

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

AIMEE R. LEWIS,)
)
 Defendant and Appellant,)
)
 vs.) Appeal No. 31105
)
 JOSH GEDNALSKE,)
)
 Plaintiff and Appellee.)

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE MICHAEL DAY
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Plaintiff/Appellee

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NOTICE OF APPEAL FILED MAY 23, 2025

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JURISDICTIONAL STATEMENT

Defendant-Appellant Aimee R. Lewis (“Mother”) appeals to this Court the Honorable Michael W. Day, Presiding Circuit Court Judge of the Fourth Judicial Circuit - hereinafter referred to as the “Trial Court,” Order Following Motions Hearing, dated May 20, 2025 (the “Order,”) denying her motion to modify custody of her and Plaintiff-Appellee Josh Gednalske’s (“Father”) child. Rec.¹ p.1089. The Trial Court did not enter written Findings of Fact and Conclusions of Law regarding the hearing on Mother’s Motion for Sole Physical and Legal Custody of Minor Child, filed on January 22, 2025 and heard on April 16, 2025; the Trial Court made oral findings. Tr. 4/16/25 pp.42-46, 1.12-9.² The Trial Court incorporated its prior Findings of Fact and Conclusions of Law in the Order. Rec. p.1089. The Trial Court found that circumstances had not changed since the custody determination that was originally made by the Trial Court in its January 30, 2019 Order. Tr. 4/16/25 pp.45-46, 1.9-4.

A status hearing was held on September 21, 2018. At this hearing, the Trial Court stated that, “there was a discussion between Mother and Father about making arrangements to suspend the child support obligations so the mother can go to Oregon. The mother takes the child to Oregon. This is okay.” Tr. 9/21/18 p. 2, 1.11-16. After Mother moved to Oregon, the Oregon Department of Social Services became involved based upon BG’s alleged statement that mother’s then boyfriend Sean Vargas slapped him in the face. The Trial Court also stated that, “none of this has been established by testimony.” Tr. 9/21/18 p. 3, 1.5. There is no allegation that mother abused BJ in any

¹ Rec. means the Trial Court’s record of this custody proceeding.

² Tr. means a transcript of a hearing held in this custody proceeding.

way concerning this incident. Mother agreed to father having temporary custody of BG and taking him back to South Dakota. Father commenced a contempt proceeding against Mother based upon her moving to Oregon with the child even though father consented to this move if mother dropped child support. Rec. pp.238-243. The Trial Court did not hold Mother in contempt but rather treated the hearing as a status hearing. Tr. 9/21/18 p.2, 1.1-2. The Trial Court granted father interim custody after this hearing and severely restricted Mothers' custodial time with BG even though there has been no showing or allegation of abuse by Mother. Rec. p.179-180.

The Trial Court held several other hearings in this child custody proceeding. A Court Trial was held on November 30, 2018. The Trial Court entered Findings of Fact and Conclusions of Law from this trial on January 14, 2019. Rec. pp. 686-698. A hearing was held on Mother's prior Motion to Modify Custody on November 5, 2021. The Trial Court entered Findings of Fact and Conclusions of Law on November 18, 2021. Rec. pp. 858-868. A Notice of Appeal was filed on May 23, 2025. Rec. pp. 1090-1133. The Notice of Appeal was filed timely.

STATEMENT OF LEGAL ISSUES

Mother raises the following issues in this Appeal:

- I. Did The Trial Court Commit Reversible Error In Failing To Consider The Rebuttable Presumption That An Individual Convicted Of Abuse Should Not Be Awarded Custody Of A Child?

No evidence was presented rebutting this presumption nor did the Trial Court make any findings of fact concerning this presumption.

List of the most relevant cases and statutory provisions:

Harwood v Chamley, 2023 S.D. 35;
Shelstad v. Shelstad, 2019 S.D. 24, 927 N.W.2d 129 (S.D. 2019); and
Stavig v. Stavig, 774 N.W.2d 454, 2009 S.D. 89 (S.D. 2009).
SDCL § 25-4-45.5.

II. Did The Trial Court Clearly Err In Finding There Was No Substantial Changes In Circumstances When It Denied Mother's Motion To Modify Custody?

List of the most relevant cases and statutory provisions:

McCarty v. McCarty, 2015 S.D. 59.
SDCL § 25-4-45.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

This appeal concerns custody of the parties' minor child BG. Mother was the child's primary custodial parent for the vast majority of the child's life prior to the Court entering an order granting Father interim custody. Specifically, Mother was BG's primary caretaker from birth to September 5, 2018. FF&CL 1/14/19 p.6, ¶ C.³ Josh had custody of BG for approximately four (4) months prior to the trial date of November 30, 2018. FF&CL 1/14/19 p.6, ¶ C.

Statement of the Facts

The parties have never been married. BG is the only child from their relationship. BG's date of birth is March 22, 2013. FF&CL 1/14/19 p.2, ¶3. Mother was BG's primary caretaker from birth to September 5, 2018. FF&CL 1/14/19 p.7, ¶ C. Father has had primary physical custody of BG since the Trial Court's Interim Custody Order of September 21, 2018. Rec. p.179-180.

3. FF&CL refers to a Findings of Fact and Conclusions of Law made by the Trial Court.

Mother was attending school at the time of the custody trial. Mother was inducted into the National Adult Education Honor Society. Rec. p. 645-663. Mother had an A average. Rec. p. 645-663.

Mother testified that BG was 2 1/2 years old when Father pointed a gun at her and BG. Tr. 4/16/25 p.12, l.7-10. Mother testified further that Father hit BG in the head and his head ricocheted into Mother's head. Tr. 4/16/25 p.12, l.7-10. Law enforcement was called and took photographs. Tr. 4/16/25 p.12, l.7-10. Mother testified to this domestic assault at each of the evidentiary hearings held in this case. At the custody trial held on November 30, 2018, Mother testified that Father threatened to kill her and BG when he was in her arms; she called the police and the police investigated and Father was convicted [of assault]. Tr. 11/30/18 p.37, l.16-17. Mother testified at the hearing on her motion to modify custody, which was held on November 5, 2021, that in her opinion Father no longer has rights to his child when he pulled a gun on BG and physically harmed him. Tr.11/5/21 p.13, l.14-18. Mother also testified further that Father stomped on her school project and poked her in the belly when she was pregnant with BG. Tr. 4/16/25 p.18, l.16-17. Mother testified that Father was arrested and convicted of simple assault. Tr. 11/30/18 p.37, l.16-17. Father testified that he pled guilty to simple assault. Tr. 11/30/18 p. 89, l.16-17. The Trial Court found that Father plead guilty to simple assault, in April 2015. FF&CL 1/14/19 p.6, ¶9e.

ARGUMENT

I. Standard of Review.

Child custody determinations are reviewed for an abuse of discretion. *Flint v.*

Flint, 2022 S.D. 27, ¶28 " The Standard of Review for determining if a Trial Court abused its discretion is:

An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.

Flint, 2022 S.D. at 27, ¶28. The standard of review for a Trial Court's findings of fact generally is:

We examine findings of fact for clear error. The credibility of the witnesses, the import to be accorded their testimony, and the weight of the evidence must be determined by the Trial Court, and we give due regard to the Trial Court's opportunity to observe the witnesses and examine the evidence."

J. Clancy, Inc. v. Khan Comfort, LLC, 2022 S.D. 68, ¶8. (citations omitted); SDCL § 15-6-52(a).

II. **The Trial Court Committed Reversible Error In Disregarding The Presumption That It Is Not In A Child's Best Interest To Be Placed With A Parent Who Has Been Convicted Of Abuse.**

The Trial Court abused its discretion and violated the clear edicts of this Court and South Dakota statutory law in making its custody determination in disregard of SDCL § 25-4-45.5. SDCL § 25-4-45.5 reads:

In awarding custody involving a minor, the court shall consider:
(1) A conviction of domestic abuse as defined in subdivision 25-10-1(1); or
(2) A conviction of assault against a person as defined in subdivision 25-10-1(2), except against any person related by consanguinity, but not living in the same household; or
(3) A history of domestic abuse.

The conviction or history of domestic abuse creates a rebuttable presumption that awarding custody to the abusive parent is not in the best interest of the minor. A history of domestic abuse may only be proven by greater convincing force of the evidence. (Emphasis added).

When making a custody determination, the circuit court "is required to consider a

conviction of domestic abuse, a conviction of assault as defined, and a history of domestic abuse." *Shelstad v. Shelstad*, 2019 S.D. 24, ¶25; citing *Stavig v. Stavig*, 2009 S.D. 89, ¶ 17, 774 N.W.2d 454, 460-61. This presumption ceases upon a showing sufficient to rebut it. *Harwood v Chamley*, 2023 S.D. 35, ¶25; citing SDCL 19-19-301, which provides:

In all civil actions and proceedings, unless otherwise provided for by statute or by this chapter, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption *When substantial, credible evidence has been introduced to rebut the presumption, it shall disappear* from the action or proceeding, and the jury shall not be instructed thereon.

Mother testified that BG was 2 1/2 years old when Father pointed a gun at her and BG. Tr. 4/16/25 p.12, 1.7-10. Mother testified further that Father hit BG in the head and his head ricocheted into Mother' head. Tr. 4/16/25 p.12, 1.7-10. Law enforcement was called and took photographs. Tr. 4/16/25 p.12, 1.7-10. Mother testified to this domestic assault at each of the evidentiary hearings held in this case. At the custody trial held on November 30, 2018, Mother testified that Father threatened to kill her and BG when he was in her arms; she called the police and the police investigated and Father was convicted. Tr. 11/30/18 p.32, 1.8-12. Mother testified at the hearing on her motion to modify custody, which was held on November 5, 2021, that in her opinion Father no longer has rights to his child when he pulled out a gun on BG and physically harmed him. Tr.11/5/21 p.13, 1.14-18. Father testified that he pled guilty to simple assault. Tr. 11/30/18 p. 89, 1.16-17. The Trial Court found that Father plead guilty to simple assault, in April 2015. FF&CL 1/14/19 p.6, ¶9e.

No evidence was tendered at any of the hearing held in this custody proceeding to

rebut this presumption. Moreover, the Trial Court made no findings that this presumption has been rebutted. Mother expressly asked the Trial Court to no longer award custody to an individual that has committed domestic violence. Tr.4/16/25 p. 20, 1.12-15. The Trial Court completely disregarded this presumption. The Trial Court committed reversible error in doing so.

III. **The Trial Court Erred In Determining That A Substantial Change Of Circumstances Did Not Occur.**

The Trial Court clearly erred in determining that Mother's circumstances had not changed since the Trial Court made its custody determination on January 30, 2019. Rec. pp725-729. Mother filed a motion to modify custody. The liberty interest at issue in this case, which is the interest of parents in the care, custody, and control of their children, is perhaps the oldest of the fundamental liberty interests recognized by the United States Supreme Court. *Howlett v. Stellingwerf*, 2018 S.D. 19, ¶13; citing, *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000). Admittedly, Mother must show a substantial change in circumstances to prevail on her motion to modify custody. *McCarty v. McCarty*, 2015 S.D. 59, ¶9; citing See SDCL 25-4-45 and *Benson v. Loffelmacher*, 2012 S.D. 75, ¶ 21, 824 N.W.2d 82, 86. However, facts pertinent to child custody, which were not put in issue or involved, tried and determined by the court as a basis for the original divorce decree, are not res judicata as to the best interests of the children . . . and may be considered anew in a subsequent custody modification hearing free from the substantial change of circumstances constraints. *Moulton v. Moulton*, 2017 S.D. 73, ¶10. Mother has shown that the Trial Court erred in finding that Mother's circumstances have not changed.

When the Trial Court made its custody determination, it found that, “Aimee is presently unemployed and is unable to provide food, clothing, medical care or meet [BG's] basic needs, except with financial support from others.” FFCL 1/14/19 p. 7, ¶B; Rec. p. 692. The Trial Court also found that, “Aimee is essentially homeless.” Mother testified that she is now living with a military member stationed in Louisiana and has another child. TR 4/16/25 p.15, l. 14-16. Mother did not testify at this hearing concerning her employment status, but she has been employed in the past as an account executive for Yelp. Tr. 11/5/21 p. 17, l.1-5. The Trial Court’s Findings concerning the lack of change in circumstances are clearly erroneous; these findings are not supported by the testimony. Mother is now in a stable relationship with her child.

CONCLUSION

The Trial Court abused its discretion in failing to consider Father’s conviction for assault in awarding custody to the abusive parent. South Dakota law creates a presumption that awarding custody to the abusive parent is not in the best interest of a child. Mother testified that BG was 2 ½ years old when Father pointed a gun at her and BG. Mother testified further that Father hit BG in the head and his head ricocheted into Mother’s head. Father testified that he pled guilty to simple assault. The Trial Court found that Father plead guilty to simple assault, in April 2015.

No evidence was tendered at any of the hearings held in this custody proceeding to rebut this presumption. Moreover, the Trial Court made no findings that this presumption has been rebutted. The Trial Court clearly erred and violated the edicts of

this Court in failing to consider Father's assault conviction in making its custody determination.

