

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

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**CASE NO. A-24-819**

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**STATE OF NEBRASKA on behalf of PAUL B. OKENG and NICKOLAS A.  
OKENG, Appellee / Plaintiff**

**vs.**

**SAMUEL OKENG, Appellant / Defendant**

**vs.**

**FANNIE B. WOTOE, Appellant / Third-Party Defendant**

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**Appeal from the District Court of Lancaster County, Nebraska  
The Honorable Matthew O. Mellor, District Court Judge**

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**BRIEF OF APPELLANT FANNIE B. WOTOE**

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**PREPARED AND SUBMITTED BY:**

**David V. Chipman, #23151  
Monzón, Guerra & Chipman  
1133 H Street  
Lincoln, NE 68508  
(402) 477-8188  
dchipman@monzonlaw.com  
Attorney for Appellant**

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## STATEMENT OF JURISDICTION

Appellate jurisdiction is proper, Neb. Rev. Stat. § 25-1911 (Reissue 1995). The Judgment appealed from is a final Order, determining the issues before this Court.

- (i) The date of entry of the Judgment for the matter to be reviewed are September 12, 2024 and October 4, 2024. (T142-162; T167-175).
- (ii) The date of filing any motion claimed to toll the time within which to appeal: September 18, 2024 (T163-166)
- (iii) The date of filing of the Notice of Appeal, and the date of depositing the docket fee: November 1, 2024.
- (iv) Basis for interlocutory appeal: Not applicable.

## STATEMENT OF THE CASE

### 1. Nature of the Case

The State filed a complaint seeking to establish the minor children's paternity and child support order against Appellee Samuel Okeng. (T1-3). The Appellee Samuel Okeng moved to add the Appellant as a party and then filed a counterclaim against the Appellant seeking joint physical and legal custody of the minor children. (T28-30). The Appellant filed a counterclaim against the Appellee Samuel Okeng seeking physical and legal custody of the minor children, for the trial court to enter a parenting plan, and for the Appellee Samuel Okeng to be ordered to pay child support for the benefit of the minor children. (T83-86).

### 2. Issues Tried by the District Court

The trial court was asked to determine:

1. The paternity of the minor children, Paul B. Okeng, born July 2015, and Nickolas A. Okeng, born October 2019.
2. The physical custody of the minor children.
3. The legal custody of the minor children.
4. The amount of child support and other ancillary financial matters regarding the minor children.
5. Whether or not the Appellant is entitled to an award of attorney's fees. (T139-140).

3. **How the Issues Were Decided**

The District Court decided the matters as follows:

1. The District Court found that the Appellee Samuel Okeng was the natural father of the minor children. (T143).
2. The District Court awarded the Appellant and the Appellee Samuel Okeng joint physical custody of the minor children. (T143).
3. The District Court awarded the Appellant and the Appellee Samuel Okeng joint legal custody of the minor children. (T143).
4. The District Court ordered the Appellant to pay \$150 per month in child support for two children and \$94 per month for one child. (T167).
5. The District Court awarded the Appellant \$2,000 of attorney's fees. (T147).

4. **Standard of Review**

In filiation proceedings, questions concerning child custody and parenting time determinations are reviewed *de novo* on the record to determine whether there has been an abuse of discretion by the trial court. *Tyler F. v. Sara P.*, 306 Neb. 397, 945 N.W.2d 502 (2020). While a paternity action is one at law, the award of child support in such an action is nonetheless equitable in nature. *Sylvis By and Through Sylvis v. Walling*, 248 Neb. 168, 532 N.W.2d 312 (1995). Thus, a trial court's award of child support in such an action will not be disturbed on appeal in the absence of an abuse of discretion. *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994).

In a review *de novo* on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Parde v.*

*Parde*, 313 Neb. 779, 787, 986 N.W.2d 504, 512 (2023). A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable or unreasonable or if its actions is clearly against justice or conscience, reason, and evidence. *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

#### **ASSIGNMENTS OF ERROR**

- I. The District Court erred in awarding joint physical custody of the minor children.
- II. The District Court erred awarding each parent equal parenting time with the minor children, which was not in the minor children's best interests.
- III. The District Court erred in its child support order by ordering the Appellant to pay child support to the Appellee Samue P. Okeng and by providing an offset to Appellee Samuel P. Okeng for the medical insurance premiums for the minor children.

#### **SUMMARY OF ARGUMENTS**

The District Court erred in awarding the parties joint physical custody of the minor children. Appellee Samuel Okeng's work schedule is such that he is unable to spend any time with the children once they come home from school, and his work schedule and childcare plans are such that the children are awoken at least 11:45 p.m. on at least 3 different weekdays during his court-ordered weekly parenting time. Moreover, the Appellant has always been the children's primary caregiver, whereas the Appellee has been very uninvolved in the children's educational needs and medical care, including having never attended a parent-teacher conference, never attending an IEP meeting for Nickolas, and having attended only one medical appointment for a child. The Appellee Samuel Okeng could not identify either child's teacher, physician or dentist. Additionally, the District Court abused its discretion in awarding equal parenting time with the parties, given that the Appellee Samuel Okeng cannot spend any time with the children after they return home from school until the children go to bed due to his work schedule and his childcare plan requires the children to be awoken at least 3 times each weekday at 11:45 p.m. to be then transported back to his home. Finally, the District Court abused its discretion by deviating from the Nebraska Child Support Guidelines by requiring the Appellant to pay child support instead of the Appellee Samuel Okeng paying child support and by allowing Appellee

Samuel Okeng a credit / deduction for his alleged payment of health insurance premiums for the minor children.

