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Tie Goes to the Primary Caregiver: The Misapplication of the Primary-Caregiver Preference in *Rommers v. Rommers*, 22 Neb. App. 606, 858 N.W.2d 607 (2014)

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Note*

Tie Goes to the Primary Caregiver: The Misapplication of the Primary- Caregiver Preference in *Rommers* *v. Rommers*, 22 Neb. App. 606, 858 N.W.2d 607 (2014)

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I. INTRODUCTION

Even for the most cavalier of baseball fans, it is hard to follow America’s pastime without eventually hearing someone shout, “Tie goes to the runner!” From parental critiques of Little League officials to managerial ejections in the Majors, no shortage of breath has been spent arguing calls based on one of baseball’s most iconic rules. Ironically, however, the “rule” is not a rule at all.¹ Official Baseball Rule

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1. See Mark Dewdney, “Come on, Blue: Tie Goes to the Runner!” *No, It Does Not.*, BLEACHER REP. (July 27, 2009), <http://bleacherreport.com/articles/225160-come-on-blue-tie-goes-to-the-runner-no-it-does-not> [https://perma.unl.edu/WRD6-DEVK].

7.01 unequivocally states that a baserunner is safe if he touches a base “before he is out.”² A tie, therefore, results in an out. Yet, this rule has been consistently misapplied to the point where the incorrect rule has swallowed the correct one.³ In a similar fashion, the misapplication of the primary-caregiver preference threatens to swallow the rule of law in Nebraska—with *Rommers*⁴ leading the way.

Physical custody determinations over minor children are often long, exhaustive, and expensive battles between two feuding parents.⁵ For a variety of reasons, Nebraska courts are often tasked with awarding sole physical custody of minor children to one of two otherwise fit parents.⁶ This responsibility forces trial courts to determine which parent, if awarded sole physical custody, would serve the child’s best interests. When coupled with the prospect of one parent removing the child to another state, Nebraska courts have stated that custodial determinations are among “the most difficult issues that trial courts face”⁷ Because of the great difficulty in resolving these determinations, some Nebraska courts have resorted to the primary-caregiver preference to break the tie.⁸

Within the last decade, the Supreme Court of Nebraska has used the primary-caregiver preference in whole or in part to uphold custody awards in four decisions.⁹ Yet, despite the supreme court’s recent treatment of the primary-caregiver preference and the intentions of the Nebraska Legislature, the Court of Appeals of Nebraska misapplied the timing and function of the primary-caregiver preference in *Rommers*.

Part II of this Note explores Nebraska statutes and recent case law relevant to the primary-caregiver preference within the scope of child-custody awards. Part II also provides an exposition of the facts and holdings of *Rommers*. Finally, Part III of this Note examines the legal

2. OFFICE OF THE COMMISSIONER OF BASEBALL, OFFICIAL RULES OF BASEBALL 7.01 (2014), http://mlb.mlb.com/mlb/downloads/y2014/official_baseball_rules.pdf [<https://perma.unl.edu/X6CW-T5XV>] (emphasis added).

3. See Dewdney, *supra* note 1.

4. *Rommers v. Rommers*, 22 Neb. App. 606, 619, 858 N.W.2d 607, 617 (2014).

5. See Leah Hoffman, *To Have and to Hold on to*, FORBES (Nov. 7, 2006, 5:00 PM), http://www.forbes.com/2006/11/07/divorce-costs-legal-biz-cx_lh_1107legaldivorce.html (finding the average cost of a divorce in 2006 ranged between \$15,000 and \$30,000 in the United States).

6. See, e.g., *Gress v. Gress*, 271 Neb. 122, 125, 710 N.W.2d 318, 324 (2006) (“[T]he trial court expressly found that both [parents were] fit parents to have custody of the children.”).

7. *Farnsworth v. Farnsworth*, 257 Neb. 242, 255, 597 N.W.2d 592, 601 (1999).

8. See, e.g., *Gress*, 271 Neb. at 126, 710 N.W.2d at 325 (finding no abuse of discretion in the trial court’s award of sole physical custody to a parent based on that parent’s prior role as the child’s primary caregiver).

9. See *Molczyk v. Molczyk*, 285 Neb. 96, 109, 825 N.W.2d 435, 446 (2013); *Kamal v. Imroz*, 277 Neb. 116, 122, 759 N.W.2d 914, 918 (2009); *Maska v. Maska*, 274 Neb. 629, 635, 742 N.W.2d 492, 497 (2007); *Gress*, 271 Neb. at 126, 710 N.W.2d at 325.

framework of the primary-caregiver analysis applied by the *Rommers* court, while discussing the potential effects of this analytical framework on future custody awards. Ultimately, this Note is a cautionary tale against a mutated application of an old custody presumption—an application with potentially powerful ramifications for Nebraska families.

II. BACKGROUND

A. Nebraska Child Custody Statutory Provisions

Nebraska trial courts determine child custody using the language of the Nebraska Parenting Act¹⁰ and various other statutes and common law doctrines.¹¹ Section 42-364 of the Parenting Act provides in part:

(2) In determining legal custody or physical custody, the court shall not give preference to either parent based on the sex of the parent and, except as provided in section 43-2933, no presumption shall exist that either parent is more fit or suitable than the other. Custody shall be determined on the basis of the best interests of the child, as defined in the Parenting Act. Unless parental rights are terminated, both parents shall continue to have the rights stated in section 42-381.

(3) Custody of a minor child may be placed with both parents on a joint legal custody or joint physical custody basis, or both, (a) when both parents agree to such an arrangement in the parenting plan and the court determines that such an arrangement is in the best interests of the child or (b) if the court specifically finds, after a hearing in open court, that joint physical custody or joint legal custody, or both, is in the best interests of the minor child regardless of any parental agreement or consent.¹²

Nebraska courts have interpreted the Parenting Act to require a two-pronged approach for determining child custody.¹³ The first prong requires Nebraska courts to inquire whether either parent seeking custody is fit.¹⁴ With regard to this prong, the Supreme Court of Nebraska has defined parental fitness in the negative, stating that parental unfitness is “a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably

10. NEB. REV. STAT. §§ 43-2920–43-2943 (Reissue 2016). Section 43-2920.01 was repealed and replaced in 2016, but should be considered part of this range. See NEB. REV. STAT. § 43-2920.01 (Cum. Supp. 2014 & Supp. 2015) (repealed 2016).

11. See, e.g., *Robb v. Robb*, 268 Neb. 694, 701–02, 687 N.W.2d 195, 202 (2004) (discussing Nebraska Parenting Act requirements and various other common law doctrines required for consideration by trial courts when determining custody awards).

12. NEB. REV. STAT. § 42-364(2)–(3) (Reissue 2016).

13. *Maska*, 274 Neb. at 633, 742 N.W.2d at 496; *Gress*, 271 Neb. at 125, 710 N.W.2d at 324; *Robb*, 268 Neb. at 701–02, 687 N.W.2d at 202; *Rommers v. Rommers*, 22 Neb. App. 606, 617, 858 N.W.2d 607, 616 (2014).

