

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

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

ON APPEAL FROM AMENDED JUDGMENT DATED SEPTEMBER 22, 2020
FROM THE DISTRICT FOR THE
SOUTHEAST JUDICIAL DISTRICT
RICHLAND COUNTY, NORTH DAKOTA
THE HONORABLE BRADLEY CRUFF, PRESIDING

**REPLY BRIEF OF APPELLANT
KYRA JOYCE MISTIC N/K/A KYRA J. BELLEW**

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ARGUMENT

[¶1.] In her principal brief, Plaintiff and Appellant Kyra Mistic, n/k/a Kyra Bellew (“Kyra”) primarily argued that the district court clearly erred in its application of the best interest of the child factors on the parties’ competing motions to modify residential responsibility; as well as that there was inadequate time to present her evidence during the evidentiary hearing. Here, only specific components of her argument are addressed in response to Defendant and Appellee Joshua Mistic’s (“Josh”) Brief.

I. The District Court Clearly Erred In Its Analysis of Factor J.

[¶2.] Modifications of judgments awarding equal residential responsibility are not subject to N.D.C.C. §14-09-06.6. *Mairs v. Mairs*, 2014 ND 132, ¶7, 847 N.W.2d 785. Instead, there must be “an original determination to award primary residential responsibility.” *Id.* (citing *Maynard v. McNett*, 2006 ND 36, ¶21, 710 N.W.2d 369). A district court “must award primary residential responsibility to the parent who will better promote the best interests and welfare of the child[ren].” *Mairs* at ¶16 (citing *Morris v. Moller*, 2012 ND 74, ¶6, 815 N.W.2d 266).

[¶3.] This Court will not set aside the district court’s award of primary residential responsibility, which is a finding of fact, “unless it is clearly erroneous or is not sufficiently specific to show the factual basis for the decision.” *Mairs* at ¶17 (citing *Schlieve v. Schlieve*, 2014 ND 107, ¶8, 846 N.W.2d 733). As the Court has held:

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. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or we are convinced, on the basis of the entire record, that a mistake has been made.

Mairs at ¶17 (internal citations and quotations omitted).

[¶4.] One of the factors the district court must consider is evidence of domestic violence. Specifically:

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

N.D.C.C. §14-09-06.2(1)(j). Once the district court reaches the best interest of the child factors, “the district court must consider all relevant evidence of domestic violence, regardless of whether the original order was based on a stipulated agreement.” *O’Hara v. Schneider*, 2017 ND 53, ¶8, 890 N.W.2d 831.

[¶5.] Even if the presumption against primary residential responsibility does not apply or is rebutted, the district court still must consider evidence of domestic violence as part of the best interest of the child factors. *Id.* at ¶29 (“We further instruct the district court to consider domestic violence as a factor even if the presumption provision does not

apply.”); *Mowan v. Berg*, 2015 ND 95, ¶11, 862 N.W.2d 523 (“Although the incident may not be sufficient, standing alone, to trigger the statutory presumption under factor (j), the domestic violence must be considered as one of the best interest factors”). “Competent evidence of domestic violence not only is relevant to determining the best interests of the child but also bears greatly on the outcome of the award of primary residential responsibility.” *Mowan*, at ¶12. “A trial court cannot simply ignore evidence of family abuse, but must make specific findings on evidence of domestic violence in making its decision on primary residential responsibility.” *Carlson v. Carlson*, 2020 ND 36, ¶9, 938 N.W.2d 413 (quoting *Law v. Whittet*, 2014 ND 69, ¶17, 844 N.W.2d 885). “Any domestic violence is presumed to negatively impact children.” *Wisnewski v. Wisnewski*, 2020 ND 148, ¶29, 945 N.W.2d 331 (emphasis in original).

[¶6.] In this case, the district court made the following findings on factor j:

Both parties testified that domestic violence occurred during the parties’ marriage.

North Dakota Century Code §14-07-.1-01 [sic] defines “Domestic Violence” as "physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members." Both parties testified about an incident that occurred in August, 2015. Kyra alleges Josh hit her repeatedly in the back of the head. Josh's rendition is that Kyra attacked him by repeatedly punching Josh in the head and that he jabbed Kyra in a defensive manner after she attacked him. As a result of this incident Josh was arrested and plead no contest to the charge of Disorderly Conduct - Domestic Abuse-Domestic Abuse Assessments. *See Defendant's Exhibit 30*. The charge was dismissed upon Josh complying with certain conditions imposed by a Deferred Prosecution Agreement which included Josh attending a course on anger management. The Court finds that this isolated incident meets the definition of domestic violence as defined by§ 14-07.1-01, but that the incident does not rise to the level of creating a presumption that Kyra be awarded primary residential responsibility of the parties' minor children.

