IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE NAME CHANGE OF S.J.K AND W.J.K
(58CIV24-000038)

Appeal No. 31021

Appeal from the Circuit Court, Sixth Judicial Circuit
Stanley County, South Dakota
The Honorable Margo D. Northrup, Presiding

APPELLANT'S BRIEF

Notice of Appeal was filed on March 5, 2025.

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JURISDICTIONAL STATEMENT[1]

This is an appeal from the Order Denying Petition for Name Change, entered on February 10, 2025, by the Honorable Margo D. Northrup, Sixth Judicial Circuit Court. SR at 60. Notice of Entry was served on February 10, 2025. SR at 61. Appellant's Notice of Appeal was filed and served with this Court on March 5, 2025. SR at 68. This Court has jurisdiction pursuant to SDCL 15-26A-3(2).

QUESTIONS PRESENTED

I. Whether the trial court erred as a matter of law in applying a heightened burden of proof to deny Mother's request to hyphenate the children's surname to include both parents' surnames.

The trial court inappropriately applied Minnesota precedent to conclude, "judicial discretion to make a change of a minor's surname against the wishes of one parent should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such a change." See Legal Precedent ¶ 9 in Court's Findings of Fact and Conclusions of Law (Denial of Name Change) (citing Application of Saxton, 309 NW2d 298, 301 (MN 1981)).

Authority on Point: *In re J.P.H.*, 2015 SD 43, 865 NW2d 488; *Keegan v. Gudahl*, 525 NW2d 695 (SD 1994).

II. Whether the trial court was clearly erroneous in finding that the hyphenation of the children's surnames would be harmful to their identity or stability.

The trial court found it was not in the children's best interests "to take any affirmative action to draw further attention to the history and current

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[1] References to the Settled Record will be made as "SR at ___." References to the hearing transcript will be made as "HT at __." Findings of Fact (FOF) and Conclusion of Law (COL) will be referenced by number. The custody trial transcript will be referred to by Appendix page and "TT at __."

circumstances," of the divorce, because of "potential confusion or embarrassment for the minor children moving forward. The potential of this happening, even if it were not to, weighs against any type of change for these minor children." SR at 54-55, 57; FOF 13; COL 7. But no evidence was offered to support this conjecture. Instead, the trial court concluded that stability weighed against change, and noted it is "significant that all vital, medical, and state and federal records of the minor children utilize the name the children have had since birth." SR at 57-58; COL 6, 9, and 10. Moreover, the trial court speculated that a future potential need for name change (i.e. upon marriage) is a basis for refusing the requested hyphenation now. SR at 56; FOF 18.

Authority on Point: *In re J.P.H.*, 2015 SD 43, 865 NW2d 488; *Keegan v. Gudahl*, 525 NW2d 695 (SD 1994); *H.G. by K.B. v. C.G.*, 702 SW3d 230 (MoCtApp 2024); *In re Andrews by and through Andrews*, 235 Neb 170, 454 NW2d 488 (1990); *Cohee v. Cohee*, 317 NW2d 381 (Neb 1982).

STATEMENT OF THE CASE

The parties were divorced on September 10, 2024. SR at 2. After the divorce, Heidi R. Sperry (Mother) filed a petition to have the children's surnames changed to reflect *both* parents' surnames. SR 1-2. Notice of hearing was properly published for four successive weeks in The Capital Journal, a legal newspaper in Stanley County, and the petition was properly served upon Father on October 22, 2024. SR at 7. The matter was heard telephonically on December 16, 2024. SR at 4; HT at 1. At the close of the hearing, the trial court directed the parties to simultaneously submit proposed Findings of Fact and Conclusions of Law ten days after the transcript was prepared, which was January 24, 2025. HT at 30.

On February 3, 2024, the trial court ruled, largely incorporating Father's proposed Findings and Conclusions (or at least more of Father's than Mother's). SR at 47-59. The trial court directed Father's counsel to prepare the Order

consistent with the Court's Findings and Conclusions. SR at 46. On February 10, 2025, Father served his proposed Order. SR at 60. Mother's counsel immediately notified the trial court that she had no objection to the *form* of the Order, but that she would be filing objection to the substance. Appendix at A1. Nevertheless, the trial court signed the proposed Order the same day it was submitted to the court. SR at 60. Notice of Entry was also served the same day. SR at 61. Mother filed her Objection the following day. SR at 64-66. This appeal follows.

STATEMENT OF FACTS

Heidi Rai Sperry (Mother) and John Franklin Kerby (Father) have two children: S.J.K. who was born on July 26, 2018 (age 6); and W.J.K. who was born on February 3, 2020 (age 5). SR at 1, 52. Both children were born in Georgetown, Williamson County, Texas. SR at 1; FOF 3.

Father is from Texas; he is an only child and both of his parents are deceased. SR 19; HT at 5. Conversely, Mother and her extended family are from the Fort Pierre area where the parties moved in 2021. SR at 33. After the divorce, both parties continued to reside in Fort Pierre. SR at 1.

The parents divorced by stipulation on September 10, 2024, but the issues of custody, parenting time and child support were reserved for trial. SR at 2, 52; FOF 4. At the conclusion of the three-day custody trial, on September 13, 2024, the parties were awarded joint legal and joint physical custody, with Mother having a few more days per month than Father. Mother also retained "the decision making on where the children attend school. She's also going to have the decision

making on major medical decisions that the parties can't agree on." Appendix at B6, TT at 19, lines 6-9. However, the parties are set to transition to shared parenting in July 2025, subject to Mother's decision on how that will be effectuated. Appendix at B5, TT at 17, lines 22-25.

The trial court in the name-change matter was the same court that presided over the divorce and custody matter. The trial court took judicial notice of the "divorce proceeding, testimony of the parties and witnesses, and specifically its Findings of Fact and Conclusions of Law entered on December 3, 2024," which were incorporated into this matter as if set forth in full. SR at 47. The same court also presided over Mother's protection order hearing against Father, of which the court also took judicial notice. SR at 47.

Shortly after the divorce, Mother petitioned for a name change so the minor children could share *both* parents' surnames. SR at 19; HT at 3. The children's first and middle names would remain unchanged; only their surname would be changed from Kerby to Sperry-Kerby. SR at 2, 52; FOF 5. Father objected to the change. SR at 10.

It is noteworthy that Mother has always maintained her maiden name, even after marriage to Father. SR at 53; FOF 6. Indeed, Mother testified that she has no intention of changing her surname in the future, even if she were to remarry. SR at 19, 22; HT at 4-5. "I've been very involved with the legacies of my family and the farm, and everything like that, and I do believe that I would never change

my name and it's never been something that's crossed my mind." SR at 22; HT at 19.

When Mother was pregnant, she asked that the children's surnames be hyphenated to "Sperry-Kerby" to incorporate *both* parents' surnames. SR at 18; HT at 4-5. Unfortunately, both children were born via emergency C-sections requiring Mother to be in recovery post-delivery. *Id.* Father completed the birth certificate paperwork to name both children and did *not* incorporate Mother's surname as she requested. SR at 18; HT at 5.

Because of the family ties to the community, and in light of the divorce, it was important to Mother that the children be allowed to share in her family heritage by sharing her surname, just as well as Father's. SR at 19, 21-22; HT at 6-7, 14, 19. This would not only help the children identify and connect with both parents and their extended family, but would simplify identification in medical and school records when both parents would be co-parenting the children. *Id.* In other words, including both parents' surnames would help the community to connect and identify the children with *both* parents for medical appointments, schools, and extra-curricular activities. SR at 18-19; HT at 5-6. It would also solidify a sense of connection and belonging for the children with respect to both parents' families. SR at 19, 21-22; HT at 6-7, 14, 19.

STANDARD OF REVIEW

In reviewing a trial court's determination of the best interests of the children, this Court will disturb that ruling only when the trial court abused its

discretion. *In re J.P.H.*, 2015 SD 43, ¶ 8, 865 NW2d 488, 490 (additional citations omitted). "An abuse of discretion occurs when 'discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence.' " *Id.* quoting *Miller v. Jacobsen,* 2006 SD 33, ¶ 18, 714 NW2d 69, 76).

Likewise, the trial court's findings of fact are reviewed under the clearly erroneous standard. *Id. (*quoting *Miller,* at ¶ 19). The trial court's factual findings will not be overturned unless "a complete review of the evidence leaves the Court with a definite and firm conviction that a mistake has been made." *Aguilar v. Aguilar*, 2016 SD 20, ¶ 9, 877 NW2d 333, 336 (additional citations omitted). Conversely, conclusions of law are reviewed *de novo*, meaning no deference is given to the circuit court's conclusions of law. *Id.*

ARGUMENT AND AUTHORITIES

"The name a child carries is one of the first and most fundamental decisions that parents make. A child's name reflects tradition, heritage, and family pride. It is often a means of honoring loved ones and a way of giving a sense of belonging to the child." *Keegan v. Gudahl*, 525 NW2d 695, 697.

"The best interest of the child govern a child's name change." *In re J.P.H.*, 2015 SD 43 at ¶ 10, 865 NW2d at 490 (citing *Keegan v. Gudahl*, 525 NW2d 695, 698-99 (SD 1994)).

> In determining the best interest of the child in a name change dispute, factors for the court to consider include, but are not limited to: (1) misconduct by one of the parents; (2) failure to support the child; (3) failure to maintain contact with the child; (4) the length of

time the surname has been used; and (5) whether the surname is different from that of the custodial parent.

Id. (additional citations omitted). The court may also consider whether the change might alienate a noncustodial parent. *Id.* (additional citations omitted).

I. The trial court applied the wrong burden of proof.

The trial court applied Minnesota precedent to conclude, "judicial discretion to make a change of a minor's surname against the wishes of one parent should be exercised *with great caution* and *only where the evidence is clear and compelling* that the substantial welfare of the child necessitates such a change." *See* Legal Precedent ¶ 9 in Court's Findings of Fact and Conclusions of Law (Denial of Name Change) (citing *Application of Saxton*, 309 NW2d 298, 301 (MN 1981)) (emphasis added). This application of law is wrong for two reasons.

A. The South Dakota Supreme Court previously rejected application of this enhanced burden of proof.

In 2015, this Court had the opportunity to address the issue of whether South Dakota should adopt this heightened burden of proof. *In re J.P.H.*, 2015 SD 43 at ¶ 15, 865 NW2d at 491. In that case, the mother filed a post-divorce petition to hyphenate the five-year old child's surname to include *both* parents' surnames. *Id.* at ¶ 4, 865 NW2d at 489. The father objected, arguing the hyphenation would add to the child's identity confusion, but he admitted he would continue to love the child either way. *Id.* Ultimately, the trial court granted the requested hyphenation. This Court affirmed the trial court's decision and denied the father's request to adopt this "clear and compelling" burden. Instead, this Court held "the

standards adopted in our current case law adequately address name-change issues. We do not find a need to alter our best-interest-of-the-child standard." *Id.* at 491-92.

B. A mother's interest in having her children bear and perpetuate her surname should be recognized as coextensive with the father's interest.

The father in *J.P.H.*, much like Father here, believed a hyphenation of the child's name would somehow alienate him. In that case, the court concluded, "A combined surname is a solution that recognizes each parent's legitimate claims and threatens neither parent's rights. The name merely represents the truth that both parents created the child and that both parents have responsibility for that child." *In re J.P.H.*, 2015 SD 43 at ¶ 12, 865 NW2d at 491 (quoting *In re Willhite*, 706 NE2d 778, 782 (Ohio 1999)).

In *J.P.H*, the mother testified, "We want [Son] to feel as much a part of our family as [Father's] family. In my opinion, it's equal, you know, but we do have [Son] the majority of the time so we want him to be able to identify with our family." *Id.* at ¶ 4, 865 NW2d at 489. Similarly, Mother in this case testified, "I think [] both our last names are important to both of us and I'm not trying to take anything away from John. I'm trying to *add* my last name because it's very important to me and my family's heritage[] to have more of a connection to both sides of the family . . . especially up here in the local area, . . . our family and our family farm and everything is up here[.] " (emphasis added). SR at 19; HT at 6; lines 22-25; HT at 7, lines 1-5.

Other precedent cited by the trial court was distinguishable from the case at bar because those cases involved complete changes or exclusion of the other parent's surname. *See, e.g., Bowers v. Burkhart*, 522 P3d 931 (UTAppCt 2022; *In re Newcomb*, 472 NE2d 1142 (OhioAppCt 1984). It is an entirely different question to ask the court to hyphenate a surname to *include both* parents' surnames. As noted in the *Application of Saxton* dissent:

> The policy considerations which led to the formulation of a standard requiring *such a high burden of proof* were (1) that the change in name might weaken the bond between the child and the noncustodial parent whose name the child bore, (2) that the parent's natural and appropriate desire was to have his children bear his name, and (3) that it was desirable for a child to know his parentage. *Id.* The same considerations do not support such a standard, however, when a parent seeks to change the child's surname so that *no natural parent's name would be eliminated, but both names would form the child's surname*. The mother's interest in having her children bear and perpetuate her surname should be recognized as coextensive with the father's interest, as are other parental rights and responsibilities, such as custody and support. *See Minn.Stat.§ 518.17 (1980).*

Application of Saxton, 309 NW2d 298, 302 (J. Amdahl and J. Wahl dissenting) (citing *Robinson v. Hansel*, 223 NW2d 138 (Minn 1974))(emphasis added).

Like Minnesota, South Dakota has similar statutes noting the importance of treating parents equally, without regard to gender: "Subject to the court's right to award custody of the child to either parent, considering the best interest of the child as to its temporal, mental, and moral welfare, the father and mother of any minor child born in wedlock are *equally* entitled to the child's custody, service, and earnings." SDCL 25-5-7 (emphasis added). *See also*, SDCL 25-5-10 (father's

parental rights are not superior to mother's while separated); SDCL 25-4-45 (neither parent may be given preference over the other in determining custody). It stands to reason that neither parent should be given preference in passing on their surnames. "Today, patrimonial control of surnames has virtually disappeared. Since the mid-19th century, there has been much progression toward martial and parental equality." *Cohee v. Cohee*, 317 NW2d 381, 382 (Neb 1982).

II. The trial court was clearly erroneous in finding that the requested surname hyphenation would be harmful to the children's stability or identity.

In determining the best interests of the children, stability is undeniably a factor the court may consider, but this is generally applied in the context of a custody change, not a name change. *See Fuerstenberg v. Fuerstenberg*, 1999 SD 35, ¶ 26, 591 NW2d 798, 808; *In re J.P.H.*, 2015 SD 43 at ¶ 10, 865 NW2d at 490 (citing *Keegan v. Gudahl*, 525 NW2d 695, 698-99 (SD 1994)) (identifying best interests factors for name change). The obvious reason is that stability, in the sense of "maintaining the status quo," would *always* weigh against *any* change. But even if the "stability" factor is applied in a name change context, stability and change are not necessarily mutually exclusive.

Stability means *more* than just "staying the same"; it is defined in subcategories, as follows:

> (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 (4) 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. Otherwise, the child's sense of sustainment and belonging may be unnecessarily impaired.

Fuerstenberg, 1999 SD 35 at ¶ 26, 591 NW2d at 808 (internal citations omitted). In the context of whether to *add* a mother's surname alongside a father's, the question should be whether doing so would support or enhance "the child's sense of sustainment and belonging." *Id.*

A. Addition of Mother's surname will support or enhance, not detract from, the children's "sense of sustainment and belonging."

In *J.P.H.*, the court noted the importance of allowing the child to identify with not just his father's family, but also with his mother's family in the Burke community. *In re J.P.H.*, 2015 SD 43 at ¶ 11, 865 NW2d at 490-91. The same is true here; the addition of Mother's surname will enhance the children's sense of community and belonging in the Ft. Pierre area, which is the home of Mother's extended family.

1. Potential confusion will be alleviated by having the children share *both* parents' surnames.

Father argued that the requested addition of Mother's surname could somehow be "confusing" to the children because (a) they might not know who their dad is; and (b) surname hyphenation is just too complicated. But the opposite is true. "Hyphenated surnames may avoid some of the inherent

difficulties of recognizing only one-half of a child's lineage in their surname. . . . [G]iving Child a hyphenated last name which incorporated the surnames of both of her custodial parents would avoid 'the potential embarrassment or discomfort' if her surname were not to match the surname of either of her parents." *H.G. by K.B v. C.G.*, 702 SW3d 230, 237 (MoCtApp 2024) (citing *In re Willhite*, 706 NE2d at 782). "Other courts have likewise recognized that the use of a hyphenated surname may help maintain a child's relationship with *both* parents, and thus may be in the best interest of the child." *Id.* (citing *Velasquez v. Chavez*, 455 P3d 95, 98-99 (UtahCtApp 2019); *In re J.P.H.*, 865 NW2d 488, 491 (SD 2015); *In re Eberhardt*, 83 AD3d 116, 920 NYS2d 216, 222 (2011); *In re A.C.S.*, 171 P3d 1148, 1153-54 (Alaska 2007); *In re Andrews by and through Andrews*, 235 Neb 170, 454 NW2d 488, 493 (1990); *In re Marriage of Douglass*, 205 CalApp3d 1046, 252 CalRptr 839, 844-45 (CalCtApp 1988)).

Mother was asked several questions about whether she had done any research on which government websites accepted hyphenated names and whether she knew of any other minor children in either school or extracurricular activities with hyphenated surnames. SR at 22; HT at 20. She testified she did not do any such research and she was not aware of other minor children with hyphenated surnames. However, at ages six and four, the children are not so set in their identity or so well-established in the community that a change to their surname would cause any identity confusion or hardship for them. SR at 19; HT at 7-8. Indeed, the youngest child is not yet in school. SR at 55; FOF 14.

Likewise, the addition of Mother's surname will not cause any confusion over the identity of the children's father. Father's surname is not being removed or replaced. The trial court found "both minor children identify with both parents." SR at 55; FOF 14. And while Father's counsel argued that having a hyphenated surname on a sports jersey might somehow be confusing for the children, Mother testified all of the children at this age use only *first* names, not surnames, and *none* are allowed to put names on their jerseys. SR at 20; HT at 10.

It is critical to note that Father did *not* testify and offered *no* witnesses or evidence at the name change hearing. Moreover, while the trial court took judicial notice of the custody proceedings, the issue of the children's name change was *not* addressed at the underlying custody trial. Thus, Mother's testimony at the name change hearing is and remains uncontradicted.

2. Any risk of potential embarrassment is minimal.

Persuaded by Father's argument, the trial court concluded that changing the children's surname *might* cause "potential embarrassment," in light of the parties' history. In order to understand this, one must first understand that the trial court is referring to the fact that Father initiated the divorce when he learned the children were not biologically his. Father also initially proceeded to *disestablish* his paternity, but later changed his mind. [2]

[2] At the name change hearing, Father's counsel attempted to make is seem as if this was first initiated by Mother, but it was not. *See* Motion at Appendix C (requesting DNA testing and to "enter an Order setting aside the legally established presumption of paternity").

The following is an excerpt of the trial court's bench ruling in the custody matter:

> The parties tried to work it out for a short period of time. They went to a short amount of counseling. That didn't work out. Ultimately, Mother decided to move out into an apartment.
>
> You know, I recall at some of those beginning hearings, it took a while for John to make a decision on whether he wanted to be in or out. And I believe at some of those initial hearings, there were [sic] disestablishment. He was trying to figure out if Mr. Tatman was going to be in or out, if he actually was the father, if he wasn't the father.
>
> There were a lot of moving parts at that time. And I can certainly understand how Heidi must have felt during that timeframe, but I can also understand how Mr. Kerby felt at that time too. It was very stressful and there were a lot of hurt feelings.
>
> Now, I would say that Mr. Kerby took a very ill-advised move . . . he systematically went to anybody that would listen to tell them that – about the children not being his biological children. I mean, I think even including the sales person at Slumberland at one point.
>
> He did this from a place of hurt and he was hurting and we can argue about, you know, whether that was justifiable or not justifiable.
>
> I can tell you that it wasn't fair to Heidi and it was very hurtful to Heidi and it's compounded how difficult it is for Heidi to move forward on a relationship for these parents to coparent.

Appendix B2, TT at 4-5, lines 23-25, and 1-13. This history resulted in Mother making it clear to the counselor and custody evaluator that Father was not the children's biological father. It also made her reluctant to believe that Father was sincere in his change of heart.

Nevertheless, nearly three years have passed since those initial painful days. The court has ordered a parenting plan, which the parties have followed,

with the help of a parenting coordinator, for the past seven months. Appendix B5, TT 17, lines 13-25; Appendix B6, TT at 20, line 11. Indeed, the parties are scheduled to transition to shared parenting in July 2025. Appendix B7, TT at 22-23, lines 25-1. The biological father's surname is not even at issue. SR at 53; FOF 8. And the court found no history of harmful parental misconduct by either party. Appendix B5, TT at 16, lines 22-23.

For example, in *H.G. by K.B. v. C.G.*, a father had petitioned the court to have the parties' daughter's name hyphenated, adding his name along with the mother's maiden name. 702 SW3d at 233. Much like Father in this case, the mother in that case argued against the change due to the issue of the father's infidelity being "well-known in the community." Indeed, the mother testified she did not want the child to be associated with this "disreputable family history." *Id.* In applying the best-interests-of-the-child standard, the court rejected this argument and ordered the hyphenation.

Similarly, in *Cohee*, the Nebraska Supreme Court rejected the trial court's contention that the child's legitimacy would necessarily be raised or questioned by implementation of a hyphenated surname. 317 NW2d at 384.

