

IN THE NEBRASKA COURT OF APPEALS

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Case No. A-20-7

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STATE OF NEBRASKA, o/b/o Emory Violet Walker,  
A minor child,

Appellee/Plaintiff,

v.

MICHAEL BRETT WALKER,

Appellant/Defendant,

v.

MALLORY MORGAN BUCKINGHAM,

Appellee/Third-Party Defendant.

BRIEF OF MALLORY MORGAN BUCKINGHAM, Appellee.

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APPEAL FROM DISTRICT COURT OF DODGE COUNTY, NEBRASKA

THE HONORABLE GEOFFREY C. HALL

District Court Judge

Trial Court Case No: CI17-438

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Avis R. Andrews #15620  
237 E. 6<sup>th</sup> Street, P.O. Box 1236  
Fremont, NE 68025  
(402) 721-9410  
e-mail: [avisa@qwestoffice.net](mailto:avisa@qwestoffice.net)

ATTORNEY FOR MALLORY MORGAN BUCKINGHAM, Appellee

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## **JURISDICTIONAL STATEMENT**

Appellant's Statement of the Basis of Jurisdiction is accepted.

## **STATEMENT OF THE CASE**

Appellant's Statement of the Case is accepted.

## **PROPOSITIONS OF LAW**

### **I.**

The paramount consideration in determining child custody is the best interests of the children.

*Donald v. Donald*, 296 Neb. 123, 892 N.W.2d 100 (2017).

### **II.**

In any proceeding involving a child, the best interests of the child shall be the standard by which the court adjudicates and establishes the individual responsibilities including consideration in any custody, parenting time, visitation, or other access determinations as well as resolution of conflicts affecting each child. The state presumes the critical importance of the parent-child relationship in the welfare and development of the child and that the relationship between the child and each parent should be equally considered unless it is contrary to the best interests of the child.

**Neb. Rev. Stat. § 43-2921 (Reissue 2016).**

III.

Custody of a minor child may be placed with both parents on a joint legal custody or joint physical custody basis, or both, (a) when both parents agree to such an arrangement in the parenting plan and the court determines that such an arrangement is in the best interests of the child or (b) if the court specifically finds, after a hearing in open court, that joint physical custody or joint legal custody, or both, is in the best interests of the minor child regardless of any parental agreement or consent.

**Neb. Rev. Stat. § 42-364(6)** (Reissue 2016).

IV.

Joint physical custody means mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time.

**Neb. Rev. Stat. § 43-2922(12)** (Reissue 2016).

V.

Physical custody means authority and responsibility regarding the child's place of residence and the exertion of continuous parenting time for significant periods of time.

**Neb. Rev. Stat. § 43-2922(20)** (Reissue 2016).

VI.

The best interests of the child require a parenting arrangement and parenting plan or other court-ordered arrangement which provides for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress for school-age children.

**Neb. Rev. Stat. § 43-2923(1)** (Reissue 2016).

VII.

In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing.

**Neb. Rev. Stat. § 43-2923(6)(a)** (Reissue 2016).

VIII.

Joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.

*Erin W. v. Charissa W.*, 297 Neb. 143, 897 N.W.2d 858 (2017).

*Zahl v. Zahl*, 736 N.W.2d 365, 273 Neb. 1043 (2007).

*Hill v. Hill*, 20 Neb.App. 528, 827 N.W.2d 304) (2013).

*Trimble v. Trimble*, 218 Neb. 118, 352 N.W.2d 599 (1984).

*Moninger v. Moninger*, 202 Neb. 494, 276 N.W.2d 100 (1979).

IX.

Communication is an essential requirement for joint custody to be successful.

*Klimek v. Klimek*, 18 Neb.App. 82, 775 N.W.2d 444 (2009).

**STATEMENT OF FACTS**

Appellant's Statement of Facts is accepted.

## ARGUMENT

### I.

#### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING APPELLEE PHYSICAL CUSTODY OF THE MINOR CHILDREN.**

The paramount consideration in determining child custody is the best interests of the children. *Donald v. Donald*, 296 Neb. 123, 892 N.W.2d 100 (2017).

In any proceeding involving a child, the best interests of the child shall be the standard by which the court adjudicates and establishes the individual responsibilities including consideration in any custody, parenting time, visitation, or other access determinations as well as resolution of conflicts affecting each child. The state presumes the critical importance of the parent-child relationship in the welfare and development of the child and that the relationship between the child and each parent should be equally considered unless it is contrary to the best interests of the child.

**Neb. Rev. Stat. § 43-2921** (Reissue 2016).

Custody of a minor child may be placed with both parents on a joint legal custody or joint physical custody basis, or both, (a) when both parents agree to such an arrangement in the parenting plan and the court determines that such an arrangement is in the best interests of the child or (b) if the court specifically finds, after a hearing in open court, that joint physical custody or joint legal custody, or both, is in the best interests of the minor child regardless of any parental agreement or consent.

