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STATE OF NORTH DAKOTA

THE SUPREME COURT
STATE OF NORTH DAKOTA

Kyra Joyce Mistic n/k/a Kyra J. Bellew,	)	Supreme Court File No.: 20200313
Plaintiff and Appellant,	)	Richland County District Court No. 2017-DM-00032
vs.	)	
Joshua James Mistic,	)	
Defendant and Appellee.	)	

BRIEF OF APPELLEE
JOSHUA JAMES MISTIC

APPEAL FROM AMENDED JUDGMENT
DATED SEPTEMBER 22, 2020

RICHLAND COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE BRADLEY A. CRUFF PRESIDING

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[¶ 1] **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

[¶ 2] Whether the trial court properly granted primary residential responsibility to Joshua Mistic pursuant to N.D.C.C. § 14-09-06.6.

[¶ 3] **STATEMENT OF THE CASE**

[¶ 4] Appellant Kyra Bellew ("Kyra") and Appellee Joshua Mistic ("Josh") were divorced on June 20, 2017. Appellant's Appendix ("Appellant's App.") 22. The terms of the divorce judgment awarded the parties equal residential responsibility of their minor children. Appellant's App. 8. The divorce judgment further allowed the parties to reside with the children in North Dakota or Minnesota. Appellant's App. 13.

[¶ 5] On October 2019, the trial court entered an Order Granting Plaintiff's Motion to Find Plaintiff in Contempt ("Contempt Order"). Appellee's Appendix (App.) 010-013. At the time the Contempt Order was entered, Kyra had moved to and was living in Sisseton, South Dakota. App. 010. The Contempt Order found Kyra in contempt for moving out of state and required the following:

> If Kyra fails to obtain Josh's permission to remain in South Dakota, or obtain a court order to that effect, prior to June 01, 2020, Kyra shall then be required to return with the children to the State of North Dakota, move to the State of Minnesota with the children, or place the children with Josh.

App. 011-012.

[¶ 6] On or about April 3, 2020, Kyra brought a Motion to Relocate Out-of-State, Alternatively, Motion to Modify Judgment, for Amended Judgment, and to Stay Order Granting Plaintiff's Motion to Find Defendant in Contempt. App. 014. Paragraph 16 of Appellant's Brief incorrectly states that the trial court denied her motion to modify primary residential responsibility; it did not. Rather, the trial court entered an Order Denying

Plaintiff's Motion to Relocate Out-Of-State; Order for Hearing on Plaintiff's Motion to Amend Judgment; and Order Denying Plaintiff's Motion to Stay Contempt Order. App. 045-047. In so doing, the trial court denied Kyra's request to move out of state and denied her request to stay the Contempt Order requirements, but found that Kyra established a prima facie case to modify primary residential responsibility. App. 034-036. Therefore, Kyra's motion to modify primary residential responsibility was allowed to proceed. App. 034-037.

[¶ 7] On or about June 4, 2020, Josh brought a counter motion for primary residential responsibility. App. 038-039. On June 9, 2020, the trial court found that Josh made a prima facie case to support his request to modify primary residential responsibility. App. 064.

[¶ 8] A hearing on both motions to modify primary residential responsibility was held on July 31, 2020. App. 064. The trial court issued its Memorandum Opinion on August 28, 2020. Appellant's App. 25-41. Findings of Fact, Conclusions of Law, and Order for Amended Judgment ("Findings") and Amended Judgment were entered on September 22, 2020. App. 065-084 (Findings); Appellant's App. 42-46 (Amended Judgment).

[¶ 9] This is an appeal from the Amended Judgment dated September 22, 2020. Appellant's App. 42-56. Notice of Appeal was timely filed on November 19, 2020. Appellant's App. 57-58.

[¶ 10] **STATEMENT OF FACTS**

[¶ 11] Josh and Kyra were divorced on June 20, 2017. App. 065. The divorce judgment granted Josh and Kyra equal residential responsibility of their three children: AJM, born in 2011; SBM, born in 2013; and RPM, born in 2014. App. 065-066.

[¶ 12] At the time of the parties' divorce, Josh worked as a traveling physical therapist. App. 066. Following entry of the divorce judgment, the parties followed a parenting time schedule by agreement whereby the children resided with Kyra during the school year and Josh received parenting time every other weekend. App. 066. The parties alternated holidays, and Josh had the children subject to Kyra's every other weekend parenting time in the summer. App. 066. Since 2016, Josh has maintained a home for the children in rural Pelican Rapids, Minnesota. App. 066-067; Corrected Evidentiary Transcript, July 31, 2020 ("Tr."), at 11.

[¶ 13] In October 2019, Josh obtained permanent employment and had continued to work for the same employer through the time of the July 31, 2020 hearing date. Tr. 11. Josh testified that he had no plans to change his employment. Tr. 11. As a result of Josh obtaining permanent employment, Josh now lives at his home in Pelican Rapids, Minnesota on a full time basis. App. 066; Tr. 13. Josh also remarried since the divorce was entered. Tr. 22. At the time of the July 31, 2020 hearing date, Josh and his wife were expecting a child. Tr. 12. Josh's wife is a homemaker and is able to provide care for the children and assist them with homework and schooling requirements. Tr. 24.

[¶ 14] Kyra made several moves and employment changes since the divorce was entered. Tr. 49 – 50. At the time of the parties' divorce, Kyra resided in Wahpeton, North Dakota. Tr. 49. While in Wahpeton, the parties' oldest child experienced bullying from peers and an assault perpetrated by a school teacher. Tr. 55.