The Trial Court also clearly erred in finding that Mother's circumstances had not changed since the Trial Court made its custody determination on January 30, 2019. The Trial Court found that Mother lacked the financial ability to support BG and was essentially homeless. Mother is currently residing in Louisiana with her husband/significant other. They have a child together.

REQUEST FOR ORAL ARGUMENT

Aimee respectfully requests that oral argument be held in this appeal.

CERTIFICATION OF VOLUME LIMITATIONS

The undersigned counsel certifies that Appellant's Brief was prepared using a Microsoft Word - Version 2024 - word processing software. This brief complies with the type-volume limitations imposed by SDCL § 15-26A-66(b)(2). Appellant's Brief contains 1,758 words and 8,749 characters. The above-mentioned word processing system was used to count the number of words and characters in Appellant's Brief.

Dated this 3rd day of November 2025.

SMOOT & UTZMAN, P.C.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of **Appellant's Brief** upon the person(s) designated herein, on the date shown below, by either email or First-Class mail, to-wit:

Josh Gednalske
8980 Highway 16, Lot 3
Rapid City, SD 57703

which address is the last address of the addressee known to the subscriber.

Dated this 3rd day of November 2025.



Brian L. Utzman

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STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)
IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

JOSH GEDNALSKE,)
)
Plaintiff,)
)
vs.)
)
AIMEE R. LEWIS,)
)
Defendant.)

FILE #51CIV14-0193

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

A Court Trial was held on Friday, November 30, 2018, before the Honorable Michael W. Day, Circuit Court Judge, in Courtroom No. 6 of the Pennington County Courthouse in Rapid City, South Dakota. Plaintiff Josh Gednalske appeared in person together with his attorney, Debra D. Watson. Defendant Aimee R. Lewis appeared in person pro se. The Court having considered the testimony of the parties and their witnesses and the exhibits¹ admitted into evidence², now makes and enters the following:

FINDINGS OF FACT:

1.

RESIDENCY: Both Plaintiff and Defendant are currently residing in Rapid City, Pennington County, South Dakota. The minor child, Benton, resides with his father. Josh has resided in Rapid City since Benton's birth. Aimee has primarily resided in Rapid City since

¹ Defendant filed a thumb drive on December 7, 2018 which was not copied to Plaintiff's counsel and is not being considered by the Court.

² At the conclusion of the Court Trial on November 30, 2018 the Court required the parties to submit proposed findings of fact and conclusions of law on or before December 21, 2018. Plaintiff filed his proposed findings and conclusions on December 21, 2018. Defendant filed her proposed findings of fact and conclusions of law on December 14, 2018. Aimee's proposed findings and conclusions appear to be an attack letter to Plaintiff's counsel.

Benton's birth; however, she has moved to other states on at least two occasions, most recently to Portland, Oregon.

2.

PARTIES: Josh Gednalske [hereafter referred to as Josh] is age 25, having been born on September 29, 1992. Aimee R. Lewis [hereafter referred to as Aimee] is age 25, having been born on January 1, 1993. Both parties are single persons. They are not now, nor have they ever been, married to each other.

3.

MINOR CHILD: Josh is the biological father and Aimee is the biological mother of a minor child, Benton Gednalske, age 5, born out-of-wedlock on March 22, 2013. Josh was present at the birth, signed a Paternity Affidavit and is shown as the father on Benton's birth certificate.

4.

PRIOR PROCEEDINGS: On March 27, 2014, Judge Thomas Trimble entered an Order Implementing South Dakota Parenting Guidelines at Josh's request. On July 6, 2017, Judge Matthew Brown entered an Order specifying Josh's visitation and addressing communication.

5.

OREGON JUVENILE PROCEEDINGS: On September 5, 2018, following a referral by personnel at Barnes Elementary School who reported a "large red mark/bruise" on Benton's cheek which Benton explained was caused when he was hit, Officer James Anderson of the Beaverton Police Department and DHS Child Protective Services Workers Miller and Taylor

reported to the Comfort Inn where Aimee, Benton and Aimee's boyfriend, Sean Varga, were staying. After receiving permission from Aimee, Benton was interviewed and reported being hit by Varga. Aimee and Sean Varga were also interviewed. Aimee admitted that the incident Benton described occurred in South Dakota on July 4th, 2018, but claimed that Benton's current injuries were from a playground incident at school. Aimee also disclosed domestic violence between her and Varga, which occurred in South Dakota. Following the investigation, Benton was taken into protective custody and placed in foster care. A hearing was held on September 6, 2018 before the Honorable Michele C. Rini, Circuit Court Judge, and after considering the testimony and exhibits at the hearing, the Court found that Benton could not be safely returned to Aimee without further danger of suffering physical injury or emotional harm and continued placement in foster care. Aimee identified Josh as Benton's dad and agreed Benton could go with his dad rather than into foster care. Josh was contacted via telephone in Rapid City, and then drove to Portland, Oregon. The Court thereafter ordered that Benton be released to Josh upon his arrival in Portland, Oregon. On September 7, 2018, DHS placed Benton in the physical custody of his father which alleviated their safety concerns. As the abuse incidents occurred in South Dakota and Josh and his son, Benton, were returning to South Dakota, Oregon thereafter dismissed the action in the best interests of justice. Aimee never appealed the Shelter Order.

6.

CURRENT ORDER: A hearing was held before the Honorable Matthew Brown on September 21, 2018. Josh requested that Benton remain in his primary physical custody, subject to supervised parenting time and Skype calls with his mother. Aimee requested that Benton be immediately returned to her physical custody. Judge Brown entered an interim order that

custody would remain with Josh subject to Aimee's supervised parenting time and Skype calls and scheduled a hearing on interim custody for October 3, 2018 and a trial on custody for November 20, 2018.

7.

UNITED STATES DISTRICT COURT LAWSUIT: On October 1, 2018, Aimee filed a lawsuit in the United States District Court against the Seventh Judicial Circuit Court, Rapid City Police Department, Pennington County Sheriff's Department, Debra Watson of Watson Law Office, P.C., Joshua Gednalske and Dwayne and Janice Gednalske [Benton's paternal great-grandparents]. At the time of the hearing on October 3, 2018, Judge Brown recused himself due to the lawsuit against the 7th Judicial Circuit filed by Aimee. No action was taken at that hearing. This matter was then reassigned on October 4, 2018 to the Honorable Michael W. Day, Presiding Judge of the Fourth Judicial Circuit Court. Notice of Hearing was given on October 22, 2018 for a custody trial to be held on November 30, 2018. An evidentiary hearing was held on Friday, November 30, 2018 from 8:30 a.m. to 12:30 p.m.

8.

DEPUTY CHIEF OF POLICE DON HEDRICK: Upon Ex Parte Request of Attorney Watson, Judge Brown entered an Order dated October 2, 2018 requiring the Rapid City Police Department and the Pennington County Sheriff's Office to provide copies of all records relating to Aimee R. Lewis from January 1, 2016 to October 2, 2018 to Attorney Watson, which records were provided to Aimee upon receipt. Deputy Chief Hedrick, custodian of the records, testified that Plaintiff's Exhibit 8 was a true and correct copy of law enforcement records produced in compliance with the Court Order. Exhibit 8 was admitted into evidence.

2.

FUERSTENBERG FACTORS: This Court having considered the testimony of Aimee Lewis and Josh Gednalske and the exhibits admitted into evidence, considers the following factors enunciated in *Fuerstenberg v. Fuerstenberg*, 592 N.W.2d 798 (SD1999) in determining the best interests of Benton in terms of his custodial placement.

- A. **Fitness:** The Court finds that Josh is better equipped to provide for Benton's temporal, mental and moral welfare.
- a. **Physical and Mental Health:** Both Aimee and Josh appear to be in good physical health. A review of the extensive law enforcement records, her communication with the Court and her behavior in court leads this Court to believe that Aimee may suffer some mental health issues.
- b. **Capacity and disposition to provide the child with protection, food, clothing, medical care, and other basic needs:** Aimee is unable to protect Benton from harm. Benton was removed from Aimee's custody by the Beaverton Police Department and DHS Protective Care Workers because her boyfriend had hit Benton. Both Aimee and Varga have reported domestic violence in their relationship to law enforcement. Aimee has been arrested for assaulting Varga. Benton appears to have been present during domestic violence incidents. This Court granted a 5-year Permanent Protection Order preventing contact by Varga with Benton on November 2, 2018³. On October 23, 2018, Aimee communicated to the court her desire to terminate her parental rights to Benton and the following day rescinded the offer. That attitude is concerning to the Court. Aimee is presently unemployed and is unable to provide food, clothing, medical care or meet Benton's basic needs, except with financial support from others. Josh is currently employed at Harley Davison and resides with his grandparents, Dwayne and Janice Gednalske. Benton has been in his father's custody since September 7, 2018. Josh is attending Kindergarten at Rapid Valley Elementary School. A review of the school records and pictures indicates that Benton is a great boy, a kind and helpful friend with a great attitude and a beautiful smile. Benton has adjusted well to school and is making academic progress with one absence and no tardies. Photographs of Benton with his dad and great-grandparents depict a happy child. Josh has been a parental figure in Benton's life since birth and is providing him with protection, food, clothing and other basic needs. Benton is in good health and has not required recent medical care.

³ 51TPO18000638

Aimee's life appears to be chaotic and not a good environment to raise a child.

- c. Ability to give the child love, affection, guidance, education and to impart the family's religion and creed: It is apparent that both Aimee and Josh love Benton and show him affection and guidance. Aimee refused to provide Josh with Benton's Social Security Card which delayed his entrance into Kindergarten but eventually provided it to the school.
- d. Willingness to maturely encourage and provide frequent and meaningful contact between the child and the other parent: Josh sought intervention on 2 occasions to obtain parenting time with Benton. Aimee left South Dakota and relocated to Portland, Oregon without court approval. Aimee is seeking legal and physical custody of Benton and desires to raise Benton away from Josh permanently⁴.
- e. Commitment to prepare the child for responsible adulthood: Aimee's extensive involvement with law enforcement involving over 50 complaints during a two-year period evidences an inability to manage her life in a responsible manner. Some of the reports reference Benton being present during the incidents. Aimee has had conflict with the clerk of court wherein she was accompanied by law enforcement, conflict with the court reporter claiming fraud in the preparation of the transcript, conflict with Judge Brown necessitating the assignment of another judge, conflict with the Rapid City Police Department and the Pennington County Sheriff's Office regarding their handling of her complaints; conflict with United Families regarding their handling of the supervised visits. Aimee has communicated to this Court how corrupt the South Dakota legal system is and how unethical Josh's attorney's representation is. Aimee's attitude would be destructive to a young child. Aimee has also had conflict with Josh resulting in him pleading guilty to simple assault in April of 2015 when she claims he pointed a gun at her while he claimed she arrived as he was leaving for target practice and denied pointing the gun at her. After Josh was given temporary physical custody of Benton, she claimed he raped her in the past. The Court finds Aimee's decisions are not consistent with a good parent or a responsible citizen. Other than the incident with Aimee and some traffic offenses, Josh appears to be a good parent and responsible citizen.

- B. STABILITY: Josh can provide Benton with a stable and consistent home environment. Although Josh has resided with his grandparents for several years, he is employed full-time and claims to be saving money for his own home. Josh

⁴ On December 17, 2018 Aimee filed an ex parte communication in which she handwrote "If I have a choice I do not want Joshua Gednalske knowing the location of Benton and/or P's whereabouts."

had been working a second job at Menards until Benton came into his care. Amy has no stable residence and during the past year has resided with her boyfriend, her boyfriend's mother, her former stepfather, her former step-grandmother, in the Comfort Inn in Portland, Oregon and in the Foothills Inn in Rapid City. Aimee is essentially homeless. At present, she is residing with Beth Varga, the mother of Sean Varga. Aimee appears to have applied for government housing but has not been approved and is refusing to release the address⁵.

- C. PRIMARY CARETAKER: Aimee has been the primary caretaker of Benton from his birth until Oregon DHS removed him from her custody on September 5, 2018. Josh was present at Benton's birth and has been an active father exercising parenting time and paying child support. Josh has been the primary caretaker of Benton for the past four months, from September 5, 2018 to the present.
- D. CHILD'S PREFERENCE: Benton, at age 5, is too young to express a preference.
- E. HARMFUL PARENTAL MISCONDUCT: The Court finds that Aimee's inability to protect Benton from harm suffered at the hands of her former boyfriend, Sean Varga, is harmful parental misconduct. Although Aimee claims that Varga is no longer her boyfriend, she is living in his mother's home and was with him the day prior to trial and on the morning of trial. Aimee's remaining in an abusive relationship with Varga which Benton has witnessed is likewise harmful parental misconduct. Aimee's failure to accept responsibility and to blame others for her situation is also harmful parental misconduct. Aimee's refusal to raise Benton in South Dakota which she refers to as a corrupt state creates an unreasonable risk for Benton.
- F. SEPARATING SIBLINGS: Benton is the only child in both homes.
- G. SUBSTANTIAL CHANGE IN CIRCUMSTANCES: There has not been a prior contested custody trial and thus this factor is not applicable.

The Fuerstenberg factors strongly favor Josh as Benton's primary physical custodian.

