**No. A-22-925**

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**IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA**

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**ELIZABETH A. BARNES,**

**Appellant,**

**VS.**

**JOSIAH W. GERRITSEN-LARGEN,**

**Appellant.**

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**APPEAL FROM THE DISTRICT COURT OF HALL COUNTY, NEBRASKA**

**Honorable Patrick Lee and Honorable Mark Young, District Judges**

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# BRIEF OF APPELLANT

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## STATEMENT OF JURISDICTION

Neb. Rev. Stat. § 25-1911 R.R.S. Neb. (Reissue 1995) provides the jurisdictional basis for the Court of Appeals.

This action which initiated in the District Court of Hall County, Nebraska is a law action in which Appellant, Elizabeth Largen, sought a dissolution of marriage from the Appellee and custody of the three minor children of the parties. A trial was held before the Honorable Patrick M. Lee on August 29, 2022, and an Order was issued on November 15, 2022, placing custody of the oldest child of the parties, Simon, with the Appellant, and placing custody of the two younger children of the parties, Cyrus and Lincoln, with the Appellee. Appellant timely filed her Notice of Appeal on December 12, 2022 with the District Court of Hall County, Nebraska. The docket fee was deposited with the Hall County District Court on December 12, 2022.

## STATEMENT OF THE CASE

### I. Nature of the Case

This is an appeal from the Court's original Decree of Dissolution, entered on November 15, 2022. Trial was held before the Honorable Patrick Lee in the Hall County District Court on August 29, 2022. Only Appellant and Appellee appeared and offered testimony. Following trial in the District Court, Appellee was granted primary custody of the parties' two younger children Lincoln and Cyrus while Appellant was granted custody of the parties' oldest child. Simon. The Court further found that while both parents were fit and proper parents, the two younger children should reside with the Appellee in Iowa. The Appellant timely appealed.

### II. Issues Actually Tried in the Court Below

1. What custody and parenting time arrangement was in the best interests of the minor children; and
2. What amount of child support should be ordered in the best interests of the minor children.

### III. How the Issues Were Decided/Judgment of the Trial Court

The District Court ruled that the marriage of the parties was irretrievably broken and that the younger children of the parties should return to live in Iowa to attend a school there related to their disability, while the older child of the parties should remain in Nebraska with the Appellant. The District Court Ordered that no child support should be ordered until the oldest child was no longer in Appellant's custody, and once he reached the age of majority, Appellant was Ordered to pay child support in the amount of $436.00 per month for two children and $303 per month for one child.

### IV. Scope of Review

This is an action for dissolution of marriage. "In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial court judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts

rather than another." *Ritter v. Ritter*, 234 Neb. 203, 209, 450 N.W.2d 204, 209 (1990) citing to *Huffman v. Huffman*, 232 Neb. 742, 747-48, 441 N.W.2d 899, 903-04 (1989).

## STATEMENT OF ERRORS

**I.** The trial court abused its discretion in determining, without any evidence, that a split custody arrangement was in the best interests of the minor children.

**II.** The trial court abused its discretion when it determined, without any evidence, that Appellant had engaged in significant alienation of Appellee's parental rights.

**III.** The trial court abused its discretion in finding that Appellee was a fit and proper parent despite overwhelming evidence that Appellee had essentially abandoned the minor children and provided no support for them for a period of three years.

**IV.** The trial court abused its discretion when it granted sole physical custody of the minor children Lincoln and Cyrus, to the Appellee, despite their having been in the State of Nebraska for the entire time the case was pending, when there was no evidence that it was in the best interests of the minor children to return to Iowa.

## PROPOSITIONS OF LAW

### I.

When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Ritter v. Ritter,* 234 Neb. 203, 209 (1990)

### II.

Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *Id*.

### III.

While the Nebraska Supreme Court has recognized that it is sound public policy to keep children together whenever possible, considerations of public policy do not, in all cases, prevent the splitting of the custody of children when a marriage is resolved; rather the ultimate standard is the best interests of the children. *Burcham v. Burcham*, 24 Neb. App. 323, 332 (Neb.App. 2016).

### IV.

The relationship between a child and his/her siblings is a significant and unique one, from which a myriad of benefits and experiences may be derived. The bonds which develop between brothers and sisters are strong ones, and are, in most cases, irreplaceable. *In re Interest of Daniel W.*, 3 Neb.App. 630 ( Neb.App. 1995).

### V.

"[A] sibling relationship can be an independent emotionally supportive factor for children in ways quite distinctive from other relationships and there are benefits and experiences that a child reaps from a relationship with his … brother(s)…which truly cannot be derived from any other." *Id*.

### VI.

While public policy does not prevent the court from splitting siblings where the evidence shows that best interests outweigh the relationship between siblings, "it strongly supports keeping siblings together." *Ehrman v. Ehrman*, 2003 Neb. App. Lexis 313, 318 (2003) (*not designated for permanent publication)*.

**VII.**

An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Koehler v. Farmer's Alliance Mutual Ins. Co.*, 252 Neb. 712 (1997).

**VIII.**

When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of facts rather than the other. *Lindblad v. Lindblad*, 309 Neb. 776 (2021).

**IX.**

By the great weight of authority, conduct toward a child which tends to poison the child's mind against, and alienate his affection from his mother or father is so inimical to the child's welfare as to be grounds for a denial of custody to or a change of custody from, the party guilty of such conduct. *Hossack v. Hossack*, 176, Neb. 368, 374 (1964).

**X.**

"While not a determinative factor, the promotion of and facilitation of a relationship by one parent with the other parent is a factor that may be considered when awarding custody. *Kashyap v. Kashyap*, 26 Neb. App. 511 (2018).

**XI.**

"It stands to reason that a parent's intentional refusal to promote and facilitate the other parent's involvement in the child's most important educational, religious, and medical needs constitutes a significant factor to consider when making custody decisions." *Burton v. Schlegel*, 29 Neb. App. 393 (2021).

