

THE FAMILY LAW PRACTITIONER'S BEST CHILD CUSTODY STRATEGY: APPOINTMENT OF A GUARDIAN AD LITEM

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ABSTRACT

In North Dakota, there are three types of appointments for those who represent the best interests of children in court. While having the same focus, the roles of attorney guardians ad litem, lay guardians ad litem, and parenting investigators differ. Pursuant to state law, if a child is of sufficient maturity, the court may give substantial weight to the child's preference for primary residential responsibility if the child's preference was not unduly or improperly influenced. Children's wishes may be expressed through an in chambers interview, testimony in open court, or articulated by an advocate.

This Article reviews eleven district court cases throughout North Dakota in which a child's wishes were included in the court's analysis. In cases where the child expressed a preference as to residential responsibility or parenting time and a guardian ad litem was appointed, the court's determination of primary residential responsibility matched the expressed preference of the child. This shows that the appointment of a guardian ad litem may be advantageous for a family law practitioner where the child's preference aligns with their client's desired outcome.

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I. INTRODUCTION

In North Dakota, attorney guardians ad litem are appointed by the court or by stipulation of the parties in disputes related to primary residential responsibility and parenting time. An attorney guardian ad litem advocates for the best interests of the minor child pursuant to state law.¹ When practitioners are considering whether a guardian ad litem should be appointed to a case, it is important to understand how that appointment may impact the outcome. This Article provides a historical review of how the court considers appointment of a guardian ad litem and the child’s expressed preference in determining primary residential responsibility and parenting time.

1. North Dakota’s best interest factors are found at N.D. CENT. CODE § 14-09-06.2(1) (2023).

II. BACKGROUND

A. DISTINGUISHING THE ROLES OF ATTORNEY GUARDIAN AD LITEM, LAY GUARDIAN AD LITEM, AND PARENTING INVESTIGATOR

There are three varying appointments for those who advocate for the best interests of children in North Dakota courts. Those appointments include attorney guardians ad litem, lay guardians ad litem, and parenting investigators. Pursuant to the North Dakota Rules of Court, attorney guardians ad litem “shall advocate the best interests of the child as to parental rights and responsibility and support.”² As such,

[a] guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and, consistent with the Rules of Professional Conduct, shall consider, but not be bound by, the wishes of the child or others as to the best interests of the child.³

The attorney guardian ad litem functions as an attorney and does not prepare a report or provide testimony.⁴ Specifically, “[a] guardian ad litem may present a case, cross-examine a witness, deliver a summation, prepare a memorandum of law, file a motion, and file or participate in an appeal on issues involving the best interests of the child.”⁵

In contrast with attorney guardians ad litem, a juvenile court lay guardian ad litem must:

prepare a written report regarding the child’s best interest, including conclusions with specific recommendations as appropriate to the facts of the case—psychological, psychiatric, parenting and chemical dependency evaluations or services or treatment deemed necessary—this report must be submitted to the juvenile court as directed by the court, and upon receipt copies must be provided to all parties by the juvenile court. . . . A lay guardian ad litem must attend all court proceedings . . . and must testify when requested.⁶

A lay guardian ad litem is automatically appointed to a case upon filing of a petition in juvenile court to “advocate for the best interests of the child.”⁷

A parenting investigator’s role is distinct from both attorney guardians ad litem and lay guardians ad litem. “In contested proceedings dealing with parental rights and responsibilities the court, upon the request of either party,

2. N.D.R.Ct. 8.7(d)(1).

3. *Id.*

4. *Id.* 8.7 explanatory note.

5. *Id.* 8.7(e).

6. N.D.R.Juv.P. 17(b)(5), (c)(1).

7. *Id.* 17(b)(1), (5); N.D. CENT. CODE § 27-20.1-08(1) (2019).

or, upon its own motion, may appoint a parenting investigator and order an investigation and report concerning parenting rights and responsibilities regarding the child.”⁸ Parenting investigators may consult with anyone who has information concerning the child as it pertains to parental rights and responsibilities.⁹ A parenting investigator must file and serve a report on counsel and unrepresented parties at least thirty days prior to the evidentiary hearing.¹⁰ Counsel and any unrepresented party may request the parenting investigator’s complete file, including all documentation considered throughout the investigation.¹¹ A parenting investigator may be called as a witness and cross-examined during the evidentiary hearing.¹²

Payment is also handled differently for attorney guardians ad litem, lay guardians ad litem, and parenting investigators.