Aimee has been exercising supervised parenting time at United Families on Sundays for one hour; however, has also reported them to law enforcement on October 7, 2018 for restraining her from leaving while Josh and Benton were exiting the building pursuant to the regulations.

Aimee has represented to the Court that she hates South Dakota and plans to take Benton and

⁵ The ex parte filing Aimee made with the Court on December 17, 2018 is on letterhead from "METROPlains" indicating she has applied for housing but her address is blacked out.

leave the state. Aimee's homelessness, her unemployment, her involvement with Sean Varga and her threats to remove Benton from South Dakota make unsupervised parenting time a serious risk to Benton.

10.

CHILD SUPPORT: Aimee is unemployed but capable of gainful employment.

Minimum wage will be imputed to her. Josh is employed at Harley Davidson earning \$2,370 gross per month. Josh provides health insurance to Benton at a cost of \$254 per month. Aimee's 8% is \$94 per month. Based thereon, Aimee's child support obligation based on the South Dakota Obligation Calculator is \$383 per month, inclusive of her share of Benton's monthly health insurance premium.

11.

The Court finds Plaintiff's testimony to be credible.

Based on the foregoing Findings of Fact, the Court now makes and enters the following

CONCLUSIONS OF LAW:

1

JURISDICTION AND VENUE: This Court has jurisdiction over the parties and subject matter and venue in the 7th Judicial Circuit (Pennington County) is appropriate.

2.

FINDINGS/CONCLUSIONS: Any Finding of Fact or Conclusion of Law which more appropriately belongs in the other category shall be inserted therein by this reference.

3.

LEGAL CUSTODY: The parties shall share joint legal custody of their son, Benton.

Both parents shall retain full parental rights and responsibilities with respect to Benton. Access to records and information pertaining to the child, including, but not limited to, medical, dental, orthodontia, optometric and similar health care, and school records shall be made equally available to both parents.

4.

PRIMARY PHYSICAL CUSTODY: It is in Benton's best interests to remain in the primary physical custody of his Father.

5.

PARENTING TIME: Due to Aimee's unstable circumstances, her parenting time shall remain supervised at United Families at her cost. Aimee shall be entitled to two visits per week up to 2 hours per visit. Due to Aimee's behavior, a psychological evaluation by a qualified mental health professional is necessary in order to determine whether unsupervised parenting time would be safe for Benton. If Aimee desires unsupervised parenting time with Benton, she shall obtain the psychological evaluation within 90 days and provide a copy of the report to the Court. The Court will entertain a motion for unsupervised parenting time if the following conditions are met:

- A. Aimee provides the requested psychological evaluation to the Court;
- B. Aimee provides proof of employment so that she is in a position to financially provide for Benton;
- C. Aimee obtains adequate housing for her and Benton so he has a safe place to live;

- D. Aimee discontinues her abusive relationship with Sean Varga;
- E. Aimee shall attend the SMILE Program and file her certificate of completion with the Court; and
- F. Aimee shall successfully complete Common Sense Parenting classes and file her certificate of completion with the Court.

No further action will be taken or communication responded to in this matter unless a party files a Motion, supporting Affidavit and Notice of Hearing with the Court. Any communication with the Court shall be served on the other party or his/her counsel.

6.

SKYPE CALLS: Aimee may call Benton on Tuesday and Thursday nights each week between 6:30 p.m. and 7:30 p.m. The calls shall last no longer than 15 minutes.

7.

SCHOOL ACTIVITIES: Both parents shall be entitled to attend school activities including parent-teacher conferences, school programs and events. Both parents shall be entitled to obtain Benton's school report cards and attendance records. Aimee can access the school calendar. Josh shall provide Aimee with information about Benton's school progress and advance notice of activities and events involving parental participation.

8.

COMMUNICATION BY PARENTS: The parents shall only speak in positive terms about the other parent in the presence of the child and shall encourage the child's relationship and respect for the other parent. Neither parent shall engage in any conduct which would alienate the child from the other parent and would be responsible to prevent such conduct by

relatives or friends. While in their respective custody, no person shall:

- Speak negatively about the other parent to the child or within the child's range of hearing.
- Make the child choose or side between mom and dad on any issue.
- Question the child about the other parent's activities or relationships.
- Use the child as a messenger or mediator.
- Involve the child in the court process, share legal information, or discuss the present court or custody proceedings.
- Use the child to spy or report on the other.

Violation of these provisions would be taken particularly serious by this Court and may subject the offending party to one or more of the following sanctions.

- Contempt proceedings;
- Civil fines or costs;
- Modification of custody and/or parenting time; or
- Further orders to protect the child.

9.

RELOCATION: Neither parent shall relocate with Benton outside the State of South Dakota without compliance with the provisions of SDCL §25-4A-17. Relocation of Benton outside the State of South Dakota shall require an Order of this Court.

10.

HEALTH CARE: Josh shall continue to provide health insurance for Benton and shall promptly notify Aimee of any significant injury or illness to Josh and any healthcare concerns. Aimee's share of Benton's health insurance premium has been included in her child support

obligation. Josh shall pay the first \$250 per calendar year of Benton's non-covered health care costs, including co-pays. After the \$250 threshold is met, Aimee shall pay 37% and Josh shall pay 63% of Benton's non-covered reasonable and necessary health care costs including medical, optometric, dental or orthodontic, or counseling costs. Josh shall provide Aimee with copies of all of Benton's health care billings and Explanation of Benefits within 10 days of receipt. Aimee shall either reimburse Josh or pay the provider directly her share within 30 days of receipt of the Explanation of Benefits.

11.

NOTIFICATION OF RESIDENTIAL ADDRESS, PHONE NUMBERS AND EMAIL

ADDRESS: Each parent shall keep the other parent informed of his/her current residential address, a telephone number where he/she can be reached and an Email address so that communication can occur between the parties and with their son consistent with this Order.

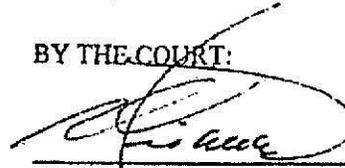
12.

CHILD SUPPORT: Commencing February 1, 2019, Aimee shall pay child support to Josh in the sum of Three Hundred Eighty Three Dollars (\$383) per month. The child support shall be paid through the South Dakota Child Support Center, 700 Governor's Drive, Pierre, SD 57501. The child support shall continue until Benton attains majority, however, if he is still a full-time student in high school, the child support shall continue until he graduates from high school or attains the age of 19, whichever occurs first. Aimee has not paid child support since September 6, 2018 and no child support will be ordered for September, 2018 through January, 2019.

LET JUDGMENT ENTER ACCORDINGLY.

Dated this 14th day of January, 2019.

BY THE COURT:



Michael W. Day
Presiding Fourth Circuit Court Judge

ATTEST:



Clerk of Courts

By:



Deputy



Pennington County, SD
FILED
IN CIRCUIT COURT

JAN 14 2019

Ranee Truman, Clerk of Courts

By  Deputy

IT IS FURTHER ORDERED That Aimee Lewis shall have parenting time with her son, Benton Gednalske, for two visits per week up to 2 hours per visit at United Families, at her cost.

IT IS FURTHER ORDERED That this Court will entertain a motion for unsupervised parenting time if the following conditions are met:

1. Aimee shall obtain a psychological evaluation within 90 days performed by a qualified mental health provider and provide a copy of the report to the Court;
2. Aimee shall provide proof of her employment so that she is in a position to financially provide for Benton;
3. Aimee shall obtain adequate housing for her and Benton so he has a safe place to live;
4. Aimee shall discontinue her abusive relationship with Sean Varga;
5. Aimee shall attend the SMILE Program and file her certificate of completion with the Court; and
6. Aimee shall successfully complete Common Sense Parenting classes and file her certificate of completion with the Court.

IT IS FURTHER ORDERED That no further action will be taken or communication responded to by the Court unless a party files a Motion, supporting Affidavit and Notice of Hearing with the Court. Any communication with the Court shall be served on the other party or his/her counsel;

IT IS FURTHER ORDERED That Aimee may call Benton on Tuesday and Thursday nights each week between 6:30 p.m. and 7:30 p.m. The calls shall last no longer than 15 minutes;

IT IS FURTHER ORDERED That both parents shall be entitled to attend school activities including parent-teacher conferences, school programs and events. Both parents shall

be entitled to obtain Benton's school report cards and attendance records. Aimee can access the school calendar. Josh shall provide Aimee with information about Benton's school progress and advance notice of activities and events involving parental participation;

IT IS FURTHER ORDERED That the parents shall only speak in positive terms about the other parent in the presence of the child and shall encourage the child's relationship and respect for the other parent. Neither parent shall engage in any conduct which would alienate the child from the other parent and would be responsible to prevent such conduct by relatives or friends. While in their respective custody, no person shall:

1. Speak negatively about the other parent to the child or within the child's range of hearing.
2. Make the child choose or side between mom and dad on any issue.
3. Question the child about the other parent's activities or relationships.
4. Use the child as a messenger or mediator.
5. Involve the child in the court process, share legal information, or discuss the present court or custody proceedings.
6. Use the child to spy or report on the other.

Violation of these provisions would be taken particularly serious by this Court and may subject the offending party to one or more of the following sanctions.

1. Contempt proceedings;
2. Civil fines or costs;
3. Modification of custody and/or parenting time; or
4. Further orders to protect the child.

IT IS FURTHER ORDERED That neither parent shall relocate with Benton outside the State of South Dakota without compliance with the provisions of SDCL §25-4A-17. Relocation of Benton outside the State of South Dakota shall require an Order of this Court;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That Josh shall continue to provide health insurance for Benton and shall promptly notify Aimee of any significant injury or illness to Josh and any healthcare concerns. Aimee's share of Benton's health insurance premium has been included in her child support obligation. Josh shall pay the 1st \$250 per calendar year of Benton's non-covered health care costs, including co-pays. After the \$250 threshold is met, Aimee shall pay 37% and Josh shall pay 63% of Benton's non-covered reasonable and necessary health care costs including medical, optometric, dental or orthodontic, or counseling costs. Josh shall provide Aimee with copies of all of Benton's health care billings and Explanation of Benefits within 10 days of receipt. Aimee shall either reimburse Josh or pay the provider directly her share within 30 days of receipt of the Explanation of Benefits;

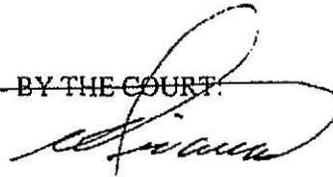
IT IS FURTHER ORDERED That each parent shall keep the other parent informed of his/her current residential address, a telephone number where he/she can be reached and an Email address so that communication can occur between the parties and with their son consistent with this Order;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That Commencing February 1, 2019, Aimee shall pay child support to Josh in the sum of Three Hundred Eighty Three Dollars (\$383) per month. The child support shall be paid through the South Dakota Child Support Center, 700 Governor's Drive, Pierre, SD 57501. The child support shall continue until Benton attains majority, however, if he is still a full-time student in high school,

the child support shall continue until he graduates from high school or attains the age of 19, whichever occurs first. Aimee has not paid child support since September 6, 2018 and no child support will be ordered for September 6, 2018 through January, 2019.

Dated this 30th day of January, 2019.

~~BY THE COURT:~~



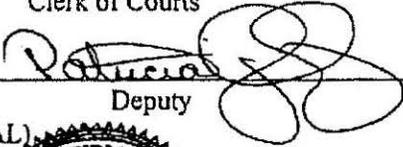
Honorable Michael W. Day
Presiding 4th Circuit Court Judge

ATTEST:



Clerk of Courts

By:



Deputy

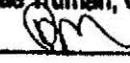
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Pennington County, SD
FILED
IN CIRCUIT COURT

JAN 30 2019

Ranae Truman, Clerk of Courts

By  Deputy

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

JOSH GEDNALSKE,
Plaintiff,

vs.

AIMEE R. LEWIS,
Defendant.

51 CIV 14-000193

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

A trial to the Court was held in the above-captioned action on November 1, 2021, on Defendant's Motion, the Honorable Michael W. Day presiding. Plaintiff Josh Gednalske appeared personally and was pro se. Defendant Aimee R. Lewis appeared personally and was also pro se. This Court, having observed and considered the evidence, testimony, and the entire file, hereby makes and enters the following Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Any Finding of Fact deemed to be a Conclusion of Law or any Conclusion of Law deemed to be a Finding of Fact should be appropriately incorporated in the Findings of Fact and Conclusions of Law as the case may be.
2. Plaintiff Josh Gednalske (hereinafter Josh) is a resident of Rapid City, Pennington County, South Dakota.
3. Defendant Aimee R. Lewis (hereinafter Aimee) is a resident of Rapid City, Pennington County, South Dakota.
4. While Josh and Aimee were never married, they have one child together; namely, Benton Gednalske (DOB: 02/22/2013) (hereinafter Benton or minor child).
5. Josh was born on September 29, 1992 and is currently 29 years old.
6. Josh is in good mental and physical health.
7. Aimee was born January 1, 1993 and is currently 27 years old.
8. Aimee is in good physical health.

