

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Richard D. Varriano, )  
 )  
 Plaintiff-Appellant, )  
 )  
 vs. ) SUPREME COURT NO. 20100278  
 )  
 Denise Varriano, )  
 )  
 Defendant-Appellee. )

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APPELLANT'S BRIEF

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APPEAL FROM THE JUNE 30, 2010 ORDER DENYING PLAINTIFF'S  
MOTION TO TERMINATE CHILD SUPPORT AND SPOUSAL SUPPORT  
THE RICHLAND COUNTY DISTRICT COURT  
THE HONORABLE DANIEL D. NARUM PRESIDING

ATTORNEY FOR APPELLANT

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**STATEMENT OF THE ISSUE PRESENTED**

- I. Whether the district court's finding that Defendant did not cohabit with a significant other clearly erroneous?

**STATEMENT OF THE CASE**

Plaintiff-Appellant Richard D. Varriano appeals from the Order Denying Plaintiff's Motion to Terminate Child Support and Spousal Support. Plaintiff seeks reversal on the grounds the court clearly erred in ruling that Defendant did not cohabit.

On May 21, 2001, Plaintiff and Defendant were divorced in Richland County before the Honorable Richard W. Grosz. All issues were resolved per the parties' stipulation which was incorporated into the Judgment and Decree. (A-14)<sup>1</sup>

The Judgment provided Defendant shall receive the sum of \$4,000.00 per month, which was for spousal support and child support for the four minor children. Initially, \$1,429.00 was for spousal support and the remaining \$2,571.00 was child support. When Plaintiff's child support obligation decreased, the spousal support increased so the amount continued to be \$4,000.00 per month. After Plaintiff's child support obligation terminated, Defendant was to receive \$1,000.00 per month for spousal support for five years. However, the Judgment provided that "Plaintiff shall be

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<sup>1</sup> Appendix

liable for spousal support hereunder until the Defendant remarries, is deceased, or co-habitates with a significant other." Page 12 of the Judgment and Decree. (A-25)

On February 2, 2010, a Notice of Arrears was filed and served onto Plaintiff. The amount of arrearage for child support and spousal support was \$181,781.20. The notice did not indicate how much was child support owing to the State Disbursement Unit. (Notice of Arrears, docket sheet No. 148) An Order to Show Cause hearing was scheduled for May 26, 2010.

On May 14, 2010, a Motion to Terminate Child Support and Spousal Support Obligation and Amended Opposition to Arrearage were filed. Plaintiff argued that Defendant had cohabited with a significant other shortly after the divorce. The spousal support payments should have been child support payments. The overpayment of spousal support payments offsets all child support arrearage. (Motion to Terminate Child Support and Spousal Support Obligation, docket No. 151 and Amended Opposition to Arrearage, docket No. 158)

On May 26, 2010, the Order to Show Cause and the Motion to Terminate Child Support and Spousal Support Obligation were heard before the Honorable Daniel Narum. Assistant State's Attorney Ronald McBeth and Plaintiff agreed to continue the Order to Show Cause hearing since Plaintiff's motion would be dispositive of the Order to Show Cause. Both Plaintiff and Mr. McBeth agreed that Plaintiff

had paid \$165,866.82 in child support, the current amount owing for child support is \$49,835.84, and if the court granted Plaintiff's motion, Plaintiff would have paid approximately \$12,000 more than his obligation. (T 2-4)<sup>2</sup> The court continued the Order to Show Cause hearing. (T 5)

At the hearing, Plaintiff presented the Affidavit of Richard Varriano, the Affidavit of C.V., the Affidavit of C.B., and the Affidavit of G.V. Additionally, R.V., C.V., and G.V. testified. Defendant testified and admitted three exhibits: a lease agreement, motel receipts, and copies of rent checks. Additionally, two of Defendant's friends, Shirley Skauge, and Kristine Christenson, testified.

On June 30, 2010, the Order Denying Plaintiff's Motion to Terminate Child Support and Spousal Support was filed. (A-28) Judge Narum ruled that "although [Defendant] spent a great deal of time at her boyfriend's residence immediately following the divorce for a short time" it did not rise to the level of cohabitation due to the lack of financial support and evidence. (Order Denying Plaintiff's Motion to Terminate Child Support and Spousal Support, docket No. 164, p. 5) (A-32)

Thereafter, on August 27, 2010, Plaintiff filed the Notice of Appeal, appealing the Order Denying Plaintiff's Motion to Terminate Child Support and Spousal Support. (A-34)

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<sup>2</sup> Motion hearing transcript

### STATEMENT OF THE FACTS

The essential facts are in dispute. Evidence and testimony were presented regarding Defendant cohabiting with her current boyfriend, Ben Many Ribs. However, for purposes of this appeal, those facts are not relevant to the issue submitted for review.

