there were multiple interjections by the district court. Often the interjections seemed to seek more than simple clarification. The district court interjected with questions and comments approximately 35 times during the parenting investigator's direct testimony. Tr. 174-196. This doesn't account for the district court's, often exceedingly lengthy, rulings on objections. Tr. 195:21-196:13. At one point, opposing

counsel was allowed to interject with cross-examination questions during direct testimony as well. Tr. 192:13-23. Opposing counsel was also allowed to testify when she stated, "I happen to know a little bit about the training that's offered in North Dakota because I wrote the materials…." App. 221:15-18. When it came time for cross-examination of the parenting investigator, the district court did not interject once. App. 202-239.

[41] The district court also required Jason to provide testimony he was wholly unqualified to provide. For example, on cross examination, Rhonda's attorney asked Jason if his psychiatric issues, including depression and anxiety, weren't necessarily situational, but rather were "organic, in [his] brain chemistry." Tr. 161:7-15. Jason's attorney objected because this called for expert opinion and Jason is not an expert. *Id.* The district court overruled the objection, stating, "I know he can't [provide expert opinion] but he can give his own opinion. He's been asked for it." Tr. 161:16-18. Jason has no background in psychology or psychiatry and he is woefully unqualified to give any opinion as to the origin of his anxiety and depression. Requiring him to answer such a question is akin to requiring a witness to testify as to their opinion regarding whether their cancer was caused by diet or genetics.

[42] Substantial procedural errors occurred as well. For example, despite no notice being provided that personal property and debts would be issues at trial, the district court indicated it would allow these issues. Tr. 157:7-9. This ruling occurred off the record the morning of trial and was referenced on the record. When opposing counsel asked about the sale of the truck that the parties had received from Jim Roers, Jason's attorney objected as to relevance. Tr. 157:2-6. The district court overruled the objection because

there had been an earlier determination that the collateral issues would be considered. Tr. 157:7-9. Shortly thereafter, Jason's counsel, on re-direct, attempted to elicit testimony regarding Jason's understanding of the alleged loan and the money exchanged between the parties. Tr. 169:19-171:5. However, opposing counsel objected on the basis of foundation and relevance and her objections were ultimately sustained. *Id.* It was plain error for the district court to consider issues of personal property and debt within a residential rights and responsibilities action when the issue was not raised in the Complaint, nor Rhonda's Counterclaim. App. 12-15. Similarly, unless a partition action is properly plead pursuant to N.D.C.C. ch. 32-16, the district court lacks subject-matter jurisdiction. This is further addressed in Paragraph IV(A)(v) of Appellant's Brief. "For subject-matter jurisdiction to attach, the particular issue to be determined must be properly brought before the court in the particular proceeding…A judgment or order entered without the requisite jurisdiction is void." *Albrecht v. Metro Area Ambulance*, 1998 ND 132, ¶ 11, 580 N.W.2d 583. The question of subject-matter jurisdiction is a question of law, which is reviewed de novo. *Munson v. Indigo Acquisition Holdings*, LLC, 2019 ND 197, ¶ 23. Jason was not put on proper notice these issues would be raised during trial. Paragraphs 47, 49, and 50 of the Judgment should be considered void for lack of subject-matter jurisdiction. App. 288-290.

[43] If this Court finds that the district court had subject-matter jurisdiction to receive evidence on the truck and alleged loan, then at the very least, both parties should have been allowed a fair opportunity to present evidence regarding the same—which was not allowed by the district court when it sustained Rhonda's objection. Tr. 170:17-171:5. To allow unpled issues to be raised by Rhonda for the first time on the day of trial, without

affording Jason the opportunity to present evidence regarding the same, is a violation of his due process rights.

[44] Substantive hearsay evidence was also received by the district court over Jason's objection. On cross examination of Jason, Rhonda's attorney offered into evidence a market analysis for the parties' house prepared by a third party, which was objected to on the basis of hearsay. N.D.R.Ev. 801. The district court's response, in part, was, "[s]o what you're going to ask for is for the person to come in to give the testimony on the document?" Tr. 151:11-153-19. The report was then received over Jason's renewed hearsay objection, with the district court reasoning that it goes to weight. App. 236-242. Tr. 153:20-154:2. Even though Jason commissioned the report, he did not agree with the same, and had no intention to offer it as evidence. If Rhonda wanted the district court to properly consider the report, the individual who prepared the report needed to be called to testify. Allowing hearsay evidence, rather than live testimony, does not provide an opportunity to assess the credibility of the witnesses. *Gullickson v. Kline*, 2004 ND 76, ¶ 12, 678 N.W.2d 138.