**Neb. Rev. Stat. § 42-364(6)** (Reissue 2016).

Joint physical custody means mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both

parents over the child for significant periods of time. **Neb. Rev. Stat. § 43-2922(12)** (Reissue 2016).

Physical custody means authority and responsibility regarding the child's place of residence and the exertion of continuous parenting time for significant periods of time. **Neb. Rev. Stat. § 43-2922(20)** (Reissue 2016).

The best interests of the child require a parenting arrangement and parenting plan or other court-ordered arrangement which provides for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress for school-age children. **Neb. Rev. Stat. § 43-2923(1)** (Reissue 2016).

In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing.

**Neb. Rev. Stat. § 43-2923(6)(a)** (Reissue 2016).

Joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars. *Erin W. v. Charissa W.*, 297 Neb. 143, 897 N.W.2d 858 (2017). See also *Zahl v. Zahl*, 736 N.W.2d 365, 273 Neb. 1043 (2007); *Hill v. Hill*, 20 Neb.App. 528, 827 N.W.2d 304 (2013); *Trimble v. Trimble*, 218 Neb. 118, 352 N.W.2d 599 (1984); *Moninger v. Moninger*, 202 Neb. 494, 276 N.W.2d 100 (1979).

Communication is an essential requirement for joint custody to be successful. *Klimek v. Klimek*, 18 Neb.App. 82, 775 N.W.2d 444 (2009).

In this case, Appellee Mallory had been the primary caretaker of the minor children since they were born. Appellant Michael was not always present and even when he did take on the parental role, he needed a lot of help from his parents to accomplish it. The record establishes that Michael's ability to raise and support the children was anything but stable. He was not able to afford a place of his own. He had vehicle problems that affected his ability to interact with the children. He worked hours that were not conducive to a joint custody arrangement and while he had intentions of changing his work schedule, he did not. He lived a considerable distance from the minor children which would become a problem when they started to attend preschool and school in the near future. Michael's solution was that the children would travel the better part of an hour to and from school each day they were with him. Michael's focus on his own needs and his reliance on others to support him are not indicative of the maturity needed for a joint physical custody arrangement.

Joint physical custody also requires that the parents be able to communicate appropriately. The testimony shows that the parties argued frequently and did not communicate well regarding the children. The fact that the trial court needed to award the tiebreaker to Mallory indicates that the trial court anticipated further disagreements by the parties. It also indicates that the trial court found Mallory to be more capable of making such important decisions on behalf of the minor children.

Michael's parenting time is in essence the equivalent of an extended weekend with overnight visitation in the off week.

The award of physical custody to Mallory was supported by the facts of this case.

## **II.**

### **CHILD SUPPORT WAS CALCULATED APPROPRIATELY.**

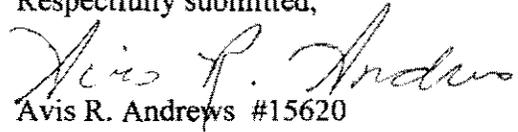
The calculation of child support was consistent with the prior order setting child support and the trial court's decision in this case. Michael had originally been paying for only one child. Now there are two children that need his financial contribution. The trial court did not abuse its discretion in ordering child support as set. The facts showed that Michael was not self-supporting, but relied greatly on the financial support of his family. He did not contribute to his own support, thereby having an income that was available to support his children. Mallory on the other hand, had a plan to have her own apartment and contributed to the financial support of the household while living with her mother. Considering the advantage to Michael of not paying household bills and the additional expense created by his living in a city distant from Mallory are factors that justify the amount of child support set.

## **III.**

### **IT WAS NOT ERROR TO REQUIRE APPELLANT TO PAY CASH MEDICAL.**

The children had the advantage of having health insurance paid for by Mallory. They had the added advantage of Medicaid coverage provided by the State of Nebraska. It is not asking too much of Michael to contribute to the health coverage for the children as Mallory was. The trial court's decision was not in error.

Respectfully submitted,

A handwritten signature in cursive script that reads "Avis R. Andrews". The signature is written in black ink and is positioned above the typed name.

Avis R. Andrews #15620

Attorney for Appellee

237 E. 6<sup>th</sup> Street, P.O. Box 1236

Fremont, NE 68025

(402) 721-9410

e-mail: [avis@qwestoffice.net](mailto:avis@qwestoffice.net)

# Certificate of Service

I hereby certify that on Tuesday, April 28, 2020 I provided a true and correct copy of this *Brief of Appellee Mallory B.* to the following:

Michael B Walker represented by Linsey Moran Bryant (23380) service method: Electronic Service to **bryantl@sidnerlaw.com**

Michael B Walker represented by Shane J Placek (22780) service method: Electronic Service to **placeks@sidnerlaw.com**

State of Nebraska represented by Justin David Bignell (25725) service method: Electronic Service to **justin.bignell@nebraska.gov**

Signature: /s/ Andrews,Avis,R. (15620)