

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

20100041

Amanda Flemming,  
Plaintiff-Appellee,  
  
vs.  
  
Kendel Klemming,  
Defendant-Appellant.

Supreme Court No. 2010041

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

MAY 10 2010

STATE OF NORTH DAKOTA

---

APPEAL FROM WARD COUNTY DISTRICT COURT  
NORTHWEST JUDICIAL DISTRICT

---

---

BRIEF OF DEFENDANT-APPELLANT + *Addendum*  
KENDEL D. FLEMMING

---

  
Kendel D. Flemming  
P.O. Box 5521  
Bismarck, N.D. 58506-5521

TABLE OF CONTENTS

Table of Cases.....ii.  
Table of Statutes.....iii.  
Statement of Issues Presented for Appeal.....iv.  
Statement of the Case .....v.  
Facts of the Case.....vi.

ISSUE I

WHETHER THE DISTRICT COURT ABUSED ITS POWER  
WHEN IT GAVE APPELLE THE POWER TO DECIDE WHEN  
THE APPEALANT WOULD BE ALLOWED PARENTING  
TIME WITH THEIR MINOR CHILDREN?.....1

ISSUE II.

WHETHER THE DISTRICT COURT FOLLOWED THE  
RUFF-FISCHER GUIDELINES WHEN IT AWARDED  
THE RESPONDENT ALL OF THE MARITAL PROPERTY?.....8

Conclusion and Statement concerning Oral Argument.....12  
Certificate of Complainace.....13  
Certificate of Service.....14  
Reprint of N.D.C.C. Section 14-05-24.....15  
Reprint of N.D.C.C. Section 14-09-30.....16,17  
Reprint of N.D.C.C. Section 14-09-32.....17  
Reprint of Minn.State Section 518.175.....18,19,20

TABLE OF CASES

Table of Cases

Ackerman v. Ackerman 596 N.W.2d 332, 335 (ND1999).....3  
Amsbaugh v. Amsbaugh 2004 ND 11 ¶23, 673 N.W.2d 601.....9  
Bladow v. Bladow 2003 ND ¶5, 665 N.W.2d 724.....9  
Blotske v. Leidholm 487 N.W.2d 607 (ND1992).....3  
Dahl v. Dahl 765 N.W.2d 118, 124 (Minn.App.2009).....5  
Dietz v. Dietz 733 N.W.2d 729, 730 (ND2009).....7  
Hitz v Hitz 746 N.W.2d 732, 738 (ND2008).....9  
In re Rood 763 N.W.2d 587, 613 (Mich.2009).....3  
In Re Welfare of B.K.P. 662 N.W.2d 913, 916 (Minn.App.2003).5  
Molian v Molian 598 N.W.2d 81, 88 (ND1999).....3  
Muraskin v. Muraskin 336 N.W.2d 332, 336 (ND1983).....3  
Ulasker v. White 760 N.W.2d 82, 86 (ND2009).....10

TABLE OF STATUTES

Minn.Stat. §518.175, subd 1(a).....5  
Minn.Stat. §518.175, subd 1(e).....5  
N.D.Cent.Code 14-05-24 Division of Marital Property.....10  
N.D.Cent.Code 14-09-30(2) Parenting plan - Contents.....1  
N.D.Cent.Code 14-09-30(2).....1,2,3,4  
N.D.Cent.Code 14-09-32 Parental Rights and Responsibilites.....1  
N.D.Cent.Code 14-09-32.....1,2,3,4

**STATEMENT OF ISSUES FOR APPEAL**

This is an appeal of the District Court's divorce that was handed down on January 7, 2010. Appellant presents the following issues for appeal:

**ISSUE I.**

WHETHER THE DISTRICT COURT ABUSED ITS POWER WHEN IT GAVE THE APPELLE THE POWER TO DECIDE WHEN THE APPEALNT WOULD BE ALLOWED PARENTING TIME WITH THEIR MINOR CHILDREN?

**ISSUE II.**

WHETHER THE DISTRICT COURT FOLLOWED THE RUFF-FISCHER GUIDELINES WHEN IT WARRANTED THE RESPONDENT ALL OF THE MARITAL PROPERTY?