[45] The district court here failed to provide Jason with a meaningful and reasonable opportunity to present evidence on the relevant issues when it required the parties to call a specific witness and devote considerable time to her; interjected frequently and aggressively during Jason's testimony and during the testimony of his witnesses (while not doing the same during Rhonda's presentation of her case); allowed hearsay and expert testimony from a non-expert witness; and allowed Rhonda to present evidence on unpled issues. The overall tenor of trial indicated that the district court reached a decision before hearing all the evidence, thereby violating Jason's due process rights.

iii. The district court erred by ignoring and misstating substantive and uncontroverted evidence.

[46] Trial courts are given great discretion in weighing evidence and there is generally no expectation that every piece of evidence be noted in the findings. However, "[t]he district court must consider all relevant evidence." *Dickson v. Dickson*, 2018 ND 130, ¶ 14, 912 N.W.2d 321. Further, "[w]hile credibility of witnesses is normally the province of the trial court, a trial court cannot disregard testimony that is uncontradicted and unchallenged where no basis for doing so appears in the record." *State v. Nelson*, 488 N.W.2d 600, 604 (N.D. 1992).

[47] In this case, this was exemplified by the multiple errors in the Memorandum. For example, the district court stated, "[t]he parties concede that [Rhonda] was the parent who assumed the primary responsibility for K.S. throughout his life." App. 264 at ¶ 65. Jason did not concede this in his testimony, his affidavit, or anywhere else in the record, and has stated that he has been an active, involved, and loving parent of K.S. for his entire life. Tr. 80:23-81:21.

[48] In its Memorandum, the district court states that, "[Jason] concedes there was a loan but recalls it being $2,800.00 . . . [Jason] appears to concede that this was a loan and not a gift." App. 261 at ¶ 47. This is not supported by the record. Jason maintained several times that the money was not a loan. Tr. 155:1; 155:24-25; 170:4-9. Regardless of whether the district court believed his testimony, Jason did not concede that this was a loan.

[49] The district court incorrectly characterized Ms. Mattheis as an impeachment witness, called by Rhonda. App. 250 at ¶ 7. Although such a mischaracterization of a witness would generally be inconsequential, it is clear here that the district court relied on

this error in its fact finding. App. at 250-251 at ¶¶ 7, 13. Not only was Ms. Mattheis called by Jason, her testimony generally supported Jason's narrative. Ms. Mattheis testified that Rhonda made negative comments about Jason with the child and Ms. Mattheis present; she and her supervisors believed the allegations of inappropriate touching did not trigger the mandatory reporting requirements; there were issues scheduling sessions for the child; and, Ms. Anderson had notified Ms. Mattheis that Rhonda had made threats of self-harm if she lost custody. App. 233 at ¶ 9; Tr. 16:11-2; 17:5-6; 28:4-29:4; 31:14-21; 36:11-40:12; 44:3-7; 47:20-48:2; 48:21-49:13. Regardless of the weight the district court gave her testimony, its characterization of Ms. Mattheis as an impeachment witness called by Rhonda and its characterization of her testimony is not supported by the record.

[50] As it relates to the "inappropriate touching" allegation, the district court found that Ms. Mattheis "was clear and unequivocal, [in that] she did not interpret the observation by Defendant Biffert noted above to be an allegation of sexual abuse but rather a parenting concern." App. 254 at ¶ 23. However, when Ms. Mattheis was asked if she brought any of Rhonda's concerns to Jason, she stated that she did not ask him about the "inappropriate sexual touching." Tr. 17:5-8. Even though Ms. Mattheis testified Rhonda did not use the words "sexual abuse," it was apparent from her testimony that is how she perceived Rhonda's concern. Ms. Mattheis, on her own, used the words "inappropriate sexual touching," showing that she viewed the allegations in a sexual light.

