IN THE COURT OF APPEALS
FOR THE STATE OF NEBRASKA

CASE NO. A-24-819

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

vs.

SAMUEL OKENG, Appellee / Cross-Appellant/ Defendant

vs.

FANNIE B. WOTOE, Appellant / Cross-Appellee / Third-Party Defendant

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

REPLY BRIEF AND ANSWER TO BRIEF ON CROSS-APPEAL OF APPELLANT / CROSS-APPELLEE FANNIE B. WOTOE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES/REGULATIONS

STATEMENT OF JURISDICTION

Appellant incorporates by reference the Statement of Jurisdiction set forth in Appellant's Brief previously filed herein.

STATEMENT OF THE CASE

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PROPOSITIONS OF LAW

Appellant incorporates by reference the Propositions of Law set forth in Appellant's Brief previously filed herein.

STATEMENT OF FACTS

Appellant incorporates by reference the Statement of Facts set forth in Appellant's Brief previously filed herein.

ARGUMENT

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

In this matter, the District Court abused its discretion in awarding the parties joint physical custody of the minor children given (1) Appellee's, Samuel Okeng's ("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 Appellant, Fannie B. Wotoe ("Fannie), was unequivocally the primary caregiver of the children. The District Court abused its discretion in not awarding the primary 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

Samuel does not seemingly address this argument which is that Samuel's work schedule and corresponding childcare plan is not conducive to the joint custody award. *See Samuel's brief,* pgs. 10-14. 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). With the week on / week off parenting plan that the District Court ordered, 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 and then

spend no other time with the children during the weekday. 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). For three weekday nights during Samuel's parenting time every other week, the children are taken to their grandmother's house at 5:45 p.m. for bedtime and then awoken by Samuel at around 11:45 p.m. for Samuel to take the children back to his home. (30:25-31:7; 145:14-18; 147:10-15).

Samuel acknowledges that due to his work 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).

In *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990), the Nebraska Supreme Court reversed the trial court's award of custody to the father. This Court held that the "time which a parent is able to devote to a child is a consideration in resolving child custody question in a marital dissolution proceeding," which necessarily involves an inquiry into the parents' work schedule and need for outside childcare. *Id.* at 213, 450 N.W.2d at 211-12. In *Ritter*, the mother had extramarital affairs. *Id.* at 206, 450 N.W.2d at 208. The trial court appeared to use these affairs to award the custody of the child to the father. If the mother had been given primary custody, the child, then age 3 1/2 years, would have been in daycare from 8 a.m. to 5:15 p.m. during the weekdays. *Id.* at 207, 450 N.W.2d at 208. Noting the father's work schedule, the Nebraska Supreme Court stated:

> Gary testified that he worked in Omaha from 10:30 each weeknight until 7 o'clock the following morning. His travel time, from Murray to Omaha and return, was just under 2 hours. For that reason, if Travis were with Gary during the week, Travis would be in the care of a babysitter from approximately 9 p.m. until 8 o'clock the next morning.

Id. at 208, 450 N.W.2d at 208. In deciding to overturn the trial court's award to the father, the Nebraska Supreme Court analyzed the father's work schedule in *Ritter* as follows:

> While Gary lives in Murray, he works in Omaha. There is no prospect that Gary's employment situation will change within the

> foreseeable future. This necessitates a babysitter for Travis during the period from 9 p.m. to 8 a.m. for each of the 5 days during which Gary works throughout the week and results in 11 hours of babysitting for Travis while Gary is working and traveling to and from work. When Gary sleeps during the day, or tries to sleep, someone will have to take care of Travis. Assuming that Gary will sleep at least 6 hours during the day, somebody, presumably a babysitter, will have to attend to Travis for 6 hours, which brings the babysitting time for Travis to 17 or 18 hours per day for 5 days of each week. With no reflection on Gary and his desire to be a good parent to Travis, even with the 2 days each week when Gary is not working and traveling to work, the vastly substantial amount of Travis' life will be spent with a babysitter.

Id. at 210, 450 N.W.2d at 211. The Nebraska Supreme Court reversed the trial court's decision in *Ritter*, finding that the "best interests" of the minor child required that the mother be awarded custody. *Id.* at 214, 450 N.W.2d at 212.