The court may direct either or both parties to pay the attorney guardian ad litem fee established by the court. If neither party is able to pay the fee, the court may direct the fee to be paid, in whole or in part, by the county where the child resided at the time the action was commenced. The court may direct either or both parties to reimburse the county, in whole or in part, for such payment.¹³

Lay guardians ad litem are not paid by the parties.¹⁴ Typically, the parties split the cost of a parenting investigator, proportionate to the parties’ income. However, if the parties are indigent, statute allows for the cost of a parenting investigator to be paid by the county in which the child resides at the time the action is commenced, or in cases of modification, at the time the motion to modify is served.¹⁵

B. IN CHAMBERS INTERVIEW OF MINOR CHILDREN

In the event that a parenting investigator or guardian ad litem is not appointed, the child may provide testimony. Children may testify in open court

8. N.D. CENT. CODE § 14-09-06.3(1) (2023).

9. *Id.* § 14-09-06.3(2).

10. *Id.* § 14-09-06.3(3).

11. *Id.*

12. *Id.*

13. *Id.* § 14-09-06.4(3).

14. Appendix A of the North Dakota Rules of Juvenile Procedure, last updated on March 1, 2010, states, “The lay guardian ad litem must charge a reasonable fee for the guardian’s services commensurate with experience and ability. The lay guardian ad litem must provide an accounting for time on each case and must make fees known to the parties in advance of providing services.” However, lay guardians ad litem are currently not compensated by parties directly. Instead, they are employees of a 501(c)(3) nonprofit organization. See *Grand Forks Programs: Youth and Family Services (Youth Under 18)*, YOUTHWORKS, <https://youthworksnd.org/grand-forks/> [https://perma.cc/R22U-FS82] (last visited Nov. 12, 2024).

15. N.D. CENT. CODE § 14-09-06.3(4).

or in the judge's chambers. The North Dakota Rules of Court require that both parents agree for a child to testify in chambers.¹⁶ The rule is meant to "balance parental due process rights with a child's right to be heard."¹⁷ Parents must not be present during the in chambers interview, but parents' attorneys must be allowed to be present.¹⁸ The court may allow attorneys to ask the child questions or submit questions for the child to the judge, and "[t]he court must make a record of the in chambers interview."¹⁹

If both parents do not agree to allow a child to testify in chambers, and a parent wants the child to provide testimony, that parent may choose to call a child as a witness in open court.²⁰ In that case, both parents, as parties to case, have the right to be present for such testimony.²¹

C. HISTORY OF BEST INTEREST FACTOR (I) – THE CHILD'S PREFERENCE

In making decisions regarding parental rights and responsibilities, residential responsibility, and parenting time, the district court must consider and make findings regarding all relevant statutory best interest factors.²² In North Dakota, there are a total of thirteen best interest factors.²³

Best interest factor (i), pertaining to the child's preference, was amended in 2009 during the Sixty-First Legislative Session.²⁴ The purpose of the amendment was based on concern that "too many young children [were] dragged into court by a parent and pressured to choose between parents."²⁵ Testimony in support of the amendment noted "[t]he proposal is not intended to bring more children into court, but rather to keep children out of a no-win situation."²⁶ Prior to the amendment, best interest factor (i) required the court to consider "the reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference."²⁷ Since the 2009 amendment, best interest factor (i) provides,

16. N.D.R.Ct. 8.13(a).

17. *Id.* 8.13 explanatory note.

18. *Id.* 8.13(a), (c).

19. *Id.* 8.13(b), (c).

20. *Hammeren v. Hammeren*, 2012 ND 225, ¶ 21, 823 N.W.2d 482.

21. *Id.*

22. *See* N.D. CENT. CODE §§ 14-09-06.2(1) (2019), 14-09-31(1) (2009); *see also* *Martodam v. Martodam*, 2020 ND 70, ¶ 20, 940 N.W.2d 664.

23. N.D. CENT. CODE § 14-09-06.2(1).

24. N.D. S. STANDING COMM. MINUTES, S. JUDICIARY COMM., S.B. 2042, 61st Leg. Sess. (N.D. Jan. 19, 2009).

25. *Id.* at 77.

26. *Id.*

27. N.D. CENT. CODE § 14-09-06.2(1)(i) (2009).

[i]f the court finds by clear and convincing evidence that a child is of sufficient maturity to make a sound judgment, the court may give substantial weight to the preference of the mature child. The court also shall give due consideration to other factors that may have affected the child's preference, including whether the child's preference was based on undesirable or improper influences.²⁸

This is significant in a child custody matter, as no other best interest factor allows the court to afford it substantial weight.²⁹

D. NORTH DAKOTA CASE LAW INTERPRETING BEST INTEREST FACTOR (I) AFTER 2009

In 2010, the district court in *Anderson v. Jenkins* ordered:

[i]f either parent believes that one of the children is of sufficient age and maturity to express a preference, the parent must first contact the Court before discussing the matter further with the child or requesting the child to sign an affidavit. The Court will appoint a guardian ad litem to advocate for and represent the child's best interests.³⁰

Two years later, in subsequent proceedings, the court appointed a guardian ad litem.³¹

At the time of the evidentiary hearing in 2014, the children were seventeen years old, fourteen years old, and twelve years old.³² The older two children testified in open court during the evidentiary hearing and expressed a desire for equal residential responsibility.³³ The court noted that the children's wishes were to be "tempered with the fact that they were both interviewed and prepared for their testimony [by the father's attorney] outside the presence of their appointed guardian ad litem and in violation of Judge Kleven's April 8, 2010 Order."³⁴ The court found the testimony of both children included "parroting phrases such as 'a right to testify' and 'their voice should be heard' provided to them during the meeting with [the father's] attorney."³⁵ The court did not place substantial weight upon the fourteen year

28. *Id.* § 14-09-06.2(1)(i) (2019).