Likewise, in another case, the Nebraska Supreme Court concluded that the proposed hyphenation would "foster the twins' affiliation with both parents." Instead of finding *harm* in the hyphenation, the court found the hyphenated surname "will *help* the twins to identify themselves as a part of a family unit in relation to *both* sides of their family, maternal and paternal, and will *facilitate and*

nurture the children's attachment to both parents and the families of their parents." *In re Andrews*, 454 NW2d at 493 (emphasis added).

3. Any risk of potential future changes is speculative.

A potential future name change (whether by the children's marriages or some other reason) is speculative, and not a basis to reject the requested surname hyphenation. "A trier of fact should refrain from unwarranted speculation, either for or against a litigant." *Estate of Gaspar v. Vogt, Brown & Merry*, 2003 SD 126, ¶ 8, 670 NW2d 918, 922.

B. The parties did not consciously agree to pass on *only* Father's surname.

The trial court also expressed concern about implementing "any additional changes or transitions" for the children. SR at 54; FOF 11. It noted that the children's current name is "stable" and they "have always had a different surname than their mother." SR at 53; FOF 6 and 10. While this is true, it does not take into consideration *how* this came to be. *See, e.g. H.G.by K.B.*, 702 SW3d at 236 (affirming hyphenation to add father's surname, when mother had denied father's input in initial selection). The trial court found, "it is *disputed* as to how the parties wished to address the name of the children at the time of birth." (emphasis added). But this Finding of Fact is clearly erroneous.

Mother testified that during both pregnancies, she asked that the children's surnames be hyphenated to "Sperry-Kerby" to incorporate both parents' surnames. SR at 18; HT at 4-5. Nevertheless, Father completed the birth certificate

paperwork to name both children while Mother was in post-surgical recovery from emergency C-sections; he unilaterally chose *not to* incorporate Mother's surname as she requested. *Id.* This testimony was *not* contradicted and remains *un*disputed.

In denying Mother's petition for name change, the trial court cited *Hayhurst v. Romano*, a two-page Florida opinion affirming the trial court's denial of a post-divorce name change due to insufficiency of evidence. 703 So2d 1178, 1179-80 (FlaDistCtApp 1997). The few facts recited are nearly identical to this case – following dissolution of marriage, the mother (who had always retained her maiden name) petitioned for hyphenated surnames for the seven- and four-year old children. But that court reasoned, "during the marriage the parties *made a conscious decision* how the children would be named." *Id.* (emphasis added).

First, this decision is three decades old. View-points on parental equality have certainly changed since then. *Cohee*, 317 NW2d at 382; *Keegan*, 525 NW2d at 699-700. But more importantly, the *manner* in which the respective children got their surnames in *Hayhurst* is markedly different than how these children got their surname.

This is not a case where, after reasoned discussion, the parties consciously *agreed* to give the children *only* Father's surname. Mother testified, "Both pregnancies were pretty tough and both of the children were born via emergency C-section." SR at 19; HT at 4, lines 24-25. So when it came time to fill out the paperwork for the children's names, Father completed that paperwork while

Mother was in recovery. SR at 19; HT at 5. After Father had excluded her name at the first birth, she specifically addressed this again with him, expressing that she wanted her surname included. SR at 19; HT at 4. Father disregarded her wishes on both occasions. As noted by this Court in *Keegan*, one parent should not gain an advantage from a unilateral act in naming the child. *Keegan*, 525 NW2d at 699-700. And neither parent has any right superior to the other based upon their gender. *Id.*

CONCLUSION

For the foregoing reasons, Mother respectfully urges the Court to reverse the trial court's decision and grant her request for the children's hyphenated surname. In the alternative, Mother asks that this Court to remand for the trial court to reconsider the matter under application of the appropriate burden of proof.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument.

Dated this 22nd day of April, 2025.

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CERTIFICATE OF COMPLIANCE

Melissa E. Neville, attorney for Appellant, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

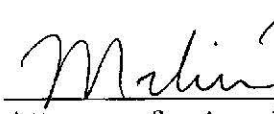
a. Appellant's brief does not exceed 32 pages;

b. The body of Appellant's brief was typed in Times New Roman 13 point typeface, with foot notes being in 12 point typeface; and

c. Appellant's brief contains 5,001 words, 24,451 characters (no spaces), and 29,659 characters (with spaces), according to the word and character counting system in Microsoft Word for Microsoft 365 used by the undersigned.

Dated this 22nd day of April, 2025.

BANTZ, GOSCH & CREMER, LLC



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CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, Heidi R. Sperry, hereby certifies that on the 22nd day of April, 2025, a true and correct copy of Appellant's Brief, and attached Appendix, were filed electronically with the South Dakota Clerk of the Supreme Court through the Odyssey File & Serve with electronic service and notification sent to:

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John F. Kerby

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and the original and 2 copies of the same were mailed by first class mail, postage prepaid to:

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APPENDIX

From: Carla Glynn
To: Northrup, Judge Margo (UJS); Marshall, Stephanie (UJS)
Cc: Michael Sabers; Melissa E. Neville
Subject: RE: Sperry-Kerby Name Change CoL-FoF
Date: Monday, February 10, 2025 10:14:00 AM

Judge,

Mr. Sabers recently filed a proposed Order re the denial of the name change. We wanted to let you know that he did send the proposed document to us prior and we do agree as to the form of the Order; however, we do plan to file an objection as to the burden of proof used so that we can preserve our objection for the record.

Thanks,

Carla J. Glynn | Attorney
Bantz, Gosch & Cremer, L.L.C.
305 Sixth Ave. SE | PO Box 970 | Aberdeen, SD 57402-0970
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From: Northrup, Judge Margo (UJS) <Margo.Northrup@ujs.state.sd.us>
Sent: Monday, February 3, 2025 10:16 AM
To: Marshall, Stephanie (UJS) <stephanie.marshall@ujs.state.sd.us>
Cc: Michael Sabers <msabers@clslawyers.net>; Carla Glynn <CGlynn@bantzlaw.com>
Subject: Sperry-Kerby Name Change CoL-FoF

Please file.

Thank you,

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
SS
COUNTY OF STANLEY) SIXTH JUDICIAL CIRCUIT

JOHN KERBY,
Plaintiff,

vs.

HEIDI SPERRY,
Defendant.

58DIV21-7

HEIDI SPERRY,
Petitioner,

vs.

JOHN KERBY,
Respondent.

58TPO24-3

TRANSCRIPT OF
BENCH RULING

BEFORE: THE HONORABLE MARGO NORTHRUP
Judge of the Sixth Judicial
Circuit, in Ft. Pierre, South Dakota, on
the 13th day of September, 2024.

APPEARANCES:

MR. MIKE SABERS
PO Box 9129
Rapid City, SD 57709
Counsel for John Kerby.

MS. MELISSA NEVILLE
PO Box 970
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PROCEEDINGS

(The following was transcribed from an audio recording.)

THE COURT: All right. Well, as the parties know, I've been involved in this case since the beginning so I've been able to watch the parties and how this has impacted them.

I think it's fair to say that this has been one of the most -- or one of the more contentious cases. It's had a lot of moving parts. Unfortunately, it went much longer than it should have. It's been more contentious, there's been more motions practiced than a normal case would have. And I know that that has really caused a lot of stress and concern for the parties.

You know, the issues between the case are limited now to child custody and the TPO and I'm required to make Findings of Fact and Conclusions of Law based on the evidence that I've heard over the last three days.

You know, the parties moved here from Texas when both children were born. I think during the marriage, it sounded like they were both very hardworking.

Ms. Sperry has four degrees. She was getting a nursing degree during the pandemic with young children. It sounded like it was a recipe for a very stressful marriage.

Mr. Kerby was busy with his military career. I can imagine that you were under a lot of stress and I think that it's very apparent that that's the reason that you

were granted a divorce on Wednesday or Tuesday of this week.

And so the way that I look at these cases is I'm sure the past is important, but the past isn't determinative of where we move forward, and it doesn't define who either one of you are.

So the facts show that the parties moved here, I believe it was in 2021 closer -- to be closer to Heidi's family who has a family farm here Blunt, South Dakota, and also to pursue a nursing job.

It's -- you know, these were two young, educated professionals with young children and it was a very stressful time.

I think shortly after moving to South Dakota, it's evident that John learned that Heidi was planning a trip to New Orleans. He was suspicious of the vague details regarding that trip.

He assessed -- or accessed a shared computer, discovered incriminating e-mails that not only was she pursuing -- or likely pursuing a relationship with other men, that the parties' two children of the marriage were likely not his biological children.

John waited through the Thanksgiving holiday, planned a meeting with the parties' pastor to confront Heidi.

I think initially, Heidi testified that she did share

that who she believed was the biological father, but this is probably the theme of this case, a complete breakdown and barrier of the trust between these two parties was fractured at this point, and that trust has not been rebuilt on either side and it's caused a lot of pain on both sides for both parties.

The parties tried to work it out for a short period of time. They went to a short amount of counseling. That didn't work out. Ultimately, Heidi decided to move out into an apartment.

You know, I recall at some of those beginning hearings, it took a while for John to make a decision on whether he wanted to be in or out. And I believe at some of those initial hearings, there were disestablishment. He was trying to figure out if Mr. Tatman was going to be in or out, if he actually was the father, if he wasn't the father.

There were a lot of moving parts at that time. And I can certainly understand how Heidi must have felt during that timeframe, but I can also understand how Mr. Kerby felt at that time too. It was very stressful and there were a lot of hurt feelings.

Now, I would say that Mr. Kerby took a very ill-advised move by reaching out and reconnecting to Ms. Sperry's brother and sister and, you know, although

there isn't a playbook on how to react to this type of news and this type of divorce, he systematically went to anybody that would listen to tell them that -- about the children not being his biological children. I mean, I think even including the salesperson at Slumberland at one point.

He did this from a place of hurt and he was hurting and we can argue about, you know, whether that was justifiable or not justifiable.

I can tell you that it wasn't fair to Heidi and it was very hurtful to Heidi and it's compounded how difficult it is for Heidi to move forward on a relationship for these parents to coparent. So we've kind of added an extra layer of hurt to two parties that are already hurting.

During that timeframe, I think Heidi has went through a series of lawyers and so it took a long time to get everybody up to speed.

Then we get to the point of 2024. I think -- I don't have any knowledge of what happened with Mr. Tatman. All I know is that at some point, he decided on his own free will, he signed a document that indicated he's no longer in the children's lives. That's all I need to know for the purposes of this legal proceeding.

Then we get to the point in February where stress, anxiety, things are still not going well. Lots of issues. And then we have the exchange at Casey's on February 15th.

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And now I'm talking specifically about the protection order. I believe that the evidence shows that there was an exchange at Casey's. Prior to that, Mr. Kerby had been at a doctor's appointment with Ms. Sperry where he had heard her indicate that she was going on a mommy and me day with her daughter.

The right of first refusal has been such a source of consternation. I will do a better job in the future to try to delineate that for people, because I think that that's been the biggest -- another layer of hurt that's been added in this case.

But I believe that after that exchange, Mr. Sperry -- or I'm sorry -- Mr. Kerby was acting on a hunch that Heidi was not, in fact, going to be spending the day with the son based on his understanding of the mommy and me day. And so when he saw Mr. Sperry, the father, it confirmed those suspicions.

He suspected that Ross was going to be helping with the daycare. That would have been a violation of the right of first refusal. He saw Ross. He followed Ross into Heidi's development.

I believe Ross testified credibly that it was the plan that there was going to be a mommy and me day that day. It corroborated John's story, and I believe that Ross was correct.

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Now, even though I know that there were the pictures and there were the text messages with the hairdressers, those text messages with the hairdresser, if I recall, were on the 6th of February, a week beforehand.

I believe that it was still the plan. Ross was very clear on that detail, and I believe that he was credible.

I don't believe that Heidi's testimony in regard to what the plan was for that day was credible.

I believe that once Ross realized that Mr. Kerby was in the neighborhood and that they got caught planning to violate the right of first refusal on that date, that plans changed and she decided to keep both of the kids and she was able to produce photos that day and both of the kids were with her all day. I agree and I believe that that was the case.

Moving forward, we're at the next exchange. The parties previously to this had had e-mail and text message exchange concern about what time was it going to be. Is it going to be at eight o'clock. Is it going to be at nine o'clock.

Obviously Heidi was upset that John had unilaterally decided that it was going to change to nine o'clock.

Moving forward, those kind of decisions has to stop.

But, nonetheless, they met at Walgreens for their exchange. The testimony shows that John leaves first.

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Heidi is texting with her stepmom, really doing the same thing that she's complaining about Mr. Kerby about Whitley told me that they did this. Whitley told me that we stopped and saw Heidi. Reporting to the stepmother what Whitley had told her about the morning activities.

John, again, concerned about the right of first refusal acting on a hunch goes and parks where he believes he'll be able to see whether or not Heidi is, in fact, going to the stepmother's house.

Heidi sees John parked there, knows that -- concerned, obviously, because he's there, calls the police, is upset, files for the protection order.

Prior to this, the parties had been going back and forth about who was watching Whitley that day. John knows that she has a new job. He is not satisfied about -- or doesn't understand how she can have leave, how there's vacation. Heidi refuses to explain it to him. It's really a fundamental issue of communication.

I don't discount the observations or the fact that Heidi felt anxious and upset on that date, but these are common and prevalent feelings during a divorce, and I can say with a hundred percent certainty if this protection order would have came across my desk on that day, I would have denied the temporary protection order because I don't believe that it met the -- what the law requires for an

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ex parte protection order.

Now, I am -- I understand, and I know that there was a lot of evidence about the control and, you know, we're not talking about physical violence. We're talking about domestic abuse in the sense of abusing in the divorce action the children as control.

I believe that both parties have done that to an extent and we need to get to a point that we're past that.

So I'm going deny the protection order. I do not believe that it shows that there has been a course of stalking as has been defined by South Dakota law.

I believe that this is a situation where two parties were in the middle of a divorce, a horrible, messy, contested divorce, and the stress and anxiety that has been caused by that is the real reason that this -- the police were called and that we continued to have issues.

Now, I understand that Ms. Sperry had called the police on a few occasions after the fact. You know, I reviewed -- I think there was a video at a hockey tournament which I believe was during the protection order over here in Fort Pierre.

I mean, it appeared to me that Ms. Sperry was trying to get the children's attention, you know, trying to cause an issue there. There's text messages that at the hockey rink, she was trying to position herself in a way that

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would impact where Mr. Kerby could stand.

More importantly, you know, there was testimony that she gave herself that indicated, really, that it was about the divorce, it was about the parenting time, it was about the visitation, and it wasn't about being fearful. She's not afraid for her life. She's not afraid. You know, she feels like it's about being harassed and about the divorce.

And I think that there's a distinction. I don't think that it meets the term or the definition of stalking under the law. I'm making that as a finding.

All right. So moving forward, in reference to the custody case, you know, this is hopefully a time for both parties to have a clean slate. I mean, we've got a situation where, you know, Ms. Sperry had an extramarital affair and kept it a secret. Okay. Well, we're done punishing her for that. That's in the past.

And then we have a situation where Mr. Kerby acted horribly after he learned that, and he had a course of action, especially during that summer, where he treated her terribly. That has to stop.

Because the only way that we can treat these children fairly moving forward in their best interest is to try to come together and figure out how that is going to work.

We have multiple examples in these reports that your children are having physical symptoms of anxiety because of

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this divorce and this custody action, and that's on you two. We need to figure out how we can move forward.

Now, the way that I look at custody evaluations is I don't just reject them up or down. I really look at them as a tool to summarize a great deal of information and I look at them independently and kind of go through whether or not I agree or don't agree to the different factors or recommendations that Ms. Bruckner gave.

I will find I think she does a nice job. She's a credible witness. I appreciated her process. I thought it was very thorough. She spent an incredible amount of time, probably more time than I usually see in a custody evaluation, and I thought that her report was very complete.

So I'm going to walk through the Fuerstenberg factors because I don't necessarily agree on all her conclusions so I will identify which ones I agree to and which ones I don't agree to.

So in reference to the first one, fitness, temporal, mental, and moral welfare. Mental and physical health. I agree that neither party has an advantage.

Heidi is in good physical and mental health.

John is in good physical and mental health.

I appreciate that both parties are in counseling and, in fact, I am going to require as part of the order that

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both parties remain in counseling until their counselor indicates that they no longer need to be in counseling. I think that that's going to be important as we move forward.

The capacity and disposition to provide the child with protection, food, clothing, medical care and other basic needs. I find that neither parent has an advantage in this category as well.

Heidi, I agree, is highly educated, intelligent. She has a great job. She is -- has a great home, provides very well for the children.

As is John highly educated, a decorated military professional. Has been able to tailor his job to be in a position to stay in South Dakota and to take care of his children. I think that he's able to do that with the food, clothing, and medical care, et cetera.

Both parents are able to provide love, affection, guidance, education, and to impart the family's religion or creed to the child.

I am going make a provision that Ms. Sperry will get to continue to take the children to Awana every Wednesday. That doesn't mean that the children can't go to Catholic church on Sunday, but that I think having that consistent church education is important and I'm going to allow Ms. Sperry to have that, and so we'll have to figure out how that all works out in the end.

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The willingness to maturely encourage and provide frequent and meaningful contact between the child and the other parent. Now, the evaluator had indicated that John has an advantage in that category, and I do agree that that is the case.

You know, what was most telling to me is that Heidi really has nothing positive to say about John, you know, but for the fact that maybe he can take them on some good trips and give them some good food, and that is very concerning. I mean, she even questions whether or not they love these children.

I mean, and I looked at all these medical records and every single thing negative that has happened to these children, according to Heidi, is John's fault. They get a sliver, it's John's fault. They get bug bites that are infected, it's John's fault. They get a fever and strep throat, it's John's fault.

There are two parents that are spending a significant amount of time with these children. Neither one is completely 100 percent at fault. Sometimes that's just part of being a child and that's just part of growing up.

So I do believe that John has the advantage in this category.

I think that Heidi -- you know, there's testimony about the father issue, whether discourages or doesn't

discourage. You know, I'm highly going to encourage that John is Dad. He's their dad. He's their father and that's the way that he should be referred to. That's not going to be an order, but that is certainly my expectation and direction to the parties.

The commitment to prepare the child for responsible adulthood, as well as to make sure that child has experiences and a fulfilling childhood. Neither party has a significant advantage in this category.

Heidi certainly does a great job making sure that they are in activities. She's up on their education.

I think John is also committed to, you know, hockey and making sure that they go to dance, gymnastics. Both parties are willing to do that, and I have no concerns there.

You know, exemplary modeling so that the child witnesses firsthand what it means to be a good parent, a loving spouse, and a responsible citizen. At the end of the day, I find that both of these parents are good parents and that they are able to model that to their children and be responsible citizens.

What happened in the marriage and what happened in the divorce, in my opinion, doesn't impact the ability for either party to parent and be the parent that these children need moving forward.

Stability. This -- the relationship and interaction of the child with the parents, stepparent, siblings, and extended family. I disagree with Ms. Bruckner in this regard. I would say that neither party has an advantage in this category.

I, you know, Heidi has her father and her stepmother. She's able to foster a relationship there.

John has been able to maintain relationships with, you know, part of the other side of the family.

I don't think that either one has an advantage. We're not picking sides on the family. I think they're both even there.

The child's adjustment to home, school, and community. Neither party has an advantage there as well.

The parent with who the child has formed a closer attachment. I agree that neither party has an advantage in this category. It appears based on all of the information and the report and all the collateral contacts that the children are attached to both parents.

Continuity when considering the child has been in one custodial setting for a long time.

And then just kind of swinging down to the primary caregiver. I do find that Heidi was the primary caregiver of these children when they were younger. Probably even up until the point where parenting time was switched in the

divorce action.

That doesn't discount that John wasn't a caregiver because he was. He was also involved.

But when the Court has to decide who the primary caregiver is, I believe that Heidi was.

Continuity when considering that the child has been in one custodial setting for a long time. I'm going to say neither parent has an advantage in this category, but I'm going to address this a little bit more later in a second.

So there's no children's preference.

Harmful parental misconduct. I think I would be remiss not to mention the child protection service contacts. So those were made in the course of mandatory reporting by professionals. Certainly, if I were in Heidi's shoes, those would cause eyebrows to raise and cause concern.

But I also believe that the process was followed. There's been forensic interviews. I am confident and comfortable that CPS has done their job and that there has been no concerns of abuse or neglect.

Even looking at the types of complaints that were made, I don't find that there's any harmful parental misconduct by either party.

We would never separate siblings in this situation.

There's not a substantial change in circumstances.

No other limitations and evaluation.

So what the Court has struggled with the most is how does it work to have shared parenting with two people that have such inability to communicate and to coparent the children.

I agree that there's no reason that shared parenting is not possible when you consider all of the factors. I mean, both parents are suitable. Both have appropriate dwellings. Each can meet the psychological and emotional needs. Each parent has a lot of contact with the children.

But where we get to the point of if the parents can show mutual respect and effectively communicate, we're having some problems here. We're not there yet.

And so what I'm going to do is I'm granting joint legal and joint physical, but I'm going to do it on a very extended basis.

And what that means is that the current arrangement is going to stay in effect until the youngest child starts kindergarten.

And then at that point, we will switch the schedule to the -- a fair -- not fair, an equitable 50/50.

And I'm going to let Ms. Sperry decide at that point whether she wants week on, week off, or if she wants a Monday, Tuesday, Wednesday Thursday, every other Friday, Saturday, Sunday. And so you'll have some time to make

that decision.

I'm doing that for a couple reasons because I'm going to build in some education components. I think that if we went to week on week off right now, the only people that that is helping is Mom and Dad because they don't have to see each other. I don't think that's in the best interest of these young children.