9. Aimee's mental health is a concern, although she is currently attempting to address her issues.

10. Aimee has been diagnosed with an adjustment disorder with mixed anxiety and depressed mood. She does endorse some symptoms consistent with PTSD but may not meet the criteria at this point.¹

11. Aimee has been prescribed medications and participates in counseling.

12. The Parties are no strangers to litigation concerning their minor child. This action began in February 2014 and multiple hearings have been held since that time.² Multiple other civil proceedings have also been filed concerning these Parties.

13. Josh has always had employment to provide for the minor child.

14. Josh is currently employed at Black Hills Harley Davidson and has been promoted while working there.

15. With the income from his employment, Josh is able to provide the minor child with protection, food, clothing, medical care, and other basic needs.

16. Aimee works from home and is employed as an account executive for YELP. She works 40 hours per week.

17. There was no evidence or testimony presented at the trial as to whether Aimee provides any monetary support for Benton.

18. Aimee lives alone with her support animal in a 2- bedroom apartment in Rapid City.³

19. Josh lives with Benton in Rapid City.

20. A trial to the Court was held on November 30, 2018. Thereafter on January 14, 2019 this Court entered Findings of Fact and Conclusions of Law as well as an Order Determining Legal Custody, Physical Custody and Parenting Time and Judgment for Child Support (hereinafter Order).

21. Pursuant to the Order this Court awarded both Parties joint legal custody of their son. Josh was to remain the primary physical custodian of Benton and Aimee was to have supervised parenting time of two visits per week up to 2 hours per visit at United Families and was allowed to call Benton on Tuesday and Thursday nights each week between 6:30 p.m. and 7:30 p.m. The calls were to last no longer than 15 minutes.

¹ See Psychiatric Evaluation dated July 29, 2019 filed on August 7, 2019 as a sealed document.

² The Court takes judicial notice of this file.

³ Aimee would not provide her address at the time of trial.

22. Pursuant to the Order both parents were entitled to attend school activities, including parent-teacher conferences, school programs and events and were able to obtain Benton's school report cards and attendance records. Aimee was allowed access to the school calendar.

23. Pursuant to the Order this Court would entertain a motion for unsupervised parenting time if the following conditions were met: 1) Aimee obtains a psychological evaluation within 90 days performed by a qualified mental health provider and provides a copy of the report to the Court; 2) Aimee shall provide proof of her employment so that she is in a position to financially provide for Benton; 3) Aimee shall obtain adequate housing for her and Benton so he has a safe place to live; 4) Aimee shall discontinue her abusive relationship with Sean Varga; 5) Aimee shall attend the SMILE Program and file her certificate of completion with the Court; and, 6) Aimee shall successfully complete Common Sense Parenting classes and file her certificate of completion with the Court.

24. Pursuant to the Order Aimee was required to pay child support to Josh in the sum of \$383.00 per month beginning February 1, 2019.

25. After the Order was entered Aimee only had supervised parenting time with Benton at United Families a couple of times. United Family complained that Aimee would not follow their rules.

26. Shortly after the Order was entered Aimee left South Dakota and moved to Idaho. She then moved to Colorado, then to South Dakota, then back to Colorado and then finally back to South Dakota on October 10, 2021.

27. On May 26, 2021 Josh filed a Motion and Affidavit for Order to Show Cause alleging Aimee had been refusing to follow the Order. This Court issued an Order to Show Cause on May 26, 2021. A hearing on the Motion to Show Cause was held on June 25, 2021. Aimee appeared at the hearing by phone, Josh appeared in person. This Court did not find Aimee in contempt and instructed the Parties to cooperate for the best interest of Benton.

28. On July 7, 2021 Josh filed a Petition and Affidavit for a Protection Order in 51TPO 21-400. This Court denied ex-parte temporary relief but issued a notice of hearing and summons to appear. A hearing was held on August 27, 2021 at which Aimee appeared by phone and Josh appeared in person. At the conclusion of the hearing this Court denied Josh's Petition again encouraging the parties to cooperate for the best interest of Benton.

29. The Motion which is the subject of these findings was filed by Aimee on September 7, 2021 in which she alleged: "Reinstatement of my lawful parental rights (sole physical and legal custody of my minor child Benton Gednalske, so that no further emotional and physical harm may come to him."

30. At the trial held on November 1, 2021 Aimee brought forth several claims and reasons why she should be awarded sole legal and physical custody of Benton: Benton has trouble eating and Josh gets mad at him when Benton gets full; Josh allows Benton to play

violent video games; Josh allows Benton to play video games with Josh and one of Josh's adult friends; Josh is an unfit parent and role model; this Court enables Josh, giving him power and control; Josh has violated this Court's previous Order by terminating between 10-15 of her calls to Benton; that Josh is unstable, lied under oath and has committed perjury; that she took good care of Benton when he was in her care; Josh said Aimee was crazy in front of Benton during one of her calls with Benton; Josh allowed Benton to make armor out of sticks and tape and then play on monkey bars; and, she has concerns of Josh allowing Benton to eat fast food and not having eaten dinner yet when she calls.

31. Aimee has not been in the physical presence of Benton since early 2019.

32. Since her return to South Dakota on October 10, 2021 Aimee has not attempted to exercise her previously ordered supervised parenting time.

33. Since the previous Order was entered Aimee has exercised her previously ordered telephonic contacts with Benton. Most of the telephonic contacts between Aimee and Benton were recorded by Aimee.

34. Josh also recorded some of the telephonic contacts between Aimee and Benton.

35. Despite the previous Order of bi-weekly phone calls lasting no longer than 15 minutes Josh has allowed Aimee and Benton to face time with the calls lasting between 30 minutes and one hour.

36. Josh answered nearly every call from Aimee to Benton.

37. Almost all of the information Aimee relies upon for her claims against Josh comes from the calls with Benton who is now 8 years old.

38. At the November 1st trial Aimee played portions of several calls between her and Benton. During the calls the Court heard Aimee push Benton for information. She also tells Benton that she has done nothing wrong.

39. During a call the night before the trial Aimee told Benton that those people are terrible and did horrible things.

40. This Court's previous Order set forth that certain conditions needed to be met in order for Aimee to have unsupervised visitation (see finding of fact #22). Aimee did comply with obtaining and filing a mental health evaluation. However, she did not comply with this Court's previous Order of providing proof of employment, adequate housing, completion of the SMILE program and completing Common Sense Parenting Classes.⁴

41. In making a child custody and parenting time determination, this Court must consider the *Fuerstenberg* factors, although the Court is not bound to make a specific finding in

⁴ No testimony at the trial was presented on the issue whether Aimee had discontinued her relationship with Sean Varga.

each category. In the end, the brightest beacon remains the best interest of the children. *Heinen v. Heinen*, 2008 SD 63, ¶10, 753 NW2d 891, 893-94 (quoting *Zepeda v. Zepeda*, 2001 SD 101, ¶13, 632 NW2d 48, 53).

42. In making a determination regarding custody and parenting time of a minor child, the Court may consider “[w]hich parent is better equipped to provide for the child’s temporal, mental, and moral welfare.” *Fuerstenberg v. Fuerstenberg*, 1999 SD 35, ¶24, 591 NW2d 798, 807.

43. Some of the factors important to the fitness question are: (1) mental and physical health; (2) capacity and disposition to provide the child with protection, food, clothing, medical care, and other basic needs; (3) ability to give the child love, affection, guidance, education and to impart the family’s religion or creed; (4) willingness to maturely encourage and provide frequent and meaningful contact between the child and the other parent; (5) commitment to prepare the child for responsible adulthood, as well as to insure that the child experiences a fulfilling childhood; and (6) exemplary modeling so that the child witnesses firsthand what it means to be a good parent, a loving spouse, and a responsible citizen. *Id.*

44. Both parties are in good physical health. Josh has no mental health concerns. Aimee has mental health concerns.

45. While both Parties have the disposition to provide Benton with protection, food, clothing, medical care and other basic needs it is Josh who has on his own and with some help from Josh’s grandparents provided these necessities to Benton since at least 2018. Josh has solely provided for all of Benton’s needs since at least 2018.

46. Both Parties have the ability to give Benton love, affection, guidance, education and to impart the family’s religion or creed, however, in actual practice since at least 2018 Josh has been the primarily responsible parent in this regard.

47. Josh is active in Benton’s education. He attends to Benton’s needs at school, attends conferences and attends extra- curricular activities.

48. Despite this Court’s prior Order allowing Aimee access to Benton’s school records, activities, conferences and the like she has chosen not to participate at all.

49. One of Aimee’s concerns at trial was that Benton had switched schools several times and did not know which school Benton attended, information she received from Benton.

50. Benton has attended Wilson Elementary for the past 3 years and has not switched schools.

51. Josh has been the only parent willing to maturely encourage and provide frequent and meaningful contact between the Benton and Aimee.

52. All Aimee wants to do is bring up the past and relitigate all the issues that have long been decided. She blames others and does not accept any responsibility for the current custody situation.

53. During one of her calls she told Josh that she should not have to communicate with Josh or talk to him. During a call she told Josh that she does not need to speak to him, that if he had anything to say that he should go through his lawyer.

54. At the trial Josh was willing to let Aimee have some unsupervised parenting time to which she refused. She demands sole legal and physical custody and that Josh should only have supervised parenting time with Benton.

55. Josh is the parent most committed to prepare Benton for responsible adulthood, as well as to insure that Benton experiences a fulfilling childhood. Josh takes Benton to the Boy's Club and the two enjoy video gaming together. Josh plays with Benton and they enjoy other activities.

56. Josh is the parent that shows Benton exemplary modeling so that Benton witnesses firsthand what it means to be a good parent and a responsible citizen.

57. Josh and Benton live alone together and have done so now for two years. Benton witnesses Josh run their household. Josh does the cooking, cleaning and laundry. Benton witnessed Josh go to work each day and then return home to take care of him.

58. Josh is the more fit parent to Benton.

59. The Court may also consider stability, that is which parent "can provide a stable and consistent home environment." *Id.* ¶26. The factors analyzed include:

(1) *The relationship and interaction of the child with the parents, step-parents, siblings and extended families;* (2) *the child's adjustment to home, school and community;* (3) *the parent with whom the child has formed a closer attachment, as attachment between parent and child is an important developmental phenomena and breaking a healthy attachment can cause detriment; and continuity, because when a child has been in one custodial setting for a long time pursuant to court order or by agreement, a court ought to be reluctant to make a change if only a theoretical or slight advantage for the child might be gained.*

Id.

60. Benton loves his parents and Josh's grandparents. He spends time with Josh's grandparents. Other than the twice weekly phone, video calls with his mother, Benton has only physically seen her in a couple of supervised visits that occurred in 2019.

61. Over the past 3 years Aimee has moved from South Dakota to Idaho to Colorado to South Dakota to Colorado and now back to South Dakota again.

62. Josh and Benton have been on their own together for at least 2 years. When Josh first brought Benton back from Oregon they lived with Josh's grandparents for a year.

63. Janice Gednalske described Benton as a 100% different kid now rather than when he was with Aimee. She described that at first Benton was bouncing off the walls. She described his mood as alot better now and that he develops more every year.

64. Benton is happy to see his great grandparents when he gets out of school.

65. Benton does well in school. Josh has worked on a program with Benton to help with his reading and spelling.

66. Aimee admits that Benton expresses to her that Benton wants to be around his parents and his grandparents.

67. Obviously, Benton has experience a close attachment to Josh having been in his custodial setting for the past 3 plus years.

68. Changing sole legal and physical custody to Aimee when Benton has been with his dad for the past 3 plus years will undoubtedly cause confusion and detriment to Benton.

69. This Court previously found in its Findings of Fact filed on January 14, 2019 that "Josh can provide Benton with a stable and consistent home environment."

70. Josh has provided Benton with a stable and consistent home environment for the past 3 years and is the parent most suited to continue a stable and consistent home environment for Benton into the future.

71. This Court previously found in its Finding of Fact filed on January 14, 2019 that "Aimee has been the primary caretaker of Benton from his birth until Oregon DHS removed him from her custody on September 5, 2018. Josh was present at Benton's birth and has been an active father exercising parenting time and paying child support. Josh has been the primary caretaker of Benton for the past four months, from September 5, 2018 to present."

72. Josh continues to be the primary caretaker for Benton. He is the parent that has been most committed and involved in parenting Benton over the past 3 plus years.

73. Over the past 3 plus years Josh has been the parent investing predominant time, care and consistency in raising Benton. He has been the parent spending the most time with Benton, preparing meals, playing, attending medical care, choosing clothing, involvement in school, attending Benton's extracurricular activities, arranging transportation and providing appropriate clothing, foods and toys.

74. Josh has had more time available to spend with Benton. Aimee chose to live out of state and not exercise previously authorized supervised parenting time with Benton.

75. Aimee has the burden of proving a substantial change in circumstances. She has not met this burden.

76. Aimee moved out of state and then from state to state over the past 3 years. She chose not to exercise her supervised parenting time with Benton.

77. Aimee does not want to co-parent Benton with Josh. She continues to try to relitigate the same issues that were decided years ago.