## **PROPOSITIONS OF LAW**

### **I.**

Although joint custody is no longer disfavored under Nebraska law, for the trial court to award joint custody, joint custody still has to actually be in the children's best interests.

*State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 955, 932 N.W.2d 692, 708 (2019).

### **II.**

"The time which a parent is able to devote to a child is a consideration in resolving a child custody question . . . ."

*Ritter v. Ritter*, 234 Neb. 203, 213, 450 N.W.2d 204, 211 (1990).

### **III.**

Parents who have to wake their children at odd hours due to their work schedule should generally not be granted custody and their parenting time should accordingly be crafted so to avoid such disruptions to the children.

*See, e.g., Limbaugh v. Limbaugh*, 749 So.12 1244 (Miss. Ct. App. 1999); *Ferguson v. Whible*, 865 N.Y.S.2d 156, 158 (N.Y. App. Div. 3d Dept. 2008); *Wennihan v. Wennihan*, 452 S.W.2d 723, 727 (Mo. App. W. Dist. 2015); *Albright v. Albright*, 2017 WL 4460981 (Ky. App. Oct. 6, 2017); *see also Henson v. Carosella*, No. A-20-096, 2020 WL 6878566 (Neb. App. Nov. 24, 2020).

### **IV.**

Child support payments should be set according to the Nebraska Child Support Guidelines ("NCSG"). However, a court may deviate from the NCSG if its application in an individual case would be unjust or inappropriate. The court must specifically find that a deviation is warranted based on the evidence and state the reason for the deviation in the decree. A deviation without a clearly articulated justification is an abuse of discretion.

*Hotz v. Hotz*, 301 Neb. 102, 917 N.W.2d 467 (2018); Neb. Ct. R. § 4-203.

### **V.**

A party can only claim a credit and/or deduction for health insurance premiums for their child's health insurance coverage from their child support if

they can show he or she incurred an increased cost for the coverage of those specific children related to the child support award.

*Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

### **STATEMENT OF FACTS**

The Appellant, Fannie B. Wotoe (“Fannie”), and Appellee, Samuel P. Okeng (“Samuel”) have two children together: Paul B. Okeng (“Paul”), born July 2015, and Nickolas A. Okeng (“Nickolas”), born October 2019. (T1). Fannie and Samuel never married. (T1).

The Appellee, State of Nebraska (“State”), filed a complaint against Samuel on September 7, 2023 seeking to establish the minor children’s paternity and child support order. (T1-3). Samuel then moved to add Fannie as a party and then filed a counterclaim against Fannie seeking joint physical and legal custody of the minor children. (T28-30). Samuel also filed for a motion for temporary orders. (T46-51). Samuel incorrectly served process of service upon Fannie and in no way complied with Neb. Rev. Stat. § 25-507. (T35-45; T74-76). Nevertheless, Fannie, acting *pro se*, appeared at the hearing on temporary orders on January 3, 2024. (T52-53; 5:1-7).

At the temporary hearing on December 7, 2023, the District Court awarded Samuel and Fannie temporary joint physical and temporary joint legal custody of the minor children. (T55-56). The District Court adopted Samuel’s proposed parenting plan which provided for Samuel to have 9 overnights with the children and for Fannie to have 5 overnights with the children every two weeks. (T59). Samuel was ordered to pay \$122 a month in temporary child support. (T55).

Fannie then obtained counsel. (T71). Fannie filed a motion for further temporary orders and to vacate the previous order of the District Court. (T74-77). The motion for further temporary orders was heard on January 26, 2024. (T88-89). The District Court found that Samuel has misrepresented his parenting role with the minor children and in the District Court’s January 30, 2024 temporary order stated:

On December 7, 2023, the Court heard arguments and entered a Temporary Order on December 8, 2023. The Third-Party Defendant was present, without counsel at the hearing. Based on the information provided to the Court on behalf of the Defendant,



the Court believes that it was not provided a clear picture of the circumstances on December 7, 2023, to make a determination in the best interests of the minor children.

(T88). The District Court then modified the temporary order to provide Fannie with temporary physical custody of the minor children, awarding Fannie 8 overnights and Samule 6 overnights every two weeks with the minor children. (T91).

Trial was conducted on August 20, 2024. (T111-113).

Prior to Fannie and Samuel ending their relationship, Samuel and Fannie lived together for less than 10 months with the children. (53:4-54:8; 181:16-18). For instance, when Paul was born, Fannie and Samuel were not living together. (181:13-15). When Nickolas was born, Samuel was at boot camp. (181:19-224). Prior to Samuel filing the motion for temporary orders in December 2023, Samuel rarely had the children overnight with him alone. Prior to December 2023, Samuel had the children with him overnight approximately 1 day a week or less. (45:20-46:2). Prior to the temporary order in December 2023, Samuel would go weeks and sometimes a month or more without seeing the children. (57:24-58:5).