And so there's a class. It's called Crossroads of Parenting and Divorce. It's a class that Shanna Moke, who has a -- she's a counselor in Sioux Falls -- on October 25th of 2024. It's from 9 to 4. It's just for parents to learn to communicate in a coparenting situation.

I'm going to require that the parents sign up for that seminar. If that date for some reason doesn't work, I know that there's later dates.

I'm also going to require that Mr. Kerby attend a common sense parenting class, which is a class that we have here locally. No more -- I mean, no more daddy secrets. Those are not appropriate. Little things.

If you have comfort items, apparently there is a bear and a cheetah, if those are in your home, send them back. It's pretty straightforward.

But I've got other lists of things I want put in place.

Counseling records of the kids obviously are

protected. They will -- the children will remain in counseling throughout this.

Mr. Kerby has agreed, I believe, that when he leaves his home, that he will go in the two directions that don't pass the home of Ms. Sperry.

Mom is going to have the decision making on where the children attend school and she's also going to have the decision making on major medical decisions that the parties can't agree on.

On regular medical appointments, medical, dental, optometry, those types of things, Mom will make those appointments, but Mom and Dad will alternate who takes those. So Mom will take them to the first one, Dad will take them to the next one.

Special appointments. So I know that the son has a large -- not large, but he has a significant amount of medical decisions. Both parents should and can attend those, any surgery, tubes, those types of things, both parties should attend and be part of those decisions.

I'm not ready to do anything with child support. I'll need a little bit more time to look at that and probably will need some input from the attorneys on my decision since, technically, the dates won't -- the number of days won't technically be a 50/50, so I'll need to think about that some more, but that's still the way I plan to do it.

Everyday FaceTiming still needs to go in effect.

In reference to activities, so for school year activities, the two parties will need to provide their proposed school activities by September -- actually, we'll do it two weeks before school starts. If they can agree on them, great. If not, that will go to the parenting coordinator.

For summer activities, they'll have to get their list to each other by May 1st. If they can't agree, that will go to the parenting coordinator.

There will be a parenting coordinator. I'm going to ask Ms. Dava Wermers. She's an attorney, and I think that she'll be able to be a good resource. She's a straight shooter and she -- I think she'll be fair and impartial and able to help you work through those issues. In reference to payment, it will be on the percentage basis of however that works out in the final child support calculation.

I'm going to require that there's no contact just on behalf of the children with Mr. Tatman, unless there's a further order of the Court.

I am going to get rid of the right of first refusal. The only exception would be is that if either party is going to be out of town for 48 hours, they would need to offer the children to the other parent.

If you're going out of town overnight, you can send

them to Grandma and Grandpa's house. If you're going to be gone for the day, send them to Grandma and Grandpa's house.

I'm going to specifically require that neither party can be 100 feet from either the home or place of employment of the other party.

I'm sure I'm forgetting something. Those were the lists that I made throughout the trial on things that I specifically wanted to address.

MS. NEVILLE: Holidays.

THE COURT: Holidays. Probably the South Dakota Parenting Time Guidelines, unless the parties can agree otherwise.

I mean, it sounded like -- I liked Ms. Sperry's ideas. She had some good ideas on holidays.

I don't know if the parties have been there or are close enough or ready to make those discussions, so I will say guidelines, unless they can agree otherwise.

MR. SABERS: Can we propose guidelines above the five and above?

THE COURT: Correct. That makes sense.

Other questions?

MS. NEVILLE: The vacation provision.

THE COURT: Okay. In reference to the vacation, in -- if we're going to a state that touches South Dakota, we don't need to give notice. So if we're driving to Minnesota to see our cousins, we don't need to give notice.

If we are going to by plane tickets or go out of the country, we need to give notice as soon as those plane tickets are purchased.
MR. SABERS: Five days or seven days for summer vacation, Your Honor?
THE COURT: What do the guidelines say? Is it seven? I think both parties -- seven.
MS. NEVILLE: You mean for one continuous vacation? I think it's seven.
THE COURT: Yeah, seven days is fine. Any other questions?
And if there's something I forgot, you drive home and go, oh, I wish I would have asked this, I'm certainly willing to --
MS. NEVILLE: Not to be used on the other parent's holiday unless they consent; right?
THE COURT: Correct.
MR. SABERS: Right.
And the Court may not be prepared to rule on this, but so Stryker's in one more year of daycare and so then next summer -- sorry -- Whitley.
So next summer, continue with the existing parenting time schedule, or next summer, does the Court contemplate going to the 50/50 in light of school coming or how would it like to order?
THE COURT: It makes sense to switch that in the middle of

summer, so let's say on July -- after the Fourth of July holiday, we can start doing week on, week off.
I just don't want -- honestly, I just don't want any more changes for these children right now. I think we need to leave them where they are and give them a little bit more normalcy and I don't think they're ready to spend a week without one parent at this point.
MS. NEVILLE: And Our Family Wizard.
THE COURT: Absolutely, yes. That should have been on my list. I missed that.
MR. SABERS: Your Honor, there is a military discount for Our Family Wizard that we discovered so my client will sign up for it.
And then my understanding from being in front of the Court on other cases is income deferential is oftentimes how the cost is handled.
THE COURT: Yeah, that would be my preference.
MR. SABERS: Okay. And there's a significant discount, so it's a lot less expensive. It's not really expensive, but it's a lot less cost, so I'll get that to Ms. Neville.
THE COURT: All right. And then, Mr. Sabers, I would ask that you prepare Findings of Fact and Conclusions of Law probably separately.
One set on the protection order, one set on the custody issue unless the parties agree in writing that they

can be waived.
And then both parties are certainly willing and able if they would like to submit Findings on things that they think that I missed or that they would like to reconsider, I would surely be happy to take a look at those as well.
And then obviously when we've gone through that process, if you can agree on a final order, great.
If not, if you have competing orders, then each send your competing order to me and then just highlight for me what the difference is so I can take a look at it. It just makes my life easier.
MR. SABERS: Will do, Your Honor.
THE COURT: Any other --
MS. NEVILLE: Timing on the Findings, Conclusions, and objections?
MR. SABERS: After having successfully not been in a divorce trial for a considerable period of time, I have another one next week that is also going to be exhausting. I would just ask for a little bit of leeway on time because I also haven't seen my family.
Could I work out with Ms. Neville, I expect maybe two weeks.
MS. NEVILLE: Why don't we say 30 days?
MR. SABERS: I would really like 30 days.
THE COURT: 30 days. And then how much time would you like

to respond?
MS. NEVILLE: Same.
THE COURT: 30 is fine. That will be fine.
UNKNOWN SPEAKER: Can I -- I'm sorry. One clarifying question.
THE COURT: Yes.
UNKNOWN SPEAKER: You said after the Fourth of July holiday, that's when it will either be week on, week off, or Heidi can pick a 2, 2, 3?
THE COURT: Yes, she can pick whatever she wants to do.
UNKNOWN SPEAKER: Thank you.
THE COURT: All right. I just want you both to know that I know how painful this has been, and this is not the outcome that one of you wanted.
I hope that we can come to a place where you guys can get past all of this. Hopefully maybe after the stress of all of this, we can just remember that it's for Whitley and Stryker. And we really want to get to a point where we can get past and forgive each other.
Thank you all. I appreciate all the hard work that the attorneys put in. This was a very well tried case. I really do appreciate that. Thank you.
MS. NEVILLE: Thank you, Judge.
MR. SABERS: Thank you, Your Honor.
(End of proceedings.)

CERTIFICATE OF REPORTER

I, Jessica Paulsen, RPR, Official Court Reporter in and for the State of South Dakota, do hereby certify that the Transcript of Bench Ruling contained on the foregoing pages was reduced to stenographic writing by me FROM RECORDING and thereafter transcribed, and that the foregoing is a full, true, and complete transcript of my shorthand notes.

Dated this 30th day of September, 2024.

Jess Paulsen, RPR

Official Court Reporter

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS:	
COUNTY OF STANLEY	)	SIXTH JUDICIAL CIRCUIT
JOHN FRANKLIN KERBY,	)	58DIV21-7
PLAINTIFF,	)	
v.	)	**MOTION FOR DNA TESTING AND MOTION TO SET DISPOSITIVE MOTION HEARING ON PRENUPTIAL AGREEMENT**
HEIDI RAI SPERRY (KERBY),	)	
DEFENDANT.	)	

COMES NOW, the Plaintiff, John Kerby ("John"), by and through his undersigned counsel, Michael K. Sabers, and for his Motion For DNA Testing and Motion to Set Dispositive Motion Hearing on Parties Prenuptial Agreement. Plaintiff would assert that there is an issue of paternity in this divorce action based upon the representations and admissions on behalf of Defendant. Plaintiff discovered facts which leads him to believe that the children are not biologically his in late November 2021. Based upon such, Plaintiff is requesting that the Court Order DNA testing for the children pursuant to SDCL 25-8-7.1 and that Defendant fully cooperate for purposes of the genetic testing. The test result shall then be filed with the court consistent with SDCL 25-8-7.1. Upon the results being filed, and if it is determined that Plaintiff is not the biological father of the children, that the Court make a determination and enter an Order setting aside the legally established presumption of paternity and find that the same in the children's best interest consistent with the factors set out in SDCL 25-8-64.

Further, as previously represented to this Court, the parties have executed a binding and enforceable Prenuptial Agreement dated August 29, 2014 which dictates the rights and obligations of each party upon a dissolution of marriage proceeding, including their support and property rights. Plaintiff would respectfully request that this Court set a dispositive motions

Filed: 5/25/2022 5:25 PM CST Stanley County, South Dakota 58DIV21-000007

hearing at a date and time for the Court to determine the validity and application of the Agreement and require each party to file timely motions relating to the same.

Respectfully submitted this 25th day of May, 2022.

CLAYBORNE, LOOS & SABERS, LLP

Michael K. Sabers
Attorney for Plaintiff
2834 Jackson Boulevard, Ste. 201
PO Box 9129
Rapid City, SD 57709
Ph: (605) 721-1517

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2022, I served a true and correct copy of the foregoing ***Motion For Hearing and Motion to Set Dispositive Motion Hearing on Prenuptial Agreement*** to the following:

☐	First Class Mail	☐	Certified Mail
☐	Hand Delivery	☐	Facsimile
☐	Electronic Mail	☒	Odyssey File and Service

Edward S. Hruska III
206 W. Missouri Ave.
PO Box 1174
Pierre, SD 57501-1174

Attorney for Defendant

Michael K. Sabers

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS:	
COUNTY OF STANLEY	)	SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF THE NAME CHANGE OF	)	58CIV24-000038
STRYKER JOHN KERBY and of **WHITLEY JADE KERBY**,	)	**ORDER DENYING PETITION FOR NAME CHANGE**
MINOR CHILDREN.	)	

This matter came before this Court on December 16, 2024, for a telephonic evidentiary hearing ("Hearing") on Petitioner Heidi Sperry's ("Petitioner") Petition for Name Change. Petitioner was represented by her counsel of record, Carla Glynn of Bantz, Gosch & Cremer, LLC, and the Respondent, John Kerby ("John"), was represented by his counsel of record, Michael Sabers of Loos, Sabers & Smith, LLP. After the Hearing this Court entered Findings of Fact and Conclusions of Law on February 3, 2025 ("Findings and Conclusions"), which are hereby incorporated herein as if set forth in full in this Order. Based on such Findings and Conclusions, and the entirety of the record, the Court hereby enters the following Order:

1. That Petitioner's Petition for Name Change is hereby DENIED;
2. Petitioner shall, with ten (10) days of Notice of Entry of this Order, hereby directly reimburse John Kerby for the transcript cost of $139.92.

SO ORDERED:

2/10/2025 8:29:11 AM

BY THE COURT:

Margo D Northrup

Honorable Margo D. Northrup
Sixth Judicial Circuit Court Judge

Attest:
Marshall, Stephanie
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS:	
COUNTY OF STANLEY	)	SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF THE NAME CHANGE OF STRYKER JOHN KERBY and of WHITLEY JADE KERBY, MINOR CHILDREN.	)	58CIV24-000038 **COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW (DENIAL OF NAME CHANGE)**

Petitioner Heidi Sperry ("Petitioner") filed a Petition for Change of Name of Minor Children on October 4, 2024 ("Petition"). The Petition indicated that the basis for the name change request for the minor children was that "Petitioner wishes for the minor children to also share the last name as her." Petitioner cited no legal precedent in support of such Petition. Respondent John Kerby (John), filed an Objection to Petition for Name Change on December 10, 2024. After such Objection was filed by John the Court scheduled and conducted a telephonic hearing on the Petition for Name Change on December 16, 2024. Petitioner was represented at such hearing by her Attorney Carla Glynn and John was represented by his Attorney Michael Sabers. At the conclusion of evidence, both parties confirmed that the record was complete, and then this Court requested each party submit proposed findings and conclusions based on the record and evidence submitted to the Court.

The Objection to Petition filed by John correctly noted that this Court also presided over the divorce trial of the parties. This matter is Kerby v. Sperry, Stanley Co. Div. No. 58 DIV. 21-07. This Court takes judicial notice of such divorce proceeding, testimony of the parties and witnesses, and specifically its Findings of Fact and Conclusions of Law entered on December 3, 2024 ("FOF COL 12/3/24"), and incorporates those herein as if set forth in these Findings of

Fact and Conclusions of Law in full. Further, the Court presided over a protection order sought by Petitioner against John in Stanley County TPO No. 24-3. The Court takes judicial notice of its limited Findings of Fact and Conclusions of Law contained within this Court's December 3, 2024 Findings of Fact and Conclusions of Law in the divorce matter as well as its Order of Dismissal entered in the protection order matter dated September 6, 2024. Last, the Court incorporates the transcript of the December 16, 2024 hearing, as if set forth in these Findings of Fact and Conclusions of Law in full. Such transcript is generally reference below but specific references will be cited to as "TR. PG. LN."

Based on the complete record before this Court, and the record to which judicial notice is taken, the Court hereby relies on the following Legal Precedent and enters the following Findings of Fact and Conclusions of Law.

LEGAL PRECEDENT

1. The Court has considered the Petition of Petitioner and notes that it did not cite legal precedent.
2. The Court has reviewed the legal precedent cited by John, in his Objection, as well as other legal precedent provided for herein.
3. Under South Dakota Codified Laws (SDCL) § 21-37-5, a parent may petition to change the name of a minor child, but the court must determine whether the name change is in the best interests of the child before granting such a request. Keegan v. Gudahl, 525 N.W.2d 695, 698 (S.D. 1994).
4. The name of a child is one of the first and most fundamental decisions parents will make. It often reflects tradition, heritage, and family pride and gives a sense of belonging to the child. This is a major decision affecting the child and "falls within

one of the 'responsibilities which the court finds unique to a particular family or in the best interest of the child.'" Keegan, 525 N.W.2d at 697. When South Dakota Courts have emphasized the best interest of the child the court will weigh factors such as the stability of the current name, potential confusion or embarrassment for the child, the child's identification with both parents, and the effect of the name change on the relationship with each parent. The best interests of the child again govern a child's name change. Keegan, 525 N.W.2d at 698–99.

5. At the hearing, counsel for Petitioner acknowledged to this Court that "there is not much case law in the State of South Dakota in regards to this" issue (TR. PG. 23; LN 3-4). This Court acknowledges the same and concludes it is appropriate in this case to examine precedent from other jurisdictions to determine whether a name change is in the best interests of minor children.
6. The Court notes, and believes it to be consistent with South Dakota law, the precedent identified by a Texas Court wherein that Court noted that the children's best interests are determinative and that the interests of the parents are not relevant. Anderson v. Dainard, 478 S.W.3d 147, 151 (Tex. App. 2015); *see also* Keegan, 525 N.W.2d at 700 ("*Only* the child's best interest should be considered by the court on remand) (emphasis added).
7. The Court notes, and believes it to be consistent with South Dakota law, the precedent identified by the following legal treatise that changing a minor child's name is a serious matter, and Courts are most reluctant to allow a change of the minor child's surname. Such decision should not be made on whim or preference. 65 *C.J.S.* Names § 24.

8. This Court notes, and believes it to be consistent with South Dakota law, the precedent that provides that the burden of proof for changing a minor child's name falls on the party who is seeking to change the name of the child. Walden v. Jackson, 2016 Ark. App. 573, 506 S.W.3d 904 (2016); Airsman v. Airsman, 179 So. 3d 342 (Fla. 2d DCA 2015), review denied, 2016 WL 5407927 (Fla. 2016); Gangi v. Edmonds, 93 Ark. App. 217, 218 S.W.3d 339 (2005); 92 Causes of Action 2d 113.
9. The Court notes, and believes it to be consistent with South Dakota law, the Minnesota precedent that provides that the judicial discretion to make a change of a minor's surname against the wishes of one parent should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change, in In re Application of Saxton (1981, Minn) 309 N.W.2d 298, cert. den 455 US 1034, 72 L Ed 2d 152, 102 S Ct 1737.
10. The Court notes, and believes it to be consistent with South Dakota law, the Utah precedent that provides a name change may create practical instability or confusion for the minor child as well as confusion or mistakes arising in government, education, or health records. Bowers v. Burkhart, 2022 UT App 132, ¶¶ 22-23, 522 P.3d 931, 936.
11. The Court notes, and believes it to be consistent with South Dakota law, the Ohio precedent that provides "when the father is and has been supporting the child, manifests an abiding interest in the child, is not infamous, has exercised visitation privileges and has promptly objected to the change of name, in the absence of a special and overwhelming reason we find that it is not in the best interest of the child, and, therefore, there does not exist a reasonable and proper cause for changing the

name of a minor under the age of eighteen years." In re Newcomb (1984), 15 Ohio App.3d 107, 472 N.E.2d 1142.

12. The Court notes, and believes it to be consistent with South Dakota law, the Florida precedent that addresses the consideration of how parents originally named the children at birth, and the burden on each party to change the same after the marriage between the parties was dissolved. Hayhurst v. Romano, 703 So. 2d 1178 (Fla. Dist. Ct. App. 3d Dist. 1997).

13. Permeating our more-typical custody and visitation decisions is the unremitting principle that "our brightest beacon remains the best interests of the child" in all judicial decisions concerning a child's care. Wasilk v. Wasilk, 2024 S.D. 79, ¶18, 2024 WL 5084604 (citing Zepeda v. Zepeda, 2001 S.D. 101, ¶13, 623 N.W.2d 48, 53); *see also* Weber v. Weber, 529 N.W.2d 190, 191 (S.D. 1995).

14. In South Dakota, a Court can take judicial notice of its own records and proceedings as set forth in both statute and Gregory v. State, 325 N.W.2d 297 (S.D. 1982); State v. Oleson, 331 N.W.2d 75 (S.D. 1983):

> Just as this court can take judicial notice of its own records, *State v. Evans*, 12 S.D. 473, 81 N.W. 893 (1900), so also may the trial court take judicial notice of its own records and proceedings. As stated by Professor McCormick, "It is settled, of course, that the courts, trial and appellate, take notice of their own respective records in the present litigation, both as to matters occurring in the immediate trial, and in previous trials or hearings." McCormick on Evidence, § 330 (2nd Ed. 1972). Likewise, we recently held that: Judicial notice may be taken of facts once judicially known. 31 C.J.S. Evidence § 10 (1964); *Carmack v. Fidelity-Bankers Trust Co.*, 180 Tenn. 571, 177 S.W.2d 351 (1944); *American Nat. Bank v. Bradford*, 28 Tenn.App. 239, 188 S.W.2d 971 (1945). A court may generally take judicial notice of its own records or prior proceedings in the same case and may take judicial notice of an original record in proceedings which are engrafted thereon or ancillary or supplementary thereto. 31 C.J.S. Evidence § 50(2) (1964). *State v. Cody*, 322 N.W.2d 11, 12 n.2 (S.D. 1982). Even more recently we pointed out that the records in a criminal case are as fully before the court through judicial

notice as they would be if introduced in evidence. *Gregory v. State*, 325 N.W.2d 297 (S.D. 1982);

See also SDCL 19-19-201; In Re: S.L. 349 N.W.2d 428 (S.D. 1984).

15. After considering this legal precedent, the Court has further considered both the testimony and evidence to which it notes it takes judicial notice, and the testimony of Petitioner from the hearing on Petitioner's Motion.

FINDINGS OF FACT

1. That any Finding of Fact more appropriately considered a Conclusion of Law should be considered as such for purposes of the record.
2. That this Court conducted an evidentiary hearing on December 16, 2024. At the conclusion of the evidentiary hearing, both parties confirmed with the Court that they had no further questions, evidence, or testimony for the Court to consider. TR. PG. 20 LN 9-20. The evidentiary portion of this matter is closed based upon the representations of the parties and their counsel of record.
3. Petitioner and Respondent have two children, to wit: Stryker John Kerby who was born in Georgetown, Williamson County, Texas on July 26, 2018 (age 6); and of Whitley Jade Kerby who was born in Georgetown, Williamson County, Texas on February 3, 2020 (age 4).
4. Petitioner and Respondent were divorced on September 10, 2024, and Petitioner's cause for the name change is so the minor children can share the last name of both of their parents going forward.
5. The names as requested for are Stryker John Sperry-Kerby and Whitley Jade Sperry-Kerby.