29. *See id.* § 14-09-06.2(1).

30. Order Denying Motion for Change of Primary Residential Responsibility, Granting Motion to Modify Parenting Time and Rule 63 Certification ¶ 5, *Anderson v. Jenkins*, 18-08-C-1727 (N.D. Dist. Ct. Oct. 28, 2014) (No. 308) [hereinafter *Anderson Order*].

31. *See* Order to Appoint Guardian Ad Litem, *Anderson v. Jenkins*, 18-08-C-1727 (N.D. Dist. Ct. July 24, 2012) (No. 120).

32. *Anderson Order*, *supra* note 30, ¶ 2.

33. *Id.* ¶ 51.

34. *Id.*

35. *Id.*

old's testimony, given the circumstances under which the child was prepared for her testimony.³⁶ Ultimately, the court found factor (i) was neutral, because neither child testified to a preference of one parent over the other.³⁷ The father's motion to modify primary residential responsibility was denied.³⁸

In *Brouillet v. Brouillet*, neither party offered the testimony of the two children who were subject to the primary residential responsibility dispute.³⁹ The children's mother offered a third child as a witness; however, the father conceded primary residential responsibility of that child, to avoid the child being called as a witness.⁴⁰ Prior to the child's testimony, the court informed the children's mother that if the third child were determined to lack sufficient age and maturity "it would be considered as part of the final determination for primary residential responsibility."⁴¹

The child testified on the record without either parent present.⁴² The child's testimony did not provide "information that was not available from other witnesses."⁴³ The court found the child, age eleven, lacked sufficient maturity and did not significantly testify to preferring the mother.⁴⁴ Under the circumstances, the court found the mother's decision to call the third child as a witness was improper.⁴⁵ The court weighed factor (m)⁴⁶ against the mother based on her decision to call the child as a witness.⁴⁷ Ultimately, the court found best interest factor (i) to be inapplicable, because the two children whose residential responsibility was at issue were not called to testify.⁴⁸ The father was awarded primary residential responsibility of all three children.⁴⁹

In *Vanyo v. Vanyo*, the minor child testified in chambers without the parties or their attorneys present.⁵⁰ The child turned fourteen years old the week of testimony.⁵¹ The court found the child's responses did not appear

36. *Id.* ¶ 52.

37. *Id.* ¶ 53.

38. *Id.* ¶ 78(1).

39. Findings of Fact, Conclusions of Law, and Order for Judgment ¶ 48, *Brouillet v. Brouillet*, 18-2013-00996 (N.D. Dist. Ct. Jan. 12, 2015) (No. 94) [hereinafter *Brouillet Order*].

40. *Id.* ¶ 69.

41. *Id.* ¶ 71.

42. *Id.* ¶ 49.

43. *Id.* ¶ 70.

44. *Id.*

45. *Id.* ¶ 69.

46. Factor (m) refers to "[a]ny other factors considered by the court to be relevant to a particular parental rights and responsibilities dispute." N.D. CENT. CODE § 14-09-06.2(1)(m) (2019).

47. *Brouillet Order*, *supra* note 39, ¶¶ 68-69.

48. *Id.* ¶ 48.

49. *Id.* ¶ 72.

50. Order Granting Motion to Modify Primary Residential Responsibility ¶ 29, *Vanyo v. Vanyo*, 18-10-C-00982 (N.D. Dist. Ct. Oct. 18, 2016) (No. 87) [hereinafter *Vanyo Order*].

51. *Id.* ¶ 30.

rehearsed and the child maintained eye contact during questioning.⁵² The child indicated a preference to reside with her father.⁵³ “She quantified her preference as an 8 on a scale of 1 to 10, with 1 being a little and 10 being a lot.”⁵⁴ The court determined the child’s preference was driven by a desire to change schools to “eliminate delinquent homework and be popular” as opposed to preferring one parent’s home over the other.⁵⁵ The court found the child “agreed that living at either home would be good and . . . neither home would be bad.”⁵⁶ While the court did determine the child was of sufficient maturity and her preference was not based on undesirable or improper influences, the circumstances did not support affording substantial weight to the child’s preference.⁵⁷ In deciding not to give the child’s preference substantial weight, the court noted it was not required to do so under factor (i).⁵⁸ Ultimately, the court found factor (i) favored the father and cited the child’s preference when awarding the father primary residential responsibility.⁵⁹