Samuel acknowledged that Fannie has always been the parent who has historically taken care of the children's educational and medical needs. (138:13-20; 139:25-2; 229:19-230:14). Samuel admitted that he has rarely, if ever, taken the children to any medical appointments. (66:4-9). Fannie has always been the parent who has taken the children to their doctor appointments, as Samuel has only taken the children to the doctor one single time. (140:9-12; 229:23-230:3). Fannie has always been the parent who has dealt with the children's doctor. (139:25-140:2). Samuel does not know who is the children's primary care doctor. (140:23-25). Samuel does not know the name of the children's dentist. (141:1-5). **Samuel has never attended a parent-teacher conference for the children.** (138:24-25; 184:24-185:1). Samuel was not even aware that Nicholas was on an IEP. (151:7-152:5; 184:16-18). **Samuel does not know the names of the children's teachers.** (141:6-15).

Aketch Oloya ("Aketch") testified. Aketch testified that she is the current romantic partner of Samuel, but that her and Samuel are not legally married. (20:11-21:3). Aketch and Samuel have been in a relationship for the last 5 years. (21:25-22:2). At the outset of Aketch's relationship with Samuel, Samuel was

having an affair with Aketch while in a relationship with Fannie, who believed she was in a monogamous relationship with Samuel, while Samuel was going back and forth between Aketch and Fannie. (37:15-38; 59:5-12; 117:5-12; 221:13-22). In fact, Fannie was pregnant with Nickolas at the same time as Aketch was pregnant with Isaac, as the boys are only 3 months apart. (38:8-10; 39:16-40:3; 58:24-59:4; 221:23-25). Consequently, Aketch and Fannie have a very poor relationship with each other. (38:11-18; 117:2-7).

Aketch and Samuel reside together in a home owned by Samuel. (20:16-17). Aketch and Samuel have lived together for two years. (21:21-24). Aketch and Samuel have two children together: Issac Okeng, born January 2020, and Lina Okeng, born April 2024. (23:4-18).

Throughout the children's lives, Samuel has worked the second shift. (54:9-21; 109:15-23). Samuel has worked at Molex for the last 2 years. (49:18-21). Samuel works Monday through Friday from 2:30 p.m. to 11:45 p.m. at Molex in Lincoln, Nebraska. (29:4-10; 145:10-13). Aketch works overnight three days a week from 6:45 p.m. to 7:15 a.m. as a nurse. (29:20-30:1). Aketch never works weekends. (40:11-15). This means that Aketch works at least 3 nights a week, Monday through Friday. (40:20-25). Samuel testified that Aketch usually works Wednesdays, Thursdays and Fridays each week. (117:13-118:9). On the days that Aketch works, she picks the kids up from school. (30:2-13). Aketch then gets the children ready for bed by placing them in their pajamas, feeds the children, and then takes the children to their grandmother's home in Lincoln at 5:45 p.m. (30:14-24). On these days that Aketch works, Samuel then goes to the grandmother's home at 11:45 p.m. after work and picks up the children and takes the children to his home. (30:25-31:7; 145:14-18). Samuel picking up the children from the grandmother's house means that he has to awaken the children and then transport them to his house after 11:45 p.m. to put them back in bed in his home. (147:10-15). During his parenting time Samuel takes the children to school. (32:1-10). Samuel testified that he now has health insurance through his employer, Molex, that covers the health insurance for Nicholas and Paul, as well as for his daughter, Lina. (108:24-109:14).

Samuel has been a member of the Army National Guard since April 2019. (50:13-21). Since joining the Army National Guard, Samuel was outside of Nebraska for 9 months from April 2019 to December 2019, meaning Samuel did

not see the children for the entire 9 months. (51:16-52:2). Samuel was also deployed for 11 months from May 2021 to March 2022 where he did not see the children for that entire time. (120:18-121:9). Samuel has military training for two weeks a year and one weekend a month. (61:1-4). For these two weeks of training each year, Samuel is not home and away from the children. (121:14-19; 121:20-25; 149:23-150:3). Samuel has been away for the children for almost two years of time in the last 5 years where the children were in Fannie's sole care. (203:23-204:4). Fannie has repeatedly raised concerns to Samuel about his failure to advise Fannie when Samuel will be away from home due to his military duties. (202:2-203:22).

Samuel further testified that he was cited and charged for having a disorderly house while he was intoxicated in 2022. (115:17-116:12; E14).

Fannie has lived at the same address for the last five or six years. (174:14-15). Besides Nicholas and Paul, Fannie has one older child, William, who is 13 years old. (174:16-19). Fannie is married to Abuchi Ukawuba who resides in Texas, with her husband attempting to move to Nebraska. (176:9-24). Fannie has just recently graduated and obtained her licensed practical nursing degree. (177:5-9).