[¶ 15] Kyra then moved to Hankinson, North Dakota. Tr. 50. Kyra refused to provide her Hankinson address to Josh, and Josh experienced difficulties with regard to exchanges of the children. Tr. 56 – 57.

[¶ 16] Next, Kyra moved to Sisseton, South Dakota. Tr. 50. Kyra moved to Sisseton without Josh's permission or a court order allowing the move. App. 012. As a result, the trial court found Kyra in contempt and required her to come into compliance with N.D.C.C. § 14-09-07(2). App. 013.

[¶ 17] Kyra moved back to Wahpeton, North Dakota shortly before the July 31, 2020 hearing date. Tr. 50, 61-62. Kyra left her home in Sisseton and was about to begin new employment at the time of July 31, 2020 hearing date. Tr. 67, 82.

[¶ 18] On July 31, 2020, the trial court held a hearing on the parties' competing motions to modify primary residential responsibility. App. 065. On August 28, 2020, the trial court issued its Memorandum Opinion. Appellant's App. 25-41. On September 22, 2020, the trial court's Findings and Amended Judgment were entered, which awarded primary residential responsibility of the children to Josh. App. 065-084 (Findings); Appellant's App. 42-56 (Amended Judgment). Notice of Entry of the Amended Judgment was served on September 22, 2020. App. 008. Kyra's Notice of Appeal was served on November 19, 2020. Appellant's App. 57.

[¶ 19] **LAW AND ARGUMENT**

[¶ 20] **1. THE STANDARD OF REVIEW**

[¶ 21] Review of a trial court's award of residential responsibility is under the clearly erroneous standard. Dieterle v. Dieterle, 2013 ND 71, ¶ 6, 830 N.W.2d 571. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, on the entire evidence, we are left with a definite and firm conviction that a mistake has been made." Id. (citations omitted). A trial court's

findings are sufficient if they afford a clear understanding of the trial court's decision and assist the appellate court in conducting its review. Id.

[¶ 22] The regulation of the presentation of evidence and the conduct of a trial is reviewed under the abuse of discretion standard. A district court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, if its decision is not the product of a rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of reaching a reasonable determination, or if it misinterprets or misapplies the law. Hartleib v. Simes, 2009 ND 205, ¶ 15, 776 N.W. 2d 271. A court also abuses its discretion when the trial court employs a procedure that fails to afford a party a meaningful and reasonable opportunity to present evidence on the relevant issues. Thompson v. Olson, 2006 ND 54, ¶ 6, 711 N.W.2d 226.

[¶ 23] **2. THE TRIAL COURT PROPERLY GRANTED PRIMARY RESIDENTIAL RESPONSIBILITY TO JOSH USING THE STANDARD SET FORTH IN N.D.C.C. § 14-09-06.6.**

[¶ 24] **a. The Standard to Modify Primary Residential Responsibility.**

[¶ 25] N.D.C.C. § 14-09-06.6(6) provides the standard for modification of primary residential responsibility. It states:

> The trial court may modify the primary residential responsibility after the two-year period following the date of entry of an order establishing primary residential responsibility if the trial court finds:
>
> a. On the basis of facts that have arisen since the prior order which were unknown to the trial court at the time of the prior order, a material change has occurred in the circumstances of the child or the parties; and
>
> b. The modification is necessary to serve the best interests of the child.

Id.

[¶ 26] In the present case, neither party was awarded primary residential responsibility of the minor children at the time of the divorce. Appellant's App. 8. Rather, the parties stipulated to sharing equal residential responsibility of their children. Appellant's App. 8. A modification from equal residential responsibility to primary residential responsibility was addressed by the North Dakota Supreme Court in Mairs v. Mairs, 2014 ND 132, 847 N.W.2d 785. In that case, the Court stated:

> Section 14-09-06.6, N.D.C.C., governs the post-judgment modification of primary residential responsibility. Generally, a parent may move to modify primary residential responsibility under the framework provided by N.D.C.C. § 14-09-06.6. See Regan v. Lervold, 2014 ND 56, ¶ 12, 844 N.W.2d 576. When the parents have joint or equal residential responsibility, however, an original determination to award "primary residential responsibility" is necessary. See Maynard v. McNett, 2006 ND 36, ¶ 21, 710 N.W.2d 369 (original determination of primary residential responsibility is appropriate when the parties have joint residential responsibility and one party wishes to relocate); see also N.D.C.C. § 14-09-00.1(6) ("'Primary residential responsibility' means a parent with more than fifty percent of the residential responsibility."); N.D.C.C. § 14-09-00.1(7) ("'Residential responsibility' means a parent's responsibility to provide a home for the child."). This is also the case when the earlier residential responsibility determination is based on the parties' stipulation. See Wetch v. Wetch, 539 N.W.2d 309, 312-13 (N.D. 1995) ("if the previous custody placement was based upon the parties' stipulation and not by consideration of the evidence and court-made findings, the trial court must consider all relevant evidence,… in making a considered and appropriate custody decision in the best interests of the children").

Mairs, ¶ 7.