C.V., the parties' son, testified at the motion hearing. C.V. testified that shortly after the divorce, Defendant was living with Jim VanErem at VanErem's residence. (T 15) According to his affidavit, Defendant lived with Jim VanErem for three years. (Affidavit of C.V., docket No. 155) He testified that Defendant had her belongings in the bathroom and his little sister, R.V., had her own bedroom at VanErem's house. (T 15-16) C.V. estimated that he visited VanErem's residence approximately 100 times. (T 17)

C.V. further testified that the family celebrated Christmas and his sister's graduation party at VanErem's house. (T 16) C.V. admitted that VanErem helped pay the repairs on his first car. (T 12 and Affidavit of C.V., docket No. 155) C.V. testified that on summer weekends, Defendant would go to VanErem's lake cabin on Turtle Lake. C.V. summed up Plaintiff's relationship with Jim VanErem:

"If I wanted to see my mom I had to go to Jim VanErem's house or his lake cabin on Turtle Lake." (T 16-17)

R.V., the parties' youngest daughter, testified

that after the parties' divorce, Defendant, her sister, G.V., and her were living at Jim VanErem's house. R.V. testified that she had her own bedroom in the basement of VanErem's house. (T 19-20) R.V. testified that her mom slept in the same bedroom as James VanErem. R.V. testified that "[w]e stayed there every single night." (T 19) They stayed at the house even when VanErem was not there. (T 22)

The court questioned R.V. why Plaintiff was unaware of Defendant's living arrangements until recently. R.V. testified:

"A: Well, we don't really communicate. I know that. And up until now we've all been on both of their sides in the matter of this and then it just came to the point where it was just too much so we just decided to tell him. Because I don't think it's right that she wants anything more from him." [T 22-23]

G.V., the parties' daughter, testified that Defendant and R.V. lived with Jim VanErem for three years. (Affidavit of G.V., docket No. 154 and T 27-28) G.V. testified that she frequently stayed overnight at VanErem's house. She estimated that she visited VanErem's residence at least 50 times. (T 27-28) G.V. observed Defendant's "shampoos, conditioners, curling iron, combs, blow dryers, and makeup" at VanErem's house. (T 28) G.V. testified that when Defendant first started living at VanErem's house, she did not have a driver's license. Therefore, whenever she needed

transportation, she would go to VanErem's house. (T 27)

G.V. testified that Defendant's cell phone is still currently under VanErem's name. (Affidavit of G.V., docket No. 154)

G.V. testified that Defendant stayed at VanErem's house when VanErem was not there. (T 29)

C.B., the oldest daughter of the parties, testified via her affidavit that Defendant lived with Jim VanErem before the divorce became finalized. C.B. testified that VanErem paid for Defendant's cell phone. The cell phone is still in VanErem's name. C.B. stated that VanErem bought a car for both G.V. and C.V. C.B. testified that Plaintiff was unaware that Defendant was cohabiting because Defendant hid it from him so she could continue to receive money from Plaintiff. C.B. testified that Defendant paid rent on her apartment solely to collect spousal support from Plaintiff. C.B. stated that Defendant profited thousands of dollars by living with men, but still paying rent on her own apartment. (Affidavit of C.B., docket No. 153) Defendant chose not to cross-examine C.B.

Plaintiff testified via his affidavit. Plaintiff testified that he was unaware of Defendant's cohabitation until his children told him earlier this year. According to his children, Defendant maintained a separate residence solely to continue to collect spousal support. According to Plaintiff, Defendant had wrongly obtained over \$140,000 in spousal support. (Affidavit of Richard Varriano, docket

No. 152) Defendant chose not to cross-examine Plaintiff.

At the hearing, Defendant testified. She denied cohabiting with Jim VanErem. (T 31) She testified that she maintained her own residence and paid her own bills with no financial help from VanErem. (T 32) Defendant denied that VanErem gave her or her children any financial support. (T 43) Defendant introduced into evidence copies of rent checks for her apartment. (T 39, Defendant's Exhibit #3, docket No. 163) Defendant denied that R.V. had her own bedroom at VanErem's house. (T 40) Defendant testified that the sole purpose that she and R.V. stayed overnight at VanErem's house was so she could take care of her dogs. (T 31-32,40,44)

On cross-examination, Defendant admitted that within a couple months of the divorce, she was sleeping overnight at VanErem's house. (T 42) She admitted that for three to four nights a week for approximately one year, she slept overnight with VanErem. (T 40,42) Defendant admitted that she had sexual relations with VanErem at his house. (T 44) Defendant testified that at some point in the relationship, VanErem wanted to marry her. (T 43)

Although Defendant denied that R.V. her own bedroom at VanErem's house, Defendant admitted that R.V. stayed overnight in VanErem's spare bedroom for "over months. I went with him for a year." (T 40) Defendant testified that R.V. stayed overnight at VanErem's house on at least 30 occasions. (T 41) R.V. had her basics, her school uniform,

makeup, and clothes over at VanErem's house. (T 43)

Shirley Skauge testified on behalf of Defendant. She testified that she had no contact with Defendant while Defendant was dating VanErem. (T 46) Ms. Skauge testified that she has no personal knowledge of Defendant's relationship with VanErem because she did not have any contact with Defendant during that time frame. (T 46-48)

Kristine Christenson testified that she had known Defendant for twenty-two years. (T 49). She testified that she was unaware of Defendant living with anybody after the divorce. (T 49)

#### ARGUMENT

- I. The district court's finding that Defendant did not cohabit with a significant other is clearly erroneous.