[51] The district court found that Rhonda denied making a sexual abuse allegation against Jason, and that she did is "unsupported by credible testimony." App. 254 at ¶¶

23-24. Considering that Rhonda raised this as a concern within her questionnaire to the parenting investigator, specifically stating she was concerned about "[s]exual behavior Jason has touched [K.S.] also plays with himself at nights" contradicts the district court's finding. App. 246.

[52] Jason testified that he believed Rhonda had alleged that he "sexually molested" his son, Rhonda objected to this statement for lack of foundation. The district court responded, "Well, if he's going to say it, he's going to back it up with a specific statement . . . I want the words. Did she say those words?" Tr. 119:1-6. The district court found "[t]he testimony by Plaintiff Stevenson regarding his perception of the interrogatory response was, in the mind of the [district court], theatrical and contrived." App. 254 at ¶ 24. Rhonda herself testified that when she spoke to Jason previously about the "inappropriate touching," that he was very upset and crying—which occurred outside of the presence of the district court. Tr. 254:5-7. It is not unreasonable for an individual to think that accusations of inappropriate genital touching, which Rhonda made against Jason, could be considered allegations of sexual molestation. App. 226 at Interrogatory No. 25. By their very nature, such "parenting concerns" are sexual in nature. App. 226 at Interrogatory No. 25; App. 246. No one would reasonably argue that repeated touching of a child's shoulder or pats on the back make a parent unfit. To claim that these allegations are not allegations of sexual abuse is a gross mischaracterization of the evidence—regardless of Rhonda's intent. Further, to say that a strong reaction to these allegations is "theatrical or contrived" is disingenuous.

[53] The district court also stated that Jim Roers "categorically denied that he gave a truck to [Jason] in return for work performed . . ." impacting Jason's credibility

negatively. App. 260 at ¶ 46. Mr. Roers' testimony is not in line with the district court's findings. He stated on two occasions that he had asked Jason if he owed him anything above and beyond the truck. Tr. 243:9-19; 244:3-8; 245:18-25. Mr. Roers' testimony did not contradict Jason's. If anything, it strengthens the possibility that there was some sort of miscommunication between the parties. Jason contended that the money from the sale of the truck was intended to repay him for work he had performed for Mr. Roers, specifically for work performed in 2015 and 2016. Tr. 158:17-19; 171:18-24. Mr. Roers' testimony is not inconsistent with Jason's testimony and he was not "impeached by the testimony of Jim Roers," as the district court states. App. 260 at ¶ 46.

[54] Regarding that parties' home the district court indicated that, "Jason expresses no interest in that home. The [district court] finds that [Rhonda] actively seeks stability which is in the best interest of K.S." App. 268 at ¶ 86. Rather than fighting over who receives the home, Jason was willing to give that up in exchange for a fair amount of equity, which he felt was the difference between the purchase price $221,702.52 and the $120,000 that Rhonda contributed. Tr. 73:22-25; 78:14-20. To use this against him and imply that his willingness to compromise showed that he did not "actively seek stability" in the best interest of the child shows that the district court was twisting facts to fit its preconceived narrative. To bolster this argument even further, the district court states Jason did not "actively seek stability," yet, disregards the child's stability as it relates to Rhonda's request to sell the house. Tr. 250:17-20.

[55] The above examples are not exhaustive of the misstatements and mischaracterizations the district court made. Further, while each example on its own would likely not be evidence of clear error, by reviewing the record as a whole compared

to the district court's findings, it appears the evidence was ignored, misconstrued, or viewed through a lens which favored Rhonda.

iv. The district court improperly analyzed the best interest factors.

[56] In determining residential responsibility, a district court must consider the best interests of the child, as described in N.D.C.C. § 14-09-06.2. Although great deference is given to a district court's determinations regarding the best interest factors, here, the district court's use of an inappropriate legal burden taints its entire analysis and, therefore, no deference should be given to the district court's findings on the best interests factors. Even if this Court determines that the district court did not err is placing an unwarranted burden on Jason, as laid out in Paragraphs 29-34 of Appellant's Brief, the district court clearly erred in its analysis of the best interest factors. "Although the 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." *Law v. Whittet*, 2014 ND 69, ¶ 10, 844 N.W.2d 885. Jason disagrees with the majority of the district court's analysis of the factors; however, he will focus specifically on the following:

a. Factor (b): Ensuring Child Receives Adequate Food, Clothing, Shelter, Medical Care, and Safe Environment

[57] The district court indicated that Rhonda had "assumed the responsibility to provide K.S. with clothing, shelter[,] medical care and provided a safe environment. The record does not establish, other than having him covered by his work health plan, that [Jason] did anything further." App. 265 at ¶ 70. This is entirely contradicted by the evidence and even **despite** opposing counsel offering a stipulation on the record "that the

parties contributed to the needs of the child." Tr. 167:12-14. The district court responded to the offered stipulation by stating that "it's become clear." Tr. 167:15.