In *Gravelle v. Monrreal*, all four minor children completed an in chambers interview.⁶⁰ Two children expressed a desire to live with their mother, while the remaining children expressed a desire to live with their father.⁶¹ The fifteen-year-old child expressed a clear preference not to reside with her father, which the court interpreted to mean she would prefer to live with her mother.⁶² The court found the child’s expressed preference was not in her best interest because the child was frequently absent from school, which resulted in commencement of truancy proceedings in juvenile court, and her preference was at least partially influenced by information the mother had inappropriately shared.⁶³ The court also considered testimony that the child rarely left the mother’s residence and the child referred to classmates as “associates” rather than “friends.”⁶⁴ The eleven-year-old child expressed a desire to reside with her mother.⁶⁵ The court found the child’s reasoning for her preference lacked specificity to give significant credibility and concluded the

52. *Id.*

53. *Id.* ¶ 31.

54. *Id.*

55. *Id.* ¶ 33.

56. *Id.* ¶ 31.

57. *Id.* ¶ 35.

58. *Id.*

59. *Id.* ¶¶ 35, 49.

60. Judgment and Decree ¶ 42, *Gravelle v. Monrreal*, 18-2016-DM-00638 (N.D. Dist. Ct. Aug. 25, 2017) (No. 125) [hereinafter *Gravelle Judgment*].

61. *Id.*

62. *Id.* ¶ 43.

63. *Id.*

64. *Id.*

65. *Id.* ¶ 44.

child did not have sufficient maturity for the court to give substantial weight to the child's preference.⁶⁶

The court felt the sixteen-year-old child and fourteen-year-old child had not considered the reasoning for their preference to reside with their father, other than that they had historically resided with him.⁶⁷ The court determined the sixteen-year-old and fourteen-year-old children's preferences "were not based on sufficient maturity to be given substantial weight."⁶⁸ The court found factor (i) weighed evenly or did not apply.⁶⁹ The court awarded the father primary residential responsibility of all four children.⁷⁰

In *Sivertson v. Drake*, both children testified in chambers.⁷¹ The fifteen-year-old testified that multiple moves with her mother made it difficult to maintain friendships.⁷² She also testified she participated in more activities when at her father's home and spent a lot of time in her room alone when at her mother's home.⁷³ The fifteen-year-old testified that she stayed with multiple family members when living with her mother, and she had issues with her mother's boyfriends, including physical altercations.⁷⁴ The fifteen-year-old expressed a preference to reside primarily with her father, stating she felt comfortable to be herself and safe in his home.⁷⁵

The twelve-year-old child testified he participated in activities when living with his father and moved frequently when with his mother.⁷⁶ The twelve-year-old also testified that his mother's boyfriends would yell, were mean, and pushed his sister against a wall.⁷⁷ The twelve-year-old felt he could talk to his father and his father was more comforting than his mother.⁷⁸ The twelve-year-old expressed a desire to reside with his father.⁷⁹ The court found both children were able to articulate their wishes "in a mature and intelligent manner."⁸⁰ The court found factor (i) weighed in favor of the father, and the

66. *Id.*

67. *Id.* ¶ 45.

68. *Id.*

69. *Id.* ¶ 58.

70. *Id.*

71. Findings of Fact, Conclusions of Law, and Order for Judgment ¶ 68, *Sivertson v. Drake*, 18-2012-DM-00809 (N.D. Dist. Ct. Sept. 21, 2020) (No. 393) [hereinafter *Sivertson Order*].

72. *Id.* ¶ 7.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* ¶ 8.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* ¶ 68.

father was awarded primary residential responsibility, subject to the mother's reasonable parenting time.⁸¹

In *Stevens v. Bachmeier*, the court determined the fifteen-year-old child was a mature child with sound judgment regarding her preference to live with her father.⁸² The child provided testimony that her preference was to live on her father's farm.⁸³ Additionally, the child testified there was a breakdown in her relationship with her mother.⁸⁴ The court referenced the portion of the guardian ad litem's brief that stated the child's preference was to remain "outside in the farming/ranching community."⁸⁵ The court found factor (i) weighed strongly in favor of the father and awarded the father primary residential responsibility of the child.⁸⁶

In *Olsen v. Bloch*, the court interviewed the child in chambers.⁸⁷ The child testified she loved and enjoyed spending time with both parents.⁸⁸ She testified she wanted to spend Christmas with her father in Florida.⁸⁹ The court found the child's preference under factor (i) to be neutral, however, the preference supported a modification of parenting time.⁹⁰

In *Lindell v. Lindell*, the three children were sixteen, twelve, and nine years old.⁹¹ The two eldest children were interviewed in chambers by the court with the parents' attorneys present.⁹² The children informed the court that their father misrepresented their statements regarding their preference to reside with him in an affidavit.⁹³ The court found it was clear the children wanted to remain living with their mother.⁹⁴ The court found the oldest child was mature and his testimony was not improperly influenced.⁹⁵ The court gave weight to the eldest child's preference to remain with his mother but did

81. *Id.* ¶¶ 68, 76.

