# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

21774

2003 SENATE JUDICIARY

SB 2174

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2174

Senate Judiciary Committee

❑ Conference Committee

Hearing Date 01/22/03

| Tape Number | Side A | Side B | Meter # |
|---|---|---|---|
| 1 | X | | 00-39.0 |
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Committee Clerk Signature Maria L Salberg

Minutes: **Senator John T. Traynor, Chairman,** called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with testimony on the bill.

**Testimony in support of SB 2174**

Senator Stanley W. Lyson - District #1 This bill was put forth from the Trial Attorneys Association. I agreed with this because I think that the "pendulum" has swing to far in one direction and we need to bring it back to some type of workable situation.

Vern Neff - Lawyer Williston, ND Read Bill (meter 2.1) Sited two Supreme Court Cases (meter 2.1) What constitutes reasonable corporal punishment? Sited two incidents in my practice (meter 4.5) Both cases were dismissed in a Grand Jury.

Senator Traynor asked if the Supreme Court has defined "Corporal Punishment" as is described in this bill? Yes pretty much (meter 8.2)

Senator John T. Traynor, Chairman asked if this bill was the present law of ND. We are trying to take the case law and put it where everyone can see it.

Senator Thomas L. Trenbeath Can we refer to 1C. According to this my daughter could not work in a soup kitchen! (meter 8.5)

Senator Dick Dever questioned the distinction between serious Vs. substantive (meter 9.3)

Substantial means obvious, has some longevity.

Senator Carolyn Nelson Refereed to a bill passed in 1989. (meter 10.2) The administration of Corporal Punishment is prohibited in School districts, non public schools, day cares, preschool. In the Penitentiary and with the use of disabled children. Now you want to allow it in a home. Discussion of where morality is learned and not learned (11.0 meter)

Senator Carolyn Nelson You are making corporal punishment and discipline the same word

Senator Dennis Bercier questioned the wide openness of "dangerous weapon". (meter 14)

**Testimony in opposition of SB 2174**

Cathy Mayer Director of Prevent Child Abuse (meter 18.0) Read Attachment #1

Senator Stanley W. Lyson, Vice Chairman asked how to parent a child that you have reasoned with and they have learned from pears extreme misbehaviors? She did not have an answer. Can you say that a parent could not spank their child and it should be against the law? No I can not say this.

Wanda Rose - ND Children's Caucus Read Attachment #2. (meter 25.4) Corporal Punishment is not a method that should be used at all.

Sen. Traynor questioned the language of Distillation of current case law? (meter 27.6)

Connie Hildebrand - National Association of Social Workers (meter 28.7) Attach. # 3 Read

Linda Johnson - Director of School Health Programs (meter 31.6) Read Attachment 4. There is an unusual time where we may use physical force. To separate fighting students or apprehend a weapon or in self defense for example. As you read this law it talks about education department in the paragraph before and this section does not. We are unclear if this refers to schools and teachers? Senator Thomas L. Trenbeath stated that he finds no conflict in this bill (meter 34.2)

Senator Carolyn Nelson spoke that corporal law is prohibited in schools

Senator Traynor asked Mr. Neff (38.6 meter) What would the effect be on the law if the legislature were to reject SB 2174? 1409.22 would remain the Law.

Senator Dick Dever asked Kathy Mayer if it is O.K. to spank your child why do you think others should not?

**Testimony Neutral to SB 2174:**

Paula Grossinger Executive Director and Lobbyist for the ND Trial Lawyers Assoc.

I want to clarify to Senator Stanley W. Lyson that there was great disagreement as to our support of this bill. We are neutral in our support of 2174.

**Senator John T. Traynor, Chairman closed the hearing**

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2174

Senate Judiciary Committee

❑ Conference Committee

Hearing Date 01/27/03

| Tape Number | Side A | Side B | Meter # |
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| 3 | X | | 6.9 Bad Tape |
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Committee Clerk Signature Mona L Sallstrom

Minutes: **Senator John T. Traynor, Chairman,** called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with committee work on the bill.

(Tape 3 side 1 meter 6.9) Discussion on custody battles and striking a child. Sited court cases. Senator Thomas L. Trenbeath, Senator Stanley W. Lyson, Vice Chairman discussed if cases were criminal cases of custody cases. (Meter 14.5) What are the perimeters on who is the better parent.

**Motion Made to DO NOT PASS SB 2174 by Senator Carolyn Nelson and seconded by Senator Dennis Bercier**

**Roll Call Vote: 6 Yes. 0 No. 0 Absent**

**Motion Passed**

**Floor Assignment Senator Thomas L. Trenbeath**

Date: January 27, 2003
Roll Call Vote #: 1

**2003 SENATE STANDING COMMITTEE ROLL CALL VOTES**
**BILL/RESOLUTION NO. SB 2174**

Senate **JUDICIARY** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken DO NOT PASS

Motion Made By Sen. Nelson Seconded By Senator Dennis Bercier

| Senators | Yes | No | Senators | Yes | No |
|---|---|---|---|---|---|
| Sen. John T. Traynor - Chairman | X | | Sen. Dennis Bercier | X | |
| Sen. Stanley. Lyson - Vice Chair | X | | Sen. Carolyn Nelson | X | |
| Sen. Dick Dever | X | | | | |
| Sen. Thomas L. Trenbeath | X | | | | |
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Total (Yes) Six (6) No Zero (0)

Absent Zero (0)

Floor Assignment Senator Thomas L. Trenbeath

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**
**January 27, 2003 1:16 p.m.**

**Module No: SR-14-1122**
**Carrier: Trenbeath**
**Insert LC: . Title: .**

## REPORT OF STANDING COMMITTEE

**SB 2174: Judiciary Committee (Sen. Traynor, Chairman)** recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2174 was placed on the Eleventh order on the calendar.

2003 TESTIMONY

SB 2174

AH #1

Testimony in opposition of SB2174
January 22, 2003

**Kathy Mayer**
Prevent Child Abuse North Dakota
Contact # - 223-9052

My name is Kathy Mayer, and I am the director of Prevent Child Abuse North Dakota, a statewide non-profit organization that provides education and public awareness for the prevention of all forms of child abuse and neglect.

I am here today in opposition of Senate bill 2174.

It is the position of this organization as well as the national organization, Prevent Child Abuse America, to oppose all use of corporal punishment in schools and custodial settings and to support the use of appropriate disciplinary alternatives.

Historically, North Dakota has been progressive in its laws and policies designed to protect children from violence. We know so much more today that we knew 10, 20 and 30 years ago about the consequences of physical violence directed at children. Research done in the fields of medicine, mental health and even corrections have all essentially come to the same conclusions, violence begets violence. Hitting and slapping as a practice by anyone is an act of violence that teaches children to become violent. There are volumes of additional studies conducted that have proven without a doubt hitting or slapping children is neither a good thing nor does it work to stop misbehavior. If it worked parents or caretakers would only have to hit once and misbehavior would be gone.

Further research has shown that children who are hit and repeatedly threatened:

- Fear adults
- Feel unloved and unwanted
- Exhibit a high degree of anxiety
- Seek revenge against others
- Tend to be more aggressive
- Learn hitting is a way to deal with anger and frustration

Regarding hitting in schools, child care environments, group homes, and foster homes, which all could be considered custodial situations, the following research has found:

- The use of corporal punishment is likely to train children to use physical violence to control behavior.
- The goals of education, training and socialization of children can be achieved without resort to physical violence.
- Research also indicates that corporal punishment impairs the responsibility development of children, interfered with learning, and increases the likelihood of vandalism and student aggression in schools.