Josh testified that Kyra intentionally broke his guitar. A picture of the broken guitar showing damage even after repairs were made is provided as *Defendant's Exhibit 15*. Josh testified that Kyra intentionally keyed his car, and a photo showing the car damage is provided as *Defendant's Exhibit 16*. Josh testified that Kyra also threw his PlayStation. Josh also acknowledges physically restraining Kyra on a separate occasion after she broke and began throwing his personal property.

Kyra disputes Josh's description of the above incidents but provided no specific details due to her discovery deficiencies. The Court notes that requests for admission related to these incidents are deemed admitted by Kyra pursuant to Rule 36(a)(3) of the North Dakota Rules of Civil Procedure.

This factor slightly favors Kyra.

Appellant's Appendix ("Appellant's App.") 37–38. The district Court found that Josh had committed domestic violence with respect to the incident occurring in August 2015. However, other incidents were deemed admitted under N.D.R.Civ.P. 36(a)(3). And on the whole, the domestic violence factor was afforded minimal weight.

[¶7.] The district court clearly erred in its analysis on this factor for several reasons. First, the district court misapplied the admissions which were made under N.D.R.Civ.P. 36(a)(3). The district court found that Kyra disputed Josh's account of the incidents involving the guitar and the PlayStation. The specific requests in question were not so broad to foreclose the district court accepting Kyra's version of the events:

REQUEST No. 16. I, Kyra Bellew, intentionally threw a PlayStation 3 owned by Joshua Mystic causing it to break.

REQUEST No. 17. I, Kyra Bellew, intentionally stuck a guitar owned by Joshua Mystic to the ground, causing it to break.

Appellee's Appendix ("Appellee's App.") 164. The specific requests for admission in question only established that Kyra took certain actions intentionally. The discovery request did not specifically define the term "intentionally." Appellee's App. 158–159. And

commonly used definitions of “intentionally” do not establish the context, justifications or excuses for conduct, but only that when a person “engages in the conduct, it is his purpose to do so.” *See* N.D.C.C. §12.1-02-02(1)(a) (definition of “intentionally” for purposes of criminal statutes). Additionally, those admissions do not, on their own, establish there was any physical harm or bodily injury to Josh, or that there was an infliction of fear of physical harm or bodily injury to him. The district court therefore clearly erred in its analysis of factor j.

[¶8.] Furthermore, the district court was not sufficiently clear as to why the factor relating to domestic violence was given minimal weight in the presence of credible evidence of domestic violence occurring. The district court did not specific findings as to the timing of the incidents of domestic violence, other than the August 2015 incident which led to charges against Josh. *See* Appellee’s App. 164; Tr. 46:10–16 (not establishing specific timing of incidents). Although the presumption against awarding Josh primary residential responsibility was not applicable in this case, the district court clearly erred by failing to give factor j more weight in the best interest of the child factors.

CONCLUSION

[¶9.] The district court clearly erred in its findings of facts under the best interest of the child factors. Specifically, the district court erred in finding factor j should be given minimal weight because it expanded the scope of the admissions which had been made and did not sufficiently articulate its reasoning. The Court should therefore vacate the Amended Judgment and remand for further proceedings.

[signature on next page]

Dated: May 3, 2021.

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CERTIFICATE OF COMPLIANCE

[¶10.] I, William D. Woodworth, as the attorney for the Appellant and the author of this brief, hereby certify that this brief is in compliance with N.D.R.App.P. 32(a)(8)(A). This brief is 10 pages long, excluding any addendum.

Dated: May 3, 2021.

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Defendant and Appellee)	<u>CERTIFICATE OF</u>
)	<u>SERVICE</u>

I, William D. Woodworth, certify on May 3, 2021, I served the following documents by Electronic service under N.D.R.App.P. 25(c)(1)(D).

1. Appellant’s Reply Brief

On:

Amy M. Clark
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Dated: May 3, 2021.

/s/ William D. Woodworth

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