[58] The district court acknowledges that Jason paid the mortgage, but neutralizes that contribution by indicating that it was Rhonda who contributed the large down payment. App. 265 at ¶ 70. Jason provided evidence, unchallenged by Rhonda, that he paid the mortgage, including taxes and insurance, on the home, he paid for the utilities, he made multiple improvements on the home the parties shared, and he shared expenses for groceries and gas. Tr. 166:21-167:7. Jason actively provided shelter, necessities, and a safe, comfortable home, facts which were wholly disregarded.

b. Factor (c): Child's Development Needs

[59] The district court determined that this factor slightly favored Rhonda because she has been the primary caregiver and structured parent to K.S. App. 266 at ¶¶ 78-80. The issue within this factor is that the district court states it, "discounts any part of the Steffan recommendation regarding the relationship between Defendant Biffert and her adult daughter TyAnna [sic]. It has no relevance." App. 266 at ¶ 77. A parent's relationship with another child who is not the subject of a parenting rights and responsibilities action is relevant and may be considered by the district court. *Hogue v. Hogue*, 1998 ND 26, ¶ 12, 574 N.W.2d 579. Although the district court finds that Rhonda's relationship with her daughter is irrelevant, it specifically finds that Jason and his extended family have cut ties with TiAnna, implying Factor (m) weighs in favor of Rhonda. App. 271 at ¶ 117. It is error for the district court to indicate that Rhonda's relationship with TiAnna "has no relevance," and later consider TiAnna's relationship with Jason's extended family. Either TiAnna's relationship with the parties and their families is relevant, or it's not.

c. Factor (d): Sufficiency and Stability

[60] The district court determined that this factor favored Rhonda because of her relationship with friends in the area, the fact that she desires to remain in the parties' home, that she was the "spiritual leader" of the parties, and that Rhonda is better positioned to ensure a relationship between the child and the other parent. The district court determined that Rhonda's statement that she might move to Fargo was made in passing and was not imminent, and that there is no credible evidence that Jason's family is supportive and involved in the child's life. App. 267 at ¶¶ 81-87.

[61] Regarding family involvement, the district court found that "[Jason] builds up his only family as close and engaged and yet the district court saw none of those people testify." App. 257 at ¶ 35. The district court made no reference to the multiple affidavits filed by Jason's family and friends. Further, Jason could not anticipate the extreme negative reaction to the parenting investigator that the district court had, and it was unexpected for the district court to disregard the entirety of the report, which included information as to Jason's involvement with his family and their overall relationship with K.S.

[62] Even with the district court disregarding the parenting investigator's report and Jason's testimony, there was evidence on the record of Jason's relationship with his family, which was not disputed by Rhonda. Jason's sister, Shannon Heick, filed an affidavit describing a loving and supportive family involved in camping, fishing, hunting, sports, and church. App. 36 at ¶ 1. In her affidavit, she also attested to regular family gatherings and strong family bonds. App. 37 at ¶ 4. Rhonda's testimony indicated that she did not get along well with Jason's family, but supports the testimony that Jason has a

close relationship with his family. *See* Paragraph 8 of Appellant's Brief. When Rhonda is asked, "[a]nd you do believe [Jason's] family is a good influence on K.S.," her response is simply, "[y]es." Tr. 275:22-24.