Fannie has almost always worked the night shift as a nursing assistant, working from approximately 11:00 p.m. to 7:00 a.m. (159:18-23; 168:19-22; 180:1-8). Fannie has always ensured that there is childcare for the nights that she works. (161:7-9; 182:20-22). Fannie, for instance, has previously had family friend's daughter, who was originally 17 years old, watch the children overnight for approximately 3 ½ years. (160:14-22; 161:1-6; 164:19-23; 182:9-14). Fannie's mother, Veronica Doe, lives with Fannie now and provides care for her children while Fannie works the nightshift and plans to stay with Fannie for the foreseeable future. (167:16-22; 168:23-169:3; 169:22-25; 183:3-6). When Fannie gets home from work, she is the one who gets the children up and ready for their day. (169:4-6; 182:15-17). Fannie takes the children to school during her parenting time. (180:9-12). Fannie then sleeps while the children are at school. (180:13-15). Fannie then picks up the children from school during their parenting time. (169:7-9; 180:16-18). Fannie does homework with the children. (169:10-14; 180:19-21). Fannie makes dinner for the children each evening while they are in her care. (180:22-23). Fannie takes the children to their activities, such as

soccer and basketball. (169:15-21; 180:24-25; 205:1-3). Fannie also gets the children ready for bed each evening during her parenting time. (181:1-2). When Fannie goes to work at night, the children are sleeping. (181:3-5). Fannie was described by her friend, Emily Wess, as an amazing mother who puts her children first. (161:13-24).

Paul goes to school from 7:45 a.m. to 2:55 p.m. (145:1-3). Nickolas goes to school from 8:30 a.m. to 2:30 p.m. (145:4-9). Both children attend school at Holmes Elementary. (183:7-9). Paul is in fourth grade and Nicholas is in preschool. (183:10-13). Nicholas has a speech issue that required him to start preschool early and be placed on an individual education plan (IEP). (183:14-22; 184:10-15). Fannie has attended every single one of Nickolas' IEP meetings. (184:16-20). Fannie has attended every single one of the children's parent-teacher conferences. (184:21-23).

Paul is involved in soccer and basketball. (204:16-18). Subsequent to the temporary order being entered in December 2023, Samuel had issues getting Paul to his activities. (127:25-129:6; 204:19-21; E24; E28). Samuel has regularly failed to take Paul to both his practices and his games during Samuel's parenting time, regardless if the practices or games are on the weekdays or weekends. (209:25-211:6).

Since the temporary order, Fannie has had several issues when attempting to communicate with the children when they are in Samuel's care as Samuel repeatedly refuses to accommodate allowing the children to speak with Fannie while the children are in his care. (129:18-134:6; 211:7-212:22; E25; E26; E30). Samuel admitted that he and Fannie have a poor relationship. (69:17-70:1; 221:10-12). Samuel and Fannie have a very hard time communicating with one another. (134:7-135:24). Since the temporary order, Samuel has taken mean-spirited actions against Fannie. For instance, when Fannie received her degree to become a licensed practical nurse, Samuel refused to allow Nickolas to attend her graduation during Samuel's parenting time. (135:25-137:15; 218:1-219:20).

Subsequent to the temporary order, Fannie has noticed a lot of negative changes with the children. (186:20-24). Fannie has noticed that the children are much more tired during Samuel's weekday visits with the children. (186:25-7). Fannie stated that Paul goes right to sleep after coming from Samuel's house. (186:25-7). Also, Paul cries a lot more and his attendance at school and

performance at school are being affected by the change of schedule. (186:25-187:7). Fannie also testified that she believes Samuel is leaving the children home alone during his parenting time. (E16; 191:6-193:8). Fannie also has concerns that Samuel is not tending to the medical needs of the children, as she has had to ensure the children receive proper medical care that should have been noticed by Samuel during his parenting time. (E17; 193:9-194:24). There were also times during Samuel's parenting time that he forgot to pick up Paul from school. (196:22-197:3).

Samuel asked the District Court to award him week on / week off parenting with the children. (145:19-21). Samuel acknowledge that due to his work schedule, if he would be awarded parenting time on a week on / week off schedule, during his weekday parenting time someone else will be doing the children's homework with them, someone else will be making the children dinner, someone else will be taking the children to soccer and basketball practice, someone else will be bathing the children, and someone else will be putting the children to bed. (145:22-147:12).

Fannie requested that she be granted primary physical custody of the minor children. (E1). Fannie requested that during the school year, Samuel have parenting time with the children every other Friday after school until the following Monday at the beginning of school. (E1; 234:10-14).

The District Court entered a Decree of Paternity on September 12, 2024 declaring Samuel to be the natural father of the minor children, awarding Fannie and Samuel joint physical and legal custody of the minor children, awarding the parties equal time with the minor children on a week on / week off basis, ordering Fannie to pay \$163 per month in child support, and ordering Samuel to pay \$2,000 in attorney's fees to Fannie. (T142-162). On September 18, 2024, Fannie filed a motion to alter or amend, requesting that the Court alter its custody, parenting time and child support orders. (T163-166). The hearing on Fannie's motion to alter and amend was heard on September 27, 2024. (T64). Subsequent to Fannie's motion to alter or amend, the District Court entered an order on October 4, 2024 denying Fannie's motion as it pertained to child custody and parenting time, but did modify its child support order so that Fannie paid \$150 per month in child support for two children and \$94 a month when there is only one minor child. (T167-168).

Fannie filed this present appeal on November 1, 2024.

