IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30808

BRIAN RAY JESSOP V. LISA JO COMBS

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

THE HONORABLE JOSHUA D. HENDRICKSON
Circuit Court Judge

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Defendant/Appellant Lisa Jo Combs n/k/a Lisa Jo Christopherson will be referred to as "Lisa". Plaintiff/Appellee Brian Raymond Jessop will be referred to as "Brian". The Parties' minor child, who is the center of this dispute, will be referred to as "B.J.J.". Reference to the settled record will be by the designation "R." followed by the page number(s). The Fundamentalist Church of Jesus Christ of Latter-Day Saints will be referred to as "FLDS". References to the June 4, 2024, trial transcript will be by the designation "TT1" followed by the page number(s). References to the June 5, 2024, trial transcript will be by the designation "TT2" followed by the page number(s).

JURISDICTIONAL STATEMENT

Lisa appeals the Court's August 15, 2024, "Findings of Fact and Conclusions of Law." R. 805-40. Notice of entry was served on August 21, 2024. R. 841-78. Per SDCL §§ 15-26A-3 & 4, it is a final order subject to appeal. Lisa timely filed and served her Notice of Appeal on August 21, 2024. SDCL § 15-26A-6; R. 879.

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request the privilege of appearing before this Court for Oral Argument.

STATEMENT OF LEGAL ISSUES

I. **Did the Trial Court Abuse its Discretion by Failing to Accommodate the Medical Emergency of a Key Witness?**

Yes. There was good cause for the trial court to continue the trial. Sam Brower had a unique perspective into FLDS, FLDS practices, the threat that FLDS posed to children, and Brian and his family's involvement with FLDS. His medical emergency was not within Lisa's control, and Lisa's continuance was not premised on an improper dilatory basis. The trial court's single rationale, that trial had been set for months, is an insufficient justification to ignore such a crucial witness.

- *Matter of Adoption of C.T.E.*, 485 N.W.2d 591 (S.D. 1992)
- *State v. Jackson*, 2020 S.D. 53, 949 N.W.2d 395
- *Fisher v. Perez*, 947 So.2d 648, 653 (Fla. Dist. Ct. App. 2007)

II. **Did the Trial Court Abuse its Discretion by Considering the Testimony of Brian's Wife After She and Brian Discussed the First Day's Proceedings, in Violation of the Court's Sequestration Order?**

Yes. The Rules of Evidence contemplate sequestration of witnesses because it inhibits collusion and dishonesty before the factfinder. Refusal to enforce the sequestration order encourages witnesses to tailor their testimony based on what other witnesses have said before them. The trial court improperly allowed Brian's wife to testify after she and Brian discussed, at length, the first day's proceedings.

- *State v. Johnson*, 254 N.W.2d 114 (S.D. 1977)

- *United States v. Engelmann*, 701 F.3d 874 (8th Cir. 2012).

III. Did the Trial Court Abuse its Discretion by Granting Brian Unsupervised Visitation?

Yes. The trial court ignored clear and convincing evidence that B.J.J. was conceived due to a nonconsensual sexual act. It also failed to consider B.J.J.'s best interests by discounting the danger that FLDS poses to her and by ignoring evidence that Brian was both an FLDS adherent and that Brian prevaricated about his FLDS beliefs.

- *Jasper v. Jasper*, 351 N.W.2d 114 (S.D. 1984)
- *Fuerstenberg v. Fuerstenberg*, 1999 S.D. 35, 591 N.W.2d 798
- SDCL § 25-5-7.1
- *Leppert v. Leppert*, 519 N.W.2d 287 (N.D. 1994)

IV. Did the Trial Court Abuse its Discretion not Awarding Lisa Attorneys' Fees?

Yes. An award of attorneys' fees is mandatory when a court grants a motion to compel, absent findings that resistance was substantially justified. The trial court declined fees and failed to disclose its rationale. Attorneys' fees are also available in custody cases. Due to the issues involved, she should have been awarded fees.

- SDCL § 15-6-37(a)(4)(A)
- *Beach v. Coisman*, 2012 S.D. 31, 814 N.W.2d 135
- SDCL § 15-17-38

INTRODUCTION

The trial court abused its discretion in multiple ways. First, it refused to accommodate the medical emergency of a key witness that occurred on the eve of trial. Second, it failed to adequately exclude the testimony of Brian's wife after he knowingly violated the trial court's sequestration order. Finally, it failed to consider B.J.J.'s best interests by ignoring the circumstances of her conception, failing to consider the danger FLDS poses to B.J.J., and by discounting Brian's ongoing affiliation with FLDS, its leadership, and its tenets. The trial court's order granting Brian unsupervised visitation was an abuse of discretion and should be reversed.

STATEMENT OF THE CASE

Brian initiated this matter via a Verified Parentage Petition, filed August 23, 2021. R. 1-8. He also filed and served a summons, but that summons failed to include a copy of the South Dakota Parenting Guidelines. R. 9-10. Lisa filed an Answer and Verified Counterclaim on October 4, 2021. R. 12-23. Brian's Answer to Counterclaim was filed on October 12, 2021. R. 24-28.

After Lisa moved for interim child support and for the trial court to appoint a custody evaluator, R. 78-84, the trial court appointed Dr. William Moss to prepare a report. R. 96-97. Dr. Moss filed his report on November 10, 2023. R. 105-14. The trial court scheduled a two-day trial for June 4-5, 2024, in Pennington County. R. 155.

On April 29, 2024, Lisa moved to compel full and complete discovery responses. R. 177-236. The Court granted the motion. R. 750-51. Lisa submitted her pretrial brief on May 21, 2024. R. 253-67; 273-426. On May 31, 2024, Lisa learned that a key trial witness had suffered a medical emergency and filed a motion to continue trial. R. 427-29. The trial court denied that motion. TT1 at 3:12-5:7.

Following trial, the trial court requested proposed findings of fact and conclusions of law; these were due July 3, 2024. TT2 at 96-97. The parties submitted competing findings and conclusions. R. 752-798. The trial court issued its Findings of Fact and Conclusions of Law on August 16, 2024. R. 805-40. Lisa filed and served her Notice of Appeal on August 21, 2024. R. 879.

STATEMENT OF THE FACTS

I. Brian was Raised in an FLDS Household and Continues to Follow FLDS Teachings

A. Brian was Raised in a Polygamous FLDS Household

Brian was raised in an FLDS household. TT1 at 67:7 ("I was born and raised FLDS."). Brian was born and raised in Hildale, Utah. R. 278. Hildale, along with Colorado City, Arizona, "is a religious settlement" straddling the Utah/Arizona border known as "Short Creek." *United States v. Town of Colorado City*, 935 F.3d 804, 806 (9th Cir. 2019). "Most residents are FLDS members and follow the teachings of Warren Jeffs, whom they sustain as a prophet and leader of

the Church." *Id.* In fact, the FLDS headquarters is located in Short Creek. TT2 at 8:17-19.

Brian's father, Richard Brian Jessop, is an active FLDS member. He practices polygamy and has five wives. R. 311. These wives are spread out over several states, including some who live as far away as 680 miles from Brian's father. R. 282. Brian has approximately 21 full or half-siblings, but he does not know where they all live. R. 280-81. Brian was homeschooled by his mother until ninth grade. R. 288. His curriculum included instruction on FLDS teachings. R. 290. Brian has no additional formal education. R. 289.

When Brian was 17,[1] he wrote a letter to Warren Jeffs, the self-proclaimed prophet of the FLDS, in prison. R. 342. No one pressured Brian to write the letter, and Brian admitted that he "took it upon [himself]" to write Jeffs. R. 343. Brian, however, could not seem to remember either the content or the tone of the letter. R. 343. Nonetheless, he did not believe that he, at any point, condemned Jeffs in the letter. R. 343.

B. The FLDS is a Designated Hate Group Associated with Child Sex Abuse and Polygamy

FLDS is a recognized hate group and considered a "sociological cult with no theological purpose." R. 810, 262. It has a history of child abuse, including forcing minor children into marriages with significantly older men. *Splinter*

[1] Brian was between 25 and 26 years old when he and Lisa were raising B.J.J. together.

Group: Fundamentalist Church of Jesus Christ of Latter-Days Saints (FLDS), MORMON RESEARCH MINISTRY, https://www.mrm.org/flds. (last visited January 31, 2025). FLDS adherents also have a history of abducting children from their non-FLDS parent. Lauren Lantry, Very Dryon, and Kaitlyn Morris, *Former FLDS members fear their children's disappearance is part of Warren Jeffs' prophecy*, ABC NEWS (June 22, 2023, 5:16 a.m.) https://abcnews.go.com/US/former-flds-members-fear-childrens-disappearance-part-warren/story?id=99943910. In Utah, where Brian resides, there are several pending cases where FLDS parents have abducted – and refused to return – children to the non-FLDS parent. Cristian Sida, *Ex-FLDS parents searching for missing children believed to be hidden by church*, KUTV (Apr. 19, 2024, 10:19 p.m.) https://kutv.com/news/local/ex-flds-parents-searching-for-missing-children-believed-to-be-hidden-by-church-fundamentalist-warren-jeffs-waco-jonestown.

Roger Hoole, a lawyer specializing in FLDS cases, testified about FLDS' troubling history. Per FLDS doctrine, "women and children are viewed as belonging to the leadership, not the parents." TT2 at 7:14-16. In fact, in FLDS, women and children are "treated fungibly as property." TT2 at 7:16. That view creates an environment rife with abuse:

> There are no safeguards for children in the FLDS. It's an isolated community. They don't have adoptions, they don't have divorces, they don't have – a lot of their marriages are not recognized. It's all spiritual commanded by Warren Jeffs or his designated leader. And as a result of that, the view of children as property and no safeguards

that normal children would have, there's just a lot of abuse, a lot of abuse.

TT2 at 7:17-24. For example, in 2008, "Texas raided the [FLDS] compound known as the Yearning for Zion Ranch in Eldorado, Texas, and there were 460 children there that were being abused." TT2 at 12:3-5. More recent "revelations" of Warren Jeffs raise concerns that there may be a mass abduction of FLDS children from their non-FLDS parent and subsequent murder of these children. TT2 at 14:6-15:14. *See also* Lauren Lantry, Very Dryon, and Kaitlyn Morris, *Former FLDS members fear their children's disappearance is part of Warren Jeffs' prophecy*, ABC NEWS (June 22, 2023, 5:16 a.m.) https://abcnews.go.com/US/former-flds-members-fear-childrens-disappearance-part-warren/story?id=99943910.

II. Brian Showered Lisa with Attention to Start their Relationship and then Got Her Pregnant by Raping Her

Brian and Lisa met on Twitter in January of 2019. TT1 at 206:21-207:7; R. 368. Brian initially showered Lisa with attention, which captivated her. TT1, 207:8-15. Their relationship moved quickly, and Lisa moved from South Dakota to live with Brian in Utah a few months later, in June of 2019. TT1, 207:16-25.

Brian described his family and religion in wholesome, healthy, unique, and loving terms. R. 369. Although they discussed religion, they mainly focused on the culture of where Brian lived, which was very family-oriented. *Id.* Brian disclosed that he was an FLDS member, and that he was a follower of Warren

Jeffs. R. 370. Lisa had little knowledge about FLDS, but she was affected with how Brian described it:

> So it was made clear to me … that [Brian] was in the Fundamentalist Mormons of Latter Day Saints. It became very real to me – I never questioned it because of how intense him telling me, giving me a narrative about – about them. When he was – emailed me a book that his friend's dad wrote about the – the perspective from the FLDS on the [Texas] raid, that's – I had no – *I had no question of doubting that he was in the FLDS because of how he dressed and how he was very proud of it.*

R. 370 (emphasis added).

Lisa was 37 when they met, and Brian was 24 or 25. R. 369. Lisa's previous marriage had fallen apart over issues conceiving a child. R. 362. As a result, Lisa was impressed with Brian's description of FLDS as having traditional Christian beliefs with large families. R. 369.

Due to the fertility issues in her former marriage, Lisa was highly attuned to her reproductive cycle. TT1 at 208:6-11. As Lisa described, "because I had tried to get pregnant with my ex-husband for so long I had become very familiar with natural family planning and my ovulation cycles." *Id.* Lisa shared this information with Brian to explain why she was refusing to have sexual intercourse with him in the days leading up to July 1, 2019. TT1 at 208:11-14.

Lisa testified about what happened next:

> I was at the stove and I was making – grounding up some beef and I just – I must have been talking about how – I was having some sort of anxiety, and Brian offered me a pill, and I asked him if it was like a Klonopin. He said yes. I took the pill. The next thing I remember is being really like falling asleep, out of it, and hanging onto Brian.

> Brian's got me around – kind of behind me and has got me here and here. He said something like, *me lady*, and pulled my pants down as we were – it was dark in the living room and going toward the couch, and that's, that's all I remember from the night.

TT1 at 209:3-15. *See also* R. 370-371, 374-75. When Lisa woke up the next morning, Brian asked her if she remembered having sex. TT1 at 209:16-21. She had no recollection of the act. TT1 at 209:18-1. She never reported the event out of fear of backlash from Brian and the community. TT1 at 209:22-210:7. Lisa never accepted any future offers of medication from Brian after that, however. R. 375 ("I never took any pills from him or took any recommendation for pills from him ever again.").

Lisa found out she was pregnant on July 16, 2019. TT1 at 210:8-10.

III. Brian's Adherence to FLDS Doctrine Increasingly Manifested After Lisa Moved in and Got Pregnant

A. Once Lisa Moved to Utah, Brian Tried to Force FLDS on her

Once Lisa moved in with Brian, he started to change. R. 376. For example, he would "disappear for days, disappear all day." *Id.* Brian would also start to control Lisa and berate her for minor perceived infractions, like making "a left turn where he didn't want [her] to make a left turn." *Id.* Brian pushed the idea of giving Lisa more medications during these arguments. *Id.* Because Lisa had no connection with Utah, other than Brian, she felt isolated. TT1 at 225:3.

Although he now claims to not be a member, Brian agrees that he follows FLDS teachings. R. 300. He, however, refuses to identify what teachings he

follows. R. 300. He also refuses to disavow some of the FLDS' more controversial teachings, including polygamy and underage marriage. R. 312, 319. The FLDS' philosophies are so engrained in Brian, that he does not believe that women should wear the color red, consistent with FLDS teachings. R. 323-24.

In fact, Brian kept a photo of Warren Jeffs on the wall of his and Lisa's home. R. 307. According to Brian, the picture was there because Jeffs "was a respected leader of the community in which [he] was raised." R. 307. Brian's family gifted B.J.J. some letter tracing cards. TT1 at 92:12-95:7; R. 308-09, 661-62, 811. The "P" card showed a picture of Warren Jeffs, the FLDS "prophet." Brian thought it appropriate to hold up Jeffs, despite Jeffs' conviction for child sex abuse, as a model for B.J.J. to emulate. TT1 at 91:2-14; R. 307.

Further, while he and Lisa were together, Brian had Lisa listen to sermons by Warren Jeffs and other FLDS leaders. TT1 at 216-17. He even kicked Lisa and B.J.J. out of the house when Lisa did not want to listen to one of Brian's father's sermons. Lisa described Brian's reaction:

> The first time [Brian] kicked [B.J.J. and I] out, he wanted me to listen to the FLDS sermon that his dad provides, but I'm – was not interested in becoming FLDS or Mormon. I'm Lutheran. So I had decided that I wanted to listen to a Lutheran service that morning. So I was in the computer area, had my computer up, and he got very upset with me that I wasn't going to listen to his dad's FLDS sermon, and proceeded to tell us that we had until the end of the month … to pack our things and get out.

R. 371.

Brian now refers to his father's FLDS sermons as "Sunday Schools." TT1 at 118. Brian claims that "Sunday School" services are not religious, but he concedes that they include Brian's father expressing religious thoughts with the participants singing and praying. *Id.* at 118:15-18. Even though Brian maintains that these Sunday Schools are not official services, he concedes that they echoed FLDS religious teachings. R. 322.

Brian's father, Richard, has his own checkered history. In February of 2024, Richard pleaded guilty to federal criminal contempt for disobeying prior federal child labor violations. *See United States v. Richard Brian Jessop*, Case. No. 22:CR-00-87, Doc. 48 (D. Utah, Feb. 8, 2024).

Richard discussed these issues in his own letter to Warren Jeffs. In it, Richard reaffirmed his family's commitments:

> Dear Uncle Warren
>
> Hello to my dear Prophet.... I again declare my devotion to the Lord through you, His servant in Zion. I dedicate my all to Him through you. *It is my testimony that you are God's prophet, holding the Keys of Priesthood, the keys to our salvation.* I feel Heavenly Fathers spirit strengthen me as I declare those words. I love you and pray for Heavenly Fathers strength to be in you and to be in me that I may live those words fully. I know that you do now and will yet do always and only the will of God.
>
> ...
>
> I live for the Lord's will through His prophet. His smile of approval means everything to me. I live for your smile. *Through the day as things come along I think of you and ask: what would Uncle Warren do? That is what I want to do.*

R. 396-97 (emphasis added). Jeffs was a "fugitive from justice," at the time, and was on the FBI's Ten Most Wanted list. *Jeffs v. State*, No. 03-10-00781-CR, 2012 WL 1660612, at *5 (Tex. App. May 10, 2012).

As Brian admitted, he intends to bring B.J.J. to visit the Short Creek area. R. 344. In order to do that, though, he would need to be considered an FLDS adherent. R. 337. He also divulged he would expose B.J.J. to the polygamous marriages taking place there. R. 344-45.

Brian, however, would not commit to telling B.J.J. whether polygamy was good or bad. R. 345. In fact, he does not appear to have an opinion on the matter. R. 345 ("Q. Okay. Do you have an opinion on whether it's a good thing or a bad thing? A. No."). Brian has even suggested that he wants B.J.J. to get "pregnant as soon as possible so she doesn't go to college[.]" R. 375. That would be consistent with FLDS teachings on child brides. R. 338 ("Q. Is higher education or secondary education for women, is that something that is embraced by the FLDS religion? A. No."). *See also Splinter Group: Fundamentalist Church of Jesus Christ of Latter-Days Saints (FLDS)*, MORMON RESEARCH MINISTRY, https://www.mrm.org/flds. (last visited January 31, 2025).

B. Lisa's Father Testified About His Contemporaneous Observations of Brian's Controlling Behavior

At trial, Lisa's father, Kent Christopherson, testified about his personal observations. Throughout their relationship, Brian and Lisa were dependent on Kent's assistance. TT1 at 157:7-161:1; R. 656. Kent met Brian shortly after Lisa

started seeing Brian. TT1 at 151:18-20. Kent observed that Brian can put on a "very nice persona as a nice young man." TT1 at 1562:1-2. Kent would communicate with Brian and Lisa over the phone and via text. TT1 at 152:3-6. Kent gave Brian and Lisa money when, for example, they were threatened with eviction. TT1 at 152:8-18.

Kent noticed the increasingly volatile nature of Brian and Lisa's relationship and attempted "to mentor [Brian], listen to both sides of the story, try to help [Brian] out." TT1 at 152:23-24. Kent, however, soon realized that Brian "grew up in a completely different cultural paradigm from what" Kent or Lisa knew. TT1 at 152:24-153:2. Kent went on to describe these paradigmatic differences:

> You know, the FLDS is about control and obedience, and with [Brian] growing up in that world he expected the same thing of Lisa. In their world it's called *keep sweet*. If Lisa didn't keep sweet, then [Brian] would threaten to kick them out of the house. He was verbally abusive.... I tried to teach [Brian] a technique I learned when I worked for Schlumberger in the early days of my career. They sent me to a lot of their internal university colleges, and one they sent me to was a Xerox college where you learned the listening technique, where you listened to the other person and repeated it back, asked them if you got it correct, and if they didn't then ask them to correct you and repeat it back again and go back and forth. I tried to teach that to Brian. After several of these conversations over a couple of months, I realized Brian was just telling me what I wanted to hear.