78. Most of her allegations against Josh are unsubstantiated and based upon what her now 8- year old son may tell her.

CONCLUSIONS OF LAW

1. Any Conclusion of Law deemed to be a Finding of Fact or any Finding of Fact deemed to be a Conclusion of Law should be appropriately incorporated in the Findings of Fact and Conclusions of Law as the case may be.
2. The Court has jurisdiction over the Parties and subject matter. Venue is proper.
3. Aimee is the biological mother and Josh is the biological father of the minor child; namely, Benton Gednalske (DOB: 03/22/2013).
4. This Court has considered the *Fuerstenberg* factors, although the Court is not bound to make a specific finding in each category. In the end, the brightest beacon remains the best interest of the children. *Heinen v. Heinen*, 2008 SD 63, ¶10, 753 NW2d 891, 893-94 (quoting *Zepeda v. Zepeda*, 2001 SD 101, ¶13, 632 NW2d 48, 53).
5. In making a determination regarding custody and parenting time of Benton, this Court had considered “[w]hich parent is better equipped to provide for the child’s temporal, mental, and moral welfare.” *Fuerstenberg v. Fuerstenberg*, 1999 SD 35, ¶24, 591 NW2d 798, 807.
6. Josh is the parent better equipped to provide for Benton’s temporal, mental and moral welfare.
7. This Court has also considered which parent “can provide a stable and consistent home environment.” *Id.* ¶26.
8. Josh is the parent that has and can provide a stable and consistent home environment for Benton.
9. This Court has also considered which parent “is more committed and involved in parenting the child.” *Id.* ¶28

10. Josh is the parent more committed and involved in parenting Benton.
11. The Court also considered who is the primary caretaker of Benton.
12. Josh is the primary caretaker of Benton.
13. This Court also considered whether there has been a substantial change in circumstances since the previous trial held in this matter on November 30, 2018.
14. There has not been a substantial change in circumstances.
15. It is in Benton's best interests that Josh and Aimee shall have joint legal custody of Benton, with Josh being vested with primary physical custody subject to Aimee's right to parenting time as set forth herein.
16. Aimee shall have parenting time with Benton every other weekend beginning December 3, 2021. Aimee's every other weekend parenting time will begin on Friday when school is released for the day or if there is no school at 4:00 p.m. Aimee's every other weekend parenting time will conclude at 5:00 p.m. on Sunday; however, if there is no school the following Monday, Aimee's every other weekend parenting time will conclude on Monday at 5:00 p.m.
17. Additionally, unless otherwise agreed upon by the Parties in writing, the major holidays will be alternated on an annual basis as follows:

During odd-numbered years, Josh shall have the Benton for Martin Luther King, Jr. Day; Easter; Labor Day; Native American Day; Halloween; and the first half of Benton's school winter (Christmas) vacation; and Aimee shall have Benton for President's Day; Memorial Day; 4th of July; Thanksgiving; and the second half of Benton's school winter (Christmas) vacation. During even-numbered years, Josh shall have Benton for President's Day; Memorial Day; 4th of July; Thanksgiving; and the second half of Benton's school winter (Christmas) vacation; and Aimee shall have Benton for Martin Luther King, Jr. Day; Easter; Labor Day; Native American Day; Halloween; and the first half of Benton's school winter (Christmas) vacation.
18. Unless the Parties' otherwise agree in writing, parenting time for holidays will begin and end as follows:

Thanksgiving shall begin on Wednesday evening and end on Sunday evening. Easter weekend will begin on Thursday evening and end on Sunday evening. Martin Luther King Jr., Day; President's Day; Memorial Day; Native Americans' Day; and Labor Day weekends will begin on the preceding Friday evening and end on Monday evening. The 4th of July holiday will begin the evening of July 3rd at 5:00 p.m. and end the morning of July 5th at 10:00 a.m. Halloween will begin

at 3:00 p.m. and end at 8:00 p.m. The school winter vacation will begin the last day of school for the start of the winter vacation and will end the evening of the day before the start of school at the end of the winter vacation. Unless otherwise specified, holiday weekends begin at 4:00 p.m. and end at 5:00 p.m. on the designated days.

19. Additionally, Aimee shall have the Benton on Mother's Day weekend and her birthday, and Josh shall have Benton on Father's Day weekend and his birthday. The Parties shall also ensure that Benton's birthday is alternated between the Parties on an annual basis, with Aimee having Benton on his birthday in even-numbered years, and Josh having Benton on his birthday in odd-numbered years. Mother's Day weekend and Father's Day weekend shall begin on Friday evening at 4:00 p.m. and end on Sunday evening at 5:00 p.m. Birthdays shall commence at 9:00 a.m. and conclude at 6:00 p.m. on the day of the birthday.

20. When there is a conflict between a holiday and the regular parenting time, the holiday takes precedence. Any parenting time missed due to a holiday shall not be made up.

21. The Parties shall cooperate with each other.

22. Unless the Parties agree otherwise, all transportation responsibilities and costs shall be shared equally by the Parties with the parent that is starting their parenting time traveling to the parking lot of the Pennington County Courthouse to obtain Benton. Both parents have an obligation to be punctual, arriving at the agreed time, not substantially earlier or later. Repeated, unjustified violations of this provision may subject the offender to court sanctions.

23. Each of the Parties shall take all measures deemed advisable to foster a feeling of affection between Benton and the other party and neither will do anything which may estrange Benton from the other party nor impair their regard for the other party. Both Parties will speak only favorably of the other when in Benton's presence. Each will promote and foster good parental relations between Benton and the other parent and avoid any communication of any kind which would be detrimental to Benton's respect or admiration for the other parent.

24. Both parents have a right to telephone Benton at reasonable hours when Benton is in the care of the other parent. Aimee may call/facetime with Benton on Tuesdays or Thursdays between 6:30 p.m. and 7:00 p.m. Benton also has the same right to telephone his parents and there shall be no interference with this right. In fact, both parents shall assist Benton in facilitating the telephone calls to the absent parent.

25. Each parent, while Benton is in their custody, shall keep the other parent informed of all activities of Benton to include, but not limited to, report cards, notices of injury, significant events in Benton's life, so that the parent who is not with Benton has full knowledge of Benton's activities, health, and well-being, education progress and honors received by Benton.

26. It shall, at all times, be the objective of both Parties to decide all questions affecting Benton in such a manner as to promote Benton's welfare, happiness, and well-being. The Parties agree to communicate and cooperate with the other to enable such decisions to be made

concerning Benton's best interests regarding Benton's care, support, education, medical care, and treatment and all other significant matters affecting Benton. Such decisions shall be decided solely upon Benton's best interests, and the particular interest of each parent shall be secondary at all times.

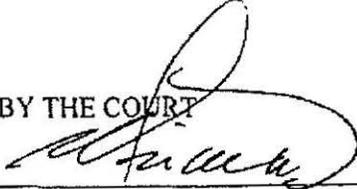
27. Aimee shall not take or allow Benton to be taken from the Rapid City/Black Hills area while Benton is in her care without the written consent of Josh.

28. Each parent shall keep the other parent informed of his/her current residential address, a telephone number where he/she can be reached and an email address so that communication can occur between the Parties and with their son consistent with the Court's Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 18th day of November, 2021.

BY THE COURT



Michael W. Day
Circuit Court Judge

Attest:

Ranae L. Truman
Clerk of Courts

By: /s/ Amber Watkins
Deputy Clerk II



Pennington County, SD
FILED
IN CIRCUIT COURT

NOV 18 2021

Ranae Truman, Clerk of Courts
By: Amber Watkins Deputy

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

JOSH GEDNALSKE,)
)
Plaintiff,)
)
vs.)
)
AIMEE R. LEWIS,)
)
Defendant.)

51 CIV 14-000193

ORDER

A trial to the Court was held in the above-captioned action on November 1, 2021, on Defendant's Motion, the Honorable Michael W. Day presiding. Plaintiff Josh Gednalske appeared personally and was pro se. Defendant Aimee R. Lewis appeared personally and was also pro se. This Court having entered its Findings of Fact and Conclusions of Law and based thereon finds good cause to grant the following relief:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the Parties shall share joint legal custody of their son, Benton. Both parents shall retain full parental rights and responsibilities with respect to Benton. Access to records and information pertaining to Benton, including but not limited to medical, dental, orthodontia, optometric, and similar health care, and school records shall be made equally available to both parents.

IT IS FURTHER ORDERED That Josh shall remain the primary physical custodian of Benton.

IT IS FURTHER ORDERED That Aimee shall have parenting time with Benton every other weekend beginning December 3, 2021. Aimee's every other weekend parenting time will begin on Friday when school is released for the day or if there is no school at 4:00 p.m. Aimee's every other weekend parenting time will conclude at 5:00 p.m. on Sunday; however, if there is no school the following Monday, Aimee's every other weekend parenting time will conclude on Monday at 5:00 p.m.

IT IS FURTHER ORDERED That additionally, unless otherwise agreed upon by the Parties in writing, the major holidays will be alternated on an annual basis as follows:

During odd-numbered years, Josh shall have the Benton for Martin Luther King, Jr. Day; Easter; Labor Day; Native American Day; Halloween; and the first half of Benton's school winter (Christmas) vacation; and Aimee shall have Benton for

President's Day; Memorial Day; 4th of July; Thanksgiving; and the second half of Benton's school winter (Christmas) vacation. During even-numbered years, Josh shall have Benton for President's Day; Memorial Day; 4th of July; Thanksgiving; and the second half of Benton's school winter (Christmas) vacation; and Aimee shall have Benton for Martin Luther King, Jr. Day; Easter; Labor Day; Native American Day; Halloween; and the first half of Benton's school winter (Christmas) vacation.

IT IS FURTHER ORDERED That unless the Parties' otherwise agree in writing, parenting time for holidays will begin and end as follows:

Thanksgiving shall begin on Wednesday evening and end on Sunday evening. Easter weekend will begin on Thursday evening and end on Sunday evening. Martin Luther King Jr., Day; President's Day; Memorial Day; Native Americans' Day; and Labor Day weekends will begin on the preceding Friday evening and end on Monday evening. The 4th of July holiday will begin the evening of July 3rd at 5:00 p.m. and end the morning of July 5th at 10:00 a.m. Halloween will begin at 3:00 p.m. and end at 8:00 p.m. The school winter vacation will begin the last day of school for the start of the winter vacation and will end the evening of the day before the start of school at the end of the winter vacation. Unless otherwise specified, holiday weekends begin at 4:00 p.m. and end at 5:00 p.m. on the designated days.

IT IS FURTHER ORDERED That additionally, Aimee shall have the Benton on Mother's Day weekend and her birthday, and Josh shall have Benton on Father's Day weekend and his birthday. The Parties shall also ensure that Benton's birthday is alternated between the Parties on an annual basis, with Aimee having Benton on his birthday in even-numbered years, and Josh having Benton on his birthday in odd-numbered years. Mother's Day weekend and Father's Day weekend shall begin on Friday evening at 4:00 p.m. and end on Sunday evening at 5:00 p.m. Birthdays shall commence at 9:00 a.m. and conclude at 6:00 p.m. on the day of the birthday.

IT IS FURTHER ORDERED That when there is a conflict between a holiday and the regular parenting time, the holiday takes precedence. Any parenting time missed due to a holiday shall not be made up.

IT IS FURTHER ORDERED That the Parties shall cooperate with each other.

IT IS FURTHER ORDERED That unless the Parties agree in writing otherwise, all transportation responsibilities and costs shall be shared equally by the Parties with the parent that is starting their parenting time traveling to the parking lot of the Pennington County Courthouse to obtain Benton. Both parents have an obligation to be punctual, arriving at the agreed time, not substantially earlier or later. Repeated, unjustified violations of this provision may subject the offender to court sanctions.

IT IS FURTHER ORDERED That each of the Parties shall take all measures deemed advisable to foster a feeling of affection between Benton and the other party and neither will do anything which may estrange Benton from the other party nor impair their regard for the other party. Both Parties will speak only favorably of the other when in Benton's presence. Each will promote and foster good parental relations between Benton and the other parent and avoid any communication of any kind which would be detrimental to Benton's respect or admiration for the other parent.

IT IS FURTHER ORDERED That both parents have a right to telephone Benton at reasonable hours when Benton is in the care of the other parent. Aimee may call/facetime with Benton on Tuesdays or Thursdays between 6:30 p.m. and 7:00 p.m. Benton also has the same right to telephone his parents and there shall be no interference with this right. In fact, both parents shall assist Benton in facilitating the telephone calls to the absent parent.

IT IS FURTHER ORDERED That each parent, while Benton is in their custody, shall keep the other parent informed of all activities of Benton to include, but not limited to, report cards, notices of injury, significant events in Benton's life, so that the parent who is not with Benton has full knowledge of Benton's activities, health, and well-being, education progress and honors received by Benton.

IT IS FURTHER ORDERED That it shall, at all times, be the objective of both Parties to decide all questions affecting Benton in such a manner as to promote Benton's welfare, happiness, and well-being. The Parties agree to communicate and cooperate with the other to enable such decisions to be made concerning Benton's best interests regarding Benton's care, support, education, medical care, and treatment and all other significant matters affecting Benton. Such decisions shall be decided solely upon Benton's best interests, and the particular interest of each parent shall be secondary at all times.