Like the father in *Ritter*, there is no prospect for Samuel changing away from his shift at work which prohibits him from spending time with the children. (29:4-10; 54:9-21; 109:15-23; 145:10-13). **The father in *Ritter* actually had more waking weekday time with his child than Samuel does with his children during his weekday parenting time.** Samuel gets at best an hour a day in the morning with his children five days a week during the school year. (145:1-9). Like the father in *Ritter*, awarding joint physical custody to Samuel means that the children spent a "vastly substantial amount" of time during Samuel's parenting time with other caretakers. When taking into consideration Samuel's routine of waking the children 3 of 5 of his weeknights at 11:45 p.m. to transport them back his home, along with his minimal time with the children during the weekday, the District Court abused its discretion in awarding joint physical custody to Samuel.

In re Marriage of Stuart, 490 N.E.2d 243, 249 (Ill. App. 5th Dist. 1986), the appellate court held:

> Harmony in and stability of the children's home life, and the relative ability of parents to devote sufficient time to the children are important factors in resolution of custody disputes.... [I]t appears that if custody were awarded to [the working parent], the

> children would spend as much of their waking hours with babysitters as with their [parent. The working parent] should not, of course, be penalized for attempting to earn a living, but we must reemphasize that it is the children's best interests which are paramount.

Other courts have also looked to work schedules and the availability of the parents as a part of the overall circumstances that bear upon the best interests of the child, such as the stability of the home environment and the parent's ability to provide for the child's daily needs. *See Bryant v. Bryant,* 739 So.2d 53 (Ala. Civ. App. 1999)(granting custody to the mother when the nature of the father's employment prevents him from being in town during the week); *Collier v. Collier,* 698 So.2d 150 (Ala. Civ. App. 1997) (affirming a determination that the mother was better available to provide for the learning impaired child because she had a more stable work schedule that allowed her more time to spend with the child); *Maloblocki v. Maloblocki,* 646 N.E.2d 358 (Ind. Ct. App.1995)(holding that the trial court should not have awarded custody to the mother, who maintained an erratic work schedule often requiring others to care for the child, when the father worked during the day and was available to care for the child in the evenings and on weekends); *In re Marriage of Muell,* 408 N.W.2d 774 (Iowa Ct. App. 1987) (concluding that because the father's job required him to be absent from the home for extended periods of time, the mother was more capable of providing the children a stable and suitable environment); *Del Papa v. Del Papa,* 569 N.Y.S.2d 170 (N.Y. App. Div. 1991)(affirming primary custody with mother, who had been primary caregiver, worked near the children's school and left work shortly after school ended, whereas father had a long work schedule and the children would be unattended by him for a significant amount of time); *Diane L. v. Richard L.*, 542 N.Y.S.2d 783 (N.Y. App. Div. 1989)(holding father's intense farm work schedule which often required him to watch the children and work simultaneously, justified an award of custody to the mother who worked more flexible hours and was more often available after school and on weekends).

Samuel’s weekday parenting time necessitates that he spends a matter of moments with the children during his now court-ordered weekday parenting time and requires him to place the children in the care of others during all most all of the children’s waking hours. It was an error to award Samuel joint custody of the

children.

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

Samuel in his brief never denies that Fannie has always been the children's primary caregiver. It is an undisputed fact. 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 . . . ."). 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.

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 in his brief attempts to argue that it is Fannie's fault why he is so uninvolved. *See Samuel's brief*, pg. 12. While Samuel attempts to make excuses for why he has not attended to the children's medical needs, Samuel is unable to provide any excuses as to why he has not been involved in the children's education. **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). Samuel indicates he has missed every one of the parent-teacher conferences because of his work. (138:21-25). Nickolas has as 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). Samuel was not even aware that Nickolas was on an IEP. (151:7-152:5; 184:16-18). In fact, when Samuel was questioned about this IEP,

Samuel replied: "What is that?" (139:1-4). **Samuel does not know the names of the children's teachers.** (141:6-15). There is zero reason why Samuel has not taken it upon himself and become involved in the children's education.