R. 153.

Something that Kent took particular notice of was how Brian was chameleon-like in his ability to tell people what they wanted to hear. TT1 at

157:10-158:4. Brian, at first, would put on "a good façade, that he's a nice, honest young man." TT1 at 157:11-12. As time progressed, however, Kent started to notice inconsistencies between Brian's words and actions. TT1 at 157:10-158:4.

For example, Kent had given Brian money to pay for an eye doctor so Brian could get his CDL license. *Id.* Kent followed up with Brian for months to make sure that Brian got his eyes checked. *Id.* Eventually, Kent realized that Brian had just been manipulating him:

> I asked [Brian] for several months, Did you get your eye doctor exam? No. No. No. Then the last time he told me, I'll just memorize the chart and pass it that way, which I knew he was just flat not telling me the truth. So through these things he lost, completely lost my trust because I kept hearing one thing and then the total opposite.

TT1 at 157:22-158:4.

IV. Brian Eventually Kicked Lisa and B.J.J. Out of His Apartment, and Lisa and B.J.J. Moved to South Dakota

In January of 2021, Brian kicked Lisa and their daughter out of his apartment. TT1 at 148:14-19. Specifically, Brian told Lisa to "get the fuck out." *Id.* Brian had kicked Lisa and B.J.J. out several times, by this point. R. 371. Lisa's parents then drove to Utah from South Dakota and moved Lisa and B.J.J. to Rapid City. TT1 at 43:10-12. Brian was fully aware of the plan, went to lunch with Lisa prior to her move, and remembers Lisa telling him that he was "always welcome to visit." TT1 at 43:24-44:6.

After moving back to South Dakota, Lisa primarily communicated with Brian via text or phone call. TT1, 44:20-21. Brian spent most of those conversations calling Lisa names and swearing. TT1, 98:10-100:11, R.663-64. Brian would also make B.J.J. uncomfortable during video calls with her. TT1 at 240:4-25. Brian would keep provoking B.J.J. to the point that it would leave her sobbing and shaking:

> [S]he doesn't like it when he sings. She can't stand it. One time she fell asleep to it, but she doesn't like it because she has asked him to stop before and then he keeps doing it louder. Then she feels unheard and gets even more mad, and then he does it just to – I don't know why. One day – I'm trying to think of when this was, probably last – I don't remember when, sometime within the last year, I was just doing my thing, doing laundry and running around the house doing something, and [B.J.J] is beating, just beating this laundry basket having just an angry meltdown and he's just loudly, loudly, loudly singing. I'm like what – I already knew, I already knew why, because this was an ongoing thing. I was like, *What is going on? Just stop it.* Of course he stops and she's sobbing, shaking, and I have to calm her down. It's just no real – he likes to do things to make her upset.

TT1 at 240:4-25.

Phone calls had gotten so bad that Lisa had to block Brian's number from her phone. TT1 at 45:5-7. That lasted ten days. TT2 at 35:12-13. Lisa eventually relented and unblocked Brian's number. TT2 at 39:6-13. Brian, however, refused to talk to Lisa or B.J.J. for months. *Id.* Brian re-initiated contact by filing the action that forms the basis for this appeal.

While the case has been pending, Brian was voluntarily absent from B.J.J.'s life for extended period. In fact, Brian exercised fewer than a dozen supervised

visits over the last three plus years. R. 112, 171-72. Brian did not attend birthday parties, recitals, or events in South Dakota, and did not request B.J.J.'s presence at his wedding to his current wife. R. 219; TT1 at 108:23-109:17.

STANDARD OF REVIEW

ISSUE 1: THE COURT'S DENIAL OF A CONTINUANCE

Motions for continuance are evaluated on the abuse of discretion standard. *State v. McCrary*, 2004 S.D. 18, ¶ 14, 676 N.W.2d 116, 121.

ISSUE 2: THE COURT'S ALLOWANCE OF AMBER JESSOP'S TESTIMONY

Decisions related to sequestration order violations are evaluated on the abuse of discretion standard. *Ctr. of Life Church v. Nelson*, 2018 S.D. 42, 913 N.W.2d 105, 114 (citing *State v. Dixon*, 419 N.W.2d 699, 701 (S.D. 1988). *See also Braun v. Wollman*, 2024 S.D. 83, ¶ 26 ("The circuit court's evidentiary rulings are presumed correct, and they are reviewed only for an abuse of discretion") (citations omitted). "'[A]dmission of evidence in violation of a rule of evidence is an error of law that constitutes an abuse of discretion.'" *Id.* (quoting *State v. Stokes*, 2017 S.D. 21, ¶ 12, 895 N.W.2d 351, 354). Reversal is warranted if a wrongful admission of evidence is prejudicial. *Id.* (citations omitted).

Prejudice will be found where the error "'most likely has had some effect on the verdict and harmed the substantial rights of the moving party.'" *Voorhees Cattle Co., LLP v. Dakota Feeding Co., LLC*, 2015 S.D. 68, ¶ 17, 868 N.W.2d 399, 408 (quoting *Schoon v Looby*, 2003 S.D. 123, ¶ 18, 670 N.W.2d 885, 891).

"'Error is prejudicial when, in all probability, it produced some effect upon the final result and affected some rights of the party assigning it.'" *Gibson v. Gibson Fam. Ltd. P'ship*, 2016 S.D. 26, ¶ 15, 877 N.W.2d 597, 602 (quoting *McDowell v. Citibank*, 2007 S.D. 52, ¶ 26, 734 N.W.2d 1, 10).

ISSUE 3: THE COURT'S CUSTODY DETERMINATION

Child custody determinations are evaluated using a modified abuse of discretion standard. *Shelstad v. Shelstad*, 2019 S.D. 24, ¶ 20, 927 N.W.2d 129, 134 (citations omitted). Findings of fact are reviewed for clear error. *Id.* No deference is afforded to the trial court's conclusions of law and they are reviewed under the de novo standard. *Koopman v. City of Edgemont by Dribble*, 2020 S.D. 37, ¶ 13, 945 N.W.2d 923, 926 (quoting *Estate of Henderson v. Estate of Henderson*, 2012 S.D. 80, ¶ 9, 823 N.W.2d 363, 366).

ISSUE 4: THE COURT'S DENIAL OF ATTORNEYS' FEES

This Court "employ[s] the abuse of discretion standard when reviewing a grant or denial of attorney fees." *Taylor v. Taylor*, 2019 S.D. 27, ¶ 15, 928 N.W.2d 458, 465 (citations omitted).

I. The Abuse of Discretion Standard, Defined

Although a trial court is afforded some latitude under the abuse of discretion standard, it is not unfettered. "An abuse of discretion is 'a fundamental error of judgment, a choice outside the reasonable range of permissible choices, a decision ... [that], on full consideration, is arbitrary or unreasonable.'" *Coester v.*

Waubay Twp., 2018 S.D. 24, ¶ 7, 909 N.W.2d 709, 711. "'The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.'" *Pieper v. Pieper*, 2013 S.D. 98, ¶ 11, 841 N.W.2d 781, 785 (quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2048, 135 L.Ed.2d 392 (1996)). "An abuse of discretion can simply be an error of law or it might denote a discretion exercised to an unjustified purpose, against reason and evidence." *Id.* (quoting *Knodel v. Kassel Twp.*, 581 N.W.2d 504, 506 (S.D.1998)).

II. Clear Error, Defined

Under clear error, this court accepts the "circuit court's factual findings unless after a complete review of the record, the Court is left with a definite and firm conviction that a mistake has been made." *Wasilk v. Wasilk*, 2024 S.D. 79, ¶ 18, 15 N.W.3d 497, 502 (citations omitted).

ARGUMENT

I. The Trial Court Abused its Discretion by Failing to Accommodate the Medical Emergency of a Key Witness

Continuances may be granted for good cause. *Matter of Adoption of C.T.E.*, 485 N.W.2d 591, 593 (S.D. 1992) (citations omitted). Although the decision to grant a continuance is within the discretion of the trial court, "'this discretion is to be exercised in a sound and legal manner, and not arbitrarily or capriciously.'" *Id.* at 594 (citations omitted). As this Court previously observed whether to grant a continuance based on an unavailable witness is dependent on

three factors: "(1) the testimony must be material; (2) the party seeking the continuance must have used due diligence to secure the witness's attendance or deposition; and (3) 'it must be reasonably certain the presence of the witness or [the] testimony will be procured by the time to which the trial would be postponed.'" *State v. Jackson*, 2020 S.D. 53, ¶ 53, 949 N.W.2d 395, 411 (quoting *State v. Karlen*, 1999 S.D. 12, ¶ 24, 589 N.W.2d 594, 600). Under prior holdings of this Court, a civil litigant would ordinarily be "entitled to a continuance, as a matter of right" unless the opposing side would admit to the proffered testimony of the absent witness. *White Sewing-Mach. Co. v. Simpson*, 74 N.W. 197, 198 (S.D. 1898).

Less than a week before trial, one of Lisa's key witnesses, Sam Brower, suffered a medical emergency related to his heart. R. 427-29. Mr. Brower "is a private investigator that has been investigating the FLDS for over 20 years." TT1 at 233:18-19. Mr. Brower personally knows Brian's family, and was physically present when Brian's father's farm was raided by law enforcement for child labor violations. TT1 at 233:20-22. Mr. Brower has written books on FLDS, its relationship to children, and how FLDS impacts custody cases. TT1 at 234:3-12. He has also produced documentaries about FLDS. *Id.*

Mr. Brower also spoke with the custody evaluator in this case. *Id.* The evaluator, however, was uninterested in Mr. Brower's impressions or the independent research Mr. Brower had performed. As such, Mr. Brower's

attendance was even more important since it would have significantly impacted the Court's understanding of FLDS, how FLDS impacts a parent's relationship with his or her children, and how FLDS has implications of the abduction of children from non-FLDS parents.

The trial court reasoned that, even though the medical emergency had just happened days before, the trial had been "set for a number of months." TT1 at 5:1-3. And, even though the witness was medically prohibited from traveling, the trial court refused to admit his testimony remotely and refused to permit Lisa's counsel to travel to Utah for a trial deposition. TT1 at 5:3-4; TT2 at 71:13-72:24.

It is well accepted that "[d]enials of motions for continuances in the face of a sudden unexpected medical emergency of either counsel, a party, or a witness have resulted in reversals on appeal in [Florida] and other courts." *Fisher v. Perez*, 947 So.2d 648, 653 (Fla. Dist. Ct. App. 2007). *See also Young v. Redman*, 55 Cal.App.3d 827, 831, 128 Cal.Rptr. 86, 88 (Cal. Ct. App.1976) ("The denial of a motion for continuance for absence of a party may constitute an abuse of discretion by the trial court sufficient to justify reversal only where there is an affirmative showing of 'good cause,' such as serious illness or unforeseen circumstances which prevented a party from appearing at trial."); *Cooney v. Com., Dep't of Transp., Bureau of Driver Licensing*, No. 1023 C.D. 2009, 2009 WL 9096512, at *3 (Pa. Commw. Ct. Nov. 16, 2009) ("Given that a material witness under subpoena was unavailable because of a medical emergency, we must

conclude the trial court abused its discretion in the denial of the Department's request for a continuance."); *Shands Teaching Hosp. & Clinics, Inc. v. Dunn*, 977 So. 2d 594 (Fla. Dist. Ct. App. 2007) (reversing trial court's denial of continuance because a pregnant witness was ordered not to travel by her doctors); *State v. Litherland*, 477 S.W.3d 156, 163-65 (Mo. App. 2015) (trial court abused its discretion in denying a continuance when the defense's sole witness was temporarily unavailable due to having gone into labor early that morning); *State v. Blocker*, 133 S.W.3d 502, 503-05 (Mo. banc 2004) (reversing denial of continuance when the defense's witness, who was under subpoena, was temporarily unavailable due to a family medical emergency). *See also cf. In re R.A.M.O.*, 190 N.E.3d 385, 391–92 (Ind. Ct. App. 2022) (finding good cause for continuance where witness is unavailable to testify due to circumstances beyond the party's control). Similar denials have been overturned even when the party affected by the medical emergency has failed to appear previously. *See, e.g., In re Marriage of Eslick*, 2013 MT 53, 369 Mont. 187, 304 P.3d 372 (husband in marriage dissolution case had failed to appear previously twice).

In fact, "'a continuance is normally appropriate when an unexpected illness renders an expert witness unavailable on the eve of trial[.]'" *Padda v. Superior Ct.*, 25 Cal. App. 5th 25, 29 (2018) (quoting lower court) (alteration in original). In *Padda*, a civil matter, one of the litigant's expert witnesses fell seriously ill shortly before trial. *Id.* at 27-28. Initially believed to be a tumor requiring

invasive surgery, it was later determined to be a cyst that would take about six weeks for full recovery. *Id.* at 27. The expert had not been deposed as his deposition was set during the time he fell ill. *Id.* The Padda Court stated that "[g]enerally, a trial court abuses its discretion when it denies a request for continuance of trial due to the absence of a properly called and subpoenaed witness." *Id.* at 28-29 (citations omitted). The *Padda* litigants "contend[ed] that their defense and cross-complaint would be rendered ineffective absent [the expert's] testimony, and that it would be extremely difficult to find a replacement expert under the circumstances." *Id.* at 29. While recognizing the lower court's "assessment that it may not be that difficult to find a replacement, and its inherent power to manage its docket", the *Padda* Court found that "the eve of trial impact on petitioners' ability to present their case is an untenable burden and a distraction during a high-tempo proceeding." *Id.* (citation omitted). Ultimately, the *Padda* court "determined that the trial court abused its discretion in denying petitioners' request for a continuance . . . ." *Id.* Note also that there had been at least four prior continuances in the matter. *Id.* at 26.

The Eighth Circuit Court of Appeals has opined that "[s]udden exigencies and unforeseen circumstances are facts that *militate* in favor of a continuance." *United States v. Pruett*, 788 F.2d 1395, 1397 (8th Cir. 1986) (citation omitted) (emphasis added). The *Pruett* Court examined a motion for continuance on the

day of trial due to a material witness' unavailability due to a death in his family. *Id.* at 1396. It noted that the Eighth Circuit has provided

> five factors which a trial court should balance in ruling on a motion for a continuance, including the nature of the case, the diligence of the party requesting the continuance, the opposing party's conduct, the effect of the delay on both parties, and the asserted need for the continuance.

Id. (citing *United States v. Bernhardt,* 642 F.2d 251, 252 (8th Cir.1981) (per curiam)). The court further noted that "no single factor is dispositive . . . ." *Id.* However, the court also found that a "sudden exigency or unforeseen circumstance" is not a factor "to be lightly dismissed." *Id.* at 1397.

Importantly, the *Pruett* Court found that although the unavailable witness' testimony "was substantially similar" to another witness, it was still "material because it would corroborate [the other witness'] versions of the facts and enhance the credibility of Pruett's defense . . . ." *Id.* "It is axiomatic that the art of persuasion often turns on the skill of corroboration." *Id.* The court disagreed with the trial court's assessment of the testimony as "cumulative or as mere surplusage to the evidence already presented" and found instead that the parallel testimony "does not defeat but rather reinforces a finding of materiality." *Id.* The court further noted that continuances had not been granted on behalf of the defendant and defendant had not failed to subpoena a material witness. *Id.* at 1398 (citation omitted).

Mr. Brower is a disinterested party who has no stake in the outcome of this matter. His testimony would not be mere surplusage, but rather, important, material testimony that would corroborate Lisa's valid and substantial concerns. Lisa reasonably and significantly relied on the testimony Mr. Brower would provide in this matter.

The denial of a continuance in this matter was an abuse of discretion. No hearing was granted on the motion. This is a high stakes case with the livelihood of a child at issue. The ends of justice clearly required a continuance to preserve Lisa's right to put on her full case before the court.

II. The Trial Court Abused its Discretion by Considering the Testimony of Brian's Wife After She and Brian Discussed the First Day's Proceedings, in Violation of the Court's Sequestration Order

South Dakota Rule of Evidence 615 allows parties to request sequestration of witnesses when they are not testifying. SDCL §19-19-615. The "purpose is to inhibit collusion and dishonesty among witnesses as the factfinder seeks to home in on the truth." *Meredith Corp. v. United States*, 433 F.Supp.3d 1109, 1110-11 (S.D. Iowa 2019); *State v. Johnson*, 254 N.W.2d 114, 116-17 (S.D. 1977). "Whether witnesses should be sequestered is a matter that is within the sound discretion of the trial court." *Johnson*, 254 N.W.2d at 117. There is no requirement "that the exclusionary request be made at any particular stage of the trial." *Wood v. Sw. Bell Tel. Co.*, 637 F.2d 1118, 1194 (8th Cir. 1981).

"[S]equestration violations are not limited to situations where a witness is present in the courtroom while another witness is testifying." *United States v. Engelmann*, 701 F.3d 874, 878 (8th Cir. 2012). Such "orders are meant to prevent witnesses from tailoring their testimony to that of prior witnesses." *Id.* (citations omitted).

A party seeking relief for violation of a court's sequestration order must show prejudice that occurred as a result of the violation. *Engelmann*, 701 F.3d at 878; *Paradigm All., Inc. v. Celeritas Techs., LLC*, 722 F.Supp.2d 1250, 1273 (D. Kan. 2010) ("The Court should generally not disqualify a witness unless allowing the testimony would result in probable prejudice. Probable prejudice results where it is shown that the conduct giving rise to the Rule 615 violation had an apparent effect or influence on the witnesses' testimony."); *Dixon*, 419 N.W.2d at 701.

Sequestration was not requested until after testimony began in this case and the court granted the request. TT1at 28:12-29:10. On rebuttal, Brian's counsel called Brian's new wife, Amber Jessop to the stand, and she was questioned as to her compliance with the sequestration order. TT2 at 74:20-76:10. Amber did not know of the sequestration order until the morning before she testified, which was the second day of trial. TT2 at 75:7-16. However, she discussed and understood testimony that occurred on the first day of trial. TT2 at 75:17-22. Amber's testimony was ultimately permitted based on Brian's counsel's classification of Amber as a rebuttal witness. TT2 at 76:2-6. "Whether as a result of intent or

neglect, [Brian's] attorney[] [was] not authorized to simply ignore the terms of the [sequestration order]." *Zeigler v. Fisher-Price, Inc.*, 302 F. Supp.2d 999, 1017 (N.D. Iowa 2004). This is materially different than the situation presented to this Court in *Center of Life Church v. Nelson*. 2018 S.D. 42, ¶ 33, 913 N.W.2d 105, 113-14. In *Center of Life Church*, the witness "was in the courtroom for only approximately five minutes before being asked to leave, and he did not recall the subject of Shaw's testimony." *Id.* Under those circumstances, this Court found that the record did not reflect that his "brief time in the courtroom gave him access to testimony that could have affected his subsequent testimony." *Id.* Rather, here, Amber testified that she had discussed the prior day's testimony with Brian and had an understanding of it. TT2 at 75:17-22. Brian knowingly violated the sequestration order by giving Amber "access to testimony that could have affected [her] subsequent testimony." *Ctr. Of Life Church*, 2018 S.D. 42, ¶ 33, 913 N.W.2d at 114.

The trial court relied on Amber's testimony to support Brian's character, and specifically, to support its conclusion that her testimony corroborated "Brians [sic] statements about his involvement with the FLDS." R. 812. However, only one question was asked of her regarding Brian's involvement in the FLDS: "Has Brian ever tried to get you to follow the beliefs of FLDS?" TT2 at 79:2-3. Amber's response was "No." TT2 at 79:4.