IT IS FURTHER ORDERED That Aimee shall not take or allow Benton to be taken from the Rapid City/Black Hills area while Benton is in her care without the written consent of Josh.

IT IS FURTHER ORDERED That Aimee shall successfully complete the SMILE Program and successfully complete Common Sense Parenting classes and file the certificates of completion with the Court.

IT IS FURTHER ORDERED That each parent shall keep the other parent informed of his/her current residential address, a telephone number where he/she can be reached and an email address so that communication can occur between the Parties and with their son consistent with the Court's Order.

IT IS FURTHER ORDERED That if any disputes arise concerning Aimee's parenting time as is hereby ordered then the Parties shall cooperate with and obtain the services of a parenting coordinator with Aimee paying the cost thereof.

IT IS FURTHER ORDERED That those portions of this Court's previous Order dated January 14, 2019 concerning relocation, health insurance, non-covered healthcare costs, and child support shall remain in full force and effect and are hereby incorporated herein by this reference.

IT IS FURTHER ORDERED That Aimee's Motion for sole physical and legal custody of Benton is hereby denied.

Dated this 18th day of November, 2021.

BY THE COURT



Michael W. Day
Circuit Court Judge

Attest:
Ranae L. Truman
Clerk of Courts
By: /s/ Amber Watkins
Deputy Clerk II



Pennington County, SD
FILED
IN CIRCUIT COURT
NOV 18 2021
Ranae Truman, Clerk of Courts
By Am Deputy

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
) ss	
COUNTY OF PENNINGTON)	SEVENTH JUDICIAL CIRCUIT

JOSHUA GEDNALSKE,)	
Plaintiff,)	51CIV14-000193
)	
vs.)	ORDER FOLLOWING
)	MOTIONS HEARING
AIMEE LEWIS,)	
Defendant.)	

A hearing was held in this matter on the 16th day of April, 2025, before the Court, the Honorable Michael Day, presiding. Plaintiff Joshua Gednalske was personally present and was represented by his attorney of record, Kimberly R. Kinney. Defendant personally appeared and was acting pro se. The Court having considered the pleadings and the arguments of counsel, having reviewed the entire file, therefore, it is hereby;

ORDERED that there has not been substantial change in circumstance to warrant a change of custody and Defendant's Motion to Modify Custody is denied; it is further

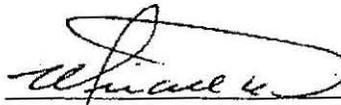
ORDERED that all previous Findings of Fact and Conclusions of law are incorporated herein; it is further

ORDERED that all previous court orders are still in effect.

5/20/2025 11:44:26 AM

BY THE COURT:

Attest:
Knapp, Lachea
Clerk/Deputy



Honorable Michael Day
Circuit Court Judge



IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

AIMEE R. LEWIS,)
)
 Defendant and Appellant,)
)
 vs.) Appeal No. 31105
)
 JOSH GEDNALSKE,)
)
 Plaintiff and Appellee.)

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE MICHAEL DAY
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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NOTICE OF APPEAL FILED MAY 23, 2025

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JURISDICTIONAL STATEMENT

Defendant-Appellant Aimee R. Lewis (“Aimee”) seeks the South Dakota Supreme Court’s review of the Trial Court’s Order Following Motions Hearing, the Honorable Michael W. Day presiding, filed with the Pennington County Clerk of Courts on May 20, 2025. Rec. p. 1117¹. The order, which denied Aimee’s motion for sole legal and physical custody of the parties’ minor child, provides that “there has not been a substantial change in circumstances to warrant a change of custody[;] . . . that all previous Findings of Fact and Conclusions of Law are incorporated herein; [and] that all previous court orders are still in effect.” Id. The Trial Court also made oral findings of fact and conclusions of law. Tr. 4/16/25 pp. 42-47². Notice of Appeal was filed on May 23, 2025. Previous trials to the court were held on November 30, 2018, (Tr. 11/30/18), and on November 1, 2021. (Tr. 11/1/21).

After the November 30, 2018 trial to the Court, the Trial Court entered Findings of Fact and Conclusions of Law, on January 14, 2018, (Rec. pp. 686-698), and an order on January 30, 2018, (Rec. pp. 733-737), which provides, that Aimee and Plaintiff-Appellee Joshua Gednalske (“Josh”), shall share joint legal custody of the minor child, and that Josh “shall remain the primary physical custodian of the minor child[.]” Id. Notice of Entry of the Trial Court’s January 30, 2018 order was served and filed on February 11, 2019. (Rec. pp. 731-732) The January 30, 2018 order was never appealed from, and Aimee has never directly challenged the trial court’s conclusion after the November 30,

¹ Rec. means the Trial Court’s record of the custody proceedings.

² Tr. Means a transcript of a hearing held in the custody proceedings.

2018 court trial, that it was in the child's best interest to remain in the primary physical custody of Josh.

After the November 1, 2021, trial to the Court, the Trial Court entered Findings of Fact, Conclusions of Law, and an Order on November 18, 2021. (Rec. pp. 858-872). The trial court's Order provides, once again, that the parties shall share joint legal custody of BG, and that Josh shall remain his primary physical custodian. (Rec. p. 869). Notice of Entry of the trial court's Findings of Fact, Conclusions of Law, and Order was filed and served on November 22, 2021. (Rec. pp. 873-875). The November 18, 2021 order was never appealed from.

STATEMENT OF LEGAL ISSUES

The following issues have been raised in this Appeal:

I. The Trial Court Considered Josh's Conviction for Domestic Simple Assault as Required Under SDCL 25-4-45.5.

The Trial Court did indeed consider Josh's conviction for Domestic Simple Assault as required under SDCL § 25-4-45.5.

List of the most relevant cases and statutory provisions:

SDCL § 25-4-45.5

II. Review of the Trial Court's Findings Of Fact And Conclusions Of Law Entered After the November 30, 2018, Court Trial Demonstrates Rebuttal of the Presumption Regarding Josh's Conviction for Domestic Simple Assault.

List of the most relevant cases and statutory provisions:

Shelstad v. Shelstad, 2019 S.D. 24, 927 N.W. 2d 129
Nemec v. Goeman, 2012 S.D. 14, 810 N.W. 2d 443.
SDCL § 25-4-45.5

III. The Trial Court Did Not Err in Determining That There Has Not Been a Substantial Change in Circumstances Warranting a Change in Custody.

List of the most relevant cases and statutory provisions:

Moulton v. Moulton, 2017 S.D. 73, 904 N.W. 2d 68

Masek v. Masek, 90 S.D. 1, 237 N.W. 2d 432 (S.D. 1976)

Huckfeldt v. Huckfeldt, 82 S.D. 344, 146 N.W. 2d 57 (S.D. 1966)

STATEMENT OF THE CASE

Aimee appeals from the trial court's Order Following Motions Hearing, in Seventh Judicial Circuit Court, Pennington County, South Dakota, the Honorable Michael W. Day presiding, filed on May 20, 2025, denying Aimee's motion for sole legal and physical custody of the parties' minor child.

STATEMENT OF FACTS

The parties are the biological parents of BG who was born on March 22, 2013, and is presently twelve (12) years of age. Rec. p. 687. The parties were never married to each other but were a couple until BG was about six months old, although they did not live together during this time. 11/30/18 Tr. pp. 84-86. Josh has had physical custody of BG since September 7, 2018, when the child was placed with him pursuant to a shelter order of the court in Portland, Oregon, entered after an allegation that BG was struck in South Dakota by Aimee's boyfriend, and a finding that the child could not be safely returned to Aimee without further danger of physical injury or emotional harm. Rec. pp. 687-688. Aimee did not appeal this order.

Prior to September 7, 2018, BG was in Aimee's care. Rec. p. 687. Upon Josh's Petition, and without objections from Aimee, Josh was awarded parenting time under the

South Dakota Parenting Time Guidelines on March 27, 2014. Rec. pp. 19-20. On March 9, 2016, an order was entered, based on the parties' stipulation, allowing Aimee to move with the child from Rapid City, South Dakota, to Boise, Idaho. Rec. pp. 114-116. Josh was awarded parenting time for the majority of each summer, along with alternate holidays, phone calls, video calls, and parenting time when in Boise. Id.

After the child's removal to South Dakota with Josh, following the entry of the Oregon Shelter Order in September of 2018, the court in Pennington County, South Dakota, entered an interim order on September 21, 2018, continuing Josh's physical custody of the child, granting Aimee two weekly Skype calls with the child, and supervised parenting time at United Families of Rapid City, South Dakota. Rec. pp. 688-689. The court scheduled a hearing on interim custody for October 3, 2018, and a trial on custody for November 20, 2018. Rec. p. 689.

On October 1, 2018, Aimee filed a lawsuit in the United States District Court against the Seventh Judicial Circuit Court, Rapid City Police Department, Pennington County Sheriff's Department, attorney Debra Watson, Josh, and the child's paternal grandparents. Id. At the October 3, 2018 hearing on interim custody, the circuit court judge assigned to the case recused himself due to Aimee's federal lawsuit against the Seventh Judicial Circuit, and the case was reassigned to the Honorable Michael W. Day, the presiding judge of South Dakota's Fourth Judicial Circuit Court. Notice of the custody trial to be held on November 30, 2018, was timely given, and an evidentiary hearing was held before Judge Day on November 30, 2018, from 8:30am to 12:30pm.

Following the November 30, 2018, evidentiary hearing, the court entered Findings of Fact, Conclusions of Law, (Rec. pp. 686-698), and an Order awarding the parties joint

legal custody of BG and ordering that Joshu remain the child's primary physical custodian, subject to supervised parenting time by Aimee through United Families. Rec. pp. 733-737. The court further ordered that it would entertain a motion for unsupervised parenting time if Aimee met certain conditions, including: the delivery of a psychological evaluation to the court within 90 days; proof of employment; adequate housing; cessation of her abusive relationship with her boyfriend; proof of completion of South Dakota's SMILE program; and completion of Common Sense Parenting classes. Aimee did not appeal this order. Id.

When determining that it was in the child's best interests to remain in Josh's physical custody, the court considered the factors enunciated in the South Dakota Supreme Court's decision in *Fuerstenberg v. Fuerstenberg*, 1999 S.D. 35, 592 N.W.2d 798. Rec. p. 690. In its Findings of Fact, the court found in Josh's favor with regard to all but one of the *Fuerstenberg* factors applicable to the case. Rec. pp. 690-693.

Regarding stability, the court noted that while Josh was able to provide a stable and consistent home environment, "Aimee has no stable residence and during the past year has resided with her boyfriend, her boyfriend's mother, her former stepfather, he former step-grandmother, in the Comfort Inn in Portland, Oregon, and in the Foothills Inn in Rapid City. Aimee is essentially homeless." Rec. pp. 691-692. The court determined that Aimee's inability to protect the child from harm suffered at the hands of her boyfriend constituted harmful parental misconduct. Rec. p. 692.

As to the capacity to provide the child with protection, food, clothing, medical care, and other basic needs, the court determined that:

Aimee is unable to protect Benton from harm. Benton was Removed from Aimee's custody by the Beaverton Police Department and DHS Protective Care Workers because her Boyfriend had hit Benton. Both Aimee and Varga have reported Domestic violence in their relationship to law enforcement. Aimee has been arrested for assaulting Varga. Benton appears to have been present during domestic violence incidents. This Court granted a 5-year Permanent Protection Order preventing contact by Varga with Benton on November 2, 2018. On October 23, 2018, Aimee communicated to the Court her desire to terminate her parental rights to Benton and the following day rescinded the offer. That attitude is concerning to the Court. Aimee is presently unemployed and is unable to provide food, clothing, medical care or meet Benton's basic needs, except with financial support from others. Josh is currently employed at Harley Davidson and resides with his grandparents, Dwayne and Janice Gednalske. Benton has been in his father's custody since September 7, 2018. Josh is attending Kindergarten at Rapid Valley Elementary School. A review of the school records and pictures indicate that Benton is a great boy, a kind and helpful friend with a great attitude and a beautiful smile. Benton has adjusted well to school and is making academic Progress with one absence and no tardies. Photographs of Benton with his dad and great-grandparents depict a happy child. Josh has been a parental figure in Benton's life since birth and is providing him with protection, food, clothing, and other basic needs. Benton is in good health and has not required recent medical care. Aimee's life appears to be chaotic and not a good environment to raise a child.

Rec. p. 690.

When considering each party's respective commitment to prepare BG for responsible adulthood, the court determined in its Findings that:

Aimee's extensive involvement with law enforcement involving over 50 complaints during a two-year period evidences an inability to manage her life in a responsible manner. Some of the reports reference Benton being present during the incidents. Aimee has had conflict with the clerk of court wherein she was accompanied by law enforcement, conflict with the court reporter claiming fraud in the preparation of the

transcript, conflict with Judge Brown necessitating the assignment of another judge, conflict with the Rapid City Police Department and the Pennington County Sheriff's Office regarding their handling of her complaints; conflict with United Families regarding their handling of the supervised visits. Aimee has communicated to this Court how corrupt the South Dakota legal system is and how unethical Josh's attorney's representation is. Aimee's attitude would be destructive to a young child. Aimee has also had conflict with Josh resulting in him pleading guilty to simple assault in April of 2015 when she claims he pointed a gun at her while he claimed she arrive as he was leaving for target practice and denied pointing the gun at her. After Josh was given temporary physical custody of Benton, she claimed he raped her in the past. The Court finds Aimee's decisions are not consistent with a good parent or a responsible citizen. Other than the incident with Aimee and some traffic offenses, Josh appears to be a good parent and responsible citizen.