[¶ 27] In making an award of primary residential responsibility, "the trial court must consider factors (a) through (m) provided in N.D.C.C. § 14-09-06.2(1) to evaluate the best interests and welfare of the child. The trial court has substantial discretion in making a primary residential responsibility determination, but the trial court must consider all of the best interest factors." Mairs, ¶ 16. "The trial court must ultimately decide which parent

will 'better promote the [children's] best interests and welfare.'" Id. (quoting Marsden v. Koop, 2010 ND 196, ¶ 9, 789 N.W.2d 531).

[¶ 28] **b. This Court Does Not Re-Weigh Evidence**

[¶ 29] Appellant asks this Court to reweigh the evidence, arguing that the trial court should have weighed evidence differently. This Court has stated:

> 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.'"

Miller v. Mees, 2011 ND 166, ¶ 12, 802 N.W.2d 153 (citing Wolt v. Wolt, 2010 ND 26, ¶ 7, 778 N.W.2d 786 (quoting Lindberg v. Lindberg, 2009 ND 136, ¶ 4, 770 N.W.2d 252)). "A choice between two permissible views of the weight of the evidence is not clearly erroneous, and our deferential review is especially applicable for a difficult child custody decision involving two fit parents." Thomas v. Thomas, 2019 ND 299, ¶ 3, 936 N.W.2d 109 (quoting Dickson v. Dickson, 2018 ND 130, ¶ 7, 912 N.W.2d 321).

[¶ 30] **c. The Trial Court Correctly Determined that a Material Change of Circumstances Had Occurred.**

[¶ 31] The trial court correctly found that a material change in circumstances had occurred since entry of the June 20, 2017 divorce judgment. App. 065-067. "A material change in circumstances is an important new fact that was unknown at the time of the prior custody decision." Heidt v. Heidt, 2019 ND 45, ¶ 6, 923 N.W.2d 530. "[A] move by a parent with primary residential responsibility either out-of-state or in-state, accompanied by other circumstances, may be viewed as a material change of circumstances." State v. Neustel, 2010 ND 216, ¶ 8, 790 N.W.2d 476 (citing Fleck v. Fleck, 2010 ND 24, ¶ 6, 778 N.W.2d 572; Dietz v. Dietz, 2007 ND 84, ¶ 13, 733 N.W.2d 225; Gietzen v. Gietzen, 1998 ND 70,

¶ 10, 575 N.W.2d 924; Hanson v. Hanson, 1997 ND 151, ¶ 5, 567 N.W.2d 216; Van Dyke v. Van Dyke, 538 N.W.2d 197, 201 (N.D. 1995); Gould v. Miller, 488 N.W.2d 42, 44 (N.D. 1992)). "[A] material change of circumstances can exist when a parent remarries, when there has been an attempt to alienate a child's affection for a parent or when parents are openly hostile towards each other and the hostility negatively affects their children." Dufner v. Trottier, 2010 ND 31, ¶ 16, 778 N.W.2d 586. "Improvements in a noncustodial parent's situation accompanied by a general decline in a child's condition with the custodial parent over the same time may also constitute a significant change in circumstances." Ehle v. Joyce, 2010 ND 199, ¶ 8, 789 N.W.2d 560.

[¶ 32] In the present case, the trial court found that Kyra's move out of state, without Josh's consent or court permission, constituted a material change of circumstances. App. 066. Other changes involving Kyra included: four moves, two relationships, multiple job changes, and her unilateral decision to switch the children's school district three times since entry of the divorce Judgment only three years prior. App. 066. The trial court recognized that Josh's circumstances have improved since entry of the divorce judgment. App. 066-067. Namely, Josh went from working as a traveling physical therapist to having full-time, permanent employment; Josh is able to reside full-time at his home in rural Pelican Rapids as a result of his permanent employment; and Josh is now married to Moon Mistic. App. 066-067; Tr. 11-12, 22. As the trial court further described in its findings of fact, these changes directly affect the children's best interests. See App. 065-085 (Findings of Fact). The best interest factors are discussed below.

[¶ 33] **d. The Trial Court Correctly Applied the Best Interest Factors.**

[¶ 34] The trial court correctly determined that a modification of the custodial arrangements was necessary to serve the children's best interests. "Trial courts must award primary residential responsibility of children to the party who will best promote the children's best interests and welfare." Deyle v. Deyle, 2012 ND 248, ¶ 5, 825 N.W.2d 245 (citing Morris v. Moller, 2012 ND 74, ¶ 6, 815 N.W.2d 266). "A trial court has broad discretion in awarding primary residential responsibility, but the trial court must consider all of the relevant factors under N.D.C.C. § 14-09-06.2(1)." Deyle, ¶ 5 (citing Morris, ¶ 6). Here, the trial court found factors (b), (c), (d), and (h) favored Josh. App. 067-079. Factor (j) slightly favored Kyra, but did not arise to the level of creating a presumption that Kyra be awarded primary residential responsibility of the children. App. 078. Factors (a), (e), (f), (g), and (k) favored neither party, and factors (i) and (l) were not applicable. App. 076, 079.

[¶ 35] ***i. The trial court did not err in its application of 14-09-06.2(1)(a).***

[¶ 36] Factor (a) of N.D.C.C. § 14-09-06.2(1) requires the trial court to evaluate "[t]he love, affection, and other emotional ties existing between the parents and child and the ability of each parent to provide the child with nurture, love, affection, and guidance." The trial court found that love, affection, and emotional ties exist between both parties and the minor children. App. 067. The Court relied upon Plaintiff's Exhibits 1, 2, 3, and 4, along with Defendant's exhibits 6, 7, and 10 in making this determination. App. 067, 091-101, 112. As provided by the trial court, the evidence at trial demonstrated that both parties have the ability to provide the children with nurture, love, affection, and guidance;

therefore the factor favored neither party. App. 067. Ample evidence in the record supported the trial court's finding.