**XII.**

Although not a completely determinative factor, the promotion and facilitation of a relationship by one parent with the other parent is a factor that may be considered when awarding custody. *Kashyap v. Kashyap*, 26 Neb. App. 511 (2018).

**XII.**

When custody of a minor children is an issue in a proceeding to dissolve the marriage of the children's parents, custody is determined by parental fitness and best interests of the children. *Ritter v. Ritter*, 234 Neb. 203 (1990).

**XIII.**

When both parents are determined to be fit, the inquiry for the court is the bests interests of the children. *Id*.

**XIV.**

The Nebraska Supreme Court has adopted the definition of parental unfitness as "a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused or probably will result in detriment to the child's well-being. *Id*. at 210

**XVI.**

In determining custody and parenting time arrangements, the court shall consider the best interests of the minor children which shall include but are not limited to:

a. The relationship between the children and each parent;
b. The desires and wishes of the minor children if of an age to make such decisions;

c. The general health, welfare and social behavior of the minor child;
d. Credible evidence of abuse inflicted on a family or household member;
e. Credible evidence of child abuse or neglect or domestic intimate partner abuse.

*Bornhorst v. Bornhorst*, 28 Neb. App. 182, 194 (2020); Neb. Rev. Stat. § 43-2923(6) (Reissue 2016).

**XVII.**

Domestic intimate partner abuse means an act of abuse as defined by 42-903 and a pattern of history or abuse evidenced by, among other acts, threats of physical assault, physical assault, stalking, harassment, mental cruelty, emotional abuse, intimidation, isolation and economic abuse. Neb. Rev. Stat. § 43-2922(8).

**XVIII.**

Economic abuse is defined under Nebraska Law as maintaining control over a person's finances, not allowing them to attend school or employment, stealing from or defrauding money or assets or withholding resources such as food, medications, clothing or shelter. This can include name calling, yelling, violence to a victim or object to instill fear, shaming, criticizing or mocking a victim. Neb. Rev. This can include name calling, yelling, violence to a victim or object to instill fear, shaming, criticizing or mocking a victim. It may also include possessiveness or isolation of a victim from friends and family and may be verbal or non-verbal. Neb. Rev. Stat. § 43-2922.

**XIX.**

Neb. Rev. Stat. § 43-2923(6) (Reissue 2016) provides that in determining custody and parenting arrangements: [T]he Court shall consider the best interests of the minor child, which shall include, but not be limited to consideration of…(a) the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; (b) the desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning; (c) the general health, welfare and social behavior of the minor child; (d) credible evidence of abuse

inflicted on any family or household member…; and (e) credible evidence of child abuse or neglect or domestic intimate partner abuse. *Burton v. Schlegel*, 29 Neb. App. 393, 417-419.

## STATEMENT OF FACTS

The parties were married in 2005 in Grand Island, Nebraska. (T1). Three children were born of the marriage, Simon (born in 2005), Lincoln (born 2011) and Cyrus (born 2013). (10:23-25; 11:1-7). The parties resided with the children in Gibbon, Nebraska and eventually moved to Ravenna, Nebraska in 2013. (9:13-21). While residing in Gibbon, Nebraska, Appellee was the primary wage earner while Elizabeth provided care for the children. Elizabeth testified at trial that during the time they lived in Gibbon, NE, she was employed once a month, cleaning for a woman, because that was all she was allowed as dictated by the Appellee. (16:11-17). The family relocated to Ravenna while Appellee attended school. (16:22-24). Appellant was allowed to work outside of the home at that time, but only part time, as she was required to care for the children while Appellee attended school. (16:21-24; 17:9-11). Cyrus and Lincoln are both children with disabilities and special needs, and as a result, a traditional daycare was not an option for the family (17:18-25; 18:1-2). During the course of the marriage, Appellee's behavior became more restrictive and controlling. (16:15-17).

Elizabeth testified that in 2016, Appellee decided that the family was going to move to Pacific Junction and she was given no choice but to go. (14:11-17). Appellee had decided that was what they were going to do. (14:16-17). At the time Appellee took Elizabeth and the children to Iowa, he had no job lined up or any family there. (14:18-20). Appellee's family and Elizabeth's family were in Nebraska. (14:6-10). Appellee testified that the family moved to Iowa for the youngest children to attend the Iowa School for the Deaf, however Elizabeth testified that she was not given a reason for the family move until they arrived in Iowa. (14:23-25). Elizabeth testified that upon arrival in Iowa, Appellee informed her that at some point she was going to die and he was going to remarry. (14:24-25). Elizabeth was shocked to find out that they had moved 5 miles from Appellee's ex-girlfriend, a woman named Becky Gafford. (15:1-4). This was not the first time the Appellee had made a statement like this to Elizabeth, though it was the first time she took it seriously. (15:15-22).

While living in Pacific Junction, Elizabeth described a living environment of physical intimidation and total control and domination. (53:23-25). Elizabeth testified that often Appellee would act in a way that made her think he was going to get violent but he would not. (54:1). Instead, he would get physically

intimidating at least three to four times per week. (54:2-4). He would punch holes in the wall, and come at her as if he was going to physically assault her in order to see her cower. (54:5-16). Appellee would use physical intimidation to control her in whatever way he wanted. (54:12-16). Appellee would control her financially as well. (54:19-25). If she was able to hide money during the marriage, he would find it and spend it. (54:19-25). Appellee restricted when she could leave the house and often forced her to utilize the vehicle he chose. (55:9-14).

Elizabeth testified she was not given permission to know the family finances or spend money without Appellee's permission. (54:19-25). If she didn't cooperate, Appellee would demand sex, often taking it whether she was willing or not. (55:1-4). Appellee isolated Elizabeth, from friends and family, refusing her permission to talk to her family unless she used subterfuge. (55:4-8). Elizabeth described a home life in which her every action from shopping for groceries to caring for the children was under the strict and watchful eye of the Appellee. (55:9-14).