While Samuel in his brief attempts to point to Fannie as the issue for the parties not getting along, the record demonstrates that Samuel shows great inflexibility and callousness towards Fannie. When Fannie has asked Samuel for work with her in changing the parenting plan or assisting with exchanges of the children, Samuel admitted that he told Fannie: "I'm not going to take the kids to you" and that: "I'm not going to be helping you with anything, period. My days is my days. If you need them, you can pick them up from grandma's because I'm going to work." (137:3-15).

The District Court abused its discretion in ordering joint physical custody. Such decision should be reversed and this matter should be remanded to the District Court to award Fannie the primary 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.

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).

Samuel in his brief attempts to distinguish Fannie's supporting cases that demonstrate the District Court abused its discretion in awarding the parties equal parenting time. *See Samuel's brief*, pgs. 14-16. Samuel's attempts at distinguishing these cases is unavailing. For instance, in *Limbaugh v. Limbaugh*, 749 So.2d 1244 (Miss. Ct. App. 1999), the appellate court upheld the award of

custody of the children to the father on two important basis: (1) the father was more of a primary caregiver than the mother and (2) the mother had "an inflexible 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 daycare." The matter of *Ferguson v. Whible*, 865 N.Y.S.2d 156 (N.Y. App. Div. 3d Dept. 2008) completely support Fannie, where the appellate court held: "[W]e find that Family Court properly exercised its discretion in awarding sole custody to petitioner. For example, respondent's work schedule sometimes required the children to wake up as early as 5:00 A.M. to be dropped off at petitioner's residence so that she could take them to school."

The matter of *Wennihan v. Wennihan*, 452 S.W.3d 723 (Mo. App. W. Dist. 2015) also completely supports Fannie's position that the District Court abused its discretion. In *Wennihan*, the trial court did not grant the mother weekday visits with the children. In affirming this decision, the appellate court noted: "The trial court specifically found that it was not in the child's best interest to spend the night with Mother during the school week because of how early he would have to be awakened and dropped off at school to accommodate Mother's work schedule." *Id.* at 735. In *Albright v. Albright*, 2017 WL 4460981 (Ky. App. Oct. 6, 2017), the appellate court upheld the trial court's refusal to grant joint custody primarily based upon the following:

> 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.

Id. at *2. And recently, the Nebraska Court of Appeals upheld the trial court's decision *Henson v. Carosella*, No. A-20-096, 2020 WL 6878566 (Neb. App. Nov. 24, 2020) limiting the father's parenting time to weekday non-overnight visits 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.

Samuel in his brief does not provide one single case that supports the District Court's order of equal parenting time to Samuel. The District Court abused its discretion in awarding equal parenting time on a week on / week off basis during the school year. It is not 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 school year parenting time. I cannot be found that it is in the minor children's best interests to be awoken at 11:45 p.m. 3 weeknights each week during Samuels' 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 SAMUE P. OKENG AND BY PROVIDING AN OFFSET TO APPELLEE SAMUEL P. OKENG FOR THE MEDICAL INSURANCE PREMIUMS FOR THE MINOR CHILDREN

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

The Appellee State of Nebraska ("State") agrees in its brief regarding Fannie's third assignment of error that the District Court erred in its child support order by ordering the Appellant pay child support to Samuel. *See State's brief,* pgs. 11-13. Samuel brief regarding this argument makes only conclusory assertions unsupported by any coherent analytical argument. *See Samuel's brief,* pg. 16. Samuel makes no citations to the record regarding his argument that the District Court correctly determined the parties' child support. *See* Neb. Ct. R.

App. P. § 2-109(C). Furthermore, Samuel provides no supporting reported cases to bolster his assertion that the District Court correctly determined child support in this matter. The fact is that the District Court failed to set child support according to its own child support calculations, and the District Court provided no explanation for its deviation from the Nebraska Child Support Guidelines. *See Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015)(In general, child support payments should be set according to the Nebraska Child Support Guidelines). The District Court abused its discretion by requiring Fannie to pay Samuel child support, and instead the District Court should have ordered Samuel to pay Fannie child support. (T173-174). *See Hotz v. Hotz*, 301 Neb. 102, 917 N.W.2d 467 (2018)(a court must specifically find that a deviation from the Nebraska Child Support Guidelines is warranted based on the evidence and state the reason for the deviation in the decree); Neb. Ct. R. § 4-203. Both Fannie and the State are in agreement that 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 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.