- Corporal punishment can provoke anger and resentment on the part of the child or adolescent to the detriment of the relationship with teachers, respect for adult authority, and attitude toward the educational system.

A North Dakota state law dedicated to the eradication of child abuse, which legally mandates educators, as well as other professionals, to report parents and caregivers for suspected child abuse, is paradoxical with the existence of legally permitted corporal punishment in educational and custodial institutions.

Furthermore, in a statewide child abuse survey taken in 2002 by the ND State Data Center at NDSU, fewer than 14% of respondents agreed that hitting a child is okay when the child misbehaves.

In conclusion, I will restate my opposition to this bill or any further bills or amendments that would condone any form of violence toward children. We've learned a lot in the past several years, and we need to use that knowledge to continue our efforts to provide safe environments for our children; in the home, in childcare, in out of home placement environments and the schools.

Thank you for your attention and I would be happy to answer any questions regarding this testimony.

Attach #2

**January 22, 2003**
**Testimony on SB 2174**
**Senate Judiciary Committee**

**Chairman Traynor and Members of the Senate Judiciary Committee. I am Wanda Rose from Bismarck, ND representing North Dakota Children's Caucus.** North Dakota Children's Caucus is a group of individuals and agencies from across the state who advocate for children. ND Children's Caucus urges a DO NOT PASS on SB 2174.

Corporal punishment refers to intentional application of physical pain as a method of changing behavior. This can include a wide variety of methods such as hitting, slapping, punching, kicking, shaking, choking, and the use of various objection (wooden paddles, belts and others) and painful body postures.

Corporal punishment is an ineffective method of discipline and has major harmful effects on the physical and mental health of those inflicted. There is no clear evidence that corporal punishment provides for better control of behavior.

Children who are exposed to corporal punishment do not develop enhanced social skills or self-control. There are many effective alternatives to corporal punishment, and it is possible for school authorities and others to learn them and for children to benefit from such techniques.

Current research in behavior modification concludes that using positive reinforcement techniques that reward appropriate behavior is more effective and long lasting than methods utilizing corporal punishment.

The use of corporal punishment, especially in schools, promotes a message that violence is an acceptable phenomenon in our society. It encourages children to resort to violence because they see their authority figures or substitute parents use physical pain to alter behavior.

As a parent or grandparent, would you want a custodian be allowed to inflict physical pain on your child or grandchild?

On behalf of children living in North Dakota, the North Dakota Children's Caucus urges a DO NOT PASS on SB 2174.

Att. #3

National Association of Social Workers
NORTH DAKOTA CHAPTER
P.O. Box 1775
Bismarck, ND 58502-1775
Telephone 701-223-4161
Fax Number 701-224-9824
E-Mail nasw@aptnd.com
Web Site www.aptnd.com/nasw

Testimony on SB 2174
North Dakota Senate Judiciary Committee
January 22, 2003

Chairman Traynor and Members of the Senate Judiciary Committee:

My name is Connie Hildebrand, Bismarck resident and current Legislative Chair of the North Dakota Chapter of the National Association of Social Workers. The National Association of Social Workers has over 150,000 members in 55 chapters throughout the United States, Puerto Rico, and the Virgin Islands, as well as our international community.

I speak in opposition to SB 2174 which would institute corporal punishment within North Dakota statute. Such legislation has been absent from most state statutes for thirty to forty years.

As stated in our national policy, *"physical punishment and corporal punishment of children are interchangeable terms; both mean the intentional infliction of physical pain or discomfort on the body of a child as a penalty for behavior disapproved of by the punisher or as a method of modifying negative behavior."*

I must clarify, physical punishment does not include physical restraint to prevent a child from harming himself, herself, or others, or to protect property, nor does it include self-defense by an adult.

The National Association of Social Workers (NASW) believes in the right of every child to a safe and nurturing environment, including home and educational experiences that are conducive to constructive learning. The use of physical force against people, especially children, is a child-rearing practice that is antithetical to the best values of a democratic society and certainly to the social work profession. Thus, NASW opposes the use of physical punishment in homes, schools, and all other institutions, both public and private, where children are cared for and children are educated.

In adopting this policy, NASW is proud to join many other organizations, both national and international, that oppose the physical punishment of children in schools, institutions, and homes.

Corporal punishment cannot be justified. Aristotle, founder of the science of *Logic* said, between 384-322 BC ..... and I quote,

nyone can become angry.
..at is easy.
But to be angry
with the right person,
to the right degree,
at the right time,
for the right purpose,
and in the right way ----
That ..... is not easy."

NASW asks your defeat of SB 2174 because, we know. You are logical men and women. That's why you were elected. We ask you make this decision . ... at the right time, for the right purpose, and in the right way.

Submitted:

Connie M. Hildebrand

Connie M. Hildebrand, LICSW
t President NASW-ND
gislative Chair, NASW-ND

#4

**TESTIMONY ON SB 2174**
**SENATE JUDICIARY COMMITTEE**
**January 22, 2003**
**by Linda L. Johnson, Director of School Health Programs**
**(701) 328-4138**
**Department of Public Instruction**

Chairman Traynor and members of the committee:

My name is Linda Johnson and I am the Director of School Health Programs including Safe and Drug Free Schools for the Department of Public Instruction. I am here to speak in opposition to SB 2174.

The Elementary and Secondary Education section of the NDCC, 15.1-19-02 prohibits corporal punishment by a school district employee. In the Section 3 addition to 14-09-02, there is no definition of "other custodian". Does this include teachers? If so, how will this bill reconcile with 15.1-19-02?

Currently through School Health Programs we offer professional development for school staff in areas of violence prevention. Our classes on *Bullying Prevention* and *Get Real About Violence* are well attended. In addition, the Conflict Resolution Center from University of North Dakota is on call to any district that requests training on nonviolence for staff and students.

I am pleased to answer your questions.

**15.1-19-02. Corporal punishment - Prohibition.**

1. A school district employee may not inflict, cause to be inflicted, or threaten to inflict corporal punishment on a student.
2. This section does not prohibit a school district employee from using the degree of force necessary:
    a. To quell a physical disturbance that threatens physical injury to an individual or damage to property;
    b. To quell a verbal disturbance;
    c. For self-defense;
    d. For the preservation of order; or
    e. To obtain possession of a weapon or other dangerous object within the control of a student.
3. For purposes of this section, corporal punishment means the willful infliction of physical pain on a student; willfully causing the infliction of physical pain on a student; or willfully allowing the infliction of physical pain on a student. Physical pain or discomfort caused by athletic competition or other recreational activities voluntarily engaged in by a student is not corporal punishment.
4. The board of each school district shall develop policies setting forth standards for student behavior and procedures to be followed if the standards are not met.

Discussion



N.W.2d 669, 670 (N.D.1996). There is no finding of a ground for reducing child support under N.D.Admin. Code § 75-02-04.1-09(2), nor is there any evidence in the record to support such a reduction.

[¶ 9] Because the court did not impose a child support obligation as required under N.D.Admin. Code § 75-02-04.1-06.1 or specifically find a ground allowing a deviation from that amount, we conclude the district court's award of child support in the amount of $25 per month is clearly erroneous.