Elizabeth was fearful for her safety and a final incident scared her so much that she decided to flee (18:23-24), stating "I wasn't going to survive this time." (19:1). Elizabeth testified that on the day she left Appellee, he had thrown a cup and had taken his anger out on the family cat who Simon was holding at the time. (19:7-8). Elizabeth stated that Appellee's eyes went dark, something that happened often when he was out of control. (19:7-8). Appellee then engaged in bizarre behavior by storming out of the house and talking to the tree in the front yard, before he left the home. (19:10-12). Elizabeth testified that though Appellee had not always behaved like that, it had been getting progressively worse and more consistent after contracted Influenza A and B simultaneously. (19:20-22). Elizabeth stated that after he recovered, Appellee began having wild mood swings often involving him crying uncontrollable or yelling at her with no in between. (20:1-3).

In June of 2019, Elizabeth fled Pacific Junction with the children and separated from the Appellee. (10:13-15). Appellee remained in Iowa during the pendency of this action and continues to live in Pacific Junction, Iowa. (66:12-13). The parties agreed at trial that they had not resumed their marriage and that they had remained separated since June of 2019. (61:23-25; 10:13-15). The matter came for trial on August 29, 2022. (T74)

At the time of trial, Simon was 17, Lincoln was 11 and Cyrus was about to turn 8. (13:8-13). All three children had resided with the Appellant since the parties separated. (13:8-13). Simon was a junior in high school and attending Kearney High School, (12:22-25), Lincoln was attending Sunrise Middle School (12:7-11) and Cyrus was attending Bryant Elementary. (11:20-25). Lincoln, who was described as "hard of hearing," and Cyrus, who is completely deaf, had IEPs through the Kearney Public School System. Both boys were given assistance through sign language interpreters and paraprofessionals. (12:10-13). All three boys were doing well in school and there were no issues with their education. (12:1-25).

Elizabeth obtained a obtained a protection order against the Appellee when she returned to Nebraska, citing several incidents of physical intimidation and violence. (20:16-21). Evidence at trial was that Appellee attended the protection order hearing order (44:19-24) and contested the protection order, but it was granted, though the children were removed from the protection order. (44:21-24). Neither the protection order itself nor the complaint to obtain the protection order were offered into evidence. Elizabeth testified to the events that led to the protection, however the documents were not offered. The protection order was renewed a year later, and Appellee did not attend the hearing or attempt to challenge the renewal. (45:4-10).

From the time Elizabeth left Iowa, there had been limited contact between the Appellee and the minor children. (22:3-7). Appellee testified that he had not had contact with the children because his attempts led to multiple protection order violations, however Appellee attended one visit with the minor children, through a mutual party, in September 2019, after the initial protection order had been issued. (21:23; 22:3-10). From that point, Appellee made few attempts to see the children, and no attempts to provide any support for them. (22:11-14). Elizabeth testified that during the pendency of this case, Appellee only attempted contact with the children one other time, when he sent a box of gifts to the children, which also contained a gift for Elizabeth, scaring her, and she reported Appellee for a protection order violation. (22:19-24). Appellee also brought a carload of items for the minor children to Nebraska on another occasion. (23:2-3). Appellee had made no other documented efforts to see the minor children. (22:8-10).

While Appellee made little effort to see the children, Elizabeth testified that his contact with her when she first left was relentless. (55:20-25). Appellee

would often send emails making statements God commanding them to be together. (55:20-25) His emails were confusing and riddled with spelling errors and half sentences. (55:20-25). Appellee never asked about the well-being of the children and never asked if she needed anything to support the children. (56:4-5).

Appellee stated he was not going to have contact with the children because he was not doing well, and he needed to get well. (56:6-9). Appellee voluntarily cut off contact with the children, stating his mental health was his priority. (56:6-9).

Elizabeth filed for divorce in October of 2020, seeking custody of the Simon, Lincoln, and Cyrus with visitation to be awarded to Appellee. (T1). Appellee was served with a copy of the Complaint on November 3, 2020. (T18). The case sat dormant for near six months, at which time Elizabeth found new counsel and proceeded on the divorce. (T20; T23). Elizabeth filed a motion for temporary orders on April 9, 2021, and Appellee finally engaged in the process by hiring an attorney. (T27). Appellee's counsel at the time requested a continuance and the matter was set for hearing on June 15, 2021. (T39). A temporary order was issued and granted Elizabeth temporary legal and physical custody of Simon, Cyrus and Largen. (T39). Appellee was given supervised visitation with the children to be supervised by a person able to communicate in ASL sign language. (T39). Appellee did not attend any visitation and made no attempts to set up visitation. In November of 2021, Appellee's attorney withdrew from representation. (T37). Appellee's current attorney entered his appearance in December of 2021. (T55).

Due to the length of time that Appellee had gone without involvement with the children as well as his erratic and unstable behavior, Elizabeth believed it would be in the best interests for his parenting time to be supervised and start with short amounts of time. (27:12-25). Elizabeth explained that Lincoln was struggling with the fact that he had not seen his father in three years but the children in general had very little contact. (27:12-25). Elizabeth asked that the court fashion a graduated parenting plan that allowed for increases in Appellee's parenting time and an opportunity to participate in therapy with the children, due to Appellee's non-involvement with the children. (28:19-22).

Elizabeth testified to efforts that had been made to allow Appellee to have visitation with the children, however, Appellee failed to use the third party he had used previously and failed and refused to show up for mediation. (48:5-20). A

motion to waive mediation was eventually filed citing, among other reasons, that Appellee had failed to show up and participate in mediation. (T46). Appellee did not attend the hearing, despite receiving notice, and did not challenge the waiver of mediation. (T51). The order waiving mediation was granted by Judge Andrew Butler, serving as interim judge following the retirement of Judge Mark Young, on November 24, 2023. (T51) Appellee took no steps while the matter was pending, either through counsel or through court, to see the children. (27:12-15).