6. Petitioner has always had the surname "Sperry", even after marriage to Respondent. Thus, the children have always had a different surname than their mother.
7. That this Court finds that it has previously identified concerns about minor children, their stability, and their issues with identity, *See e.g.* FOF COL 12/3/24 FOF 20, 35, 36, 38, 64 106. Specifically, this Court previously found and concluded that Petitioner's failure to encourage the minor children to call John "dad" and other conduct has caused confusion in the children's identity. FOF COL 12/3/24 38. The Court found it appropriate that the children remain in counseling to address such concerns.
8. That this Court previously found it appropriate to continue its Order, and broaden it, to make certain that the minor children did not have contact with or otherwise communicate with a person named Tyler Tatman. FOF COL 12/3/24 106. The purposes of such prohibition included but was not limited to issues which had arisen in which the minor children were exposed to and had questions about their parentage and identity.
9. That the Court found that such issues, and the general difficulties associated with a difficult and long divorce had caused the minor children to manifest physical issues associated with change, transition, and consequently their identity. FOF COL 12/3/24 54.
10. The Court finds that the minor children's current name is stable. It is disputed as to how the parties wished to address the name of the children at the time of birth. However, it is undisputed the parties gave the children the name Kerby at birth, such last name has been used since the birth of the minor children, and is on all vital, medical, state and federal government records for the minor children. Such stability of name is an important factor for the Court to consider when determining best interests. The Court finds this especially

important in light of the other instabilities which have existed or now exist in the lives of the minor children.

11. The Court finds such stability of name important in the post-divorce scenario as the Court is hesitant to further effectuate any additional changes or transitions for these minor children unless such change or transition is supported by a compelling and substantial reason. The Court previously addressed such concern about transition and change when it provided a transitional timeline to share parenting based on this similar concern. FOF COL 12/3/24 79. The Court's concern about change is further triggered in this circumstance and the Court finds "the stability of the current name" weighs against further change and consequently the changing of the last name of the minor children. Keegan v. Gudahl, 525 N.W.2d 695, 698–99 (S.D.1994).
12. The Court finds that Heidi testified that she was unaware of any other minor children at either school or in extracurricular activities who hyphenated their children's names. TR. PG. 11; LN 10-15. Further, Heidi testified to the Court that on uniforms "everybody" just puts their last name on there" and again was not aware of any hyphenated names. To that end, the children's identity, which has been and is a concern for this Court, is of paramount consideration in determining their best interests. Drawing additional attention to a hyphenated name under the circumstances present here either creates, or has a substantial likelihood of creating "potential confusion or embarrassment for the minor child[ren]." Keegan, 525 N.W.2d at 698–99 (bracketed material added). This is not in the best interests of the minor children.
13. The Court does not find it is in the best interests of the minor children to take any affirmative action to draw further attention to the history and current circumstances and

the Court finds it could well draw further potential confusion or embarrassment for the minor children moving forward. The potential of this happening, even if it were not to, weighs against any type of change for these minor children.

14. The Court has previously found and addressed that both minor children identify with both parents. The Court notes that Petitioner specifically acknowledged in her testimony, and this Court further does not find, that a denial of a Petition for Name Change will negatively affect the relationship either parent has with the minor children. TR. PG.14 LN. 11-4. Petitioner has not met the burden of proving a name change is necessary to effectuate her relationship with the minor children. Again, the Court notes that it is Heidi's wish she relies upon to argue that a name change should be granted.
15. The Court notes it prior findings that Heidi's failure to encourage the minor children's relationship with their father and regarding "Heidi's characterization and insistence that John is not the children's father." The Court has concerns that the pending Petition may be an extension of such conduct or action. FOF COL 12/3/24 64. Even if it is not, again, changing the name of the minor children when titles, and names, has already occurred and been a concern of this Court, is not in the best interests of the minor children.
16. Petitioner testified that it is "very important to me that the kids have a hyphenated name." TR. PG. 11 LN 5-9. Petitioner through her counsel further testified "her last name in incredibly important to her." TR. PG. 23 Ln 23-25. The Court notes the basis for the Petition itself was the interests of the Petitioner. The Court does not find that the wishes of either party is to be considered in determining whether to grant a name change. The Court finds that the paramount beacon for considering whether to grant a name change remains the best interests of the minor children and not the interests of the parents.

Anderson v. Dainard, 478 S.W.3d 147, 151 (Tex. App. 2015); *see also* Keegan, 525 N.W.2d at 700 ("*Only* the child's best interest should be considered by the court on remand) (emphasis added).

17. The Court notes that Petitioner acknowledged that she had not done any independent research on websites or otherwise regarding sites or entities that accept or do not accept hyphenated names.TR. PG. 12 LN. 22-25.
18. The Court notes that Petitioner acknowledged that hyphenating the name of the minor children would equate to making decisions for the minor children later in life wherein they may, again, need to change their last names. TR. PG. 18 LN. 8-25. The Court does not find that such testimony or fact support the changing of the name of the minor children.

CONCLUSIONS OF LAW

1. That any Conclusion of Law more appropriately considered a Finding of Fact should be considered as such for purposes of the record.
2. That the Court incorporates all of the legal precedent cited above in the Legal Precedent section as if set forth in these Conclusions of Law in full. This Court further incorporates by Judicial Notice those proceedings, and Findings of Fact and Conclusions of law from both the divorce and protection order matter, herein as if set forth in full.
3. That the Court concludes that this matter was brought pursuant to SDCL § 21-37-5 and that notice and publication elements were satisfied by Petitioner. The notice of hearing was properly published for four successive weeks in the Capital Journal, a legal newspaper in Stanely County, and was personally served upon the father, John Franklin Kerby on October 22, 2024.

4. The Court concludes that a Petition for Name Change is a serious matter, and the Court should be reluctant to change the name of a minor child unless the Petitioner has clearly shown that such name change is in the best interests of the minor children. 65 *C.J.S.* Names § 24.
5. The Court has considered the South Dakota legal precedent and authority contained in statute and in Keegan v. Gudahl, 525 N.W.2d 695 (S.D.1994).
6. As noted above, the Court concludes that the stability of the current name, considering the history of this case and the other matters to which the Court takes judicial notice, weighs against changing the name of the minor children. The Court also concludes that the burden of proof for changing a minor child's name lies with the Petitioner. *See* Walden v. Jackson, 2016 Ark. App. 573, 506 S.W.3d 904 (2016); Airsman v. Airsman, 179 So. 3d 342 (Fla. 2d DCA 2015), review denied, 2016 WL 5407927 (Fla. 2016); Gangi v. Edmonds, 93 Ark. App. 217, 218 S.W.3d 339 (2005); 92 Causes of Action 2d 113.
7. As noted above, the Court concludes and has concerns, considering the history of this case and other matters to which this Court takes judicial notice, that potential confusion and embarrassment for the minor children exists and that such factor weighs against changing the name of the minor children. The Court does not believe it is in the best interests of the minor children to draw attention to either their last names or to otherwise draw them apart from other children in the community. The Court has considered the fact that Heidi was unable to identify other children at the school or in activities that hyphenate their last names when she testified at the hearing and further failed to provide any evidence or testimony that such exists. Based on the record, the Court does conclude

the possibility of potential confusion or embarrassment could well occur under these circumstances and further concludes that such is not in the best interest of the minor children.

8. The Court concludes that the denial of the Petition to Change the Name Change of the Minor Children will not negatively affect the relationship the minor children have with each parent. The Court does conclude and finds that a potential for the opposite, i.e. a potential to further damage John's relationship with the minor children as the Court has found Heidi has done in the past, could well occur.
9. The Court concludes and finds it significant that the name of the minor children is and has remained stable since birth.
10. The Court concludes and finds it significant that all vital, medical, and state and federal records of the minor children utilize the name the children have had since birth.
11. Under South Dakota law, the Court does not conclude or find that it is in the best interests of the minor children to grant the Petition for Name Change of Minor Children.
12. This Court also believes it appropriate, as both parties acknowledged to this Court, to consider other legal precedent from other jurisdictions.
13. The Court believes that both South Dakota, and other jurisdictions, appropriately indicate that the interests of either parent is not to be considered, rather it is only the best interests of the minor children to be considered in determining whether to change a name. The Court understands that Petitioner has sought the name change because she wishes such name to change but that is not a consideration for the Court to take into account in determining the best interests of the minor children. Anderson v. Dainard, 478 S.W.3d 147, 151 (Tex. App. 2015).

14. The Court does not conclude that Petitioner met her evidentiary burden in proving that it is in the best interests of the minor children to change their names. Hence, this Court hereby denies the Petition for Name Change of the Minor Children.

15. SDCL 21-37-10 states that "all proceedings under this chapter shall be at the cost of the Petitioner and Judgment may be entered against him for costs as in other civil actions."

16. At the conclusion of the evidentiary hearing, and based on this Court's request that each party propose Findings of Fact and Conclusions of Law, the transcript for such hearing was ordered on the record by John's attorney. The cost for such transcript was $139.92 and was paid by John. Petitioner shall promptly reimburse John for such transcript cost as a cost associated with this matter.

17. John's attorney shall submit a separate Order, consistent with these Findings of Fact, and Conclusions of Law, denying the Petition for Name Change and which grants John the reimbursement for transcript identified above.

BY THE COURT:

Margo D Northrup

Honorable Margo D. Northrup
Sixth Judicial Circuit Court Judge

Attest:
Marshall, Stephanie
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

Appeal No. #31021

* * * *

IN THE MATTER OF THE NAME CHANGE OF S.J.K. AND W.J.K.,
Minor Children.

APPEAL FROM THE
SIXTH JUDICIAL CIRCUIT
STANLEY COUNTY, SOUTH DAKOTA
(58CIV24-000038)
Notice of Appeal Filed March 5, 2025

* * * *

HONORABLE MARGO D. NORTHRUP
Circuit Court Judge

* * * *

APPELLEE'S BRIEF

* * * *

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Filed: 6/5/2025 5:07 PM CST Supreme Court, State of South Dakota #31021

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REFERENCES TO SETTLED RECORD

In this Appellee's Brief, the following abbreviations for references to record will be utilized. For reference to Appellant Heidi Sperry ("Heidi"). For reference to Appellee John Kerby ("John"). For Heidi's Appendix ("HAPP Letter and Pg. -). For references to the settled record generally (SR Pg. -). For John's Appellee Appendix (J APP Letter and Pg. -). For the Trial Court's Findings of Fact and Conclusions of Law from the divorce action if not citing to the settled record ("D FOF COL with corresponding Pg. or No.). For the Trial Court's Findings of Fact and Conclusions of Law on Appellant's Petition for Name Change if not citing to the settled record (P FOF COL with corresponding Pg. or No.). For the Hearing Transcript from the Petition for Name Change hearing shall be referenced as Appellant's B ("HT Pg. and Ln.).

JURISDICTIONAL STATEMENT

John agrees with the factual and legal assertions set forth in Heidi's Jurisdictional Statement. He agrees that the appeal was timely filed and arises from a final order, thereby conferring jurisdiction under SDCL § 15-26A-3(2). However, John notes for the appellate record that certain issues relating to the scope of review are limited due to Heidi's failure to object or to timely present supporting legal authority to the Trial Court prior to entry of its final decision.

QUESTIONS PRESENTED

I. Whether the trial court erred as a matter of law in applying a heightened burden of proof to deny Mother's request to hyphenate the children's surname to include both parents' surnames.

The trial court did not apply an incorrect burden of proof but instead properly exercised its discretion in accordance with South Dakota law.

Authority on Point: *Keegan v. Gudahl*, 525 N.W.2d 695, 698 (S.D. 1994).

Heidi's failure to timely object or present supporting legal authority before the trial court's denial of the petition for name change became final limits the scope of this court's appellate review.

Authority on Point: *Weber v. Weber*, 2023 SD 64, 999 N.W.2d 230; *Tri-City Assocs., LP v. Belmont*, 2014 SD 23, ¶17, 845 N.W.2d 911.

II. Whether the trial court was clearly erroneous in finding that the hyphenation of the children's surnames would be harmful to their identity or stability.

The trial court properly applied the best interest standard in denying the petitioner's request for a name change.

The trial court correctly applied South Dakota law in finding that a name change was not in the best interests of the minor children.

Heidi's attempt to reargue her interpretation of the facts and disparage John on appeal should be summarily rejected.

Authority on Point: *Keegan v. Gudahl*, 525 N.W.2d 695, 698 (S.D. 1994); *Van Duysen v. Van Duysen*, 2015 SD 84, ¶ 4, 871 N.W.2d 613;

STATEMENT OF THE CASE

John agrees with the Heidi's Statement of the Case wherein it identifies the date of divorce, dates of filings, dates of publication, and the date of hearing. However, John would further note that Heidi cited no legal precedent in her Petition for Name Change (SR Pg. 1-2) (hereinafter "Petition"). The only basis for which the name change was sought in the Petition was that "Petitioner wishes" for the names of the minor children to be changed (SR Pg. 2). John filed a timely Objection to Petition ("Objection"), citing much if not all of the South Dakota and other legal precedent which was ultimately relied upon or referenced by the Trial Court in its denial of the Petition (SR Pg. 10-15). The Court subsequently set the evidentiary hearing to hear such Petition and Objection after such filings were made.

After the hearing on the Petition was concluded and the record closed, the Court instructed both parties to submit proposed findings of fact and conclusions of law for the Trial Court's consideration. John submitted detailed findings of fact and conclusions of law that cited majority of the legal precedent either relied upon or referenced by the Trial Court in its own Findings of Fact and Conclusions of Law (SR Pg. 47-59). As further addressed below, the only legal precedent cited, and therefore relied upon by the Trial Court, was the legal precedent submitted by John.

Heidi also submitted proposed findings of fact and captioned conclusions of law to the Trial Court (SR Pg. 32-34). Other than a general reference to the name change chapter, and publication notice statute in the findings, Heidi cited no law to the Trial Court in such submission (SR Pg. 34). In fact, Heidi submitted three captioned "conclusions of law" to the Trial Court that did not, as this Court can clearly see from reviewing the same, cite any legal precedent whatsoever. *Id.* None. Heidi did not object to John's proposed Findings of Fact and Conclusions of Law. Heidi did not object to the Court's Findings of Fact and Conclusions of Law entered by the Court on February 3, 2025 (SR Pg. 47-59). Heidi did not object to the form of the Court's Order denying Petition for Name Change as noted in Appellant's Brief (SR Pg. 63). The first time Heidi submitted any legal precedent to the Trial Court was in Heidi's "Petitioner's Objection" which was filed on February 11, 2025, after the Trial Court's Order Denying Petition for Name change was already a final order (SR Pg. 64). As further noted and addressed below, Heidi's failure to object, or submit legal authority, limits the scope or review on appeal.

STATEMENT OF THE FACTS

The Trial Court's findings of fact which were incorporated into the Trial Court's Order Denying Petition for Name Change accurately summarizes the factual background of the issue on appeal (SR Pg. Pg. 52-56). John would largely rely on the Court's findings of fact on appeal as well as the findings of fact from the divorce action which were specifically incorporated by the Trial Court into the Order denying the Petition (*See* e.g. D FOF Nos. 20, 35, 36, 38, 54, 64, 106 incorporated into P FOF and COL at SR. Pg. 39-34). This is a unique case in that the Trial Court had overseen a lengthy three-day divorce trial prior to conducting the evidentiary hearing on the Petition.

In sum, the Trial Court was intimately familiar with the minor children, all issues in regards to the minor children, the credibility of the witnesses and intentions of the parties, as well as the history on the issue of paternity when it denied Heidi's Petition. These facts, again, are best summarized by a review of the Trial Court's Findings of Fact which were incorporated into the Order denying Petition for Name change (SR. Pg. 47-59).

STANDARD OF REVIEW

This Court has held that the decision on whether to grant a minor child name change, is similar to all other custody determinations, which is governed by the best interests of the minor child standard and that such decisions are reviewed for an abuse of discretion. *Keegan v. Gudahl*, 525 N.W.2d 695, 698 (S.D. 1994). This was the case cited to the Trial Court by John and relied upon by the Trial Court in its decision. This standard of review, in this context, was addressed by this Court in *Van Duysen v. Van Duysen*, 2015 SD 84, ¶ 4, 871 N.W.2d 613, 614, wherein this Court noted:

> We review child custody decisions under the abuse of discretion standard. *Pietzrak v. Schroeder*, 2009 S.D. 1, ¶ 37, 759 N.W.2d 734, 743. "The credibility of witnesses and the weight afforded to their testimony is also within the discretion of the [circuit] court." *Id.* "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 or incomplete. The broad discretion of a trial court in making child custody decisions will only be disturbed upon a finding that the [circuit] court abused its discretion." *Id.*

This is a deferential standard of review and is based on the reality that the Trial Court had opportunity to weigh evidence, gauge credibility, and observe witnesses, in their testimony and behaviors. The broad discretion afforded a Trial Court's decision was further addressed in *Van Duysen:*

> We have previously explained that the court has broad discretion in child custody matters; "[t]hat broad discretion includes discretion as to what evidence the trier of fact will rely on." *Pieper v. Pieper*, 2013 S.D. 98, ¶ 29, 841 N.W.2d 781, 788. Further, "[t]he credibility of 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." *Baun v. Estate of Kramlich*, 2003 S.D. 89, ¶ 21, 667 N.W.2d 672, 677.

Id., ¶ 12. In this case, the Court specifically made findings of fact after having presided over the three-day divorce trial and the evidentiary hearing on the Petition. The Trial Court's findings of fact are reviewed under the clearly erroneous standard identified by this Court in *Kirwan v. City of Deadwood*, 2023 SD 20, ¶ 30, 990 N.W.2d 108, 116:

> The deferential clearly erroneous standard is a familiar and acceptable means by which courts routinely review factual findings. The standard also serves to acknowledge not only a fact-finder's advantage for weighing evidence, but also the limitations of reviewing courts. Using the clearly erroneous standard, we will reverse only "[i]f after careful review of the entire record we are definitely and firmly convinced a mistake has been committed[.]" *Sopko*, 1998 S.D. 8, ¶ 6, 575 N.W.2d at 228.

The Trial Court's decision must therefore take into account the best interests of the minor children and is subject to an abuse of discretion review by this Court. The Court's

findings of fact which it relied upon to make such determination is subject to the clearly erroneous standard of review. John would further incorporate the factual history above, and precedent cited below, as it pertains to the limit on this Court's scope of review.

ARGUMENT AND AUTHORITIES

A. Heidi's failure to timely object or present supporting legal authority before the trial court's denial of the petition for name change became final limits the scope of this court's appellate review.

None of the South Dakota case law, or out of state legal precedent, contained in Heidi's brief to this Court was ever cited or submitted to the Trial Court for its consideration prior to the Court's Order denying the Petition becoming a final order. This is explained above in the Statement of the Case. In *Weber v. Weber*, 2023 SD 64, ¶ 24, 999 N.W.2d 230, 235, this Court has consistently held that the failure to raise an issue or to timely object in the trial court constitutes a waiver of the right to assert that issue on appeal, as matters not submitted for the trial court's consideration cannot be raised for the first time on review:

> A party's failure to argue an issue to the circuit court waives their ability to argue it on appeal. In re M.S., 2014 S.D. 17, ¶ 17 n.4, 845 N.W.2d 366, 371 n.4 (quoting *In re Estate of Smid*, 2008 S.D. 82, ¶ 43 n.15, 756 N.W.2d 1, 15 n.15 (Konenkamp, J., dissenting)). Furthermore, "[i]t is well established that 'we will not review a matter on appeal unless proper objection was made before the circuit court.'" *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶ 23, 913 N.W.2d 496, 503 (quoting *Halbersma*, 2009 S.D. 98, ¶ 29, 775 N.W.2d at 219). "An objection must be sufficiently specific to put the circuit court on notice of the alleged error so it has the opportunity to correct it." *Id.* (quoting *Halbersma*, 2009 S.D. 98, ¶ 29, 775 N.W.2d at 220).

Notice to the Trial Court is a prerequisite to appeal. This Court has further held in *Tri-City Assocs., LP v. Belmont*, 2014 SD 23, ¶ 17, 845 N.W.2d 911, 916, that a party can

preserve such right but they must either object or submit their own Findings of Fact and Conclusions of Law:

> We held that the failure to *either* object to *or* propose findings or conclusions limited our "review to the question of whether the findings support[ed] the conclusions of law and judgment." *Id.* ¶ 11 (quoting *Premier Bank, N.A. v. Mahoney,* 520 N.W.2d 894, 895 (S.D. 1994)). We also cited *Selway Homeowners Association v. Cummings,* for a similar holding, explaining that because "the appellant failed to *either* object to findings of fact or conclusions of law proposed by the appellee, *or* propose findings of fact and conclusions of law of their own," our review was limited to determining "whether the findings supported the conclusions of law and judgment[.]" *Canyon Lake,* 2005 S.D. 82, ¶ 11, 700 N.W.2d at 733 (emphasis added) (citing *Selway,* 2003 S.D. 11, ¶ 14, 657 N.W.2d 307, 312).

In this case Heidi did not object to John's proposed findings of fact and conclusions of law, including those specific findings and conclusions adopted by the Trial Court. Further, although Heidi did submit proposed findings of fact and conclusions of law to the Trial Court prior to decision becoming final, a review of Heidi's proposed findings and conclusions confirms that Heidi cited no law – none – to the Trial Court, that Heidi now relies upon for her appeal. In fact, the only cite to any authority in Heidi's proposed findings of fact and conclusions of law was a cite to the Chapter which governs a name change (SDCL § 21-37) and the publication statute, neither of which are in dispute or an issue raised in Heidi's appeal to this Court. Heidi's three purported conclusions of law submitted to the Trial Court are not, in fact, conclusions of law because they cite no law (SR Pg. 34). A cite to legal precedent is a prerequisite to a conclusion of law, and without citing legal precedent Heidi's failure to object or provide legal precedent to the Trial Court limits the Court's scope of review.