14. *Maska*, 274 Neb. at 633, 742 N.W.2d at 496.

will result in, detriment to a child's well-being."¹⁵ If, after resolving this inquiry, Nebraska courts are unable to award custody by distinguishing between two parties on the grounds of parental fitness, then the second prong of the approach requires Nebraska courts to perform a best-interests analysis to determine custody.¹⁶ The Parenting Act requires Nebraska courts to consider the following factors in their best-interests analyses:

- (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
- (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
- (c) The general health, welfare, and social behavior of the minor child;
- (d) Credible evidence of abuse inflicted on any family or household member. For purposes of this subdivision, abuse and family or household member shall have the meanings prescribed in section 42-903; and
- (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse. For purposes of this subdivision, the definitions in section 43-2922 shall be used.¹⁷

This multifactor approach covers a variety of issues surrounding minor children in custody disputes. Nebraska courts must consider the child's relationship to each parent before the commencement of the action,¹⁸ and they must also consider preferences of the child, if those preferences are based upon sound reasoning.¹⁹ Trial courts must weigh the health and behavior of the child,²⁰ any credible evidence of abuse inflicted upon family or household members,²¹ and any "[c]redible evidence of child abuse or neglect or domestic intimate partner abuse."²² In addition to the factors listed in section 43-2923(6), trial courts must also consider the entire scope of section 43-2923, which further contemplates issues such as parental communica-

15. *Ritter v. Ritter*, 234 Neb. 203, 210, 450 N.W.2d 204, 210 (1990).

16. *Id.*; *Gress*, 271 Neb. at 126, 710 N.W.2d at 324.

17. NEB. REV. STAT. § 43-2923(6) (Reissue 2016).

18. *Id.* § 43-2923(6)(a).

19. *Id.* § 43-2923(6)(b); see *Miles v. Miles*, 231 Neb. 782, 785, 438 N.W.2d 139, 142 (1989) ("While the wishes of the child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, his preference is entitled to consideration.").

20. NEB. REV. STAT. § 43-2923(6)(c).

21. *Id.* § 43-2923(6)(d). This section neither states whether the abuse inquiry is relative to the parents in question, nor whether "family member" as defined by this section is tethered to any specific party's family member. For example, if relevant, probative evidence can be introduced that the uncle of a parent who brought a custody action with respect to Child A inflicted abuse on his spouse (the great aunt of Child A), then it is arguable that a court must consider such evidence under this section.

22. *Id.* § 43-2923(6)(e).

tion, agreements, and mediation plans; domestic violence, child development, and school attendance.²³

Beyond the enumerated list of best-interests considerations that are statutorily mandated, the Supreme Court of Nebraska has added the following common law considerations:

[C]ourts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.²⁴

In light of these best-interest factors, the language of section 42-364(2) limits judicial presumptions in custody actions,²⁵ and also forbids trial courts from preferring the sex of one parent over the other parent's sex.²⁶ In addition, the Nebraska Legislature has codified the requirement of parenting plans in custody disputes in line with the national trend.²⁷ This requirement has influenced best-interests analyses in Nebraska by enhancing judicial deference to agreeable parents, who are often "in a better position than almost any third party to know the family situation and the needs of the child" ²⁸ However, the Nebraska Legislature has yet to enact a presumption into law that favors parental agreements,²⁹ and although custody agreements between parties are often persuasive in Nebraska courts,

23. See *Kamal v. Imroz*, 277 Neb. 116, 121, 759 N.W.2d 914, 917–18 (2009) (requiring trial courts to consider the entirety of section 43-2923, specifically section 43-2923(4), before establishing a parenting plan and thus awarding custody).

24. *Davidson v. Davidson*, 254 Neb. 357, 368, 576 N.W.2d 779, 785 (1998) (internal citations and quotations omitted).

25. NEB. REV. STAT. § 42-364(2) (Reissue 2016). The major exception to Nebraska's limitation on custody presumptions is found in section 43-2933, which presumptively bars custody awards to registered sex offenders or persons residing with registered sex offenders unless a court determines that such a custodial arrangement presents "no significant risk to the child." *Id.* § 43-2933. See *State ex rel. Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015) (finding no significant risk of harm regarding a child living with her stepfather who registered as a sex offender).

26. NEB. REV. STAT. § 42-364(2).

27. NEB. REV. STAT. § 42-364(1)(a). For an overview of state requirements regarding parenting plans, see Andrea G. Nadel, Annotation, *Primary Caretaker Role of Respective Parents as Factor in Awarding Custody of Child*, 41 A.L.R.4th 1129, 1134–35 (1985).

28. LINDA D. ELROD, *CHILD CUSTODY PRACTICE & PROCEDURE* § 4:7 (rev. ed. 2015).

29. *Id.* at 439 n.2.

they are not determinative.³⁰ Furthermore, the Parenting Act expressly grants Nebraska courts the power to nullify a custody arrangement if such an arrangement is not in the best interests of the child;³¹ and while Nebraska's current statutory scheme permits joint physical custody as a discretionary option for trial courts, it does not require joint physical custody as a presumptive award.³²

In 2007, the Nebraska Legislature's Judiciary Committee held hearings regarding a potential amendment to the Parenting Act that sought to include a joint physical custody presumption.³³ Such an amendment was never passed, and currently Nebraska's statutes do not include a presumption in favor of joint physical custody.³⁴ Yet, the Nebraska Legislature has historically adopted special statutory provisions to protect certain parental actions from best-interests scrutiny under section 43-2923(6)(a).³⁵ For example, section 43-2929.01(3) expressly forbade Nebraska courts from considering "military membership, mobilization, deployment, absence, relocation, or failure to comply with custody, parenting time, visitation, or other access orders because of military duty" from factoring into best-interests analyses.³⁶

Through this interconnected web of statutory meanderings, refinements, and common law doctrines, Nebraska courts must apply case-specific facts and determine the best custodial arrangements for children locked in difficult tug-of-wars between diverging families. Such a system has tempted some courts to search for analytical "shortcut[s]."³⁷

30. *Zerr v. Zerr*, 7 Neb. App. 885, 891, 586 N.W.2d 465, 470 (1998) ("Thus, while agreements for child custody and support are not binding on the court, as are those involving matters other than child custody and support, even the latter are subject to independent court scrutiny and a finding of conscionability is a prerequisite to their binding effect.") (internal quotations omitted).

31. NEB. REV. STAT. § 42-364(3).

32. *See id.*; *Klimek v. Klimek*, 18 Neb. App. 82, 87, 775 N.W.2d 444, 450 (2009).

33. *See Hearing Before the Judiciary Comm. on LB 47, LB 76, LB 413, LB 535, LB 554, and LB 682*, 100th Neb. Leg. 27–28 (2007) (statement of Amy S. Geren, and statement of Sen. Steve Lathrop, Vice Chairperson, Neb. Leg. Judiciary Comm.) (discussing the inherent problems of a legal presumption in favor of joint physical custody).

34. *See* NEB. REV. STAT. §§ 43-2920–43-2943 (Reissue 2016); *supra* note 10.

35. *See* NEB. REV. STAT. § 43-2923(6)(a).

36. NEB. REV. STAT. § 43-2929.01(3) (Cum. Supp. 2014 & Supp. 2015) (repealed 2016). This statute has been repealed by the Nebraska Legislature and has since been replaced with the Uniform Deployed Parents Custody and Visitation Act, which became operative January 1, 2016. L.B. 219, 2015 Leg., 104th Sess. (Neb. 2015).