Appellee testified that the parties had begun living in Nebraska but had moved to Commerce, Oklahoma in 2008. (69:1-8). Appellee testified that while living in Commerce, there was a tornado that went through and "the sound kind of messed up with me. Like it was kind of posttraumatic with me." (69:13-16). Appellee admitted, openly, that this event caused him some "mental health problems." (69:22-25). Appellee agreed that there were times during the marriage when he would get angry with Elizabeth, but denied violence and yelling, stating, "I would get angry and I would walk away because I didn't want to hurt anybody when I was angry." (76:11-15). Appellee admitted Elizabeth was the one who was responsible for rearing the children while he worked or went to school. (79:1-7). Appellee also admits that when Elizabeth left, there was a dispute between them, stating that they "had a dispute" he "went to work" and when he came home she was gone. (80:1-10). He alleges that he went to work and came home around midnight at which time Elizabeth and the children were gone. (80:22-24).

Appellee testified that he was made aware of the temporary order in September after numerous attempts to contact his attorney of record at the time. (85:8-15). There was no evidence presented as to why Appellee didn't take steps through the court system to re-establish parenting time, other than Appellee's assertion that he was not going to contact Elizabeth directly. (85:23-25). Appellee had attended the Baptist Church and had devout relationship which colored his views on marriage and marital roles. (88:8-15).

Appellee stated that he was requesting every other weekend, any of the holidays and Father's Day. (89:3-8). Appellee testified that it was approximately three hours from his home to Kearney for drive time and that "I understand that they would need to be in Kearney, Nebraska, area, but in the summertime, I would like to have them a lot more in the summertime." (89:3-8). Appellee also wanted the two younger boys to attend the Iowa School for the Deaf. (89:12-23). Appellee stated that the boys would be eligible to attend the school but provided

no evidence to establish their eligibility or to establish how the children performed at the school previously. (89:12-20).

Appellee agreed that he had not seen the children in several years and that a "build-up visitation" schedule would be appropriate. (90:16-22). Appellee requested video and Facetime contact several times during the week so that he could communicate with the children but did not believe his parenting time should be supervised. (90:19-25). Appellee agreed that had an attorney throughout most of his case but had taken little to no steps to establish a relationship with the children. (95:10-25; 96:1-6)

Appellee further testified that during the three years of separation between he and Elizabeth, he had made no attempts to provide any financial support for the minor children and only minimal attempts to establish contact. (96:1-17). Appellee even admitted he was aware that the protection order did not cover or apply to the children and that he had contested the protection order to remove the minor children, however following that, Appellee took no steps to enforce his parenting time. (83:13-25).

During cross examination, Appellee contradicted himself on numerous occasions. On direct examination Appellee stated that he left school due to the Elizabeth leaving him but on cross examination, he gave different excuses for leaving school, which he had done several times. (96:18-25; 97:1-13). Appellee admitted that during the time of separation, he had used social security funds provided to the children to pay various household bills, claiming he had spoken to Elizabeth about this issue, despite previous testimony that he had made no contact due to the protection order. (97:14-25; 98:1-23). These checks had continued to be written against the children's accounts up until October of 2019, long after Appellee stated that he was no longer in contact with the Elizabeth. (99:1-8). This was during a time period where Appellee admitted he provided no financial support to the children.

Appellee provided for none of the medical care or expenses of the children, had paid for none of their school related expenses and had provided nothing towards the support of the children. (99:1-25; 100:1-3). Appellee, when pressed on the issue of parenting time, stated for the record that he was not asking for sole custody but rather was asking for joint custody of the minor children, with holidays, weekends, and extended summer visitation. (101:5-12). While

Appellee stated he would prefer to have the children return to Iowa to attend their school, he was not able to say for certain if that would require the children to return to living in Iowa or would require Elizabeth to relocate. (101:13-25; 102: 1-7). Appellee provided no evidence that he had contacted the school and wasn't able to answer even basic questions about the children and their eligibility to return to the school. (101:19-25). Appellee admitted that while he had testified that it was hard not to see his children, he had taken zero steps to initiate visitation, filed no motions, did not contest the temporary hearing and made no attempts to have anyone assist him in getting visitation set up. (102:8-25). Appellee freely and openly admitted that he had taken no steps to see the children, to support the children, or to be a part of their lives for more than three years while this action was pending. (28:5-11).

On November 20, 2022, a Decree of Dissolution was entered by Judge Patrick Lee of the Hall County District Court. The trial court found it had jurisdiction over the parties, and despite being represented by two different attorneys, the Appellee never filed an Answer in this case. (T74). The ourt also noted that the parties never attempted mediation as it had been waived, however Appellant testified in trial that mediation had been attempted but that Appellee would not show up for mediation. (49:21-25). The court acknowledged that Appellee had not seen the children in many years but found that the evidence presented showed that the Appellee and the minor children's relationship had been limited due to its perception of Elizabeth's intentional actions. (T74).

The court discounted Elizabeth's claims of abuse as "not credible" and found Appellee posed no risk to Elizabeth or the children, despite evidence being adduced that Appellee had continued to attempt to make contact with the Elizabeth, even with the existence of a valid protection order. (82:13-25; 83:1-25; 84:1-9). The court found that the protection Order, the validity of which was not challenged during trial, was obtained without credible evidence and that Elizabeth had used the protection order and "significantly alienated the parental rights and access of the [Appellee] to his children." (T74). The court further found Elizabeth's action had put the Appellee in a "situation where he had no legal choice but the one he took." (T74). However, the Court also found, despite its belief that Elizabeth had alienated Appellee from the children, that both parents were fit and proper parents of the children. (T74).