III

[¶ 10] Because the district court's child support calculation is clearly erroneous, we reverse and remand to the district court for imposition of the $89-per-month child support obligation required by the guidelines.

[¶ 11] VANDE WALLE, C.J., and NEUMANN, MARING and MESCHKE, JJ., concur.



1997 ND 115

**Carmen DINIUS, n/k/a, Carmen Oswald, Plaintiff and Appellee,**

**v.**

**John DINIUS, Defendant and Appellant.**

Civil No. 960287.

Supreme Court of North Dakota.

June 8, 1997.

Divorce proceedings were brought. The District Court, Oliver County, South Central Judicial District, James M. Vukelic, J., entered third amended divorce judgment based on determination that former husband was perpetrator of domestic violence. Husband appealed. The Supreme Court, Neumann, J., held that: (1) reasonable force used by parents for purposes listed in statute governing use of reasonable force upon minor by parent does not constitute "domestic violence" for purposes of statute creating presumption against custody, and (2) husband's actions did not constitute "domestic violence" within meaning of such statute.

Reversed.

**1. Divorce ⇐298(1)**

In original placement of child following divorce, district court need only determine best interests and welfare of child.

**2. Infants ⇐19.3(5)**

To modify original custodial placement, district court must apply two-step analysis under which, first, it must determine whether there has been significant change in circumstances since original custody placement and, second, if significant change of circumstances exists, court must determine whether that change compels change of custody in child's best interests.

**3. Infants ⇐19.3(7)**

District court's decision to modify custody is finding of fact subject to clearly erroneous standard of review. Rules Civ.Proc. Rule 52(a).

**4. Appeal and Error ⇐1008.1(5)**

Finding of fact is "clearly erroneous" if it is induced by erroneous view of the law, if there is no evidence to support it, or if although there is some evidence to support it, on the entire evidence, Supreme Court is left with definite and firm conviction that a mistake has been made.

See publication Words and Phrases for other judicial constructions and definitions.

**5. Parent and Child ⇐2(8)**

Reasonable force used by parents for purposes listed in statute governing use of reasonable force upon minor by parent does not constitute "domestic violence" for purposes of statute creating rebuttable presumption that parent who has perpetrated domestic violence may not be awarded custody

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NDCC 12.1–05–05, subd. 1, 14–09–06.2, subd. 1, par. j.

See publication Words and Phrases for other judicial constructions and definitions.

6. Divorce ⇐303(6)

Although amendment clarifying degree of domestic violence required to invoke presumption against custody award was not in effect when district court made custody decision adverse to former husband, amendment contained clear instruction to help Supreme Court determine the law concerning domestic violence, and Supreme Court thus would examine former husband's conduct in light of amendment in determining whether former wife was entitled to presumption. NDCC 14–09–06.2, subd. 1, par. j; Laws 1997, c. 147, § 2.

7. Divorce ⇐303(6)

Former husband's actions of hitting daughter in face in dispute over washing dishes and pulling her from automobile by grabbing her arm and hair did not constitute "domestic violence" required to invoke presumption against custody, where acts had occurred seven years previously and husband had not committed any acts of domestic violence since that time, and there was no evidence that such acts involved serious bodily injury or suggested pattern of domestic violence. NDCC 14–09–06.2, subd. 1, par. j.

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Robert J. Snyder, of Snyder Coles Lawyers, Bismarck, for defendant and appellant.

Orell D. Schmitz, of Schmitz, Moench & Schmidt, Bismarck, for plaintiff and appellee.

NEUMANN, Justice.

[¶ 1] John Dinius appeals from the district court's judgment finding him the perpetrator of domestic violence and granting Carmen Oswald, formerly known as Carmen Dinius, custody of their children. We reverse.

[¶ 2] In 1989, John and Carmen Dinius divorced. That same year, John was awarded the custody of their four children. Carmen appealed, and this court upheld the district court's custody award. *Dinius v. Dinius*, 448 N.W.2d 210 (N.D.1989).

[¶ 3] Three years after the custody award, the eldest child, Angela, expressed a preference to live with her mother. In 1992, custody of Angela was transferred to Carmen, leaving custody of the three younger boys with John. At that time, a visitation schedule was established and neither party was ordered to pay support.

[¶ 4] On March 8, 1995, John moved for child support. Carmen countered seeking child support for Angela. On December 28, 1995, the district court issued a second amended divorce judgment, ordering John to pay Carmen $82 monthly child support from March 1995 to February 1996. Thereafter, the court ordered Carmen to pay John $554 monthly child support.

[¶ 5] In May 1996, Carmen moved for custody of the three boys, or alternatively, moved for a specified visitation schedule. In her motion to transfer custody, Carmen alleged John was a perpetrator of domestic violence. The district court found John to be a perpetrator of domestic violence based on two incidents involving Angela which occurred in 1990. The court granted Carmen custody of the two youngest boys, Jordan and Jarett, and allowed Landon, an adult, to live with whomever he chose.

[¶ 6] John appealed the decision and requested this court to stay the transfer pending the appeal. On October 30, 1996, we granted the stay and remanded the case to the district court to determine John's potential child support obligation.

[¶ 7] On November 22, 1996, the district court issued a third amended divorce judgment specifying John's child support obligation. John appealed and asked the court to stay the judgment and order Carmen to pay child support pending the appeal, as outlined in the second amended divorce judgment. On December 18, 1996, we stayed the judgment, and ordered that Carmen pay child support. John appeals.

[¶ 8] John argues the district court erred by determining he was the perpetrator of domestic violence. John argues he did not commit domestic violence, but rather was

disciplining Angela as permitted under N.D.C.C. § 12.1-05-05(1).

[¶ 9] In its order granting Carmen custody, the district court found John committed two acts of domestic violence against Angela in 1990. One incident involved John hitting Angela in the face in a dispute over washing dishes. Another incident involved pulling Angela from a car by grabbing her by the arm and hair. In its findings, the district court stated:

> "Angela Dinius testified that John hit her 'on the face' on one occasion in 1990. John allegedly became angry with her because she was doing the dishes too slowly. Angela testified that on another occasion in December of 1990, John pulled her out of a car by grabbing her by the arm and by her hair. Angela testified that as a result of the latter incident, 'I had marks on my arm. And I had some bruises on my head.'
>
> * * * * * *
>
> The Court finds that John did commit two acts of domestic violence against Angela Dinius. From this the Court concludes there exists a material change in circumstances."

[¶ 10] The district court invoked the presumption against custody and ordered a change of custody to Carmen. In reaching its decision, the district court did not determine whether John's acts constituted reasonable disciplinary measures.

[1, 2] [¶ 11] In the original placement of a child following a divorce, the district court need only determine the best interests and welfare of the child. *Gould v. Miller*, 488 N.W.2d 42, 43 (N.D.1992). To modify an original custodial placement, the district court must apply a two-step analysis. *Van Dyke v. Van Dyke*, 538 N.W.2d 197, 201 (N.D.1995). First, the court must determine whether there has been a significant change in circumstances since the original custody placement. *Klose v. Klose*, 524 N.W.2d 94, 95 (N.D.1994). Secondly, if a significant change of circumstances exists, the court must determine whether that change compels a change of custody in the child's best interests. *Barstad v. Barstad*, 499 N.W.2d 584, 587 (N.D.1993).

