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Child Custody - Modification: Parentification of an Older Sibling Babysitting a Younger Sibling

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CHILD CUSTODY—MODIFICATION:
PARENTIFICATION OF AN OLDER SIBLING BABYSITTING
A YOUNGER SIBLING

Mayo v. Mayo, 2000 ND 204, 619 N.W.2d 631

I. FACTS

Pamela Mayo Banjac (Banjac) and William Mayo (Mayo) divorced in 1995.¹ Banjac gained primary custody of their three minor children: Garnet, Caitlin, and Nicholas.² Four years later, Mayo moved for a change of custody based on the alleged deterioration of Banjac's physical, mental, and financial conditions.³

The parties agreed that Dr. Rick P. Ascano, a licensed clinical psychologist, would conduct a parental capacity psychological evaluation and testify as a neutral expert witness as to his findings regarding custody modification.⁴ Dr. Ascano reported Banjac suffered from fibromyalgia⁵ and

1. Brief for Appellant at 4, *Mayo v. Mayo*, 2000 ND 204, 619 N.W.2d 631 (No. 20000032). Banjac and Mayo were married on April 24, 1982, and divorced on October 5, 1995. *Id.*

2. *Mayo v. Mayo*, 2000 ND 204, ¶ 2, 619 N.W.2d 631, 633; *see also* Appellant's Brief at 4, *Mayo* (No. 20000032). At the time of the divorce and afterward, both parties lived in Wahpeton, North Dakota. Appellant's Brief at 4, *Mayo* (No. 20000032). Banjac was a homemaker, and Mayo was a doctor. *Id.* Mayo stipulated that custody of the children be given to Banjac in the divorce despite being aware of Banjac's medical problems, which included fibromyalgia and migraine headaches. *Mayo*, ¶¶ 2, 55, 619 N.W.2d at 633, 643.

3. *Mayo*, ¶ 2, 619 N.W.2d at 633; *see also* Appellant's Brief at 4-5, *Mayo* (No. 20000032). Banjac went to Bismarck to visit her father on March 5, 1999, and she married Dr. Boris Banjac, on March 6, 1999, in Bismarck. Appellant's Brief at 4, *Mayo* (No. 20000032). Banjac planned to relocate to Sauk Rapids, Minnesota, which is located one mile from St. Cloud, Minnesota, and is within the 150-mile radius of Wahpeton, North Dakota, stipulated to in Banjac and Mayo's divorce decree. *Id.* On March 5, 1999, Mayo's attorney served Banjac with the motion for change of custody. *Id.* Mayo alleged Banjac's migraines and fibromyalgia constituted a deterioration of her physical and mental condition even though Banjac's health had actually improved with medication since the divorce. *Mayo*, ¶ 55, 619 N.W.2d at 643 (Maring, J., dissenting).

4. *Mayo*, ¶ 3, 619 N.W.2d at 633. Dr. Rick P. Ascano is a clinical psychologist who has regularly testified as an expert witness in custody cases since 1984. Brief for Appellee at 25, *Mayo v. Mayo*, 2000 ND 204, 619 N.W.2d 631 (No. 20000032). Dr. Ascano has specialized training in custody issues and has a board certification in child custody evaluation procedure. *Id.* Dr. Ascano's practice is called R. P. Ascano, Ph.D. & Associates, Forensic Consultation & Psychotherapy, and is located in Breckenridge, Minnesota. Transcript of Proceedings on Aug. 10, 1999 at 169, *Mayo* (No. 20000032). Dr. Ascano's fee of \$1800 was to be fully paid by Mayo. Appellant's Brief at 5, *Mayo* (No. 20000032).

5. Fibromyalgia is the chronic inflammation of a muscle, ligament, or tendon (the fibrous tissues in the body) with an overgrowth of the connective tissue, which causes pain in the surrounding fibrous tissues. *See* STEDMAN'S MEDICAL DICTIONARY 649 (26th ed. 1995) (defining fibromyositis, which is also known as fibromyalgia); *see also* *Fibromyalgia*, available at

migraine headaches, causing her to lie down for one hour at least once a month while Garnet, age fourteen, watched the younger children, ages eleven and six.⁶ Dr. Ascano concluded that this unexpected babysitting of her younger siblings resulted in Garnet's parentification.⁷

Parentification "refers to a child assuming adult responsibilities and acting as a care provider for younger siblings."⁸ Parentification affects a child by forcing the child to be more responsible than is age appropriate, creating other psychological difficulties, and resulting in the child having difficulties forming bonds with peers as an adult.⁹

Dr. Ascano testified as to the effects of parentification in light of the statutory best interest factors.¹⁰ He reported that the children were equally bonded to both parents and that both parents had average parenting abilities.¹¹ Dr. Ascano recommended that if the court decided to change custody to Mayo, "Mayo should undergo individual therapy to help him

<http://health.yahoo.com> (last visited Nov. 11, 2002) (listing alternative names for fibromyalgia, one being fibromyositis) [hereinafter *Fibromyalgia* on yahoo]; *Fibromyalgia Network*, available at <http://www.fmnetnews.com> (last visited Nov. 11, 2002) (defining fibromyalgia) [hereinafter *Fibromyalgia Network*]. Approximately three to six million Americans suffer from fibromyalgia according to the American College of Rheumatology, with the primary sufferers being women of childbearing age. *Fibromyalgia*, available at <http://nih.gov/niams/healthinfo/fibrofs.htm> (last visited Nov. 11, 2002) [hereinafter *Fibromyalgia* on nih]. The cause of the disorder is unknown, but can be linked to physical or emotional trauma. See *Fibromyalgia* on yahoo *supra*. There is no proven cure, but treatment includes education, physical therapy, and counseling coupled with low-dose anti-depressants or anti-inflammatory drugs. See *id.* (noting that symptoms may come and go over months or years). Symptoms include pain, fatigue, sleep disorder, chronic headaches, and sensitivities to odors, noise, bright lights, and various foods and medications. *Fibromyalgia Network supra*. Fibromyalgia is chronic, but its symptoms wax and wane. *Id.*

6. *Mayo*, ¶ 4, 619 N.W.2d at 633-34.

7. *Id.* at 634. Parentification is not a diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994), but is a construct developed by psychologists, which has various definitions and effects depending upon the expert. *Id.* ¶ 18, 619 N.W.2d at 636. Parentification is not a diagnosis, but is a descriptive term. Interview with Val Farmer, psychologist, MeritCare, Fargo, North Dakota. (Aug. 10, 2001) [hereinafter Farmer]. Parentification is more than just babysitting, it is when an older sibling adopts a disciplinary or caretaker role with the younger sibling even when the parent is present, and can occur with or without the parent's support. *Id.*

8. *Mayo*, ¶ 4, 619 N.W.2d at 633-34.

9. *Id.* ¶ 7, 619 N.W.2d at 634.

10. *Id.* ¶ 5. The statutory best interest factors are found in section 14-09-06.2(1) of the North Dakota Century Code. N.D. CENT. CODE § 14-09-06.2(1) (2000). The considerations used to determine the best interest of a child include the following: the emotional connection between parent and child; the ability of the parent to love and guide the child; the ability of the parent to provide food, clothing, and shelter; the length of time the child has lived with the parent in a nurturing environment; stability; moral fitness of the parent; mental and physical health of the parent; the home, school and community; the child's preference; any incidence of domestic violence; the parent-child relationship in the home; whether any false allegations which harm the child were made; and any other factors the court deems to be relevant to the particular dispute. See *id.* (listing the criteria the court uses to determine a child's best interest); see also *Mayo*, ¶ 26, 619 N.W.2d at 637 (stating the trial court must use the best interest factors set forth in section 14-09-06.2).