37. *See* JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 220 (2006) (discussing judicial use of the primary-caregiver preference as a means to resolve vagueness issues inherent in best-interests analyses).

B. The Primary-Caregiver Preference

The Supreme Court of Nebraska has expressly rejected a per se rule that would award custody of minor children to their primary caregiver.³⁸ Nevertheless, the supreme court has interpreted the Nebraska Parenting Act to create a preference in favor of the child's primary-caregiver, which weighs as a factor in best-interests analyses.³⁹ The fundamental principal underlying the application of a best-interests analysis in child-custody cases is to reasonably infer what "past conduct . . . may be expected in the future . . ." in order to determine the best prospective situation for children involved in custody disputes.⁴⁰ This retrospective analysis allows trial courts to utilize tangible facts in order to determine difficult custody awards.

As mentioned above, Nebraska courts are statutorily required to analyze a multitude of past events and parental actions before determining prospective custody awards of minor children.⁴¹ From these statutory commands, namely section 43-2923(6)(a), and from a historical framework of common law preferences,⁴² Nebraska courts have developed and utilized the primary-caregiver preference to differentiate relative parity between parents seeking sole custody.⁴³

The basic premise of the primary-caregiver preference is to grant custody to the parent who has historically provided the most supervision and guidance to the minor child in question.⁴⁴

[V]irtually all of the courts which have considered the [primary caregiver] issue have taken the view, either expressly or by necessary implication, that in determining which parent should be awarded custody of the parties' child, when other factors bearing on the parties' ability to provide for the best inter-

38. *Applegate v. Applegate*, 236 Neb. 418, 418, 461 N.W.2d 419, 420 (1990) ("At the outset we reject adoption of the primary caretaker rule as a per se rule."). To distinguish between the primary-caregiver preference and the primary-caretaker doctrine, it is important to note that the primary-caregiver preference is an evolution of the primary-caretaker doctrine, a custody presumption first recognized in West Virginia that acts as an "almost absolute preference to award custody to the primary caretaker parent of young children, regardless of the parent's gender." 2 *Child Custody And Visitation: Law And Practice* § 10.06[3][b] (Matthew Bender 2006). Although remnants of the primary-caretaker presumption may be found to varying degrees in other jurisdictions, a jurisdiction recognizing an absolute adherence to the primary-caretaker presumption "no longer exists." 59 *AM. JUR. 2D Parent and Child* § 30 (2012).

39. *Applegate*, 236 Neb. at 418, 461 N.W.2d at 420.

40. Nadel, *supra* note 27, at 1134.

41. *See supra* notes 10–31.

42. For a historical context of child custody awards and the evolution of custody presumptions, see J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 *FAM. CT. REV.* 213 (2014).

43. *See, e.g., Pohlmann v. Pohlmann*, 20 Neb. App. 290, 298, 824 N.W.2d 63, 70 (2012) (citing *NEB. REV. STAT.* § 43-2923(6)(a) to uphold the district court's custody award, which it determined based on the primary-caregiver preference).

44. Nadel, *supra* note 27, at 1134–35.

ests of the child are relatively equal, considerable weight should be given to which parent was the primary caretaker of the child, especially where the child was of tender years In so holding, these courts have reasoned that it would be in the best interests of the child to award his or her custody to the parent on whom the child has depended for satisfying his or her basic physical and psychological needs, regardless of the sex of the proposed custodian⁴⁵

In determining which party is the child's primary caregiver, Nebraska courts decipher factual evidence that illuminates the respective parties' past relationships with their child.⁴⁶ Specifically, Nebraska courts look to see which party's responsibilities included "feeding the [child], playing with the [child], getting the [child] ready in the mornings, putting the [child] to bed at night, helping the [child] with [his or her] homework, and making and keeping the [child's] various appointments."⁴⁷

The ALR notes that this preference, whether intentional or not, typically favors mothers, even if they are employed.⁴⁸ Some scholars have argued that this preference, along with best-interests analyses in general, has led to gender bias in the courts with respect to custody awards.⁴⁹ As of August of 2015, twenty-five of Nebraska's thirty-three appellate-reviewed custody awards decided in whole or in part by using the primary-caregiver preference have resulted in custody awards

45. *Id.*

46. *See Staman v. Staman*, 225 Neb. 864, 867, 408 N.W.2d 320, 322 (1987).

47. *See Pohlmann*, 20 Neb. App. at 295, 824 N.W.2d at 68.

48. Nadel, *supra* note 27, at 1135.

49. *See* 131 AM. JUR. PROOF OF FACTS 3D *Gender Bias as Factor in Child Custody Cases* §§ 2, 6 (2013); *see also* Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 448-49 (1990) (summarizing critical arguments against the primary-caregiver preference, which argue that the preference is biased toward mothers); Douglas Dotterweich & Michael McKinney, *National Attitudes Regarding Gender Bias in Child Custody Cases*, 38 FAM. & CONCILIATION CTS. REV. 208, 220 (2000) (finding more than 53% of judges in Texas, a primary-caregiver preference state, believe that fathers *rarely or never* receive fair consideration when seeking sole custody of their children, whereas 10% of Texas judges believe that fathers always receive fair consideration); Ronald K. Henry, *'Primary Caretaker': Is It A Ruse?*, FAM. ADVOC., Summer 1994, at 53, 53 (arguing that the primary-caregiver preference is a "masquerade[of] equality").

to mothers, while eight have resulted in custody awards to fathers.⁵⁰ *Rommers* falls within the majority.⁵¹

C. The Facts of *Rommers*

In January 2013, Aaron Rommers, claiming his three-year marriage with Elizabeth Rommers was at an end, filed a complaint for dissolution of marriage in the District Court for Holt County, Nebraska.⁵² He asserted in his complaint that both he and Elizabeth were fit and proper parents, and he accordingly sought joint physical and joint legal custody over their infant child, Samantha.⁵³

At trial, Aaron testified that Elizabeth left their marital residence in Ewing, Nebraska with Samantha and moved to Arizona in December of 2012.⁵⁴ He claimed the departure was sudden and that Eliza-