82. Findings of Fact, Conclusions of Law and Order for Judgment ¶ 35, *Stevens v. Bachmeier*, 25-2020-DM-00027 (N.D. Dist. Ct. July 14, 2021) (No. 291) [hereinafter *Stevens Order*].

83. *Id.*

84. *Id.* ¶ 36.

85. *Id.* ¶ 37.

86. *Id.* ¶¶ 38, 43.

87. Findings of Fact, Conclusions of Law, and Order for Judgment ¶ 25(i), *Olsen v. Bloch*, 49-2013-DM-00029 (N.D. Dist. Ct. Dec. 22, 2021) (No. 148) [hereinafter *Olsen Order*].

88. *Id.*

89. *Id.*

90. *Id.*

91. Findings of Fact, Conclusions of Law and Order Denying Motion for Change in Primary Residential Responsibility; Order Appointing Guardian Ad Litem; Order for Child Support Review; Order Setting Review of Testing Requirement; and Order to Amend Judgment ¶ 7, *Lindell v. Lindell*, 50-2019-DM-00062 (N.D. Dist. Ct. Nov. 12, 2023) (No. 238) [hereinafter *Lindell Order*].

92. *Id.* ¶ 25(1).

93. *Id.*

94. *Id.*

95. *Id.*

not give substantial weight to the preference of the middle child.⁹⁶ Factor (i) weighed in favor of the mother.⁹⁷ The father's motion to modify primary residential responsibility was denied, despite the court's finding that there was a material change in circumstance.⁹⁸

In *Ludwig v. Ludwig*, one of the three children lived with her father for over a year.⁹⁹ Several out-of-court discussions occurred between the mother and that child pertaining to the child's preference.¹⁰⁰ Those conversations led the court to conclude the child was mature enough to make a decision regarding preference for custody.¹⁰¹ The child's preference was to reside with her father, and the court granted the father's motion to modify residential responsibility regarding that child.¹⁰² The father was awarded primary residential responsibility of the child.¹⁰³ The two other children continued to follow an equal residential responsibility arrangement.¹⁰⁴ The court found it was in the best interest of the children to allow split residential responsibility.¹⁰⁵

In *Scott v. Scott*, the eldest minor child, who was fifteen years old, testified in open court.¹⁰⁶ The child testified about an argument between herself and her father that occurred while she and two of the younger children were passengers in his vehicle.¹⁰⁷ The child recalled exiting the vehicle and calling her mother and law enforcement because she felt unsafe.¹⁰⁸ When she returned to the vehicle, her father began driving before she fastened her seat-belt.¹⁰⁹ The father slammed the brakes of the car and the child hit her head on the car's dashboard.¹¹⁰

The child also testified to her personal knowledge of her father's marijuana use, including his use before driving with the children.¹¹¹ The child testified to her own mental health struggles related to her relationship with

96. *Id.*

97. *Id.*

98. *Id.* ¶¶ 33-34.

99. Findings of Fact, Conclusions of Law, and Order for Second Amended Judgment ¶ 22, *Ludwig v. Ludwig*, 09-2017-DM-00376 (N.D. Dist. Ct. May 1, 2023) (No. 110) [hereinafter *Ludwig Order*].

100. *Id.*

101. *Id.*

102. *Id.* ¶¶ 22-23.

103. *Id.*

104. *Id.* ¶ 24.

105. *Id.* ¶¶ 24, 37.

106. Findings of Fact, Conclusions of Law, and Order for Judgment ¶ 13, *Scott v. Scott*, 50-2022-00034 (N.D. Dist. Ct. May 1, 2023) (Nos. 236-37) [hereinafter *Scott Order*].

107. *Id.* ¶ 13(A).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* ¶ 13(B).

her father and her parent's divorce.¹¹² The court found it was clear the child did not desire to spend extended summer parenting time with her father.¹¹³ The court found the child's testimony was credible, and she was of sufficient maturity to express a preference.¹¹⁴ The court ordered that the eldest child was not required to participate in any parenting time with her father unless she expressed a preference to do so, in which case the parents were to respect her preference.¹¹⁵ The court issued a separate parenting time schedule for the remaining five children.¹¹⁶

In *Rybak v. Rybak*, the mother wanted the children to express their preferences, and the father strongly opposed the children's participation in trial.¹¹⁷ The court noted it would have preferred the children's wishes be expressed through a parenting investigator or guardian ad litem, neither of which were requested by the parties.¹¹⁸ The sixteen-year-old child testified in open court, stating she did not want a relationship with her father.¹¹⁹ While the court found the child's feelings of anger towards her father were genuine, the court found she was disrespectful and immature.¹²⁰ The court determined the child's preference was not based on improper influences, despite the mother's unhealthy boundaries with the child.¹²¹ The fifteen-year-old child testified he wanted his mother to have primary residential responsibility.¹²²

The court did not feel the children were coached by either parent but believed the mother spoke to the children about their right to express an opinion in the proceedings.¹²³ The court held factor (i) favored the mother and awarded the mother primary residential responsibility.¹²⁴

112. *Id.* ¶ 13(C).