[3, 4] [¶ 12] A district court's decision to modify custody is a finding of fact subject to the clearly erroneous standard of review. *Blotske v. Leidholm*, 487 N.W.2d 607, 609-10 (N.D.1992); Rule 52(a), N.D.R.Civ.P. A finding of fact is clearly erroneous "if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence, we are left with a definite and firm conviction that a mistake has been made." *McDonough v. Murphy*, 539 N.W.2d 313, 316 (N.D.1995).

[¶ 13] Under N.D.C.C. § 14-09-06.2(1)(j), there is a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded custody of the children:

> "If the court finds credible evidence that domestic violence has occurred, this evidence creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child."

[¶ 14] The statute adopts by reference the definition of domestic violence in N.D.C.C. § 14-07.1-01(2):

> "'Domestic violence' includes physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members."

[¶ 15] However, N.D.C.C. § 14-07.1-01(2) is not the only statute discussing the use of force in a household. In circumstances concerning force used on children, N.D.C.C. § 12.1-05-05(1) is also relevant. Under N.D.C.C. § 12.1-05-05(1) the legislature grants parents the right to use reasonable force to discipline their children. Section 12.1-05-05(1), N.D.C.C., states:

> "[Parents] may use reasonable force upon the minor for the purpose of safeguarding or promoting his welfare, including prevention and punishment of his misconduct, and the maintenance of proper discipline.... The force used must not create a substan-

tial risk of death, serious bodily injury, disfigurement, or gross degradation."

[5] [¶ 16] Clearly, an ambiguity arises in circumstances when a parent uses force to discipline a child. Under N.D.C.C. § 14-07.1-01(2), an assault on a family member is considered domestic violence. Yet, under N.D.C.C. § 12.1-05-05(1), parents have the right to use reasonable force to discipline their children. Section 14-07.1-01(2), N.D.C.C., provides a very broad definition of domestic violence, addressing *any* member of a household who uses force on *any* other member of the household. Section 12.1-05-05(1), N.D.C.C., specifically addresses the relationship between parents and children. Attempting to harmonize these statutes it appears the legislature intended that reasonable force used by parents for the purposes listed in N.D.C.C. § 12.1-05-05(1) would not constitute domestic violence. Normally, if this were all the guidance afforded to us by the legislature, we would remand for a determination of whether the force used by John was reasonable, under the circumstances. The legislature, however, has also given us recent help in understanding the meaning of domestic violence for purposes of N.D.C.C. § 14-09-06.2(1)(j).

[¶ 17] In 1997, the legislature amended N.D.C.C. § 14-09-06.2(1)(j). N.D.Sess.Laws ch. 147, § 2 (1997). Although the amended statute did not take effect until April 3, 1997, after the district court's custody decision, it contains a clear instruction to help us determine North Dakota law concerning domestic violence. *Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Association*, 337 N.W.2d 427, 431-32 (N.D.1983) (looking to new law for guidance). In order to help us determine whether the alleged use of force might constitute domestic violence, we will examine the conduct in light of the recent amendment.

[6] [¶ 18] Under the amendment, the rebuttable presumption against the parent who has committed domestic violence continues to exist. However, the legislature clarified the degree of domestic violence required to invoke the presumption. The amended statute requires "*one incident of domestic violence which resulted in serious bodily injury* or involved the use of a dangerous weapon or *... a pattern of domestic violence within a reasonable time proximate to the proceeding.*" N.D.Sess.Laws ch. 147, § 2 (1997) (emphasis added).

[7] [¶ 19] Here, the district court invoked the presumption against John for two acts committed in 1990 against Angela. The acts committed were seven years ago, quite remote in time. The district court did not find John to have committed any acts of domestic violence since that time. *See Krank v. Krank*, 529 N.W.2d 844, 851 (N.D.1995) (Neumann, J., concurring) (noting a pattern of good conduct over time could suggest a violent individual has been rehabilitated). Furthermore, the district court found only two acts of domestic violence: once when John hit Angela in the face in a dispute over the dishes, and once when John pulled Angela from the car. According to the record, there is no evidence suggesting either of these acts involved serious bodily injury or that the two suggest a pattern of domestic violence. *See Krank*, 529 N.W.2d at 851 (Meschke, J., concurring) (suggesting that the presumption against custody should be invoked if the violent act is significant enough and not too remote). In light of the amendment, we do not believe John's actions constitute domestic violence required to invoke the presumption against custody.

[¶ 20] We, therefore, reverse the district court's decision, instructing the district court to deny the motion to change custody of the two youngest children.

[¶ 21] VANDE WALLE, C.J., and MARING, MESCHKE and SANDSTROM JJ., concur.

1999 ND 105

April Jeanne HOLTZ, Plaintiff and Appellant,

v.

James Floyd HOLTZ, Defendant and Appellee.

No. 980261.

Supreme Court of North Dakota.

June 18, 1999.

Following divorce, father moved to establish a visitation schedule, or in the alternative, to change custody of parties' child. The District Court, Wells County, Southeast Judicial District, Randall L. Hoffman, J., changed the custody of the child to the father, and the mother appealed. The Supreme Court, VandeWalle, C.J., held that change in custody was warranted in light of mother's mental limitations.

Affirmed.

1. Infants ⇐19.3(5)

While the best interests and welfare of the child are the sole concerns in an original custodial placement, to modify child custody a court must consider whether there is a significant change of circumstances since the original custody decree, and if so, whether this change compels or requires the court to change custody to serve the best interests of the child. NDCC 14-09-06.6.

2. Infants ⇐19.3(7)

Decision to modify custody is a finding of fact subject to the clearly erroneous standard of review. NDCC 14-09-06.6; Rules Civ.Proc., Rule 52(a).

3. Appeal and Error ⇐1008.1(5)

Finding of fact is "clearly erroneous" only if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, upon review of the entire evidence, appellate court is left with a definite and firm conviction that a mistake has been made. Rules Civ.Proc., Rule 52(a).

See publication Words and Phrases for other judicial constructions and definitions.

4. Divorce ⇐303(7)

For purposes of post-divorce child custody modification proceeding, finding of a "material change in circumstances" based upon mother's mental inability to cope with and parent her growing child was not clearly erroneous, even though mother's mental abilities apparently had not worsened since the original placement; there was abundant evidence that mother was no longer able to effectively care for child because of her mental limitations, including dyslexia, a learning disability, a low IQ, and developmental disability. NDCC 14-09-06.6.

See publication Words and Phrases for other judicial constructions and definitions.

5. Infants ⇐19.3(5)

Where the present environment endangers a child's physical or emotional health or impairs the child's emotional development, there is, as a matter of law, a "material change in circumstances" that warrants a change of custody. NDCC 14-09-06.6, subd. 6.

6. Appeal and Error ⇐1106(5)

Supreme Court does not remand for clarification of findings of fact when, through inference or deduction, it can discern the rationale for the result reached by the trial court.

7. Appeal and Error ⇐846(5)

Supreme Court will rely on implied findings of fact when the record enables it to clearly understand the trial court's factual determinations, and the basis for its conclusions of law and judgment.

8. Divorce ⇐303(7)

Finding in post-divorce proceeding that mother, due to her mental limitations, "would not be capable or competent to raise" child, implying that a change of

tody was required by a material change circumstances, was not clearly erroneous, even though mother had had custody child for the past five years; record pported finding that child's immaturity s attributable to mother's inadequate renting capabilities and the conditions in r present residence, and trial court nd that father was capable of providing e necessary maintenance, love, affection d guidance for child, and was capable of sisting her with her education. NDCC -09-06.6.