11. *Mayo*, ¶ 5, 619 N.W.2d at 634.

manage conflicts and stress and should participate in family parenting therapy.”¹² However, if the court decided to leave custody with Banjac, Dr. Ascano concluded that “a guardian ad litem should be appointed to evaluate Banjac’s ability to parent considering her chronic pain, and the children should become involved in step-family therapy followed by blended-family therapy to facilitate the adjustment of all the family members into one unit.”¹³

Dr. Ascano testified that the oldest child was likely to endure significant psychological harm if Banjac remained the custodial parent.¹⁴ He further testified that counseling and hiring a nanny could eliminate parentification even if Banjac retained custody of the oldest child.¹⁵ However, this backup childcare needed to be available at all times in order to stop the parentification process and alleviate the oldest child’s anxiety caused by not knowing when she may have to care for her younger siblings.¹⁶ Dr. Ascano testified that the oldest child was experiencing anticipatory anxiety because she did not know when she would need to babysit her younger siblings.¹⁷ Dr. Ascano stated that if the child lived with Mayo, the child would not endure any psychological harm because she would not be anxious about having to care for her younger siblings, and thus, she would not be subject to parentification.¹⁸

12. *Id.* ¶ 6. Family therapy is therapy in which a family in conflict meets as a group with the therapist and explores the family relationship and process. *STEDMAN’S MEDICAL DICTIONARY* 1441 (26th ed. 1995). Because Mayo is the parent, his family counseling would be family parenting therapy and would help him deal with parenting issues. *Id.* Individual therapy, also known as dyadic psychotherapy, involves only the patient and therapist, is based primarily on communications with the patient, and addresses emotional, behavioral, and personality disorders. *Id.* at 1167, 1441.

13. *Mayo*, ¶ 6, 619 N.W.2d at 634. Step-family therapy is used to work on family dynamics, or interaction when a stepparent is brought into a family, and helps to define the roles of each family member. Telephone Interview with John Tyler, Ph.D. ABPP, Family Institute PC (Aug. 2, 2001) [hereinafter Tyler]. Blended-family therapy is used to help two individual parents with children merge into a single-family unit, usually after the marriage of the two parents. *Id.* In this case, both Dr. Banjac and Pamela Banjac had children from a previous marriage. Brief for Appellant at 8, *Mayo v. Mayo*, 2000 ND 204, 619 N.W.2d 631 (No. 20000032).

14. *Mayo*, ¶ 7, 619 N.W.2d at 634.

15. *Id.* The nanny would have to be available twenty-four hours a day to eliminate the parentification. *Id.*

16. *Id.*

17. Appellant’s Brief at 9, *Mayo* (No. 20000032). Anticipatory anxiety is the fear that a future event may happen. Tyler, *supra* note 13. It is harmful to the child because of the fear and worry associated with wondering when she will next be left alone to care for her siblings. MARK H. BEERS & ROBERT BERKOW, *THE MERCK MANUAL OF DIAGNOSIS AND THERAPY* 1512-13 (17th ed. 1999).

18. *Mayo*, ¶ 7, 619 N.W.2d at 634.

According to Dr. Ascano, the easiest way to halt the parentification process was to change custody.¹⁹ He recommended such a change of custody based on the combination of Banjac's health problems and Mayo's recognition of his need to decrease his working hours.²⁰ The trial court temporarily remanded custody to Mayo.²¹ However, Banjac was given four days to obtain a childcare provider and to provide a plan approved by Dr. Ascano to eliminate the oldest child's parentification if she desired to regain custody of the children.²²

Instead of finding a childcare provider, Banjac obtained a second opinion that rebutted the finding of parentification by Dr. Ascano.²³ Banjac retained Dr. Thomas Will, a clinical psychologist, and Mayo retained his own clinical psychologist, Dr. Stephen Timm.²⁴ After hearing from the parties, their experts, and Dr. Ascano, the trial court granted Mayo's motion for a change in custody because of Banjac's inability to care for the children and the potential harm to the oldest child through parentification.²⁵ Banjac appealed to the North Dakota Supreme Court, which *held* that: (1) parentification constitutes a material change in circumstances,²⁶ (2) parentification outweighs the custodial stability factor in regard to the best interests of the children,²⁷ (3) the trial court did not have to exhaust all other remedies before changing custody,²⁸ and (4) the trial court did not err in finding a substantial change in circumstances requiring a change of custody that was in the best interest of the children.²⁹

II. LEGAL BACKGROUND

The Diagnostic and Statistical Manual of Mental Disorders does not list parentification as a diagnosis, instead, it is considered a "construct" that has

19. *Id.*

20. *Id.*

21. *Id.* ¶ 8, 619 N.W.2d at 634-35.

22. *Id.*

23. *Id.* ¶ 52, 619 N.W.2d at 642 (Maring, J., dissenting).

24. *Id.* ¶¶ 10-11, 619 N.W.2d at 635. Dr. Stephen Timm is a licensed self-employed clinical psychologist in Fargo, North Dakota. Transcript of Proceedings on Dec. 16, 1999, at 331, Mayo v. Mayo, 2000 ND 204, 619 N.W.2d 631 (No. 20000032). He has been in private practice since 1978 and is on the National Register of Health Service Providers in Psychology. *Id.* Dr. Thomas Will is a licensed clinical psychologist in Minneapolis, Minnesota, and is employed by Gary Fischler and Associates and the Institute for Forensic Psychology. *Id.* at 211. Dr. Will has done previous custody evaluations for divorce and custody cases. *Id.* at 212.

25. Mayo v. Mayo, 2000 ND 204, ¶ 12, 619 N.W.2d 631, 635.

26. *Id.* ¶ 25, 619 N.W.2d at 637.

27. *Id.* ¶ 30, 619 N.W.2d at 638.

28. *Id.* ¶ 32.

29. *Id.* ¶ 38, 619 N.W.2d at 639.

been developed by psychologists and given significantly different definitions.³⁰ This parentification construct has been addressed by several state courts in regard to decisions involving child custody,³¹ termination of parental rights,³² and intervention in abuse and neglect proceedings.³³ A court may use parentification testimony in one of three ways: it may not address parentification in deciding the case,³⁴ it may use parentification testimony as one of many factors,³⁵ or it may decide the case using

30. *Id.* ¶ 18, 619 N.W.2d at 636; see generally DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994). A construct is an invention or fabrication. WEST'S LEGAL THESAURUS/DICTIONARY 178 (1985). Parentification is cited in sexual abuse literature in regard to role imbalance, and in family therapy related research. See generally CAVNET, available at <http://www.calib.com> (last visited Nov. 11, 2002) (searching for the term "parentification" will locate many articles that describe it).

Many substance-abusing parents also recount histories of growing up in households in which there was a blurring of boundaries between parental and child roles. As young children, such parents often assumed primary responsibility for taking care of household and family needs. Although it may have filled a void or a need within the family, this role reversal may have also seriously interfered with the parent's timely acquisition of age-appropriate life skills and experiences. Thus, as adults, such individuals often have an impaired ability to form truly mutual adult relationships and a healthy self-concept that are prerequisites to successful parenting.

CAVNET, *Characteristics of Parents at Risk*, available at <http://www.calib.com> (last modified May 30, 2002). Dr. Val Farmer, a psychologist in Fargo, North Dakota, defined parentification not as a diagnosis, but as a descriptive term that refers to an older sibling going beyond baby-sitting by taking on a parental disciplinary role with a younger sibling, with or without parental support. Farmer, *supra* note 7.

31. See *Myers v. Myers*, 14 Phila. Co. Rptr. 224, 235 (Pa. Com. Pl. 1986) (hearing expert testimony in regard to parentification in a child placement proceeding); see also *Cloutier v. Lear*, 691 A.2d 660, 662 (Me. 1997) (deciding a motion to modify custody based on testimony about the adult-to-adult relationship between a parent and child, which resulted in unhealthy parentification).