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED IN AWARDING JOINT PHYSICAL CUSTODY OF THE MINOR CHILDREN.**

The District Court abused its discretion by awarding the parties joint physical custody of the minor children. Child custody and visitation determinations are matters initially entrusted to the discretion of the trial court, and though reviewed *de novo* on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011). 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. *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 969 (2008). In this matter, the District Court abused its discretion in awarding the parties joint physical custody given (1) Samuel's work schedule which prevents him from parenting the children on 5 days out of his weekly parenting time and where he has to awaken the children at 11:45 p.m. at least 3 nights during his weekday parenting time to transport the children back to his home and (2) the fact that Fannie was unequivocally the primary caregiver of the children. The District Court should have awarded primary physical custody of the minor children to Fannie.

#### **A. Samuel's work schedule and corresponding childcare plan is not conducive to the joint physical custody award**

The District Court abused its discretion in awarding the parties joint physical custody of the children. Although joint custody is no longer disfavored under Nebraska law, for the Court to award joint custody, joint custody still has to actually be in the children's best interests. *State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 955, 932 N.W.2d 692, 708 (2019). "The time which a parent is able to devote to a child is a consideration in resolving a child custody question . . . ." *Ritter v. Ritter*, 234 Neb. 203, 213, 450 N.W.2d 204, 211 (1990). In this matter, Samuel works now and has always historically worked the second shift, meaning he works from 2:30 p.m. to 11:45 p.m., Monday through Friday. (29:4-10; 54:9-21; 109:15-23; 145:10-13).

While Fannie works the nightshift, during the school year she is able to spend the entirety of the time with the children's waking hours that they are not in

school. (169:4-6; 180:9-12; 182:15-17). Fannie is able to get the children ready for school each day. (169:4-6; 182:15-17). Fannie takes the children to school during her parenting time. (180:9-12). Fannie then sleeps while the children are at school. (180:13-15). Fannie then picks up the children from school during their parenting time. (169:7-9; 180:16-18). Fannie does homework with the children. (169:10-14; 180:19-21). Fannie makes dinner for the children each evening while they are in her care. (180:22-23). Fannie takes the children to their activities, such as soccer and basketball. (169:15-21; 180:24-25; 205:1-3). Fannie also gets the children ready for bed each evening during her parenting time. (181:1-2). When Fannie goes to work at night, the children are sleeping. (181:3-5).

In comparison, Samuel at best spends a few moments in the morning with the children during the school year weekdays prior to the children going to school. Paul goes to school from 7:45 a.m. to 2:55 p.m. (145:1-3). Nickolas goes to school from 8:30 a.m. to 2:30 p.m. (145:4-9). Both children attend school at Holmes Elementary. (183:7-9). Paul is in fourth grade and Nicholas is in preschool. (183:10-13). When the children return home from school, they do not see Samuel again unless they see him at 11:45 p.m. on the now 3 days a week he has to wake them up when he picks them up from their grandmother's home. (30:25-31:7; 145:14-18). Samuel acknowledge that due to his work schedule, if he would be awarded parenting time on a week on / week off schedule, during his weekday parenting time someone else will be doing the children's homework with them, someone else will be making the children dinner, someone else will be taking the children to soccer and basketball practice, someone else will be bathing the children, and someone else will be putting the children to bed. (145:22-147:12).

Fannie testified that Samuel's parenting time during the weekday, even on the 8-6 schedule, is causing the children to be very tired and caused the children to be overly emotional. (186:20-187:7). It is unfathomable that any court would believe that it is in a minor child's best interests to be awoken at least three times during the week at 11:45 p.m. and then transported to another home. This is pure insanity. The District Court abused its discretion in awarding Samuel joint physical custody given the children's schedule during his school year parenting time. Samuel spends almost no time with the children, Monday through Friday. In comparison, Fannie is able to spend all of the children's waking hours with

them while they are out of school.

Among the factors to take into consideration when deterring the best interests of the custody of the minor children is the work schedules of the parties. *See Jay M. Zitter, Parents' Work Schedules and Associated Dependent Care Issues as Factors in Child Custody Determinations*, 26 A.L.R.6th 331 (2007). Given the very little time that Samuel has to spend with his children, Monday through Friday, and given that his children have to be awoken 3 of the 5 weekdays at 11:45 p.m. and then transported to his home, the District Court abused its discretion in awarding the parties joint physical custody of the minor children and should have awarded primary physical custody to Fannie. *See, e.g., Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990)(reversing the trial court's decision to award the father custody of the children because the father's work schedule allowed him to spend very little time with the children, Monday through Friday.).

**B. Fannie has always unequivocally been the children's primary caregiver**

Nebraska courts have time and time again favored awarding physical custody to the parent who was the child's primary caregiver and has the most time to spend with the child. *See, e.g., Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013)(finding custody should have been awarded to the mother because she the "children's primary caretaker."); *Kamal v. Imroz*, 277 Neb. 116, 759 N.W.2d 914 (2009)(justifying awarding sole physical and legal custody to the wife because she "had been the child's primary caregiver and her flexible work schedule made it possible for her to be with her son nearly fulltime."); *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d 444 (2009)(justifying award of custody to mother because she "had been the primary care-giver for the children, and [the father] admitted that he had spent much time out of the home . . . working . . ."). In the case at bar, the District Court ignored this long history of jurisprudence of awarding custody to the children's primary caregiver and abused its discretion in awarding joint physical custody of the minor children.