The Court's Findings of Fact and Conclusions of Law were signed by the Trial Court on February 3, 2025 (SR Pg. 60). The Court entered an Order Denying Petition for

Name Change one week later (SR Pg. 60). The Court's Order Denying Petition for Name Change incorporated in its entirety the Trial Court's Findings of Fact and Conclusions of Law. Notice of Entry of that Order Denying Petition for Name Change, making it a final order, was filed on that same date February 10, 2025 (SR Pg. 61). It was only after the Trial Court's Order was made final that Heidi, for the first time in this matter, submitted any legal authority to the Trial Court other than the noted reference to the chapter which governs name change and the statue governing notice. Such factual and legal argument was contained in the Petitioner's Objection filed on February 11, 2025 (SR Pg. 64-66).

Heidi now submits a brief to this Court that is replete with factual and legal arguments which it is undisputed on this record were never argued or submitted to the Trial Court before the Trial Court's Order became final. Heidi's brief further contains multiple objections to the Trial Court's Order Denying Petition for Name Change which were never objected to by Heidi prior to the decision becoming final. In sum, the Trial Court was never provided notice of any objection, or provided any legal precedent to consider, by Heidi prior to its Order becoming final. This is the precise scenario that triggers the result contemplated in both *Weber*, 2023 SD 64, ¶ 24, 999 N.W.2d 230, 235, and *Tri-City Assocs.*, 2014 SD 23, ¶ 17, 845 N.W.2d 911, 916.

Based upon Heidi's failure to object or timely submit legal precedent to the Trial Court, this Court's scope of review on appeal, and conditioned by the standards of review cited above, is limited to "whether the findings supported the conclusions of law and judgment[.]" *Id.* As set forth in more detail below, it is clear the Court's findings of fact were not clearly erroneous, and the application of such facts to the South Dakota

precedent cited was not an abuse of discretion. The Trial Court's decision should be affirmed.

B. The trial court properly applied the best interest standard in denying the Petitioner's request for a name change.

The Trial Court cited *Keegan v. Gudahl*, 525 N.W.2d 695, 698 (S.D. 1994) at length in its Order Denying Petition for Name Change. In *Keegan* this Court indicated that the best interest of the child standard governs a minor child's name change:

> When applying South Dakota's child custody statutes, the best interest of the child governs. SDCL § 25-5-7.1; SDCL § 30-27-19 (repealed S.L. 1993, ch. 213, § 172; reenacted in relevant part, S.L. 1994, ch. 192, and codified at SDCL § 25-4-45); *McKinnie v. McKinnie*, 472 N.W.2d 243 (S.D. 1991) (citing *Nauman v. Nauman*, 445 N.W.2d 38, 39 (S.D. 1989). Consequently, the trial court should have applied this standard in resolving the name change dispute. Accord, *Cohee*, 317 N.W.2d at 384 (in determining child's surname in a divorce proceeding, the proper standard is the best interests of the child, the same standard used in all custody decisions involving minor children); *Gulsvig*, 498 N.W.2d at 729 (there is no presumption that a child bear the father's name or that the mother has a superior right to name the child because she has custody at birth; the real issue is what is in the best interest of the child); *In re Marriage of Schiffman*, 28 Cal.3d 640, 620 P.2d 579, 583 (1980) ("The sole consideration when parents contest a surname should be the child's best interest."); *Garling v. Spiering*, 203 Mich.App. 1, 512 N.W.2d 12, 13 (1993) (parental disputes regarding a child's surname should be resolved in accordance with the best interests of the child).

Keegan, 525 N.W.2d at 698. This Court further noted in *Keegan* the factors that a Trial Court should examining when determining a name change:

> In determining the best interest of the child in a name change dispute, factors for the court to consider include, but are not limited to: (1) misconduct by one of the parents; (2) failure to support the child; (3) failure to maintain contact with the child; (4) the length of time the surname has been used; and (5) whether the surname is different from that of the custodial parent. *Cohee*, 317 N.W.2d at 384. The court may also consider whether a particular name will contribute "to the estrangement of the child from a non-custodial parent who wishes to foster and preserve the parental relationship." *In re Marriage of Nguyen*, 684 P.2d 258, 260 (Colo.Ct.App. 1983), cert. denied, 469 U.S. 1108 (1985).

Id. at 699-700. This precedent, and the factors identified above which were applicable in this case, were addressed extensively by the Trial Court in its Decision. Consistent with the scope of review and standard of review identified above, the Trial Court's findings of fact fully supported the conclusion that it was not in the best interests of the minor children to change name. Petitioner had an obligation to prove that the facts, applied to the factors identified in *Keegan,* warranted the requested relief sought. Petitioner failed in providing facts, which when applied to the best interest factors, convinced the Trial Court such change was warranted. That decision should be affirmed under the appropriate scope of review and standard of review identified.

C. The trial court correctly applied South Dakota law in finding that a name change was not in the best interests of the minor children.

The Trial Court's findings of fact track the factors identified in *Keegan.* The following findings of Fact of the Trial Court, which were incorporated into the Court's Order Denying Petition for Name Change, which do just that are as follows:

> 7. That this Court finds that it has previously identified concerns about minor children, their stability, and their issues with identity, *See e.g.* FOF COL 12/3/24 FOF 20, 35, 36, 38, 64, 106. Specifically, this Court previously found and concluded that Petitioner's failure to encourage the minor children to call John "dad" and other conduct has caused confusion in the children's identity. FOF COL 12/3/24 38. The Court found it appropriate that the children remain in counseling to address such concerns.
>
> 9. That the Court found that such issues, and the general difficulties associated with a difficult and long divorce had caused the minor children to manifest physical issues associated with change, transition, and consequently their identity. FOF COL 12/3/24 54.
>
> 10. The Court finds that the minor children's current name is stable. It is disputed as to how the parties wished to address the name of the children at the time of birth. However, it is undisputed the parties gave the children the name Kerby at birth, such last name has been

used since the birth of the minor children, and is on all vital, medical, state and federal government records for the minor children. Such stability of name is an important factor for the Court to consider when determining best interests. The Court finds this especially important in light of the other instabilities which have existed or now exist in the lives of the minor children.

11. The Court finds such stability of name important in the post-divorce scenario as the Court is hesitant to further effectuate any additional changes or transitions for these minor children unless such change or transition is supported by a compelling and substantial reason. The Court previously addressed such concern about transition and change when it provided a transitional timeline to share parenting based on this similar concern. FOF COL 12/3/24 79. The Court's concern about change is further triggered in this circumstance and the Court finds "the stability of the current name" weighs against further change and consequently the changing of the last name of the minor children. Keegan v. Gudahl, 525 N.W.2d 695, 698–99 (S.D.1994).

12. The Court finds that Heidi testified that she was unaware of any other minor children at either school or in extracurricular activities who hyphenated their children's names. TR. PG. 11; LN 10-15. Further, Heidi testified to the Court that on uniforms "everybody" just puts their last name on there" and again was not aware of any hyphenated names. To that end, the children's identity, which has been and is a concern for this Court, is of paramount consideration in determining their best interests. Drawing additional attention to a hyphenated name under the circumstances present here either creates, or has a substantial likelihood of creating "potential confusion or embarrassment for the minor child[ren]." Keegan, 525 N.W.2d at 698–99 (bracketed material added). This is not in the best interests of the minor children.

13. The Court does not find it is in the best interests of the minor children to take any affirmative action to draw further attention to the history and current circumstances and the Court finds it could well draw further potential confusion or embarrassment for the minor children moving forward. The potential of this happening, even if it were not to, weighs against any type of change for these minor children.

14. The Court has previously found and addressed that both minor children identify with both parents. The Court notes that Petitioner specifically acknowledged in her testimony, and this Court further does not find, that a denial of a Petition for Name Change will

negatively affect the relationship either parent has with the minor children. TR. PG.14 LN. 11-4. Petitioner has not met the burden of proving a name change is necessary to effectuate her relationship with the minor children. Again, the Court notes that it is Heidi's wish she relies upon to argue that a name change should be granted.

15. The Court notes it prior findings that Heidi's failure to encourage the minor children's relationship with their father and regarding "Heidi's characterization and insistence that John is not the children's father." The Court has concerns that the pending Petition may be an extension of such conduct or action. FOF COL 12/3/24 64. Even if it is not, again, changing the name of the minor children when titles, and names, has already occurred and been a concern of this Court, is not in the best interests of the minor children.

16. Petitioner testified that it is "very important to me that the kids have a hyphenated name." TR. PG. 11 LN 5-9. Petitioner through her counsel further testified "her last name in incredibly important to her." TR. PG. 23 Ln 23-25. The Court notes the basis for the Petition itself was the interests of the Petitioner. The Court does not find that the wishes of either party is to be considered in determining whether to grant a name change. The Court finds that the paramount beacon for considering whether to grant a name change remains the best interests of the minor children and not the interests of the parents. *Anderson v. Dainard*, 478 S.W.3d 147, 151 (Tex. App. 2015); *see also* Keegan, 525 N.W.2d at 700 ("*Only* the child's best interest should be considered by the court on remand) (emphasis added).

17. The Court notes that Petitioner acknowledged that she had not done any independent research on websites or otherwise regarding sites or entities that accept or do not accept hyphenated names.TR. PG. 12 LN. 22-25.

18. The Court notes that Petitioner acknowledged that hyphenating the name of the minor children would equate to making decisions for the minor children later in life wherein they may, again, need to change their last names. TR. PG. 18 LN. 8-25. The Court does not find that such testimony or fact support the changing of the name of the minor children.

(SR Pgs. 52-56).

As this Court will note, the "best interests" of the minor children, and the specific factors from *Keegan* to be considered, are repeatedly and specifically addressed and referenced by the Trial Court as the paramount considerations the Court considered.

The Trial Court subsequently incorporated and applied the findings of fact identified above into its conclusions of law as follows and again consistent with *Keegan*:

> 4. The Court concludes that a Petition for Name Change is a serious matter, and the Court should be reluctant to change the name of a minor child unless the Petitioner has clearly shown that such name change is in the best interests of the minor children. 65 *C.J.S.* Names § 24.
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> 5. The Court has considered the South Dakota legal precedent and authority contained in statute and in *Keegan v. Gudahl*, 525 N.W.2d 695 (S.D.1994).
>
> 6. As noted above, the Court concludes that the stability of the current name, considering the history of this case and the other matters to which the Court takes judicial notice, weighs against changing the name of the minor children. The Court also concludes that the burden of proof for changing a minor child's name lies with the Petitioner. *See Walden v. Jackson*, 2016 Ark. App. 573, 506 S.W.3d 904 (2016); *Airsman v. Airsman*,179 So. 3d 342 (Fla. 2d DCA 2015), review denied, 2016 WL 5407927 (Fla. 2016); *Gangi v. Edmonds*, 93 Ark. App. 217, 218 S.W.3d 339 (2005); 92 Causes of Action 2d 113.
>
> 7. As noted above, the Court concludes and has concerns, considering the history of this case and other matters to which this Court takes judicial notice, that potential confusion and embarrassment for the minor children exists and that such factor weighs against changing the name of the minor children. The Court does not believe it is in the best interests of the minor children to draw attention to either their last names or to otherwise draw them apart from other children in the community. The Court has considered the fact that Heidi was unable to identify other children at the school or in activities that hyphenate their last names when she testified at the hearing and further failed to provide any evidence or testimony that such exists. Based on the record, the Court does conclude the possibility of potential confusion or embarrassment could well occur under these circumstances and further concludes that such is not in the best interest of the minor children.

8. The Court concludes that the denial of the Petition to Change the Name Change of the Minor Children will not negatively affect the relationship the minor children have with each parent. The Court does conclude and finds that a potential for the opposite, i.e. a potential to further damage John's relationship with the minor children as the Court has found Heidi has done in the past, could well occur.

9. The Court concludes and finds it significant that the name of the minor children is and has remained stable since birth.

10. The Court concludes and finds it significant that all vital, medical, and state and federal records of the minor children utilize the name the children have had since birth.

11. Under South Dakota law, the Court does not conclude or find that it is in the best interests of the minor children to grant the Petition for Name Change of Minor Children.

(SR Pgs. 56-59). The summary in Conclusion of Law No. 11 makes it clear the Trial Court appropriately applied South Dakota law in determining best interests consistent. The other conclusions of law confirm that the Trial Court appropriately did so under the *Keegan* factors.

Any claim of Heidi that the Trial Court did not appropriately decide this case under South Dakota law is misplaced as identified above. The Trial Court did precisely that. Heidi's does not identify how any finding of fact of the Trial Court was clearly erroneous. Furthermore, Heidi's failure to show how the Trial Court abused its discretion in determining that it was in the best interests of the minor children to deny the name change warrants affirmance of the Trial Court's decision.

D. The trial court did not apply an incorrect burden of proof but instead properly exercised its discretion in accordance with South Dakota law.

The Trial Court's findings and conclusions above indicate the basis for the Court's decision. As noted above, South Dakota law is cited and relied upon by the Trial

Court. Heidi argues to this Court for the first time on appeal that by referencing the Minnesota case of *Application of Saxton*, 309 N.W.2d, 298 (Minn. 1981) that the Trial Court applied a clear and compelling standard. This Court can see that such argument is misplaced by reviewing the Court's decision, in the Legal Precedent Section (SR Pg. 38, Paragraph 9), that the Trial Court referenced *Application of Saxton* in the context of exercising judicial caution prior to making a decision to changing the name of the minor child. The Trial Court never indicated it was applying a clear and compelling standard nor did it state it was doing so in its Conclusions of Law.

Further, the case now relied upon by Heidi, *In re J.P.H.*, 2015 SD 43, 865 N.W.2d 491 was never cited or argued to the Trial Court prior to the Trial Court's decision becoming final. Even had it been cited or argued by Heidi, *In re J.P.H.* still cites *Keegan* and provides "the best interests of the child govern a child's name change." *Id.* ¶ 10. Last, and as to any factual argument, this Court can see that the facts of *In re J.P.H.* are starkly different than the very unique facts of the present case. In sum, Heidi's argument, even had it been timely made, does not warrant reversal of the Trial Court's decision.

In the Trial Court's Conclusions of Law, it stated that it considered the precedent in *Keegan v. Gudahl*, 525 N.W.2d 695, 698-699. *See* P FOF No. 5; SR Pg. 44. The Trial Court further stated, "the burden of proof for changing a minor child's name lies with the Petitioner. *See* P FOF No. 6; SR Pg. 44. This conclusion is true in any case wherein one party seeks relief or change from a status quo. A party seeking to change a child's name must prove under the *Keegan* factors that changing the name of the children is in the best interests of the minor child. The Trial Court further concluded that "a Petition for name change is a serious matter and that a Court should be reluctant to change the name of a

minor child unless the Petitioner has clearly shown that such name change is in the best interests of the minor children. *See* P FOF No. 4; SR Pg. 9. Again, nothing about conclusion or this precedent is inconsistent with the best interest considerations identified in *Keegan.* None of these references change the fact that the Trial Court applied the best interests factors where the Trial Court summarily stated, "The Trial Court does not conclude that Petitioner met her evidentiary burden in proving that it is in the best interests of the minor children to change their names" (*See* P FOF No. 14; SR Pg. 45) and further stated, "The Court finds that the paramount beacon for considering whether to grant a name change remains the best interests of the minor children and not the interests of the parents" (*See* P FOF No. 16; SR Pg. 55). Under the applicable scope of review and standard of review, the findings of fact are not clearly erroneous and when such are applied to the cited South Dakota law the result reached by the Trial Court is not an abuse of discretion.

E. Heidi's attempt to reargue her interpretation of the facts and disparage John on appeal should be summarily rejected.

Heidi's brief is replete with many (many are also new and presented for the first time on appeal) factual arguments that the Trial Court heard, weighed, and ultimately did not rely upon or adopt. As noted in *Van Duysen:*

> We have previously explained that the court has broad discretion in child custody matters; "[t]hat broad discretion includes discretion as to what evidence the trier of fact will rely on." *Pieper v. Pieper*, 2013 S.D. 98, ¶ 29, 841 N.W.2d 781, 788. Further, "[t]he credibility of 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." *Baun v. Estate of Kramlich*, 2003 S.D. 89, ¶ 21, 667 N.W.2d 672, 677. (Id. at ¶ 12).

The Trial Court exercised its broad discretion in determining the credibility of witnesses, the weight of evidence, and which evidence the Trial Court would or would not rely on. The divorce trial took three full days. The hearing on the Petition took as long as Petitioner believed appropriate to get her factual arguments made. Such were weighed and considered by the Court, but the Court rejected most if not all of such arguments actually made to the Trial Court. Again, reviewing Heidi's proposed findings of fact submitted to the Trial Court makes it immediately evident many of Heidi's factual arguments proffered to this Court are made for the first time on appeal.

Heidi's brief also attempts to paint John in a bad light in order to seemingly try to bolster factual arguments and consequently distract this Court from the best interest factors identified in *Keegan.* One such examples would include on page four of Heidi's brief a reference to the "Mother's protection order hearing against Father." Heidi's reference may make it appear as if Heidi either obtained such protection order, or even had a basis to pursue such protection order. Neither of those claims or inferences are true. Per the Trial Court's final decision in the divorce action, and to which the Trial Court incorporated (as well as the stated concerns) into the final Order Denying Petition for Name Change, the factual history leading up to and after Heidi's failed protection attempt supported the denial of the name change Petition:

> 38. John is the father of the minor children, and the Court would strongly encourage Heidi to refer to him as dad in front of the minor children. By directly or indirectly, encouraging the children to refer to their dad as "John," Heidi is intentionally interfering with John's relationship with the children.
>
> 39. A source of frustration for the parties was Heidi's unwillingness to abide by the right of first refusal. On two separate occasions, John was able to confirm Heidi was not abiding by the right of first refusal. This was corroborated by the testimony of Heidi's father. The Court found Heidi's

testimony regarding her willingness to abide by the right of first refusal throughout the divorce proceedings and leading up to the filing of the protection order disingenuous.

40. Heidi filed an ex parte protection order against John in February of 2022 in an effort to completely limit John's contact with the minor children for a period of five years. The ex parte protection order was granted by a judge not familiar with the lengthy litigation history between the parties. The ex parte protection order was later amended to remove the children as protected parties. The ex parte protection order stayed in effect, by agreement of the parties, until the divorce trial.

41. Heidi's description of John's stalking behavior by following, parking, waiting, and watching her, is completely misleading.

42. On two occasions, when John accurately suspected Heidi was violating the right of first refusal, he parked and/or drove to a location to confirm where he assumed Heidi would have to travel in furtherance of her disobedience of the court-ordered right of first refusal. In the context of this case, the Court determines his actions were for a legitimate purpose.

43. The Court finds that Heidi filed the protection order in retaliation for being "caught" purposely violating the court ordered right of first refusal. The Court did not find Heidi's testimony that she was fearful of John credible but does find Heidi was upset and anxious because of these encounters.

44. Heidi made multiple police reports alleging John had violated the protection order when he attempted to be involved in medical appointments or activities of the children. None of the reports resulted in charges being filed against John by the prosecuting authorities.

45. The psychological and emotional needs and the development of the children would suffer if they did not have active contact with both John and Heidi. John is their father in every sense of the word.

(D FOF COL; App F; Pgs. 8-9).

The findings of fact and conclusion of law from the divorce matter supported the Trial Court's finding of fact in the Petition matter wherein the Trial Court noted its concerns about Heidi's motives (P FOF No. 15; Pg. 55), the history as it affected the identity of the minor children (P FOF No. 9; SR Pg. 53), as well as the stability of the name (P FOF No. 10, SR Pg. 23). To that end, and to the extent Heidi's reference to the

"Mother's protection order hearing against Father.," which she impermissibly sought against John is relevant, would be to the extent it supports the Trial Court's Order Denying Petition for Name Change.

Heidi also references on page thirteen of her Brief that after John discovered that Heidi had deceived him in regards to the issue of paternity, his conduct in emails and communications with siblings and family (not the minor children) was by no means perfect. Heidi references this conduct in relation to a pleading that was filed requesting DNA testing and addressing paternity very early on in the multi-year pending divorce action. Heidi attempts to tie this reference to conduct into a criticism of the Court's concern about embarrassment that may arise by further drawing attention to the paternity or the names of the minor children (P FOF No. 12; SR Pg. 54).

Although Heidi's factual argument identified above is attenuated at best, what Heidi fails to acknowledge is that John's conduct ceased early in the divorce after the initial shock of Heidi's fraud and deceit passed. As the Trial Court noted, "there isn't a playbook on how to react to this type of news" and "he did this from a place of hurt") A App. B; Pg. 5; lines 1, 6). The Trial Court in the divorce also found "Importantly, the Court finds that John has since recognized this behavior is harmful and it has ceased." (D FOF COLS No. 51; App F; Pg. 10). In sum, Heidi's criticism of how John, for a short time, reacted to her fraud and deceit, does not warrant a reversal of the Trial Court's decision. Further, Heidi's conduct, which continued throughout the divorce, and which specifically bore upon the *Keegan* factors, was appropriately considered.

Heidi's continued attempts to paint John in a bad light, even now on appeal and if relevant at all, supports the affirmance of the Trial Court's Order denying Petition for

Name Change. The Trial Court noted its concerns about Heidi's prior conduct and that the Petition may be an extension of her noted conduct and consistent with her inability to encourage John's relationship as the minor children's father:

> 15. The Court notes it prior findings that Heidi's failure to encourage the minor children's relationship with their father and regarding "Heidi's characterization and insistence that John is not the children's father." The Court has concerns that the pending Petition may be an extension of such conduct or action. FOF COL 12/3/24 64. Even if it is not, again, changing the name of the minor children when titles, and names, has already occurred and been a concern of this Court, is not in the best interests of the minor children.