Rec. p. 691.

At the November 30, 2018, trial, Josh was examined with regard to the circumstances surrounding his guilty plea to simple assault: 11/30/18 Tr. Pp 87-90. He testified that the incident occurred when Aimee appeared two hours late to pick up BG. Josh explained that he and a girlfriend had planned to go shooting while it was still daylight. Id. p. 87. BG started running into the street. Id. p.88. Josh handed a pistol which was holstered on his person to his girlfriend and went to retrieve BG. Id. p. 89. Josh stated that he did not point the weapon at Aimee. Id. Aimee struck him and made his nose bleed. Id. He started to call the police, but Aimee had already done so, and when the police arrived, he was arrested. Id. Josh testified that upon the advice of counsel, he accepted a favorable plea agreement and entered a guilty plea. Id. pp. 89-90.

On November 5, 2021, roughly three years after the November 30, 2018, court trial referenced above, a trial to the court was held on Aimee's Motion requesting "reinstatement of my lawful, parental rights (sole physical and legal custody of my minor child [BG], so that no further emotional and physical harm may come to him)." 11/5/21 Tr. pp.1-50. This motion was filed with the circuit court on September 7, 2021. Rec. p.852. The Trial Court heard the testimony of the parties, who appeared pro se, and served and filed its Findings of Fact, Conclusions of Law, and Order on November 18, 2021. Rec. pp.873-875. The Order provides, once again, that the parties shall share joint legal custody of BG, and that Josh shall remain his primary physical custodian. Rec. pp.869-872.

The Trial Court's findings of fact provide, in relevant part, that "Aimee has the burden of proving a substantial change in circumstances. She has not met this burden." Rec. p. 865. The Trial Court's conclusions of law, provide, in turn, that "[t]his Court also considered whether there has been a substantial change in circumstances since the previous trial held in this matter on November 30, 2018." [and] "There has not been a substantial change in circumstances." Rec. p. 866. Notice of Entry of Order and Findings of Fact and Conclusions of Law was served and filed on November 22, 2021. Rec. pp. 873-875. The Trial Court's Order and Findings were never appealed from.

The Trial Court considered, again, the Fuerstenberg factors, in its child custody and parenting time determination after the November 5, 2021 hearing. Rec. pp. 861-864. When considering "fitness," namely, which party is better equipped to provide for BG's temporal, mental, and moral welfare, the Trial Court applied six factors expressed in Fuerstenberg regarding fitness, ruling that each favored Josh, and, ultimately found that

“Josh is the more fit parent to [BG].” *Id.* Notably, the Trial Court determined that “[a]ll Aimee wants to do is bring up the past and relitigate all the issues that have long been decided. She blames others and does not accept responsibility for the current custody situation.” *Rec. p. 863.*

When considering “stability,” under Fuerstenberg, that is, which parent can provide a stable and consistent home environment, the Trial Court applied three factors favorably to Josh. These include: (1) BG’s relationship and interaction with his parents, siblings and extended family; 2) his adjustment to home, school and community; and 3) the parent with whom he has formed a closer attachment. *Id.*

On the question of BG’s attachment to either parent, the Trial Court observed that “[o]ther than the twice weekly phone, video calls with his mother, [BG] has only physically seen her in a couple of supervised visits that occurred in 2019.” [and] “Over the past 3 years Aimee has moved from South Dakota to Idaho to Colorado to South Dakota and now back to South Dakota again.” *Rec. p. 863.* The court found it obvious that BG has experienced a close attachment to Josh having been in his custodial setting for the past 3 years.” [and that] “Changing sole legal and physical custody to Aimee when [BG] has been with his dad for the past 3 plus years will undoubtedly cause confusion and detriment to [BG].” *Rec. p. 864.*

On April 16, 2025, a trial to the court was held on Aimee’s Motion For Sole Physical and Legal Custody of My Minor Child filed with the court on January 22, 2025. After the trial, the court entered its Order Following Motions Hearing on May 20, 2025. 4/16/25 Tr. pp. 1-49. The Order, which denied Aimee’s motion, provides that there has not been a substantial change in circumstances to warrant a change of custody[;] . . . that

all previous Findings of Fact and Conclusions of Law are incorporated herein; [and] that all previous court orders are still in effect.” Rec. p. 1117. The Trial Court also made oral findings of fact and conclusions of law. 4/16/25 Tr. pp. 42-47. In its oral findings, the court observed that in 2018, for Aimee to obtain unsupervised parenting time, the court ordered her to provide proof of employment, obtain adequate housing, discontinue her abusive relationship, complete the SMILE program and Common Sense Parenting Classes, and file certificates of completion. 4/16/25 Tr. p. 43. The court found that Aimee did not complete any of these requirements to secure unsupervised parenting time, choosing instead to maintain that “[s]he doesn’t need to be told how to be a parent and/or have any type of training or counseling to be a parent.” Id.

The court found that after its order following the 2018 hearing, Aimee only had supervised parenting time through United Families a couple times because she would not follow their rules. 4/16/25 Tr. p. 44. The court noted that after the hearing on November 1, 2021, Aimee was awarded unsupervised parenting time with BG every other weekend beginning December 3, 2021, but “has not seen [BG], my understanding, physically, since early 2019. She chose to leave South Dakota.” Id.

ARGUMENT

I. Standard of Review:

The trial court is given broad discretion in granting custody and parenting time regarding minor children, and the trial court’s decision will only be reversed upon a clear showing of an abuse of that discretion. *Pieper v. Pieper*, 2013 S.D. 98, ¶11, 841 N.W.2d 781, 785. “An abuse of discretion ‘is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or

unreasonable.” Evens v. Evens, 2020 S.D. 62, ¶ 21, 951 N.W.2d 268, 277 (citing Shelstad v. Shelstad, 2019 S.D. 24, ¶ 20, 927 N.W.2d 129, 134). “An abuse of discretion occurs in a child custody proceeding when the [circuit] court’s review of the traditional factors bearing on the best interests of the child is scant and incomplete.” Kreps v. Kreps, 2010 S.D. 12, ¶ 25, 778 N.W.2d 835, 843 (quoting Pietrzak v. Pietrzak, 2009 S.D. 1, ¶ 37, 759 N.W.2d 734, 743).

“The circuit court’s findings of fact are reviewed for clear error.” Pieper v. Pieper, supra, 2013 S.D. 98, ¶ 13, 841 N.W.2d at 785. Clear error means that the Court will only overturn the trial court’s findings of fact on appeal when a complete review of the evidence leaves the Court with a definite and firm conviction that a mistake has been made. Id.

II. The Trial Court Considered Josh’s Conviction For Domestic Simple Assault As Required Under SDCL 25-4-45.5.

In awarding custody of a minor child, SDCL 25-4-45.5 requires that a trial court consider a conviction of domestic abuse as defined in SDCL 25-10-1(1); a conviction of assault against a person as defined in SDCL 25-10-1(2); or, a history of domestic abuse. SDCL 25-4-45.5 Contrary to Aimee’s contention on appeal, the trial court did, indeed, consider Josh’s conviction for domestic simple assault.

In this regard, at the court trial held seven years ago, on November 30, 2018, Josh acknowledge his conviction for domestic simple assault. 11/30/18 Tr. p. 89. Upon examination by his attorney, Josh explained the circumstances that led to his guilty plea. He testified that the incident occurred when Aimee appeared two hours late to pick up BG. Josh and a girlfriend had planned to go shooting while it was still daylight. BG

started running into the street. Josh handed a pistol which was holstered on his person to his girlfriend and went to retrieve BG. Josh stated that he did not point the weapon at Aimee. Aimee struck him and made his nose bleed. He started to call the police, but Aimee had already done so, and when the police arrived, he was arrested. Josh testified that upon the advice of counsel, after lengthy delays in the criminal proceedings, he accepted a favorable plea agreement and entered a guilty plea. 11/30/18 Tr. 87-90.

The trial court considered Josh's conviction in its findings entered after the November 30, 2018 court trial. Rec. p. 691. In connection with its delineation of Aimee's many conflicts with the courts and South Dakota's judicial system, the Rapid City Police Department, the Pennington County Sheriff's Department, and United Families, as well as Aimee's expressed belief in the corruption of South Dakota's legal system, the trial court stated that "Aimee's attitude would be destructive to a young child." Id. Then, with regard to Josh's conviction, the trial court stated:

Aimee has also had a conflict with Josh resulting in him pleading guilty to simple assault in April of 2015 when she claims he pointed a gun at her while he claimed she arrived as he was leaving for target practice and denied pointing a gun at her. After Josh was given temporary physical custody of [BG], she claimed he raped her in the past. The Court finds Aimee's decisions are not consistent with a good parent or a responsible citizen. Other than the incident with Aimee and some traffic offenses, Josh appears to be a good parent and responsible citizen.

Id.

III. Review Of The Trial Court's Findings Of Fact And Conclusions Of Law Entered After The November 30, 2018 Court Trial Demonstrates Rebuttal of The Presumption Regarding Josh's Conviction For Domestic Simple Assault

Under SDCL 25-4-45.5, Josh's 2015 conviction for domestic simple assault created a rebuttable presumption that awarding custody of BG to Josh after the November 30, 2018 court trial was not in BG's best interest. *Id.* The presumption provided for in SDCL 25-4-45.5 is subject to South Dakota's rule on presumptions in civil cases expressed in SDCL 19-19-301. *Shelstad v. Shelstad*, supra, 2019 S.D. 24, ¶ 30, 927 N.W.2d at 136. SDCL 19-19-301 provides that a presumption can be rebutted with substantial credible evidence. *Id.* The substantial credible evidence requirement "means that a presumption may be rebutted or met with such evidence as a trier of fact would find sufficient to base a decision on the issue, if no contrary evidence was submitted." *Shelstad v. Shelstad*, supra, 2019 S.D. 24 ¶ 29, 927 N.W.2d at 136 (quoting *In re Estate of Dimond*, 2008 S.D. 131, ¶ 9, 759 N.W.2d 534, 538).

In *Nemec v. Goeman*, 2012 S.D. 14, 810 N.W.2d 443, the South Dakota Supreme Court affirmed the trial court's conclusion that evidence rebutted the presumption that the subject father should not be awarded physical custody based on an assault conviction. *Id.*, 2012 S.D. 14, ¶ 26, 810 N.W.2d at 449.

In considering its review of this issue on appeal the Court observed that:

This Court utilizes all the findings of fact and conclusions of law in examining whether the presumption was rebutted. The circuit court carefully considered all of the factors Relevant to determining the children's best interests. Overall, the circuit court's findings and conclusions overwhelmingly indicated that, at this time, it is in the children's best interests that primary physical custody be awarded to father.

Id., 2012 S.D. 14, ¶ 25, 810 N.W.2d at 449.

In the present case, the trial court considered Josh's simple assault conviction, noting that Aimee claimed he pointed a gun at her, while Josh denied this claim. Rec. p. 691. The court further noted that after Josh obtained temporary custody of BG, Aimee claimed that he raped her in the past. Id. The trial court concluded its consideration of the conviction stating that "[o]ther than the incident with Aimee and some traffic offenses, Josh appears to be a good parent and responsible citizen." Id. The court's finding as to Josh's good parenting and responsible citizenship, when juxtapose with Aimee's many conflicts with authority, is, in itself, tantamount to a rebuttal of the presumption.

Additionally, review of the trial court's findings of fact and conclusions of law entered after the November 30, 2018, court trial demonstrate overwhelmingly that the presumption based upon Josh's conviction has been rebutted. Here, the trial court considered and applied factors enunciated in Fuerstenberg when reaching its ultimate conclusion of law that it was in BG's best interests that he remain in Josh's physical custody.

IV. The Trial Court Did Not Err In Determining That There Has Not Been A Substantial Change In Circumstances Warranting A Change In Custody

In South Dakota, the rule has been long held, that in order to modify a custody decree rendered after a contested hearing, the moving party must show a substantial change in circumstances. *Moulton v. Moulton*, 2017 S.D. 73, ¶10, 904 N.W.2d 68, 72. Indeed, the degree of change required has been described as a "substantial and material change of circumstances." *Masek v. Masek*, 90 S.D. 1, 237 N.W.2d 432, 434 (S.D.1976) (Emphasis added).