Divorce ⇐303(7)

Mother's mental inability to parent ild, coupled with father's legitimate atmpts to receive professional help to conol his anger, constituted clear and conncing evidence that the best interests of e child required change of custody to ther in post-divorce proceeding, despite y presumption against award of custody father arising from incidents of domes- violence. NDCC 14-07.1-01, subd. 4, 4-09-06.2, subd. 1, par. j.

. Infants ⇐19.3(5)

Evidence of domestic violence which is sufficient to trigger the presumption gainst award of child custody nevertheless remains one of the best-interest factors to be considered by the court on a notion to modify custody. NDCC 14-09-6.2, subd. 1, par. j.

1. Parent and Child ⇐2(8)

Domestic violence presumption gainst award of child custody is not confined to circumstances in which a parent or hild is the direct victim of the violence, ut includes persons who are in a dating elationship, and persons who are presenty residing together or who have resided ogether in the past. NDCC 14-07.1-01, ubd. 4, 14-09-06.2, subd. 1, par. j.

2. Divorce ⇐303(7)

When the original custody decree is ntered upon default or based upon a stipulation of the parties, the trial court must onsider all ...t evidence, including pre-divorce domestic violence, in deciding a change-of-custody issue. NDCC 14-07.1-01, subd. 4, 14-09-06.2, subd. 1, par. j.

13. Parent and Child ⇐2(14)

When a trial court addresses whether evidence of domestic violence triggers the presumption against award of child custody, Supreme Court requires the trial court to make specific and detailed findings regarding the effect the allegations of domestic violence have on the presumption, but specific factual findings are not required when the evidence of domestic violence does not rise to the level triggering the presumption. NDCC 14-07.1-01, subd. 4, 14-09-06.2, subd. 1, par. j.

14. Infants ⇐19.3(6)

Trial court's oral findings in child custody modification proceeding can be considered by Supreme Court if they do not conflict with the written findings.

15. Divorce ⇐303(8)

Having found, in post-divorce custody modification proceeding, that child's best interests required a change of custody to father, who lived in California, trial court was not required to further find separately that a move to the state of California would be in the child's best interests.

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Paul C. Murphy (argued) and Marina Spahr (appearance), Murphy & Spahr Law Office, PC, Carrington, for plaintiff and appellant.

Neil Thompson, Thompson & Thompson, Devils Lake, for defendant and appellee.

VANDE WALLE, Chief Justice.

[¶ 1] April Jeanne Holtz appealed from a judgment changing the custody of her daughter, Jessica, to the child's father, James Floyd Holtz. We conclude the trial court's findings there was a material change of circumstances since the parties' divorce which required, in the best interests of Jessica, a change of custody, and James rebutted the presumption against custody arising from past acts of domestic violence, are not clearly erroneous. We affirm.

I

[¶ 2] April and James married in 1988 at Reno, Nevada. Jessica was born November 12, 1990. The parties lived in California and Texas during their somewhat tumultuous and abusive marriage. When the parties separated in the fall of 1993, April and Jessica moved to Harvey, North Dakota, where April's mother lived. The couple was divorced by a North Dakota court in July 1994. James was served with the divorce papers while living in California, but made no appearance, claiming he could not afford to travel to North Dakota to contest the divorce. The court awarded April "sole and exclusive custody" of Jessica and reserved ruling on James's visitation rights until James applied to the court for visitation privileges. James was also ordered to pay child support.

[¶ 3] April, age 29 at the time of trial, is a high school graduate, but has a learning disability, is developmentally disabled, and was described as having below normal intelligence. A parent aide from Wells County Social Services spends about three or four hours per week with April to help her keep her two-bedroom apartment in Harvey in an orderly condition. April is not employed, but receives Supplemental Security Income payments for her disability, Aid to Families with Dependent Children payments, food stamps, medical assistance and rent subsidy payments. Jessica is a first grade student.

[¶ 4] James, age 31 at the time of trial, was described as being of average intelligence. He has been employed as an over-the-road trucker, but at the time of trial was working as a cab driver in Fresno, California. He has lived for two years in a three-bedroom apartment in Fresno with a married couple and their two minor children. James has had very little contact with Jessica since the divorce. He occa-...ally contacted the Wells County Social Services office expressing his desire to relinquish his parental rights because he was frustrated over continually being denied contact with the child. James's only visitation with Jessica occurred at the Social Services office. James, however, sent numerous letters to Jessica through the Social Services office because he was concerned Jessica would not see them if he sent them to her home address.

[¶ 5] In April 1997, James made a motion to establish a visitation schedule, or in the alternative, to change custody of Jessica. James alleged April had previously frustrated his attempts at visitation with Jessica, and April "is not mentally capable of growing with the child so she could be far enough ahead of the child to be able to handle the child's mental needs as far as growing up and progressing without substantial assistance."

[¶ 6] A court-appointed guardian ad litem (GAL) evaluated the situation and recommended that custody of Jessica be changed from April to James. The GAL reported she did not find April "credible" during their conversations, that April relied on Jessica to assist her in dealing with unknown persons and unfamiliar circumstances, and that "Jessica frequently speaks up for her mother and explains things to her." Noting April's "ineffectiveness in parenting," the GAL said she could not "condone leaving a seven year old child in a home to care for her developmentally disabled mother." The GAL also noted James's "unique living arrangements," but said she was "convinced that if James[ ] were awarded custody of Jessica that she would be warmly absorbed into this less than conventional family unit." The GAL recommended a schedule for transfer of custody, that April be awarded reasonable visitation and be required to pay child support, that James be required to enroll in and complete parenting and anger management classes, that April be encouraged to continue to work on her parenting skills, and that James have Jessica evaluated for possible learning disabilities.

[¶ 7] Both parties, the GAL, and several other persons testified at the hearing. However, April either refused to respond to, or gave inaudible responses to, the vast majority of the questions posed to her by the court and the attorneys. The trial court found "a material change in circumstances based upon [April's] mental incapacity to develop as ... Jessica ... grows older and develops in her own right. Therefore, [April] would not be capable or competent to raise the minor child...." The court also found the best interests of Jessica would be served by changing custody to James. April appealed.

II

[¶ 8] April contends the trial court erred in granting James's motion for change of custody.

[¶ 9] For cases decided after August 1, 1997, motions to modify custody are governed by statute. *See Hill v. Weber*, 1999 ND 74, ¶ 9, 592 N.W.2d 585. N.D.C.C. § 14-09-06.6 provides in pertinent part:

6. The court may modify a prior custody order after the two-year period following the date of entry of an order establishing custody if the court finds:
   a. On the basis of facts that have arisen since the prior order or which were unknown to the court at the time of the prior order, a material change has occurred in the circumstances of the child or the parties; and
   b. The modification is necessary to serve the best interest of the child.