## STATEMENT OF THE CASE

The district court abused its power when it granted Amanda Flemming (herein after referred to as Amanda) the right to decide when Kendel Flemming (herein after referred to as Kendel) parenting time at Amanda's discretion. The parenting plan is to be a written agreement between both the parents, and not to allow one parent the right to limit the amount of the time that the other parent has with the child(ren).

The district court failed to apply the Ruff-Fischer guidelines, in dividing the marital property. Had the court applied the guidelines it would of seen that this 9 year marriage should of been ruled a long-term marriage and therefore warranted an equal division of the marital property as well as the earning abilities of Amanda. The court would of seen that Amanda is in an adulteress relationship.

The court would also of determined that Amanda is in good health and earning ability and therefore she was not entitled to be granted both the vehicles, rather that she should of only been granted the vehicle that was in both the parties names and not the vehicle that was/is in Kendel's name.

That Kendel is in a state of health that creates the inability to retain full-time employment, that Kendel has to relay on S.S.I. to supplement the loss of income.

## FACTS OF THE CASE

The parties were married on the 22nd day of June, 2001. As a result of this marriage there are two minor children, A.D.F. who was born in February 2001, and B.A.F. who was born in January of 2004.

The divorce was granted on the 7th day of January, 2010. In granting the divorce the court granted Kendel parenting time at Amanda's discretion, the court advised Amanda that Kendel and their minor children have rights and privileges, but failed to advise Amanda what those rights and privileges are. The court encouraged Amanda not to alienate the children from Kendel.

Amanda was in an adulterous relationship.

As a result of the divorce Amanda was granted all of the marital property.

ISSUE I.

WHETHER THE DISTRICT COURT ABUSED  
ITS POWER WHEN IT GAVE THE APPELLE  
THE POWER TO DECIDE WHEN THE APPEALANT  
WOULD BE ALLOWED PARENTING  
TIME WITH THEIR CHILDREN?

A parenting plan must be in agreement by both parties  
and in compliance with N.D.Cent.Codes 14-09-30(2), 14-09-32.

In N.D.Cent.Code 14-09-30(2) **Parenting plans - Contents.**

(2) A parenting plan must include, at a minimum,  
provision regarding the following or an explanation  
as to why a provision is not included:

- a) Decision making responsibility relative to:
  - 1) Routine or day to day decisions to:
  - 2) Major decisions such as education, health care, and spiritual development;
- b) Information sharing and access, including telephonic and electronic access;
- c) Legal residence of a child for school attendance;
- d) Responsibility, parenting time and parenting schedule, including;
  - 1) Holidays and days off from school, birthday, and vacation planning;
  - 2) Weekends and weekdays; and
  - 3) Summers;
- e) Transportation and exchange of the child, considering the safety of the parents,
- f) Procedure for review and adjustment of the plan, and
- g) Methods for resolving disputes.

In N.D.Cent.Code 14-09-32 **Parental Rights and Responsibilities.**

1. Each parent of a child has the following rights and responsibilities:
  - a) right to access and obtain copies of the child's educational, medical, dental, religious, insurance, and other records of information.
  - b) Right to attend educational conferences concerning the child....
  - c) Right to reasonable access to the child by written, telephonic and electronic means.
  - d) Duty to inform the other parent of a serious accident or serious illness for which the child receives health care treatment. The parent shall provide to the other parent a description of the serious accident or serious illness, the time of serious accident or serious illness, and the name and the location of the treating health care provider.
  - e) Duty to inform the other parent of the residential telephone numbers, and address, and any changes to the same.
  - f) Duty to keep the other parent informed of the name and the address of the school the child attends.

Amanda has already shown that she has no knowledge of her and Kendel's parental rights and responsibilities. The court erred when it failed to inform the parties of these rights and responsibilities, as explained in N.D.Cent.Codes 14-09-30(2), and 14-09-32.

As fore mentioned a parenting plan needs to be described in great detail. It is up to the parties to come up with a parenting plan that will be beneficial to all parties. The agreement to the parenting plan must be signed by both parents.

When a right as important as establishing parenting time was left up to Amanda, Amanda was allowed to dictate, what

rights Kendel shall be granted, which is bias against Kendel.

The district court cannot deprive Kendel of his right and privilege to parenting time with his children. When the court granted Amanda the discretion as to when and what rights Kendel may be granted was abuse of discretion.