32. See *In re Tabitha T.*, 722 A.2d 1232, 1234 (Conn. App. 1999) (listing parentification as one of many physical, sexual, and mental traumas present in a termination of parental rights hearing); see also *In re Nelson T.*, 1999 Conn. Super. LEXIS 668, at *1, *26-*27 (Conn. Super. Ct. Mar. 15, 1999) (noting that in a termination of parental rights case, the oldest of six children, age eight at the time, was parentified and tried to care for his younger siblings and mother); *In re Michael N.*, 1998 Conn. Super. LEXIS 991, at *2, *13 (Conn. Super. Ct. Apr. 13, 1998) (noting that a therapist identified many issues common to older children, including parentification, present in the oldest child in a termination of parental rights hearing).

33. See *In re Michael Ray T.*, 525 S.E.2d 315, 319 (W.Va. 1999) (listing parentification among the many abuses and neglect suffered by a five-year-old while in the parents' care).

34. See *Myers*, 14 Phila. Co. Rptr. at 235, 254 (stating as uncontradicted testimony that the mother was a loving, caring parent who placed the children's needs first despite Dr. Lewis' testimony about the oldest child being parentified while in the care of the mother and not the father); see also *In re Michael Ray T.*, 525 S.E.2d at 319, 321 (stating the five-year-old child, the oldest of three children, exhibited unhealthy parentification when entering foster care, however, parentification did not apply to the issue before the court, which was whether to allow the foster parents to intervene in the abuse and neglect hearings in which the foster children and their biological parents were involved); *In re Michael N.*, 1998 Conn. Super. LEXIS 991, at *13, *23-*27 (listing seven findings of the court, but not mentioning the parentification testified to by Dr. Berkowitz).

35. See *Cloutier*, 691 A.2d at 664 (holding the adult-to-adult relationship between mother and daughter resulted in the child's involvement in the conflict between the parents); see also *In re Tabitha T.*, 722 A.2d at 1234, 1237 (finding harm to the children as a result of the parents' acts,

parentification as the determinative factor.³⁶ In Maine and Pennsylvania, the courts have used parentification as one of many factors in deciding the best interests of the children.³⁷

A. *CLOUTIER V. LEAR*: USING PARENTIFICATION AS ONE OF MANY REASONS TO CHANGE CUSTODY

In *Cloutier v. Lear*,³⁸ the Supreme Court of Maine upheld the modification of a three-year-old divorce judgment providing the mother with primary custody of the parties' two minor children.³⁹ The court considered whether there had been a substantial change in circumstances and whether modification was in the best interests of the children in determining whether a modification of the custody arrangement was justified.⁴⁰

The trial court found that the mother failed to comply with a number of court orders, denigrated the father to his children, frustrated contact between the father and the children, and interfered with the father's parent-child relationship.⁴¹ The court also found that the children suffered "significant emotional problems because of the strife."⁴² A therapist who spent time with the children testified that the mother had an adult-to-adult relationship with the older child.⁴³ This made the child want to protect her mother, and thus, she became involved in the parents' discourse.⁴⁴ The child strongly identified with the strife between the parents, and this caused parentification.⁴⁵ Hence, the child became emotionally distraught and felt her mother was emotionally controlling her in an unhealthy and manipulative manner.⁴⁶

The trial court found that "the best interest of the child requires developing the best possible relationship with *both* parents."⁴⁷ After

which included sexual abuse, physical abuse, and parentification); *In re Nelson T.*, 1999 Conn. Super. LEXIS 668, at *38-*41 (listing parentification as one of many detriments to the children in the court's decision to terminate parental rights).

36. See *Mayo v. Mayo*, 2000 ND 204, ¶ 30, 619 N.W.2d 631, 638 (holding the trial court did not err in finding the danger of damage due to parentification outweighed the stability of not removing the children from their home).

37. *Cloutier*, 691 A.2d at 664; *Myers*, 14 Phila. Co. Rptr. at 235.

38. 691 A.2d 660 (Me. 1997).

39. *Cloutier*, 691 A.2d at 661. The daughter was twelve and the son was eight when the case was tried. *Id.*

40. *Id.* at 662.

41. *Id.* at 662-63.

42. *Id.*

43. *Id.* at 662.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 663 (quoting *Sheldon v. Sheldon*, 423 A.2d 943, 946 (Me. 1980)).

considering all factors, the court upheld the trial court's decision to change custody of the children to the father, stating that continued exposure to the mother's conduct would impair or destroy the children's relationship with their father.⁴⁸ Thus, parentification was one of several factors, including parental alienation, used to decide that a change in custody was in the best interests of the children.⁴⁹

B. *MYERS V. MYERS*: CONSIDERING PARENTIFICATION, BUT FINDING IT UNNECESSARY TO CHANGE CUSTODY

In *Myers v. Myers*,⁵⁰ the Philadelphia County Court of Common Pleas found that it was in the best interests of the two children, ages eleven and ten, to remain with their mother, the custodial parent.⁵¹ The court made this decision despite a psychologist's evaluation that the older child was parentified and playing the role of the parent to her younger sibling while in the presence of their mother, but not in the presence of their father.⁵² At the time of trial, the children had lived with their mother for five years.⁵³

Dr. Kenneth Lewis, a custody specialist who performs comparative studies in child custody cases, testified at trial as an expert witness.⁵⁴ Dr. Lewis stated that the older child was parentified, essentially playing the role of the parent for her younger brother.⁵⁵ Dr. Lewis also testified that when the children were with their father and stepmother, parentification was not visible.⁵⁶ However, Dr. Lewis had not done a comparative study because she resided out-of-state, and visiting both biological parents was not possible.⁵⁷

In addition to Dr. Lewis, the father hired a psychologist, Dr. Jessica Lippman, to evaluate the children.⁵⁸ Dr. Lippman could not make a comparative recommendation because she did not interview the mother, and

48. *Id.* at 664.

49. *Id.* at 662-63. Parental alienation is the frustration or intentional interference of a parent's attempt to exercise visitation and the alienation of the child from the visiting parent. *Hendrickson v. Hendrickson*, 1999 ND 37, ¶ 8, 590 N.W.2d 220, 223.

50. 14 Phila. Co. Rptr. 224 (Pa. Com. Pl. 1986).

51. *Myers*, 14 Phila. Co. Rptr. at 266.

52. *Id.*

53. *Id.* at 226, 228. The parents separated five years prior to this litigation and divorced three years prior to the litigation. *Id.* at 226.

54. *Id.* at 234. "Comparative studies" is a broad term used to describe a study in which two or more options are studied in order to determine the best alternative. Tyler, *supra* note 13.

55. *Myers*, 14 Phila. Co. Rptr. at 235.

56. *Id.*

57. *Id.* at 234-35.

58. *Id.* at 236.

thus, testified only to the fitness of the father.⁵⁹ Dr. Lippman recommended that the older child should live with her father in Chicago and that both children needed to remain in counseling regardless of the court's placement decision.⁶⁰

Dr. Schechter, a board certified child psychiatrist who testified on behalf of the child advocate, did a comparative child custody study.⁶¹ He testified that both parents desired for the children to have a relationship with their mother and father.⁶² Dr. Schechter concluded that the children should be separated.⁶³ He further added the older child should be with her father and the younger child with his mother so they would not have the "constant source of friction from each other as well as the source of friction from the parents."⁶⁴

Dr. Schwartz, a clinical psychologist and director of Montgomery County Guidance Clinic, testified as an expert on behalf of the mother.⁶⁵ Dr. Schwartz found that when the younger child was subjected to the pressure of the custody dispute, caused by the father's questions regarding where the child wanted to live and if things were "okay" at his mother's home, the child became tense and anxious.⁶⁶ The older child was similarly being pressured by her father to choose him over her mother.⁶⁷ This caused her anxiety because if she chose her mother, she would have risked alienating her father completely.⁶⁸ Dr. Schwartz determined that there was no justification to warrant a change in custody with regard to either child.⁶⁹

The court considered each expert's testimony in light of the facts and circumstances of the case.⁷⁰ It noted that Dr. Lewis was an expert in comparative child custody studies, yet he did not do a comparative study.⁷¹ Dr. Lippman recommended that the older child live with her father, but the court did not give Dr. Lippman's opinion any weight regarding custody

59. *Id.* at 238.