[¶ 37] ***ii. The trial court did not err in its application of 14-09-06.2(1)(b).***

[¶ 38] Factor (b) of N.D.C.C. § 14-09-06.2(1) requires the trial court to evaluate "[t]he ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment." The trial court determined that this factor slightly favors Josh due to concerns regarding the supervision of the children and their emotional well-being at Kyra's home. App. 067-068. Specifically, the trial court had concerns regarding two kittens in Kyra's home (one maimed and the other smothered) and a puppy being shot, and the impact these situations had on the children. App. 067-068. In paragraph 19 of her brief, Appellant incorrectly states that "[t]here was never any evidence presented regarding this." Appellant's Brief, ¶ 19. Facts regarding these situations were presented by Josh through his testimony, in a text message exhibit, and in an affidavit filed in support of his motion to modify primary residential responsibility. Tr. 31; App. 054-055, 122. Kyra did not offer any comment or context to these situations at the trial court level, but now attempts to improperly supplement the record on appeal. See Appellant's Brief, ¶¶ 19-20 (Appellant's supplementations to the record regarding kittens and puppy). The trial court's decision on this factor was not clearly erroneous.

[¶ 39] ***iii. The trial court did not err in its application of 14-09-06.2(1)(c).***

[¶ 40] The trial court found that factor (c) favors Josh, which requires the trial court to consider "[t]he child's developmental needs and the ability of each parent to meet those needs, both in the present and in the future." N.D.C.C. § 14-09-06.2(1)(c).

[¶ 41] The trial court considered that the children have been residing primarily with Kyra during the school year since the parties' separation. App. 068. The trial court also recognized that Kyra has been primarily responsible for the children's developmental needs and established that she can meet those needs. App. 069. However, Kyra had just moved back to Wahpeton in June. Tr. 67. The trial court found that Kyra caused the children to change school districts three times in the prior three years, and that Kyra intended to enroll the children in the Wahpeton Public School District again, which is where AJM was previously bullied. App. 068-069; Tr. 55, 95. The trial court believed AJM, who was diagnosed with high functioning autism, would do better in a "very stable, predictive, and repetitive environment." App. 068; Tr. 83, 85.

[¶ 42] While the children did not live primarily with Josh during the school year, the trial court found that Josh (a) engages the children in informal learning activities; (b) provides the children with learning opportunities through education programs, books, life experiences; and (c) stays informed regarding the children's school by talking with teachers and requesting progress reports. App. 069. Josh testified, and the trial court found, that he would be able to see to the children's schooling needs. App. 069. Josh's wife is a homemaker who can assist with online learning needs, and Josh's home has computers and good internet access to facilitate online learning, should it be necessary. App. 069.

[¶ 43] The trial court considered that, with Kyra having primary residential responsibility, AJM would return to an environment where he was previously bullied. App. 070; Tr. 55. At trial, Kyra admitted to intending to have the children attend school in Wahpeton, which is the same school that AJM previously attended. Tr. 95. Kyra argues in her brief that she "emphasized that AA attended the Zimmerman elementary school, not the Wahpeton

elementary school. It was at Zimmerman he had a rough time." Appellant's Brief, ¶ 24. This is not true; rather, Kyra testified as follows:

> Q: Under the home school and community records of the children and any potential effect of any change, would you admit today that you've just moved back to Wahpeton so they are now in a new school?
> A: Yes.
> Q: They've been to this school before though?
> A: Yes. AA has already been here before.

Tr. 95. Kyra provided further details about AJM's experience at Wahpeton in her affidavit filed in support her motions. She stated:

> School life for A.J.M. in Wahpeton was not good. We had a number of instances that angered me as a parent to which I felt it best for A.J.M. to transfer to a new school. News of this made him happy, he was very excited to go to a new school given the incidents we went through with Wahpeton."

App. 033. Based on the evidence presented, with regard to schooling in Wahpeton, the Court found: "Although familiar to AJM the Court also has to believe it is also an emotionally distressing environment to AJM." App. 070.

[¶ 44] Kyra testified that she was about to begin a new job in Wahpeton at Minn-Dak Farmers' Cooperative. App. 069. In her Affidavit submitted to support her motion, Kyra informed the trial court that she was not working in the spring due to being furloughed, which Kyra referred to as a "precarious situation." App. 015. While Kyra may have been able to attend to the children's online learning needs in the spring of 2020 as a result of being furloughed, Kyra provided no facts or details to the trial court regarding how she would provide for the children's educational needs in the fall when she was to begin her new employment. Kyra did not testify regarding what her hours or work schedule would be; she did not testify about how her employment may or may not be conducive to the children's learning needs; she also did not testify as to whether anyone could assist with

the children's learning needs during the hours that she worked, should online schooling continue to be necessary. See App. 070. Rather, the only testimony Kyra gave regarding her new employment was (a) that orientation was coming up, and (b) her earnings rate. Tr. 67.

[¶ 45] Based on Kyra's multiple moves, her recent return to the Wahpeton school district, new work commitments, concerns regarding Kyra's ability to see to the children's potential online learning needs, Josh's involvement with the children's education and development, as well as Josh's home environment being conducive to the children's learning needs, there was ample evidence in the record to support the trial court's finding on factor (c). The trial court's finding was not clearly erroneous.