It is unequivocal that Fannie has always been the primary caregiver of the minor children. First, in the last 5 years alone, Samuel has been away from the children for an equivalent period of 2 years due to his military service. (203:23-204:4). Samuel's ignorance regarding his children cannot be understated. Fannie



has provided for the majority of the children's needs. *See Rommers v. Rommers*, 22 Neb. App. 606, 858 N.W.2d 607 (2014). Samuel acknowledged that Fannie has always been the parent who has historically taken care of the children's educational and medical needs. (138:13-20; 139:25-2; 229:19-230:14).

i. Children's medical care

Samuel admitted that he has rarely, if ever, taken the children to any medical appointments. (66:4-9). Fannie has always been the parent who has taken the children to their doctor appointments, as Samuel has only taken the children to the doctor one single time. (140:9-12; 229:23-230:3). Samuel does not know who is the children's primary care doctor. (140:23-25). Samuel does not know the name of the children's dentist. (141:1-5).

ii. Children's education

Samuel's most glaring ignorance of the children demonstrating he in no way was an equal parent was his lack of attendance to the children's educational needs. **Samuel has never attended a parent-teacher conference for the children.** (138:24-25; 184:24-185:1). Fannie has attended every single one of the children's parent-teacher conferences. (184:21-23). Nicholas has a speech issue that required him to start preschool early and be placed on an individual education plan (IEP). (183:14-22; 184:10-15). Fannie has attended every single one of Nicholas' IEP meetings. (184:16-20). Samuel was not even aware that Nicholas was on an IEP. (151:7-152:5; 184:16-18). **Samuel does not know the names of the children's teachers.** (141:6-15).

It makes no sense to award joint physical custody to Samuel when he has been such an involved father, and who demonstrated complete ignorance at trial to the children's medical and educational needs. *See, e.g., Steinke v. Steinke*, 428 N.W.2d 579 (Minn. Ct. App. 1988)(if a trial court in custody proceedings determines that one parent to be the primary caretaker, it can then reject that parent as sole custodian if he or she is unfit, or if having children in his or her sole custody would endanger children physically or emotionally). Although joint custody is no longer disfavored under Nebraska law, for the court to award joint custody, joint custody still has to actually be in the children's best interests. *State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 955, 932 N.W.2d 692, 708 (2019). Given that Fannie was unequivocally the primary caregiver of the children throughout their lives, it was an abuse of discretion to award joint physical

custody to the parties. The District Court should have awarded primary physical custody of the minor children to Fannie.

**II. THE DISTRICT COURT ERRED AWARDING EACH PARENT EQUAL PARENTING TIME WITH THE MINOR CHILDREN, WHICH WAS NOT IN THE MINOR CHILDREN'S BEST INTERESTS.**

A trial court has discretion to set a reasonable parenting time schedule. *Thompson v. Thompson*, 24 Neb. App. 349, 887 N.W.2d 52 (2016). The determination of reasonableness is made on a case-by-case basis. *Id.* The best interests of the children are the primary and paramount consideration in determining and modifying visitation rights. *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001). The best interest inquiry has its foundation in both statutory and case law. *Thompson*, 24 Neb. at 356, 887 N.W.2d at 58. Although joint custody is no longer disfavored under Nebraska Law, for the Court to award joint custody, joint custody still has to actually be in the children's best interests. *State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 955, 932 N.W.2d 692, 708 (2019). Specifically, a district court is not required by statute to grant equal time with both parents if such is not in the child's best interest. *Thompson*, 24 Neb. at 357, 887 N.W.2d at 58. In this matter, the Court made no factual finding why equal parenting time was in the best interest of the minor children.

According to Nebraska's Parenting Act, the best interest of the child requires:

- (1) 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. In this matter, the District Court awarded the parties week on / week off parenting time. During the school year, this means that Samuel during his weekly parenting time will not see the children when they return home from school, Monday through Friday, unless he is waking them up the 3 nights during the week at 11:45 p.m. to transport them back to his home from his mother's home. (30:25-31:7; 145:14-18). It cannot be found that waking the children up 3 times during Samuel's parenting time at 11:45 p.m., usually on a

school night, is in the children's best interest. Fannie testified that Samuel's parenting time during the weekday since the Court's temporary orders, even on the 8-6 schedule, is causing the children to be very tired and has caused the children to be overly emotional. (186:20-187:7).

Courts have repeatedly found that parents who have to awaken their children at odd hours due to their work schedule should not be granted custody and their parenting time should accordingly be crafted so to avoid such disruption to the children. *See, e.g., Limbaugh v. Limbaugh*, 749 So.2d 1244 (Miss. Ct. App. 1999)(granting father custody the children in part because the mother's "inflexible [work] schedule which, when she kept the children, required her to wake the children at 5:30 a.m. and take them to [the father's] house for transporting later to school and day care."); *Ferguson v. Whible*, 865 N.Y.S.2d 156, 158 (N.Y. App. Div. 3d Dept. 2008)(mother was awarded custody in part because father's "work schedule sometimes required the children to wake up as early as 5:00 a.m. to be dropped off at [mother's] residence so that she could take them to school."); *Wennihan v. Wennihan*, 452 S.W.2d 723, 727 (Mo. App. W. Dist. 2015)(The court found "that it was in the child's best interest not to have midweek overnight stays with Mother during the school year because Mother's work schedule and the location of the child's school in relation to Mother's home and workplace would require the child to wake very early in the morning."); *Albright v. Albright*, 2017 WL 4460981 (Ky. App. Oct. 6, 2017)(The court noted that while father testified he would like to have the children overnight during the school week, father's work schedule would require the girls to wake up unnecessarily early or find childcare and transportation before school in the mornings. Accordingly, the court ordered that father would have parenting time on alternating weekends from Friday to Sunday and Tuesdays and Thursdays until 7:00 p.m.); *see also Henson v. Carosella*, No. A-20-096, 2020 WL 6878566 (Neb. App. Nov. 24, 2020)(affirming decision by trial court to shape father's parenting time by father's work schedule by only granting father weekday visits of the child since his work schedule would require him to deliver the child for childcare provider by 5:30 a.m. during weekdays if the father was given overnights, thus disrupting the child's normal routine).