60. *Id.* at 237-38.

61. *Id.* at 242; *see also* comparative studies defined *supra* note 54.

62. *Myers v. Myers*, 14 Phila. Co. Rptr. 224, 242 (Pa. Com. Pl. 1986).

63. *Id.*

64. *Id.*

65. *Id.* at 243.

66. *Id.*

67. *Id.* at 244.

68. *Id.* The oldest child felt that she had the emotional support of her mother even if she chose to live with her father, but if she chose to live with her mother, she felt she would lose the emotional support of her father. *Id.*

69. *Id.* at 246.

70. *Id.* at 251-52.

71. *Id.* at 252.

because she never interviewed the mother, never saw how the children interacted with their mother, and never saw their home environment.⁷²

The court weighed the expert testimony with the “uncontradicted testimony” that the mother was a good and loving parent who placed the children’s needs above her own.⁷³ The court concluded that the father did not establish a substantial change in circumstances.⁷⁴

In regard to the best interests of the children, the court found both parents to be fit; therefore, it weighed the best interest factors to determine the best placement for the children.⁷⁵ The children had always lived with their mother, their primary caregiver.⁷⁶ The mother had an active and open relationship with the children.⁷⁷ With their mother, the children had their own rooms, many friends at school, a safe environment to play, and several relatives nearby.⁷⁸

Although both parents were fit, the court balanced the best interest factors and decided the father did not have as many advantages as the mother to offer the children.⁷⁹ The father defied the previous court order stipulated to by the parties and refused to return the children to their mother after his summer visitation.⁸⁰ He enrolled the children in school and had them psychologically evaluated in preparation for the custody motion he later filed.⁸¹ Furthermore, he pressured the children in an attempt to obtain information about their mother and home life that he could use against her in the court case.⁸² This pressure caused the children emotional stress and fear associated with having to choose loyalties between their parents.⁸³

72. *Id.* at 252-53. Stephen Herman, M.D., associate clinical professor of psychiatry at Mount Sinai School of Medicine in New York, strongly urges psychiatrists to turn away requests for unilateral child custody evaluations which involve seeing only one parent with a child. *Custody Cases Can Blur Line Between Therapy and Advocacy*, PSYCHIATRIC NEWS, Dec. 18, 1998, available at <http://www.psych.org>. Herman stated:

[Unilateral child custody evaluations] lack credibility because you are getting only one side of the story. In addition, the lawyer may use you for this case because he or she is interested in winning and knows you can be bought. So it isn’t worth it; it’s a disservice to you, the profession, and to desperate families.

Id.

73. *Myers v. Myers*, 14 Phila. Co. Rptr. 224, 254 (Pa. Com. Pl. 1986).

74. *Id.* at 255.

75. *Id.* at 256.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 256-57.

80. *Id.* at 258.

81. *Id.*

82. *Id.*

83. *Id.*

The court concluded that the majority of the friction between the children was due to this custody dispute.⁸⁴ Because the friction would likely disappear when the case was settled, there was no reason to separate the siblings.⁸⁵ The court stated, “If psychiatrists and psychologists knew how to achieve a child’s best interest, deciding child custody cases would be comparable to diagnosing and treating a known medical condition. But psychiatrists and psychologists don’t know—as the record of their disagreement in this case amply demonstrates.”⁸⁶ The court determined that it was the final decision-maker regarding the best interests of the children and that its decision must be made after exploring and developing all the pertinent facts and circumstances in the case.⁸⁷ Therefore, the court concluded that the best interests of the children required that they live with their mother and that she retain physical custody of both children, despite the psychologists’ opinions regarding parentification.⁸⁸

Like in Maine and Pennsylvania, post-custody modification in North Dakota requires a material or substantial change in circumstances since the last court order.⁸⁹ North Dakota also requires that the change in custody is in the best interest of the child.⁹⁰

C. THE BEST INTEREST FACTORS IN NORTH DAKOTA

In 1973, North Dakota courts began using the best interest of the child factors when determining child custody issues.⁹¹ In 1979, the common law best interest factors were codified and have since been amended by adding three more factors.⁹² Since its codification, North Dakota courts have

84. *Id.* at 265.

85. *Id.*

86. *Id.* at 265-66.

87. *Id.* at 266.

88. *Id.*

89. *Holtz v. Holtz*, 1999 ND 105, ¶ 9, 595 N.W.2d 1, 4. A material change is a significant change that has occurred since the original custody order that requires the court to change custody to serve the best interest of the child. *Id.* ¶ 10. It can occur if the child’s current environment may endanger the child’s physical health, emotional health, or emotional development. *Id.* ¶ 17, 595 N.W.2d at 6.

90. *Id.* ¶ 9, 595 N.W.2d at 4.

91. *Odegard v. Odegard*, 259 N.W.2d 484, 486 (N.D. 1977).

92. *Kathlene B. Garner, Infants-Parent and Child: Applying the Rebuttable Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, 72 N.D. L. REV. 155, 156-57 (1996). The three factors most recently added were factor j, evidence of domestic violence; factor k, the interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child’s best interests; and factor l, the making of false allegations by one parent against the other. *Id.* at 156; *see also* N.D. CENT. CODE § 14-09-06.2(1) (2000) (listing the statutory best interest factors).

consistently based child custody determinations on the statutory best interest factors.⁹³

When determining placement of a child, it is not only the fact that a difference exists in the parents regarding one or more of the statutory best interest factors, but that the difference might adversely affect the parent's ability to care for the child.⁹⁴ Both parents can be good and fit parents.⁹⁵ In a close decision between two nearly equal parents, the best interest factors are used to favor one parent over another in determining a child's physical placement.⁹⁶ The factors are considered by the court in light of the effect they have on the parent's ability to care for the child.⁹⁷ The court is not required to make a separate finding of fact on each factor, but the factors it uses should be explained in its opinion.⁹⁸

Thus, section 14-09-06.6(6), which requires a material change in circumstances and that the modification of custody be in the best interest of the children, must be considered in light of the children involved in the custody dispute.⁹⁹ The material change in circumstances must have arisen since the prior order or have been unknown at the time of the prior order.¹⁰⁰ "A material change in circumstances occurs when new facts are presented that were unknown to the moving party at the time the decree was entered."¹⁰¹ Examples of material changes arising after a prior order include frustration of visitation,¹⁰² serious drug abuse, physical abuse, neglect, or an attempted suicide by the primary caregiver.¹⁰³

The modification must also be necessary to serve the best interests of the children.¹⁰⁴ In determining the best interests of the children, the court should look to the statutory best interest factors.¹⁰⁵ Lack of stability is the overriding concern in the determination.¹⁰⁶ The North Dakota Supreme

93. *Hogue v. Hogue*, 1998 ND 26, ¶ 6, 574 N.W.2d 579, 582.

94. *See Ackerman v. Ackerman*, 1999 ND 135, ¶¶ 10-11, 596 N.W.2d 332, 334 (relating the factors the trial court used to determine child placement to the effect the factors had on the parent's ability to care for the child).

95. *Id.*

96. *Id.* ¶¶ 8-9.

97. *Id.*

98. *Id.* ¶ 11.

99. *Mayo v. Mayo*, 2000 ND 204, ¶ 14, 619 N.W.2d 631, 635.

100. *Id.*

101. *Id.* ¶ 16, 619 N.W.2d at 635-36.

102. *Anderson v. Resler*, 2000 ND 183, ¶ 6, 618 N.W.2d 480, 483.

103. *Wright v. Wright*, 463 N.W.2d 654, 655 (N.D. 1990).