The court granted custody of Simon to Elizabeth and gave Appellee custody of Lincoln and Cyrus. (T74). The court further found that the move from Iowa to Nebraska, was not in the best interests of the two younger children. (T74). The minor children were placed in the joint legal care of the parties, with Appellee having final say, despite Elizabeth having sole physical custody of the Simon. (T74). The court fashioned a parenting plan that allowed for parenting time between Appellee and Simon one time per month. The parenting time that Appellee had with Simon was on the same weekend per month that Elizabeth would see Lincoln and Cyrus. (T74). The children, per the court's order, would only see each other on holidays and during brief summer visitation. (T74).

Child support was not ordered until Simon reached the age of majority, at which point Elizabeth was ordered pay child support to the Appellee in the amount of $436.00 per month for two children and $303 per month for one child. (T74)

## SUMMARY OF ARGUMENT

The trial court erred in determining that the best interests of the minor children was met by awarding custody of Simon to Elizabeth and custody of Lincoln and Cyrus to Appellee. The trial court erred in deciding that custody of the children of the parties was in their best interest, despite evidence from the parties that the boys had a good relationship and that it wasn't their desire for the boys to be separated. The trial court also erred in finding that Elizabeth had engaged in alienation of Appellee's parental rights when she sought and was awarded a protection order in Nebraska. There was no other evidence that Elizabeth had engaged in any action to prevent Appellee from enforcing his parental rights, but Appellee chose to do nothing for three years to see or support his children. The trial court committed further error when it found that Appellee was a fit and proper parent, ignoring overwhelming evidence that Appellee had abandoned the children for three years while the case was pending. Finally, the court erred in determining that awarding custody to the Appellee of Lincoln and Cyrus despite all evidence to the contrary. The court abused its discretion in awarding custody to the Appellee.

## ARGUMENT

### I. The trial court abused its discretion when it determined that the evidence showed that a split custody arrangement was in the best interests of the minor children of the parties.

The trial court found that the best interests of Simon would be met by remaining in the home of the Appellant. The trial court further abused its discretion in finding that the best interests of the parties' younger children Logan and Cyrus, would be best met by placing those children with the Appellee.

While the Nebraska Supreme Court has recognized that it is sound public policy to keep children together whenever possible, considerations of public policy do not, in all cases, prevent the splitting of the custody of children when a marriage is resolved; rather the ultimate standard is the best interests of the children. *Burcham v. Burcham*, 24 Neb. App. 323, 332 (2016). "The relationship between a child and his/her siblings is a significant and unique one, from which a myriad of benefits and experiences may be derived. The bonds which develop between brothers and sisters are strong ones, and are, in most cases, irreplaceable. *In re Interest of Daniel W.*, 3 Neb.App. 630 (1995). "[A] sibling relationship can

be an independent emotionally supportive factor for children in ways quite distinctive from other relationships and there are benefits and experiences that a child reaps from a relationship with his … brother(s)…which truly cannot be derived from any other." *Id*. While public policy does not prevent the court from splitting siblings where the evidence shows that best interests outweigh the relationship between siblings, "it strongly supports keeping siblings together." *Ehrman v. Ehrman*, 2003 Neb. App. Lexis 313, 318 (2003) (*not designated for permanent publication)*.

Simon, Lincoln and Cyrus resided with Elizabeth in Nebraska since leaving the Appellee in 2019. The children have always resided together and there was no evidence presented at trial that would suggest the children had anything other than a loving relationship. Elizabeth testified that the minor children were all doing well in her care and doing well in school. Simon was able to assist in providing ongoing care and support for his brothers in the event Elizabeth had to work. The evidence presented at trial was that the boys had always lived together and had a strong bond and good relationship.

The court, however, determined that it was best for the children to be split up, despite any evidence suggesting this was in the best interests of the children. The parenting plan fashioned by the court also created a further separation of the children by assigning parenting time to Appellee for Simon at the same time that Cyrus and Lincoln would be in Elizabeth's care. The parenting plan ensured that Simon, Cyrus, and Lincoln would only see each other for holidays and a short period of three weeks during the summer.

Further, the court found that the best interests of Logan and Cyrus would be met by returning to Iowa to attend school, without any evidence of the care that the children would receive with the Appellee while he was working, or what help he would have. Elizabeth, on the contrary, testified that she had Simon's assistance as well as family and was able to work a schedule that allowed her to be with the children when they weren't in school, so a childcare provided wasn't need. Further, even Appellee appears to believe that it was best for the children to remain together, as Appellee asked that the have extended time with the minor children in the summer, so that he would be able to have all three children in his home.

The court's sole reasoning for custody of Lincoln and Cyrus to be returned to Appellee was for them to return to the Iowa School for the Deaf. There was no evidence presented that the children did well at the school, were able to actually return to the school or that the children wanted to return to the school. Appellee provided no evidence as to the desirability of splitting the children and stated that he wanted all the boys together during his parenting time. Both parties appeared, at least through their positions and testimony in court, to believe that it was in the best interests for the minor children to remain together, however, the court, without evidence or either party requesting it to do so, determined that the best interests of the minor children involved splitting them up in order to return the younger two children to a school in Iowa due to their hearing loss.

The only evidence that the court had before it, which goes uncontroverted by both parties, is that the boys had always lived together, and that they had lived in Nebraska since 2019. The Court made no finding as to the best interests of Simon but awarded custody to Elizabeth.

An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Koehler v. Farmer's Alliance Mutual Ins. Co.*, 252 Neb. 712 (1997).

In the present case there was no evidence presented that it was in the best interests of the minor children to be split up. The trial court not only split the siblings, but also crafted a parenting plan that provided no time for the minor children to be together, other than holidays and a few scant weeks during the summer. There was no evidence presented that it was in the best interests of the minor children to have only limited contact due to the distance between the parties and neither party asked for the children to be split. Both parties acknowledged the relationship between the siblings and both parties appeared to believe it was best for the siblings to remain together, as evidenced by Appellee's own statements on cross examination. The court conducted no inquiry regarding the relationship of the minor children nor did either party suggest or offer evidence that the children should be split in their custody. Both parties testified and requested parenting time that contemplated all three children being kept together. In the absence of evidence to the contrary, sound public policy would require the court to first rule from the perspective of keeping the minor children

together unless the court had evidence that not keeping the children together was in the best interests of the children. There was no such evidence in this case.