[¶ 46] ***iv. The trial court did not err in its application of 14-09-06.2(1)(d).***

[¶ 47] The trial court found that factor (d) "strongly favors" Josh. App. 073. This factor requires the trial court to consider: "the sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desireability of maintaining continuity in the child's home and community." N.D.C.C. § 14-09-06.2(1)(c). In making its finding, the trial court relied on Josh having the same home in Pelican Rapids since May, 2016. App. 071; Tr. 011. Josh's residence served as a "home base" for the children, and was very familiar to them. App. 051; 071. The trial court found that the rural location and ability to control social interactions while in Josh's care was beneficial for AJM due to his borderline autism needs. App. 071. The trial court noted that the bus for the Pelican Rapids school would pick up the children from Josh's driveway, which provides easy transportation and overall safety. App. 055, 071.

[¶ 48] The trial court recognized that Josh had previously been a travelling physical therapist. App. 066; Tr. 068-069. However, since October of 2019, Josh has maintained full time, regular employment and permanently resides at his Pelican Rapids home. App. 051-052, 071, 107-111; Tr. 011-012, 014-015. The trial court found that this home is familiar and comfortable for the children. App. 071; Tr. 014.

[¶ 49] The trial court also found that Josh's wife, Moon Mistic, is a positive influence for the children. App. 072. Moon has good relationships with the children, assists in caring for the children, and implements routine and structure in the home. App. 072; Tr. 022-025. Moon is able to greet the children after school and provide care for the children until Josh arrives home from work. App. 055-056, 072; Tr. 024. Moon is also able to assist with distance learning needs, as necessary. App. 055-056, 072. Josh's parents, Paul and Kim Mistic, also play an important role in the children's lives and have a positive influence. App. 072; Tr. 020-021. The trial court ultimately found that "it is desirable to maintain continuity in the children's home and community in Pelican Rapids." App. 072.

[¶ 50] Kyra argues that the trial court should have known that her boyfriend, Jenkins, is still a member of her family. Appellant's Brief, ¶ 23. However, Kyra never testified or otherwise told the trial court that Jenkins moved back to Wahpeton, North Dakota with her. Kyra also never provided any information regarding his role or support to the children since her return to Wahpeton. The trial court did not err by stating it is "not aware if Jenkins is still a member of Kyra's household[.]" App. 070.

[¶ 51] The trial court gave due consideration to the fact that Kyra had "de facto" primary residential responsibility following the parties' divorce, that she has been a "constant" in the children's lives, but also found that nothing else has been consistent for Kyra. App.

066, 072. The trial court found that Kyra's home environment has not been stable. App. 072. Kyra lived with the children in Mooreton, North Dakota, then moved to Wahpeton, North Dakota, then to Hankinson, North Dakota, then to Sisseton, South Dakota, and finally back to Wahpeton, North Dakota. App. 072; Tr. 049-050. With regard to Kyra's moves, the trial court also found the following:

> Kyra moved back to Wahpeton to comply with the Court's contempt order and for employment as Kyra was furloughed or laid off from her prior employment due to the pandemic. With the moves to Hankinson and Sisseton, Kyra unilaterally changed the children's schools without Josh's approval or consent. Kyra's move to Sisseton was also without the Court's consent, which she knew to be in violation of North Dakota state law. See Defendant's Exhibit 23. For this, Kyra was held in contempt of court on October 22, 2019. In June of 2020, when Kyra moved from Sisseton to Wahpeton, Kyra did not inform Josh of her move until after the fact. See Defendant's Exhibit 29.

App. 072-073. Kyra argues that the trial court erred by stating that she moved because she "simply 'did not like the town' she was in." Appellant's Brief, ¶ 28. To the contrary, the trial court considered the reasons given for each of her moves, which included the bullying experienced by AJM, more sports opportunities, and a home purchase. App. 072; Tr. 074. [¶ 52] The trial court expressed concerns regarding Kyra potentially renewing her motion to relocate to Sisseton, where she still owned a home, which would change the children's residence and schools yet another time. App. 073; See App. 015-016 (Kyra's concerns regarding selling the home). Appellant incorrectly argues that it is inappropriate for a court to speculate about future moves. To the contrary, "[c]urrent factor (d) incorporates consideration both of the length of time the child has lived in a stable home as well as the permanence or stability of the home environment and adds the forward-looking consideration of 'the desirability of maintaining continuity in the child's home and community.'" Deyle, ¶ 8 (quoting N.D.C.C. § 14-09-06.2(1)(d)). "Factor (d) no longer

restricts the district court's analysis to past events…. [D]istrict courts now must look both forward and backward[.]" Deyle, ¶ 9. The trial court found granting Josh primary residential responsibility would provide greater continuity and stability for various reasons, all of which are supported by the record. Tr. 49-50.

[¶ 53] ***v. The trial court did not err in its application of 14-09-06.2(1)(e).***

[¶ 54] The trial court found that factor (e) favored neither party. App. 073-074. This factor requires the trial court to consider "[t]he willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child." N.D.C.C. § 14-09-06.2(1)(e).