The State agrees that an 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. *See State's brief*, pgs. 11, 13. There is no Nebraska jurisprudence that supports the State's position that Samuel should receive an offset and credit against his child support obligation under these circumstances. It is undisputed there is no increased cost for Samuel to provide health insurance coverage for Nickolas and Paul, as he is already providing health insurance for his other biological child, Lina, through his employer-provided health insurance. (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).

Neb. Ct. R. § 4-215 appears to have been codified on July 18, 2008 to include for the first time allowing a "parent paying the [health insurance] premium [to] receive a credit against his or her share of the monthly support." Prior to July 18, 2008, provisions regarding mandating health insurance coverage for minor children were found in paragraph O of the Nebraska Child Support Guidelines. *See Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005)(stating in part: "Children's health care needs are to be met by requiring either parent to provide health insurance as required by state law."); *see also Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004)(citing a version of paragraph O of the Nebraska Child Support Guidelines that states, in part: "Children's health care needs are to be met by requiring either parent to provide health insurance as required by state law."). Given the 2008 change to the Nebraska Child Support Guidelines, cases prior to 2008 amendment that created section A of Neb. Ct. R. § 4-215 likely are not quite as instructive as those occurring subsequent to the codification of Neb. Ct. R. § 4-215.

The State cites to following six cases in its brief which the State either cites in support or attempts to differentiate in support of its position: (1) *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); (2) *Ruhge v. Schwede*, No. A-11-714, 2012 WL 882511 (Neb. App. Mar. 13, 2012); (3) *Grebin v. Grebin*, A-09-131, 2009 WL 6472977 (Neb. App. Dec. 8, 2009); (4) *Eicke v. Eicke*, No. A-20-081, 2021 WL 1186214 (Neb. App. Mar. 30, 2021); (5) *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999); and (6) *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). *See State's brief*, pgs. 13-25.

Of the above-mentioned cases that were decided prior to the enactment of Neb. Ct. R. § 4-215, none of them support the State's position that Samuel should receive a prorated credit against his child support obligation for the costs of health insurance premiums for Paul and Nickolas. It is important to note that prior to Neb. Ct. R. § 4-215 being put in place in 2008, parents were only allowed to obtain a deduction from their income for health insurance premiums attributable to the children. *See Noonan*, 261 Neb. at 565, 624 N.W.2d at 325. In *Noonan*, for example, the Nebraska Supreme Court affirmed the district court's decision not to allow the father to deduct his health insurance premiums from his income because the father could not show the amount attributable to the requirement of insuring

his children. *Id.* at 568, 624 N.W.2d at 328. The same is true in *Rauch*. In *Rauch*, the district court denied the father's request to deduct from his income for purposes of calculating 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" *Id.* at 265, 590 N.W.2d at 176.

None of the above-mentioned cited that were decided after the enactment of Neb. Ct. R. § 4-215 support the State's position that Samuel should receive a prorated credit against his child support obligation for the costs of health insurance premiums for Paul and Nickolas, except for *Eicke*, which as is demonstrated, *infra*, is easily distinguishable from the case at bar. For instance, in *Grebin*, the father's health insurance covers "his wife, their two children, Rafe, and possibly [the father's] stepdaughter." 2009 WL 6472977 at *2. The father in *Grebin* paid an additional $250 per month in additional health insurance premiums for his second family as well as for the child in question, Rafe. *Id*. at *4. The district court refused to give the father a reduction of his child support for the costs of his health insurance premiums to cover Rafe. In upholding this decision, the Nebraska Court of Appeals found that:

> The record shows that the $250 additional premium covers Jeffrey's second family, and, as such, if Rafe is not covered under Jeffrey's policy, there would be no reduction in the premium. Under the circumstances of this case, we cannot say that the district court abused its discretion in failing to allow Jeffrey a deduction for health insurance.