104. *Mayo*, ¶ 14, 619 N.W.2d at 635. *Mayo* had the burden of proving a change in custody was required to serve the best interest of the children because he was the moving party. *Id.*; *see also* N.D. CENT. CODE § 14-09-06.6(8) (2000).

105. *See* N.D. CENT. CODE § 14-09-06.2(1) (listing the statutory best interest factors).

106. *In re N.C.C.*, 2000 ND 129, ¶ 24, 612 N.W.2d 561, 567.

Court considered these statutory factors in its review of the trial court's decision in *Mayo v. Mayo*.¹⁰⁷

III. ANALYSIS

In *Mayo*, Justice Neumann penned the majority opinion, in which Chief Justice VandeWalle, Justice Sandstrom, and Justice Kapsner concurred.¹⁰⁸ The Supreme Court of North Dakota upheld the modification of child custody due substantially to parentification.¹⁰⁹ The lone dissenting opinion, by Justice Maring, stated that a mistake had been made and that common sense would have decided the case differently.¹¹⁰

A. MAJORITY OPINION

The majority first analyzed the facts under the two-prong test used to determine whether a change in child custody is warranted under North Dakota Century Code section 14-09-06.6(6).¹¹¹ To modify a court order over two years old, the statute requires a material change in circumstances that has arisen since or was unknown at the time of the prior order.¹¹² The modification must also be necessary to serve the best interests of the children.¹¹³

First, the court looked for a material change in circumstances.¹¹⁴ The court found that Banjac's health problems, namely fibromyalgia and migraine headaches, constituted a material change in circumstances because of the resulting parentification of the oldest child.¹¹⁵ Banjac's illness was present at the time of the divorce and, in fact, had improved since the divorce,¹¹⁶ but the material change resulted from the oldest child beginning the process of parentification.¹¹⁷

The court held that a material change in circumstance had occurred after the divorce, not from Banjac's illness, but from the oldest child becoming parentified.¹¹⁸ The court stated that Banjac was unable to

107. 2000 ND 204, 619 N.W.2d 631.

108. *Mayo*, ¶¶ 25-38, 619 N.W.2d at 637-39.

109. *Id.* ¶ 35, 619 N.W.2d at 639.

110. *Id.* ¶ 54, 619 N.W.2d at 643 (Maring, J., dissenting).

111. *Id.* ¶ 14, 619 N.W.2d at 635.

112. *Id.*

113. *Id.*

114. *Id.* ¶ 16, 619 N.W.2d at 635-36.

115. *Id.* at 636.

116. *Id.* ¶ 55, 619 N.W.2d at 643 (Maring, J., dissenting).

117. *Id.* ¶ 16, 619 N.W.2d at 635-36.

118. *Id.*

consistently care for her children's basic needs.¹¹⁹ The court noted that Banjac's health problems would continue for the rest of her life.¹²⁰ The court found that these health problems were impairing the oldest child's emotional health and would likely impair the middle child in the future.¹²¹ Therefore, the court decided that continuing Banjac's physical custody and control could result in substantial psychological damage to the two oldest children, so a material change in circumstances had occurred.¹²²

The *Mayo* court next analyzed the effects of parentification, defining it as "the process in which a child loses his or her childhood after assuming the responsibilities of a parent."¹²³ According to the majority, the causes of parentification can range from an occasional responsibility within the family as the children grow, a child's feeling of responsibility for the conflict of divorce, or a continuous and constant upbringing of younger siblings.¹²⁴

The effects of parentification can vary, but the common theme identified by the courts is anxiety of the child due to the increased and overwhelming responsibility placed on the child.¹²⁵ The court in *Mayo* found the anxiety resulting from the role reversal in parentification caused sleep loss, obsessive thoughts, perfectionism, over-extension, and depression due to worrying about the younger siblings' well-being.¹²⁶ The court found that these symptoms could cause a problem in the development and emotional health of the child, which could "manifest itself in adulthood in one of two extreme ways."¹²⁷ The first way is by codependency, which results from the child trying to compensate for the lack of care and nurturing he or she received.¹²⁸ The second way is by caring for others to the extent of denying personal emotional needs.¹²⁹

The court found a parentified child may suffer developmental and emotional problems; however, "the greatest loss experienced by a . . .

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* ¶ 18, 619 N.W.2d at 636; see also discussion of parentification *supra* note 7.

124. *Mayo v. Mayo*, 2000 ND 204, ¶ 18, 619 N.W.2d 631, 636; *In re Michael Ray T.*, 525 S.E.2d 315, 319 n.9 (W.Va. 1999); *Ely v. Potter*, No. J93-34, 1994 WL 1031125, at *4 (Va. Cir. Ct. Apr. 6, 1994).

125. *Mayo*, ¶ 19, 619 N.W.2d at 636; *In re Michael Ray T.*, 525 S.E.2d at 319 n.9; *Ely*, 1994 WL 1031125, at *4.

126. *Mayo*, ¶¶ 19-22, 619 N.W.2d at 636-37.

127. *Id.* ¶¶ 17-19, 619 N.W.2d at 636.

128. *Id.* ¶ 17. Codependency is used to describe people who use others as their sole source of identity, value, and well-being because they are addicted to an unhealthy relationship with that other person. Alcoholism, available at <http://alcoholism.about.com/library/glos/bldef57.htm?iam=dpile&terms=codependency> (last visited Nov. 11, 2002).

129. *Mayo*, ¶¶ 17, 619 N.W.2d at 636.

parentified child is the loss of their childhood, although the bitterness, disappointment, depression, and other effects might not be realized until later in their life.”¹³⁰ Even a nurturing adult relationship may not compensate for parentification because the child does not know how to accept affection; the child only knows how to give at the expense of his or her own emotional needs.¹³¹

In incorporating its findings regarding parentification, the court in *Mayo* found that endangering a child’s physical or emotional health, or the impairment of a child’s emotional development through parentification, represented a material change in circumstances, as did the possibility of parentifying the second oldest child.¹³² Because the court found a material change in circumstances, it then considered whether this change warranted a change in custody.¹³³ The second prong of the two-part custody modification test is whether a change in custody is in the best interest of the child.¹³⁴ The best interest of the child must be measured against the stability of the child’s present home and the current relationship with the custodial parent.¹³⁵

The court relied on the testimony of three expert psychologists.¹³⁶ Dr. Ascano, the neutral expert agreed upon by the parties, testified that after he considered parentification, additional information about the parties, and the children, his custody recommendation was no longer a “close call.”¹³⁷ Considering the report of Dr. Timm, the psychologist for Mayo, who “concluded that the weight of the evidence strongly favored granting permanent physical custody to Mayo,” Dr. Ascano changed his recommendation.¹³⁸ Ultimately, the court agreed with both Dr. Ascano and Dr. Timm that the

130. *Id.*

131. *Id.*

132. *Id.* ¶ 25, 619 N.W.2d at 637.

133. *Id.*

134. *Id.* ¶ 38, 619 N.W.2d at 639; *see also* N.D. CENT. CODE § 14-09-06.6 (2000).

135. *In re* N.C.C., 2000 ND 129, ¶ 24, 612 N.W.2d 561, 567 (citing *Blotske v. Leidholm*, 487 N.W.2d 607, 610 (N.D. 1992)). After balancing the child’s best interest with stability, the court may find a change in custody is required. *Myers v. Myers*, 1999 ND 194, ¶ 10, 601 N.W.2d 264, 268. A close call “should be resolved in favor of continuing custody” where the child has been living. *Id.* The ultimate determination of a child’s best interest lies with the court, not with any witness or expert. *Mayo v. Mayo*, 2000 ND 204, ¶ 28, 619 N.W.2d 631, 637 (citing *Severson v. Hansen*, 529 N.W.2d 167, 169 (N.D. 1995)).