(SR Pg. 55).

In sum, Heidi's efforts, even on appeal, further bolster this finding and the Trial Court's stated concern about Heidi's intent or motive. The Trial Court was in the best position to judge credibility, motive, and intent. And did so. Such findings, and the conclusion to which they were relevant, were not clearly erroneous nor was the decision that such resulted in an abuse of discretion.

CONCLUSION

The scope of review in this case is limited by Heidi's failure to object or submit any legal precedent to the Trial Court prior to the Court's Order in this case becoming final. As to standard review, Heidi has failed to prove that the Trial Court's Findings of Fact were clearly erroneous. Rather, the rationale and decision reached by the Trial Court was rooted in a careful, fact-specific evaluation of the children's best interests, consistent with South Dakota law, and supported by the record. Reviewing the Trial Court's findings of fact and applying them to the conclusions of law, it is clear on the record appropriately before this Court that the Trial Court did not abuse its discretion. Based on such, John respectfully requests that this Court affirm the Trial Court's Order

Denying Petition for Name Change and grant him his reasonable attorney's fees and costs associated with the need to defend this unnecessary appeal.

REQUEST FOR ORAL ARGUMENT

Appellant hereby respectfully requests oral argument.

Dated this ____ day of June, 2025.

LOOS, SABERS & SMITH, LLP

/s/ Michael K. Sabers

Michael K. Sabers
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Rapid City, SD 57702
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Attorney for Respondent / Appellee
John F. Kerby

[*Certificate of Service to Follow*]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of June, 2025, he electronically filed the foregoing documents with the Clerk of the Supreme Court Odyssey File and Serve portal, and further certifies that the foregoing document was also mailed via U.S. Mail, postage prepaid thereon, to:

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/s/ Michael K. Sabers
Michael K. Sabers

[*Certificate of Compliance to Follow*]

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Michael K. Sabers, counsel for the Appellee, does hereby submit the following:

The foregoing brief is 20 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 6,733 words, and 32,934 characters (no spaces) in the body of the Brief.

/s/ Michael K. Sabers
Michael K. Sabers

APPELLANT'S APPENDIX

Description **Page Number:**

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS:	
COUNTY OF STANLEY	)	SIXTH JUDICIAL CIRCUIT
JOHN FRANKLIN KERBY,	)	58DIV21-000007
	)	
PLAINTIFF,	)	
	)	
v.	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
	)	
HEIDI RAI SPERRY (KERBY),	)	
	)	
DEFENDANT.	)	

This divorce matter came before the Court on September 11th, 12th and 13th, 2024 before the Honorable Margo D. Northrup at the Stanley County Courthouse, Ft. Pierre, South Dakota. Also pending before the Court was Defendant Heidi Sperry's Petition for Protection Order against Plaintiff John Kerby in Stanley County 58TPO24-3. Plaintiff was present personally and represented by counsel, Michael Sabers; Defendant was present personally and represented by her counsel, Melissa Neville and Carla Glynn.

Prior to trial, the parties submitted a Stipulation for Property Settlement and Alimony Waiver signed by the parties on September 9, 2024 that made a complete and final settlement of all claims that either may have against the other for alimony, support, maintenance, to memorialize the separation of the parties, to finalize the agreement as to division of property, both real and personal, to extinguish any claims that existed as to back due child support or medical reimbursements, to address an equalization payment owed by John to Heidi, to extinguish any other claims as to the premarital agreement, and which stipulation consented to the divorce being granted on the grounds of irreconcible differences. Based on that September 9, 2024, Stipulation, the Court entered a Judgment and Decree of Divorce on September 10, 2024.

Based on the September 9, 2024 Stipulation of the parties, and the Court's September 10, 2024 Judgment and Decree of Divorce, the remaining divorce issues for the Court at the time of trial were issues of custody between Heidi and John, the issue of child support, the issue of parenting time, and the Court's exercise of the gate keeping function on John's civil tort claims asserted in the Plaintiff's Second Amended Complaint for Divorce and Alternative Claims for Negligent and Intentional Infliction of Emotional Distress dated August 1, 2023 as well as Heidi's civil tort claims of negligent and intentional infliction of emotional distress contained in Heidi's Answer and Counterclaim to Plaintiff's Second Amended Complaint dated August 31, 2023. As noted, the Court also heard evidence and testimony on Defendant Heidi Sperry's Petition for Protection Order. As set forth below, the Court subsequently dismissed the Defendant's Petition for Protection Order against Plaintiff in Stanley County 58TPO24-3 after trial via a separate Order dated September 16, 2024. In that Order Dismissing Protection Order, the Court noted that Petitioner failed to provide sufficient evidence to support, by a preponderance of the evidence that a protection order should be granted,[1] and that written findings and conclusions would be submitted to the Court as needed. Subsequently, the parties notified the Court that written findings and conclusions in 58TPO24-3 were waived.

After the trial was complete, this Court entered an oral ruling on September 13, 2024, that was a framework for these Findings of Fact and Conclusions of Law. Based on such, such oral ruling is hereby incorporated herein as if set forth in full. To the extent the written findings of fact and conclusions of law differ from those state orally and recorded in open court, the written findings shall prevail. This Court, having considered the evidence introduced, both testimony and

[1] The Order in 58TPO 24-3 inaccurately referred to domestic abuse, not stalking.

documentary, and the arguments of legal counsel, and having been fully advised as to all matters pertinent hereto, issues its Findings of Fact and Conclusions of Law.

PRELIMINARY MATTERS AND FINDINGS

1. That any Finding of Fact more appropriately considered a Conclusion of Law should be considered as such for purposes of the record.
2. The parties hereto will be referred to as "Plaintiff," or "John;" and "Defendant," or "Heidi."
3. At trial, the Court heard the live testimony of, and was able to determine credibility, of Plaintiff, Defendant, the Custody Evaluator Lindsey Bruckner, as well as Defendant's witnesses Counselor Patty Jonas, proffered expert Christina J. VanDeWetering, Ross Sperry, Nancy Sperry, Officer Nathan Howell, Officer Dalton Sack, Skyla Nichols, Jamie Spaid, McKenzie Blake, Samantha Schuetlzle, and Rochelle Smith.
4. Based on a stipulation of the parties, or through introduction of evidence at trial, the following Plaintiff's exhibits were admitted: 1-31, 33, 34, 35, and 36. Based on a stipulation of the parties, or though introduction at trial, the following Defendant's exhibits were admitted: 113-186, 188-194.
5. All prior orders of this Court entered in this divorce action not modified or altered herein shall remain in full force and effect.

FINDINGS OF FACT

1. The parties were married in Georgetown, Texas on August 31, 2014.
2. The parties have two (2) minor children born during this marriage and subject to this action, namely: Stryker John Kerby (DOB 7/26/18; age 6); and Whitley Jade Kerby (DOB 2/3/20; age 4).
3. John is on the birth certificate for both minor children and has acted as the father of the minor children since birth. Heidi hid the fact that John was not the biological father until shortly before the divorce action was commenced and she finally confessed she knew John was not the biological father. John was understandably devastated.
4. The Complaint for divorce was filed December 15, 2021. Service of the same was completed via Sheriff's service on December 17, 2021. Sixty (60) days has now passed and the Court had jurisdiction to divorce the parties.

5. John is 47 years of age (DOB 10/16/76).
6. Heidi is 40 years of age (DOB 12/8/1983).
7. John and Heidi are both in good health and good physical condition.
8. Neither John nor Heidi has any mental health concerns. Both are in counseling to address the stressors involved with this litigation.
9. John and Heidi are both gainfully employed and well educated each having multiple educational degrees. Heidi is highly intelligent and articulate and has been able to secure good employment in Pierre, SD. John is also highly intelligent and has a long and successful military career.
10. This Court entered an Order for Custody Evaluation on September 15, 2023, appointing Lindsay Bruckner as the custody evaluator. The custody evaluation was ordered for purposes of ascertaining a custody and parenting plan in the best interests of the minor children.
11. The Custody Evaluation report was completed on August 24, 2024. Such was offered and admitted as Plaintiff's Exhibit 11. Ms. Brucker recommended joint physical and legal custody.
12. Ms. Lindsay Bruckner testified live at trial. The Court finds Ms. Bruckner's testimony to be credible and helpful. The Court finds that the report was very thorough, that Ms. Bruckner spent an incredible amount of time in her evaluation, and that the report was very complete.
13. Lindsay Bruckner found the children to be nice, high spirited, happy, high energy, and showed love for both parents.
14. Multiple parties testified, Linday Bruckner agreed, and the Court finds that Heidi is a very good mother to the children. She focuses her life on ensuring the children have a positive, happy, childhood.
15. Likewise, multiple parties testified, Lindsay Brucker agreed, and the Court finds that John is a very good father to the children. He has modified his military career to ensure he is present and in engaged in the life of the children.
16. Dr. Laura Hughes performed psychological testing of the parties as part of the custody evaluation. No information was provided that would indicate either party was unable to provide care for their children.

17. Dr. Laura Hughes did note the results of the testing administered to Heidi Sperry may be unreliable due to inaccurate self-reporting.
18. The Court does incorporate many, but not all of the findings of Ms. Bruckner and adopts most, but not all of the recommendations of Ms. Bruckner as to custody and parenting time.
19. The children see counselor Patty Jonas at Rising Hope Counseling. Patty Jonas utilizes a form of play therapy that is "subject to interpretation." The children are showing improvement.
20. The children's primary medical providers are Dr. Hutton and PA Theresa Cass. The medical providers expressed concern that the prolonged stress and anxiety of the pending divorce action has impacted the children negatively.
21. The Court has independently considered the *Fuerstenberg* factors and the shared parenting factors outlined in SDCL 25-4A-24 in reaching the Court's findings and determination of a custody and parenting time arrangement in the best interests of the minor children.
22. The parties shall continue to share joint legal custody of the minor children.
23. The Court hereby finds that shared parenting wherein each party has the minor children in their care for no less then one hundred eight two nights is appropriate.
24. The Court finds that it is the best interests of the minor children to transition from the existing parenting time schedule to shared parenting after the Fourth of July holiday in 2025 as this is when both children will be in elementary school full-time.
25. That the Court finds that the holiday parenting time as provided for in the most current South Dakota parenting guidelines for children of the age of five or above is appropriate. The Court finds it appropriate that if the minor children do not have school on an exchange date, that the parties will agree to exchange the minor children at 8:00 a.m. Unless the parties can agree otherwise, the holiday parenting time shall be as follows, with John being parent 2 and Heidi being parent 1:

Holiday / Special Event	Details / Times	Even-Numbered Years	Odd-Numbered Years
Martin Luther King Jr. Day weekend	Starts when school is released on Friday or 3:15 p.m., whichever is applicable and ends when the children are returned to school on Tuesday or at 8:00 a.m., whichever is applicable.	Parent 2	Parent 1

President's Day weekend	Starts when school is released on Friday or 3:15 p.m., whichever is applicable and ends when the children are returned to school on Tuesday or at 8:00 a.m., whichever is applicable.	Parent 1	Parent 2
Easter weekend	Starts when school is released for the holiday weekend and ends at 8:00 a.m. on the day school recommences after the holiday weekend.	Parent 2	Parent 1
Spring Break, if one is designated separately from Easter	Starts when school is released for Spring Break and ends at 8:00 a.m. on the day school begins after the break. If a spring break is not granted by the school, this provision would not apply. Also, if the spring break is combined with Easter, this provision would not apply.	Parent 1	Parent 2
Mother's Day	Starts at 8:00 a.m. on Mother's Day and ends at 8:00 a.m. on Monday; one overnight.	Parent 1	Parent 1
Memorial Day weekend	Starts when school is released on Friday or 3:15 p.m., whichever is applicable, and ends when the children are returned to school on Tuesday or at 8:00 a.m., whichever is applicable.	Parent 2	Parent 1
Juneteenth	Starts at 8:00 a.m. on 6/19 and ends at 8:00 a.m. on 6/20	Parent 1	Parent 2
Father's Day	Starts at 8:00 a.m. on Father's Day and ends at 8:00 a.m. on Monday; one overnight.	Parent 2	Parent 2
4th of July	Begins July 3 at 5:00 p.m. and ends July 5 at 5:00 p.m.	Parent 1	Parent 2
Labor Day weekend	Starts when school is released on Friday or 3:15 p.m., whichever is applicable, and ends when the children are returned to school on Tuesday or at 8:00 a.m., whichever is applicable.	Parent 1	Parent 2
Native American Day weekend	Starts when school is released on Friday or 3:15 p.m., whichever is applicable, and ends when the children are returned to school on Tuesday or at 8:00 a.m., whichever is applicable.	Parent 2	Parent 1
Halloween	Starts on 10/31 when school releases for the day or 3:15 p.m., whichever is applicable, and concludes on 11/01 when school resumes or at 8:00 a.m., whichever is applicable.	Parent 1	Parent 2
Thanksgiving weekend	Starts when school releases on Wednesday or 3:15 p.m., whichever is applicable, and ends Monday at 8:00 a.m.	Parent 2	Parent 1

Christmas Eve	Starts on 12/23 at 8:00 a.m. and concludes on 12/25 at 8:00 a.m.	Parent 2	Parent 1
Christmas Day	Starts on 12/25 at 8:00 a.m. and concludes on 12/27 at 8:00 a.m.	Parent 1	Parent 2
1st half of winter break	The winter break starts when the day the children are released from school for the break and continues to the morning of the day the children return to school. The 48-hour parenting times for each Christmas Eve and Christmas Day are not included in the division of the winter break.	Parent 1	Parent 2
2nd half of winter break, including New Year's holiday	The winter break starts when the day the children are released from school for the break and continues to the morning of the day the children return to school. The 48-hour parenting times for each Christmas Eve and Christmas Day are not included in the division of the winter break.	Parent 2	Parent 1
Children's Birthdays	Starts 8:00 a.m. on date of birthday – 8:00 a.m. the next day (If the birthday falls on a holiday, the parenting time for the birthday shall take place the day before); parenting time shall be with all of the children not just the one who has the birthday.	Parent 2	Parent 1
Parent 2's Birthday	Starts 8:00 a.m. on date of birthday – 8:00 a.m. the next day (If the birthday falls on a holiday, the parenting time for the birthday shall take place the day before).	Parent 2	Parent 2
Parent 1's Birthday	Starts 8:00 a.m. on date of birthday – 8:00 a.m. the next day (If the birthday falls on a holiday, the parenting time for the birthday shall take place the day before).	Parent 1	Parent 1

26. That as to the fitness, temporal, mental, and moral welfare, the Court finds that neither party has an advantage, and as noted both parties are in good health.

27. That the Court finds it appropriate that both parties and the children continue in counseling until their respective counselors are of the opinion, they no longer need counseling.

28. As to the capacity of each parent to provide the children with protection, food, clothing, medical care, and other basic needs, the Court finds that neither party has an advantage in this category.

29. Either party would be a suitable custodian of the children.

30. Both parties have an appropriate dwelling to support physical custody of the children. Both parties have a safe, comfortable home to allow the children to grow up in a healthy environment. Both parties provide food, clothing, and basic necessities to the children. To

the extent the children have individual comfort items, those items should be allowed to go back and forth between homes.

31. The parties both live in close proximity to each other in Fort Pierre, South Dakota.

32. The Court finds that both parties are able to provide love, affection, guidance, education, and to impart their families' religion or creed to the minor children.

33. Both parties are able to ensure the children have fulfilling childhoods.

34. Heidi shall continue to take the children to Awana on Wednesdays. In the event Awana falls during John's regular parenting time, he shall be responsible for transportation to and from the church. To the extent parental involvement is needed or expected at Awana, Heidi will be the parent responsible for doing so. John shall be allowed to continue to involve the children in Catholic mass or Sunday school during his regular parenting time.

35. As to the willingness or ability of each party to maturely encourage and provide frequent and meaningful contact between the children and the other parent, the Court finds that John has the advantage under this factor.

36. The Court finds it troubling that Heidi has nothing positive to say about John and that Heidi even questions whether John loves the minor children. On the other hand, John recognizes Heidi is a good mother to the children.

37. Heidi itemized a list of common childhood illnesses and injuries that she specifically attributed as solely John's fault. The Court finds her assignment of fault and blame is misplaced.

38. John is the father of the minor children, and the Court would strongly encourage Heidi to refer to him as dad in front of the minor children. By directly or indirectly, encouraging the children to refer to their dad as "John," Heidi is intentionally interfering with John's relationship with the children.

39. A source of frustration for the parties was Heidi's unwillingness to abide by the right of first refusal. On two separate occasions, John was able to confirm Heidi was not abiding by the right of first refusal. This was corroborated by the testimony of Heidi's father. The Court found Heidi's testimony regarding her willingness to abide by the right of first refusal throughout the divorce proceedings and leading up to the filing of the protection order disingenuous.

40. Heidi filed an ex parte protection order against John in February of 2022 in an effort to completely limit John's contact with the minor children for a period of five years. The ex parte protection order was granted by a judge not familiar with the lengthy litigation history between the parties. The ex parte protection order was later amended to remove the children as protected parties. The ex parte protection order stayed in effect, by agreement of the parties, until the divorce trial.

41. Heidi's description of John's stalking behavior by following, parking, waiting, and watching her, is completely misleading.[2]

42. On two occasions, when John accurately suspected Heidi was violating the right of first refusal, he parked and/or drove to a location to confirm where he assumed Heidi would have to travel in furtherance of her disobedience of the court-ordered right of first refusal. In the context of this case, the Court determines his actions were for a legitimate purpose.[3]

43. The Court finds that Heidi filed the protection order in retaliation for being "caught" purposely violating the court ordered right of first refusal. The Court did not find Heidi's testimony that she was fearful of John credible but does find Heidi was upset and anxious because of these encounters.

44. Heidi made multiple police reports alleging John had violated the protection order when he attempted to be involved in medical appointments or activities of the children. None of the reports resulted in charges being filed against John by the prosecuting authorities.

45. The psychological and emotional needs and the development of the children would suffer if they did not have active contact with both John and Heidi. John is their father in every sense of the word.

46. As to the commitment of each party to prepare the minor children for a responsible adulthood, as well as to make sure that the minor children have positive experiences and a fulfilling childhood, the Court finds that neither party has an advantage on this factor.

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[2] Although the parties waived written findings of fact and conclusions of law in 58TPO24-3, the Court is making limited additional written findings to the extent the issues relate to the custody dispute.

[3] The Court does not necessarily condone this behavior and acknowledges the appropriate remedy would have been to involve the Court to address his suspicions that Heidi was violating the court-ordered right of first refusal. Nonetheless His actions were not willful, malicious, or repeated. Nor were they intentionally done to vex, annoy, or cause injury.

47. The Court finds that both parties are equally capable of exemplary modeling so that the minor children can see first hand what it means to be a good parent and responsible citizen. Neither party has an advantage on this factor.

48. The Court finds as to stability that each parent is capable of making certain the minor children have interaction with parents, stepparents, siblings, and extended family. Neither party as the advantage on this factor.

49. Heidi is close to her father and his wife and her mother and her husband. She actively includes the grandparents in the children's lives.

50. John is close to his stepmother and actively includes the grandparents and Heidi's extended family in the children's lives.

51. Heidi has a strained relationship with her siblings. John has developed a relationship with Heidi's siblings to ensure a relationship with those siblings and their children. The Court reviewed multiple e-mail messages between John and Heidi's siblings throughout the course of the litigation. The parties were far to preoccupied by what Heidi was doing on a day-to-day basis. The Court does not condone the behavior of John and Heidi's siblings in the year after Heidi's affair was discovered. The parties collectively took steps to discredit and hurt Heidi by sharing the details and reasons for the divorce with members of Heidi's extended family. This type of activity cannot continue and is contrary to the children's best interests. Importantly, the Court finds that John has since recognized this behavior is harmful and it has ceased.

52. As to the children's adjustment as to home, school, and community, the Court finds that the minor children are well adjusted to each and neither has any advantage in this factor. The Court makes this finding based on all of the information and the report as well as all collateral contacts and witness testimony offered at trial.

53. The children are well bonded with both parents and neither parent has any advantage in this factor.

54. The children have been subjected to a great deal of stress as a result of the ongoing proceedings in this matter manifesting in physical symptoms. The children are currently in counseling to help the children cope with this stress. This counseling should be continued to ensure the children remain well adjusted and continue to adjust to the transition of increased parenting time by John.

55. The Court finds that when the minor children were younger that Heidi was the primary physical caretaker of the minor children. John was in the military which impacted his ability to be in the home full time throughout the marriage. The Court also finds that John was very involved and capable of providing care to the minor children as well. He was the primary physical caretaker of the children while Heidi was away from the home pursuing her nursing degree.
56. As to continuity in care, and based on the prior parenting time order of this Court, the Court finds that neither party has an advantage in the continuity in care.
57. As to harmful parental conduct, this Court finds that Child Protection Service ("CPS") mandatory reports were made during the pendency of the divorce action against John.
58. The Court finds that CPS followed protocols and that the minor children each were interviewed in a forensic setting.
59. The Court is confident and comfortable that CPS has done their job and the Court finds that there has been no abuse or neglect of the minor children which has occurred in this case.
60. The Court further heard the explanations from Patty Jonas and Lindsey Bruckner on what information was relayed to them by the minor children and the reasons they both felt compelled to report information to DSS. The Court is not concerned that there was any parental misconduct by John.
61. The Court also heard testimony about bruises on Whitley's arm that were ultimately attributed to John's stepmother. John shall not allow the children to be with his stepmother unsupervised.
62. Lindsey Bruckner reviewed all of the information relevant to the CPS investigation, including the information she relied upon in making her personal referral to DSS, and determined there was no parental misconduct by John.
63. The Court does not find any parental misconduct by John.
64. The Court reviewed the CPS reports included and relied upon by Lindsey Bruckner and does note Heidi's characterization and insistence that John is not the children's father, is concerning and telling of her current ability to promote a positive relationship between the children and John.