It was prejudicial error to allow Amber to testify in violation of the sequestration order. Prejudicial error is found in situations where the error "'most likely has had some effect on the verdict and harmed the substantial rights of the moving party.'" *Voorhees Cattle Co., LLP,* 2015 S.D. 68, ¶ 17, 868 N.W.2d at 408 (quoting *Schoon*, 2003 S.D. 123, ¶ 18, 670 N.W.2d at 891). Here, Amber's testimony was used to conclude that Brian was not involved with FLDS and to bolster his credibility. Amber was made privy to all of Brian's testimony due to the violation of the sequestration order. Her testimony was not used as mere rebuttal, but rather, to falsely bolster Brian's credibility.

III. The Trial Court Abused its Discretion in Granting Brian Unsupervised Visitation

A. The Trial Court Ignored Clear and Convincing Evidence that Brian Raped Lisa to get her Pregnant

Clear and convincing evidence was presented to show that Brian committed an act of rape that resulted in the conception of B.J.J. and, as such, parenting time should not have been awarded to Brian pursuant to statute. South Dakota recognizes a rebuttable presumption that custody or visitation rights should not be given "to a person that the court has found by a standard of clear and convincing evidence to have committed an act of rape . . . resulting in the conception of the child." SDCL § 25-4A-20. The act of rape is accomplished with any person under the following circumstances:

. . .

> (4) If the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis and the perpetrator knows or reasonably should know the victim is incapable of giving consent;
>
> . . .
>
> (6) Without the victim's consent and the perpetrator knows or reasonably should know the victim is not consenting.

SDCL § 22-22-1. The term "consent" is defined as "a person's positive cooperation in act or attitude pursuant to the person's exercise of free will[.]" SDCL § 22-22-1.5(1). A "physical incapacity" is "a person's incapability of resisting because the person is unconscious, asleep, or is subject to another physical condition that prevents the person from giving consent or resisting." SDCL § 22-22-1.5(4). Utah follows a similar standard. Utah Code Ann. §§ 76-5-402; 76-5-406.

Brian knew on July 1, 2019, that Lisa would likely become pregnant if they were to have sexual intercourse. That is because Lisa refused Brian's sexual advance in the days before and had told Brian that it was because she believed she was ovulating. Brian overcame Lisa's refusals by administering a drug that incapacitated her. SDCL § 22-22-1(4).

Brian never even denied drugging Lisa. He merely said that he does not remember drugging Lisa. TT1 at 79:2-14. Instead, all Brian did was say that he and Lisa had had sex shortly after they moved in together. *Id.* "In South Dakota it is not essential to a sexual offense conviction that the testimony of the victim be

corroborated by other evidence." *State v. Grey Owl*, 316 N.W.2d 801, 804 (S.D. 1982).

The trial court, however, refused to make a full finding regarding B.J.J.'s conception. Instead, the trial court merely stated that it "does not find Lisa's testimony regarding the conception of BJJ to be credible given the totality of the circumstances." R. 807. The trial court never explained what totality of circumstances it considered, and it never laid out what facts it relied on to reach that conclusion. This failure to meaningfully address these factors warrants reversal, alone. *See Shelstad*, 2019 S.D. 24, ¶ 20, 927 N.W.2d at 134 (abuse of discretion exists when the court's review of traditional factors is "scant or incomplete").

Regardless, Lisa's undisputed testimony would be more than enough to warrant a rape conviction, on its own. Her testimony, coupled with the FLDS' practice of sexual assault and forced impregnation,[2] should have been sufficiently clear and convincing for the trial court to find that B.J.J. was the result of nonconsensual intercourse. The trial court abused its discretion and should be reversed.

B. The Trial Court Ignored B.J.J.'s Best Interests

1. A Trial Court Must Consider the Minor Child's Best Interests

[2] This fact highlights the importance of Mr. Brower's testimony. He would have been able to testify how these kinds of practices are rampant within the FLDS community.

When determining matters of custody or visitation, "the trial court must be guided by what appears from all the facts and circumstances to be in the best interests of the child's temporal, mental and moral welfare." *Jasper v. Jasper*, 351 N.W.2d 114, 116 (S.D. 1984) (citations omitted). "The best interests of the child [even] prevail over the noncustodial parent's privilege of visitation." *Pieper*, 2013 S.D. 98, ¶ 15, 841 N.W.2d at 785 (citations omitted).

> It is the trial court's duty to see that the children are protected at every turn. This court has repeatedly stated that the welfare and best interests of the children are paramount to all other considerations. Given the focus on the children's best interest, circumstances may operate to defeat the custody preference of a parent. *The children's welfare must be considered over the legal rights and claims of the parents. The parents' personal wishes and desires must yield to what the court in the discharge of its duty regards as the children's best interest.*

Jasper, 351 N.W.2d at 117 (citations omitted) (emphasis added). "The bottom line, as it has always been, is the best interest of the child." *Pieper*, 2013 S.D. 98, ¶ 16, 841 N.W.2d at 786. In particular, trial courts "must resist the temptation to take the path of least resistance" by making an award of custody or visitation to appease one party when that award is not supported by evidence, facts, or testimony. *Jasper*, 351 N.W.2d at 118.

2. *A Trial Court is Required to Consider the Parties' Religious Practices When Determining Custody*

The issue of religion is entirely relevant in child custody cases. *See* SDCL § 25-5-7.1 (items contained within the responsibilities of legal custody of a minor child include "religious instruction"); SDCL § 25-4A-24(17) (a factor in custody

matters is "[w]hether a parent is willing and capable to provide the child love, affection, guidance, and education in order to impart the family's religion or creed"); SDCL § 25-4A-17(23) (a factor in custody matters is "[w]hether a parent is guilty of misconduct that may have a harmful effect on the child"); *see generally, Fuerstenberg v. Fuerstenberg*, 1999 SD 35, 591 N.W.2d 798. South Dakota does recognize the protections afforded by the First Amendment regarding religion and by its own Constitution. S.D. CONST. ART. VI, § 3. However, the protections afforded those rights are limited: "[T]he liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the state." S.D. CONST. ART. VI, § 3. Furthermore, "[i]llegal activities are not entitled to constitutional protection just because they occur in a religious context." Journal of the American Academy of Matrimonial Lawyers, Vol. 18, 2002 *Religion and Best Interests in Custody Cases*, 227-28 (citing *Washington ex rel. Hendrix v. Waters*, 951 P.2d 317 (Wash. Ct. App. 1998)).

It is within the Court's sound discretion to deny custody, limit parenting time, or deny parenting time entirely if the Court determines that religiously motivated actions are or could be emotionally and physically harmful to a child. *Leppert v. Leppert*, 519 N.W.2d 287 (N.D. 1994) (holding evidence of grandparent being the supreme leader of a religious sect that "rejects the authority of governments, [refusal] to pay taxes, [refusal] to register with selective service,

ignore hunting and fishing regulations, and [refusal] to buy liability insurance on their vehicles as required by law" plays into the Court's "duty of objectively determining whether a belief system's secular effects are likely to cause physical or emotional harm to children"); *Lange v. Lange*, 175 Wis.2d 373 (Wis. Ct. App. 1993) (holding that mother's award of sole legal custody to determine the children's religious upbringing resulting in restrictions on parenting time was not a violation of father's First Amendment rights as it was limited in scope and duration); *Andros v. Andros*, 396 N.W.2d 917, 922 (Minn. Ct. App. 1986) (holding "where the parents hold deep commitments to their religions, where both are equally desirous of involving the children in their religions, and *where mutual cooperation is not possible*, the dispute is sufficiently serious to support the trial court's finding of a danger to the children's emotional health") (emphasis added); *In re Marriage of Short*, 698 P.2d 1310, 1313 (Colo. 1985) (holding that "evidence of a party's religious beliefs or practices is relevant and admissible in a custody proceeding if it is shown that such beliefs or practices are reasonably likely to cause present or future harm to the physical or mental development of the child").

"Serious disputes between the parents regarding the children's religious upbringing may dictate an award of sole legal custody to one parent." Journal of the American Academy of Matrimonial Lawyers, Vol. 18, 2002 *Religion and Best Interests in Custody Cases*, 222 (citing *Andros v. Andros*, 396 N.W.2d 917 (Minn.

Ct. App. 1986)). "Restrictions on a noncustodial father prohibiting unsupervised visits until he demonstrated that he would not expose the children to his fundamentalist religious view were upheld on appeal[.]" *Id.* (citing *Lange*, 502 N.W.2d 143 (Wis. Ct. App. 1993)). Importantly, the *Lange* Court noted:

> The dissent concludes that the state can protect [Mother's] exclusive right to choose the religion of the children only if they have been emotionally harmed by [Father] imposing his views on them. *The health of the children is an outrageous price for that protection. No parent in [Mother's] position should be compelled to pay it. No parent in [Father's] position should be allowed to extort it. It is grossly unfair because the children ultimately bear it.* No United States Supreme Court decision has authorized it. To the extent that other jurisdictions have implicitly set that price, we reject their decisions. This state need not require harm to the children before protecting [Mother's] rightful choice.

502 N.W.2d at 148 (emphasis added).

3. The Trial Court Failed to Consider B.J.J.'s Best Interests by Improperly Discounting Brian's FLDS Affiliation

The trial court acknowledged that "[o]ne of the biggest areas of contention in this matter deals with Brians [sic] involvement with the Fundamentalist Church of [sic] Latter-Day Saints (FLDS)." R. 810. The trial court appeared to understand some of the basic threats that FLDS and its adherents pose to children in its findings:

> 53. This Court does recognize that the FLDS has history of treating women and children as property.
>
> 54. The FLDS further has a history of child abuse in arranging marriage between underage girls with sometimes much older men.

> 55. The head of the FLDS church at one point, Warren Jeffs, is currently serving a federal prison sentence in relation to activities involving underage girls.
>
> 56. Most concerning to the Court is the history of missing children and the potential abduction of children from the non-FLDS parents as described by defense witnesses.
>
> 58. Brians [sic] father appears to be a current member and is also engaged in the practice of plural marriage appearing to have five (5) wives.
>
> 60. Brian still has contact with family that are practicing FLDS members, most notably his parents.

R. 810-11.

The trial court, however, discounted the impact that FLDS had on Brian's life. It seemed fixated on the idea that, because B.J.J. was conceived outside of a state-sanctioned marriage, it would be impossible for Brian to be an FLDS member or adherent. R. 812. In reaching this conclusion, the Court ignored or discounted Brian's numerous vacillations or prevarications on FLDS issues that went "against reason and evidence." *Pieper*, 2013 S.D. 98, ¶ 11, 841 N.W.2d at 785 (citations omitted).

The most glaring example is Brian's testimony about Short Creek. Brian testified that he intends to bring B.J.J. to Short Creek. R. 344. As Brian acknowledged, however, neither he nor B.J.J. would be welcome in Short Creek if he were not an FLDS member or, at a minimum, an FLDS adherent. R. 337. These are mutually exclusive conditions. He cannot bring B.J.J. to Short Creek if he is not an FLDS member or adherent, yet he still plans on bringing her there.

Given the other facts of this case, the only reasonable conclusion that the trial court should have reached is that Brian was just saying what he needed to in the moment. Lisa's father discovered this facet of Brian; it seems the trial court just did not realize it.

Another glaring example of Brian's flip flopping is his father's polygamy. As the trial court acknowledged, Brian's father is a polygamist, with five wives. R. 811. Brian, prior to the retention of his current attorney, agreed that his father is a polygamist. R. 311.

Brian's testimony, however, shifted once he switched attorneys. At trial, Brian decided that his father was not really a polygamist, after all:

> Q. Okay. You put in your most recent interrogatory responses that your father has one wife, one marriage, correct?
>
> A. Correct.
>
> Q. You previously stated that he has five wives, correct?
>
> A. I believe I said that, yes.
>
> Q. Okay. So did he so [sic] something to lose the other four wives?
>
> A. Not to my knowledge, no.
>
> Q. So he does have more than one wife, correct?
>
> A. I believe I had an opportunity to reconsider, I guess, what I thought marriage meant.

TT1 at 114:20-115:8. If Brian is willing to conveniently "reconsider" his father's marital status, why would he not also be willing to conveniently "reconsider" his longstanding affiliation with FLDS, FLDS tenets, and FLDS leadership?

Likewise, and what should have been even more concerning to the Court, is how Brian simultaneously seemed to honor FLDS leadership while refusing to condemn FLDS practices that would negatively affect B.J.J. As Brian conceded, he pushed FLDS "prophets" and FLDS propaganda on both Lisa and B.J.J.:

- He hung photos of FLDS leaders, including Warren Jeffs, over B.J.J.'s crib. TT1 at 117:16-119:14.
- He kicked Lisa and B.J.J. out of their apartment when Lisa wanted to listen to Lutheran services instead of FLDS-oriented "Sunday Schools". R. 371.
- Brian is unable to compromise over Lisa's preference for non-FLDS religious productions over FLDS-oriented religious productions. TT1 at 119:15-12:2.
- Brian has neither been excommunicated nor identified as an apostate by FLDS leadership. TT1 at 117:16-19.
- Brian punished Lisa over her sending a picture of Brian wearing clothing inconsistent with FLDS practices by requiring her to listen to Warren Jeffs' album about "keeping sweet." TT2 at 22:10-14.
- Brian refused to even say whether polygamy was a bad thing. R. 345.

These are just a few examples, but no reasonable person could conclude anything other than Brian maintained strong FLDS connections and beliefs. The court committed clear error when it found otherwise.

Brian's testimony on polygamy, alone, should have raised red flags to the trial court. At trial, when Brian was asked about polygamy, he ducked:

> Q. What are your beliefs regarding polygamy?
>
> A. I believe in freedom of association for consenting adults to the extent it complies with local laws.

That is not a hard question to answer. The harms of polygamous practices are well established, especially in the context of FLDS. The *only* reason why answering that question might be difficult is if Brian wanted to make it *appear* that he was against polygamy without actually saying that he was against it. After all, if Brian testified that he stood against one of the *basic tenets* of FLDS teachings,[3] he would be considered an apostate and *not welcome at Short Creek*.

The only reasonable conclusion supported by reason, testimony, and evidence would be that Brian's new-found "reconsiderations" are little more than a trial strategy designed to obfuscate his true affiliations. That is something Brian knows well how to do. He did it with Lisa. He did it with Lisa's father. He did it with the trial court.

It was clear error for the trial court to miss or ignore the serious threats that unsupervised exposure to FLDS poses to B.J.J. That is especially concerning considering the history of missing FLDS children and the refusal by Short Creek

[3] *See* R. 291-92 (discussing how FLDS broke away from Mormonism due to a dispute over plural marriages).

law enforcement to get involved in finding these abducted children. TT1 at 249:21-23.

It is not in B.J.J.'s best interests to be exposed to FLDS, FLDS members, or FLDS teachings. It was an abuse of discretion for the trial court to permit Brian to have unsupervised visitation until it can get more reassurance that Brian is truly distanced from FLDS and FLDS adherents. The trial court's findings of fact, conclusions of law, and order should be reversed.

4. The Trial Court Abused its Discretion by not Applying the Uniform Child Abduction Prevention Act

Although this Court has yet to opine on it, South Dakota has adopted the Uniform Child Abduction Prevention Act ("UCAPA"). SDCL § 26-18-1 *et seq.* Due to the unique factors at play in this case, the trial court should have, but failed to, apply UCAPA. The trial court abused its discretion by not doing so.

The purpose of UCAPA is to give a trial court additional authority to retain jurisdiction to work hand-in-hand with the Uniform Child Custody and Jurisdiction Enforcement Act. *Uniform Child Abduction Prevention Act: Hearing on S.B. 88 Before the Senate Judiciary Comm.*, Jan. 24, 2007, 2007 Leg., 82nd Session, (S.D. 2007) (statement of Senator McCracken). Under UCAPA, a trial court may enter an order preventing abduction when there is a credible risk of abduction by a preponderance of the evidence. *Id.* Additionally, UCAPA empowers law enforcement by giving it the power to act when it would otherwise not be allowed to. *Id.*

Under UCAPA, a trial court "on its own motion may order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child." SDCL § 26-18-4(a). There are several factors that should have deserved consideration in this case:

- When a party lacks strong familial, financial, emotional, or cultural ties to the state. SDCL § 26-18-7(6).
- When a party has strong familial, financial, emotional, or cultural ties to another state. SDCL § 26-18-7(6).
- When a party has made misrepresentations to the United States government. SDCL § 26-18-7(11).
- When a party has engaged in any other conduct the court considers relevant to the risk of abduction. SDCL § 26-18-7(13)

As noted above, Brian has little to no ties to South Dakota. All of his ties are to Utah and, more specifically, to the Short Creek community. Those ties, and, more specifically, his ties to FLDS, increase the risk that B.J.J. might be subject to abduction during unsupervised visitation with Brian. Furthermore, Brian's tax returns, at best, appear to be suspect. The trial court received no information that the proffered tax returns were actually submitted or processed, and they are especially problematic in the larger context of rampant fraud by FLDS members and adherents. R. 111, 456-507. The trial court abused its discretion by failing to even consider UCAPA in this matter, much less placing additional restrictions, based on its provisions. The trial court's order should be reversed with direction to place certain restrictions on Brian's visitations, supervised or unsupervised, per

UCAPA. At a minimum, the trial court's order should be reversed with direction to apply the UCAPA factors to the facts of this case.

IV. The Trial Court Abused its Discretion by not Awarding Lisa Attorneys' Fees

An award of attorneys' fees is mandatory when a motion to compel is granted absent a finding that resistance was substantially justified. SDCL § 15-6-37(a)(4)(A). Findings of fact and conclusions of law are required when ruling on a request for attorneys' fees. *Beach v. Coisman*, 2012 S.D. 31, ¶ 13, 814 N.W.2d 135, 140 (citations omitted). The trial court granted Lisa's motion to compel. It, however, declined to award attorneys' fees, and failed to make findings why those attorneys' fees were denied. Lisa should be awarded her attorneys' fees on her motion to compel. The trial court's ruling should be reversed.

Likewise, attorneys' fees are available in custody cases. SDCL § 15-17-38. Lisa's attorneys' fees were necessary and reasonable due to the complexity of the case, the legal issues involved, and Brian's general intransigence. The trial court abused its discretion by failing to award her fees and by failing to make findings why it declined to do so.

CONCLUSION

FLDS poses a grave danger to B.J.J. Its "prophet" is a convicted child abuser. It considers women and children property of its leadership. And, it has abducted the children of non-adherents and thwarted outside attempts to recover

those children. Brian grew up in the FLDS community, honored its leadership, and tried to push FLDS onto both Lisa and B.J.J.

The trial court improperly refused to accommodate the medical emergency of a witness whose testimony would shed greater light on this danger. This witness has been intimately involved in investigating the danger FLDS presents, and, more importantly, the role that Brian's family plays in furthering FLDS abuses.

On the other hand, the trial court refused to exclude testimony that was necessarily influenced by violations of the sequestration order. That failure unfairly prejudiced Lisa because it gave Brian a witness who helped Brian tailor the false narrative that he was no longer affiliated with FLDS.

The trial court ignored Brian's repeated inconsistencies about his involvement with FLDS *and* the threat that exposure to FLDS poses to B.J.J. It is not in B.J.J.'s best interests to have unsupervised exposure to that kind of environment, and the trial court abused its discretion by forcing B.J.J. into a potentially dangerous situation. The trial court's order granting Brian unsupervised visitation should be reversed.

Finally, the trial court refused to award fees, despite a mandate to do so. That reversible error should be corrected.

Dated February 6, 2025.

HALBACH|SZWARC LAW FIRM

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,955 words, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Emily Maurice
One of the attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the below documents were electronically filed with the Clerk of the Supreme Court via Odyssey:

- Appellant's Brief;
- Certificate of Compliance; and
- Certificate of Service

Notification of filing and service of such documents completed upon the following person, by placing the same in the service indicated, addressed as follows:

George Nelson	[ ] Federal Express
George Nelson Law Office	[ ] Hand Delivery
2640 Jackson Blvd.	[ ] Facsimile
Rapid City, SD 57702	[X] Electronic Filing
Email: gjnlaw@gmail.com	[ ] Email

The undersigned further certifies that a copy of Appellant's Brief was mailed by First Class U.S. Mail, postage prepaid to:

Ms. Shirley A. Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

Dated February 6, 2025.