8. Upon a motion to modify custody under this section, the burden of proof is on the moving party.

[1-3] [¶ 10] This part of the statutory formulation essentially tracks the two-step approach previously used by this Court for deciding a change of custody case. While the best interest and welfare of the child are the sole c[illegible] in an original custodial placement, *e.g. Divine v. Divine*, 1997 ND 115, ¶ 11, 564 N.W.2d 300, to modify child custody a court must consider whether there is a significant change of circumstances since the original custody decree, and if so, whether this change compels or requires the court to change custody to serve the best interests of the child. *E.g., State ex rel. Melling v. Ness*, 1999 ND 73, ¶ 27, 592 N.W.2d 565. A district court's decision to modify custody is a finding of fact subject to the clearly erroneous standard of review under N.D.R.Civ.P. 52(a). *Gietzen v. Gietzen*, 1998 ND 70, ¶ 8, 575 N.W.2d 924. A finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, upon review of the entire evidence, we are left with a definite and firm conviction that a mistake has been made. *Sumra v. Sumra*, 1997 ND 62, ¶ 8, 561 N.W.2d 290.

A

[4] [¶ 11] The trial court found a "material change in circumstances based upon [April's] mental incapacity to develop as ... Jessica ... grows older and develops in her own right." We conclude the trial court's finding of a material change in circumstances is not clearly erroneous.

[¶ 12] Although there is no expert medical evidence in the record establishing the parameters of April's developmental disability at the time of the divorce or at the time of the custody hearing, there is abundant evidence showing that April was simply no longer able to effectively care for Jessica because of April's mental limitations. April has dyslexia, a learning disability, a low IQ, and is developmentally disabled. April's parent aide helps her "with many of the basic tasks that she needs to do from day to day." The parent aide helps with home management, writes most of April's checks, helps her balance the checkbook, and informs her "about the developmental stages of children at certain levels and what behaviors are normal." April's parent aide had worked with April for more than three years and testified that, without the assistance given to April, she and Jessica could not function as a family unit because April is not mentally capable of doing things by herself.



[¶ 13] The parent aide testified April is very withdrawn and needs help with socializing, but has refused to go to group therapy sessions to try and remedy the situation. When Jessica interacts with her mother, according to the parent aide, Jessica acts "childish" and "whiny," a lower level of maturity she exhibits while interacting with other children as well. Jessica is also hyperactive at school, and because of her immaturity and extreme difficulty with some subjects, the school planned to have her repeat the first grade. The parent aide also testified she sometimes worries about Jessica eventually having to take care of April. When the GAL asked a social worker how long the parent aide would be available to assist April, "he stated that a decision had not been made on when to terminate the assistance but that the 'team' had commented that at some point the child would start to take care of the mother and they could then pull the parent aide out of the home at that time."

[¶ 14] The GAL testified she found "[v]ery little" credibility with April, and believed April gave answers April thought she wanted to hear. The GAL was also concerned Jessica may have a learning disability. The GAL discussed her concerns with April, but April said Jessica did well in school and did not think there was a problem. Administrators at Jessica's school informed the GAL they also thought Jessica may have a learning disability, and the GAL made an appointment to have Jessica evaluated by a Minot psychiatrist. April refused to sign a medical release so the GAL and the school could get copies of the evaluation. The GAL explained in her report:

> It took several minutes to convince her to sign and when she did she appeared to be traumatized by my request. She was visibly shaking and seemed to be having trouble breathing. She finally admitted that the reason she was reluctant to sign was that she thought the court would use it against her. I asked how she expected the school to help Jessica if she did have [learning disabilities] and they had no information about it. She was unable to answer other than to say that she didn't want the court to see the report. She had little understanding of [learning disabilities] and seemed to want to discuss her own disability.

[¶ 15] When a Social Services volunteer drove April and Jessica to the psychiatrist, she reported that April was unable to control Jessica, who would not stay in the car seat. The visit with the psychiatrist was cut short because "Jessica became so demanding and out of control." April refused to take Jessica back to the psychiatrist to complete the testing, explaining she and Jessica were moving to California soon. April also told the GAL she would not be willing to take Jessica to see a counselor, even if a court ordered her to do so, because "Jessica doesn't need it." Jessica's teacher stopped sending homework home with the child because April was unable to help her with the work, and on the few occasions she attempted to assist, the answers were often wrong. Jessica knew the homework answers were wrong but explained to her teacher that April was simply unable to help her.

[¶ 16] A social worker told the GAL teaching April more parenting skills was not an available option because April cannot work in a group atmosphere and any assistance must be given on a one-to-one basis. Even on that basis, skills taught to April by the parent aide "are not retained well and she quickly falls back to her less effective methods of discipline." The GAL said:

> Given the resources currently available and April's inability and/or unwillingness to learn parenting skills, I see no reason to believe that she will [illegible] able to parent Jessica on a full ti[illegible]is. Jes-

sica would appear to be "out growing" her mother's limited parenting skills and the problem is likely to get worse as time passes. I observed a number of situations in which Jessica used inappropriate behavior to manipulate April including whining, screaming and hitting and kicking her mother.

[5] [¶17] A material change of circumstances can occur if a child's present environment may endanger the child's physical or emotional health or impair the child's emotional development. *See Hill*, 1999 ND 74, ¶11, 592 N.W.2d 585; N.D.C.C. § 14-09-06.6(3)(b). Although April's mental abilities apparently have not worsened since the original custodial placement, Jessica's needs have changed and will continue to change as she grows older and matures. We have said changed circumstances required in a modification proceeding must be new facts which were unknown to the moving party at the time the decree was entered. *See, e.g., Fritzford v. Ell*, 1997 ND 16, ¶7, 558 N.W.2d 848; *Leppert v. Leppert*, 519 N.W.2d 287, 292 (N.D.1994). However, even if the trial court in this case knew at the time the divorce decree was entered that Jessica's needs would change as she grew older, we do not believe the trial court was foreclosed from finding a material change of circumstances. Where the present environment endangers the child's physical or emotional health or impairs the child's emotional development, there is as a matter of law a material change of circumstances that warrants a change of custody under N.D.C.C. § 14-09-06.6(6). *See Hill*, 1999 ND 74, ¶11, 592 N.W.2d 85. We conclude April's inability to mentally cope with and parent her growing child constitutes a material change of circumstances, and the trial court's finding to that effect is not clearly erroneous.

B

[6-8] [¶18] The trial court did not expressly state [illegible] material change of circumstances "[illegible]" or "compels" changing custody of Jessica from April to James. Instead, the trial court's findings focus on the general best interests factors appropriate for an original custodial placement. *See Dittus*, 1997 ND 115, ¶11, 564 N.W.2d 300. April, however, has not raised this as an issue on appeal. In any event, we do not remand for clarification of findings of fact when, through inference or deduction, we can discern the rationale for the result reached by the trial court. *Almont Lumber & Equipment Co. v. Dirk*, 1998 ND 187, ¶13, 585 N.W.2d 798. We will rely on implied findings of fact when the record enables us to clearly understand the district court's factual determinations, and the basis for its conclusions of law and judgment. *Schmitz v. Schmitz*, 1998 ND 203, ¶6, 586 N.W.2d 490. Here, the trial court found April "would not be capable or competent to raise" Jessica, thereby implying that a change of custody was not only in Jessica's best interests, but was required by the material change of circumstances. *See Hill*, 1999 ND 74, ¶11, 592 N.W.2d 585; *Carver v. Miller*, 1998 ND App 12, ¶16, 585 N.W.2d 139. We further conclude that this implied finding is abundantly supported by the record.

[¶19] April contends the trial court failed to give proper weight to the fact April had custody of Jessica for the past five years and that the stability of leaving Jessica in her current environment outweighs any benefits from a change of custody.