Fannie's work schedule is much more conducive to her care of the children during the school week, whereas Samuel's work schedule makes it

impossible for him to personally spend more than a few moments a day, Monday through Friday, with the children. The District Court's award of equal parenting time was an abuse of discretion. *See, e.g., Miller v. Miller*, 336 S.W. 578 (Tenn. App. 2010)(Reversing an award of equal parenting time due to the father's work schedule when the evidence demonstrated that it was in the "best interests of the children that this time should be with the Wife rather than Husband's parents.").

The District Court abused its discretion in awarding equal parenting time on week on / week off basis during the school year. The District Court made no finding why it was in the minor children's best interests for the children to be in the care of others during the entirety of their waking hours after school during Samuel's parenting time. Nor did the District Court make a specific finding why it was in the minor children's best interests to be awoken at 11:45 p.m. 3 weeknights each week during Samuel's parenting time. The District Court adopted Samuel's proposed parenting plan as is. The District Court should have provided Fannie with the children during the weekdays for the school year, as she was available to provide them care and the children were not required to be awoken at 11:45 p.m. during school nights while in Fannie's care. The District Court should have adopted Fannie's proposed parenting time schedule. (E1).

This Court should reverse the District Court's decision regarding its order of parenting time, as the District Court abused its discretion in ordering equal parenting time between the parties.

**III. THE DISTRICT COURT ERRED IN ITS CHILD SUPPORT ORDER BY ORDERING THE APPELLANT TO PAY CHILD SUPPORT TO THE APPELLEE SAMUEL P. OKENG AND BY PROVIDING AN OFFSET TO APPELLEE SAMUEL P. OKENG FOR THE MEDICAL INSURANCE PREMIUMS FOR THE MINOR CHILDREN**

While a paternity action is one at law, the award of child support in such an action is nonetheless equitable in nature. *Sylvis By and Through Sylvis v. Walling*, 248 Neb. 168, 532 N.W.2d 312 (1995). Thus, a trial court's award of child support in such an action will not be disturbed on appeal in the absence of an abuse of discretion. *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994). In this matter, the District Court abused its discretion by

improperly applying the Nebraska Child Support Guidelines and in its award of child support to Samuel.

**A. The District Court inexplicably awarded Samuel child support instead of Fannie**

Initially, the District Court ordered Fannie to pay Samuel child support in the amount of \$163 a month. (T143). This was based upon a calculation provided by Samuel that stated Fannie had a monthly gross income of \$4,160 per month, stated Samuel had a monthly gross income of \$5,613, provided Samuel with a \$324 deduction for monthly health insurance premiums attributable to the children and provided Samuel with a deduction for \$623 for “previously ordered support.” (T158). Subsequent to the Court’s initial Decree of Paternity, Fannie filed for a motion to alter or amend arguing, *inter alia*, that the District Court abused its discretion in the calculation in determining the parties’ income, allowing Samuel to have deduction for this other two biological children, and allowing Samuel to have a credit for the children’s health insurance premiums. (T163). The District Court granted Fannie’s motion to alter or amend in part by altering the child support award. (T167-168). The District Court lowered Fannie’s child support from \$163 per month to \$150 per month. (T167). The new child support calculations attached to the Court’s “Order on Motion to Alter or Amend” were provided by the State that shows Samuel has a monthly gross income of \$5,479.34, Fannie has a monthly gross income of \$3,538.60, provided Samuel with a deduction of \$78.00 for health insurance premiums for his children, provided Samuel with a deduction of \$388 for the support of other children, and provided Fannie with a deduction of \$396 for the support of other children.(T172). The child support calculation attached to the “Order on Motion to Alter or Amend” then showed based upon a joint custody calculation that Samuel, not Fannie, would owe \$150 per month in child support for two children and \$94 per month for one child. (T173-174).

In general, child support payments should be set according to the Nebraska Child Support Guidelines (“NCSG”). *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015). However, a court may deviate from the NCSG if its application in an individual case would be unjust or inappropriate. *Id.*; Neb. Ct. R. § 4-203. The court must specifically find that a deviation is warranted based on the evidence and state the reason for the deviation in the decree. *Hotz v. Hotz*, 301

Neb. 102, 917 N.W.2d 467 (2018); Neb. Ct. R. § 4-203. A deviation without a clearly articulated justification is an abuse of discretion. *Hotz*, 301 Neb. at 114, 917 N.W.2d at 477. In this matter, while the child support calculations used by the District Court showed that Samuel was to owe \$150 per month in child support, the District Court inexplicitly and without any articulated justification required Fannie to pay \$150 per month in child support. This is a clear abuse of discretion, warranting a reversal of the District Court's child support order.