/s/ Emily Maurice
One of the attorneys for Appellant

INDEX TO APPELLANT'S APPENDIX

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1.	Findings of Fact and Conclusions of Law	1-36

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
BRIAN RAY JESSOP,	)	51CIV21-1024
Plaintiff,	)	
v.	)	
LISA JO COMBS,	)	**FINDINGS OF FACTS AND CONCLUSIONS OF LAW**
Defendant.	)	

A Court Trial before the Honorable Joshua Hendrickson was held regarding this matter on June 4th and 5th, 2024. The Plaintiff appearing in person and with his attorney, George Nelson; the Defendant appearing in person and with her attorney, Emily Maurice. The Court having reviewed the file in its entirety, heard the testimony, received evidence, and considered the law herein; it does hereby make the following:

FINDINGS OF FACT

1. Any Finding of Fact that should more appropriately be a Conclusion of Law, or vice versa, shall be treated as such for purposes herein.
2. Plaintiff, Brian Jessop ("Brian"), is a resident of the State of Utah.
3. Defendant Lisa Combs n/k/a Lisa Christopherson ("Lisa") is a resident of the State of South Dakota.
4. The parties have one child, Betty Jo Jessop ("BJJ"), born on March 15, 2020.

5. BJJ was, at the time of the hearing on this matter, and is currently four (4) years of age.

6. The parties' relationship began in January of 2019 through interaction on the internet.

7. Lisa relocated to Utah to live with Brian on or around June 21, 2019.

8. Lisa did not have any family in Utah.

9. Prior to moving to Utah Lisa did not meet any of Brians relatives.

10. The parties stopped living together in January 2021.

11. There were conflicting versions of how the relationship ended, with Lisa stating she was kicked out of the home while Brian asserted she left of her own volition without notifying him.

12. Lisa returned to South Dakota with BJJ when the relationship ended.

13. Lisa did not work when the parties lived together in Utah.

14. Brain was present in the hospital room during the birth of BJJ and participated in her early life.

15. Lisa was the primary caretaker for BJJ, and Brian was involved and saw her daily when home when the parties lived together.

16. Lisa testified that she believes the conception date of BJJ to be July 1, 2019.

17. Lisa testified that it was not a consensual sexual encounter that led to the pregnancy.

18. Lisa testificd she was given a pill by Brain which he said would help with an anxiety attack, which she took that left her feeling dizzy and out of sorts.

19. Lisa did not recall them having intercourse at that time but did indicate that Brian asked her if she remembered having sex after the fact.

20. Lisa does not know what the pill was.

21. Brian denies this interaction.

22. Brian indicates that the parties had sexual intercourse on a regular basis both before and after the July 1, 2019, date.

23. The Court does not find Lisa's testimony regarding the conception of BJJ to be credible given the totality of the circumstances.

24. Neither party disputes that Lisa primarily cared for BJJ after her birth on Marh 15, 2020.

25. Upon returning to South Dakota with BJJ in 2021 Lisa first resided with her parents, Kent and Christine Christopherson.

26. Brian has been limited in his involvement with the parenting of BJJ since Lisa returned to South Dakota.

27. Brians interactions with BJJ has been primarily through FaceTime video calls. Brian has continued to express a desire to participate in parenting BJJ.

28. Brian has had some visits with BJJ in South Dakota in the interim of this hearing, always being supervised either by Lisa or one of her parents.

29. Brian appears to have made attempts to be more involved as a parent with BJJ, but has been unsuccessful in that effort.

30. The parties have shown difficulty in being able to effectively communicate in relation to parenting time.

31. Brian filed this matter on August 23, 2021, in Pennington County.

32. Brian filed to be the custodial parent in his petition but clarified that he is seeking guideline parenting time at the hearing.

33. Lisa is seeking sole legal and physical custody allowing only supervised visits by Brain in South Dakota.

34. The Court ordered a child custody evaluation to be completed in this matter which was done by Dr. William Moss.

35. Dr. Moss did not testify at trial, but the admission of his report was stipulated too and was received as Plaintiff's Exhibit #4.

36. Dr. Moss, in his custody evaluation report, recommends:

a. Each parent be granted full and equal access to educational and medical records regardless of custody arrangements unless otherwise ordered by the court. Either parent should be allowed to make emergency decisions affecting the health and safety of their daughter while she is in that parent's care.

b. Lisa Combs should be identified as the primary custodial parent.

c. Brian Jessop should be allowed a visitation schedule consistent with the South Dakota Parenting Guidelines. Whether this should include overnight, or unsupervised visitation is a matter for the courts to decide based on its presumption of danger.

37. Brian, since initiating this action, has married.

38. He is now married to Amber Jessop.

39. Amber and Brian have one child, a daughter Eliana.

40. BJJ and Eliana are half-sisters but have never had any interaction.

41. Brian is currently employed as a carpenter for Reliable Handyman, LLC.

42. Brian does not have a history of being financially stable for long periods of time.

43. Lisa is not currently employed and is primarily supported by her father Kent Christopherson.

44. Kent Christopherson testified about his financial history and ability to continue to provide for Lisa and BJJ.

45. Kent Christopherson assisted Brian and Lisa financially when they lived together in Utah.

46. Kent Christopherson is capable and willing to support Lisa and BJJ.

47. Lisa does not appear able to support herself and BJJ without the assistance of her father at this time.

48. Lisa does have plans to return to the workforce once BJJ is of school age.

49. Lisa has been receiving education for work in the clinical herbalism field.

50. One of the biggest areas of contention in this matter deals with Brians involvement with the Fundamentalist Church of Latter-Day Saints (FLDS).

51. Dr. Moss includes a brief synopsis in his report on the background of the FLDS that the Court considers accurate.

52. Further testimony was presented by the defendant through Rodger Hoole, a Utah attorney that has experience dealing with the FLDS in relation to custody cases.

53. This Court does recognize that the FLDS has history of treating women and children as property.

54. The FLDS further has a history of child abuse in arranging marriage between underage girls with sometimes much older men.

55. The head of the FLDS church at one point, Warren Jeffs, is currently serving a federal prison sentence in relation to activities involving underage girls.

56. Most concerning to the Court is the history of missing children and the potential abduction of children from the non-FLDS parents as described by defense witnesses.

57. Brian does have connections to the FLDS.

58. Brians father appears to be a current member and is also engaged in the practice of plural marriage appearing to have five (5) wives.

59. Brian was raised in the FLDS, but indicates he is no longer a practicing member.

60. Brian still has contact with family that are practicing FLDS members, most notably his parents.

61. Lisa testified that Brian did attend some family FLDS functions that she was not allowed to be at, including a funeral for a woman that Lisa helped provide care and support for.

62. Lisa had to dress in a more traditional fashion when she did have contact with Brians parents.

63. Dr. Moss expresses some concerns over his belief that Brian continues to adhere to much of the FLDS edicts.

64. After BJJ was born, presents were given to Brian and Lisa by Brians parents that included tracing cards for writing letters wherein the card for the letter "P" stood for "Prophet" and showed a picture of convicted felon Warren Jeffs, the self-proclaimed prophet of the FLDS. Exhibit X.

65. Dr. Moss's report further indicated Brian still has regular contact with his father in which scripture is discussed.

66. Brian testified that he does not currently associate himself with the FLDS and is not considered a member.

67. Brian indicates he moved away from FLDS as a teenager.

68. Brian indicates he intends to have a discussion about the FLDS with BJJ once more age appropriate.

69. Brian testified he does not want to push any religion on BJJ.

70. Brians wife Amber, herself coming from a Mormon religious background but not FLDS, testified in corroboration with Brians statements about his involvement with the FLDS.

71. While the Court is concerned with the FLDS connection, it does not find that Brian is a current member or follower of the FLDS faith.

72. The Court is reluctant to hold any negative aspect of the FLDS church against Brian as the Court does not find the evidence is sufficient to establish that Brian does, or would follow FLDS edcit. Particularly in regard to the issues of concern regarding the safety of BJJ.

73. Brians current and past relationships, including his relationship with Lisa, having a child out of wedlock with a non-FLDS member seems to this Court, contrary to the belief that he is a practicing member of the FLDS.

74. Both parties have asked for attorney fees associated with this action.

CONCLUSIONS OF LAW

1. Any Conclusion of Law deemed to be a Finding of Fact or vice versa shall be appropriately incorporated in the Findings of Fact or Conclusions of Law.

2. The Court has personal and subject matter jurisdiction over the parties and issues herein.

3. The parties had proper notice of the date and time of the trial herein.

Paternity

4. "An admission by an alleged father of paternity of a child born out of wedlock, other than completion of an affidavit of paternity which creates a presumption of paternity as specified with in this chapter, is prima facie evidence of paternity." SDCL §25-8-49.

5. Brian admitted he is the biological and legal father of BJJ in his verified Parentage Petition.

6. Plaintiff Brian Ray Jessop is the biological father of BJJ.

7. Defendant Lisa Combs n/k/a Lisa Christopherson is the biological mother of BJJ.

Child Custody/Visitation

8. The Court does not consider prohibiting, revoking, or restricting Brian's visitation rights under SDCL §25-4A-20 based upon it's finding of fact #23.

9. The Court looks at what would be in the best interest in the child in respect to the children's temporal and mental and moral welfare when determining custody. *Moulton v. Moulton*, 2017 S.D. 73, ¶ 9, 904 N.W.2d 68, 72 (quoting SDCL § 25-4-45).

10. The Court considers the *Fuerstenberg* factors in determining the best interests and welfare of the child. *Id.*; *Roth v. Haag*, 2013 S.D. 48, ¶ 13, 834 N.W.2d 337, 340. The *Fuerstenberg* factors are: (1) parental fitness, (2) stability, (3) primary caretaker, (4) child's preference, (5) harmful parental misconduct, (6) separating siblings, and (7) substantial change in

circumstances. *Moulton*, 2017 S.D. 73, ¶ 9, 904 N.W.2d at 72 (quoting *McCarty v. McCarty*, 2015 S.D. 59, ¶ 12, 867 N.W.2d 355, 359).

11. The Courts take a "balanced and systematic approach when applying the factors revenant to a child custody proceeding." *Nickles v. Nickles*, 2015 S.D. 40, ¶ 16, 865 N.W.2d 142, 149 (quoting *Roth*, 2013 S.D. 48, ¶ 13, 834 N.W.2d at 340).

12. The Court is not required to make specific findings for each factor, and may consider additional relevant considerations. *Moulton*, 2017 S.D. 73, ¶ 9, 904 N.W.2d at 72.

13. When determining parental fitness the following subfactors may be applied:

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

Id. ¶ 11, 904 N.W.2d at 72 (quoting *McCarty*, 2015 S.D. 59, ¶ 13, 867 N.W.2d at 359-60).

Furstenbeg Factors :

Fitness:

Mental and Physical Health

14. Lisa testified to having some metal heath problems in the past, including having some inpatient treatment.

15. Both Parties appear physically and mentally fit currently.

16. Neither parent has a significant edge in this sub factor.

Capacity to Provide

17. Both parties have the ability to provide for basic needs.

18. Brian is currently employed and has more financial stability than he historically has had.

19. Lisa currently relies on her father for her and BJJ's financial needs.

20. Neither parent has a significant edge in this factor.

Ability to Give Child Love, Affection, Guidance, Education and to Impart the Family's Religion or Creed.

21. Brian has been involved to an extent in BJJ's life given the distance involved.

22. Brian has an understanding of her developmental needs and appears committed to providing a nurturing environment in that regards.

23. Lisa has routinely shown good parenting skills and has proven her ability in this sub factor.

24. Biran indicates he doesn't wish to force any religion on BJJ, which the Court finds credible.

25. While the Court recognizes the concern over highlighted FLDS activity it again does not attribute that to Brian or find the evidence presented supports that Brian would act in accordance with FLDS philosophy in relation to the safety concerns expressed by Lisa.

26. Lisa still would have the advantage in this sub factor.

Willingness to Maturely Encourage and Provide Frequent and Meaningful Contact between the Child and Other Parent.

27. Brian has made consistent efforts to communicate about parenting issues.

28. Brian has completed the SMILE classes.

29. While restrictive, Lisa has allowed contact primarily through FaceTime calls.

30. Lisa is much more reluctant to encourage contact based upon her fears in relation to the FLDS.

31. Both parties have indicated a belief of the importance of both parents in the child's life.

32. Brian has the edge in this sub factor.

Commitment to Prepare the Child for Responsible Adulthood

33. Neither parent appears to have a significant edge in this sub factor.

Commitment to ensure the child experiences Fulfilling Childhood

34. Both parents appear committed to having BJJ have a fulfilling childhood.

35. Neither parent has an edge in this factor.

Exemplary Modeling

36. Brian has maintained employment consistently.

37. Brian has rejected FLDS doctrines and shows commitment to more traditional and accepted parenting practices.

38. Brian appears to be in a stable loving marriage.

39. Lisa has also role modeled appropriate behavior in parenting BJJ.

40. Dr. Moss finds in relation to fitness that Lisa is "deemed to be better suited for these aspects of child care."

41. The court doesn't find a significant edge but gives a slight edge to Lisa in regard to overall Fitness.

Stability

42. A court should consider "the relationship and interaction of the child with the parents, step-parents, siblings, and extended families." *Furstenberg*, 1999 SD 35.

43. BJJ has formed meaningful bonds with her maternal grandparents and extended family in South Dakota.

44. BJJ does not have bonds with the paternal extended family.

45. BJJ has a stronger bond with Lisa.

46. A court should consider "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 a detriment" *Id.*

47. The Court does recognize that Brian has not had the opportunity to establish as deep of an attachment, and that he does seek to have that connection.

48. Lisa would have the edge in this factor.

Primary Caretaker

49. It is uncontested that Lisa has always been the primary caretaker of BJJ.

50. Lisa has the edge in this factor.

Childs Preference

51. This factor was not considered by the Court.

Harmful Parental Misconduct

52. The court doesn't Identify any evidence presented raises to the level of harmful misconduct that the court would consider.

Separation of Siblings

53. BJJ does now have a younger half-sister.

54. BJJ has never had contact with her half-sister.

55. The Court gives no weight to this factor.

56. The Court, having considered all *Fuerstenberg* factors and Dr. Moss's Child Custody Evaluation, concludes it is in the best interests of the child that the parties share legal custody of the child, with Lisa having primary physical custody.

57. Brian shall have parenting time in accordance with the South Dakota Parenting Guidelines, a copy of which is attached to these findings.

58. Prior to the child turning 5 and guideline 3 controlling as outlined, parties shall continue video contact as done currently and all in person visitation by Brian should be done in Rapid City but should be allowed as unsupervised and should include 1 overnight not to exceed 24 hours, monthly. A minimum of two (2) weeks' notice should be given in regards to this visitation.

59. The party picking the child up is responsible for transportation costs, unless otherwise agreed to by the parties.

Attorney Fees and Costs

60. SDCL § 15-17-38 provides the Court statutory authority to award attorney fees in this proceeding.

61. It is in the discretion of the Court to award attorney's fees under SDCL § 15-17-38. *Smetana v. Smetana*, 2007 S.D. 5, ¶ 19, 726 N.W.2d 887, 894 (quoting *Keller v. Keller*, 2003 S.D. 36, ¶ 18, 660 N.W.2d 619, 624).

62. In order to award attorney fees, the Court must examine both the necessity and the reasonableness of the award. *Id.* ¶ 32.

63. When determining whether an attorney's fees is reasonable, the court looks at:

> (1) the amount and value of the property involved, (2) the intricacy and importance of the litigation, (3) the labor and time involved, (4) the skill required to draw the pleadings and try the case, (5) the discovery utilized, (6) whether there were complicated legal

problems, (7) the time required for the trial, and (8) whether briefs were required.

Id. (quoting *Streier v. Pike*, 2016 S.D. 71, ¶ 25, 886 N.W.2d 573, 581).

64. The Court then looks at the necessity of the fee, or "what portion of that fee, if any should be allowed as costs to be paid by the opposing party." *Id.* This analysis generally requires the Court review the parties' "relative worth, income, liquidity, and whether either party unreasonably increased the time spent on the case." *Id.*

65. Both parties have requested attorney's fees.

66. Neither party shall be entitled to attorney's fees.

67. No attorney's fees will be assessed in relation to the defendants request for sanctions in regards to its Motion to Compel.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 15 day of August, 2024.

FOR THE COURT:

The Honorable Joshua Hendrickson
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:
AMBER WATKINS
CLERK OF COURTS

Heather Shaw
Deputy

FILED
Pennington County, SD
IN CIRCUIT COURT

AUG 16 2024

Amber Watkins, Clerk of Courts
By HS Deputy

25-4A-5. Sanctions for violation of custody or visitation decree.

If the court finds that any party has willfully violated or willfully failed to comply with any provisions of a custody or visitation decree, the court shall impose appropriate sanctions to punish the offender or to compel the offender to comply with the terms of the custody or visitation decree.

The court may enter an order clarifying the rights and responsibilities of the parents and the court's order. The court may order one or more of the following sanctions:

(1) To require the offender to provide the other party with make up time with the child equal to the time missed with the child, due to the offender's noncompliance;
(2) To require the offender to pay, to the other party, court costs and reasonable attorney's fees incurred as a result of the noncompliance;
(3) To require the offender to pay a civil penalty of not more than the sum of one thousand dollars;
(4) To require the offender to participate satisfactorily in counseling or parent education classes;
(5) To require the offender to post bond or other security with the court conditional upon future compliance with the terms of the custody or visitation decree or any ancillary court order;
(6) To impose a jail sentence on the offender of not more than three days; or
(7) In the event of an aggravated violation or multiple violations, the court may modify the existing visitation or custody situation, or both of any minor child.

The provisions of this section do not prohibit the court from imposing any other sanction appropriate to the facts and circumstances of the case.

Source: SL 1994, ch 195, § 5; SL 2008, ch 125, § 1; SL 2018, ch 155, § 3.

SOUTH DAKOTA PARENTING GUIDELINES

Prepared by the 2021 South Dakota
Commission on Parenting Guidelines

The South Dakota Parenting Guidelines are located on the South Dakota Legal Self-Help Center found at www.ujslawhelp.sd.gov

For more information, contact:

South Dakota Unified Judicial System
State Court Administrator's Office
500 E. Capitol Avenue
Pierre, SD 57501
605-773-3474

Enforcement.

These Guidelines are required to be served with the Summons and Complaint in a divorce, paternity action or any other custody action or proceeding. *See* https://ujslawhelp.sd.gov/onlineforms.aspx under divorce or paternity actions for instructions on how to initiate an action (service of summons).

If the parents are able to agree to a schedule other than the guidelines, these Guidelines should be used as a ***minimum*** direction in creating the parenting time plan. Parents should agree to parenting times that they find reasonable and in the best interest of their children and the Parenting Guidelines are not intended to prevent such agreements.

If the parents are unable to agree on a parenting plan, these Guidelines become mandatory as the parenting plan and are enforceable as a court order upon initiation of a divorce or court action involving custody. SDCL 25-4A-11. If you disagree with the use of these Guidelines as your parenting time plan, either parent has the right to object. Your written objection shall be filed with the Clerk. After it is filed, a hearing will be held and the Judge will determine your parenting time schedule. Instructions and this objection form can be found at https://ujslawhelp.sd.gov/defendants.aspx.

Instructions and forms regarding enforcement can be found at https://ujslawhelp.sd.gov/enforcement.aspx.

Guideline 1. For Parents Who Have Children Under Age 5.

1.1. Children Under Age 5 Generally.

- Newborns (birth to 3 months) and infants (3 – 6 months) have a great need for continuous contact with their primary caregiver, but also frequent contact with both parents who provide a sense of security, nurturing and predictability.
- Generally, overnights for very young children is not recommended unless the parents are both very closely attached to the children, are able to personally provide primary care, the children are adaptable, and the parents are cooperative.
- Older children are able to tolerate more and longer separations from one parent or the other.