There needs to be an agreed to parenting plan to protect the parent-child relationship that has already been established.

The court recognized the importance of protecting the parent-child relationship already in place, and further recognized that parenting time is not just the right and privilege of the parent, but a right of the child.

Ackerman v. Ackerman 596 N.W.2d 332, 335 (N.D. 1999) "... Visitation is one of the reasonable rights allowed the noncustodial parent. (citing Muraskin v. Muraskin 336 N.W.2d 332, 336 (.N.D.1983))The priamry purpose of visitation is to promote the best interests of the child not to fulfill the wishes or desires of the parent.(citing Blotske v. Leidholm, 487 N.W.2d 607 N.W.2d (N.D.1992))"

Moilan v. Moilan 598 N.W.2d 81, 88 (N.D. 1999) "Visitation with the non-custodial parent is not just a privilege but a right of the child."

In re Rood 763 N.W.2d 587, 613 (Mich.2009) "There is no reason to conclude that a parent has diminished constutional right to his child merely because he does not have physical custody of that child."

However, the court erroneously gave Amanda the power to deny Kendel his parental rights, the rights as stated in N.D.Cent.Codes 14-09-30(2), 14-09-32.

In the appendix page 1/ on lines 21 and 22 Amanda is asked if she was opposed to Kendel having visitation at all?

On line 22, Amanda responded by saying, "He can, but I would like them supervised."

Under the parenting plan, visitation is considered part of a parenting plan, and therefore Kendel should be allowed to have reasonable contact with A.D.F. and B.A.F. as is stated in N.D.Cent.Codes 14-09-30(2), 14-09-32. Amanda has already failed to comply with the courts request as well as the statutes.

In the appendix page 12 on lines 21 - 24 the court advised Amanda that both Kendel and the minor children have a right to have contact.

Amanda has already denied Kendel this right when she denied Kendel the right to call his sons on Knedel's birthday.

Kendel was allowed to call B.A.F. on B.A.F's birthday, but Amanda made arrangements so that Kendel would not be allowed to call A.D.F. on A.D.F.'s birthday. When Amanda did this it showed that she wants to alienate their sons from Kendel.

If she truly had no objection then Amanda would allow Kendel to have phone calls with their sons.

When the court failed to establish a proper parenting plan it committed an error, which needs to be corrected.

The court failed to take into consideration that even though Kendel is incarcerated, there are still means in which Kendel has at his disposal to keep the parent-child relationship intact.

The district court erred when it granted Amanda the discretion to allow Kendel parenting time. There is no way that letters, cards, phone calls, etc. will endanger the minor children's physical, mental health, or impair their children's emotional development. Therefore the district court placed unreasonable restrictions on Kendel's parenting time.

It is in the children's best interest to have this right and privilege.

Amanda has stated in the trial transcripts (see appex page 11 line 22) that Kendel may have parenting time with their children. Amanda feels that the parenting time should be supervised, there is no more supervision that can take place then with letters, cards, phone calls, etc.

It has been well established that both parents are entitled to a set amount of uninterrupted parenting time.

Dahl v. Dahl 765 N.W.2d 118, 124 [10], (Minn.App.2009) Under Minn.Stat. § 518.175, subd. 1(e), "...there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of parenting time for the child." See In Re Welfare of B.K.P., 662 N.W.2d 913, 916 (Minn.App. 2003) (remanding for application of Minn.Stat. § 518.175 subd. 1(a) to a modification motion) Like in subdivision 1(e) applies to motions for parenting time modification and should have been applied to ... modification of 25% of the parenting time. We therefore remand for application of subdivision 1(e).

The district court erred by not awarding Kendel specific parenting time while he is in and when he is released from prison; however in appex. page 13 on lines 7 - 13 the district court told Amanda that she needed to be reasonable with the visitation. Amanda has already shown that she has no intentions in being reasonable.

The district court must enforce a parenting plan, that must be in writing and signed by both parties. Only then can the district court enforce the parenting plan.

When the district court failed to establish a written agreement, and failed to make Amanda aware of the legal ramifications for not complying with the parenting plan.

The parenting plan needs to establish the amount of time Kendel is entitled to. As is stated in Dahl v. Dahl.

The parenting plan needs to establish the amount of parenting time that Kendel will be granted upon his release from prison.