[¶ 55] The trial court recognized that "significant conflict" occurred between the parties following the divorce. App. 073. The significant conflict included communication difficulties (App. 125-138), Kyra encouraging the children to address Josh by his first name (App. 056), conflict over the children's phone calls (App. 021), Kyra not always facilitating Josh's relationship with the kids (App. 057-058; Tr. 056), and the parties degrading one another (App. 020-021). App. 073-074. In her brief, Kyra argues that she did not interfere with Josh's parenting time or hinder his ability to coparent. Appellant's Brief, ¶¶ 9, 12. However, facts in the record show that interference did occur. App. 057-058, 135-138; Tr. 056-066.

[¶ 56] The trial court also considered that the parties cooperated to meet halfway for exchanges. App. 074; Tr. 65. Facts in the record support the trial court's findings on this factor, and the trial court's findings were not clearly erroneous.

[¶ 57] ***vi. The trial court did not err in its application of 14-09-06.2(1)(f).***

[¶ 58] The trial court found that factor (f), regarding the moral fitness of the parents, did not favor either party. App. 074. Kyra did not dispute this. App. 021. The trial court did not err in making this finding, and this finding is not clearly erroneous.

[¶ 59] ***vii. The trial court did not err in its application of 14-09-06.2(1)(g).***

[¶ 60] The trial court found that factor (g), regarding the mental and physical health of the parents, favored neither party. App. 076. While there was evidence suggesting that Kyra may have suffered from mental health issues in the past, the trial court found that both Josh and Kyra are currently physically and mentally healthy. App. 075-076. Kyra did not dispute this. See App. 021.

[¶ 61] ***viii. The trial court did not err in its application of 14-09-06.2(1)(h).***

[¶ 62] The trial court found that factor (h) favored Josh, which requires the trial court to consider "[t]he home, school, and community records of the child and the potential effect of any change. N.D.C.C. § 14-09-06.2(1)(h). In making this finding, the trial court believed the children would remain in the same home and attend the same school for more than one year with Josh having primary residential responsibility. App. 076. At the time of the hearing, Josh had lived in the same home for over four years and retained the same employment going on nearly two years. Tr. 10-11. Josh testified that he did not have any plans to change his employment or residence. Tr. 10-11. On the other hand, Kyra had made multiple moves and switched the children's school district three times in the preceding three years. App. 066; Tr. 49-50, 55-56, 64. In making this finding, it was

appropriate for the trial court to consider potential relocations of the parties. Deyle, ¶ 7. The trial court's findings on this factor are supported by the record.

[¶ 63] ***ix. The trial court did not err in its application of 14-09-06.2(1)(j).***

[¶ 64] The trial court found that factor (j), which requires the trial court to consider domestic violence, slightly favored Kyra due to one incident that occurred five years prior to the hearing. App. 078. The incident occurred in August of 2015, which resulted in law enforcement being called to the parties' home and Josh pleading no contest to the charge of "Disorderly Conduct – Domestic Abuse – Domestic Abuse Assessments". App. 077; see App. 156 (case history exhibit). Josh testified that Kyra repeatedly punched him in the head during this incident, and Josh responded by jabbing her in the stomach. Tr. 043. Josh testified that, on other occasions, Kyra slapped him and broke his guitar. Tr. 046. Requests for admission related to these incidents were deemed admitted by Kyra pursuant to Rule 36(a)(3) of the North Dakota Rules of Civil Procedure. App. 078, 163-164.

[¶ 65] The trial court correctly determined that these facts did not rise to the level of creating a presumption pursuant to N.D.C.C. § 14-09-06.2(1)(j). For a presumption to be created, domestic violence must have "resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding[.]" Id. There was no testimony that either party was seriously injured, no testimony that a dangerous weapon was used, and the incidents all occurred prior to entry of the parties' divorce. See Tr. 42-46.

[¶ 66] The trial court's findings on this factor are not clearly erroneous.

[¶ 67] ***x. The trial court did not err in its application of 14-09-06.2(1)(k).***

[¶ 68] The trial court found that factor (k), regarding the interaction and interrelationship of third parties, favored neither party. App. 079. In making this finding, the trial court noted that both Josh and Kyra have a spouse or significant other who have positive relationships with the children. App. 078. This is supported by the record. Tr. 22-25, 86, 90. This finding is not clearly erroneous.

[¶ 69] ***xi. The trial court did not err in its application of 14-09-06.2(1)(i) or (l).***

[¶ 70] Factor (i) deals with a child's preference. Due to the children's ages (born in 2011, 2013, and 2014), the trial court correctly determined that this factor was not applicable. App. 066, 076.

[¶ 71] Factor (l) deals with false allegations of harm to a child. No false allegations of harm to a child were made by either party, therefore, the trial court correctly determined that it was not applicable. App. 079.

[¶ 72] **3. RESPONSE TO MISCELLANEOUS ISSUES RAISED BY APPELLANT**

[¶ 73] In her brief, Appellant complains of time constraints imposed by the lower court, requests that a mediation requirement now be imposed upon the parties, and further requests this Court to assist in recognizing "wrongs" done by the trial court. Appellee provides the following response to these issues.

[¶ 74] **a. The Trial Court Did Not Abuse Its Discretion by Imposing Time Limitations at the Hearing.**

[¶ 75] Appellant complains of time restraints imposed by the trial court at the July 31, 2020 hearing. Appellant's Brief, ¶ 32. As is evident from the date of the pleadings,

Appellant's motion was served in April 2020, and the hearing date was set in early May. Had either party wanted more time, there was ample time to request it. However, Kyra made no objection to the time constraint at the trial court level, and Kyra further made no offer of proof as to what any additional time would have added to her case. See Tr. 4 (no objection made when time limitation discussed).