The following Guidelines for children under age 5 are designed to take into account childhood developmental milestones. Since children mature at different rates, these may need to be adjusted to fit the children's individual circumstances.

1.2. Birth until 3 Months. Three, 2-hour parenting time periods per week and one weekend parenting time period for 6 hours. In situations where both parents have been engaged in an ongoing caregiving

routine with a nursing child, overnights are allowed to continue as much as possible to provide the same caregiving arrangement to the child and maintain stability for the child. If applicable, breastfeeding shall be accommodated, but the parents must cooperate in working out alternatives. *See* 1.8 below.

1.3. 3 – 6 Months. Recognizing the amount of time each parent spent with the children prior to the parents' separation and/or since that time, alternative parenting plans are recommended:

(1) Three, 3-hour custodial periods per week and one weekend day for 6 hours. If applicable, breast feeding shall be accommodated but the parents must cooperate in working out alternatives; or

(2) Three, 3-hour custodial periods per week and one overnight on a weekend not to exceed 18 hours, if the parent is capable of personally providing primary care. See exceptions in Section 1.8 below; or

(3) In situations where both parents have been engaged in an ongoing caregiving routine with a child, overnights are allowed to continue as much as possible to provide the same caregiving arrangement to the children and maintain stability for the children.

1.4. 6 – 12 Months. Recognizing the amount of time each parent spent with the children prior to the parents' separation and/or since that time, alternative parenting times are recommended:

(1) Three, 4-hour parenting time periods per week and one weekend day for 6 hours; or

(2) Three, 4-hour parenting time periods per week and one overnight on a weekend not to exceed 18 hours, if the child is not breastfeeding and the parent is capable of personally providing primary care; or

(3) Children spend time in alternate homes, but spends significantly more time in one parent's home and no more than 1-2 overnights spaced regularly throughout the week at the other parent's home; or

(4) In situations where both parents have been engaged in an ongoing caregiving routine with a child, overnights are allowed to continue as much as possible to provide the same caregiving arrangement to the children and maintain stability for the children.

1.5. 12 – 36 Months. Recognizing the amount of time each parent spent with the children prior to the parents' separation and/or since that time, alternative parenting times are recommended:

(1) Three, 8-hour parenting time periods per week on a predictable schedule; or

(2) Three, 8-hour parenting time periods per week on a predictable schedule and one overnight per week not to exceed 18 hours; or

(3) Children spends time in alternate homes, but with significantly more time in one parent's home with 1-2 overnights spaced regularly throughout the week. This arrangement requires adaptable children; or

(4) In situations where both parents have been engaged in an ongoing caregiving routine with the children (nursing or otherwise), overnights are allowed to continue as much as possible to provide the same caregiving arrangement to the children and maintain stability for the children.

1.6. 3 Years – 5 Years. Recognizing the amount of time each parent spent with the children prior to the parents' separation and/or since that time, alternative parenting times are recommended:

(1) One overnight parenting time period not to exceed 24 hours and two additional 8-hour parenting time periods each week, separate from the overnight, with the children returning to the other parent's home at least 1 hour before bedtime; or

(2) Two to three overnights at one home, spaced throughout the week, the remaining time at the other parent's home. This arrangement requires adaptable children; or

(3) In situations where both parents have been engaged in an ongoing caregiving routine with the children, overnights are allowed to continue as much as possible to provide the same caregiving arrangement to the children and maintain stability for the children.

If the parents cannot agree on which provision shall apply in sections 1.2 through 1.6, the parties shall use option 1 until further order of the court. Absent special circumstances as determined by the court, parenting time shall not decrease from one age category to the next.

1.7. Children in Day Care. In families where children are in day care before and/or after parental separation, the children may be able to tolerate more time with each parent earlier than their specific age group indicates above because the children are accustomed to separations from both parents.

1.8. Breastfeeding Children. – Parents must be sensitive to the special needs of breastfeeding children. Children's basic sleeping, feeding, and waking cycles should be maintained to limit disruption in the children's routine. Forcibly changing these routines due to the upheaval of parental disagreement is detrimental to the physical health and emotional well-being of the children. On the other hand, it is important that the children be able to bond with both parents.

a. For children being exclusively breastfed, the nursing child can still have frequent parenting time with the other parent. The amount of time will be guided by/subject to the infant's feeding schedule, progressing to more time as the child grows older. Both parents should be mindful that a feeding may occur, and the child may return to time with the other parent after the feeding.

b. Where both parents have been engaged in an ongoing caregiving routine with a nursing child, the same caregiving arrangement should be continued as much as possible to maintain stability for the children.

c. If the other parent has been caring for the children overnight or for twenty-four hour periods while the nursing mother sleeps or works, that arrangement should/shall continue.

d. A mother may not use breastfeeding to deprive the other parent of time with the children. If, for example, a nursing mother uses day care or a babysitter for the children, the same accommodations (i.e., bottle feeding with breast milk or formula, or increased time between breast feeding sessions) used with the day care provider or babysitter will be used with the other parent, if the other parent is capable of personally providing the same caregiving.

1.9. Holidays. For children aged 0-5 years, when the parents live and/or celebrate the holiday in the same or a nearby community, the parents shall alternate the following holidays in the chart below. Prior to a child's 5th birthday, holiday parenting time shall not exceed the longest period of parenting time currently being exercised and shall be scheduled by the parent exercising holiday time. If the parents cannot otherwise agree, the holiday time shall be exercised within the time frames provided in the chart below not to exceed the longest period of parenting time currently being exercised. It is recommended that the parents communicate two weeks in advance about who is exercising what time period for the holidays set forth below. Parenting time, however, shall not be withheld solely for failure to abide by this two-week recommendation.

Holiday	Details	Even-Numbered Years	Odd-Numbered Years
Martin Luther King, Jr. Day weekend	5:00 p.m. Friday – 8:00 a.m. Tuesday	Parent 2	Parent 1
President's Day weekend	5:00 p.m. Friday – 8:00 a.m. Tuesday	Parent 1	Parent 2
Easter weekend	8:00 a.m. Friday – 8:00 a.m. Monday	Parent 2	Parent 1
Mother's Day	8:00 a.m. – 8:00 a.m. the following day	Parent 1	Parent 1
Memorial Day	5:00 p.m. Friday – 8:00 a.m. Tuesday	Parent 2	Parent 1
Juneteenth (6/19)	8:00 a.m. – 8:00 a.m. the following day	Parent 1	Parent 2
Father's Day	8:00 a.m. – 8:00 a.m. the following day	Parent 2	Parent 2
4th of July	5:00 p.m. July 3rd – 5:00 p.m. July 5th	Parent 1	Parent 2
Labor Day	5:00 p.m. Friday – 8:00 a.m. Tuesday	Parent 1	Parent 2
Native American Day	5:00 p.m. Friday – 8:00 a.m. Tuesday	Parent 2	Parent 1
Halloween	3:00 p.m. – 8:00 p.m.	Parent 1	Parent 2
Thanksgiving	8:00 a.m. Thursday – 5:00 p.m. Sunday	Parent 2	Parent 1

Christmas Eve	8:00 a.m. Christmas Eve – 8:00 a.m. Christmas Day	Parent 2	Parent 1
Christmas Day	8:00 a.m. Christmas Day – 8:00 a.m. December 26th	Parent 1	Parent 2
Child's Birthday	Ages 0-3 = 4 hours Ages 3-5 = 8 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 1
Parent 2's Birthday	Ages 0-3 = 4 hours Ages 3-5 = 8 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	Ages 0-3 = 4 hours Ages 3-5 = 8 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

1.10. Vacation With Children 3 – 5 Years Old. Upon 30 days advance written notice (by mail, email or text message), each parent is entitled to two separate periods of uninterrupted time for up to 5 days each with their children each year, not to conflict with the other parent's holiday parenting time. Parents are encouraged to coordinate vacation plans. The parents shall consider extending the 5 day time periods to 7 days if the children are adaptable and accustomed to spending time with both parents.

1.11. Long-Distance Parenting. When substantial distance between the parents exists, the ability to exercise these Guidelines is compromised. The parents will need to create a developmentally appropriate parenting plan for their unique situation. When parenting time is unable to be frequent, parents are encouraged to use video/audio contact to build and/or maintain the bond between the children and parent who lives afar.

Guideline 2. For Parents Who Have Children Age 5 and Older And Reside No More Than 200 Miles Apart.

2.1. Weekends. In most cases, it is a positive experience for the children to have both parents involved in taking the children to and from school. Parenting time shall consist of alternate weekends starting Friday upon the release of school or 3:15 p.m., whichever is applicable, and continuing until the return to school Monday or 8:00 a.m., whichever is applicable. Parenting time shall be an equivalent period of time if a parent is unavailable on weekends and the children do not miss school.

2.2. Mid-Week. If time and distance allow, parenting time shall include one mid-week overnight every week, in addition to the weekends in 2.1 above, with the children. If the parents cannot otherwise agree, this mid-week time shall be on Wednesdays and shall start when the children are released from school or at 3:15 p.m., whichever is applicable, and concludes when the children are returned to school the next day or at 8:00 a.m., whichever is applicable. All transportation for the midweek parenting time is the responsibility of the parent exercising the parenting time.

2.3. Summer Break. The children shall be with each parent for one-half of the school summer break. Summer break begins the day after school is released and ends the day before school commences. The parent with whom the children reside the majority of the time during the school year has priority to have the children the week before school resumes, which counts as part of that parent's summer break. At the option of the other parent, his/her parenting time during summer break may be consecutive or it may be split into 2 or more blocks of time. This parent shall provide a minimum of 30 days advance notice of the dates selected.

If the children go to summer school and it is impossible for a parent to schedule time other than during summer school, the parent may elect to take the time when the children are in summer school and transport the children to the summer school sessions at the children's school or an equivalent summer school session in that parent's community.

The parent with whom the children reside for the majority of the school year shall have the weekend before the beginning and the weekend after the end of the other parent's summer period, regardless of whose weekend it may be. This weekend time will not be made up.

During any summer vacation parenting times of three or more consecutive weeks, the parent exercising parenting time shall arrange for a mutually convenient 48-hour continuous period of time for the other parent to spend with the children.

2.4. Holidays. The following chart shows the allocation of the holidays between parents. School breaks and release times may be different from school to school and district to district. The school calendar is published on your children's school's website before each school year starts. It is important to know these dates / times as they pertain to your children.

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

2.5. Conflicts Between Regular and Holiday Weekends. When there is a conflict between a holiday weekend and the regularly scheduled weekend time, the holiday takes precedence. Unless mutually agreed in writing, there will be no makeup parenting time in conflicts between holiday weekend and the regularly scheduled weekend time. This may result in one parent having the children for three weekends in a row; however, neither parent shall have the children for more than 3 weekends in a row.

2.6. Parent's Vacation with Children Age 5 and Older. Each parent is entitled to a vacation with the children totaling up to 14 days, with 7 days being the most that may be exercised at one time. When possible, each parent shall provide the other with 30 days advance notice of their intent to utilize their vacation time. Parents are encouraged to coordinate vacation plans. In the event there is a dispute, the mother gets priority in choosing her vacation periods first in even-numbered years and the father gets priority in choosing his vacation periods first in odd-numbered years.

2.8. Precedence. The allocation of holidays listed in the above chart shall take precedence over vacations. In other words, a parent cannot exercise their vacation with the children when it is the other parent's holiday. But vacations shall take precedence over the regular parenting time schedule.

2.9. Notice of Canceled Time With the Children. Whenever possible, each parent shall give a minimum of three days' notice of intent not to exercise all or part of the scheduled time with the children. When such notice is not reasonably possible, the maximum notice permitted by the circumstances, and the explanation, shall be provided to the other parent.

2.10. Pick Up and Return of Children. When the parents live in the same area/community, the responsibility for picking up and returning the children shall be shared. The parent who receives the children for his/her parenting time will pick the children up from the other parent. Both parents have an obligation to be punctual and to arrive at the agreed upon time, not substantially earlier or later. Repeated, unjustified violations of this provision may subject the offender to court sanctions.

Guideline 3. For Parents Who Have Children Age 5 and Older and Reside More Than 200 Miles Apart.

3.1. Holidays. Parents who reside more than 200 miles apart shall exercise the following holidays as follows:

Holiday	Details	Even-Numbered Years	Odd-Numbered Years
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
Thanksgiving	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
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.	Parent 1	Parent 2

3.2. Summer Break. The parent with whom the children do not reside during the school year shall have the children for the children's summer break as follows: summer break begins 3 days after school is released and ends 7 days before school recommences. This allows 10 days of parenting time during the summer with the parent with whom the children reside during the school year. Additionally, the parent with whom the children reside during the school year shall be entitled to exercise a 48 hour period of parenting time with the children every three weeks during the summer break; to be exercised at the sole expense of the parent with whom the children reside during the school year.

3.3. Priority of Summer Time With Parent. Parenting time in the summer with the parent who lives more than 200 miles away takes precedence over summer activities (such as sports) when the parent's time cannot be reasonably scheduled around such events. Even so, the conscientious parent will often be able to enroll the children in a similar activity in the parent's community. When each child reaches an age and maturity where activities are very important to them, the parents should reach an agreement that works best for the child.

3.4. Notice. At least sixty (60) days' notice (recommended to be by mail, email, or text message) shall be given by the parent who lives more than 200 miles away from the children of the date for commencing extended summer parenting time with the children so that the most efficient means of transportation may be obtained and the parents and the children may arrange their schedules. Failure to

give the precise number of days' notice does not entitle the parent with primary residence of the children the right to deny the other parent parenting time with the children.

3.5. Additional Time With the Parent Who Lives More Than 200 Miles Away. The parent who resides more than 200 miles away from the children shall have the following parenting time:

- If the parent who lives more than 200 miles away wants to travel, at his/her sole expense, to visit with his/her children, this parenting time shall be accommodated for a reasonable time period of no less than 48 hours. However, this is not intended to be exercised more than every other weekend;

- Where distance and finances permit, additional parenting time for the parent residing more than 200 miles away from the children, such as holiday weekends or special events, is encouraged. Parents are encouraged to reference the holiday schedules set forth in Section 2.4 when determining the allocation and duration of other holidays; and

- When the parent who lives 200 miles away is in the area where the children reside, or the children are in the area where this parent resides, liberal time with the children based on the circumstances must be allowed. Circumstances will vary and may only allow for a quick visit or may allow for overnight parenting time.

The children may miss some school to spend time with the parent who lives 200 miles away, so long as it does not substantially impair the children's academic progress. However, additional time with the parent who lives more than 200 miles away from the child shall not interfere with the alternating holiday schedule set forth in Section 3.1 herein.

Parents are encouraged to communicate with each other and cooperate in creating additional parenting times for the children. If the additional parenting time exceeds 4 hours, the parent who lives more than 200 miles away shall provide as much advance notice as possible, preferably 30 days. Failure to provide notice shall not be the sole reason for denial of additional parenting time.

Guideline 4. General Rules Applicable to All Parents

4.1. Rules of Conduct. A parent shall always avoid speaking negatively about the other parent and must firmly discourage such conduct by relatives or friends. Each parent should speak in positive terms about the other parent in the presence of the children. Each parent shall encourage the children to respect the other parent. Children should never be used by one parent to spy or report on the other parent.

4.2. Relatives. Children will usually benefit from continued contact with all relatives on both sides of the family. Such relationships should be protected and encouraged. But relatives, like parents, need to avoid being critical of either parent in front of the children. Parents should have their children maintain ties with both the maternal and paternal relatives. Usually the children will visit the paternal relatives

during times when the children are with their father and the maternal relatives during times when they are with their mother. This may include allowing the children to spend time with these relatives even when the parent is not present.

4.3. Relocation. Relocation is governed by South Dakota state law. *See* SDCL 25-4A-17. Instructions and forms on how to comply with the requirements surrounding relocation, as well as how to object to a parent's notice of relocation, can be found at www.ujslawhelp.sd.gov.

4.4. Communication between Parents. Parents must always keep each other advised of their home and work addresses and telephone numbers. Whenever possible and unless otherwise stated herein, all communication concerning the children must be conducted directly between the parents (i.e., in person, by telephone, email, text message, communication notebook, a designated third party or co-parenting tool). Absent an emergency, communication should not occur at a parent's place of employment.

4.5. School and Medical Information. Both parents shall keep the other parent informed with the name, address and telephone number of the school where each of their children attends and each parent is authorized to communicate concerning the children directly with the school and with the children's doctors and other professionals, outside the presence of the other parent. Each parent has an obligation to contact the school to ensure receipt of class schedules, school report cards, notices, etc. so that they can remain involved with their children's education. Both parents shall be listed as a parent and emergency contact on all of the children's records, forms, registrations, etc. Attendance at academic or disciplinary meetings pertaining to the minor children shall be limited to the parents and the respective school professional(s). Others may not attend such meetings without advance mutual parental agreement or court order.

Each parent shall immediately notify the other parent of any medical emergencies or serious illnesses of the children. Access to records and information pertaining to minor children, including, but not limited to, medical, dental, therapy, counseling, orthodontia and similar health care and school records must be made equally available to both parents. The parents must make reasonable efforts to ensure that the name and address of the other parent is listed on all such records. If children are taking medications, both parents shall have access to a sufficient amount for their parenting time as well as the instructions.

The parent who has medical insurance coverage on the children shall supply to the other parent an insurance card or copy thereof and, as applicable, insurance forms and a list of insurer-approved or HMO-qualified health care providers in the area where the other parent is residing. Except in emergencies, the parent taking the children to a doctor, dentist or other provider not so approved or qualified may be required to pay the additional cost for that provider. However, when there is a change in insurance, which requires a change in medical care providers and a child has a chronic illness, thoughtful consideration shall be given by the parents to what is more important, i.e., allowing the child to remain with the original provider or the economic consequences of changing carriers. When there is an obligation to pay medical expenses, the parent responsible for paying shall be promptly furnished with the bill, and where applicable, the explanation of benefits, by the other parent. The parents shall

cooperate in submitting bills to the appropriate insurance carrier. Thereafter, the parent responsible for paying the balance of the bill shall make arrangements unless previously paid by the other parent. Insurance refunds shall be promptly turned over to the parent who paid the bill for which the refund was received.

4.6. Extracurricular Activities. Both parents shall consult the other parent prior to enrolling the children in any event that may affect the other parent's parenting time. Both parents shall be listed as a parent and emergency contact on all of the children's records, forms, registrations, etc. Both parents shall be provided access to the name of the coach, director, and organization providing the activity for each child along with their contact information. Both parents shall have the obligation to contact the activity director to ensure receipt of information such as practice schedules, games, parental participation, etc.

4.7. Clothing. In situations where the children reside primarily with one parent, that parent shall send an appropriate supply of children's clothing with the children for the other parent's parenting time. At the conclusion of his/her parenting time, this clothing shall be returned clean (when reasonably possible). Parents must advise, as far in advance as possible, of any special activities so that appropriate clothing for the children may be sent. It is recommended that both parents have some basic clothing available in their home to ensure that all of the children's basic needs are met.

4.8. Withholding Support or Time with the Children. Neither time with the children nor child support is to be withheld because of either parent's failure to comply with a court order. Only the court may enter sanctions for non-compliance. Children generally have a right both to support and, time with both parents, neither of which is dependent upon the other. In other words, if the parent ordered to pay child support fails to do so, he/she is still entitled to their parenting time. Likewise, if one parent denies the other parent parenting time, child support payments must still be made.

Forms and instructions on how to enforce your parenting time can be found on the South Dakota Legal Self-Help Center at https://ujslawhelp.sd.gov/onlineforms.aspx.

4.9. Adjustments in Parenting Plan. Parents are expected to fairly modify the parenting plan as family necessities, illnesses, weather or commitments reasonably so require. The parents must work together in good faith to get any missed parenting time rescheduled to occur within a reasonable period of time, usually within 30 days. When possible, each parent must timely advise the other when scheduled parenting time with the children cannot be exercised.