The standard of review is clearly erroneous. This Court will not reverse a district court's decision on spousal support unless the court's findings are clearly erroneous. Ebach v. Ebach, 2008 ND 187, ¶ 9, 757 N.W.2d 34. Baker v. Baker, 1997 ND 135, 566 N.W.2d 806. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire record this Court is left with a definite and firm conviction that a mistake has been made." Ebach at ¶ 9.

According to Black's Law Dictionary, at p. 260 (6th ed.

1990), cohabitation is defined as "to live together as husband and wife. The mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations."

In Baker v. Baker, 1997 ND 135, 566 N.W.2d 806, this Court created factors to determine whether one has cohabited. "Cohabiting in an informal marital relationship is more than merely living together briefly or having sexual relations." Id. at ¶ 14. The factors include "establishment of a common residence; long-term sexual, intimate or romantic involvement; shared assets or common bank accounts; joint contribution to household expenses; and a recognition of the relationship by the community." Id. at ¶ 14. "[T]hese factors are non-exclusive, and no one factor is an absolute prerequisite for a finding of cohabitation." Id. at ¶ 14. The determination of cohabitation is factual and depends on the totality of circumstances. Id. at ¶ 15.

However, long term sexual relations is an important factor in determining cohabitation. Id. at ¶ 16. "To cohabit as husband and wife merely means to have intercourse with each other, the same as husband and wife." State v. Hoffman, 68 N.D. 610, 282 N.W. 407, 409 (1938).

Here, the totality of the circumstances clearly indicate that Defendant cohabited with VanErem. Based on the evidence, there exists a definite and firm conviction that

Judge Narum's finding was a mistake.

All the evidence supports the finding that Defendant was living at VanErem's house. Five of the six witnesses who had personal knowledge of Defendant's relationship with VanErem testified that she lived with VanErem. All four of the parties' children and Plaintiff testified that Defendant lived with VanErem either before or after the divorce.<sup>3</sup> (T 15, 19-20, 27-28, Affidavit of C.V., docket No. 155; Affidavit of G.V., docket No. 154; Affidavit of C.B., docket No. 153; and Affidavit of Richard Varriano, docket No. 152)

Even Defendant's testimony corroborated Plaintiff's position. Defendant admitted that for three to four nights a week for approximately one year, she slept overnight with VanErem and engaged in sexual relations with him. (T 40, 42, 44)

On page two of the Order, the court found that both of Defendant's friends "indicated that the Defendant has her own residence, spends time at her own residence, takes care of the expenses of her own residence, and does not cohabit with anyone, nor has she ever." (A-29) This is contrary to all the evidence! Shirley Skauge testified that she had no contact with Defendant while Defendant was dating VanErem. (T 46) She testified that she had no personal knowledge of Defendant's relationship with VanErem because she did have any contact with Defendant during that time frame. (T 46-48)

<sup>3</sup> When an affidavit is submitted, but cross-examination of the affiant is waived, the affidavit is the functional equivalent of testimony.

Kristine Christenson merely testified that she was unaware of Defendant living with anybody after the divorce. (T 49) Ms. Christenson testified that after the parties' divorce, her only contact with Defendant was meeting for lunch. (T 49) Ms. Christenson testified that her extent of her knowledge about the VanErem relationship is what Defendant told her. (T 50-51)

The Baker factors clearly show that Defendant engaged in cohabitation with VanErem. The evidence clearly established a common residence for two main reasons.

First, the evidence was unrefuted that R.V. lived overnight for significant periods of time at VanErem's residence. (T 19,40-41) Moreover, the evidence is unrefuted that C.V. visited VanErem's house on approximately 100 occasions and G.V. visited on at least 50 different occasions. (T 17, 27-28) This is very significant because Defendant recognized the relationship publicly and openly to her children. This is not a mere casual sexual or dating encounter with a man. Instead, when a parent permits her children to see her significant other and stay overnight at her significant other's house, this signifies a very serious relationship. Judge Narum ignored this important factor.

Second, the evidence is unrefuted that Defendant and R.V. stayed overnight at VanErem's residence when VanErem was not present. (T 22,29) As the Baker court indicated, this is indicia of a common residence. Id. at ¶ 16. Judge

Narum ignored this fact.