## II. The trial court abused its discretion when it determined the evidence showed that Appellant had engaged in significant alienation of Appellee's parental rights.

The trial court made a finding that Elizabeth's efforts to obtain a protection order in Nebraska, and her reports of Appellee's violations of that protection order "significantly alienated the parental rights and access of the Defendant to his children." (T74). Further the court found that "compliance with the protection order, obtained by the Plaintiff, was the direct cause of the resulting parental alienation and placed Defendant in a situation where he had no legal choice but the one he took." (T74).

No one challenged the validity of the protection orders granted. Elizabeth testified, as did Appellee, that the protection order was filed by Elizabeth, both parties participated in the hearing, and the order was granted. Appellee did not appeal said order and for two years took no other steps to modify the order or to have the matter reconsidered.

Appellee and Elizabeth both testified that when the protection order was renewed a year later, Appellee did not attend that hearing. Appellee testified during the pendency of the divorce proceedings, he had an attorney representing him, but had taken no steps to attempt to see or visit the children. Appellee testified that the last time that he had seen the children was in September of 2019 and that shortly thereafter was served with a protection order. (81:17-25) Appellee further admitted that once he was served with the protection order, there were three incidents in which he had violated the protection order prior to the filing of the dissolution. The court's assertion that Appellee did not have any other options is simply untrue. The temporary order issued in this case allowed him an opportunity to visit with the children. Appellee failed to avail himself of that option. The Appellee had an attorney the entire time this case was pending, yet he failed and refused to participate in mediation or avail himself of the court's assistance in attending visitation. Appellee testified he just expected his attorneys to "handle it," but made no other efforts to attempt visit the children.

The court's finding that Elizabeth had alienated the parental rights or engaged in alienation through obtaining a valid protection order and having it renewed is

also specious. “By the great weight of authority, conduct toward a child which tends to poison the child’s mind against, and alienate his affection from, his mother or father, is so inimical to a child’s welfare as to be grounds for a denial of custody to, or change of custody from, the party guilty of such conduct.” *Hossack v. Hossack*, 176 Neb. 368 (1964). “While not a determinative factor, the promotion of and facilitation of a relationship by one parent with the other parent is a factor that may be considered when awarding custody. *Kashyap v. Kashyap*, 26 Neb. App. 511 (2018). “It stands to reason that a parent’s intentional refusal to promote and facilitate the other parent’s involvement in the child’s most important educational, religious, and medical needs constitutes a significant factor to consider when making custody decisions.” *Burton v. Schlegel*, 29 Neb. App. 393 (2021).

The court’s finding that Elizabeth had engaged in alienation of the Appellee is unfounded and not supported by any evidence. Appellee provided no testimony or direct or indirect evidence that he had attempted to contact the children and had been prevented from doing so. In fact, Appellee’s entire testimony was that in each case where a violation was filed, it was because he attempted to make direct contact with Elizabeth, and not attempts to contact the children. Appellee was aware that the children had been removed from the protection order and had the right to engage in visitation.

Appellee testified that upon the filing of the dissolution matter, he had consistent legal counsel but had made no attempts through his attorneys to arrange visitation. Appellee did absolutely nothing during the pendency of the action to secure or exercise parenting time with the children. Elizabeth was the party who filed for a temporary order to establish visitation for the Appellee. Appellee did nothing even after he was served with papers, and did nothing until a temporary motion was filed. At that point the case had been on file for more than six months and it had been over a year since Appellee had visitation with the children. During the entirety of the case, Appellee didn’t even file an answer in the matter.

There was no evidence presented that Elizabeth had discussed any nature or involvement in the court proceedings with the children. Appellee presented no evidence or testimony that Elizabeth had engaged in any behavior alienating him from the children. Appellee’s entire testimony was he was served with a protection order, violated it three times and then did absolutely nothing to see or secure his rights to see his children.

It would be a gross derivation of public policy to require someone with an active protection order, based on a hearing where a separate judge who observed both witnesses and believed Elizabeth after a hearing on her application, to have to take active steps to ensure that the subject of that protection order sees their children. Yet, that is exactly what Elizabeth did. Elizabeth obtained a temporary order that provided Appellee with opportunities to see the children. Appellee testified that he did nothing because he found out the Order was about to expire, but again he took no steps to see the children. Appellee's new counsel entered an appearance in December of 2021 (T55) and Appellee still took no steps to attempt to see the children. The transcript shows that Appellee filed no motions, no contempt actions, nothing from the time the case started in 2020 until his second counsel filed a pretrial memorandum in July of 2022. (T1-T66).

The court's finding that Elizabeth engaged in parental alienation against the Appellee, is an abuse of discretion, especially when it was never raised as an argument and was not supported by the record. It was untenable and not based on evidence in the record, but rather on the court's belief that the facts that led to the underlying protection order, presented to a different court and granted as valid, were not credible. While the court can make that determination, to find that alienation had occurred when there was no evidence in the record, and then to deny Elizabeth custody was such that it denied and deprived Elizabeth of a substantial right and just result.

## III. The trial court abused its discretion when it found that Appellee was a fit and proper parent despite overwhelming evidence that Appellee had abandoned the minor children and provided no support for them for a period of three years.

The trial court found that Appellee was a fit and proper parent to have custody of Lincoln and Cyrus. Appellee testified at trial that during the two years the matter was pending he provided no financial support for the children. Appellee made no attempts to contact the children. Appellee did not avail himself of the court system to establish parenting time. The Appellee had, for all intents and purposes, abandoned the minor children for three years. Appellee was aware that he could have contact with the minor children as he contested the protection order and was able to have them removed, yet he took no steps to maintain any contact with the children.