4.10. Children of Different Ages. It usually makes sense for all the children to share the same schedule of parenting time. Having brothers or sisters along can be an important support for children. Because it is intended that parenting time with the children be a shared experience between siblings and, unless these Guidelines or a court order provides otherwise, all the children shall enjoy parenting time together. Parents shall consider the children's best interests when scheduling parenting time especially for newborns and infants who may have developmental needs that may prevent them from immediately experiencing the same schedule as their older siblings. Additionally, older teenagers' special needs for

peer involvement and for some control of their own lives may place them on different schedules from their younger brothers and sisters.

4.11. Communication with Children. Unless prohibited by a court order, either parent may mail, call, text, email, FaceTime or skype (or use similar technology) to communicate with the children at reasonable times and with reasonable frequency during those periods the children are with the other parent. The children may, of course, mail, call, text, email, FaceTime or skype (or use similar technology) to communicate with either parent, at reasonable hours or with reasonable frequency.

- Parents are cautioned that communication between the parent and the children should not be so excessive as to interfere with the other parent's time, nor used to undermine the other parent's authority.
- During long vacations, the parent with whom the children are on vacation is required to make the children available for telephone calls with the other parent at least every three days.
- At all other times, the parent the children are with must not refuse to answer the other parents telephone calls or turn off their telephone in order to deny the other parent telephone contact.
- If a parent uses an answering machine or cell phone voicemail, messages left should be returned to that person as soon as possible.
- Parents should agree on a specified time for calls to the children so that the children will be made available no less than three days a week.
- Either parent may provide the children with a cell phone subject to each parent's ability to set restrictions in their home. A parent shall not prohibit contact between the children and the other parent; nor shall they impede the children's ability to contact the other parent during reasonable times and at a reasonable frequency.
- Communication between a parent and the children must not be censored, recorded, or monitored, absent a court order.
- Each parent shall have an unrestricted right to send cards, letters and/or packages to their children. The children shall also have the same right to receive and send items to their parents.

4.12. Social Media. Each parent shall have full access to monitor the social media accounts of the children, but neither shall open or read communications between the children and the other parent.

4.13. Privacy of Residence. A parent shall not enter the residence of the other parent except by express invitation, regardless of whether a parent retains a property interest in the residence. Unless otherwise indicated herein, the children shall be picked up and returned to the front entrance of the other parent's residence. The parent dropping off the children shall not leave until the children are safely inside the other parent's residence. Parents must refrain from surprise visits to the other parent's home.

4.14. Refusal / Hesitation by Children. Parents should always encourage the children to attend parenting time with the other parent absent circumstances outlined in the "Scope of Application" provision on page 3. Parents shall not deny parenting time with the other parent solely based on the refusal of the children.

4.15. Special Considerations for Adolescents. While children never get to choose where they live, the parents should honestly and fairly consider their teenager's wishes regarding time with a parent. Neither parent shall attempt to influence their teenager's wishes on parenting time. Teenagers should explain the reason for their wishes directly to the affected parent, without intervention by the other parent.

4.16. Daycare Providers. When parents reside in the same community, they should use the same day care provider. To the extent feasible, the parents should rely on each other to care for the children when the other parent is unavailable.

4.17. Parents in the Armed Services. When one or both parents are serving in the military, it is important to create a parenting time schedule that focuses on sharing the children when the parents live close to each other and allowing for temporary duty assignment (TDY) possibilities. Military families should also consider what parenting time would look like if TDY's or overseas commitments were engaged requiring one parent to live more than 200 miles from the children. The residential parent shall support the children's relationship with the other parent by having a consistent plan of communication with the military parent.

Legal Notice.

These Guidelines do not provide legal opinions or legal advice and are not intended to serve as a substitute for the advice of licensed, legal professionals.

Laws and interpretations of laws change frequently, and the material contained in these Guidelines have important legal consequences. In using these Guidelines, parents are responsible for determining the applicability of any information contained in this document to their situation and are strongly encouraged to seek professional legal and other expert assistance in resolving their parenting time issues. Parents will often benefit from getting advice from mediators, counselors, therapists, parenting coordinators and lawyers to help them make a parenting time schedule.

Definitions.

Any custody proceeding involving children is going to involve a determination of both legal and physical custody.

"Legal Custody" refers to the legal authority to make major decisions for your children. There are 2 options when it comes to legal custody:

> Joint Legal Custody – "[B]oth parents retain full parental rights and responsibilities with respect to their child[ren] and so that both parents must confer on, and participate in, major decisions affecting the welfare of the child[ren]." *See* SDCL 25-5-7.1.
>
> Sole Legal Custody – one parent shall have the right and responsibility to make the decisions related to health, education and welfare of the children.

"Physical Custody" refers to how parenting time is divided between 2 parties. Parents may agree on the amount of time the children spend with each parent. If parents do not agree, the parenting time schedule set forth herein shall remain in place until a court orders otherwise.

Shared Parenting.

These Guidelines do not address shared parenting, which is defined as "a detailed shared parenting plan which provides that the children will reside no less than 180 nights per calendar year in each parent's home and that the parents will share the duties and responsibilities of parenting the children and the expenses of the children in proportion to their incomes[.]" SDCL 25-7-6.27. If you are interested in this arrangement, you are strongly encouraged to consult with an attorney of your choosing. More information and sample schedules can be found at https://ujslawhelp.sd.gov/.

Scope of Application.

General. These Guidelines are applicable to all custody situations, including divorces with minor children, paternity actions and cases involving joint legal custody where one parent has primary physical custody. These Guidelines are not applicable to situations where the court reasonably believes the children's physical health or safety is in danger or the children's emotional development could be significantly impaired. These situations may include, but are not limited to, the following:

- Family Violence (physical, verbal or otherwise);
- Substance Abuse;
- Mental Illness of Parent or Child;
- Risk of Flight with Children;
- Long Interruption of Contact Between Parent and Children;
- A Parent's New Relationship;
- Religious & Cultural Holidays; or
- An Incarcerated Parent.

In such cases one or both parents may have legal, psychological, substance abuse or emotional problems that may need to be addressed before these Guidelines can be used. The type of help that is needed in such cases is beyond the scope of these Guidelines.

A parent who believes one or more of the above situations exists should file an Objection to the Implementation of the South Dakota Parenting Guidelines (UJS Form 372). This form can be found at https://ujslawhelp.sd.gov/defendants.aspx. The opposing parent should also file a response to this Objection and should appear at the hearing.

Existing Parenting Time Orders. Existing parenting time orders on the date of adoption of these revised Guidelines shall be enforced according to the parenting time guidelines that were in effect on the date the parenting time order was issued. Changes to the South Dakota Parenting Time Guidelines do not alone constitute good cause for modifying an existing parenting time order; however, a court or parties

to a proceeding may refer to these Guidelines in requesting changes to their parenting time order after the effective date of the Guidelines.

Protection Orders. If a protection order has been established regarding the minor children, that order would prevail over these Guidelines, until a court specifically orders otherwise. If an active protection order prohibits contact between the parents or between one parent and the children, parents are cautioned that the parent who is the subject of the protection order will violate the order if he/she has contact with the other parent and makes agreements as suggested in these Guidelines without permission for contact from the court that issued the protection order.

Additional Resources

There are several resources available to parents who need help in creating, enforcing or improving their parenting plan. Visit https://ujslawhelp.sd.gov/ (under the "Parenting" tab) for additional information on mediators, parenting coordinators, co-parenting tools and counseling options.

Additional tips that parents should consider in order to keep the children the focus of the parenting time arrangements can be found in Appendix A.

Tips to Stay Focused on the Children

A powerful cause of stress, suffering, and maladjustment in children of divorce or separation is not simply the divorce or separation itself, but rather continuing conflict between their parents before, during and after the divorce and/or separation. To minimize harm to the children, parents must agree on some basic rules to keep the children the focus of their parenting time arrangement.

Parents need to keep in mind that it is generally accepted that in most cases of divorce or separation:

1. Children of separated parents do best in both the short-term and the long-run when they feel loved and cared for by both parents;

2. Children generally do better when both parents have stable and meaningful involvement in their children's lives;

3. The strength of a parent's relationship to a child is affected more by parental commitment, warmth and the ability to meet the child's needs than it is by time spent with the child (i.e. quality vs. quantity);

4. Each parent has different and valuable contributions to make to their children's development;

5. Children should have structured routine time (such as bedtime and doing homework) with each parent, as well as unstructured time (such as playing in the park);

6. Parents should help their children maintain positive existing relationships, routines and activities;

7. Children may find security in personal possessions, like a favorite stuffed animal or blanket. Children should be permitted to bring personal possessions back and forth between homes, regardless of which parent purchased them; and

8. Parenting plans may need to be adjusted over time as the needs and circumstances of parents and children change.

Children are harmed by exposure to conflict between their parents. High conflict between parents increases children's anxiety and negatively impacts healthy child development. The following are guidelines to help you navigate your role in co-parenting your children:

1. Children shall not be put in a position to "choose" between the parents. Children must not be made to feel guilty about having a good time with the other parent;

2. Each parent should strive to show respect for the other parent;

3. Each parent must support the child's relationship with the other parent and encourage them to enjoy themselves with the other parent;

4. Children shall not be expected to communicate messages between parents, regarding parenting time, financial matters or issues about which parents disagree;

5. Parents should exchange the children in a respectful manner;

6. A parent should consider allowing their children to attend important family celebrations and events with both sides of their family, even when the events occur on the other parent's parenting time;

7. Differences between the parent's homes may occur (i.e. daily routines, activities, and diet). Parents should remember these are merely "differences" and are not necessarily a "better" or "worse" practice;

8. Children need consistency in both homes (i.e. bed times, meal times, medications etc.);

9. If one parent has been significantly more involved with the care of the child before separation, that parent may need to help the other parent gain the skills and knowledge to care appropriately for the child and support the development of a positive relationship between the child and the other parent, unless there are legitimate concerns about the other parent's capacity to care for their child. Both parents will need to approach this transition in a cooperative manner.

Parenting plans made for infants and young children may need to change as children get older and start to attend school. Parenting plans designed to accommodate a parent's employment may need to be modified if parents change their employment or work schedule. It is important for parents to communicate effectively, discuss changes that they observe in their children with one another and be prepared to modify the plans consistent with the best interests of the children.

Each family needs to consider the age, temperament, previous caretaking arrangements and the child's relationship with each parent, as well as whether the child has special needs. It is important that parents are able to communicate about their children on a regular basis, whether that communication is written or verbal. Parents shall share information so that a child's experience, as he/she transitions between parents, is as smooth as possible.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30808

BRIAN RAY JESSOP,
Petitioner and Appellee,

vs.

LISA JO COMBS,
Respondent and Appellant.

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

The Honorable Joshua D. Hendrickson
Circuit Court Judge

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STATEMENT OF THE CASE

Brian Jessop initiated a parentage action on August 23, 2021, seeking to establish custody and parenting time over his daughter, Betty Jo ("B.J.J."). Lisa Combs answered and filed a counterclaim. After extended discovery disputes, the matter proceeded to a two-day bench trial. Early on day one, Lisa moved for a continuance to accommodate a late-breaking medical emergency for a potential FLDS investigator. The trial court denied that motion. *(Tr. Vol. 1, p. 4, l. 23–p. 5, l. 4).* Over two days of testimony, the court heard from both parties, denied Lisa's claims that Brian posed an FLDS-related danger, and found it was in the child's best interests for Brian to have unsupervised parenting time.

Lisa appeals, claiming error in (1) denying the continuance; (2) the handling of sequestration; (3) awarding unsupervised parenting; and (4) denying her request for attorney fees.

STATEMENT OF THE FACTS

Brian Jessop and Lisa Combs met online in early 2019. *(Tr. Vol. 1, p. 9, ll. 10–12).* Their relationship initially flourished, and Lisa moved from Rapid City to Pleasant Grove, Utah, in June 2019 to cohabit with Brian. *(Tr. Vol. 1, p. 11, ll. 13–15).* Lisa became pregnant with their child, Betty Jo ("B.J.J."), born March 15, 2020. *(Tr. Vol. 1, p. 14, ll. 9–16).* During pregnancy and after, Brian provided continuous financial support by paying rent and utilities, while Lisa was not working or contributing to those expenses. *(Tr. Vol. 1, p. 13, l. 16–p. 14, l. 6).* He gave day-to-day pregnancy assistance, such as accompanying Lisa to prenatal visits, and basic help at home, and was present at Betty Jo's birth. *(Tr. Vol. 1, p. 16, ll. 5–6; p.19, ll. 2–10).* Once home, Brian shared in

childcare, including feeding, changing, and bonding with B.J.J. *(Tr. Vol. 1, p. 22, ll. 6–15).*

By early 2021, tensions arose. Lisa moved out on January 30, 2021, and claimed that Brian's behavior was threatening but never produced any documentary or eyewitness evidence of Brian's alleged threats or behavior. *(Tr. Vol. 2, p. 35, ll. 5–15; p 38, ll. 13–19.)*

On January 30, 2021, Lisa, with her parents' assistance, moved back to Rapid City, taking Betty Jo. *(Tr. Vol. 1, p. 42, ll. 12–24; p. 43, ll. 10–12).* Although Brian was willing to reconcile, Lisa effectively cut off contact. *(Tr. Vol. 1, p. 45, ll. 9–16).* After April 11, 2021, Brian was blocked from FaceTime calls and had almost no contact with Betty Jo for nearly a year. (*Tr. Vol. 1, p. 45, ll. 6–24*). Brian testified that from April 2021 until March 2022, Lisa cut off his communication with Betty Jo entirely. *(Tr. Vol. 1, p. 45, ll. 9-24)* Lisa, however, claimed she only blocked Brian for 10 days. *(Tr. Vol. 2, p. 35, ll. 10–15.)*

Brian eventually secured occasional FaceTime communication but only limited supervised visits every few months. *(Tr. Vol. 1, p. 47, l. 19–p. 48, l. 15).* During subsequent visits, Lisa insisted on supervising, refusing to let Brian see Betty Jo alone. *(Tr. Vol. 1, p. 47, l. 19–p. 48, l. 15.)*

On cross-examination, Lisa's counsel alleged Brian abruptly wore a GoPro camera or brought a firearm to a Summerset play area, but Brian denied carrying a firearm or being told not to return. *(Tr. Vol. 1, p. 108, ll. 4–22.)* Brian emphasized that Lisa never offered unsupervised time despite his repeated requests. *(Tr. Vol. 1, p. 140, l.*

23–p. 141, l. 5.) Lisa's mother, Christine, acknowledged that during Brian's supervised visits, she never witnessed any conflict or harm. *(Tr. Vol. 2, p. 31, ll. 15–17.)*

Much of Lisa's disdain for Brian stems from her fears about the practices of the FLDS. When pressed, neither Lisa nor her attorney-witness (Mr. Hoole) cited any direct knowledge tying Brian to abductions or 'missing children." *(Tr. Vol. 2, p. 17, ll. 24-p.18, ll.13 (Hoole), p. 36, l.24-p.37, l.8 (Lisa discussing no corroborating witness besides Brower)).*

Brian has since married Amber, with whom he has another daughter. *(Tr. Vol. 1, p. 57, ll. 8-15).* He maintains steady construction work and a stable home environment. *(Tr. Vol. 1, p. 8, ll. 1–20; p. 58, ll. 8–21).* He disavows FLDS teachings that Lisa claims pose a risk to Betty Jo. *(Tr. Vol. 1, p. 69 l. 23– p. 71 l. 3).* Brian specifically testified he has not practiced or adhered to FLDS standards since his teens. *(Tr. Vol. 1, p. 67, l. 7–p. 69 l. 17).* He completed a parenting course recommended by the custody evaluator. *(Tr. Vol. 1, p. 73, ll. 21– p. 74 l.5).*

Kent Christopherson, Lisa's father, testified that he gave $16,000 or more to help Lisa and Brian pay rent and other expenses while they lived together. *(Tr. Vol. 1, p. 154, ll. 3–4; p. 158, ll. 10–23).* He claimed to "mentor" Brian but felt Brian lied about seeking a driver's license and job prospects. *(Tr. Vol. 1, p. 157, l. 13–p. 158 l. 4.)* On cross, Kent's dislike of Brian was clear; he accused Brian of rape, death threats, and child molestation but admitted to no first-hand knowledge. *(Tr. Vol. 1, p. 166, l. 22–p.167 l.12; p. 167, l. 25–p. 168 l. 21.)* He conceded that he never personally saw Brian threaten Lisa or Betty Jo. *(Tr. Vol. 1, p. 167, ll. 7–10.)* He also acknowledged spending thousands of dollars to finance Lisa's litigation. *(Tr. Vol. 1, p. 172, ll. 16–19.)*

Christine Christopherson, Lisa's mother, testified that she sees Betty Jo four or five times a week, but never personally witnessed Brian be abusive. *(Tr. Vol. 1, p. 180, l. 24–p.181 l. 15; p. 190, ll. 14–22.)* She admitted her impressions came mostly from Lisa. *(Tr. Vol. 1, p. 190, l. 23-p.191 l. 8; p. 193, ll. 7–21.)* Christine also recounted that Brian was present at Christmas in Rapid City once. *(Tr. Vol. 1, p. 192, ll. 3–11.)* She never invited him for Betty Jo's day-to-day activities. *(Tr. Vol. 1, p. 191, ll. 9–25.)* She said she couldn't recall any first-hand abuse by Brian. *(Tr. Vol. 1, p. 190, ll. 14-22.)*

At trial, Lisa suggested FLDS influence remains, but Brian forcefully denied current FLDS participation. *(Tr. Vol. 1, p. 67, l. 7–p. 69 l. 17.)* He lives with his wife, Amber, and their infant child. *(Tr. Vol. 1, p. 57, ll. 8–15.)* On cross, Brian clarified he parted ways with any FLDS teachings well over a decade ago. *(Tr. Vol. 1, p. 117, ll. 18–22.)* Brian disputed Lisa's abduction concerns, saying he had never threatened or planned to flee with Betty Jo, and saw no basis for such claims. *(Tr. Vol. 1, p. 83, ll. 14–25; p. 84, ll. 1–14.)* Dr. Moss's custody evaluation recommended Lisa remain the primary custodian but acknowledged the court might allow unsupervised visits if it found no danger. *(Tr. Vol. 1, p. 122, ll. 13–24 [discussing Dr. Moss's "no presumption of danger" excerpt].)*

Lisa recounted her allegations of sexual assault on July 1, 2019, stating that Brian gave her a pill leading to a blackout. *(Tr. Vol. 1, p. 209, ll. 3–21; p. 210, l. 22– p. 211 l.5.)* She concedes she never reported it and has no supporting evidence. *(Tr. Vol. 1, p. 209 l. 22–p. 210, l. 7.)* She also alleged daily fear of FLDS abduction, referencing out-of-court statements about "thousands of missing children." *(Tr. Vol. 1, p. 247, l. 19–p. 248 l. 5; p. 249, ll. 18–23.)* She claims Brian threatened to kill or molest them, yet no third-party witness saw it. *(Tr. Vol. 1, p. 229, ll. 1–18; p. 229, l. 22–p. 230 l. 15.)*

Brian said he visited about seven times in supervised settings in Summerset or Rapid City. *(Tr. Vol. 1, p. 50, ll. 16–19.)* Lisa's mother Chris concedes that Brian was not invited to participate in Betty's daily activities (like camping, skiing, or holidays) after moving. *(Tr. Vol. 1, p. 191, ll. 15–25.)*

Lastly, Lisa demanded sole legal and physical custody, plus potential "protective orders." *(Tr. Vol. 1, p. 249, ll. 10–18.)* Neither Lisa nor her father offered direct, objective evidence that Brian ever intended to abduct Betty Jo. *(See Tr. Vol. 1, p. 176, l. 2-p.177, l.17 (Kent stating absent Brower's testimony, he lacked proof), Tr. Vol. 2, p.36, ll.24-p.37, ll.8 (Lisa similarly relying on Brower)).*

Brian testified he wants standard guidelines for parenting time, modified to account for geographic distance, so he can have consistent involvement with Betty Jo. *(Tr. Vol. 1, p. 63, l. 17–p. 64, l. 13).* Although steadily employed, the cost of traveling from Utah to Rapid City (a 10-hour drive each way) remains an obstacle for Brian. *(Tr. Vol. 1, p. 146, ll. 5–p. 147, l. 2.)* Lisa has never offered to share or reimburse his travel costs, even though she chose to unilaterally relocate with Betty Jo. *(Tr. Vol. 1, p. 146, l. 25–p. 147, l. 15 [citing references to cross/redirect].)*

Brian also testified that Lisa never personally informed him of the child's new medical or educational updates. *(Tr. Vol. 1, p. 55, ll. 3–22).*

STANDARD OF REVIEW

Denial of a continuance is reviewed for abuse of discretion. *Matter of Adoption of C.T.E.*, 485 N.W.2d 591, 593 (S.D. 1992). Custody, visitation, and evidentiary rulings are similarly discretionary. *Center of Life Church v. Nelson*, 2018 S.D. 42, ¶ 33, 913 N.W.2d

105, 113–14. A trial court's factual findings are upheld unless clearly erroneous. *Shelstad v. Shelstad*, 2019 S.D. 24, ¶ 20, 927 N.W.2d 129, 134.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion in Denying Lisa's Motion for Continuance

Lisa contends that the trial court erred by refusing to continue the trial so that her FLDS investigator, who experienced a medical emergency on the eve of trial, could testify. *(Tr. Vol. 1, p. 3, l. 21–p. 5, l. 7).* As the court noted, however, the matter had been set for months, Lisa never secured alternative means to preserve the investigator's testimony (such as a deposition), and the court disfavored remote testimony because it precluded a live credibility assessment. (*Id.*) These determinations are reviewed for abuse of discretion. *Matter of Adoption of C.T.E.*, 485 N.W.2d 591, 593 (S.D. 1992).