[¶20] We have said maintaining stability and continuity in the child's life, without harm to the child, is the most compelling factor when considering a motion for change of custody. *See Alvarez v. Carlson*, 524 N.W.2d 584, 589 (N.D.1994). Requiring a showing a change of custody is compelled or required gives some finality to a trial court's original custody decision and helps ensure that a child is not bounced back and forth between parents as the scales settle slightly toward one parent and then the other. *See Lovin v. Lovin*, 1997 ND 55, ¶17, 561 N.W.2d 612.



Thus, when a court decides a change of custody is compelled or required, the court has effectively determined the stability that may have existed with the custodial parent has been outweighed by benefits from the change of custody.

[¶21] Here, the trial court essentially found the present circumstances in April's custodial home were not beneficially stable, but were potentially harmful to Jessica. The court found:

> [April] is not mentally capable to guide [Jessica] and to continue to assist the child with educational needs. [April] does not accept advice pertaining to raising the minor child and refuses to do the things that are necessary to help further the child's education and guide the minor child.
>
> ....
>
> [Jessica] is developing at home and at school, but she needs more assistance in view of the fact that it is reported that she is not maturing at an adequate level so she will be repeating first grade in school.

The trial court found Jessica's immaturity was attributable to April's inadequate parenting capabilities and "the conditions in her present residence." These findings are supported by the record.

[¶22] After April and Jessica moved to Harvey, Social Services began receiving child neglect complaints relating to lack of supervision and emotional abuse by April by her yelling at Jessica. Social Services arranged to have Jessica enrolled in a preschool and child care center, and later involved the child in the Headstart program. Social Services also had conferences with April regarding her "rather harsh discipline techniques," including one incident when April was confronted "about letting her boyfriend ... spank Jessica with a belt." Social Services also received a letter from Headstart regarding "April's hygiene, outbursts, refusal to participate in the program's parent group, [and] yelling at Jessica." One of the last entries on the case by Social Services says "Jessica was absolutely out of control. April could not manage her." This evidence illustrates the decline in April's ability to care for Jessica, as well as the lack of any real stability in Jessica's life as the years have progressed.

[¶23] On the other hand, despite what the GAL termed James's "less than conventional family unit," the trial court found James is capable of providing the necessary maintenance, love, affection and guidance for Jessica and is capable of assisting her with her education. The GAL spoke extensively with James and the woman who resides in the Fresno apartment. According to the GAL, all three adults in the apartment have jobs. The married couple have one of the bedrooms and the two children have their own bedrooms. James sleeps on the couch and Jessica would sleep in one of the girl's rooms in her own bed. James testified he is also attempting to find his own home. The woman living there was supportive of James's efforts to obtain custody of Jessica, and James said he would place Jessica in daycare with a longtime friend, a licensed foster care provider in California. James also expressed his willingness to have Jessica see a counselor "to help her adjust" and to have her evaluated for possible learning disabilities. James also said he "would help Jessica overcome any problems she might have."

[¶24] Although April complains about the lack of contact James has had with Jessica over the last five years, the record suggests the difficulty James has had trying to maintain contact with Jessica is mainly attributable to April. While there was no court order setting a visitation schedule for James, visitation with a noncustodial parent is presumed to be in a child's best interests, *see Reinecke v. Griffith*, 533 N.W.2d 695, 698 (N.D.1995), and divorced parties are not foreclosed from fostering additional visitation to that decreed by the trial court. *See Nomik v. Nomik*, 441 N.W.2d 656, 6[illegible]).1989). April cannot credibly conten[illegible] was en-

titled to thwart James's attempts to contact Jessica simply because the court had not set forth a formal visitation schedule. The GAL and the trial court noted Jessica's excitement when talking to James by telephone. James's letters to Jessica, according to the GAL, were age and content appropriate, expressed his love for Jessica, and often included a phone number where she could reach him by calling collect. Although April served the role of Jessica's "primary caretaker," that designation has never gained a presumptive status in this state. *See Hogue v. Hogue*, 1998 ND 26, ¶ 14, 574 N.W.2d 579. Moreover, April's role as primary caretaker is hardly a beneficial attribute to her retaining custody when the change of circumstances is based on her growing inability to appropriately function in that role.

[¶ 25] We conclude the trial court's implied finding that the material change of circumstances required or compelled, in Jessica's best interests, the change of custody is not clearly erroneous.

C

[9] [¶ 26] April contends the trial court erred in failing to weigh James's incidents of domestic violence in arriving at its decision to change custody.

[10] [¶ 27] In *Reeves v. Chepulis*, 1999 ND 63, ¶¶ 11–12, 591 N.W.2d 791, we recently explained the domestic violence presumption:

> A trial court's evaluation of evidence of domestic violence in a custody determination is guided by subsection (j) of N.D.C.C. § 14–09–06.2(1). Section 14–09–06.2(1)(j) was amended in 1993 to create a rebuttable presumption against awarding custody to a parent who had perpetrated domestic violence when the court found "credible evidence that domestic violence has occurred." *See* 1993 N.D. Sess. Laws ch. 144, § 2. In 1997 the Legislature amended the statute again, raising the level of domestic violence required to trigger the presumption. *See* 19[illegible] Sess. Laws ch. 147, § 2. The presumption is now triggered when the trial court finds: "credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding." *Id.*; *see Divine v. Divine*, 1997 ND 115, ¶ 18, 564 N.W.2d 300 (discussing the effect of the 1997 amendment).
>
> Once the presumption under section 14–09–06.2(1)(j) is triggered, the issue of domestic violence becomes the "paramount factor" in the trial court's custody decision. *Engh v. Jensen*, 547 N.W.2d 922, 924 (N.D.1996). The presumption prevents an abusive parent from obtaining custody of the child unless the abusive parent proves "by clear and convincing evidence that the best interests of the child require" the abusive parent to participate in or have custody. *Id.* (citing N.D.C.C. § 14–09–06.2(1)(j)); *see also Zuger v. Zuger*, 1997 ND 97, ¶ 31, 563 N.W.2d 804.
>
> Evidence of domestic violence which is insufficient to trigger the presumption nevertheless remains one of the best-interest factors to be considered by the court under N.D.C.C. § 14–09–06.2. *See Reeves*, 1999 ND 63, ¶ 15, 591 N.W.2d 791; *Ramstad v. Biewer*, 1999 ND 23, ¶ 21, 589 N.W.2d 905; *Zimmerman v. Zimmerman*, 1997 ND 182, ¶ 7, 569 N.W.2d 277; *Huseers v. Huseers*, 1997 ND 33, ¶ 7, 560 N.W.2d 219.

[11–13] "Domestic violence" is defined in N.D.C.C. § 14–07.1–01(2) as including:

> physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members.