The evidence is undisputed that Defendant engaged in a long term sexual and intimate relationship with VanErem. (T 40,42) Judge Narum completely ignored the fact that Defendant had sexual relations with VanErem for approximately one year. In fact, despite being a significant Baker factor, Judge Narum did not even mention Defendant's sexual relations in his findings of fact! (A-28 thru A-31) Once again, this was not a casual sexual encounter, but a long term, serious relationship.

The evidence is undisputed that there was a recognition of the relationship by the community. The evidence was unrefuted that Christmas and one of the children's graduation parties were celebrated at VanErem's house. (T 16) The evidence was undisputed that Defendant spent a significant amount of time at VanErem's lake cabin. (T 16-17, Affidavit of G.V., docket No. 154) As the Baker court noted, celebrating holidays together with family and friends and traveling together are important factors to show there was recognition of the relationship by the community. Id. at ¶ 17. Judge Narum ignored this important factor.

There was no evidence of shared assets or common bank accounts, or joint contributions to household expenses between Defendant and VanErem. Judge Narum erroneously made this factor controlling in his ruling rather than viewing the totality of the circumstances. (Order Denying Plaintiff's

Motion to Terminate Child Support and Spousal Support, docket No. 164, pp. 5-6; (A-32 to A-33) However, the evidence was unrefuted that VanErem financially helped two of the children with vehicles and paid for Defendant's cell phone. (T 12 and Affidavit of C.V., docket No. 155; Affidavit of G.V., docket No. 154; Affidavit of C.B., docket No. 153) The fact that VanErem was financially helping the children of the woman he wanted to marry illustrated the relationship rose to the level of cohabitation. VanErem was not merely helping out Defendant's children because of Defendant's dog sitting abilities.

Judge Narum committed reversible error when he ruled that he "does not find credible the testimony put forth regarding why Mr. Varriano only recently learned of the alleged cohabitation."<sup>4</sup> And the children's choosing sides to protect Plaintiff. (A-30)

Generally, this court defers to the district court for credibility assessment of witnesses. "[T]he trial court is in a better position to judge the demeanor and credibility of witnesses and weigh the evidence than we who only have the cold record to review." Svedberg v. Stamness, 525 N.W.2d 678, 682 (N.D. 1994).

However, Rule 43(e) of the Rules of Civil Procedure provides:

"When a motion is based on facts not appearing of

<sup>4</sup> The court ruled on the merits on the motion and did not rule Plaintiff was precluded by laches from bringing the motion.

record the court may hear the matter on affidavits presented by the respective parties, but the court may direct the matter be heard wholly or partly on testimony or depositions."

Pursuant to motion practice, Plaintiff submitted four affidavits for the motion hearing. Defendant waived cross-examination on two of the affiants, C.B. and Plaintiff. Judge Narum cannot judge or impugn the credibility of affiants that Defendant waived her right to cross-examine. A party cannot be punished because it complied with standard motion practice and the opposing party waived its rights.

On cross-examination, Defendant never attacked or challenged the motives of the three children who testified at the hearing. Defendant did not dispute the fact that she and R.V. stayed frequently overnight at VanErem's house. She merely objected to the characterization that it was cohabitation. (T 31-32) Likewise, Defendant did not dispute the fact that she stayed frequently at VanErem's lake cabin, that holidays were celebrated at VanErem's house, or the frequency in which C.V. or G.V. stayed at VanErem's house.

The court's finding that the children have chosen sides is against the evidence and is pure speculation and conjecture. Describing to the court the nature of the relationship between Defendant and VanErem is not "choosing sides," but merely telling the truth. This is evident when

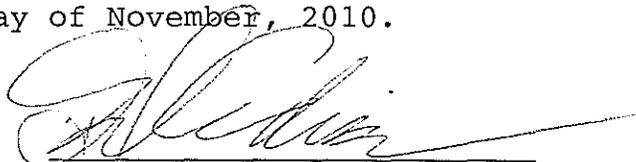
one considers that all the children testified that Defendant was living with VanErem and Defendant essentially corroborated this by admitting that she slept over at VanErem's house four nights a week for approximately one year. (T 40,42,44)

In summation, under the totality of circumstances, Defendant's relationship with VanErem was cohabitation. Unfortunately, some marriages last only one year. Likewise, this cohabitation lasted only one year. The evidence clearly established that this was not a casual relationship as Judge Narum ruled. This was a serious relationship which is defined as cohabitation.

CONCLUSION

WHEREFORE, the reasons stated herein, Plaintiff respectfully requests that this Honorable Court reverse the district court's June 30, 2010 Order Denying Plaintiff's Motion to Terminate Child Support and Spousal Support.

Dated this 17th day of November, 2010.



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