The trial court's decision whether to grant a continuance rests "within the sound discretion of the trial court," reviewed only for an abuse of that discretion. *State v. McCrary*, 2004 S.D. 18, ¶14, 676 N.W.2d 116, 121. Federal courts similarly accord "wide latitude" to trial judges in deciding last-minute continuances grounded on a key witness's unavailability. *See, e.g., United States v. Kindle*, 925 F.2d 272, 276 (8th Cir. 1991) (upholding denial of mistrial/continuance where defendant failed to show how the absence or delay of one witness caused actual prejudice). Even where a party asserts sudden medical unavailability, an appellate court requires a showing that the trial court's denial was "arbitrary or capricious" or that it wrought "clear prejudice." *Cf. United States v. Ricker*, 983 F.3d 987, 992 (8th Cir. 2020) (affirming trial court's scheduling discretion in witness-related rulings).

The record shows Lisa had ample notice of the trial date, possessed other anti-FLDS testimony (*e.g.*, from attorney Hoole), and never deposed the investigator. The trial court was entitled to conclude Lisa had not exercised due diligence to secure that testimony by other means. *See Ashker v. Class*, 152 F.3d 863, 872 (8th Cir. 1998) (no relief where excluded or missing testimony was largely cumulative of other evidence and no prejudice shown). Indeed, Lisa introduced essentially the same allegations about FLDS danger through other witnesses. The court reasonably concluded that any additional witness's testimony would be cumulative and would not justify displacing the long-set trial date.

Denying Lisa's request, under these circumstances, was well within the zone of reasonableness. *State v. Jackson*, 2020 S.D. 53, ¶ 53, 949 N.W.2d 395, 411 (continuances due to witness unavailability require showing of material testimony and due diligence; denial is not abuse of discretion absent prejudice). Lisa had no affidavits detailing new facts the investigator alone could supply, and she failed to depose him earlier. The trial court found no prejudice would ensue—particularly as Lisa's counsel had already presented (and would present) similar FLDS-related testimony from other sources.

Consequently, the court did not abuse its discretion in declining to postpone trial solely to accommodate that investigator's eleventh-hour medical emergency.

II. The Trial Court Properly Allowed the Testimony of Brian's Wife

Lisa objects to the trial court's handling of witness sequestration, specifically alleging that Brian's wife, Amber, discussed the first day's proceedings in violation of the court's order. (Tr. Vol. 2, p. 74, l. 20–p. 76, l. 10). But a violation of a sequestration order, to merit reversal, requires a showing of prejudice—that the witness's testimony

was demonstrably tainted or altered. *See United States v. Engelmann*, 701 F.3d 874, 878–79 (8th Cir. 2012); *State v. Randle*, 2018 S.D. 53, ¶¶ 15–17, 916 N.W.2d 461 (requiring prejudice from sequestration violations).

Under *Fed. R. Evid. 615*—mirrored by South Dakota precedent—sequestration orders are meant "to prevent witnesses from tailoring their testimony" and to aid in detecting falsehoods. *United States v. Ricker*, 983 F.3d at 993 (citing the same principle). Yet even if a technical violation occurs, an appellate court will reverse only if the "defendant's rights were prejudiced by a witness's changed or influenced testimony." *State v. Randle*, 2018 S.D. 53, ¶ 17. Similarly, the Eighth Circuit has emphasized that an appellant must show "the testimony was tainted" to obtain a new trial or reversal. *Kindle*, 925 F.2d at 276.

Lisa identifies no specific differences in Amber's testimony caused by overhearing or discussing prior evidence. She does not allege that Amber changed her statements or tailored them after day one. *See Engelmann*, 701 F.3d at 878 (no prejudice where "testimony that agent overheard bore no direct relationship to" his ultimate testimony). Here, Amber was a rebuttal witness who testified succinctly regarding Brian's lack of FLDS affiliation and the stable home they shared. (Tr. Vol. 2, p. 79, ll. 2–4.) Even if there was a brief discussion about day one's proceedings, Lisa has not shown "how it influenced or changed the witness's account," which is the core inquiry. *Randle*, 2018 S.D. 53, ¶ 17.

Trial courts have "wide latitude in fashioning the nature and extent" of sequestration. *Kindle*, 925 F.2d at 276. The court was satisfied there was no meaningful prejudice and allowed Amber to testify. Nothing suggests a fundamentally tainted

proceeding. Absent actual prejudice, there is no abuse of discretion. *Engelmann*, 701 F.3d at 878–79.

Hence, the trial court's rulings regarding sequestration and Amber's testimony were proper.

III. The Trial Court Properly Granted Brian Unsupervised Parenting Time

Lisa urges this Court to disallow unsupervised visits, alleging (a) the child was conceived via rape and (b) FLDS membership poses a grave risk. The trial court examined these allegations, found Lisa's lack of credibility, and concluded unsupervised time served Betty Jo's best interests. *(Tr. Vol. 2, p. 97, ll. 7–21).* That decision merits deference. *Shelstad v. Shelstad*, 2019 S.D. 24, ¶ 20, 927 N.W.2d 129, 134.

A. The Court Properly Found Lisa's Allegations of Rape Not Credible

Under SDCL § 25-4A-20, a parent found "by clear and convincing evidence" to have committed an act of rape causing conception is presumptively denied custody or visitation. But the court declined to find Brian committed rape. *(Tr. Vol. 1, p. 167, l. 24–p. 168, l. 8*). Lisa offered only her own testimony, never reported the alleged incident, and produced no corroboration. Brian denied any sexual violence. (Tr. Vol. 1, p. 79, ll. 2–14). Evaluating these conflicting accounts is for the trial court. Credibility determinations "will not be disturbed unless clearly erroneous." *Stavig v. Stavig*, 2009 S.D. 81, ¶¶ 17–20, 774 N.W.2d 454, 460–61 (discussing trial court's findings on domestic abuse credibility).

1. Lisa Presented No Independent Proof of Sexual Assault.

   Lisa never filed a police report, never sought medical attention for drugging, and never raised it contemporaneously. The trial court expressly found her account unpersuasive. *(Tr. Vol. 1, p. 209, l. 3–p. 210, l. 3.)*

2. The Record Supports the Court's Finding.

Brian consistently testified there was consensual intimacy. *(Tr. Vol. 1, p. 79, ll. 2–7.)* The court resolved the credibility dispute in Brian's favor, which is controlling on appeal. *Fuerstenberg v. Fuerstenberg*, 1999 S.D. 35, ¶ 22, 591 N.W.2d 798, 807.

Because the trial court found no rape had occurred, SDCL § 25-4A-20's presumption does not apply.

B. The Court Correctly Addressed Betty Jo's Best Interests and Brian's Alleged FLDS Affiliation

In custody and visitation matters, "the welfare and best interests of the child are paramount." *Jasper v. Jasper*, 351 N.W.2d 114, 116 (S.D. 1984). Lisa contends FLDS involvement endangers Betty Jo. The trial court weighed the evidence, found Brian had no current FLDS membership or practices, and concluded unsupervised parenting would benefit the child. *(Tr. Vol. 1, p. 67, l. 4–p. 68, l. 20).*

1. Lisa's FLDS Abduction Theories Lack Evidentiary Support.

Lisa relies on allegations of "missing FLDS children" gleaned from media or hearsay. (*Tr. Vol. 1, p. 247, l. 19–p. 248 l. 7.*) But Lisa admitted Brian never attempted kidnapping. (Tr. Vol. 2, p. 33, ll. 1–10; p. 39, ll. 14–25.) The trial court found these abduction fears purely speculative.

2. Brian Credibly Disavowed FLDS.

Brian testified that although he was raised in an FLDS community, he left as a teen, does not attend or tithe, and lives in a mainstream environment with his wife. *(Tr. Vol. 1, p. 67, ll. 7–14.)* The trial court believed Brian, concluding no

realistic FLDS risk endures. *Cf.* "C. FLDS Connection Lacks Evidentiary Support," *supra.*

3. No Basis for UCAPA Restrictions.

Lisa also invoked the Uniform Child Abduction Prevention Act, SDCL § 26-18-1 et seq., but that statute requires "a credible risk of abduction." SDCL § 26-18-4(a). Because Lisa showed no actual plan, attempt, or likelihood that Brian would flee with Betty Jo, the court declined additional restrictions. That was not an abuse of discretion.

C. FLDS Connection Lacks Evidentiary Support

Lisa's father and the amicus curiae highlight polygamy and past FLDS wrongdoing, but the record never ties those issues specifically to Brian. Indeed, Lisa's own mother testified she never witnessed Brian engage in abusive or unlawful acts. *(Tr. Vol. 1, p. 190, l. 14–p. 191 l. 8.)* The trial court rightly saw no reason to bar him from normal parenting.

Brian testified that he no longer associates with FLDS, left it as a teen, and does not practice polygamy. *(Tr. Vol. 1, p. 67, ll. 7–21.)* Lisa's references to the father's extended family and narratives about missing children do not implicate Brian personally. Indeed, Lisa's parents conceded they never witnessed wrongdoing by Brian. *(Tr. Vol. 1, p. 166, l. 24–p. 167, l. 12; p. 190, l. 14–p. 191 l. 8.)*

Even if Brian's father belongs to the FLDS, that does not disqualify Brian from unsupervised time. Lisa never showed Brian's active involvement. *(Tr. Vol. 2, p. 36, ll. 5–14; p. 42, l. 22–p. 43, l. 12.)* The trial court properly declined to deny parenting time based on speculation.

Lisa's speculation about abduction is unsupported. The trial court found no credible evidence that Brian intended to flee with Betty Jo. *(Tr. Vol. 1, p. 49, ll. 12–19)*. UCAPA measures require proof of a credible risk of abduction. SDCL § 26-18-4. Absent such proof, a trial court properly declines to invoke UCAPA. *Cf. Kostreva v. Kostreva*, 337 Mich.App. 648, 976 N.W.2d 889 (2021).

Lisa's abduction fears remain speculative. *(Tr. Vol. 1, p. 49, ll. 12–19.)* The court found no credible proof that Brian planned to abscond with Betty Jo. *Cf.* SDCL § 26-18-4.

D. Policy and Best-Interests Considerations Support Affirmance

When evaluating custody and parenting time, the "welfare of the child" supersedes parents' disagreements. *Pietrzak v. Schroeder*, 2009 S.D. 1, ¶14, 759 N.W.2d 734, 738. The trial court concluded that having a meaningful relationship with both parents, free of unwarranted FLDS alarm, serves Betty Jo's best interests. *(Tr. Vol. 2, p. 54, ll. 7–14)*. Contrary to Lisa's claims, no credible evidence shows actual danger or threats. The court's decision to allow unsupervised contact furthers the child's need for a stable, loving connection with Brian—who has secured steady housing, employment, and is now remarried with a supportive environment. *(Tr. Vol. 1, p. 57, ll. 8–21.)*

In sum, the trial court found Lisa's concerns of abduction, forced labor, or polygamy unsubstantiated; it deemed her rape allegations not credible; and it concluded that the child's best interests favored unsupervised time with Brian. Nothing in the record suggests an abuse of discretion in refusing to continue trial, permitting limited rebuttal testimony, and denying fees. The decision below should be affirmed in all respects.

IV. The Trial Court Properly Denied Lisa's Request for Attorney Fees

Finally, Lisa asserts the court erred by denying her motion for attorney fees under SDCL §§ 15-6-37(a)(4)(A) and 15-17-38. Yet an award of fees rests in the court's discretion. *Toft v. Toft*, 2006 S.D. 91, ¶¶ 7–12, 723 N.W.2d 546, 551–52. Nothing compels a fee shift here, and the trial court declined to impose one.

Although Lisa moved to compel, the court did not find Brian's conduct to be in bad faith or wholly unjustified. The trial court's "extremely broad" discretion in discovery sanctions is rarely disturbed. *Hiller v. Hiller*, 2018 S.D. 67, ¶ 28, 919 N.W.2d 548, 559. Here, the court concluded no fee award was warranted given the overall circumstances. *(Tr. Vol. 2, p. 25, ll. 5–23.)*

Lisa also cites SDCL § 15-17-38, but that statute vests discretion in the trial court to award fees "as are reasonable and necessary." *Hiller*, 2018 S.D. 67, ¶ 29. But awarding fees *is* discretionary. *Beach v. Coisman*, 2012 S.D. 31, ¶ 13, 814 N.W.2d 135, 140. The court evidently determined that Lisa's extended litigation, financed by her father, did not warrant further burden on Brian's limited means. Having weighed the relevant factors, the court properly denied the request. *Toft*, 2006 S.D. 91, ¶¶ 8–9. The record supports the court's finding that neither party's conduct warranted a fee shift. The trial court's refusal was within its discretion.

Accordingly, the court's refusal to shift fees was neither arbitrary nor an abuse of discretion. The trial court found no misconduct necessitating fee-shifting and concluded neither party was entitled to attorney fees. *(Findings of Fact ¶¶ 66-67; Tr. Vol. 2, p. 25, ll.5-23 (Lisa discussing fees)).* Given the court's broad discretion, no abuse occurred.

CONCLUSION

The record amply supports the trial court's rulings:

1. Denial of Continuance was no abuse of discretion (Tr. Vol. 1, p. 3, l. 21–p. 5, l. 7).

2. Allowing Rebuttal Testimony did not prejudice Lisa or contravened sequestration orders.

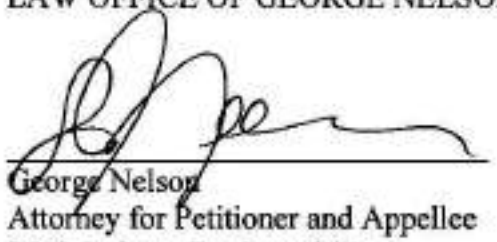
3. Awarding Unsupervised Time was consistent with the best interests of Betty Jo, given Brian's stable life and disavowal of FLDS.

4. Denying Fees was within the court's broad discretion.

Appellee Brian Jessop respectfully asks that this Court affirm the judgment.

Dated this 24 day of March, 2025.

LAW OFFICE OF GEORGE NELSON



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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellee's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 4,556 words. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 24th day of March, 2025.

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CERTIFICATE OF SERVICE

I certify that on the 24th day of March, 2025, I caused to be served via electronic service a true and correct copy of *Appellee's Brief* to:

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George Nelson

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30808

BRIAN RAY JESSOP V. LISA JO COMBS

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

THE HONORABLE JOSHUA D. HENDRICKSON
Circuit Court Judge

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PRELIMINARY STATEMENT

Defendant/Appellant Lisa Jo Combs n/k/a Lisa Jo Christopherson will be referred to as "Lisa". Plaintiff/Appellee Brian Raymond Jessop will be referred to as "Brian". The Parties' minor child, who is the center of this dispute, will be referred to as "B.J.J.". Reference to the settled record will be by the designation "R." followed by the page number(s). The Fundamentalist Church of Jesus Christ of Latter-Day Saints will be referred to as "FLDS". References to the June 4, 2024, trial transcript will be by the designation "TT1" followed by the page number(s). References to the June 5, 2024, trial transcript will be by the designation "TT2" followed by the page number(s).

INTRODUCTION

Brian has failed to overcome the Trial Court's abuses of discretion. The Trial Court failed to accommodate the medical emergency of a witness with firsthand knowledge of both FLDS and Brian's involvement with FLDS. Brian fails to identify any instance where a denial of continuance was upheld for similar circumstances. The Trial Court abused its discretion in permitting Amber's testimony when she violated the sequestration order. Brian provides no justification for the deliberate violation of the sequestration order. Lastly, the Trial Court abused its discretion in disregarding the circumstances of B.J.J.'s conception and failing to properly weigh Brian's involvement with FLDS and the

inherent danger that proposes to B.J.J. Brian has failed to overcome the evidence of Lisa's rape or his ongoing fidelity to FLDS.

ARGUMENT

I. The Trial Court Abused its Discretion by Denying the Motion for Continuance

There are two things that are relatively certain about this case. First, there was a significant dispute between the parties regarding the influence of FLDS in Brian's – and, by extension, potentially B.J.J.'s – life. Second, the one neutral witness with firsthand knowledge and experience of *both* FLDS *and* Brian's and his family's involvement with FLDS suffered a medical emergency less than a week before trial. The Trial Court's decision to not accommodate that medical emergency was an abuse of discretion and should be reversed.

Brian suggests that this denial was business as usual because courts are afforded "wide latitude … in deciding last- minute continuances". Appellee's Brief, p. 6. Brian, however, fails to cite a *single case* where a denial of a continuance was upheld under circumstances similar to those here. Of the cases that Brian does cite, most do not even mention the word continuance, and *none of them* discuss how a court should address medical emergencies of witnesses.

It is the generally accepted rule, however, that "a trial court abuses its discretion when it denies a request for continuance of trial due to the absence of a properly called and subpoenaed witness." *Padda v. Superior Ct.*, 25 Cal. App. 5th 25, 28-29 (2018). That is particularly true where the witness cannot appear due to

an unexpected medical emergency. *Fisher v. Perez*, 947 So.2d 648, 653 (Fla. Dist. Ct. App. 2007) ("Denials of motions for continuances in the face of a sudden unexpected medical emergency of either counsel, a party, or a witness have resulted in reversals on appeal in [Florida] and other courts."). *See also* Appellant's Brief, pp. 18-21 for a longer discussion of continuances based on medical emergencies.

In fact, the first case Brian cites involves the reversal of a denial of a continuance. *See, generally, Matter of Adoption of C.T.E.*, 485 N.W.2d 591 (S.D. 1992). As this Court observed, there would have been "no apparent prejudice" to the non-moving party had the trial court granted a continuance. *Id.* at 594. There was, however, like here, "great" prejudice to the moving party by denying the continuance. *Id.*

Brian never disputes the relevance of Sam Brower's testimony to the case. Brian, likewise, never suggests that Mr. Brower is biased or lacks personal knowledge of FLDS or Brian's family. Mr. Brower even had knowledge regarding how the custody evaluator failed to adequately weigh or evaluate FLDS or Brian's ongoing fidelity to FLDS. TT1 at 234:3-12. These are issues central to the custody determination.