[63] Further, in regard to Jason missing K.S.'s baptism, the district court specifically states that his "indignation at missing the baptism of their son falls flat. Again it is creating drama where none exists. It is an attempt to create material issues out of trite occurrences." App. 258 at ¶ 38. Religious decisions, such as baptism, are typically considered a major decision that, absent a court order, both parties would be involved in. It is entirely reasonable for a parent to be distressed that they not only were not consulted, but were not notified of such a major life event. However, for the district court, "missing the baptism of their son", which in the district court's eyes is a "trite occurrence," and Rhonda failing to inform Jason of the same must be within her right as a "spiritual leader." *Id.*; App. 267 at ¶ 82. This can be the only explanation of the district court's complete diminishment of this issue.

d. Factor (e): Parents' Ability to Facilitate Relationship

[64] During his testimony, Jason introduced two recordings: the recording of the joint session with Ms. Anderson and a recording of an exchange of the child. App. 217-218. Rhonda's attorney had no objection, "so long as the [district court] reviews them in their entirety." The district court assured the parties the recordings would be reviewed in their entirety. Tr. 100:21-24. Jason explained he felt it was his way of defending himself, presumably to show that the behavior he was alleging Rhonda was doing was actually occurring. Tr. 101:6-16. The recordings themselves do, in fact, show that Rhonda was redirected on multiple occasions during the session with Michelle Anderson. App. 218

(First Part) 7:07; 19:18; 24:48; (Second Part) at 3:19. This was stated by Ms. Anderson in her letter to the parenting investigator. App. 234-235. Further, the recordings show that Rhonda will, unprompted and unprovoked, make inappropriate comments to and about Jason around the child. App. 217 at 1:16.

[65] The district court found that there was no evidence that Rhonda's "childish behavior" occurred in front of the child, and "the taping of a presumed confidential counseling session by [Jason] says volumes more regarding this factor." App. 269 at ¶ 93. The district court's disgust with the recordings, and seemingly Jason, is apparent when it states that the recording "may be illegal." App. 255 at ¶ 28. However, despite the district court's feelings on the recordings, it is undisputed that they support Jason's testimony regarding Rhonda's inappropriate comments around the child.

[66] The district court felt that Rhonda was "true and sincere" when she stated that the child needs a relationship with his father. App. 268 at ¶ 89. Yet, Rhonda admitted that, although she had initially agreed to allowing Jason to receive Thursday through Tuesday every other week, she withdrew the Monday night visitation. She provided no particular reason for withdrawing this visitation and stated that she did not know why. Tr. 271:9-13. The district court states that the "narrative [Jason] creates about Defendant Biffert, does not, in the mind of the [district court], ring true" due to his "inability to compromise with daycare arrangements." App. 268 at ¶ 90. This is despite Rhonda admitting that the child did come to her home, instead of daycare, during Jason's parenting time. Tr. 109:2-22; 266:22-267:9. This is also despite the Interim Order which had been in place at the time of time of trial which stated "[e]ach party will be responsible for arranging daycare during their parenting time." App. 76 at ¶ 6.

[67] When Rhonda was called as a witness, several inconsistencies between her affidavit, her discovery responses, her deposition testimony, and her testimony at trial were highlighted which are in no way acknowledged by the district court. For example, in her affidavit, Rhonda claimed that Jason did not ask to see K.S. after the breakup and that they worked out a schedule once Jason did ask for parenting time. App. 63 at ¶ 32. However, after text messages were produced showing that this was untrue, she admitted that Jason did, in fact, ask to see the child after they broke up. Tr. 269:2-19. Rhonda had also claimed in her discovery responses that she had never spoken negatively towards Jason with the child around. App. 226 at Interrogatory No. 29; Tr. 271:14-20. This was shown to be untrue, not only by testimony and evidence from Ms. Anderson, Ms. Mattheis, and Jason, but also Rhonda herself. App. 232-235; Tr. 27:6-11; Tr. 59:22-25; Tr. 271:21-272:10. Despite this, the district court states there was "no evidence that [her childish behavior] was done in front of the child. App. 269 at ¶ 92. Regardless of the weight the district court gave the testimony and evidence presented, to state that there was no evidence that Rhonda made negative comments, or behaved childishly, in front of the child is clearly incorrect.

[68] Rhonda testified that Jason's alleged inappropriate touching of the child occurred one time. Tr. 273:25-274:1. This, however, is not what her position was on June 15, 2018, when she submitted her discovery responses. According to Rhonda at the time, "Jason has touched [K.S.'s] privates on numerous occasions…and he still touches him inappropriately now." App. 226 at Interrogatory No. 25. When asked if she alleged in her discovery responses that Jason "still touches him inappropriately now," Rhonda's response was that "[i]t doesn't say now." Tr. 273:1-4.