65. The children both reported John uses spanking as a form of discipline which is not parental misconduct if the force used is reasonable in manner and moderate in degree. The Court has specifically recommended a Common Sense Parenting Class for John, which will provide alternative tools for discipline. In a situation when both parents do not believe spanking is an appropriate form of discipline, neither party shall be allowed to utilize it when discipling the children.

66. Heidi testified that she believed she was a victim of domestic abuse by John during the marriage and during the pendency of the divorce. Heidi proffered an expert witness in the cycle of domestic violence. Heidi believed that John's actions during the pending divorce matter were meant to control, isolate, and intimidate her. She also alleged he utilized his position in the community and financial means to do so. The Court specifically finds that these allegations are unfounded and unwarranted.

67. Heidi was deceitful during the marriage and John has found it hard to trust Heidi. John inappropriately responded to the breach in trust and acted unfairly to Heidi during a period of time the divorce action was pending. Unfortunately, these are common forms of marital misconduct and treatment towards spouses in contentious divorces. Both parties will need to make an active effort to focus on the future, not the past, for the sake of the children.

68. The Court finds that there was no domestic abuse by either party during the marriage.

69. As noted by Dr. Hughes, and based on the observations of the Court, Heidi lacks apparent knowledge of how her behaviors may have resulted in the dispute. Further there was no evident acknowledgement of any responsibility for the effect her behaviors may have had on John during the time of the marriage, or how her actions impact the parties' relationship and ability to co-parent.

70. The safety of the children will not be jeopardized by an award of joint physical custody.

71. Due in large part to the right of first refusal disputes and the activities leading up to filing of the protection order and the fact that a protection order was pending during the Spring and Summer of 2024, the parties have had difficulty showing mutual respect and effectively communicating. The Court finds both parties are highly intelligent, organized, and successful and have the ability to communicate for the needs of the children.

72. The Court finds that generally, the parties have a similar approach to daily child rearing matters. Both parties want religion to be incorporated in the children's lives. Both parties

value education and see the importance of fostering learning for the children. Both parties agree the children should be active in extracurricular activities they enjoy. Both parties recognize the importance of contact with extended family.

73. Shared parenting requires the parents to have substantial and regular interaction on many issues. Heidi has shown difficulty supporting the children's relationship with John. These issues would be present regardless of the amount of time the children spend with each parent.

74. Heidi is opposed to shared parenting. John is supportive of shared parenting.

75. The pending length and the type of issues presented in this case certainly resulted in a high-conflict situation. Heidi's deceit during the marriage and John's inappropriate response when being confronted with the same, has caused hurt and mistrust for both parents.

76. Both the Court, Lindsay Bruckner, and the parties acknowledge that the current communications and interactions between the parties is strained. It would make immediate shared parenting difficult on the parents and the children.

77. Despite this high-conflict divorce, the Court does not find any reason that shared parenting cannot occur in this case subject to this Court's finding of fact regarding the delay to transition to such equal parenting time schedule starting after the Fourth of July holiday in July of 2025.

78. Shared parenting is in the best interests of the children. They deserve continued and equal contact with both John and Heidi.

79. The Court has built in a longer than usual transition time to full shared parenting to address some of these concerns, including a time period for continued counseling, parenting classes, utilization of a parenting coordinator, and use of a parenting communication app. The parties need to focus on effectively communicating and showing mutual respect for each other.

80. The Court finds that transitioning to full Shared Parenting when both children are in school is appropriate as it will reduce the amount of contact the parents will have with each other during exchanges.

81. Heidi expressed her desire to have detailed rules in place so both parties are clear on expectations. The Court finds that once the "rules" and parenting time agreement is established neither party will have trouble following the agreement. Both parties are highly

intelligent, educated, and organized. It was specifically noted in his psychological testing that John is a rule-follower.

82. That the Court finds it appropriate to allow Heidi to determine whether week on/off parenting time or whether a two–two–three or two-five parenting time plan is more workable for the parents. The Court is not delegating its authority to Heidi to determine what is in the best interests of the children, rather the Court is allowing Heidi the ability to determine the amount of contact she wants to have with John based on her perceived issues and how much progress the parties make in co-parenting communication within the next few months.

83. The children will be able to adjust appropriately to any schedule and deserve to have equal time with each parent. Heidi shall provide notice of such decision to John no later than sixty (60) days prior to the July date identified.

84. The Court finds it appropriate that after the summer transition date identified, unless agreed to in writing, exchanges shall continue to occur at school, daycare, or Casey's general store as previously ordered by the Court.

85. Both parties shall enroll and take the CrossRoads of Parenting and Divorce class in Sioux Falls on October 25, 2024.

86. John shall attend a Common Sense Parenting Class. John's post trial request to delay such class to the next cycle is hereby granted.

87. The Court finds that the counseling record treatment notes of the minor children shall remain confidential and shall not be requested or accessed by either party to ensure the children's ability to be open and honest with their therapist without fear of reprisal from the parents.

88. John agreed, and the Court finds it appropriate, that when John leaves the neighborhood, he will take a route that does not pass by Heidi's house.

89. If the parties cannot agree after having meaningfully and reasonably conferred on the same, Heidi shall be allowed to make decisions as to school and medical issues. If John does not agree with the decision made by Heidi, John may file a motion with the Court and the Court will address the same.

90. Heidi is medically trained and well-suited to make decisions regarding medical issues.

91. Heidi will be responsible for making all the medical, dental, optometry, counseling, and related appointments. The parties will alternate which parent takes the minor children to medical, dental, optometry, counseling, and related appointments. Special appointments for Stryker's ongoing medical issues, or other major medical issues that may arise in the future, may be attended by both parents.

92. Father's monthly gross income is $14,661 and his monthly net income is $10,823. *See* SDCL 25-7-6.3, SDCL 25-7-6.7. Father's income is calculated as follows:

    a. Father works full time for the Veterans Administration (GS 14 Step 5). As of pay period ending August 10, 2024, Father had earned a gross income of $96,043.39 or $13,121 per month.[4] *See* Exhibit 18 at 35; SDCL 25-7-6.3(1) and (8). $96,043.39 ÷ 7.32 months = $13,120.68 → $13,121

    b. Father also receives military disability in the amount of $1,539.88. *See* Exhibit 181-2.

    c. Father contributes $105 per month to qualified retirement. *See* Exhibit 18 at 35. (There is no documentary support for the $1,393 used in Plaintiff's calculation.) $767.79 ÷ 7.32 months = $104.89 → $105.

93. Mother's monthly gross income is $5,261 and her monthly net income is $4,275. *See* SDCL 25-7-6.3. Mother's income is calculated as follows:

    a. Mother works full time as a nurse consultant for the State of South Dakota, earning $30.35 per hour, or $5,261 per month. *See* Exhibit 18 at 11; SDCL 25-7-6.3(1). $30.35/hr x 40 hrs/wk x 52 wks/yr ÷ 12 mo/yr = $5,260.67/mo → $5,261

    b. Mother contributes $163.89 per pay period or $328 per month to a qualified retirement. 163.89 x 2 = 327.78 → $328. S*ee* Exhibit 18 at 11.

94. Father's base child support is $2,125 per month, which is calculated as follows:

    1. The parties' combined monthly net income is $15,098.

    2. The total support obligation for two children at this combined monthly net income is $2,952. *See* SDCL 25-7-6.2.

    3. Mother's proportionate share is 28% and Father's proportionate share is 72%. *See* Exhibit A attached.

[4] It should be noted that not all of Father's income is taxable, but for purposes of this calculation, it has treated it as such.

95. Father has met his burden "to demonstrate the increased costs that the noncustodial parent incurs for non-duplicated fixed expenditures, including routine clothing costs, costs for extra-curricular activities, school supplies, and other similar non-duplicated fixed expenditures."

96. Father is entitled to an abatement of 50% for the number of nights he has the children, which is every Tuesday overnight, and every other weekend from Friday through Monday. This is 6 overnights every two weeks, or 156 nights per year. Father is entitled to an abatement of $454 per month. *See* SDCL 25-7-6.14.

97. Father provides health insurance coverage for the two minor children, totaling $336 per month. *See* Exhibit 18 at 1. Mother's share of this is $94. Mother also provides health insurance coverage for the two minor children, totaling $238 per month. Father's share of this is $171. *See* SDCL 25-7-6.16. The parties agreed and the Court ordered that both insurance plans and their respective expenses be factored into support.

98. Father's total monthly support obligation is the base support, less the abatement, less Mother's share of his health insurance policy for the children, plus his share of Mother's health insurance policy for the children. $2,125 - $454 – (336 x .28) + (238 x .72) = $2,125 – $454 – $94 + $171 = $1,748.

99. Child support arears up to the month of trial were settled. However, Father owes Mother for the difference of what he has paid and what is due for the months of September, October and November. That is ($1,748 – 1,168) x 3 = $1,740.

100. The parties shall, prior to July of 2025 when shared parenting is enacted, try to meet and work with attorneys to determine a modified amount of child support as well as address the additional children's expenses that are to be identified and paid based on the then existing income differential of the income of the parties. If unable to agree, either party may move to modify child support under the shared parenting formula.

101. That the Court finds it appropriate to appoint a parenting coordinator. This will help mitigate the Court's concern regarding the parents' current ability to communicate. The Court hereby appoints Ms. Dava Wermers. The Court finds it appropriate that the cost of Ms. Wermers be split between the parties based on the now existing or later modified income differential identified in the child support calculation, subject to Ms. Wermer's

right to reallocate the costs of the parenting coordinator time if she believes either party's actions, conduct, or time spent with the parenting coordinator justifies such reallocation. Ms. Wermers is directed to facilitate a workable shared parenting plan for the parties prior to August 15, 2025.

102. This Court's prior ex parte order from Sperry v. Kerby (58TPO24-3) regarding FaceTime shall become an Order of this Court in this divorce action. To that end, this Court finds it appropriate to allow FaceTime or other video calls between the off-duty parent and the children once per day between 5:00-5:30 p.m. daily, unless otherwise agreed to in writing by the parties.
103. The Court finds it appropriate that both parties shall exchange their proposal on the activities of the minor children for the upcoming year no less than two weeks prior to the start of school through Our Family Wizard.
104. For summer activities for the minor children, the parties shall exchange their proposals no later than May 1st of each year through Our Family Wizard. The parties are encouraged to confer even earlier than such date if necessary to assure that summer activities can be addressed and resolved in a timely fashion.
105. If unable to agree on school activities, or summer activities, the parties shall utilize the parenting coordinator to try to work out any disagreement.
106. The Court hereby reaffirms its prior Order as to Mr. Tyler Tatman and finds that until further order of this Court, or until both children reach the age of majority, that there be no contact between Mr. Tatman and the minor children nor shall any party facilitate any such contact. The Court does not find any such contact is in the best interests of the minor children.
107. The Court hereby finds it appropriate to remove the right of first refusal with one exception. That exception shall be if either party is out of town for forty-eight (48) hours straight (two overnights), then each party must first offer parenting time to the other parent prior to making any other arrangements for childcare.
108. For a period of one year, the Court finds it appropriate that neither party shall come within one hundred (100) feet of the residence of the other party. For a period of one year, the parties will also not come within one hundred (100) feet of the employment of the other party absent genuine medical, business, or an actual emergency dealing with the minor

children or if John, or the children, or his stepmother, has a medical appointment in the Avera medical institution or business appointment in the State building in which Heidi is employed. For that purpose, and in the rare chance either was to see the other, neither party shall communicate with the other.

109. The Court finds that as it pertains to traveling with the minor children, that as long as the state borders the State of South Dakota, that no advance notice be given, or consent obtained.

110. If either parent is flying with the minor children, or going out of country, that parent shall give notice as soon as the plane tickets are purchased and shall generally let the other parent know where they are going or staying in case of emergency.

111. That each party shall be afforded seven (7) days for their summer vacation with the minor children, and that such parenting time shall occur, unless a genuine and unavoidable reason exists otherwise, on that parent's week of parenting time.

112. That the Court finds that it is appropriate that the parties promptly start utilizing Our Family Wizard to exchange information regarding the children. John shall seek out if a military discount exists, and enroll, and the actual cost of Our Family Wizard shall be borne by the parties in relation to the current or then existing income differential identified by the child support calculation.

113. That the Court finds that had it been presented the Petition for Protection Order, and the facts contained therein, that it would not have granted the ex parte interim protection order. As noted, the Court has via separate Order previously dismissed the same.

114. Both parents shall refrain from making disparaging remarks to the children about the other parent, future romantic partners, family, or friends of the other parent, and that both parents shall encourage the children to have a positive perception of the other parent. Both parents shall be respectful of the children's right to have a positive relationship with the other parent and should not question them excessively about the time spent with the other parent.

115. Future romantic partners or significant others shall not be introduced to the children absent agreement from the parties, or permission from the Parenting Coordinator.

116. In John's Second Amended Complaint he alleged both negligent and intentional infliction of emotional distress against Heidi and her paramour, Tyler Tatman.

117. Tyler Tatman was dismissed as a defendant pursuant to a Mediated Settlement Agreement.

118. John alleged the Defendants underwent a course of conduct that was willful, wrongful, intentional, negligent, and a malicious interference with the relationship and marriage of John and Heidi and it resulted in serious emotional distress and injury as a direct and proximate cause to John. Heidi denied the same.
119. Heidi alleged in her Counterclaim that John had undertaken a course of conduct toward Heidi that was willful, wrongful, intentional, negligent, and malicious and it resulted in serious emotional distress and injury to Heidi which manifested in physical symptoms. John denied the same.
120. The actions complained of by both Heidi and John do not exceed the common emotional torments accompanying adultery, a deteriorating marriage and a contentious divorce.
121. The parties resolved all issues of the divorce, including waiver of alimony, by a Stipulation for Property Settlement and Alimony Waiver. The divorce was granted by the Court on irreconcilable differences pursuant to the Stipulation.
122. Blame lies with both parties for the contentious nature of this proceeding. The Court has observed that deteriorating marriages and divorce does not always bring out the best in people. Any of the findings made herein should not discount the amazing parents John and Heidi are to their children.
123. Further pursuit of the negligent or intentional tort claims would severely hinder the parties' ability to move forward and successfully co-parent their children.
124. Neither party identified any physical symptoms as a result from the alleged conduct. The stress described by the parties is common in these types of situations and the parties have been able to engage in counseling to help provide support and relief.

CONCLUSIONS OF LAW

1. The Court hereby incorporates all terms and conditions associated with its Judgment and Decree of Divorce entered on September 10, 2024, and which incorporated the Stipulation for Property Settlement and Alimony Waiver signed by the parties on September 9, 2024, are hereby incorporated herein.
2. The trial court has broad discretion in awarding custody of minor children and likewise visitation rights. Pieper v. Pieper, 2013 S.D. 98, ¶ 11, 841 NW2d 781, 785. When trial courts make custody determinations, they are "guided by consideration of what appears to

be for the best interests of the child in respect to the child's temporal and mental and moral welfare." SDCL 25-4-45. We have described this essential standard as the "brightest beacon" in child custody determinations. Zepeda v. Zepeda, 2001 S.D. 101, ¶ 13, 632 N.W.2d 48, 53.

3. In order to assist in its determination of a child's best interests, circuit courts utilize the factors set out in Fuerstenberg v. Fuerstenberg, 1999 SD 35, 591 N.W.2d 798. These include parental fitness, stability, primary caretaker, child's preference, harmful parental misconduct, separating siblings, and substantial change of circumstances. *Id.*
4. When looking at fitness of the parents, circuit courts may look at the following:

   (1) mental and physical health; (2) capacity and disposition to provide the [children] with protection, food, clothing, medical care, and other basic needs; (3) ability to give the [children] 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 [children] and the other parent; (5) commitment to prepare the [children] for responsible adulthood, as well as to insure that the child experiences a fulfilling childhood; and (6) exemplary modeling so that the children witness firsthand what it means to be a good parent, a loving spouse, and a responsible citizen. Schieffer v. Schieffer, 2013 S.D. 11, ¶ 17, 826 N.W.2d 627, 634 (quoting Kreps v. Kreps, 2010 S.D. 12, ¶ 26, 778 N.W.2d 835, 843-44). McCarty v. McCarty, 2015 S.D. 59, ¶ 13, 867 N.W.2d 355, 359-60.

5. When analyzing stability, the circuit court should look at the following subfactors:

   (1) the relationship and interaction of the [children] with the parents, step-parents, siblings and extended families; (2) the [children's] adjustment to home, school and community; (3) the parent with whom the [children have] formed a closer attachment, as attachment between parent and [children] is an important developmental phenomena and breaking a healthy attachment can cause detriment; and (4) continuity, because when [children have] 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 [children] might be gained. Roth, 2013 S.D. 48, ¶ 14, 834 N.W.2d at 340 (quoting Schieffer, 2013 S.D. 11, ¶ 17, 826 N.W.2d at 634); McCarty, 2015 S.D. 59, ¶ 17, 867 N.W.2d at 361.

6. Though the Fuerstenberg factors have become an accepted means of determining child custody disputes, a court is not, strictly speaking, required to examine them in its best interests determination. See McCarty, 2015 S.D. 59, ¶ 12, 867 N.W.2d at 359. This is because questions concerning the best interests of children involve unique, fact-intensive considerations and are much more nuanced than simply determining which parent fares better under a larger number of the Fuerstenberg factors. Flint v. Flint, 2022 S.D. 27, ¶¶ 28-30, 974 N.W.2d 698, 703. In sum, the circuit court must take a "balanced and systematic approach when applying the factors relevant to [this] child custody proceeding." *See* Roth v. Haag, 2013 S.D. 48, ¶ 13, 834 N.W.2d 337, 340 (quoting Schieffer, 2013 S.D. 11, ¶ 18, 826 N.W.2d at 634); McCarty, 2015 S.D. 59, ¶ 27, 867 N.W.2d at 363.
7. In considering a contested request for joint physical custody, in addition to the traditional factors for determining the best interests of a child, the Court shall consider the factors outlined in SDCL 25-4A-24.
8. Having considered the Custody Evaluation report of Ms. Lindsay Bruckner, as well as all other competent and admissible evidence, and based on this Court's findings above, the Court concludes that it is the best interests of the minor children to share joint legal and physical custody of Stryker John Kerby (DOB 7/26/18; age 6) and Whitley Jade Kerby (DOB 2/3/20; age 4), subject to the transition period and other terms and conditions of custody and parenting time identified in the findings above.
9. That the Court concludes and appoints Ms. Dava Wermers as a parenting coordinator and both parties, and their counsel, shall participate and cooperate in the drafting and ultimately the Court's entering of a Court Order on the same.
10. The Court concludes it is in the best interests of the minor children for the parties to utilize Our Family Wizard subject to the findings identified above.
11. That the Court concludes that Heidi failed to provide sufficient evidence to support, by a preponderance of the evidence, that a permanent Protection Order should be in place. The Court has previously dismissed the Petition for Protection Order based on a prior Order dated September 16, 2024.
12. That the Court concludes it appropriate that each party shall take the parenting class, or classes, identified in the findings above.

13. Father shall pay to Mother child support in the amount of $1,748 per month, beginning on September 1, 2024, and continuing on the first day of each month thereafter until each child reaches the age of 18, or until age 19 if he or she is a full-time student in a secondary school.
14. Father owes Mother child support arrears in the amount of $1,740, to be paid within the next thirty days.
15. Mother shall pay the first $250 of out-of-pocket health care expenses for each minor child annually. Thereafter, Father shall pay 72% of such expenses and Mother shall pay 28% of such expenses.
16. Both parties' health insurance coverage for the minor children will be maintained at the current rate, so long as it is accessible and affordable as defined in SDCL 25-7-6.16. The same has been and shall continue to be calculated into the parties' support obligation.
17. To avoid tort claims conceived out of familiar marital misconduct and petty spite for concessions, it is the court's duty to sift out unmeritorious suits. Christians v. Christians, 2001 S.D. 142, ¶ 40, 637 N.W.2d 377, 385 (Konenkamp, J., concurring specially). To survive the court's gatekeeping function the "extreme outrage committed by the offending spouse must far exceed the bitter but common emotional torments accompanying a deteriorating marriage." Christians, 2001 S.D. 142, 41, 637 N.W.2d at 385 (Konenkamp, J., concurring specially) (citing Hill v. Hill, 415 So.2d 20 (Fla. 1982)).
18. For conduct to be actionable under IIED "'it must be so extreme in degree as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community.'" Richardson v. Richardson, 2017 S.D. 92, ¶ 22, 906 N.W.2d 369, 376 (quoting Estate of Johnson ex rel. Johnson v. Weber, 2017 S.D. 36, ¶ 17, 898 N.W.2d 718, 726).
19. "The tort of intentional infliction of emotional distress 'is especially appropriate for a continuing pattern of domestic abuse.'" Richardson, 2017 S.D. 92, ¶ 23, 906 N.W.2d at 376 (quoting Christians v. Christians, 2001 S.D. 142, ¶ 38 n.3, 637 N.W.2d 377, 385 n.3).
20. "'Proof under [IIED] must exceed a rigorous benchmark.'" Estate of Johnson by and through Johnson v. Weber, 2017 S.D. 36, ¶ 17, 898 N.W.2d 718, 726 (quoting Harris v. Jefferson Partners, L.P., 2002 S.D. 132, ¶ 11, 653 N.W.2d 496, 500). A prima facie case for IIED requires a showing of "(1) extreme and outrageous conduct by the defendant; (2)

that the defendant intended to cause severe emotional distress; (3) there must be a causal connection between the wrongful conduct and the emotional distress; (4) and severe emotional distress must result." Christians, 2001 S.D. 142, ¶ 23, 637 N.W.2d at 382 (quoting French v. Dell Rapids Community Hospital, Inc., 432 N.W.2d 285, 289 (S.D. 1989). "The law intercedes only when the distress is so severe that no reasonable person should be expected to endure it." Christians, 2001 S.D. 142, ¶ 42, 637 N.W.2d at 386 (Konenkamp, J., concurring specially).