Brian, in his brief, regularly discounts witness testimony because they do not have personal or firsthand knowledge of the events in question. *See, e.g.*, Appellant's Brief, p. 2 (Lisa "never produced any documentary or eyewitness

evidence of Brian's alleged threats or behavior."), p. 3 ("When pressed, neither Lisa nor her attorney-witness (Mr. Hoole) cited any direct knowledge tying Brian to abductions or 'missing children.'"), p. 4 (Lisa's mother "admitted her impressions came mostly from Lisa."), etc.... Brian's argument, however, only highlights the need for Mr. Brower's testimony. Mr. Brower's testimony would satisfy the predicate that Brian seems to suggest was lacking at trial: direct, firsthand, knowledge. That, alone, demonstrates the prejudice to Lisa due to the Trial Court's denial.

At best, Brian suggests that Mr. Brower's testimony might be cumulative.[1] Brian even goes so far as to assert that "[t]he court reasonably concluded that any additional witness's testimony would be cumulative and would not justify displacing the long-set trial date." Appellee's Brief, p. 7. It is worth noting that Brian neglects to cite to the record to support this claim.

That is unsurprising because there is no citation to the record that would support his claim. As the actual transcript reveals, the Trial Court's *sole rationale* for its denial was the length of time that trial had been set:

> THE COURT: All right. I'll deny the motion to continue, at this point. You can, I guess, remake the motion at the time you are presenting your part of the case. The grounds for that, essentially, are that this matter has been set for a number of months.

[1] Brian's argument ignores the Eighth Circuit's observation that "[i]t is axiomatic that the art of persuasion often turns on the skill of corroboration." *United States v. Pruett*, 788 F.2d 1395, 1396 (8th Cir. 1986).

TT1 at 4:23-5:3. When Lisa's counsel renewed her motion, the Trial Court swatted the request down by reiterating its reliance on the court's calendar:

> THE COURT: … So the trial's been set for over two months. The case has been going on for over two years. *That's what I'm basing the denial on.*

TT2 at 73:8-11 (emphasis added).

Brian compounds this error by suggesting that "[t]he trial court was entitled to conclude Lisa had not exercised due diligence to secure [Mr. Brower's] testimony by other means." Appellee's Brief, p. 7. Brian, again, ignores the settled record to make that claim. Lisa tried to minimize the disruption of the trial by seeking a trial deposition. TT1 at 4:3-14. The Trial Court *denied* that request and noted it does not "allow remote trial testimony." *Id.* at 5:3-4. Brian never explains how else Lisa was supposed to preserve that testimony.

In the modern age, trials are rarely, if ever, set with little to no notice. They are mostly set *months* in advance. Medical emergencies, on the other hand, do not happen on a schedule. They do not give notice. They do not care about a court's calendar. Medical emergencies happen regardless of our desire, or lack thereof, for them to occur. They are an entirely "unforeseen" circumstances that neither the parties nor the court have any control over. *Pruett*, 788 F.2d at 1397 ("Sudden exigencies and unforeseen circumstances are facts that militate in favor of a continuance."). The Trial Court abused its discretion by denying Lisa's motion. Reversal is necessary.

II. Brian's Wife Should have been Excluded Due to Sequestration Order Violations

Brian never disputes that he violated the sequestration order by discussing prior witnesses' testimony with his wife, Amber. He even appears to concede that this violation was intentional since he decided to classify Amber as a "rebuttal witness" not subject to sequestration. *See* Appellee's Brief, p. 8 ("Here, Amber was a rebuttal witness who testified succinctly regarding Brian's lack of FLDS affiliation and the stable home they shared."). *See also* TT2 at 76:3-6 ("[Amber] was not called on direct for either side. She is a rebuttal witness and her testimony obviously is going to be rebuttal to certain aspects of prior testimony. *That's her purpose*. That's why she should be allowed.").

Despite this apparent intentional violation Brian suggests that reversal is not warranted because Lisa was not prejudiced by the violation. Although it is unclear, exactly, what standard Brian suggests this Court should use, his argument appears to coalesce around a three prong test: a litigant must show (1) what the testimony would have been absent the violation; (2) that the testimony materially changed as a result of the violation; and, (3) that the trial court would have reached an opposite conclusion absent the violation.

Brian's proposed standard, however, has never been a holding of this Court. Neither Brian's proffered first or third prongs have been adopted previously. Worse, Brian's citations in support of this proffered test appear suspect. Brian first cites *State v. Randle* to assert that "an appellate court will reverse only if the

'defendant's rights were prejudiced by a witness's changed or influenced testimony.' *State v. Randle*, 2018 S.D. 53 [sic], ¶ 17." Appellee's Brief, p. 8.

State v. Randle, however, contains no such quote. Although paragraph 21, not 17, references prejudice, the actual language is more nuanced than what Brian proffers:

> "To find an abuse of discretion by the trial court in denying a mistrial where a sequestration order was violated, it must be shown that the denial prejudiced the defendant's rights."

State v. Randle, 2018 S.D. 61, ¶ 21, 916 N.W.2d 461, 466 (quoting *State v. Dixon*, 419 N.W.2d 699, 701 (S.D. 1988)). Brian's conclusion, however, falls apart under the following sentence in *Randle*, where the Court defined prejudice:

> "Prejudice is established where the witness'[s] testimony has changed or been influenced by what [they] heard from other witnesses."

Randle, 2018 S.D. 61, ¶ 21, 916 N.W.2d at 466 (quoting *Dixon*, 419 N.W.2d at 701) (other citations omitted).[2] Contrary to Brian's argument, prejudice occurs when testimony "has changed *or* been influenced" by prior testimony. *Randle*, 2018 S.D. 61, ¶ 21, 916 N.W.2d at 466 (emphasis added) (citations omitted). There is no need to find that the change or influence "fundamentally tainted" the

[2] Brian's citations to the Eighth Circuit Court of Appeals case of *United States v. Kindle*, 925 F.2d 272 (1991), appear to be similarly problematic. Brian claims that the *Kindle* decision stands for the idea that "an appellant must show 'the testimony was tainted' to obtain a new trial or reversal" Appellant's Brief, p. 8 (quoting *Kindle*, 925 F.2d at 276). The *Kindle* decision, however, contains no reference to some sort of tainted testimony standard. *Kindle* does not even deal with a situation where, like here, a witness heard prior testimony and discussed it with a party. The dispute in *Kindle* was about "contact between D.E.A. case agents and sequestered witnesses." 925 F.2d at 276.

proceedings, as Brian claims. Appellee's Brief, pp. 8-9. All that needs to be established is that *either* the testimony changed *or* was influenced by prior testimony. There is ample evidence of that.

As Amber conceded, she both discussed the prior day's testimony with Brian *and* understood its purpose in the context of the trial:

> MS. MAURICE: Were you discussing this case or any testimony that occurred yesterday with your husband?
>
> THE WITNESS: Yesterday, Yes.
>
> MS. MAURICE: So you understand testimony that has been presented to this Court yesterday?
>
> THE WITNESS: Yes.

TT2 at 75:17-22.

It is hard to imagine how Amber's testimony would not be changed or influenced by what happened. She admitted to discussing the whole day's testimony with her husband. That is *per se* evidence of influence and should not have been tolerated.

Although we may never know precisely how that influence manifested, that should not be the standard. This Court should take a firm line for sequestration order violations, especially where, like here, there appears to be some gamesmanship involved. Allowing a person, to discuss an entire day of trial testimony with one of the parties, and then be allowed to testify because that person was tactically classified as a rebuttal witness defeats the entire purpose of

sequestration orders. It creates an exception so wide that any well-experienced trial lawyer could make sequestration meaningless.

The Trial Court abused its discretion by admitting Amber's testimony. Reversal is necessary.

III. The Trial Court Abused its Discretion in Granting Brian Unsupervised Visitation

A. The Trial Court Ignored Clear and Convincing Evidence that Brian Raped Lisa to get her Pregnant

One of the problems with this case, including the Trial Court's Findings of Fact, is the disconnect between what is cited and what is stated. One of the most glaring examples is the disconnect between the Trial Court's findings of fact and the actual trial testimony regarding B.J.J.'s conception. Brian complicates this effort by suggesting to this Court that he made a denial that he never actually made.

The Trial Court's only finding regarding B.J.J.'s conception can be found at paragraphs 22 and 23 of the Trial Court's Findings of Fact and Conclusions of Law:

> 22. Brian indicates that the parties had sexual intercourse on a regular basis both before and after the July 1, 2019, date.
>
> 23. The Court does not find Lisa's testimony regarding the conception of BJJ to be credible given the totality of the circumstances.

R. 807. The Trial Court never explains what totality of the circumstances it considered, but there was clear and convincing evidence that B.J.J.'s conception was the result of a nonconsensual sexual act.

Brian starts his argument by falsely claiming that he "denied any sexual violence" during his trial testimony. Appellee's Brief, p. 9. That, however, is not his actual testimony. Rather than deny the rape, he merely denies remembering any specifics about that night:

> Q. Do you recall having sex with Lisa on July 1st of 2019?
>
> A. That would have been very shortly after she moved out to Utah and moved in with me. During that time, during those months we were frequently engaging in sexual relations.
>
> Q. Do you recall specifically the night of July 1, 2019?
>
> A. No.
>
> Q. Do you recall ever hovering over Lisa and asking her whether or not she remembered that the two of you had had sex?
>
> A. No.

TT1 at 79:2-14. This is not a denial. This Court has used similar statements to form the basis of an admission of self-incrimination. *See, e g., State v. Janis*, 356 N.W.2d 916, 921 (S.D. 1984) (affirming rape conviction where defendant testified that he was drunk and did not remember details except having sex with a woman the night in question).

Brian then relies on two reasons why the Trial Court's factual findings were correct: first, that Lisa presented no independent proof of sexual assault; and,

second, that the record supports the fact that Brian and Lisa had engaged in other consensual sexual activity.

Both of Brian's arguments, however, have been rejected. As this Court observed in *State v. Grey Owl*, 316 N.W.2d 801, 804 (1982), "it is not essential to a sexual offense conviction that the testimony of the victim be corroborated by other evidence." As for Brian's second argument, this Court has upheld convictions where testimony of prior sexual consent with a defendant was not relevant where, like here, the rape was based on incapacity of giving consent. *See, generally, State v. Malcolm*, 2023 S.D. 6, 985 N.W.2d 732.

Brian never directly disputes Lisa's testimony. This testimony, alone, would be enough to sustain a criminal conviction, much less the lower burden in civil cases. But, that testimony, in conjunction with the history and practices of FLDS (which further demonstrates the prejudice to Lisa over the exclusion of Mr. Brower's testimony) would be more than enough to satisfy the clear and convincing standard laid out by SDCL § 25-4A-20. The Trial Court clearly erred by finding to the contrary.

B. The Trial Court Ignored B.J.J.'s Best Interests

1. The Trial Court Failed to Consider B.J.J.'s Best Interests by Improperly Discounting Brian's FLDS Affiliation

Brian seems to rest his argument on the idea that he allegedly disavowed FLDS as a teenager and lives in a mainstream environment. The Trial Court

seemed to agree with that blanket statement. That, however, ignores ample evidence of Brian's continued fidelity to FLDS, its teachings, and its leaders.

In particular, the Trial Court failed to consider Brian's evolving testimony on FLDS. For example, Brian originally conceded that his father continues to live a polygamist life. R. 311. His recollection of this fact, however, evolved once he retained his current attorney. In stark contrast to his prior testimony, Brian testified at trial that his father was not a polygamist, after all. TT1 at 114:20-115:8.

Brian's refusal to condemn polygamy was not confined to testimony about his father's practices. Brian, himself, refused to condemn the practice of polygamy:

> Q. What are your beliefs regarding polygamy?
>
> A. I believe in freedom of association for consenting adults to the extent it complies with local laws.

TT1 at 67:15-18. It is worth noting that polygamy is one of the central tenets of the FLDS. R. 291-92. It is also one of the most concerning as it pertains to female children, like B.J.J. Furthermore, had Brian condemned polygamy he would not be welcome at Short Creek, which is somewhere that he planned to take B.J.J. Brian's waffling on this question should have been alarming to the Trial Court. The fact that it overlooked this issue is clear error.

This error is compounded by Brian's own admissions regarding FLDS. Brian made numerous admissions demonstrating that his supposed disavowal of FLDS was little more than a ruse:

- He hung photos of FLDS leaders, including Warren Jeffs, over B.J.J.'s crib. TT1 at 117:16-119:14.
- He kicked Lisa and B.J.J. out of their apartment when Lisa wanted to listen to Lutheran services instead of FLDS-oriented "Sunday Schools". R. 371.
- Brian is unable to compromise over Lisa's preference for non-FLDS religious productions over FLDS-oriented religious productions. TT1 at 119:15-12:2.
- Brian has neither been excommunicated nor identified as an apostate by FLDS leadership. TT1 at 117:16-19.
- Brian punished Lisa over her sending a picture of Brian wearing clothing inconsistent with FLDS practices by requiring her to listen to Warren Jeffs' album about "keeping sweet." TT2 at 22:10-14.
- Brian refused to even say whether polygamy was a bad thing. R. 345.

Finally, Brian's testimony regarding Short Creek and his desire to take B.J.J. there cannot be reconciled with his alleged disavowal of FLDS. Brian admitted that he could not bring B.J.J. to Short Creek to visit his family if he was not an FLDS adherent. R. 337. He, however, plans to take B.J.J. to Short Creek. R. 344. As a result, Brian must continue to follow FLDS if his testimony regarding Short Creek is to be believed.

None of Lisa's evidence required speculation by the Trial Court. There was both direct and circumstantial evidence that Brian was repeatedly untruthful or deceptive regarding FLDS and his affiliation with it. The Trial Court's findings went "against reason and evidence." *Pieper v. Pieper*, 2013 S.D. 98, ¶ 11, 841 N.W.2d 781, 785 (quoting *Knodel v. Kassel Twp.*, 581 N.W.2d 504, 506 (S.D.1998)). Reversal is necessary.

2. *The Trial Court Abused its Discretion by not Applying the Uniform Child Abduction Prevention Act ("UCAPA")*

Brian suggests that "[b]ecause Lisa showed no actual plan, attempt, or likelihood that Brian would flee with B.J.J., the court declined additional restrictions." That, however, is not the standard under UCAPA. The actual factors a court may consider are contained in SDCL § 26-18-7. Several of them implicate the risk of allowing B.J.J. out of South Dakota:

- When a party lacks strong familial, financial, emotional, or cultural ties to the state. SDCL § 26-18-7(6).
- When a party has strong familial, financial, emotional, or cultural ties to another state. SDCL § 26-18-7(6).
- When a party has made misrepresentations to the United States government. SDCL § 26-18-7(11).
- When a party has engaged in any other conduct the court considers relevant to the risk of abduction. SDCL § 26-18-7(13)

Brian never disputes any of the following facts:

1) Brian has little to no ties to South Dakota. SDCL § 26-18-7(6).

2) All of Brian's familial, financial, emotional, or cultural ties are to Utah and, more specifically, the Short Creek FLDS community. SDCL § 26-18-7(6).

3) Brian's tax returns appear to be fraudulent. SDCL § 26-18-7(11).

4) FLDS has a history of tax fraud by FLDS members and adherents. *Id.*

5) FLDS has a history of abducting children from custodial parents and refusing to return them to the proper jurisdiction. SDCL § 26-18-7(13).

As noted above, Brian's testimony about his affiliation with FLDS is suspect, at best. That, coupled with Brian's almost nonexistent ties to South Dakota merited, at a minimum, the Trial Court's consideration under UCAPA. The fact that it failed to do so is an abuse of discretion.

IV. The Trial Court Abused its Discretion by not Awarding Lisa Attorneys' Fees

Brian asks this Court to ignore explicit precedence regarding motions to compel. There is no dispute that Lisa's motion to compel was granted and she was not granted fees. There is no dispute that the trial court failed to enter findings of fact and conclusions of law on its decision not to award fees on the granted motion to compel. Those findings are mandatory and cannot be ignored. *Beach v. Coisman*, 2012 S.D. 31, ¶ 13, 814 N.W.2d 135, 140 (citations omitted). Brian's claim that the trial court did not find his "conduct to be in bad faith or wholly unjustified", Appellee's Brief p. 13, is not supported by actual findings of fact and conclusions of law identifying the basis of the court's decision not to award

attorneys' fees under SDCL § 15-6-37(a)(4)(A). Reversal is necessary on that ground alone.

The Trial Court also failed to make findings regarding Lisa's general request for attorneys' fees under SDCL § 15-17-38. Because findings should also be required in custody cases, the Trial Court should be compelled to outline its reasoning.

CONCLUSION

The denial of a continuance was an abuse of discretion when one of Lisa's key witnesses suffered a medical emergency on the eve of trial. The Trial Court failed to consider the great prejudice Lisa suffered by not presenting the testimony of Sam Brower, a neutral third party with firsthand knowledge of both Brian and his connections to the FLDS community. Instead, the trial court denied the continuance based solely on the length of time trial had been set. Brian fails to identify any prejudice he would have suffered had the continuance been granted and fails to identify what mechanism Lisa was supposed to use to preserve Mr. Brower's testimony when her request to take his trial deposition was denied.

Brian flagrantly disregarded the sequestration order and discussed the first day's testimony with his wife, who was then allowed to testify herself. Mere classification as a rebuttal witness does not make an individual outside the prohibitions of a sequestration order. The Trial Court abused its discretion in admitting Amber's testimony.

Brian suggests that Lisa was required to provide corroboration of her rape in order to meet the clear and convincing standard. This Court, however, has held that corroboration is not a necessary element even to meet the higher criminal burden. Brian further falsely claims that he denied sexual violence in his testimony when, in fact, he merely stated he did not recall the events of the night of Lisa's rape and B.J.J.'s conception. Brian suggests that he and Lisa's history of consensual sexual encounters overcomes the fact that he drugged Lisa and made her incapable of consenting on the night in question. There is clear and convincing evidence that Lisa was raped, thus creating the presumption that Brian should not be afforded custody or visitation rights.

Brian has continued to adhere to FLDS teachings and the FLDS lifestyle. Brian's own testimony reveals his fidelity to FLDS. The Trial Court overlooked both the direct and circumstantial evidence of Brian's involvement with FLDS and failed to consider B.J.J.'s best interests related to Brian's involvement with FLDS.

Several factors under UCAPA implicate the inherent risk of permitting Brian to exercise visitation without any protective orders in place. The Trial Court's failure to consider any such protective orders was an abuse of discretion.

Lisa's motion to compel was granted and there was no substantial justification on Brian's part for failing to meaningfully participate in discovery. Attorneys' fees should have been awarded. Further, the Trial Court failed to issue findings of fact and conclusions of law justifying the lack of attorneys' fees.

Similarly, the Trial Court failed to issue findings on Lisa's request for attorneys' fees under the custody provisions.

Dated April 23, 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 4,102 words, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Emily Maurice
One of the attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the below documents were electronically filed with the Clerk of the Supreme Court via Odyssey:

- Appellant's Reply Brief;
- Certificate of Compliance; and
- Certificate of Service

Notification of filing and service of such documents completed upon the following person, by placing the same in the service indicated, addressed as follows:

George Nelson	[ ] Federal Express
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Rapid City, SD 57702	[X] Electronic Filing
Email: gjnlaw@gmail.com	[ ] Email

The undersigned further certifies that a copy of Appellant's Reply Brief was mailed by First Class U.S. Mail, postage prepaid to:

Ms. Shirley A. Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

Dated April 23, 2025.

/s/ Emily Maurice
One of the attorneys for Appellant