Early on, in *Huckfeldt v. Huckfeldt*, 82 S.D. 344, 146 N.W.2d 57 (S.D.1966), the Court expressed the rationale for the rule stating:

The rule of 'changed circumstances' is not statutory, but a creature of judicial expedience. Its purpose is to protect the court, the parties, and the children from continuing vexatious litigation on questions of custody. Admittedly the welfare of the children is of primary importance, but when it is once decided, and the custodial order is made, it will not be overturned unless a substantial and material change of circumstances has occurred. Any other interpretation would result in endless litigation and continual uncertainty. The burden to show a change of circumstances rests with the party seeking modification. *Wellnitz v. Wellnitz*, supra. While proof of a change of conditions is a prerequisite to modification of a custody decree, such proof does not necessarily require modification. The mere fact that circumstances have changed since the entry of the decree is not sufficient itself to warrant modification. There must be a showing of a material and substantial change of circumstances affecting the welfare of the children to a substantial or material extent and the two issues are closely intertwined. 27B C.J.S. Divorce s 317(2), p. 539; *Ulver v. Ulver*, supra.

Id., 82 S.D. 344, 348, 146 N.W.2d at 58.

Contrary to Aimee's assertions, the fact that she is living in Louisiana with a member of the military and now has another child is neither a substantial nor material change of circumstances which warrants resting physical custody of BG from Josh and awarding custody to Aimee. Josh has had BG in his care in Rapid City, South Dakota for seven years, and the trial court determined that Aimee has not seen BG since early 2019, because she chose to leave South Dakota. The notion that BG should be required to move to Louisiana because Aimee now lives there is unreasonable. In point of fact, the trial court noted at several proceedings the number of times Aimee has moved from state to state. At the hearing held on April 16, 2025, the court also dispelled the argument

that Aimee's new child constituted a substantial change of circumstances. The trial court did not abuse its discretion when ruling that no substantial change of circumstances has been demonstrated.

CONCLUSION

Appellee Josh Gednalske respectfully requests that this Court affirm the trial court's order in its entirety.

WAIVER OF ORAL ARGUMENT

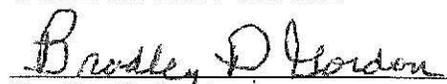
Josh hereby waives oral argument in this appeal.

CERTIFICATE OF VOLUME LIMITATIONS

The undersigned counsel certifies that Appellee's Brief was prepared using Microsoft Word - 365 Version 2511 - word processing software. This brief complies with the type-volume limitations imposed by SDCL § 15-26A-66(b)(2). Appellant's Brief contains 5,053 words and 32,455 characters. The above-mentioned word processing system was used to count the number of words and characters in Appellant's Brief.

Dated this 2nd day of January, 2026.

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The undersigned hereby certifies that he served a true and correct copy of Appellee's Brief upon the person(s) designated herein, on the date shown below, by eFile SD, to-wit:

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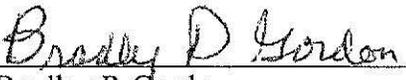

Bradley P. Gordon

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JURISDICTIONAL STATEMENT

Defendant-Appellant Aimee R. Lewis ("Mother") does not take issue with Plaintiff-Appellee Josh Gednalske's ("Father") Jurisdictional Statement, because Father does not contend that the Honorable Michael W. Day, Presiding Circuit Court Judge of the Fourth Judicial Circuit- hereinafter referred to as the "Trial Court," entered written Findings of Fact and Conclusions of Law regarding the recent hearing on Mother's Motion for Sole Physical and Legal Custody of Minor Child, namely: B.G., d/o/b March 22, 2013 – the "Child" - nor that the Trial Court made explicit findings concerning rebuttal of the statutory presumption concerning domestic violence in either its initial custody determination or recent custody determination.

STATEMENT OF LEGAL ISSUES

Mother takes issue with Father's Statement of Legal Issues, because Father has not stated the issues as an appellate court would state the broad issue presented, as required. SDCL § 15-26A-61; and SDCL § 15-26A-60(4).

STATEMENT OF THE CASE

Mother does not take issue with Father's Statement of the Case.

STATEMENT OF THE FACTS

Mother takes issue with Father's Statement of the Facts, because many facts denoted therein are not relevant to the grounds urged for reversal by Mother. Father's Statement of the Facts is not concise, as required. SDCL § 15-26A-61; and SDCL § 15-26A-60(5).

ARGUMENT - STANDARD OF REVIEW

Mother does not take issue with Father's recitation of the applicable Standard of Review.

ARGUMENT

I. **The Trial Court Committed Reversible Error in Disregarding the Presumption that it is Not in a Child's Best Interest to be Placed With a Parent Who Has Been Convicted of Abuse.**

As he must, Father acknowledges that the rebuttable presumption created by SDCL § 25-4-45.5 is applicable here. Father alleges that this presumption has been rebutted, but he cites no findings where the Trial Court expressly found that the presumption had been rebutted in either the Trial Court's initial custody determination or its recent order on Mother's motion to modify custody. The Trial Court abused its discretion and violated the edicts of this Court and South Dakota statutory law in making both its initial custody determination and its current custody determination in disregard of SDCL § 25-4-45.5. The Trial Court made no written Findings of Fact or Conclusions of Law concerning the motion to modify custody that is before this Court. The Trial Court made written Findings of Fact and Conclusions of Law in its initial custody determination, but it did not address whether Father's physical violence towards Mother, his threatening her with a firearm that led to his conviction of simple assault, are no longer a concern. *See, Shelstad v. Shelstad*, 2019 S.D. 24, ¶28. Whether Father's behavior has changed is relevant to both the resolution of Mother's recent motion to modify custody and the Trial Court's initial custody determination. Mother has testified concerning the domestic violence perpetrated upon her by Father at each hearing held in this matter, including the most recent hearing on her motion to modify custody.

Moreover, the Trial Court's initial Findings of Fact reference that Father pointed a gun at Mother and his simple assault conviction, but do not demonstrate that Father has changed his behavior. The Trial Court's initial Findings of Fact and Conclusions of Law make no reference to, much less rebut, the presumption that awarding custody to an abusive parent is not in the best interest of a child. SDCL § 25-4-45.5. It is extremely difficult, if not impossible, to determine whether the Trial Court considered Father's conviction of simple assault in denying Mother's most recent motion to modify custody or in its initial custody determination, because the Trial Court made no findings concerning the effect of Father's simple assault conviction either then or now.

The Trial Court apparently did not focus its attention on the proper grounds for its decision; its failure to do so, by definition, constitutes an abuse of discretion. *See*, Justice Konenkamp's dissent in *Kreps v. Kreps*, 778 N.W.2d 835, 2010 SD 12, ¶ 67, (S.D. 2010) citing *Willoughby v. Grim*, 1998 SD 68, ¶ 6, 581 N.W.2d 165, 167-68, where he stated that, "[j]udicial decisions on children's lives deserve our highest effort. Here is no place for perfunctory procedure." *Id.* ¶44. Justice Konenkamp stated further, "to answer this question (what custody determination is in the children's best interest given father's arrest for domestic assault on mother and a deferred sentence on a reduced charge of disorderly conduct (¶55)), all we can appropriately review are the stilted findings and conclusions entered here." *Id.* ¶67.

Father's Appellee Brief does not even attempt to argue that the Trial Court found expressly that the presumption, created by SDCL § 25-4-45.5, that awarding custody to the abusive parent is not in the best interest of a child, was rebutted in either its oral findings on Mother's most recent motion to modify custody or the Trial Court's initial

custody determination. All that this Court can review is the Trial Court's findings and conclusions. *See*, Justice Konenkamp's dissent in *Kreps*, 778 N.W.2d at 835, 2010 SD 12, ¶ 67.

The only time that this Court has determined that it is not necessary for a circuit court to make explicit findings concerning rebuttal of the presumption is when this Court determined that SDCL § 25-4-45.5 was inapplicable, because there was no conviction of domestic abuse within the meaning of SDCL § 25-4-45.5(1). *See*, *Nickles v. Nickles*, 2015 S.D. 40, ¶19-¶20. In the vast majority of, if not all, the other cases addressing the impact of SDCL § 25-4-45.5, the circuit courts made explicit findings rebutting the presumption created by this statute. *See*, *Shelstad*, 2019 S.D. at 24, ¶30 where this Court stated that,

a presumption can be rebutted with "substantial, credible evidence[.]" In *In re Estate of Dimond*, we explained that "the substantial, credible evidence requirement means that a presumption may be rebutted or met with such evidence as a trier of fact would find sufficient to base a decision on the issue, if no contrary evidence was submitted." 2008 S.D. 131, ¶ 9, 759 N.W.2d 534, 538. "[M]ere assertions, implausible contentions, and frivolous avowals will not avail to defeat a presumption." *Id.* From our review, Duane relied on more than mere assertions, implausible contentions, and frivolous avowals. Therefore, the circuit court did not abuse its discretion or err when it concluded Duane presented substantial, credible evidence to rebut the presumption under SDCL 25-4-45.5(3).

See also *Harwood v Chamley*, 2023 S.D. 35, ¶23, where the circuit court in its findings acknowledged the statutory presumption and found that it had been rebutted by "the totality of the evidence presented in this matter." *See also*, *Stavig v. Stavig*, 774 N.W.2d 454, 2009 SD 89, ¶11 (S.D. 2009), where the circuit court specifically addressed the issue of domestic abuse in its memorandum decision that was incorporated in the findings of fact and conclusions of law. *See also*, *Nemec v. Goeman*, 2012 S.D. 14, ¶ 22, 810 N.W.2d

443 (S.D. 2012), where the circuit court determined that while father has an assault conviction . . . any presumption in favor of awarding custody to mother under this statute was rebutted by the clear and convincing weight of the evidence. Here, the Trial Court did not make any reference to the statutory presumption nor did it make any findings that this presumption was rebutted in either its oral findings on Mother's most recent motion to modify custody or in its initial custody determination. In short, the Trial Court did not give meaningful consideration, if any whatsoever, to either Father's conviction of simple assault or whether the presumption arising as result of this conviction was rebutted. The Trial Court merely relied upon other considerations, including extraneous ones, to determine that it would be in the Child's best interest if Father is awarded primary physical custody of him. The Trial Court erred in doing so.

II. **The Trial Court Erred in Determining that a Substantial Change of Circumstances did not Occur.**

Contrary to Father's contention, the Trial Court did not find that Mother having another child and a stable home environment did not constitute a substantial change in circumstances. The Trial Court made no findings, oral or written, that there was not a substantial change in circumstance since the initial custody determination was made. The Trial Court stated at the recent motions hearing that:

“[t]o modify a custody decree after a contested hearing, Aimee must show a substantial change in circumstances. The only substantial change that I see is that she has now a daughter, which is Benton's half-sister, and she lives in Louisiana. But that doesn't have anything to do with the previous custody determination that was tried back in 2018, which was never appealed, or the secondary custody decision that was tried on November 1 of 2021, which was never appealed.”

Tr. 4/16/25 pp.45-46 l.24-9. This statement does not constitute a finding that there has been no substantial change in circumstances since the initial custody determination was

made. By definition, a change in circumstances would concern events occurring after the initial custody determination was made; a change in circumstances would not have anything to do with the initial custody determination, whether it was appealed or not. This statement references a change in circumstances, which is that the Child now has a half-sister and that Mother now lives in Louisiana. Mother is in what appears to be a stable relationship. TR 4/16/25 p.15, l. 14-16. The Trial Court has found in the past that Mother was essentially homeless. Rec. p.692; FF&CL, p. 7, ¶B. Mother is certainly not homeless now; Mother testified that she is now living with a military member stationed in Louisiana and has another child. TR 4/16/25 p.15, l. 14-16. A finding of no substantial change of circumstances would be clear error if such a finding was made by the Trial Court.

CONCLUSION

Father acknowledges, as he must, that the statutory presumption exists that awarding custody to an abusive parent is not in a child's best interest. The Trial Court clearly erred in failing to make any explicit findings on whether the presumption created by SDCL § 25-4-45.5 was rebutted in either the Trial Court's current custody determination or its initial custody determination. This Court has consistently required explicit findings of fact concerning the rebuttal of this statutory presumption when it is applicable. The Trial Court made no such findings concerning this statutory presumption whatsoever. It committed clear error in doing so.

Father does not reference any specific finding where the Trial Court determined that no substantial change in circumstances existed. The Trial Court made no written findings whatsoever on Mother's motion to modify custody. The Trial Court stated what

changes had occurred since the initial custody determination, but it did not find that there were no substantial changes in circumstances. If the Trial Court had made such a finding, it would be clearly erroneous. The Trial Court found in the past that Mother was essentially homeless. Mother testified that she is now living with a military member stationed in Louisiana and that she has another child.

REQUEST FOR ORAL ARGUMENT

Once again, Mother respectfully requests that oral argument be held in this appeal.

CERTIFICATION OF VOLUME LIMITATIONS

The undersigned counsel certifies that Appellant's Brief was prepared using a Microsoft Word - Version 2024 - word processing software. This brief complies with the type-volume limitations imposed by SDCL § 15-26A-66(b)(2). Appellant's Brief contains 1,854 words and 9,707 characters. The above-mentioned word processing system was used to count the number of words and characters in Appellant's Reply Brief.

Dated this 11th day of February 2026.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of **Appellant's Reply Brief** upon the person(s) designated herein, on the date shown below, by Tyler Technologies, to-wit:

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which address is the last address of the addressee known to the subscriber.

Dated this 11th day of February 2026.



Brian L. Utzman