[69] The evidence shows that Rhonda made repeated negative comments to and about Jason, was dishonest in her testimony, changed previously agreed-upon parenting time without reason, and refused to share essential information (such as the date and time of the baptism). There is no evidence that Jason interfered with Rhonda's relationship with the child. The district court's finding that Rhonda is the parent more likely to facilitate a relationship with the other parent is not supported by the evidence.

e. Factor (h): Home, School, and Community Records

[70] The evidence presented was that the child would continue to attend the same daycare, same school, and would be in the same community no matter who received residential responsibility. Tr. 260:3-7; 266:15-21. However, the district court determined that this factor favored Rhonda because the child attends the same daycare, the same school, and the same healthcare providers, and to leave this environment would be disruptive. Even though the district court stated, "[l]eaving this environment would be disruptive," it also ordered the house Rhonda was living in be sold. App. 270 at ¶ 102; 272 at ¶ 122. The district court's findings are insufficient to understand its conclusion.

f. Factor (k): Interaction with Others Who Frequent the Household

[71] The district court determined that this factor slightly favors Rhonda because Jason is involved in a new relationship. App. 270 at ¶¶ 111-113. There was zero evidence presented that this individual would negatively impact the best interests of K.S. Further, when Jason was asked whether there were any plans for her to meet K.S., he stated, "[n]ot yet."

g. Factor (m): All Other Factors

[72] The district court considered the testimony by Rhonda that Jason's extended family had cut ties with Rhonda's adult daughter. App. at 271 ¶¶ 117-118. As indicated under the analysis for Factor (c), it's nonsensical for TiAnna's relationship with Jason and his family to be relevant under this factor; however, her relationship with Rhonda is not relevant under Factor (c). At the very least, the district court should have maintained a consistent position on the relevance of TiAnna's relationships with the parties and their families.

h. Analysis of Best Interest Factors

[73] In the district court's zeal to analyze the parenting investigator's report, it seemed to lose sight of the basic and undisputed facts of this case: this child has two loving, fit parents who have been actively involved in his life since the day he was born. One of those parents has been unable to set aside her anger towards the other parent, leading her to restrict parenting time, speak negatively about him around others (including in front of the child), fail to include him in major decision making, fail to invite him to important life events, and threaten (whether seriously or not) to kill herself if she loses custody. App. 217-218; Tr. 62:7-16; 102:14-104:11; 107:1-8; 271:9-13; In addition, she has made serious allegations of inappropriate touching. App. 226 at Interrogatory No. 25; App. 246. Whether or not these allegations were made with malicious intent, such allegations, particularly coupled with her other actions, are likely to undermine Jason's relationship with his child. There is no evidence that Jason has attempted to come between Rhonda and the child, and ample evidence that Rhonda has actively sought to erode the child's relationship with K.S.

[74] Because of the district court's use of the incorrect legal standard, its multiple evidentiary errors, and the overall tenor of the proceedings, Jason respectfully requests that this Court reverse and remand for additional findings consistent with the evidence presented

v. If this Court finds the district court had proper subject-matter jurisdiction to partition the home, the district court still erred in failing to make adequate findings regarding the partition and erred in its distribution of equity.

[75] As discussed more thoroughly above, the partition action was not properly before the district court and therefore the district court lacked subject-matter jurisdiction. However, if this Court determines that the district court properly had subject-matter jurisdiction, although a partition action wasn't properly brought before the district court pursuant to N.D.C.C. ch. 32-16, the district court erred in failing to include appropriate findings supporting its decision in accordance with the aforementioned Chapter. App. 259 at ¶¶ 40-42; App. 272 at ¶ 122.

[76] As to the parties' home, Jason agreed that Rhonda could keep the home, but asked that he receive the $101,702.00 that he had put into it. The evidence established that the total amount paid for the home was $221,702.52, of which Jason had paid $101,702.00 and Rhonda had contributed $120,000.00. Tr. 73:22-74:3; 75:18-19; 149:23-24. The district court specifically stated Rhonda contributed $120,000.00. App. 259 at ¶ 40. The district court ordered the home to be listed and sold, with Rhonda receiving 57% of the net proceeds and Jason receiving the remainder. Beyond the district court stating that "[Rhonda] testified she had contributed 57% of the dollars put into the home…," there was no explanation where the percentage was actually derived. App. 259 at ¶ 52.