136. *Mayo*, ¶ 17, 619 N.W.2d at 636. The three psychologists were Drs. Rick Ascano, Stephen Timm, and Thomas Will. *Id.* ¶¶ 10-11, 17, 619 N.W.2d at 635-36.

137. *Id.* ¶¶ 29-30, 619 N.W.2d at 638. Dr. Ascano did not make a custody recommendation in his written report. *Id.* ¶ 29, 619 N.W.2d at 637.

138. *Id.* ¶¶ 29-30, 629 NW.2d at 637-38. Dr. Ascano’s written report stated custody was too close to call, however, after hearing Dr. Timm’s testimony at trial, Dr. Ascano stated that custody was no longer a close call and should be given to Mayo. *Id.*

oldest child was becoming parentified.¹³⁹ Dr. Will, Banjac's expert, did not agree with Drs. Ascano and Timm in their diagnosis of parentification because he felt that the diagnosis was flawed.¹⁴⁰ However, Dr. Will agreed with Dr. Timm and Dr. Ascano that therapy could correct the parentification process without a change in physical custody.¹⁴¹ The court, finding the oldest child was becoming parentified, ordered a change in physical custody of all three children.¹⁴²

The North Dakota Supreme Court, in *Hendrickson v. Hendrickson*,¹⁴³ stated that alternative remedies must be attempted before changing physical custody of a child.¹⁴⁴ However, the *Mayo* court stated that this only applies in alienation and frustration of visitation cases where the problem is the custodial parent's misbehavior, not an involuntary illness.¹⁴⁵ The court declined to extend the rule to situations other than those that could be eliminated by parental choice.¹⁴⁶ Even though all the expert psychologists in *Mayo* testified that counseling could minimize or alleviate parentification, the North Dakota Supreme Court upheld the change in custody, claiming that Banjac rejected this option when she obtained her own expert, Dr. Will.¹⁴⁷

139. *Id.*

140. Brief for Appellant at 16, *Mayo v. Mayo*, 2000 ND 204, 619 N.W.2d 631 (No. 20000032). Dr. Will listed several reasons for disagreeing with the parentification diagnosis: first, the diagnosis was based on a ten minute portion of a thirty minute interview by Dr. Ascano with Garnet; second, the cause of the parentification and the possibility it was due to Mayo was not researched; third, the only option given to Banjac, a twenty-four hour nanny, was not scientifically based and was counter-therapeutic and traumatic to the children; and finally, Dr. Ascano arrived at his verbal custody recommendation without interviewing Banjac for her perspective on Garnet's possibility of parentification. *Id.* at 16-17.

141. *Mayo*, ¶¶ 30-31, 619 N.W.2d at 638.

142. *Id.* ¶ 35, 619 N.W.2d at 639.

143. 1999 ND 37, 590 N.W.2d 220.

144. *Hendrickson*, ¶ 13, 590 N.W.2d at 224. In *Hendrickson*, the North Dakota Supreme Court found the mother repeatedly interfered with the father's visitation of the children and attempted to alienate them from their father. *Id.* The court stated that evidence of alienation and frustration of visitation are relevant in determining whether a material change in circumstances has occurred since the prior custody order. *Id.* The court also stated that other methods of modifying the mother's behavior must be attempted before changing physical custody of the children. *Id.*

145. *Mayo*, ¶ 32, 619 N.W.2d at 638.

146. *Id.* Parental choice means that the parent consciously chooses to disobey a court order. *Id.* In this case, Banjac's illness was not a matter of parental choice because she could not choose to eliminate the illness. *Id.*

147. *Id.* ¶¶ 33-35, 619 N.W.2d at 638-39. The trial court originally decided that if Banjac hired a nanny who would be available twenty-four hours a day, she could retain custody. *Id.* This was the only option given by the trial court that allowed Banjac to regain custody of the children. *Id.* ¶ 8, 619 N.W.2d at 634. The court stated that Banjac rejected the nanny option when she hired Dr. Will to rebut Dr. Ascano's opinion about the parentification of the oldest child. *Id.* ¶ 35, 619 N.W.2d at 639.

The question arose whether the parentification was indeed caused by Banjac having to lie down for one hour once a month or whether Mayo leaving for work-related emergencies both day and night contributed to the parentification of the oldest child.¹⁴⁸ As to this issue, Dr. Ascano testified that the oldest child was not anxious or unhappy about Mayo leaving for a work-related emergency, and therefore, parentification was not present when Mayo was called out on an emergency.¹⁴⁹ The court accepted Dr. Ascano's opinion and determined the best interests of the children required a change in physical custody to eliminate parentification.¹⁵⁰

In summation, the court held that there had been a substantial change in circumstances since the divorce due to the parentification of the oldest child, and a change in custody was required in the best interests of the children.¹⁵¹ It was not necessary to attempt other remedies before changing physical custody because the cause of the parentification was not a parental choice, even though all three experts agreed that therapy could have halted the process of parentification.¹⁵²

B. JUSTICE MARING'S DISSENT

In her dissent, Justice Maring disagreed with the majority's conclusion that there was a substantial change in circumstances since the parties divorced in 1995.¹⁵³ In Justice Maring's opinion, the trial court did not afford the stability of the children's home sufficient weight in evaluating their best interests, especially because other remedies, like counseling, existed.¹⁵⁴ Justice Maring reasoned that a material change of circumstances was required before a transfer of custody could be made in the best interests of the children.¹⁵⁵ However, she further stated that not every change of circumstance justified a change in custody.¹⁵⁶

The material change in circumstances found by the trial court and affirmed by the majority was the oldest child becoming parentified, not by Banjac's choice, but because of health problems that existed prior to the 1995 divorce.¹⁵⁷ Banjac was awarded custody of the children by stipulation

148. *Id.* ¶ 34, 619 N.W.2d at 638-39.

149. *Id.* at 639.

150. *Id.* ¶ 35.

151. *Id.* ¶ 38.

152. *Id.* ¶ 35.

153. *Id.* ¶ 43, 619 N.W.2d at 640 (Maring, J., dissenting).

154. *Id.*

155. *Id.* ¶ 44.

156. *Id.* (citing *Ludwig v. Burchill*, 481 N.W.2d 464, 469 (N.D. 1992)).

157. *Id.* ¶ 45.

of the parties at that time.¹⁵⁸ Justice Maring noted that at the time of the stipulation, Banjac had more frequent migraines that required her to lie down more often, and Mayo was aware of Banjac's condition.¹⁵⁹ It was not until Banjac remarried and planned to move to Minnesota, stated Justice Maring, that Mayo desired a change in custody, even though Banjac's health had improved with medication.¹⁶⁰

Justice Maring stated, "The alleged parentification occurs when Banjac is forced to lie down for one hour each month" due to fibromyalgia and migraine headaches.¹⁶¹ She noted that during this one hour, the oldest child was given the responsibility of babysitting her younger siblings.¹⁶² "This increase in responsibility has allegedly caused the oldest child to assume a care-taking role."¹⁶³

North Dakota law does not stipulate an age at which children can be left alone or care for younger children.¹⁶⁴ The North Dakota Department of Human Services provides guidelines for parents, which state that children who are age nine can be left home alone, unsupervised, for not more than two hours in the day; however, children ages ten and eleven may be left home alone for longer periods.¹⁶⁵ At age twelve, a child is deemed able to babysit for reasonable lengths of time.¹⁶⁶ According to these guidelines, Banjac made a childcare choice that was within the acceptable state-sanctioned guidelines for parents, and Mayo may have made a choice outside these guidelines by leaving the children for extended periods of time over sleeping hours.¹⁶⁷ Justice Maring considered these guidelines and their application to the family unit in her dissent.¹⁶⁸

158. *Id.* ¶ 55, 619 N.W.2d at 643.

159. *Id.*

160. *Id.*

161. *Id.* ¶ 45, 619 N.W.2d at 640.