50. Cases finding for mothers include: *Molczyk v. Molczyk*, 285 Neb. 96, 110, 825 N.W.2d 435, 446 (2013); *Kamal v. Imroz*, 277 Neb. 116, 123, 759 N.W.2d 914, 919 (2009); *Gress v. Gress*, 271 Neb. 122, 126, 710 N.W.2d 318, 325 (2006); *Marcovitz v. Rogers*, 267 Neb. 456, 466, 675 N.W.2d 132, 142 (2004); *McLaughlin v. McLaughlin*, 264 Neb. 232, 246, 647 N.W.2d 577, 590 (2002); *Schaefer v. Schaefer*, 263 Neb. 785, 789, 642 N.W.2d 792, 797 (2002); *Smith-Helstrom v. Yonker*, 249 Neb. 449, 461, 544 N.W.2d 93, 101 (1996); *Leonard v. Leonard*, No. A-13-942, 2014 WL 5439773, at *5 (Neb. Ct. App. Oct. 28, 2014); *Rommers v. Rommers*, 22 Neb. App. 606, 617, 858 N.W.2d 607, 619 (2014); *Crumbly v. Crumbly*, No. A-12-822, 2013 WL 5366333, at *5 (Neb. Ct. App. July 16, 2013); *Pohlmann*, 20 Neb. App. at 299, 824 N.W.2d at 71 (2012); *Stark v. Weatherholt*, No. A-11-446, 2012 WL 661353, at *6 (Neb. Ct. App. Feb. 28, 2012); *Klimek v. Klimek*, 18 Neb. App. 82, 88, 775 N.W.2d 444, 451 (2009); *Edwards v. Edwards*, 16 Neb. App. 297, 323, 744 N.W.2d 243, 262 (2008); *Meister v. Meister*, No. A-03-1157, 2005 WL 625888, at *6 (Neb. Ct. App. Mar. 1, 2005); *Kay v. Ludwig*, 12 Neb. App. 868, 884, 686 N.W.2d 619, 631 (2004); *Bartels v. Bartels*, No. A-03-559, 2004 WL 1380175, at *4 (Neb. Ct. App. June 22, 2004); *Bierbower v. Bierbower*, No. A-00-1099, 2001 WL 1091133, at *6 (Neb. Ct. App. Sept. 4, 2001); *Smith v. Smith*, 9 Neb. App. 975, 981, 623 N.W.2d 705, 712 (2001); *Gochenouer v. Gochenouer*, No. A-99-516, 2000 WL 351100, at *6 (Neb. Ct. App. Mar. 14, 2000); *Dunn v. Dunn*, No. A-95-491, 1996 WL 70972, at *7 (Neb. Ct. App. Feb. 20, 1996); *Drevo v. Drevo*, No. A-95-193, 1996 WL 5863, at *4 (Neb. Ct. App. Jan. 9, 1996); *Adams v. Adams*, No. A-91-437, 1993 WL 120294, at *7 (Neb. Ct. App. Apr. 20, 1993); *Taylor v. Taylor*, No. A-92-130, 1993 WL 80591, at *4 (Neb. Ct. App. Mar. 23, 1993); *Phillips v. Phillips*, No. A-91-895, 1992 WL 132307, at *2 (Neb. Ct. App. May 26, 1992). Cases finding for fathers include: *Maska v. Maska*, 274 Neb. 629, 635, 742 N.W.2d 492, 497 (2007); *Ziebarth v. Ziebarth*, 238 Neb. 545, 557, 471 N.W.2d 450, 458 (1991); *Applegate v. Applegate*, 236 Neb. 418, 419, 461 N.W.2d 419, 420 (1990); *State ex rel. Jade K. v. Luke K.*, No. A-12-1144, 2013 WL 5911205, at *5 (Neb. Ct. App. Nov. 5, 2013); *Schnell v. Schnell*, 12 Neb. App. 321, 326, 673 N.W.2d 578, 584 (2003); *Tremain v. Tremain*, No. A-00-067, 2000 WL 1673320, at *5 (Neb. Ct. App. Nov. 7, 2000); *Judge v. Judge*, No. A-96-064, 1996 WL 737585, at *4 (Neb. Ct. App. Dec. 17, 1996); *Wiese v. Wiese*, No. A-92-312, 1993 WL 35711, at *5 (Neb. Ct. App. Feb. 16, 1993).

51. *Rommers*, 22 Neb. App. at 619, 858 N.W.2d at 617.

52. *Id.* at 608, 858 N.W.2d at 611.

53. *Id.*

54. *Id.* at 609, 858 N.W.2d at 611.

beth left without providing him notification of the move.⁵⁵ In June, Elizabeth gave Aaron permission to come to Arizona to see Samantha.⁵⁶ Aaron made the 1,400 mile, twenty-four-hour car trip and spent four nights in Arizona.⁵⁷ On the first night, Elizabeth refused Aaron permission to see Samantha.⁵⁸ By the second day of Aaron's trip, Elizabeth had rescinded her visitation refusal, permitting Aaron to see Samantha for an average of three hours per day, split between two daily visits.⁵⁹ Before the divorce proceedings, Aaron's only other communication with Samantha was limited to video calls over the Internet.⁶⁰

Aaron testified that he was unable to financially support Elizabeth and Samantha's new living expenses in Arizona.⁶¹ Aaron also testified that he believed Elizabeth's motive for moving to Arizona stemmed from her observation of emails that Aaron had received from another woman.⁶² He denied these communications, and he also denied Elizabeth's assertions that Aaron had "lashed out against property in moments of frustration."⁶³ Aaron's aunt testified that Aaron was a proud and fit father and that she had last observed Aaron with Samantha three months before Elizabeth's departure.⁶⁴ Aaron's mother, Laura Rommers, testified that Aaron had regularly performed caregiving tasks for Samantha before Elizabeth's departure, such as changing Samantha's diapers and bathing her.⁶⁵ Laura conceded that Aaron did not have many opportunities to feed Samantha because Elizabeth breast fed Samantha.⁶⁶ Laura also testified that Aaron was the financial provider for the family and that Elizabeth became a stay-at-home mother after Samantha was born.⁶⁷

Elizabeth counterclaimed for sole custody over Samantha and requested that Aaron's future visitations be supervised.⁶⁸ Elizabeth testified that she was Samantha's primary caregiver and that Aaron had not assisted Elizabeth in rearing Samantha.⁶⁹ Elizabeth claimed that Aaron would yell "shut up" at Samantha when she cried and that he would destroy property in frustration when Samantha displayed col-

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 610, 858 N.W.2d at 612.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 612, 858 N.W.2d at 613.

69. *Id.* at 611, 858 N.W.2d at 612.

icky symptoms.⁷⁰ Elizabeth also claimed that Aaron had inappropriate communications with minor girls, and she presented evidence to the district court of a sexually explicit picture that Aaron had received from a girl who was between the ages of twelve and thirteen.⁷¹ She had reported this incident to police.⁷²

Elizabeth disputed Aaron's contention that she had left for Arizona in December 2012 without providing notice.⁷³ She testified that she had left Aaron her wedding ring and a note.⁷⁴ Upon arriving in Arizona, Elizabeth stayed with her brother, his wife, and their six children in a four-bedroom home.⁷⁵ She testified that she and Samantha shared a room and that she planned for her stay with her brother to be temporary.⁷⁶ Elizabeth began working thirty hours per week as a truck-stop cashier, earning \$8.50 per hour,⁷⁷ and during her employment hours, Elizabeth's sister-in-law was responsible for providing care for Samantha.⁷⁸ Elizabeth also testified that she had never refused Aaron's visitation requests with Samantha so long as he was willing to travel to Arizona.⁷⁹

D. District and Appellate Court Holdings in *Rommers*

The district court awarded sole physical and legal custody of Samantha to Elizabeth, finding that such an award was in Samantha's best interests.⁸⁰ The court held Aaron responsible for \$424 of child support per month after deducting \$75 per month to account for travel expenses to and from Arizona.⁸¹ Aaron was awarded one continuous week of parenting time each year until Samantha's fifth birthday, upon which his parenting time would be increased to six continuous weeks per year.⁸² He was also awarded various holidays for parenting time and a guaranteed video call to last no less than fifteen minutes per day for three days per week.⁸³

In reaching its decisions, the district court analyzed the best interests of Samantha, to which it applied various factual findings.⁸⁴ After

70. *Id.*

71. *Id.*

72. *Id.* at 613, 858 N.W.2d at 613.