When custody of a minor children is an issue in a proceeding to dissolve the marriage of the children's parents, custody is determined by parental fitness and best interests of the children. *Ritter v. Ritter*, 234 Neb. 203 (1990). When both parents are determined to be fit, as they were here, the inquiry for the court is the bests interests of the children. *Id*. The Nebraska Supreme Court has adopted the definition of parental unfitness as "a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused or probably will result in detriment to the child's well-being. *Id*. at 210.

Appellee was not prevented from performance of reasonable parental duties, but instead abandoned those duties. Appellee made absolutely no efforts during the pendency of the matter and only token efforts in 2019, to preserve or engage in parental rearing of any of the children. Appellee was given an opportunity to engage in mediation, he failed and refused to participate. Appellee was given supervised visitation, he took no steps to follow through with that. Appellee was represented by legal counsel but took no steps to assert a parenting right, and did everything that he could to avoid his parental responsibilities. Appellee's counsel at trial questioned Appellee about orders to pay child support or for expenses for the children. Appellee admitted he did nothing. For the three years the matter was pending, Appellee at no time took steps to put the minor children on his health insurance or took a single step to determine where the children lived or went to school. Appellee sat on his hands while Elizabeth provided, solely, all the needs and necessities of the minor children. As during their marriage, Appellee required and forced Elizabeth to provide all care and necessities for the children while engaging in his own life for three years.

While the trial court found this was the result of Elizabeth's behavior, the evidence in trial did not suggest that. The evidence as presented by Appellee was that he took no steps to engage in or preserve his relationship with the children, even despite having legal counsel to represent him. Elizabeth provided all care, structure, routine, financial support, educational support, and love that the children required while Appellee did nothing to engage or encourage a relationship with his children. Appellee rested on his laurels and provided no evidence that he had made anything other than a handful of token attempts. Indeed, Appellee didn't so much as take the step to prevent the protection order from being reissued and didn't show up to the hearing to contest it. Appellee's

action and testimony demonstrate that Appellee had prevented, through his own choices and actions, his own ability to perform a reasonable parental obligation which resulted in detriment to the children's well-being.

Despite the evidence in this case, the trial court ignored the actions of the Appellee due to its assumption and belief that the underlying allegations of abuse were not credible. The court failed and refused to consider the facts of the case or the evidence that demonstrated the Appellee's actions were those of a parent who was unwilling to provide for the care of the minor children. The court's ruling was untenable and not based on the evidence presented but rather on the court's preconceived bias that Elizabeth was lying about underlying evidence of abuse, rather than the actual evidence that was presented at trial.

## IV. The trial court abused its discretion in finding that the best interests of the minor children were met by granting sole legal and physical custody of the minor children, L. Largen and C. Largen, to the Appellee.

In determining custody and parenting time arrangements, the court shall consider the best interests of the minor children which shall include but are not limited to:

f. The relationship between the children and each parent;
g. The desires and wishes of the minor children if of an age to make such decisions;
h. The general health, welfare and social behavior of the minor child;
i. Credible evidence of abuse inflicted on a family or household member;
j. Credible evidence of child abuse or neglect or domestic intimate partner abuse.

*Bornhorst v. Bornhorst*, 28 Neb. App. 182, 194 (2020); Neb. Rev. Stat. § 43-2923(6) (Reissue 2016).

Domestic intimate partner abuse means an act of abuse as defined by 42-903 and a pattern of history or abuse evidenced by, among other acts, threats of physical assault, physical assault, stalking, harassment, mental cruelty, emotional abuse, intimidation, isolation and economic abuse. Neb. Rev. Stat. § 43-2922(8). Economic abuse is defined under that same section as maintaining control over a person's finances, not allowing them to attend school or employment, stealing from or defrauding money or assets or withholding resources such as food,

medications, clothing or shelter. Neb. Rev. Stat. § 43-2922(9). Emotional abuse includes acts or patterns of acts to threaten or intimidate to gain compliance. Neb. Rev. Stat. § 43-2922(10). This can include name calling, yelling, violence to a victim or object to instill fear, shaming, criticizing or mocking a victim. Neb. Rev. Stat. § 43-2922(10). It may also include possessiveness or isolation of a victim from friends and family and may be verbal or non-verbal. Neb. Rev. Stat. § 43-2922(10).

Here the District Court found that there was no credible evidence of abuse and awarded custody to the Appellee. However, there was substantial evidence of abuse throughout the testimony of Elizabeth, most of which was undisputed by the Appellee. Elizabeth testified that during her marriage, after Appellee became ill, his personality changed. Appellee restricted the amount of time she could work, moved the family without warning to another state, and often would not allow Elizabeth access to her friends or family. If Elizabeth wanted to go grocery shopping or do things on her own, she often had to do it at night because she was taking care of the children during the day. Elizabeth testified that on the last day that they were in the home, Appellee became explosively angry, harmed a family pet, and began behaving erratically before leaving. Elizabeth was able to obtain a protection order, at a hearing where Appellee appeared and challenged her claims, which were the same claims in this case. Appellee further testified that he violated the protection order on three separate occasions and had been charged with violation of the protection order at least three times.

Appellee, additionally, wrote several checks to pay his household bills on the account involving the minor children's disability payments. Appellee, during this time, was not paying child support, not providing assistance for the children and had made few efforts to obtain visitation with the children. Appellee not only failed to provide support for the children, he depleted resources that Elizabeth relied on to provide for the children. Appellee testified that he had been undergoing counseling to address his anger issues, but provided no proof that any such counseling had occurred. The court acknowledged that a prior protection order had been granted, and renewed at least once, but failed to acknowledge that Appellee had been present at the hearing and that another judge had determined the validity of Elizabeth's allegations of abuse, which should have been deemed credible. The trial made no findings about the validity of the protection order and did not claim that Elizabeth was fraudulent or had engaged in malfeasance in her

obtaining of a protection order. The court simply determined it did not believe Elizabeth's story.