[77] The district court does allude that it relied on the inadmissible comparative market analysis when it states that "…the house is now worth less that [sic] the original purchase price…[meaning] Defendant Biffert would be recovering substantially less than what she put into the home." App. at ¶ 41. It is clear error for the district court to rely on the comparative market analysis, which is hearsay, in its decision.

[78] Considering the admissible evidence, the parties contributed a total of $221,702.00 towards the home. App. 152. If Rhonda contributed $120,000.00, she contributed 54% ($120,000.00/$221,702.00). Even using only the purchase price of $215,000.00, Rhonda's contribution would be 56% ($120,000.00/$215,000.00). The district court seemed to accept Rhonda's testimony that she contributed 57% without any critical analysis, and it is not clear from the district court's findings the rationale behind Rhonda receiving 57%.

V. CONCLUSION

[79] The district court erred as a matter of law by improperly requiring Jason to "shift" the burden, when he had no burden to shift. Perhaps because the district court was so focused on rebutting the parenting investigator's analysis and recommendations, it ignored and misrepresented uncontested evidence, facilitated trial in an unfair manner, and improperly weighed the best interest factors. Rather than conducting an independent review of the evidence, the district court was unwilling to consider evidence favorable to Jason, twisting even stipulated facts. Ultimately, the evidence submitted at trial does not support the district court's analysis, nor conclusion. Jason respectfully requests this case be reversed and remanded.

Respectfully submitted this 14th day of August, 2019.

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CERTIFICATE OF SERVICE

[80] I hereby certify that a true and correct copy of the foregoing Appellant's Brief and Appendix (absent App. 217 and 218, which were served via USPS on August 13, 2019) were served on the 14th day of August, 2019, on the following:

DeAnn M. Pladson
deann@pladsonlaw.com

Clerk of the Supreme Court
supclerkofcourt@ndcourts.gov

[81] Service was accomplished by filing through the North Dakota Supreme Court E-Filing Portal. Appellant's Brief was also sent via e-mail to the above listed e-mail addresses.

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CERTIFICATE OF COMPLIANCE

[82] The undersigned, as attorney for the Plaintiff/Appellant, Jason Stevenson, in the above-captioned matter, and as the author of the Appellant Brief, hereby certifies, in compliance with N.D.R.App.P. 28 and 32, that Appellant's Brief is 38 pages, not including the Certificate of Service, nor the Certificate of Compliance. Appellant's Brief was created using Microsoft Word for Office 365.

Dated this 14th day of August, 2019.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No.: 20190106

Mercer Co. Case No.: 29-2018-DM-00006

Jason P. Stevenson,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	**REQUEST FOR ORAL ARGUMENT**
	)	
Rhonda S. Biffert,	)	
	)	
Defendant/Appellee.	)	

[1] COMES NOW Appellant Jason Stevenson, by and through his attorney, Kristin A. Redmann, who brings this Request for Oral Argument pursuant to N.D.R.App.P. 28(h). Appellant's Brief was filed and served on August 14, 2019, and did not include a request for oral argument pursuant to the recently amended rule. Oral argument in this case would be beneficial as it would allow the Court an opportunity to ask questions regarding the arguments presented. Due to the multiple arguments, it is likely the Court will have questions or points it wishes to clarify.

[2] If preferable, and in lieu of ruling on this Request, the undersigned would request leave to submit an amended brief to include a request for oral argument in accordance with N.D.R.App.P. 28(h).

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Dated this 16th day of August, 2019.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No.: 20190106

Mercer Co. Case No.: 29-2018-DM-00006

Jason P. Stevenson,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	**CERTIFICATE OF SERVICE**
	)	
Rhonda S. Biffert,	)	
	)	
Defendant/Appellee.	)	

I certify that a true and correct copy of the following document was served:

1. Request for Oral Argument

The aforementioned document was served on the 16th day of August, 2019, via North Dakota Supreme Court E-Filing Portal on the following:

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