73. *Id.* at 611, 858 N.W.2d at 613.

74. *Id.*

75. *Id.* at 612, 858 N.W.2d at 613.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 614, 858 N.W.2d at 614.

81. *Id.*

82. *Id.*

83. *Id.* at 614–15, 858 N.W.2d at 614.

84. *Id.* at 613, 858 N.W.2d at 613.

weighing relevant testimony, the court found Elizabeth to be Samantha's primary caregiver; however, the court found that Aaron also helped in caregiving.⁸⁵ The district court found that "there was no credible evidence of child abuse, neglect, or domestic intimate partner abuse, but that Aaron had a temper and had acted out in a physical and aggressive manner which justified Elizabeth's concerns about leaving Aaron alone with Samantha."⁸⁶ The court found enough evidence to call into question Aaron's moral fitness,⁸⁷ and the only evidence the court weighed against Elizabeth was her removal of Samantha to Arizona, because it provided no better employment opportunities for her and deprived Samantha of contact from Aaron's family.⁸⁸ Aaron timely appealed to the Court of Appeals of Nebraska.⁸⁹

Upon review, the court of appeals scrutinized the district court's best-interests analysis.⁹⁰ In doing so, the court interpreted the Nebraska Parenting Act, *Gress*, and various moral factors proscribed by the Supreme Court of Nebraska in *Robb*.⁹¹ The court of appeals gave weight to the district court's observation of witnesses and likewise determined Elizabeth to be Samantha's primary caregiver.⁹² The court of appeals echoed the district-court finding that "Elizabeth was concerned with Aaron's moral fitness after finding a picture of a naked woman on his cell phone and social media Web site conversations with other women on his computer."⁹³ In affirming the district court, the court of appeals concluded that "[b]oth parents [were] fit to parent Samantha, but because Elizabeth [was] the primary caregiver of Samantha, custody with Elizabeth [was] not an abuse of discretion."⁹⁴

III. ROMMERS ANALYSIS

The Court of Appeals of Nebraska committed two reversible errors in reaching its decision to uphold the district court's sole-custody award to Elizabeth Rommers. First, the court of appeals erroneously

85. *Id.* at 613, 858 N.W.2d at 614.

86. *Id.*

87. *Id.*

88. *Id.* at 613, 858 N.W.2d at 613.

89. *Id.* at 615, 858 N.W.2d at 614.

90. *Id.* at 617, 858 N.W.2d at 616.

91. *Id.* at 618, 858 N.W.2d at 616 ("Other pertinent factors include the moral fitness of the child's parents, including sexual conduct; respective environments offered by each parent; the age, sex, and health of the child and parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the parental capacity to provide physical care and satisfy educational needs of the child.").

92. *Id.* at 618-19, 858 N.W.2d at 617.

93. *Id.* at 619, 858 N.W.2d at 617.

94. *Id.*

applied Nebraska statutory and common law governing best-interests analyses. By giving more weight to the primary-caregiver preference than other more compelling factors such as moral fitness, the court of appeals incorrectly promoted the primary-caregiver preference to the status of a first-class factor among equal peers.⁹⁵ Second, the court of appeals procedurally misapplied the primary-caregiver preference by implementing the preference before properly realizing a best-interests stalemate between parties. In committing these two errors, as discussed below, the court of appeals broadened the use of the primary-caregiver preference beyond precedential limits, clouding prospective application of the primary-caregiver preference in Nebraska child custody cases.

A. Disproportionate Best-Interests Factors

While performing its best-interests analysis, the *Rommers* court erroneously prioritized the primary-caregiver preference over equivalent factors. As previously mentioned, Nebraska law requires a best-interests analysis pursuant to statutory mandates in the Nebraska Parenting Act and common law factors incorporated by the Supreme Court of Nebraska.⁹⁶ The supreme court has defined best-interests analysis under section 43-2923 of the Nebraska Parenting Act to include the primary-caregiver preference as one of many factors.⁹⁷ The court has refused to interpret section 43-2923(6)(a) to establish the primary-caregiver preference as the sole, determinative factor in child custody awards,⁹⁸ and instead has applied the preference for its utility in determining “[t]he relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing.”⁹⁹ While it is not uncommon for Nebraska courts to rely on the primary-caregiver preference as a deciding factor in custody awards,¹⁰⁰ section 43-2923 forbids Nebraska courts from disre-

95. See *infra* section III.A.

96. See NEB. REV. STAT. §§ 43-2920–43-2943 (Reissue 2016); *supra* note 10; Robb v. Robb, 268 Neb. 694, 701–02, 687 N.W.2d 195, 202 (2004).

97. See *Molczyk v. Molczyk*, 285 Neb. 96, 109, 825 N.W.2d 435, 446 (2013); *Kamal v. Imroz*, 277 Neb. 116, 121–22, 759 N.W.2d 914, 918 (2009); *Maska v. Maska*, 274 Neb. 629, 635, 742 N.W.2d 492, 497 (2007); *Gress v. Gress*, 271 Neb. 122, 126, 710 N.W.2d 318, 324–25 (2006); *Applegate v. Applegate*, 236 Neb. 418, 418, 461 N.W.2d 419, 420 (1990).

98. *Applegate*, 236 Neb. at 418, 461 N.W.2d at 420.

99. *Id.* (quoting NEB. REV. STAT. § 42-364 (Reissue 1988), which has since been codified in the Nebraska Parenting Act as NEB. REV. STAT. § 43-2923(6)(a) (Reissue 2016)).

100. See, e.g., *Molczyk*, 285 Neb. at 109–10, 825 N.W.2d at 446 (“It is sufficient to say the evidence showed that [the defendant] had been the children’s primary caretaker and that [the plaintiffs] temporary custody of them had not been in their best interests. The court did not abuse its discretion in awarding [the defendant] sole custody.”) (emphasis added).

garding other statutorily compelled factors to exclusively apply the primary-caregiver preference.¹⁰¹ Accordingly, the Supreme Court of Nebraska has carefully distinguished this distinction in its line of primary-caregiver decisions.¹⁰²

First, it is important to note that the failure of a court to explicitly state the factors upon which it has conducted its best-interests analysis comprises a different situation from that of a court which has improperly weighed relevant factors under its best-interests analysis. For example, the Supreme Court of Nebraska in *Molczyk* found no abuse of discretion when a lower court failed to expressly state its use of the best-interests factors used to determine a custody award.¹⁰³ Although the lower court in *Molczyk* did not provide an express accounting of its best-interests factors, the district court's record provided ample evidence to support its award.¹⁰⁴ The record established that the appellee was the child's primary caregiver; the record also displayed sufficient alternative evidence against finding custody for the appellant.¹⁰⁵ Although the district court did not expressly state these findings in its holding, the supreme court found no abuse of discretion from such an exclusion because the law presumes "in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise."¹⁰⁶

This distinction is vital in recognizing the flaw in *Rommers*, because although the district court and the court of appeals in *Rommers* clearly identified the appropriate factors to weigh in issuing and upholding a custody award, the court of appeals in *Rommers* improperly upheld the district court's decision by using the primary-caregiver preference *alone*, therein distinguishing its holding from *Molczyk*.