113. *Id.* ¶ 13(F).

114. *Id.* ¶ 13.

115. *Id.* ¶ 32(A).

116. *Id.* ¶ 32(B)-(J).

117. Findings of Fact, Conclusions of Law, and Order for Judgment ¶ 98, *Rybak v. Rybak*, 18-2023-DM-00423 (N.D. Dist. Ct. Mar. 15, 2024) (No. 214) [hereinafter *Rybak Order*].

118. *Id.*

119. *Id.* ¶ 99.

120. *Id.*

121. *Id.*

122. *Id.* ¶ 100.

123. *Id.*

124. *Id.* ¶¶ 102, 112.

III. ANALYSIS

A. PRIMARY RESIDENTIAL RESPONSIBILITY OUTCOMES IN CASES WITHOUT A GUARDIAN AD LITEM

In eight of the eleven cases discussed *supra*, a guardian ad litem was not appointed.¹²⁵

In *Brouillet v. Brouillet*, a shared child of the parties testified, however, primary residential responsibility of that child was not in dispute.¹²⁶ Thus, the court found factor (i) was inapplicable.¹²⁷ Four factors favored the father, one factor favored the mother, and the remaining were neutral or inapplicable.¹²⁸ The father was awarded primary residential responsibility.¹²⁹

In *Vanyo v. Vanyo*, the child was interviewed in chambers.¹³⁰ The child's preference was for the father to receive primary residential responsibility.¹³¹ The court did not give substantial weight to the child's preference but did find that factor (i) favored the father.¹³² Five factors favored the father, three factors favored the mother, and five factors were either neutral or inapplicable.¹³³ The father was awarded primary residential responsibility.¹³⁴

In *Gravelle v. Monrreal*, four children were interviewed in chambers.¹³⁵ Two expressed preference for their mother to receive primary residential responsibility, and the other two children preferred their father.¹³⁶ The court found factor (i) was neutral and did not give the children's preferences substantial weight.¹³⁷ Five factors favored the father, one factor favored the

125. See generally *Brouillet v. Brouillet*, No. 94, 18-2013-DM-00996 (N.D. Dist. Ct. Jan. 12, 2015) (Odyssey); *Vanyo v. Vanyo*, No. 87, 18-10-C-00982 (N.D. Dist. Ct. Oct. 18, 2016) (Odyssey); *Gravelle v. Monrreal*, No. 125, 18-2016-DM-00638 (N.D. Dist. Ct. Aug. 25, 2017) (Odyssey); *Sivertson v. Drake*, No. 393, 18-2012-DM-00809 (N.D. Dist. Ct. Sept. 21, 2020) (Odyssey); *Olsen v. Bloch*, No. 148, 49-2013-DM-0029 (N.D. Dist. Ct. Dec. 22, 2021) (Odyssey); *Lindell v. Lindell*, No. 238, 50-2019-DM-62 (N.D. Dist. Ct. Nov. 12, 2023) (Odyssey); *Ludwig v. Ludwig*, No. 110, 09-2017-DM-00376 (N.D. Dist. Ct. May 1, 2023) (Odyssey); *Rybak v. Rybak*, 18-2023-DM-00423 (N.D. Dist. Ct. Mar. 15, 2024) (No. 214).

126. *Brouillet Order*, *supra* note 39, ¶¶ 69-70.

127. *Id.* ¶ 48.

128. The four factors favoring the father were factors a, d, f, and m. The factor favoring the mother was factor k. Factors b, c, e, g, h, i, j, and l were either neutral or inapplicable. See *id.* ¶ 72.

129. *Id.*

130. *Vanyo Order*, *supra* note 50, ¶ 29.

131. *Id.* ¶ 31.

132. *Id.* ¶ 35.

133. The five factors favoring the father were factors c, d, e, g, and i. The three factors favoring the mother were h, k, and m. Factors the court found neutral or inapplicable were a, b, f, j, and l. See *id.* ¶ 47.

134. *Id.* ¶ 49.

135. *Gravelle Judgment*, *supra* note 60, ¶ 42.