When the district court granted Amanda the right to determine the amount of parenting time that Kendel may receive with their minor children was an abuse of discretion. Because it allowed Amanda that right to determine the amount of parenting time Kendel shall be granted.

The district court can grant such rights as visitation as will enable the non-custodial parent to maintain a parent-child relationship. The district court ruled that Kendel is to have some parenting time, therefore the district court determined that there is no harm that will come to the children's physical, or mental health or their emotional development. The district court determined that it would be beneficial to the children to have parenting time with Kendel.

Amanda agreeing to allow Kendel parenting time is followed by her unwillingness to allow Kendel any parenting

time.

Dietz v. Dietz 733 N.W.2d 225, 229, 230 [2-5][113] (ND.2009)  
The district court said problems with visitation, phone calls,  
... failure to notify ... of her change of address, and the  
general lack of cooperation and acrimony between the parties  
was merely a continuation of conduct.... A party's failure to  
comply with the terms of judgment or order is not excused.

## ISSUSE II.

WHETHER THE DISTRICT COURT FOLLOWED  
RUFF-FISCHER GUIDELINES WHEN IT  
GRANTED THE RESPONDENT ALL OF THE  
MARITAL PROPERTY?

The court failed to apply the Ruff-Fischer guidelines when dividing up the marital property. Had the court properly applied the guidelines it would of determined that this marriage was a long-term marriage and therefore warranted an equal division of the marital property, rather than an equitable division of property. The court failed to take into account the length of the marriage, the earning ability of the parties that Amanda is in good health and that Kendel has health issues which makes it impossible for Kendel to obtain suitable employment, and therefore has to rely on S.S.I. to supplement his income.

The court also failed to apply the guidelines when it failed to rule, against Amanda for she was in a relationship with another man during the length to this marriage.

The district court committed clear error in the division of the marital property.

When distributing marital property, all the guidelines of Ruff-Fischer must be considered to ensure that there is an equal division of the marital property. The court needed to look at the conduct of the parties, had the court done this then the court would have seen that Amanda was involved in a relationship with another man. The conduct of Amanda does not warrant Amanda to recieve all of the marital property.

It has been held that a long-term marriage supports an equal distribution of property whether the property was purchased before or during the marriage.

Had the court applied the Ruff-Fischer guidelines it then the court would have determined that this was a long-term marriage and that an equal division of the marital property was warranted.

Upon following the Ruff-Fischer guidelines the court would have found that a marriage under 5 years is a short-term marriage and a marriage over 5 years is a long-term marriage. The parties of this marriage were married for 9 years, and therefore warrant this marriage to be a long-term marriage, and an equal division of the marital property was warranted.

The parties had two vehicles during the course of this marriage and the court erred when it ruled that Amanda was entitled to obtain both vehicles. The court failed to not only take into consideration the length of the marriage, but the earning ability of the parties.

Had the court applied the Ruff-Fischer guidelines then it would have determined that Kendel does not have the means to purchase another vehicle.

Hitz v Hitz 746 N.W.2d 732, 738 (N.D.2008) ¶16 ... (quoting Amsbaugh v. Amsbaugh 2004 ND 11, ¶23, 673 N.W.2d 601 (quoting Bladow v Bladow 2003 ND 123, ¶5, 665 N.W.2d 724)) "In general, a lengthy marriage supports an equal division of marital assets."

Ulasker v White 760 N.W.2d 82, 86 (N.D.2009) [5][¶ 12]...  
"We have recongized that a long-term marriage supports an equal division of property."

Under N.D.Cent.Code. 14-05-24 **DIVISION OF MARITAL PROPERTY**

- 1) When a divorce is granted the court shall make an equatable division of the property and debts of the parties.
- 2) The court may redistribute property and debts as required if a party has failed to disclose property and debts as required by rules adopted by the Supreme Court or the party fails to comply with the terms of a court order distributing property and debts.

Amanda failed to disclose all of the property. Kendel had/has some guns that were his prior to the marriage. When Amanda failed to disclose this. She violated her right to obtain all of the property in which she requested, as stated in N.D.Cent.Code 14-05-24. Therefore it is warranted for the court to redistribtbe the division of the martial property. With this error on Amanda's part it gives great discreditably to the marriage. That if Amanda would fail to disclose the marital property .