The domestic violence presumption is not confined to circumstances in which a parent or child is the direct victim of the violence, but includes "persons who are in a dating relationship," or "persons who are presently residing together or who have resided together in the past." *Anderson v. Henstad*, 548 N.W.2d 410, 413 (N.D. 1996); N.D.C.C. § 14–07.1–01(4). When the original custody decree is entered upon default or based upon a stipulation of the parties, the trial court must consider all relevant evidence, including pre-divorce domestic violence, in deciding a change-of-custody issue. *See Wetch v. Wetch*, 539 N.W.2d 309, 312 (N.D.1995). *See also Kraft v. Kraft*, 554 N.W.2d 657, 659 (N.D. 1996). When a trial court addresses whether evidence of domestic violence triggers the presumption under N.D.C.C. § 14–09–06.2(1)(j), we require the court to make specific and detailed findings regarding the effect the allegations of domestic violence have on the presumption. *See Kasprowicz v. Kasprowicz*, 1998 ND 68, ¶ 13, 575 N.W.2d 921. Specific factual findings are not required when the evidence of domestic violence does not rise to the level triggering the presumption. *See Reeves*, 1999 ND 63, ¶¶ 13, 16, 591 N.W.2d 791.

[14] [¶ 28] The trial court's written findings and conclusions on the domestic violence issue are brief. The court said "there has been abuse by both of the parties toward each other, but none recently," and noted James "has received treatment" since then. The trial court's oral findings, which can be considered by this Court if they do not conflict with the written findings, *see generally Fenske v. Fenske*, 542 N.W.2d 98, 102 (N.D.1996), further explained:

> There is a history of domestic violence existing between the parties, in which both parties participated ... but which [James] was more abusive towards [April] .... These circumstances occurred before the birth of the child. There have been no recent circumstances of domestic violence. [James] has sought counseling and appears to exhibit proper anger management at the present time. The presumption of custody not being with the ... father, comes into play, but ... this presumption is overcome by the circumstances of the individuals, the previous findings that the Court just made on domestic violence, and the findings regarding the best interests of the child including, but not limited to, [April's], inadequate capability for parenting.

[¶ 29] April relies on James's harassment of her family, his hitting her during the marriage, a marital rape and a tire slashing incident after the marriage to show James should not be entitled to custody. James denied that the telephone calls he made to some of April's relatives were harassment. James denied raping April and rape charges were dropped in California when April admitted in a signed statement that she had lied about the incident. James admitted hitting April once during the marriage because she had hit Jessica. The only alleged incident of domestic violence to occur after James and April separated in 1993 was in 1995 when James brandished a knife and slashed his girlfriend's car tires he had bought for her after discovering her at home with another man. *Compare Ryan v. Flemming*, 533 N.W.2d 920, 923–24 (N.D.1995) (holding father's acts of breaking flower pot and pulling phone off the wall which produced no actual injury to household members were insufficient to raise domestic violence presumption).

[¶ 30] The trial court found there had been no recent incidents of domestic violence and James has been taking anger management classes and counseling. We agree the evidence of domestic violence is remote in time. More important, however, the trial court found any presumption against custody arising against James from the incidents of domestic violence was rebutted by the same [illegible]s that necessitated the change of cu[illegible]

[¶31] We believe April's mental inability to parent Jessica, coupled with James's legitimate attempts to receive professional help to control his anger, constitute clear and convincing evidence under N.D.C.C. § 14-09-06.2(1)(j) that the best interests of the child require James to have custody of Jessica. We conclude the evidence in this record supports the trial court's findings and conclusions that James has rebutted any presumption against custody of Jessica arising from his past incidents of domestic violence.

III

[15] [¶32] We have reviewed April's other claims of error and deem them to be without merit. The GAL did not apply an improper domestic violence standard under North Dakota law in evaluating the evidence of domestic violence. The trial court did not err in failing to place custody of Jessica with the fiancee of April's brother, rather than James, based on the record before the trial court. Having found the best interests of Jessica required a change of custody to James who lives in California, the trial court was not further required to find separately that a move to the state of California would be in Jessica's best interests.

[¶33] The judgment is affirmed.

[¶34] SANDSTROM, NEUMANN, MARING, and KAPSNER, JJ., concur.

1999 ND 107

**Deborah F. RIEHL, Plaintiff and Appellant,**

**v.**

**Andrew J. RIEHL, Defendant and Appellee.**

**No. 980246.**

Supreme Court of North Dakota.

June 18, 1999.

In divorce proceeding, the District Court, Morton County, South Central Judicial District, Donald L. Jorgensen, J., granted parties a divorce, divided their marital property, placed parties' minor children in ex-wife's custody, and ordered ex-husband to pay rehabilitative spousal and child support. Ex-wife appealed award of spousal support. The Supreme Court, Maring, J., held that award of rehabilitative spousal support for only the period of time commensurate with ex-wife's period of rehabilitation was clearly erroneous.

Reversed and remanded.

Sandstrom, J., filed a dissenting opinion.

1. Divorce ⇐286(6.1)

Trial court's spousal support determination in a divorce proceeding is treated as a finding of fact which the Supreme Court will not set aside on appeal unless clearly erroneous.

2. Appeal and Error ⇐1008.1(5)

Finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, there is no evidence to support it, or, although there is some evidence to support it, on the entire record the Supreme Court is left with a definite and firm conviction a mistake has been made. Rules Civ.Proc., Rule 52(a).

3. Divorce ⇐245(2), 247

Factors in making a determination of spousal support in a divorce proceeding both as to amount and duration, include the respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material.

4. Divorce ⇐243

Although a trial court need not make specific findings as to each factor used in making a determination of spousal support in a divorce proceeding, the Supreme Court must be able to discern a rationale for its determination.

5. Divorce ⇐237

To be awarded spousal support in a divorce proceeding, the trial court must find the spouse to be "disadvantaged."

6. Divorce ⇐237

"Disadvantaged" spouse, entitled to award of spousal support in a divorce proceeding, is one who has foregone opportunities or lost advantages as a consequence of the marriage and who has contributed during the marriage to the supporting spouse's increased earning capacity.

See publication Words and Phrases for other judicial constructions and definitions.

7. Divorce ⇐247

Award of rehabilitative spousal support to ex-wife, a homemaker of 24 years, for a period commensurate with the length of re-education or rehabilitation, at which time her earning capability as a nurse would likely be half of that of ex-husband, who earned $52,000 a year as a boilermaker, was clearly erroneous.

8. Divorce ⇐247

Permanent support is appropriate in a divorce proceeding when the economically disadvantaged spouse cannot be equitably rehabilitated to make up for the opportunities and development she lost during the course of the marriage.

9. Divorce ⇐247

Rehabilitative spousal support is appropriate in a divorce proceeding when it is possible to restore an economically disadvantaged spouse to independent economic status, or to equalize the burden of divorce by increasing the disadvantaged spouse's earning capacity.

10. Divorce ⇐247

"Equitable" approach to determining rehabilitative spousal support in a divorce proceeding attempts to provide education, training, or experience that will enable the recipient to achieve adequate or appropriate self-support while improving her employment skills.

11. Divorce ⇐247

There is no ready formula to determine what amounts to "adequate" or "appropriate" rehabilitative support in a divorce proceeding; in making that determination, however, a trial court should consider the duration of the marriage, the parties' earning capacities, the value of the marital property and other judicially-recognized factors.

12. Divorce ⇐245(2)

Typically, the trial court should consider the marital property division when setting the amount of spousal support in a divorce proceeding.

13. Divorce ⇐247

"Equitable" rehabilitative support in a divorce proceeding goes further than minimal self-sufficiency; it aims to mitigate marital disadvantage caused by the impact at divorce of an economic role assumed during marriage.

14. Divorce ⇐247

Trial court should have considered whether permanent spousal support was equitable to offset permanent economic disadvantage suffered by ex-wife as a con-