136. *Id.*

137. *Id.* ¶¶ 45, 58.

mother, and seven factors were neutral or inapplicable.¹³⁸ The father was awarded primary residential responsibility of all four children.¹³⁹

In *Sivertson v. Drake*, two children were interviewed in chambers.¹⁴⁰ Both expressed preference that their father receive primary residential responsibility.¹⁴¹ The court found factor (i) favored the father.¹⁴² The court was silent on whether to afford the children's preference substantial weight.¹⁴³ Five factors favored the father, no factors favored the mother, and eight factors were neutral or inapplicable.¹⁴⁴ The father was awarded primary residential responsibility.¹⁴⁵

In *Olsen v. Bloch*, the child was interviewed in chambers.¹⁴⁶ The child's preference for primary residential responsibility was neutral, and the court found factor (i) neutral.¹⁴⁷ The court did not state whether substantial weight was afforded; however, the evidence and testimony presented supported modification of parenting time.¹⁴⁸ Of the three factors considered by the court, one favored the father, none favored the mother, and two were neutral.¹⁴⁹

In *Lindell v. Lindell*, two children were interviewed in chambers.¹⁵⁰ Both children expressed preference for the mother to be awarded primary residential responsibility.¹⁵¹ Factor (i) was found to favor the mother.¹⁵² The court did not state whether substantial weight was given to the children's preference. Four factors favored the mother, two factors favored the father, and

138. The five factors favoring the father were factors a, c, d, h, and k. The factor favoring the mother was m. The factors the court found neutral or inapplicable were b, e, f, g, i, j, and l. *See id.* ¶ 58.

139. *Id.*

140. Sivertson Order, *supra* note 71, ¶ 68.

141. *Id.* ¶¶ 7-8.

142. *Id.* ¶ 68.

143. *Id.*

144. The factors favoring the father were b, c, d, h, and i. The factors the court found neutral or inapplicable were a, e, f, g, k, j, l, and m. *See id.* ¶¶ 59-73.

145. *Id.* ¶ 76.

146. Olsen Order, *supra* note 87, ¶ 25(i).

147. *Id.*

148. *Id.*

149. Factor m favored the father. The factors the court found neutral or inapplicable were factors a and i. The other best interest factors were not discussed in the court's opinion. *See id.* ¶¶ 25, 42-45.

150. Lindell Order, *supra* note 91, ¶ 25(l).

151. *Id.*

152. *Id.*

seven factors were neutral or not considered.¹⁵³ The father's motion for modification of primary residential responsibility was denied.¹⁵⁴

In *Ludwig v. Ludwig*, one child testified in open court.¹⁵⁵ That child preferred the father to receive primary residential responsibility.¹⁵⁶ The court did not make factual findings as to each best interest factor. The court awarded split residential responsibility of the children.¹⁵⁷

In *Rybak v. Rybak*, two children testified in open court.¹⁵⁸ Their preference was for the mother to receive primary residential responsibility.¹⁵⁹ Factor (i) favored the mother.¹⁶⁰ The court was silent about whether substantial weight was given to factor (i). Two factors favored the mother, one factor favored the father, six factors were neutral, and three factors were not considered.¹⁶¹ The mother was awarded primary residential responsibility.¹⁶²

B. PRIMARY RESIDENTIAL RESPONSIBILITY OUTCOMES IN CASES WITH A GUARDIAN AD LITEM

In *Anderson v. Jenkins*, the children testified in open court.¹⁶³ The children's preference was for equal residential responsibility.¹⁶⁴ Factor (i) was determined to be neutral, and the children's preference was not given substantial weight by the court.¹⁶⁵ Four factors favored the mother, no factors favored the father, and eight factors were neutral or inapplicable.¹⁶⁶ The mother was awarded primary residential responsibility.¹⁶⁷

In *Stevens v. Bachmeier*, the child testified in open court.¹⁶⁸ The child's preference was for the father to receive primary residential responsibility.¹⁶⁹

153. The factors that favored the mother were a, c, h, and i. The factors that favored the father were f and k. The factors the court found to be neutral were b, d, e, and g. The court did not consider factors j, l, and m. *See id.* ¶ 25.

154. *Id.* ¶¶ 33-34, 56.

155. Ludwig Order, *supra* note 99, ¶ 23.

156. *Id.*

157. *Id.* ¶¶ 24, 37.

158. Rybak Order, *supra* note 117, ¶¶ 99-100.

159. *See id.*

160. *Id.* ¶ 102.

161. The factors that favored the mother were a and i. Factor e favored the father. The court found factors b, c, d, f, g, and h to be neutral. The court did not consider factors j, l, and m. *See id.* ¶ 112.

162. *Id.*

163. Anderson Order, *supra* note 30, ¶ 47.

164. *Id.*

165. *Id.* ¶¶ 52-53.

166. The factors that favored the mother were d, h, l, and m. The factors the court found to be neutral or inapplicable were a, b, e, f, g, i, j, and k. *See id.* ¶ 60.