In line with *Molczyk*, the Supreme Court of Nebraska has consistently treated the primary-caregiver preference as incapable of sufficing as the sole factor for determining custody under the best-interests analysis.¹⁰⁷ For example, the *Maska* court examined a district court ruling that failed to specify which best-interests factors it had used in

101. NEB. REV. STAT. § 43-2923(6)(e) ("In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the foregoing factors and . . . (e) [c]redible evidence of child abuse or neglect or domestic intimate partner abuse. For purposes of this subdivision, the definitions in section 43-2922 shall be used.") (emphasis added).

102. See *Molczyk*, 285 Neb. at 109, 825 N.W.2d at 446; *Kamal*, 277 Neb. at 121–22, 759 N.W.2d at 918; *Maska*, 274 Neb. at 635, 742 N.W.2d at 497; *Gress*, 271 Neb. at 126, 710 N.W.2d at 324–25; *Applegate*, 236 Neb. at 418, 461 N.W.2d at 420.

103. *Molczyk*, 285 Neb. at 109, 825 N.W.2d at 446.

104. *Id.*

105. *Id.*

106. *Id.* (emphasis added).

107. See *Maska*, 274 Neb. at 635, 742 N.W.2d at 497.

determining its custody award.¹⁰⁸ Like the *Molczyk* court, the *Maska* court had determined that the failure of a district court to expressly state the factors it used to determine the best interests of a child had no appealable merit.¹⁰⁹ However, the *Maska* court continued to examine the record of the district court to ensure that proper best-interests factors, although not expressly stated, were indeed in the record.¹¹⁰ The court noted that “[t]he record does not establish that either parent was unfit, although it was clear that the parties had had a ‘violent and abusive relationship towards each other’”¹¹¹ After checking the record for parental fitness, the court weighed the following considerations:

[G]eneral considerations of moral fitness of the child’s parents, including the parents’ sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and the parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent’s character, parental capacity to provide physical care and satisfy educational needs of the child; and many other factors relevant to the general health, welfare, and well-being of the child.¹¹²

The court found that the appellee was the child’s primary caregiver, but the court weighed this factor *in addition* to noting that the appellee was a more supportive parent who would provide a better environment for the child during the school year.¹¹³ The fact that the appellee was the child’s primary caregiver was a factor considered by the court, but such a factor was insufficient *by itself* to determine custody.¹¹⁴

Although the *Rommers* court correctly noted that binding precedent and Nebraska statutes govern best-interests analyses, the *Rommers* court failed to correctly apply them.¹¹⁵ For instance, the court of appeals identified the condemning evidence of Aaron’s moral fitness with regard to nude pictures of minor girls that the district court noted in its record,¹¹⁶ and it acknowledged the documented episodes of Aaron’s anger and frustration manifested in response to Samantha’s colicky conditions.¹¹⁷ Yet, despite these observations, the *Rommers* court upheld the lower court’s custody award entirely upon the primary-caregiver preference.

108. *Id.* at 633, 742 N.W.2d at 496.

109. *Id.*

110. *See id.* at 634, 742 N.W.2d at 496.

111. *Id.*

112. *Id.* at 633–34, 742 N.W.2d at 496.

113. *Id.* at 635, 742 N.W.2d at 497.

114. *See id.*

115. *See Rommers v. Rommers*, 22 Neb. App. 606, 619, 858 N.W.2d 607, 617 (2014) (reciting the law on best-interests analysis).

116. *Id.*

117. *Id.* at 618–19, 858 N.W.2d at 617.

Such a ruling diverges from *Molczyk* and *Maska*, and entirely ignores section 43-2923's "shall consider" language, which requires Nebraska courts to weigh multiple factors. Accordingly, it is vital to recognize that the Nebraska Legislature's use of the words "shall consider" connotes more than the mere recognition of facts. Instead, the Nebraska Legislature's choice of words requires courts to both recognize and evaluate the factors enumerated in section 43-2923. While there is no doubt that the *Rommers* court recognized the moral-fitness concerns raised by the district court,¹¹⁸ the court failed to evaluate these concerns when it based its holding entirely upon the primary-caregiver preference.

To illustrate this point, consider two plausible lines of reasoning that the *Rommers* court utilized in crafting its holding. Either (1) the court of appeals recognized and evaluated the evidence of Aaron's moral-fitness shortcomings and determined that such evidence was outweighed by the fact that Elizabeth was Samantha's primary caregiver, or (2) the court of appeals failed to evaluate statutorily required factors and errantly based its holding upon the primary-caregiver preference alone. If the court employed the latter line of reasoning, the decision clearly runs afoul of the "shall consider" language of section 43-2923.

Yet, the former line of reasoning is also erroneous because it would create a new precedent that favors the primary-caregiver preference over evidence of moral-fitness concerns under Nebraska common law and child-welfare factors under section 43-2923(6)(c), thus subverting the statutorily compelled best-interests factors of section 43-2923 in favor of the primary-caregiver preference. It is incredible to imagine a Nebraska appellate court disregarding credible evidence of child pornography and intimate partner abuse by casually upholding the primary-caregiver preference. Moreover, such reasoning ultimately subverts the purpose of best-interests analyses—to protect children.¹¹⁹ However, if this is the line of reasoning adopted by the *Rommers* court, then *Rommers* stands to erode the protective aspects of best-interests analyses by disregarding evidence of harm in favor of the primary-caregiver preference.

Moreover, because the *Rommers* court acknowledged that the district court had based its custody award on the fact that Elizabeth was the primary caregiver and that evidentiary findings sufficiently showed that Aaron had directed physical outbursts toward his child,

118. *See id.* at 619, 858 N.W.2d at 617.

119. *See, e.g.,* *Petersen v. Petersen*, 190 Neb. 805, 807, 212 N.W.2d 580, 581 (1973) ("[The purpose of the best-interests analysis] is preventive as well as remedial; and when . . . the trial court determines a child could suffer harm by remaining in his present home then it would be incumbent upon that court to order a change [of custody].").

had possessed child pornography, and had committed sexual improprieties against his wife,¹²⁰ it seems unlikely that the court of appeals intended for its holding to completely disregard this evidence in favor of the sole finding that Elizabeth was Samantha's primary caregiver. If such a holding is to be believed, then credible evidence of the common law factors expressed in *Maska* and *Davidson* would become irrelevant when juxtaposed with the primary-caregiver preference. Conversely, if Aaron had presented credible evidence showing that Elizabeth had possessed child pornography, had displayed physical frustration toward Samantha's colicky conditions, and had committed sexual improprieties against Aaron, then such evidence would be irrelevant to a showing that Elizabeth was Samantha's primary caregiver.

Instead, it seems more probable that the court of appeals *meant* to hold that "because Elizabeth [was] the primary caregiver of Samantha,"¹²¹ and because the record showed that there was credible evidence to call into question Aaron's moral fitness, "custody with Elizabeth [was] not an abuse of discretion."¹²² A ruling based entirely upon the primary-caregiver preference either negates the Nebraska Legislature's "shall consider" mandate, or it relegates the statutory factors of the Nebraska Parenting Act and various other common law best-interests factors moot when juxtaposed to the primary-caregiver preference.