[¶ 76] "The district court has broad discretion over the presentation of evidence and the conduct of a trial or hearing." Hartleib, ¶ 15. "In exercising that discretion, the trial court may impose reasonable restrictions upon the length of the trial or hearing and upon the number of witnesses allowed." Id. "Within the context of a due process challenge, "[a] court abuses its discretion only when the trial court employs a procedure which fails to afford a party a meaningful and reasonable opportunity to present evidence on the relevant issues." Id. (quoting Thompson, ¶ 6).

[¶ 77] At the July 31st hearing, each party was afforded approximately ninety minutes of testimony, including direct and cross-examination. Tr. 4. The trial court explained this at the onset of the hearing, and neither party objected or complained that they would not be able to complete their presentation. Tr. 4. Appellant's counsel was able to elicit three rounds of questioning from Josh at the hearing, along with two rounds of questioning from Kyra. See Tr. 2. He asked approximately 40 questions of Josh, asked 155 questions of Kyra, and announced that he didn't have anything further. Tr. 117. As part of the motion procedure, the parties also submitted affidavits, which the trial court reviewed prior to the hearing. Tr. 4.

[¶ 78] "A trial court has great latitude and discretion in conducting a trial and, absent an abuse of discretion, its decision on matters relating to the conduct of a trial will not be set

aside on appeal." Francis v. Francis, 2014 ND 111, ¶ 4, 847 N.W.2d 131 (quoting Selzler v. Selzler, 2001 ND 138, ¶ 10, 631 N.W.2d 564). A trial court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, if its decision is not the product of a rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of reaching a reasonable determination, or if it misinterprets or misapplies the law. Hartleib, ¶ 15. A trial court also abuses its discretion when the trial court employs a procedure which fails to afford a party a meaningful and reasonable opportunity to present evidence on the relevant issues. Thompson, ¶ 6.

[¶ 79] The failure to object or protest the procedure by Kyra's counsel when it was announced demonstrated she lacked concern that the time allotted was inadequate to present Kyra's case. See, e.g., Wahl v. N. Imp. Co., 2011 ND 146, ¶ 8, 800 N.W.2d 700 (counsel's failure to object to the scheduling of the trial for four days demonstrated that the trial court did not abuse its discretion in scheduling trial for four days); Mairs, ¶ 11 (no abuse of discretion occurred where trial court limited parties to 3 hours of time and no request or motion for additional time was brought). Appellant made no motions for additional trial time, no complaints of time limitations, nor any requests for additional days of testimony. Tr. 4-5. More importantly, Appellant made no offer of proof as to what additional facts would have been elicited by further cross examination or witnesses. Complaining of time limitations without a sufficient offer of proof as to what would be proven if further evidence or cross examination were allowed leaves this Court to only speculate as to whether Appellant was in any way prejudiced. Isaacson v. Isaacson, 2010

ND 18, ¶ 11, 777 N.W.2d 886; Thompson, ¶ 7; Mairs, ¶ 11. Simply put, the trial court did not abuse its discretion by imposing time limits at the July 31, 2020 hearing.

[¶ 80] **b. Appellant's Request to Add a Mediation Clause to the Amended Judgment is Improper.**

[¶ 81] Appellant now requests that a mediation clause be added to the Amended Judgment. Appellant's Brief, ¶ 34. "It is well settled that issues not raised in the district court may not be raised for the first time on appeal[.]" Paulson v. Paulson, 2011 ND 159, ¶ 9, 801 N.W.2d 746. "The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories." Id. ¶ 9 (quoting Beeter v. Sawyer Disposal LLC, 2009 ND 153, ¶ 20, 771 N.W.2d 282; Heng v. Rotech Med. Corp., 2006 ND 176, ¶ 9, 720 N.W.2d 54). Appellant never made a request for a mediation provision at the trial court level, therefore it is improper for the issue to now be raised on appeal.

[¶ 82] **c. Appellant's Request for this Court to Assist Her in "Recognizing Wrongs" is Improper.**

[¶ 83] Appellant asks the Court to assist her in "recognizing what wrongs have been overlooked or committed" by the lower court. Appellant's Brief, ¶ 35. This request is improper. "It is not the function of this appellate court to advise parties as to the strategy or method of proceeding with litigation. A party acting pro se should not be treated differently nor allowed any more or any less consideration than parties represented by counsel." Horace Farmers Elevator Co. v. Brakke, 383 N.W.2d 838, 840 (N.D. 1986).