167. *See id.* ¶¶ 60, 66.

168. Stevens Order, *supra* note 82, ¶ 14.

169. *Id.* ¶ 35.

Factor (i) favored the father, and the court gave that factor substantial weight.¹⁷⁰ Three factors favored the father, one factor favored the mother, and ten factors were neutral or inapplicable.¹⁷¹ The father was awarded primary residential responsibility.¹⁷²

In *Scott v. Scott*, one child testified in open court.¹⁷³ The child preferred the mother receive primary residential responsibility.¹⁷⁴ Factor (i) favored the mother, and the court gave that factor substantial weight.¹⁷⁵ Seven factors favored the mother, no factors favored the father, four factors were neutral or inapplicable, and two factors were not considered.¹⁷⁶ The mother was awarded primary residential responsibility.¹⁷⁷

IV. CONCLUSION

A. THE SIGNIFICANCE OF GUARDIAN AD LITEM APPOINTMENTS FOR PRACTITIONERS

In each of the eleven cases discussed, minor children testified to their preference for primary residential responsibility. Factor (i) was weighed in favor of one parent in six of the eleven cases.¹⁷⁸ In the other five cases, factor (i) was either neutral or found to be inapplicable.¹⁷⁹ In only two of the eleven cases, the child's preference was given substantial weight.¹⁸⁰ In both of the cases affording substantial weight to the child's preference, a guardian ad litem was appointed.¹⁸¹ In those cases, the children were fifteen and sixteen years of age at the time of their testimony, and both testified in open court.¹⁸²

170. *Id.* ¶ 38.

171. The factors that favored the father were factors h and i. Factor e favored the mother. The factors the court found neutral or inapplicable were a, b, c, d, f, g, j, k, l, and m. *See id.* ¶¶ 19-43.

172. *Id.* ¶ 43.

173. Scott Order, *supra* note 106, ¶ 13.

174. *Id.* ¶ 22(I).

175. *See id.*

176. The factors that favored the mother were factors b, d, f, g, i, k, and m. The factors the court found to be neutral or inapplicable were a, c, e, and h. The court did not consider factors j and l. *See id.* ¶ 22.

177. *Id.* ¶ 31.

178. *See* Vanyo Order, *supra* note 50, ¶¶ 5, 29-35; Sivertsen Order, *supra* note 71, ¶¶ 7-8, 68; Stevens Order, *supra* note 82, ¶¶ 14, 35-38; Lindell Order, *supra* note 91, ¶ 25(I); Scott Order, *supra* note 106, ¶¶ 13, 22(I); Rybak Order, *supra* note 117, ¶¶ 21-27, 98-102.

179. *See* Anderson Order, *supra* note 30, ¶¶ 47-53; Brouillet Order, *supra* note 39, ¶¶ 48-49; Gravelle Judgment, *supra* note 60, ¶¶ 42-45; Olsen Order, *supra* note 87, ¶ 25(i); Ludwig Order, *supra* note 99, ¶¶ 2-25.

180. *See* Stevens Order, *supra* note 82, ¶¶ 35-38; Scott Order, *supra* note 106, ¶ 22(I).

181. *See* Stevens Order, *supra* note 82, ¶ 1; Scott Order, *supra* note 106, ¶ 4(E).

182. *See* Stevens Order, *supra* note 82, ¶¶ 3, 8, 14, 34; Scott Order, *supra* note 106, ¶¶ 6, 22(I).

In total, a guardian ad litem was appointed in three of the eleven cases.¹⁸³ In two of those three cases, the child's expressed preference coincided with the court's determination of primary residential responsibility.¹⁸⁴ In the third case, the child's preference was for equal residential responsibility, and factor (i) was considered neutral.¹⁸⁵ In that case, the mother was awarded primary residential responsibility.¹⁸⁶ Therefore, in the two cases in which a guardian ad litem was appointed, factor (i) weighed in favor of the child's wishes, and the outcome of two of the three cases corresponded with the child's preference.¹⁸⁷

This review suggests that appointment of a guardian ad litem may be advantageous to the outcome of a residential responsibility or parenting time matter for the parent who the child prefers. This is true despite whether children are interviewed in chambers or testify in open court. However, the only two cases where the court afforded substantial weight to the child's preference were cases in which the child testified in open court.

183. Anderson Order, *supra* note 30, ¶ 51; Stevens Order, *supra* note 82, ¶ 1; Scott Order, *supra* note 106, ¶ 4(E).

184. Stevens Order, *supra* note 82, ¶¶ 35, 43; Scott Order, *supra* note 106, ¶¶ 22(I), 31.

185. Anderson Order, *supra* note 30, ¶¶ 47-48.

186. *Id.* ¶ 66(1)(A).

187. Stevens Order, *supra* note 82, ¶¶ 35, 43; Scott Order, *supra* note 106, ¶¶ 22(i), 31.