B. The Proper Timing of Primary-Caregiver Preference Analysis

Second, the *Rommers* court displaced the proper timing for the application of the primary-caregiver preference by analyzing the preference before it was relevant. As mentioned above, a majority of jurisdictions apply the primary-caregiver preference only "when other factors bearing on the parties' ability to provide for the best interests of the child are relatively equal."¹²³ In essence, the primary-caregiver preference functions as a tie-breaker for courts that must, for various reasons, award primary or sole custody to one parent.¹²⁴ Courts have generally applied the primary-caregiver preference in this capacity because, without more substantive, determinative factors present, courts feel comfortable awarding custody to the parent "on whom the child has depended for satisfying his or her basic physical and psychological needs."¹²⁵ The Supreme Court of Nebraska has yet to decide when the application of the primary-caregiver preference is appropri-

120. *Rommers*, 22 Neb. App. at 613–14, 858 N.W.2d at 613–14.

121. *Id.* at 619, 858 N.W.2d at 617.

122. *Id.*

123. See Nadel, *supra* note 27, at 1134.

124. See *id.* at 1134–35.

125. See *id.*

ate in a best-interests analysis,¹²⁶ but Nebraska courts have been generally consistent in their application of the primary-caregiver preference.¹²⁷

For example, the Court of Appeals of Nebraska in *Pohlmann* upheld a district court custody award between two parents whom the district court had determined to be relatively equal under its best-interests analysis.¹²⁸ On appeal, the *Pohlmann* court was forced to distinguish between these parents, both of whom presented questionable character flaws. The first parent had admitted to inappropriate sexual behavior during her marriage, which had brought “public animosity towards her . . . [and] adversely affected [her] minor children.”¹²⁹ The second parent had spent most of his time away from the children while working on his farm, and the evidence showed that the children were more likely to succeed in a new environment away from the one in which he (the second parent) lived.¹³⁰ To emphasize its struggle to find one parent more suitable for the children under its best-interests analysis, the district court stated that “[t]his is truly unfortunate, for this looked to be a case where the parties, if left alone, could have worked out a joint custody relationship.”¹³¹ Forced to break the tie, the district court determined that the first parent was the children’s primary caregiver and accordingly awarded her primary custody.¹³² The court of appeals affirmed this decision, finding no abuse of discretion.¹³³

In a similar fashion, the Supreme Court of Nebraska in *Gress* relied on the primary-caregiver preference to uphold a district court’s custody award against the appellant whom the district court had determined to be relatively equal to the appellee under its best-interests analysis.¹³⁴ The supreme court agreed with the lower court’s findings, stating that “[b]oth parents had loving, caring relationships with

126. As mentioned above, the Supreme Court of Nebraska in *Applegate* refused to adopt the primary-caregiver preference as a per se rule for awarding custody and instead stated that the primary-caregiver preference “is simply one of several considerations.” *Applegate v. Applegate*, 236 Neb. 418, 418, 461 N.W.2d 419, 420 (1990). It is important to note that the *Applegate* court never determined the proper *timing* for applying the primary-caregiver preference.

127. *See, e.g.*, *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 299, 824 N.W.2d 63, 71 (2012) (holding that even though both parties were shown to be fit and loving parents, the award of custody to the primary caregiver was not an abuse of discretion).

128. *Id.* at 295–97, 824 N.W.2d at 68–69.

129. *Id.* at 297, 824 N.W.2d at 69.

130. *Id.* at 299, 824 N.W.2d at 71.

131. *Id.* at 297, 824 N.W.2d at 70.

132. *Id.* at 297, 824 N.W.2d at 69.

133. *Id.* at 299, 824 N.W.2d at 71.

134. *Gress v. Gress*, 271 Neb. 122, 125–26, 710 N.W.2d 318, 324 (2006).

the children prior to the dissolution action”¹³⁵ The *Gress* court partially based its decision to uphold the lower court’s custody award on the fact that the children had stated a preference for custody with the appellee; nevertheless, the supreme court applied the primary-caregiver preference in favor of the appellee, but only *after* the court had found on review that both parents were “fit . . . [and] loving.”¹³⁶

The flaw in *Rommers*’ implementation of the primary-caregiver preference stems from the timing of the court’s application. The court of appeals applied the primary-caregiver preference in its analysis after it upheld the district court’s finding that both parents were fit, but such application was unnecessary because the parties in question lacked parental parity under the district court’s best-interests analysis.¹³⁷

For example, the *Pohlmann* and *Gress* courts struggled to differentiate between two otherwise similarly situated parents under their best-interests analyses.¹³⁸ Faced with situations that required an award of primary custody, these courts searched for a tie-breaking factor permissible under section 43-2923 and settled on the primary-caregiver preference.¹³⁹ Yet, the relative best-interests equality found in both *Pohlmann* and *Gress* is not found in *Rommers*.¹⁴⁰ Although

135. *Id.* at 125, 710 N.W.2d at 324. The Supreme Court of Nebraska refused to review evidence presented to the district court by the appellant that attempted to show the appellee’s personality was subject to question under the district court’s best-interests analysis. The court found such evidence irrelevant because “there [was] no indication that the [district] court gave any particular weight to the testimony of either expert.” *Id.*

136. *Id.* at 125–26, 710 N.W.2d at 324. In applying the primary-caregiver preference, the supreme court noted that the appellee “was responsible for the children’s care from the time they were infants, including bathing the children, purchasing their clothes, doing laundry, cooking the family meals, and taking the children to and from school, activities, and doctor’s appointments. Further, the youngest son ha[d] Down syndrome and require[d] special care. Although [the appellant] [was] able and willing to care for him, [the appellee] work[ed] only part time outside the home and consider[ed] her ‘vocation in life’ to be caring for her children.” *Id.* at 126, 710 N.W.2d at 324.

137. *See Rommers v. Rommers*, 22 Neb. App. 606, 619, 858 N.W.2d 607, 617 (2014); *Rommers v. Rommers*, No. CI 13-1, slip op. at 8 (Neb. Dist. Ct. Dec. 30, 2013) (“[Aaron’s] explanation of the anonymous sender of the picture showing the naked younger sister of a past girlfriend is not accepted by the court. His penchant for carrying on communications having sexual innuendo with much younger girls does not reflect favorably on his moral fitness. Elizabeth’s concerns about Aaron’s behavior have merit.”).

138. *See Pohlmann v. Pohlmann*, 20 Neb. App. 290, 297, 824 N.W.2d 63, 69–70 (2012); *Gress*, 271 Neb. at 125–26, 710 N.W.2d at 324.

139. *See Pohlmann*, 20 Neb. App. at 297, 824 N.W.2d at 69; *Gress*, 271 Neb. at 125–26, 710 N.W.2d at 324.