162. *Id.*

163. *Id.*

164. CHILD PROTECTION SERV., N.D. DEP'T. OF HUMAN SERV., HOME ALONE: IS YOUR CHILD READY? (2001).

165. *Id.* The North Dakota Department of Human Services publishes a pamphlet that provides guidelines for parents to help them decide if their child is ready to be left home alone or care for younger children. *Id.*

166. *Id.* It is recommended that a child complete an approved training course before babysitting. *Id.* Other factors to consider besides age are: the maturity of the child; physical, mental, and emotional limitations and health of the child; length of time; time of day or night; location and environment; frequency; and the accessibility of a parent. *Id.*

167. Mayo v. Mayo, 2000 ND 204, ¶¶ 45-47, 619 N.W.2d 631, 640-41 (Maring J., dissenting).

168. See *id.* ¶ 45, 619 NW.2d at 640 (discussing the commonality of older siblings watching younger siblings for short periods of time).

Justice Maring noted that, historically, older children have cared for younger children, especially in large families.¹⁶⁹ She determined this was not a new or unique role for children, but more like a chore, similar to cleaning the house, and is a way that children contribute to the family.¹⁷⁰ She stated that the increased responsibility is not only part of growing-up, but is usually a beneficial and common life experience.¹⁷¹ Watching siblings for one hour once a month while a parent remains available, according to Justice Maring, is within the guidelines and is historically accepted by society.¹⁷²

Justice Maring stated, "It is . . . the court's conclusion the oldest child is in the process of becoming parentified because of her mother's health problems. Yet, the evidence shows the oldest child assumes the role of caretaker while in the custody of her father, Mayo."¹⁷³ Justice Maring noted that Mayo was unexpectedly called away for emergencies at the hospital, both day and night, leaving the oldest child to care for the younger children.¹⁷⁴ She stated there was an issue of whether the parentification was being caused by Mayo as well as Banjac.¹⁷⁵ From Justice Maring's perspective, the court overlooked Dr. Will's testimony by not giving it the weight she would have afforded it.¹⁷⁶ Dr. Will testified that extensive testing would be required to determine which parent was causing the parentification.¹⁷⁷ The trial court decided Dr. Will's testimony was not reliable because he based his conclusions on tests like the Rorschach test,¹⁷⁸ however, the majority opinion did not address this issue in its decision.¹⁷⁹ Justice Maring pointed out that the Rorschach test has been routinely used and interpreted by psychologists to form diagnosis and has been accepted in court proceedings for many years.¹⁸⁰

169. *Id.*

170. *Id.* at 640-41.

171. *Id.*

172. *Id.* ¶ 46, 619 N.W.2d at 641.

173. *Id.* ¶ 47.

174. *Id.*

175. *Id.*

176. *Id.* ¶ 48.

177. *Id.*

178. The Rorschach test was developed by Hermann Rorschach, a Swiss psychiatrist who lived from 1884 to 1922. *STEDMAN'S MEDICAL DICTIONARY* 1244 (26th ed. 1995). The test is characterized by the patient revealing his attitudes, emotions, and personality by responding to a series of ten inkblot pictures. *Id.* at 1427.

179. *Mayo v. Mayo*, 2000 ND 204, ¶ 49, 619 N.W.2d 631, 641.

180. *See id.* (mentioning *State v. Iverson*, 225 N.W.2d 48, 54 (N.D. 1974) and *Bender v. North Dakota Workmen's Compensation Bureau*, 139 N.W.2d 150, 155 (N.D. 1965) as examples of when the Rorschach test was used as a basis for a psychological determination in North Dakota).

Justice Maring stated that Dr. Ascano testified he did not have enough information to determine which parent was the cause of the parentification.¹⁸¹ Additionally, Dr. Will concluded that it was equally likely that Mayo contributed to the parentification process since he also required the oldest child to take care of her siblings when he had an emergency at the hospital.¹⁸² Even though the court acknowledged Mayo would still be called away to the hospital for emergencies, Justice Maring disagreed when the court found Mayo was not contributing to the parentification.¹⁸³ As support for her opinion, Justice Maring noted that Mayo had previously and unsuccessfully attempted to reduce his work hours, and this was an issue Banjac testified to concerning their divorce in 1995.¹⁸⁴ During visitation with the children, Mayo left them with caregivers because he continued to work long hours at the hospital.¹⁸⁵ "Assuming the process of parentification ha[d] begun in the oldest child," Justice Maring noted that the record indicated the cause was not clear and both parties contributed to it.¹⁸⁶

Justice Maring emphasized this case was a modification proceeding, not an original custody order, and in a modification proceeding, a child's stability is "the most compelling factor."¹⁸⁷ She stated that the court presumes the child is better off with the custodial parent, and to support stability, a close call is resolved by leaving the child with the custodial parent, not bouncing the child from parent to parent when the circumstances change slightly.¹⁸⁸

Dr. Ascano testified at trial that the oldest child suffered from "anticipatory anxiety."¹⁸⁹ Dr. Ascano continued by stating if Banjac remained the

181. *Id.* ¶ 50, 619 N.W.2d at 640-41.

182. *Id.*

183. *Id.* at 641-42.

184. *Id.*

185. *Id.* at 642.

186. *Id.*

187. *Id.* ¶ 51 (citing *Blotske v. Leidholm*, 487 N.W.2d 607, 610 (N.D. 1992)). In an original custody order, the trial court determines "the single issue of the best interest of the child." *Starke v. Starke*, 458 N.W.2d 758, 760 (N.D. 1990). In a custody modification proceeding, the criteria in North Dakota Century Code section 14-09-06.6(6) are considered. *Id.* In order to promote stability, "a prior decree should not be modified without a showing of a significant need for doing so." *Id.* (citing *Wright v. Wright*, 431 N.W.2d 301 (N.D. 1988)). Justice Maring stated that had the *Mayo* decision been an original custody order, the trial court's finding would have been within its authority, but it was not an original custody order. *Mayo v. Mayo*, 2000 ND 204, ¶ 51, 619 N.W.2d 631, 642 (citing *Bloiske*, 487 N.W.2d at 611).

188. *Mayo*, ¶ 51, 619 N.W.2d at 642 (Maring J., dissenting). "A child is presumed to be better off with the custodial parent, and close calls should be resolved in favor of continuing custody." *Myers v. Myers*, 1999 ND 194, ¶ 10, 601 N.W.2d 264, 268 (quoting *Hagel v. Hagel*, 512 N.W.2d 465 (N.D. 1994)).

189. *Mayo*, ¶ 52, 619 N.W.2d at 642; *see also* discussion of anticipatory anxiety *supra* note 17.

custodial parent of the oldest child, there was “a substantial likelihood of significant psychological harm” to the child.¹⁹⁰ According to Justice Maring, the court then found parentification to be an irreparable condition that would cause a substantial amount of harm to the oldest child’s emotional health.¹⁹¹ However, Justice Maring pointed out Dr. Ascano’s testimony was not that “the oldest child will suffer harm in the future,” only that she would likely suffer harm in the future.¹⁹² She noted that the court further indicated there was no alternate remedy because Banjac rejected the nanny option by requesting the chance to rebut Dr. Ascano’s findings.¹⁹³ According to Justice Maring, Banjac’s action and rebuttal of Dr. Ascano’s conclusion that the oldest child was parentified in no way altered the fact that remedies other than a change of custody existed.¹⁹⁴

Justice Maring also disagreed with the majority as to whether the rule from alienation and frustration of visitation cases (that other remedies should be exhausted before custody is changed) should apply to this case.¹⁹⁵ The majority did not require any other options to be considered before a change in custody was ordered because the misbehavior of a parent can be eliminated, or at least controlled, but “Banjac’s illness and the resulting parentification of the oldest child [could] not similarly be controlled.”¹⁹⁶ Dr. Ascano testified that the parentification process could be eliminated through therapy or by arranging for a nanny to provide for the children’s care when Banjac becomes ill.¹⁹⁷ Justice Maring stated one of these two options should have been attempted before “uprooting” the children from their home and lifelong caretaker.¹⁹⁸ According to Justice Maring, “‘judges bring to each case their common sense, ordinary experience, and observation of human affairs.’ Here, common sense and experience dictates this child is not emotionally endangered and this is a situation that could be remedied, if necessary, by the hiring of a nanny and some therapy.”¹⁹⁹ For the above reasons, Justice Maring dissented.²⁰⁰

190. *Mayo*, ¶ 52, 619 N.W.2d at 642.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* ¶ 53; *see also* *Hendrickson v. Hendrickson*, 1999 ND 37, ¶ 13, 590 N.W.2d 220, 223-24 (recognizing other methods to remedy a child custody dispute must be exhausted before changing custody).