Amanda has a history of domestic violance against Kendel. One incident occured in the summer of 2006. It involved two minor children (referred to as N.W. and G.B.)

While at the home of Teresa and Bruce Leavey, Kendel and Amanda's son A.D.F. was harassing N.W. and G.B.

Amanda had threatened to beat A.D.F. if he did not stop. Kendel spoke up and said that they are just playing. About 15 minutes later, N.W. went up to Amanda and said the A.D.F. was

continuing to bother her.

Amanda then said that she had, had it and that when they got home she was going to beat A.D.F.

Amanda then grabbed A.D.F. by the upper arm and dragged him to the vehicle. Amanda then threw A.D.F. in the vehicle. Then Amanda said for the second time that she was going to take A.D.F. home and beat him.

Kendel went outside to try to get A.D.F. out of the vehicle, when Kendel opened the rear passenger's door, so that Amanda could not leave, in the process Amanda started to back up penning Kendel between the vehicle and the door. Amanda then dragged Kendel about thirty (30) feet.

A.D.F. yelled at Amanda to stop, A.D.F. said that's my daddy, that's my daddy. Because of Amanda dragging Kendel, he received some minor cuts and bruises on both legs.

This was witnessed by Teresa Leavey, Bruce Leavey, N.W. and G.B.

Right after this Amanda called the Minot police department on Kendel. After the police did their investigation they found that Amanda was at fault.

**CONCULSION AND STATEMENT CONCERNING ORAL ARGUMENT**

Kendel respectfully request that this court reverse the District Court and hold that he is entitled to at least 25% of parenting time by setting set days and times which Kendel is allowed to call A.D.F. and B.A.F.

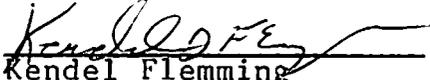
That due to the fact that Amanda failed to list all of the marital property that this court issue an order granting an equal distrubtion of marital property not an equitable distrubtion of property, as well that this was a long term marriage and that also warrents an equal distribution.

Kendel humbly request that there be oral arguments for this issue.

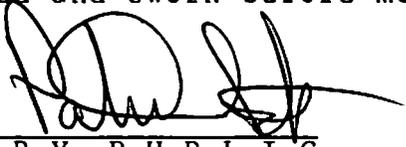
CERTIFICATION OF COMPLANCE:

Pursuant to North Dakota Rules of Appellate Procedure, Rule 28, I certify that this Brief complies with the requirements.

Dated this 10 day of May, 2010.

  
Kendel Flemming  
Appellant  
P.O. Box 5521  
Bismarck, ND. 58505-5521

Subscribed and sworn before me this 10<sup>th</sup> day of May,  
2010.



NOTARY PUBLIC

My Commission Expires On: \_\_\_\_\_

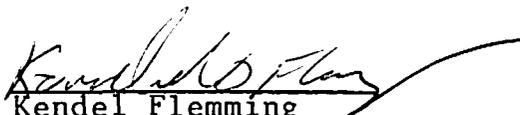
PATRICK SCHATZ  
Notary Public  
State of North Dakota  
My Commission Expires Oct. 31, 2014

CERTIFICATE OF SERVICE

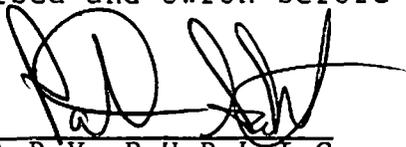
I hereby certify a true and correct copy of the foregoing document, together with a copy of the Appendix, was served by US First Class Mail on the 10 day of May, 2010, and addressed to:

**NORTH DAKOTA SUPREME COURT**  
State Capitol  
Judicial Wing, 1st Floor  
600 E. Boulevard Ave., Dept. 180  
Bismarck, ND. 58505-0530

Richard Roy Lemay  
Attorney for Appellee  
20 1st St. SW, Ste 201  
P.O. Box 1666  
Minot, N.D. 58702-1666

  
Kendel Flemming  
Appellant  
P.O. Box 5521  
Bismarck, ND. 58506-5521

Subscribed and sworn before me this 10<sup>th</sup> day of May  
2010.

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires On: \_\_\_\_\_

PATRICK SCHATZ  
Notary Public  
State of North Dakota  
My Commission Expires Oct. 31, 2014