Id. Likewise, in *Ruhge*, this Court also affirmed the district court's finding that a parent was not entitled to a credit against child support when covering the child in questing did not increase the costs of the premium. This Court in *Ruhge* found:

> Ruhge alleges the court erred in not allowing a health insurance credit for the amount he puts toward family insurance when calculating child support. However, Ruhge testified that the family coverage he provides also covers his wife and son. Further, the price of coverage would remain the same regardless of whether Kirsten is covered by the plan. Ruhge testified that he currently

> pays $360.71 per month for individual coverage and $843.42 per month for coverage of Kirsten, his wife, and his son. Ruhge attributed an additional $482.71 per month to Kirsten. However, without Kirsten on the plan, the amount to cover his wife and son would remain exactly the same. Ruhge cannot show that any portion of the increase between individual coverage and family coverage can be attributed to Kirsten, and therefore, it was not an abuse of discretion for the court to disallow the deduction.
>
> Ruhge's first assignment of error alleges the court erred when it incorrectly computed the amount of child support due from Ruhge to Schwede because the court did not include a health insurance credit for Ruhge. Having determined that the court did not err in disallowing the deduction for health insurance, it is, therefore, not an abuse of discretion for the court to prepare the child support calculation without including a health insurance deduction for Ruhge.

2012 WL 882511 at *4. In *Dustin W.*, the mother appealed the district court's decision not to give her a credit against her share of monthly support for her insurance coverage of the children. 2024 WL 1402449 at *5. The mother testified that her new husband pays for the health insurance for her, their two children, and for the child in question, Dustin. In affirming the district court's order, this Court found:

> 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 paid by her current husband.

Id. at *14.

The State relies on *Eicke* in support of its position that Samuel is entitled to a credit against his child support for the health insurance premiums he pays through his employer. The mother in *Eicke* provided health insurance for the minor children, and such policy also includes her oldest child and her youngest child who are not children of the marriage in question. 2021 WL 1186214 at *4.

The mother testified that "it will not cost any additional money to cover the three children she shares with the [father] when she enrolls in the family health insurance plan in March 2020 when her newest child is born." *Id.* The district court in *Eicke* gave the mother a credit against her portion of child support for the health insurance premium attributable to providing health insurance coverage for all children, including both the children of the marriage and the two children not of the marriage. The father appealed. The father's assignment of error was that the mother should receive a three-fifths credit for the total amount of the health insurance premium, and the father did not argue the legal axiom that no credit should be given when there is no increased cost for the coverage of the specific children involved in the matter. *See id.* at *7 ("Kody argues that the amount of the credit should be reduced to 3/5 of the total monthly premium paid so as to reflect the number of children of the marriage enrolled in the plan as compared to the total number of children covered."). The father's appellate brief specifically requested that the mother's credit for health insurance premiums be reduced to "$315.89 for the three children of the marriage." This Court agreed and reduced the mother's credit for health insurance premiums for the minor children to "$315.89." *Id.* at 10. In reversing the district court's decision on the health insurance credit for the mother, this Court noted the father's specific request for the amount to be reduced to three-fifths instead of requesting the credit be reduced to zero. Specifically, this Court stated:

> We agree with Kody's position. While we agree that Nikki would pay the same premium even if the only children covered were those of the marriage, one could as easily argue that she should get no credit for the premium paid since she would have purchased the health insurance for her other two children in any event. Under that argument, the additional cost for the children of the marriage would be zero. Kody's position strikes an appropriate balance. It allows a percentage of the premium paid to be figured into the total obligation, thus increasing his child support obligation to help offset Nikki's costs, but it does not place the entire burden on Kody in a situation where Nikki benefits from having all of her children covered. Appendix 1, our child support calculation, reflects Kody's

> suggested approach. According to our calculation 3/5 (60 percent) of the monthly premium for the children is $315.89.

Id. at *8. Given the father's assignment of error in *Eicke* to provide a three-fifths credit instead of the standard zero credit, *Eicke* does not support the State's position.

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 Nickolas 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

The Appellant Fannie B. Wotoe respectfully renews her requests that 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. The District Court should not have granted Samuel with overnight parenting time during the weekday nights during the school year. Finally, the Appellant requests that this Court reverse the District Court's child support order, as such order represents an abuse of discretion.

ANSWER TO BRIEF ON CROSS-APPEAL
TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES/REGULATIONS

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PROPOSITIONS OF LAW

I.

An award of attorney fees in a paternity action is reviewed *de novio* on the record to determine whether there has been an abuse of discretion by trial judge; absent such an abuse, the award will be affirmed.