21. The Court finds that neither party has met the rigorous benchmark to allow further litigation on their respective tort claims. Specifically, neither party has met the benchmark to show his or her ex-spouse intended to cause severe emotional distress or that there was severe emotional distress that resulted in physical symptoms.
22. That all other findings identified above, to the extent that such findings address parenting time, custody, or the terms and conditions of such parenting time or conduct of either parent, is hereby incorporated as a conclusion of law by this Court.
23. The Court reserves the right to enter any subsequent Order necessary to effectuate the findings provided for herein.

Dated this 3rd day of December 2024.

BY THE COURT:

Margo D Northrup

Honorable Margo D. Northrup
Sixth Judicial Circuit Court Judge

Attest:
Marshall, Stephanie
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE NAME CHANGE OF S.J.K AND W.J.K
(58CIV24-000038)

Appeal No. 31021

Appeal from the Circuit Court, Sixth Judicial Circuit
Stanley County, South Dakota
The Honorable Margo D. Northrup, Presiding

APPELLANT'S REPLY BRIEF

Notice of Appeal was filed on March 5, 2025.

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PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellant Heidi Rai Sperry will be referred to as "Heidi." Defendant/Appellee John Franklin Kerby will be referred to as "John." References to the Settled Record will be made as "SR at ___." Findings of Fact (FOF) and Conclusion of Law (COL) will be referenced by number.

STATEMENT OF FACTS

Appellant relies on the Statement of Facts set forth in Appellant's Brief at pages 3-5. There are, however, a number of misstatements made in Appellee's Brief that must be corrected.

First, Appellee's Brief notes that the trial court presided over "a lengthy three-day *divorce* trial prior to conducting the [telephonic] evidentiary hearing on the Petition." (emphasis added). This is not correct. The parties were actually divorced by stipulation on September 10, 2024. Only the issues of custody, parenting time and child support were reserved for trial. SR at 2, 52; FOF 4. Notably, neither the issue of the surname-change nor any of the *Keegan* factors were addressed in that trial. *See Keegan v. Gudahl*, 525 NW2d 695, 698-99 (SD 1994).

Second, while the trial court did take judicial notice of the divorce and custody matter (58DIV21-000007), as well as the temporary protection matter (58TPO24-000003), it bears repeating that, with the exception of the parents' and

children's backgrounds,[1] none of the facts most relevant to the surname change (58CIV24-000038) were addressed in those previous matters. For example,

(1) Pursuant to Heidi's petition, the children's first and middle names would remain unchanged; only their surname would be changed from Kerby to Sperry-Kerby. SR at 2, 52; FOF 5.

(2) Mother has always maintained her maiden name, even after marriage to Father. SR at 53; FOF 6. Indeed, Mother testified that she has no intention of changing her surname in the future, even if she were to remarry. SR at 19, 22; HT at 4-5. "I've been very involved with the legacies of my family and the farm, and everything like that, and I do believe that I would never change my name and it's never been something that's crossed my mind." SR at 22; HT at 19.

(3) When Mother was pregnant, she asked that the children's surnames be hyphenated to "Sperry-Kerby" to incorporate *both* parents' surnames. SR at 18; HT at 4-5. Unfortunately, both children were born via emergency C-sections requiring Mother to be in recovery post-delivery. *Id.* Father completed the birth certificate paperwork to name both children and did *not* incorporate Mother's surname as she requested. SR at 18; HT at 5.

(4) Because of the family ties to the community, and in light of the divorce, it was important to Mother that the children be allowed to share in her family heritage by sharing her surname, just as well as Father's. SR at 19, 21-22; HT at 6-7, 14, 19. This would not only help the children identify and connect with both parents and their extended family, but would simplify identification in medical and school records when both parents would be co-parenting the children. *Id.*

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[1] Father is from Texas; he is an only child and both of his parents are deceased. SR 19; HT at 5. Mother and her extended family are from the Fort Pierre area where the parties still reside. SR at 1, 33. Both of the parties' two children, S.J.K. (born July 26, 2018) and W.J.K. (born February 3, 2020) were born in Georgetown, Williamson County, Texas. SR at 1; FOF 3. Neither party was found to have committed harmful parental misconduct. Both children identify with both parents. SR at 42; FOF 10.

(5) [I]ncluding both parents' surnames would help the community to connect and identify the children with *both* parents for medical appointments, schools, and extra-curricular activities. SR at 18-19; HT at 5-6. It would also solidify a sense of connection and belonging for the children with respect to both parents' families. SR at 19, 21-22; HT at 6-7, 14, 19.

Appellant's Brief at 3-5. More importantly, the only facts presented on these issues came from Heidi's testimony alone; she was the *only* witness. While John was present for the hearing and heard Heidi's testimony, he offered no testimony to refute or contradict it.

ARGUMENT

Historically, surnames or family names have symbolized a continuation of lineage, a connection to ancestors, and belonging in both societies and cultures. "The name a child carries is one of the first and most fundamental decisions that parents make. A child's name reflects tradition, heritage, and family pride. It is often a means of honoring loved ones and a way of giving a sense of belonging to the child." *Keegan v. Gudahl*, 525 NW2d 695, 697 (SD 1994). This tradition, heritage, pride and belonging should not be limited to only paternal lineage.

I. Contrary to Appellee's assertions, this Court's scope of review is not limited in this case.

"On appeal from a judgment, the Supreme Court may review any order, ruling, or determination of the trial court . . . ." SDCL 15-26A-7.

A. Heidi preserved her right to appeal by submitting her own proposed findings of fact and conclusions of law.

John asserts, "Heidi's failure to object, *or submit legal authority*, limits the scope of review on appeal." Appllee's Brief at 3 (emphasis added). But John's assertion misstates the rule. *See Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 2005 SD 82, ¶ 11, 700 NW2d 729, 733. Instead, this Court has explained:

> We held that the failure to *either* object to *or* propose findings or conclusions limited our "review to the question of whether the findings support[ed] the conclusions of law and judgment." *Id.* ¶ 11 (quoting *Premier Bank, N.A. v. Mahoney*, 520 NW2d 894, 895 (SD 1994)). We also cited *Selway Homeowners Association v. Cummings*, for a similar holding, explaining that because "the appellant failed to *either* object to findings of fact or conclusions of law proposed by the appellee, *or* propose findings of fact and conclusions of law of their own," our review was limited to determining "whether the findings supported the conclusions of law and judgment[.]" *Canyon Lake*, 2005 SD 82, ¶ 11, 700 NW2d at 733 (emphasis added) (citing *Selway*, 2003 SD 11, ¶ 14, 657 NW2d 307, 312).

Tri-City Assocs., LP v. Belmont, Inc., 2014 SD 23, ¶ 17, 845 NW2d 911, 916.

In other words, there are two methods by which a party may preserve an issue for appeal under the ordinary standard of review: (a) object to the opposing party's proposed findings and conclusions; ***or*** (b) submit your own proposed findings of fact and conclusions of law. *Id.* at ¶ 18. "Either alternative satisfies the purpose of the rule, which is to bring the issue to the attention of the circuit court for a ruling." *Id.* (citations omitted).

Moreover, the primary purpose of the trial court in ordering the parties to *simultaneously* submit proposed findings and conclusions is to conserve judicial economy by eliminating the unnecessary step of submitting objections that would require additional time, expense and ruling. Heidi properly preserved her right to appeal the issues presented herein because she timely submitted her own proposed findings of fact and conclusions of law regarding the same. To the extent that one party's proposed findings and conclusions differ from those of the other party, the trial court certainly had "notice" of the issues in dispute.

B. Heidi was not required to proffer legal precedent within her proposed conclusions of law.

Next, John argues that Heidi's proposed conclusions of law did not preserve her issues for appeal because she did not include legal authority therein. Appellee's Brief at 7. He claims, "[a] cite to legal precedent is a prerequisite to a conclusion of law[.]" *Id.* Ironically, John cites no legal precedent that supports this proposition.

SDCL 15-6-52(a) provides direction for the submission and adoption of findings of fact and conclusions of law. "It is well settled that '[t]he intent of a statute is determined from what the Legislature said, rather than what we think it should have said'." *Smith v. WIPI Group, USA, Inc.*, 2025 SD 26, ¶ 45, ___ NW3d ___ (quoting *Reck v. SD Bd. Of Pardons and Paroles*, 2019 SD 42, ¶ 11, 932 NW2d 135, 139 (additional citation omitted)). Applying that rule here, there is no language in SDCL 15-6-52(a) requiring the inclusion of legal precedent or

case citations within either findings of fact or conclusions of law. *Ibid.* ("In conducting statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole.").

Heidi filed her motion pursuant to the mandates of SDCL Ch 21-37, which provided the trial court with authority for ruling on the same. She presented her evidence at hearing and, consistent with the trial court's order, she timely (and simultaneously with the opposing party) submitted her own proposed findings of fact and conclusions of law. SR at 34.

John points to *Weber v. Weber*, 2023 SD 64, 999 NW2d 230 for support of his claim. *Weber* was an appeal from the trial court's unequal property division at the end of a four-year marriage; husband challenged what he believed was a disproportionate and inequitable award to wife, largely due to wife's inheritance and the parties' relative contributions during the marriage. *Id.* at ¶¶ 20-21. But husband also raised the issue of spousal support on appeal, to which the wife objected because "he failed to request spousal support or present any evidence regarding this issue to the circuit court." *Id.* at ¶ 23. Nor did he propose any findings of fact or conclusions of law relative to spousal support. *Id.* This Court concluded, "[husband's] attorney affirmatively relinquished any issue except the division of property by stating . . . 'I believe the only issue here is going to be property division'." *Id.* at ¶ 25. Thus, this Court found that husband had waived any such claim for review on appeal. *Id.*

While John claims that "this is the precise scenario" in the case at bar, that simply is not true. Appellee's Brief at 8. Heidi's requested surname change was actually presented to the trial court (indeed, hers was the only evidence offered) and nowhere in *Weber* is there any language requiring legal precedent to be cited within proposed findings of fact or conclusions of law.

John also points to *Tri-City Assocs., LP v. Belmont, Inc.*, in support of his position. Appellee's Brief at 2, 6-8. But as noted above, this case does not provide support for John's assertion either. 2014 SD 23, ¶ 17, 845 NW2d 911, 916. Nor is there any other statute or legal precedent offered in Appellee's Brief which states that Heidi is *required* to include legal precedent in her proposed findings of fact and conclusions of law in order to preserve a tried issue for appeal.

II. The trial court was improperly swayed by speculation and applied the wrong burden of proof.

The trial court rejected Heidi's request for the children's surname change because it *might* cause "potential confusion or embarrassment" for the children (FOF 8), the risk of future name-changes *could* be problematic (FOF 14), and because stability favored no additional changes for the children (FOF 6-7). But this decision was the result of an improper application of the best interest factors, improper speculation (no testimony or evidence was offered regarding "potential confusion or embarrassment" nor on any detrimental effect of potential future name changes) and the application of an improper burden of proof.

A. Appellee improperly conflates the *Fuerstenberg* child custody factors with the *Keegan* name change factors.

John begins his argument with incorrect cites to the standards of review "in a *child custody* proceeding." Appellee's Brief at 5. Indeed, the trial court's Conclusions of Law 3 through 5 cite the *Fuerstenberg* factors, rather than the *Keegan* factors. This is not a child custody proceeding. Nor are the factors, facts, circumstances, or outcomes the same. While it is possible there may be some overlap in the facts, it is important to understand that the standard is not identical.

It is undisputed that, "[t]he best interest of the child govern a child's name change." *In re J.P.H.*, 2015 SD 43 at ¶ 10, 865 NW2d at 490 (citing *Keegan v. Gudahl*, 525 NW2d 695, 698-99 (SD 1994)). However, the factors for determining the best interests of a child in a custody dispute are ***not*** the same factors for determining the best interests of a child in a name-change dispute.

> In determining the best interest of the child ***in a name change dispute***, factors for the court to consider include, but are not limited to: (1) misconduct by one of the parents; (2) failure to support the child; (3) failure to maintain contact with the child; (4) the length of time the surname has been used; and (5) whether the surname is different from that of the custodial parent.

Id. (emphasis added) (additional citations omitted). The court may also consider whether the change might alienate a non-custodial parent. *Id.* (additional citations omitted).

As mentioned above, the trial court found there was no parental misconduct, no failure to support the children, and no failure to maintain contact with the children. The length of time they have had their surname is 5-6 years,

respectively. This leaves the question of "whether the surname is different from that of the custodial parent." *Id.*

The trial court concluded that this factor was not an issue because Heidi had always maintained a different surname and the children's current surname was "stable." FOF 6-7. But in *J.P.H.*, this Court disagreed, noting, "[i]t is significant to the child that the surname is different from that of the custodial parent and the family and community setting where he spends the majority of his time." *In re J.P.H*, 2015 SD 43 at ¶ 11, 865 NW2d at 490. While the parties are soon transitioning to shared parenting, Heidi is nonetheless a "custodial parent."

Additional factors have been addressed in various states. For example, in *H.G.by K.B.*, the factor of ***how*** the children obtained their surname was found significant. 702 SW3d 230, 236 (MoCtApp 2024) (affirming hyphenation to add father's surname, when mother had denied father's input in initial selection). This Court seemed to agree in *Keegan*, holding one parent should not gain an advantage over the other from a unilateral act in naming the child. *Keegan*, 525 NW2d at 699-700. And neither parent has any right superior to the other based upon their gender. *Id.*

The same is true here. Heidi testified that, while she was in post-surgery recovery from emergency C-sections, John disregarded her wishes and completed the paperwork to assign each child only his surname. Only ***one*** witness testified at the evidentiary hearing in this matter. Only Heidi offered any evidence on this subject.

While the trial court relies on "stability" as a factor, it should be considered differently in the context of a name change. *See Fuerstenberg v. Fuerstenberg*, 1999 SD 35, ¶ 26, 591 NW2d 798, 808; *In re J.P.H.*, 2015 SD 43 at ¶ 10, 865 NW2d at 490 (citing *Keegan v. Gudahl*, 525 NW2d 695, 698-99 (SD 1994)) (identifying best interests factors for name change). As previously explained in Appellant's Brief, even if the trial court considers stability in a name-change context (e.g. how long the children have maintained their current surname), it means *more* than just continuity; stability includes "the relationship and interaction of the child with the parents, step-parents, siblings and extended families," as well as "the child's sense of sustainment and belonging." *Fuerstenberg*, 1999 SD 35 at ¶ 26, 591 NW2d at 808 (internal citations omitted). In other words, the real question is whether adding Heidi's surname to the children's surname would support or enhance their "sense of sustainment and belonging." *Id.* Again, Heidi's testimony, the ***only*** testimony offered on this subject, was in the affirmative.

Heidi is not asking to *remove* John's surname; she is merely asking to *add* hers. While the trial court acknowledged its concerns over "issues with identity" in the underlying custody dispute,[2] no one presented any evidence of how *adding Heidi's surname* might cause any identity confusion for the children. Any

[2] This was largely because of the parties' divorce and Heidi's initial unwillingness to refer to John as "dad." SR at 40. As previously mentioned in Appellant's Brief, the trial court acknowledged that Heidi's reticence was the result of pain, hurt, and distrust when John initially attempted to disestablish his paternity.

conclusions to this effect are purely speculation. *Estate of Gaspar v. Vogt, Brown & Merry*, 2003 SD 126, ¶ 8, 670 NW2d 918, 922 ("A trier of fact should refrain from unwarranted speculation, either for or against a litigant.").

Finally, the trial court's judicial notice of the previous cases is not a substitute for the evidence taken in this case. When a trial court takes judicial notice, it means the court recognizes certain adjudicative facts as established without requiring formal evidence to prove them. These facts must either be generally known within the court's jurisdiction or be capable of accurate and ready determination from reliable sources that cannot reasonably be questioned. *Mendenhall v. Swanson*, 2017 SD 2, ¶ 9, 889 NW2d 416, 419; SDCL 19-19-201. "However, a court may not judicially notice a fact simply because it was included in the findings of fact of a prior proceeding, as such findings are not indisputable and may be subject to appeal or further litigation." *Id.* at ¶ 9. "Factual findings from previous proceedings are not *per se* noticeable under Rule 201." *Id.* at ¶ 15.

Contrary to John's assertions, there can be no weighing of witness credibility when there was no competing testimony offered at the hearing. *See* Appellee Brief at 5 (citing *Van Duysen v. Van Duysen*, 2015 SD 84, ¶ 4, 871 NW2d 613, 614). Judicial notice of the divorce or protection order proceedings does not allow the trial court to disregard *un*controverted evidence offered in the case at bar in order to extrapolate what the court may personally believe *might* have happened when the children's names were given or what *could* happen in the

future. Instead, the trial court should fairly consider the *un*disputed facts presented. *Smith v. WIPI Group, USA, Inc.*, 2025 SD 26, ¶ 36, ___ NW3d ___.

B. The Trial Court applied the wrong burden of proof.

The trial court noted, "Petitioner has not met the burden of proving *a name change is necessary to effectuate her relationship with the minor children.*" [3] FOF 10 (emphasis added). The trial court also "incorporate[d] the Legal Precedent section as if set forth in these Conclusions of Law in Full." COL 2. Specifically, "The Court notes and believes it to be consistent with South Dakota law the Minnesota precedent that provides that the judicial discretion to make a change of a minor's surname against the wishes of one parent should be exercised with great caution and *only where the evidence is clear and compelling that the substantial welfare of this child necessitates such change*[.]" SR at 38 (emphasis added). Both of these *incorrectly* state the burden of proof and affirmatively demonstrate the trial court's error.

This Court has already considered and *rejected* the Minnesota standard applied by the trial court. *See In re J.P.H.*, 2015 SD 43 at ¶ 15, 865 NW2d at 491. Instead, this Court concluded, "[a] combined surname is a solution that recognizes each parent's legitimate claims and threatens neither parent's rights. The name merely represents the truth that both parents created the child and that both parents

[3] The real question is whether adding or failing to add Heidi's surname will contribute to the estrangement of the children from her as a parent wishing to foster and preserve the parental relationship. *In re J.P.H*, 2015 SD 43 at ¶ 11, 865 NW2d at 491.

have responsibility for that child." *Id.* at ¶ 12 (quoting *In re Willhite*, 706 NE2d 778, 782 (Ohio 1999)).

While the trial court here emphasized that Heidi's wishes are irrelevant in the name change decision (FOF 12), her testimony was nearly identical to the testimony relied upon in *J.P.H.*: "We want [Son] to feel as much a part of our family as [Father's] family. In my opinion, it's equal, you know, but we do have [Son] the majority of the time so we want him to be able to identify with our family." *Id.* at ¶ 4. Similarly, Heidi testified, "I think [] both our last names are important to both of us and I'm not trying to take anything away from John. I'm trying to *add* my last name because it's very important to me and my family's heritage[] to have more of a connection to both sides of the family . . . especially up here in the local area, . . . our family and our family farm and everything is up here[.] " (emphasis added). SR at 19; HT at 6; lines 22-25; HT at 7, lines 1-5.

John essentially skates over this issue, asserting only that the trial court appropriately considered the best interests of the child standard. But this wholly disregards the trial court's actual findings and conclusions, confirming it applied the wrong burden of proof.

CONCLUSION

For the foregoing reasons, Heidi respectfully urges the Court to reverse the trial court's decision and grant her request for the children's hyphenated surname. In the alternative, Heidi asks that this Court to remand this matter to the trial court

for rehearing under application of the appropriate best interest standard and burden of proof.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument.

Dated this 7th day of July, 2025.

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CERTIFICATE OF COMPLIANCE

Melissa E. Neville, attorney for Appellant, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

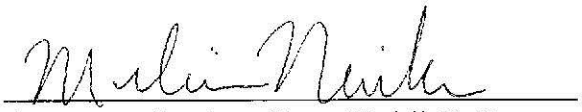
a. Appellant's Reply brief does not exceed 20 pages;

b. The body of Appellant's Reply brief was typed in Times New Roman 13 point typeface, with foot notes being in 12 point typeface; and

c. Appellant's Reply brief contains 3,585 words, 17,876 characters (no spaces), and 21,624 characters (with spaces), according to the word and character counting system in Microsoft Word for Microsoft 365 used by the undersigned.

Dated this 7th day of July, 2025.

BANTZ, GOSCH & CREMER, LLC



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CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, Heidi R. Sperry, hereby certifies that on the 7th day of July, 2025, a true and correct copy of **Appellant's Reply Brief** was filed electronically with the South Dakota Clerk of the Supreme Court through the Odyssey File & Serve with electronic service and notification sent to:

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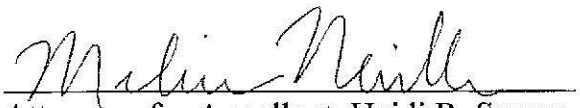

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