140. As mentioned above, the district court had found that Aaron had directed physical tantrums at Samantha, had possessed child pornography, and had committed sexual improprieties against his wife. *Rommers*, 22 Neb. App. at 613–14, 858 N.W.2d at 613–14.

the district court determined Aaron to be fit, Aaron's lack of parenting skills (culminating in his inability to properly cope with an ill child), combined with his moral-fitness shortcomings, far outweighed any evidence presented against Elizabeth.¹⁴¹ In fact, the only evidence that the district court weighed against Elizabeth was its determination that Elizabeth's move to Arizona was not better for her employment prospects and that Samantha's new home in Arizona would make visitation with Aaron's family more difficult.¹⁴² The district court's holding properly weighed caregiving evidence under section 43-2923(a) but stopped short of using this evidence to satisfy an unnecessary presumption. Its ultimate custody ruling was founded on the entirety of evidence weighed against Aaron.¹⁴³

However, the court of appeals, on review, interpreted the district court's evidentiary findings as sufficient to establish the requisite parity needed to implement the primary-caregiver preference. Yet, if such evidence is sufficient to form the requisite best-interests parity required to implement the primary-caregiver preference, then it is difficult to imagine a situation that would not permit Nebraska courts to use the primary-caregiver preference as the ultimate determining factor in awarding custody. A search for two parties further apart than Elizabeth and Aaron Rommers in best-interests parity would almost certainly yield one party who is unfit for custody, and therefore negate the need for best-interests analyses in the first place. Thus, if *Rommers* is the extent to which a court can perceive the necessary parity between two parties, then no best-interests analyses would be exempt from the primary-caregiver preference. Such a system runs counter to the national application of the primary-caregiver preference¹⁴⁴ and against Nebraska's own implementation.¹⁴⁵

Furthermore, adherence to the best-interests analysis purported by *Rommers* would likely serve to undermine the underlying purpose of the primary-caregiver preference. As mentioned above, the primary-caregiver preference is utilized as a tie-breaking procedure by the courts to distinguish similarly situated parties in custody disputes.¹⁴⁶ To elevate the primary-caregiver preference to the position of a custody presumption under Nebraska's best-interests analyses,

141. On this point, it is important to note that the district court did not fault Elizabeth for departing with Samantha for Arizona after finding child pornography on Aaron's phone. *See id.* at 613, 858 N.W.2d at 613.

142. *Id.*

143. *Rommers v. Rommers*, No. CI 13-1, slip op. at 10 (Neb. Dist. Ct. Dec. 30, 2013) (emphasis added) ("Based upon the *whole of the evidence* the court concludes that it would be in Samantha's best interests that her custody be awarded to Elizabeth . . .").

144. *See Nadel, supra* note 27, at 1134–35.

145. *See supra* notes 43–51.

146. *See Nadel, supra* note 27, at 1134–35.

such as the *Rommers* holding purports, is expressly forbidden by the Nebraska Legislature via section 42-364(2).

Moreover, use of the primary-caregiver preference as the ultimate deciding factor in a best-interests analysis creates inherent flaws absent from nearly all other substantive factors considered by Nebraska courts. First, courts have generally applied the primary-caregiver preference for its value of stability to the child, i.e., placing the child with “the parent on whom the child has depended.”¹⁴⁷ Yet, Nebraska courts are well aware of the volatile nature of child custody proceedings, which is why the courts have stated that their focus in best-interests analyses is directed toward the “immediate future” after a custody award.¹⁴⁸ While the other best-interests factors expressed in section 43-2923 and by the Supreme Court of Nebraska are unlikely to change immediately after the conclusion of custody proceedings,¹⁴⁹ it is inherently foreseeable that the previous role of a parent as a primary caregiver will change or significantly reshape itself after divorce proceedings. One need not look any further than *Rommers* for proof.¹⁵⁰

Second, and perhaps most importantly, by prioritizing the substantive weight afforded to the primary-caregiver preference, Nebraska courts will inevitably perpetuate gender bias in custody awards.¹⁵¹ With the exception of abuse,¹⁵² no other best-interests factor expressed in section 43-2923 or by the Supreme Court of Nebraska provides such an outcome determinative result based upon gender.¹⁵³

147. *See id.*

148. *See State ex rel. Dawn M. v. Jerrod M.*, 22 Neb. App. 835, 841, 861 N.W.2d 755, 761 (2015) (“The focus is on the best interests of the child now and in the immediate future, and how the custodial parent is behaving at the time of the modification hearing and shortly prior to the hearing is therefore of greater significance than past behavior when attempting to determine the best interests of the child.”).

149. For example, it is difficult to foresee abusive tendencies or moral-fitness trepidations of a parent immediately altering after a child custody award.

150. Immediately after separating from Aaron, Elizabeth began working thirty hours per week, during which time the caregiving duties for Samantha fell to Elizabeth’s sister-in-law. *Rommers v. Rommers*, 22 Neb. App. 606, 612, 858 N.W.2d 607, 613 (2014).

151. *See* 131 AM. JUR. PROOF OF FACTS 3D, *supra* note 49, §§ 2, 6; *supra* note 50.

152. MICHELE C. BLACK, ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 44–45 (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [<https://perma.unl.edu/UT9T-AGX6>] (finding women nearly twice as likely as men to suffer from severe physical violence as a product of intimate partner abuse).

153. *See* 131 AM. JUR. PROOF OF FACTS 3D, *supra* note 49, §§ 2, 6; *supra* note 50; *see also* Crippen, *supra* note 49, at 448–49 (summarizing critical arguments against the primary-caregiver preference, which argue that the preference is biased toward mothers); Dotterweich & McKinney, *supra* note 49, at 220 (finding more than 53% of judges in Texas, a primary-caregiver preference state, believe that fathers rarely or never receive fair consideration when seeking sole custody of

IV. CONCLUSION

The *Rommers* court erred in its application of the primary-caregiver preference to uphold the District Court for Holt County's custody award, which granted Elizabeth Rommers sole custody of her daughter, Samantha Rommers. As discussed above, this decision commits two legal mistakes and posits a plethora of unintended repercussions. First, the Court of Appeals of Nebraska errantly utilized the primary-caregiver preference as the sole factor for upholding the district court's custody award. In doing so, the court of appeals subverted the Nebraska Legislature's express commands in the Nebraska Parenting Act and the Supreme Court of Nebraska's common law considerations for custody awards.¹⁵⁴

Second, the court of appeals applied the primary-caregiver preference at an improper time.¹⁵⁵ By applying the primary-caregiver preference before a best-interests analysis tie-breaking procedure was necessary, the court of appeals misapplied the Supreme Court of Nebraska's implied, appropriate usage of the primary-caregiver preference. In doing so, the court of appeals prioritized the primary-caregiver preference above other best-interests factors enumerated by the Nebraska Parenting Act and the Supreme Court of Nebraska, expanding the primary-caregiver preference beyond its tie-breaking function and elevating it to the status of a superior substantive factor under best-interests analyses.

Left unchanged, *Rommers* stands for the proposition that when a court is faced with a parent in a custody dispute who possessed child pornography, initiated frustrated displays of violence toward his infant, and committed numerous sexual misconducts toward his wife, *the only important* factor relevant in the court's custody analysis is the primary-caregiver preference. Not only does such a holding promulgate gender bias and further frustrate an already arbitrary and complicated system of determining child custody in Nebraska courts, it also looms as erroneous precedent capable of perpetuating unintended consequences upon Nebraska families and children. Just as the misinterpretation of Official Baseball Rule 7.01 has steadily swallowed the correct rule of America's pastime, *Rommers* threatens to swallow the purpose of the primary-caregiver preference—to break a tie.

their children, whereas 10% of Texas judges believe that fathers always receive fair consideration); Henry, *supra* note 49, at 53 (arguing that the primary-caregiver preference is a “masquerade[of] equality”).

154. See *supra* section III.A.

155. See *supra* section III.B.