The trial court also failed to consider the relationship between the children and the Appellee and makes very little mention of this in the Decree. The minor children of the parties did not testify and Appellee provide little to no testimony as to his relationship with the children. Appellee testified that Elizabeth had always been the primary care giver of the children while he worked or attended school. Appellee further testified that he had made no efforts in the three years that the matter was pending, to obtain any parenting time with his children. Appellee provided no testimony or evidence of his interactions with the children, even before he stopped seeing them in September of 2019, and provided nothing to indicate that he had any kind of relationship with them at all.

Elizabeth, on the other hand, testified to her relationship with the children and the fact that the children, other than Lincoln, seemed indifferent to the lack of contact from Appellee. Appellee had a valid temporary Order in place that would have allowed him contact with the children and took no steps to enforce the parenting time he was awarded. Appellee, by the time of trial, had not had contact with the children in more than two years and there was no evidence of any relationship between he and the children.

The trial court, despite this evidence that there was no relationship between Appellee and the children simply decided that it did not believe Elizabeth's claims of abuse and gave custody to Appellee who did nothing throughout the pending case, without considering the relationship between Elizabeth and the minor children or the lack of relationship between the Appellee and the children.

The Court also failed to consider the general health, welfare and social interactions of the minor children. The evidence presented showed that the minor children had been in the exclusive care of Elizabeth, were enrolled in school and were receiving additional assistance. The children had adjusted well and were doing well in school. The trial court outright ignored the evidence that for the three years prior to the trial, Elizabeth was the sole provider of the minor children and that Appellee had provided no financial, emotional, educational or other assistance. Appellee provided no evidence of steps that he took to follow up on the children's performance in school or activities, their medical and mental health needs or their overall well-being. Appellee had numerous opportunities to have

parenting time with the children through the Temporary Order and also had the opportunity to engage in mediation. Appellee refused to avail himself of any of those options and took no steps to provide for or look into the care of his children.

Elizabeth testified that she worked part time at a coffee shop on the UNK campus and was able to provide care for the children when they were not in school. She testified that due to the younger children's disabilities, daycare was not an option and that the children could not be left alone. Appellee testified that he is currently employed full time, and provided no evidence or plan as to who would provide care for the children while he worked. Appellee testified that he would like the children to return to Iowa to attend school, but provided no evidence that he had engaged in any steps to assure that would be possible. Appellee provided no evidence or plan of care for the boys while he worked and provided no information as to who would provide said care while he was working. Indeed, Appellee's only evidence provided was a proposed parenting plan that allowed him to have extended time with the children during the summer and weekend visitations throughout the school year. The court ignored Appellee's own statements and the care of the children due to its belief that Elizabeth was not credible in her claims of abuse.

The court further erred in finding that it was in the best interests of the minor children to return to the Appellee's care in Iowa. The trial court failed to consider the factors required for a child to be removed to another jurisdiction. *Kashyap v. Kashyap*, 26 Neb. App. 511 (Neb. Ct. App 2018). There is no dispute that Appellee had a legitimate reason to leave the state at the time of trial (he owned and had lived in a home in Pacific Junction Iowa for more several years). There is some speculation as to the legitimacy of the move during the marriage but the family lived there for several years before Appellant relocated to Nebraska. Testimony at trial was that Elizabeth and Appellee both had family ties to Nebraska, all three children were born in Nebraska and, the family had lived in Nebraska for most of the children's lives. The trial court's only determination on the enhancement of the children's lives was that they would be able to return to the Iowa School for the Deaf, despite any evidence that this was actually a possibility. The trial court ignored evidence that the children had lived in Nebraska for more than 3 years since the parties' separated and had been without any contact to their father or the State of Iowa since that time.

The court failed to consider the impact on the relationship between the minor children and the Appellant, as well as their relationship with their older brother, and granted Appellant only one weekend per month with the minor children. Even less logical, however, is that the trial court ordered that Simon attend parenting time with Appellee, on the same weekend that his brothers would be seeing Appellant. There was no evidence in the case to suggest that this was in the children's best interests. The court provided no rationale for this nor engaged in any analysis to determine why this was in the best interests of the minor children. The court's sole inquiry appears to be whether or not it believed Elizabeth's claims of abuse, despite substantial evidence that was presented to the contrary. The court's ruling was based on preconceived notions rather than a determination of the best interests of the children.

## CONCLUSION

The trial court abused its discretion in granting custody of the minor children Lincoln and Cyrus to the Appellee. The trial court separated siblings with a close relationship, against the wishes of the parties, without any analysis or evidence, that separation was in the best interests of the children. The trial court abused its discretion when it determined that Elizabeth had engaged in alienation of Appellee's parental rights. There was no evidence presented, other than Elizabeth's protection order, the validity of which was not challenged by either party, to demonstrate that Elizabeth had taken any actions against Appellee. Appellee had taken no action at all to have a relationship with the minor children. The court abused its discretion in granting custody to Appellee despite Appellee's lack of any involvement with the children and his abandonment of the children for more than three years. The trial court abused its discretion when it determined that best interests of the minor children would be better served by returning to Appellee's care while failing to do a proper best interests and removal analysis. For all these reasons, Elizabeth prays this Court reverse the Order of the District Court of Hall County and for such other and further relief as the court deems just and

**Respectfully submitted,**

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## CERTIFICATE OF COMPLIANCE

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# Certificate of Service

I hereby certify that on Monday, May 01, 2023 I provided a true and correct copy of this *Replacement Brief of Appellant Barnes* to the following:

Josiah W Gerritsen-Largen represented by Mitchell Charles Stehlik (24451) service method: Electronic Service to **mitchell.stehlik@stehliklawfirm.com**

Signature: /s/ Kearney, Jennifer, D (23415)