**B. The District Court abused its discretion in allowing Samuel a deduction for health insurance premiums for the minor children**

The District Court in its initial Decree gave Samuel a deduction/credit of \$324 from his child support obligation for health insurance premiums paid for Paul and Nickolas. (T158). Subsequently, the District Court in its Order on Motion to Alter or Amend gave Samuel a deduction/credit of \$78 from his child support obligation for health insurance paid for Paul and Nickolas. (T169). Providing this credit / deduction for Samuel to reduce his child support obligation was an abuse of discretion by the District Court.

Interpretation of the Nebraska Child Support Guidelines presents a question of law which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Gress c. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007). The NCSG allows a deduction from child support payments for health insurance premiums that specifically cover the minor children under certain circumstances. Neb. Ct. R. § 4-215. It is the parent requesting a certain deduction under the NCSG guidelines burden of proof to demonstrate that he or she is entitled to such deduction. *See Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). The NCSG takes this a step further explicitly requires the “parenting requesting an adjustment for health insurance premiums must submit proof of the cost for health insurance coverage of the child(ren).” Neb. Ct. R. § 4-215(A).

First, the document submitted to the District Court does not show coverage for Nickolas or Paul. (E39). Specifically, the document provided to the court has a section that says “Dependent(s) currently covered by Health Insurance” which is completely blank. (E39). Thus, Samuel cannot even meet his burden under Neb. Ct. R. § 4-215(A).

Secondly, even though Samuel failed to demonstrate that he even was providing coverage for Nickolas and Paul, he also testified that his other biological child, Lina, was also on his health insurance plan through Molex. (108:24-109:14). The evidence submitted by Samuel for his health insurance shows that his out-of-pocket cost of coverage for one child is the same as coverage for multiple children. (E39). Nebraska appellate court have repeatedly can only claim the health insurance deduction from their child support if they can show he or she incurred an increased cost for the coverage of those specific children related to the child support award. *See, e.g., Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999)(denying father’s request to deduct from child support the health insurance premiums for his children when the health insurance coverage also covered the father’s new wife and the new wife’s son all at the same price; thus, demonstrating that the father did not establish that the “health insurance premiums actually increased because [the children] were named on the policy.”). The Nebraska Court of Appeals recently had a similar case to the one at bar in *State on behalf of Dustin W. v. Trevor O.*, No. A-23-311, 2024 WL 1402449 (Neb. App. Apr. 2, 2024), *review denied* (June 13, 2024). The mother in *Trevor O.*, wanted a deduction from the child support guidelines under Neb. Ct. R. § 4-215 because she provided health insurance coverage for her minor child, Nathan. The district court in *Trevor O.* denied the deduction request and the mother, Shelby, appealed. In upholding the district court decision, this Court held:

Here, Shelby testified that her new husband pays for the health insurance for her, their two children, and Dustin. Because the insurance covers her other two children, there is no additional cost for Dustin to also be covered. Having failed to establish that she paid the insurance premium for which she requests a credit, we find that the district court did not abuse its discretion in declining to grant Shelby a credit for health insurance premiums.

*Id.* at \*14. Like in *Trevor O.*, because Samuel incurs no additional cost for covering Nickolas and Paul in addition to covering his other biological child, Lina, Samuel is not entitled to a deduction for any health insurance premiums to cover Nicholas and Paul. Given this, it was an abuse of discretion for the District Court in this matter to provide Samuel with such deduction for health insurance

premiums, necessitating the reversal of the District Court's child support award.

### **CONCLUSION**

Based upon the foregoing discussion, the Appellant Fannie B. Wotoe respectfully requests this Court reverse the District Court's order awarding joint physical custody of the minor children. It was an abuse of discretion by the District Court to not award the Appellant with primary physical custody of the minor children. Additionally, the Appellant requests that this Court reverse the District Court's decision to order equal parenting time between the parties, as such decision was an abuse of discretion. Finally, the Appellant requests that this Court reverse the District Court's child support order, as such order represents an abuse of discretion and is contrary to the law.

DATED this 9th day of February, 2025.

FANNIE B. WOTOE, Appellant



BY:

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David V. Chipman, #23151  
Monzón, Guerra & Chipman  
1133 H Street  
Lincoln, NE 68508  
(402) 477-8188  
dchipman@monzonlaw.com  
Attorney for Appellant

### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this Brief contains 8,309 words. This Brief was drafted using Microsoft Word using Microsoft Office for Windows 10 that was subsequently converted to PDF using Adobe Acrobat DC. This Brief used Times New Roman font exclusively.

s/ David V. Chipman  
David V. Chipman



# Certificate of Service

I hereby certify that on Sunday, February 09, 2025 I provided a true and correct copy of this *Brief of Appellant Wotoe* to the following:

Samuel P Okeng represented by Steffanie Janelle Garner Kotik (22438) service method: Electronic Service to **sgkotik@kotikandmcclure.com**

State of Nebraska represented by Katherine Judith Doering (25746) service method: Electronic Service to **child.support@lancaster.ne.gov**

Signature: /s/ David V. Chipman (23151)