196. *See Mayo v. Mayo*, 2000 ND 204, ¶ 53, 619 N.W.2d 631, 643 (Maring, J., dissenting) (discussing the majority opinion).

197. *Id.*

198. *Id.*

199. *Id.* ¶ 54 (citing *Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 208 (N.D. 1991)).

200. *Id.* ¶ 56.

IV. IMPACT

Between 1988 and 1998, the average number of marriages per year in the state of North Dakota was 4681.²⁰¹ The average number of births per year over that ten-year period was nearly double that number at 8692.²⁰² During that same period, an average of 2233 married couples divorced or had their marriages annulled each year.²⁰³ With such a high rate of divorce, the courts are deciding child custody issues on a regular basis.²⁰⁴ The North Dakota Supreme Court heard twenty-one cases dealing with the best interest of a child from October 2000 through October 2001.²⁰⁵

Mayo dealt not only with the best interest of the child, but it also focused on the health of the parent.²⁰⁶ Statistically, an estimated three to six million people suffer from fibromyalgia.²⁰⁷ Considering additional factors such as migraine headaches and other diseases that may cause a person to lie down for one hour once a month, the impact of *Mayo* on divorce cases involving child custody and placement is potentially enormous.²⁰⁸

The North Dakota Supreme Court uses the statutory best interest factors in North Dakota Century Code section 14-09-06.2(1) to determine the best interest of a child in custody decisions.²⁰⁹ By considering parentification as a factor in deciding child custody cases like *Mayo*, the court has arguably added parentification to the best interest criteria.²¹⁰ This addition is easily falls under the catchall factor of section 14-09-06.2(1)(m) which

201. See North Dakota Marriage Data, available at <http://www.vitalnd.com> (last visited Nov. 11, 2002) (listing marriage statistics for the state of North Dakota by county from 1982 to 1998).

202. See *id.* (listing birth data according to the county where the license was issued).

203. See *id.* (listing divorce and annulment statistics).

204. See *id.* (listing the divorce rates and number of divorces from 1988 through 1998); see also Vital Statistics Report, available at <http://www.divorcereform.org/94staterates.html> (last visited Nov. 11, 2002) (listing North Dakota as having 2201 divorces in 1994, which is 3.4 divorces for every 1000 people living in the state).

205. A search for "best interest" and "child" was run on LEXIS with an October 2000 to October 2001 date restriction, which resulted in twenty-one North Dakota Supreme Court cases being identified as containing those terms. See generally, e.g., *Selzler v. Selzler*, 2001 ND 138, 631 N.W.2d 564; *In re A.B.*, 2001 ND 111, 627 N.W.2d 776; *In re C.R.C.*, 2001 ND 83, 625 N.W.2d 533.

206. *Mayo v. Mayo*, 2000 ND 204, ¶ 51, 619 N.W.2d 631, 642 (Maring, J., dissenting).

207. *Fibromyalgia on nih*, *supra* note 5.

208. *Mayo*, ¶ 16, 619 N.W.2d at 636.

209. See N.D. CENT. CODE § 14-09-06.2(1) (2000). North Dakota Century Code section 14-09-06.2(1) is the statutory provision that codifies the relevant considerations North Dakota trial courts have used to decide child custody in divorce disputes throughout the past decade. *Lapp v. Lapp*, 293 N.W.2d 121, 125-26 (N.D. 1980).

210. See *Mayo*, ¶ 30, 619 N.W.2d at 638 (stating that the trial court gave the appropriate weight to each factor when it weighed the stability factor against the testimony of Dr. Ascano). Dr. Ascano testified counseling and having a nanny available for childcare when the mother had to lie down could minimize the impact of parentification on the oldest child. *Id.* ¶ 7, 619 N.W.2d at 634.

includes “any other factors considered by the court to be relevant to a particular child custody dispute.”²¹¹

In modification of custody proceedings, the child’s stability has historically been the most compelling of the best interest factors considered by the court.²¹² The *Mayo* decision seemingly infers that parentification has surpassed the stability of a child as the overriding consideration when deciding the best interest of the child by finding that the parentification in *Mayo* outweighed the custodial stability factor.²¹³

In the North Dakota Supreme Court’s first decision on parentification, *Mayo*, the court defined parentification as the process whereby “a child loses his or her childhood after assuming the responsibilities of a parent.”²¹⁴ Other states, like Virginia, have defined parentification as an emotional process or the result of constant and continual responsibility, not merely watching a sibling for one hour once a month.²¹⁵ In West Virginia, parentification has been defined as the routine or habitual babysitting of a younger sibling.²¹⁶

Parentification does not have a uniformly accepted definition in the court system or in psychological reference materials.²¹⁷ The states that have addressed the issue of parentification have not only given the evidence significantly different weighted value, but have failed to compose a uniform definition.²¹⁸ Therefore, the court and the state determine the meaning of parentification because it does not have a uniformly accepted definition.²¹⁹

211. N.D. CENT. CODE § 14-09-06.2(1)(m).

212. See *Mayo*, ¶ 51, 619 N.W.2d at 642 (Maring, J., dissenting) (citing *Lovin v. Lovin*, 1997 ND 55, ¶ 17, 561 N.W.2d 612, 615, as stating that “maintaining the child’s stability with the custodial parent is the most compelling factor”).

213. See *id.* ¶ 30, 619 N.W.2d at 638 (deciding parentification outweighed custodial stability).

214. *Id.* ¶ 18, 619 N.W.2d at 636.

215. See *Ely v. Potter*, No. J93-34, 1994 WL 1031125, at *4 (Va. Cir. Ct. Apr. 6, 1994) (defining parentification as the result of distress caused by the conflict between divorcing parents because of feeling responsible for the divorce).

216. *In re Michael Ray T.*, 525 S.E.2d 315, 319 n.9 (W. Va. 1999) (defining parentification as resulting when a child is “routinely permitted to assume responsibilities which appropriately belong to parents”).

217. See *Mayo*, ¶ 18, 619 N.W.2d at 636 (stating that parentification is not a diagnosis in the Diagnostic and Statistical Manual of Mental Disorders); see also parentification defined *supra* note 7.

218. See *supra* Part II.A-B.

219. Compare *Mayo*, ¶ 18, 619 N.W.2d at 636, with *In re Michael Ray T.*, 525 S.E.2d at 319 n.9, and *Ely*, 1994 WL 1031125, at *4 (each defining parentification differently).

V. CONCLUSION

In *Mayo*, the court held that the onset of parentification in a child is a material change in circumstance.²²⁰ Upon weighing the statutory best interest factors, the court held the psychological harm to a child due to parentification outweighed the custodial stability factor.²²¹ This in turn justified a change in custody designed to eliminate the parentification in the best interest of the child.²²² The court found that given the circumstances, there was no need to consider other remedies before ordering a change in custody.²²³

Bonnie L. Christner

220. *Mayo*, ¶ 25, 619 N.W.2d at 637.

221. *Id.* ¶ 30, 619 N.W.2d at 638.

222. *Id.* ¶ 35, 619 N.W.2d at 639.

223. *Id.* ¶ 32, 619 N.W.2d at 638.