[¶ 84] **4. OBJECTION TO APPELLANT'S REFERENCES TO FACTS NOT CONTAINED IN RECORD.**

[¶ 85] Appellant's Brief contains references to various facts not contained in the trial court record. Such facts include the following:

a. Appellant's Brief, ¶ 6: "The defendant has been a traveling physical therapist since we separated." To the contrary, the record reflects that Josh stopped being a traveling physical therapist and gained full time, regular employment in October 2019. Tr. 11.

b. Appellant's Brief, ¶ 10: This paragraph contains references to a move by Josh from Pelican Rapids, Minnesota to Bemidji, Minnesota. None of these facts are contained in the lower court record.

c. Appellant's Brief, ¶ 15: Kyra references a situation where Josh got "physical" with her "while [Kyra's] back was turned (proof that I was not aggressive towards him." This is not contained in the record. See Tr. 42-45, 95-99.

d. Appellant's Brief, ¶ 17: "I worked for the same company for four years, the location of my job moved as I was promoted." This fact is not contained in the record.

e. Appellant's Brief ¶ 17: "[T]he defendant also had relationships prior to his marriage in 2019. I am unaware of how many there were as I did not see it as my business this is something the defendant would randomly share with me while we were still on good terms." These facts are not contained in the record.

f. Appellant's Brief ¶¶ 19-20: Kyra provides various factual details concerning animals that were maimed or killed during her parenting time. Such details are not part of the record. See Tr. 31; App. 054-055, 122-124.

g. Appellant's Brief, ¶ 22: "When the pandemic hit, the children were online schooling for the entirety of the tail end of the school year. I had no problems providing this to the children as they also had a great internet connection, computers, tablets, offered in my home and the like to ensure they completed schoolwork. This was void of

acknowledging that I had not only the ability to cater to online learning needs, but also, that I had already proven I was capable in the months prior to summer." None of these facts are contained in the lower court record. To Appellee's knowledge, the only reference in the record to Kyra's online learning efforts is the following statement made in Kyra's affidavit: "I now find myself in a very precarious situation. With the COVID19 pandemic, I find myself furloughed and on administrative leave (through April 10th) then I'm unsure of what will happen next with the kids out of school." App. 015.

h. Appellant's Brief, ¶ 23: "I had a job offer that was a schedule of Monday-Friday, normal hours and did not change to a swing or grave shift." These facts are not contained in the record. See Tr. 067.

i. Appellant's Brief, ¶ 23: "I want to note that Jenkins has been physically present in the trial courtroom for each hearing." This fact does not appear in the record.

j. Appellant's Brief, ¶ 24: "I emphasized that AA attended the Zimmerman elementary school, not the Wahpeton elementary school. It was at Zimmerman he had a rough time." This distinction does not appear in the record. Rather, Kyra testified that AA would be attending the same Wahpeton school as before if she were awarded primary residential responsibility. Tr. 95.

k. Appellant's Brief, ¶ 26: Kyra again references a move by Josh from Pelican Rapids, Minnesota to Bemidji, Minnesota. These facts do not appear in the record.

l. Appellant's Brief, ¶ 28: Kyra again references a move by Josh from Pelican Rapids, Minnesota to Bemidji, Minnesota. These facts do not appear in the record.

m. Appellant's Brief, ¶ 30: Kyra again references a move by Josh from Pelican Rapids, Minnesota to Bemidji, Minnesota. These facts do not appear in the record.

n. Appellant's Brief, ¶ 30: "I will note that I have no intentions of moving as I have many ties to Wahpeton." This fact does not appear in the record.

[¶ 86] Rule 28(f) of the North Dakota Rules of Appellate Procedure provides as follows:

> References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed or if references are made in the briefs to parts of the record not reproduced in the appendix, the references must be to the docket number of that part of the record. A party referring to evidence for which admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

"Evidence which does not appear in the record of the [district] court proceedings cannot be considered by this Court on appeal." Arndt v. Maki, 2012 ND 55, ¶ 15, 813 N.W.2d 564 (quoting Evenstad v. Buchholz, 1997 ND 141, ¶ 12, 567 N.W.2d 194).

[¶ 87] The statements in question made by Appellant are facts that are not in the record. Therefore, a violation of Rule 28(f) has occurred. Hanson v. Hanson, 2003 ND 20, ¶ 13, 656 N.W.2d 656. "Inappropriate attempts to supplement the evidentiary record at the appellate level cannot be condoned." Id. (quoting Van Dyke, at 203). Appellee objects to the Court's consideration of such facts, and requests that such facts be stricken as provided for in Appellee's separate Motion to Strike.

[¶ 88] CONCLUSION

[¶ 89] A trial court's "opportunity to observe the witnesses and determine credibility should be given great deference." In re K.M.G., 2000 ND 50, ¶ 6, 607 N.W.2d 248. In this case, the trial court heard testimony from both parties, weighed the credibility of the witnesses, applied the correct law, and resolved the matter in favor of Josh. The trial court's decision was not clearly erroneous, and Josh respectfully requests that the trial court's decision be AFFIRMED.

[¶ 90] Dated this 19th day of April, 2021.

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[¶ 91] **CERTIFICATE OF COMPLIANCE**

[¶ 92] The undersigned, as attorney for Appellee, hereby certifies that Appellee's Brief was prepared in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. This brief is 33 pages in length, excluding any addendum.

[¶ 93] Dated this 19th day of April, 2021.

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THE SUPREME COURT
STATE OF NORTH DAKOTA

Kyra Joyce Mistic n/k/a Kyra J. Bellew,	)	Supreme Court File No.: 20200313
Plaintiff and Appellant,	)	Richland County District Court
	)	No. 2017-DM-00032
vs.	)	
Joshua James Mistic,	)	
Defendant and Appellee.	)	

CERTIFICATE OF SERVICE

I, Amy M. Clark, certify on April 19, 2021, I served the following documents by electronic service under N.D. R. App. P. 25(c)(1)(D):

1. Appellee's Brief;
2. Appellee's Appendix;
3. Motion to Strike; and
4. Brief in Support of Motion to Strike

on

William Woodworth
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Dated this 19th day of April, 2021.

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