Cross v. Perreten, 257 Neb. 776, 600 N.W.2d 780 (1999).

II.

Attorney fees and costs are statutorily allowed in paternity and child support cases.

Wolter v. Fortuna, 27 Neb. App. 166, 928 N.W.2d 416 (2019); Neb. Rev. Stat. § 43-1412(3).

III.

In a paternity proceeding, the award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Drew ex rel. Reed v. Reed, 16 Neb. App. 905, 755 N.W.2d 420 (2008).

STATEMENT OF FACTS

Appellant incorporates by reference the Statement of Facts set forth in Appellant's Brief previously filed herein.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE APPELLANT FANNIE WOTOE ATTORNEY'S FEES

Samuel argues that the District Court erred in awarding Fannie $2,000 in attorney's fees. *See Samuel's brief*, pg. 17-18. An award of attorney fees in a paternity action is reviewed *de novio* on the record to determine whether there has

been an abuse of discretion by trial judge; absent such an abuse, the award will be affirmed. *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999). Attorney fees and costs are statutorily allowed in paternity and child support cases. *Wolter v. Fortuna*, 27 Neb. App. 166, 928 N.W.2d 416 (2019); Neb. Rev. Stat. § 43-1412(3).

In this matter, the District Court awarded Fannie $2,000 in attorney's fees. (T147). Samuel argues that in paternity matters, only the prevailing party can obtain attorney fees by misstating the holding in *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009). The attorney fee request in *Coleman* related to a request for attorney fees on appeal. *Id.* at 531, 766 N.W.2d at 151-52. In a paternity proceeding, the award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Drew ex rel. Reed v. Reed*, 16 Neb. App. 905, 755 N.W.2d 420 (2008). Fannie, unlike Samuel, offered evidence of the attorney fees she incurred in this matter. (236:20-237:23). The evidence at trial showed that Fannie had incurred $7,575.80 in attorney fees and expenses. (E31). The evidence showed that Fannie was going to occur at least an additional $2,500 in attorney fees due to the trial itself. (E31). Fannie testified that this litigation had caused her financial issues due to the burden of paying attorney fees. (178:6-8). Samuel never once cross-examined Fannie or in any other way challenged Fannie on her request for attorney fees.

The District Court further explicitly found that there was an income disparity between Fannie and Samuel, as Fannie had monthly gross income of $3,538.60 compared to Samuel's gross income of $5,479.34, meaning Fannie only earned 65% of what Samuel earned. (T172). Moreover, evidence was shown at trial that Samuel unnecessarily protracted these proceedings. Specifically, Samuel misrepresented the historical parenting roles of the parties at the initial temporary hearing when Fannie was unrepresented by counsel. (E20). This required Fannie to hire counsel and seek and obtain a new temporary order. (E19; 185:9-21). In the District Court's subsequent temporary order, the District Court found:

> 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 that 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.

(E19). When Samuel was questioned why he went to court on temporaries and asked for a 9-5 schedule on December 7, 2023, when he had never been an equal parent in any way, Samuel blamed his previous attorney. (142:8-16; 142:24-143:3). Samuel testified that he only ever wanted 50/50 custody, but when Fannie had to hire counsel to re-do the temporary order, Samuel protested against a new order saying that he wanted to keep a 9/5 schedule. (142:17-23). Samuel repeatedly made this litigation unnecessarily challenging, further justifying an award of attorney's fees to Fannie. *See, e.g., Schwensow v. Bartnicki*, 32 Neb. App. 798, 6 N.W.3d 549 (2024)(affirming an award of $8,000 to wife even though she made considerably more income than the husband, and even though the Nebraska Court of Appeals reversed the wife's various miscalculations provided to the district court, on the basis that husband protracted litigation).

Given all the evidence before the District Court, it cannot be found that the District Court abused its discretion in awarding Fannie $2,000 in attorney fees.

CONCLUSION

For the reasons as stated herein, this Court should deny Samuel's cross-appeal and affirm the District Court's award of attorney fees to Fannie.

DATED this 30th day of April, 2025.

FANNIE B. WOTOE, Appellant

BY: _____

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief contains 6,953 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 Wednesday, April 30, 2025 I provided a true and correct copy of this *Reply Brief* to the following:

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