

20100041

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Amanda Fleming,)
)
 Plaintiff/APPELLEE,)
)
)
 Vs.)
)
 Kendel D. Fleming,)
)
 Defendant/Appellant.)

Supreme Court No. 2010041

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG - 9 2010

STATE OF NORTH DAKOTA

APPEAL FROM THE WARD COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

REPLY BRIEF OF DEFENDANT-APPELLANT
KENDEL D. FLEMMING

and Addendum

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ARGUMENT

Kendel is entitled to have this divorce appealed to the Supreme Court and to have the Supreme Court to set aside the judgment of the district court, as is stated in the N.D.Civ.P. 61 Harmless Error, No error in either admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating a new trial, or for otherwise disturbing a judgment or order unless refusal to take such actions appears to the court inconsistent with substantial justice.

Under this rule Kendel is requesting that the Supreme Court set aside the district court's judgment.

The court or every stage of the proceeding must disregard any error or defect in the proceeding which does not affect substantial rights to the parties.

When the district court granted Amanda the power to decide when and what rights Kendel shall have the court made a critical error that strongly affects Kendel's parental rights.

There was a appearance made by Kendel via letter and Kendel's mother, who showed in an attempt to protect Kendel's rights.

It was also pointed out to the district court that while the parties were married, that Amanda started to run around on Kendel. When Kendel's mother answered (Appx. page 604: on lines 14-16): "So when did you become the listed lien holder? A: When Mandy started to running around a lot, then I told Kendel I---." When Kendel's mother referred to Mandy she was referring to Amanda.

That is where the district court failed to make a ruling on the extra marital affairs. That is where the district court failed to apply the Ruff-Fischer guidelines.

This appeal is also concerning the errors which the district court did when it granted Amanda such power to delegate which parental rights and parenting time Kendel shall be entitled to receive.

The district court's judgment is a violation of Kendel's substantial parental rights.

DID THE DISTRICT COURT
COMMIT OBVIOUS ERROR
WHEN IT GRANTED AMANDA
THE POWER TO DECIDE
KENDEL'S PARENTING TIME?

The district court erred when it failed to order Amanda to have a parenting plan before the ruling could be handed down. The district court also failed to warn Amanda of the legal ramifications for failing to comply with such plan and rights and responsibilities, as is granted under N.D.Cent.Codes 14-09-32 (a-f) and 14-09-30. It is well within the courts jurisdiction to make such a ruling.

In order for there to be a restriction placed on visitation, there has to be a preponderance of the evidence that Kendel has or will pose a threat to the minor children, Amanda has not produced such evidence. Therefore there is yet another error in which the district court committed when it failed to place such a reasonable stipulation in place on the divorce decree.

The district court made it's finding that the minor children will suffer emotional, or physical harm by coming to the Penitentiary to visit Kendel. The district court made it's finding based on one child rather than doing a child by child bases. The district court should have inquired with both children if they were/are scared to come and visit their father.

As the court system is to evaluate each case on a case by case basis. The district court failed to follow this very basic guideline. When there is an issue for child visitation.

Amanda is right and gives support to Kendel's argument that "A district court cannot delegate to anyone the power to decide questions of child custody or related issues." That is what the district court did when the district court, granted Amanda such power.

Ackerman vs. Ackerman 596 N.W.2d 333, 335 (ND 1999) [8-12][¶13]
...visitation is one of reasonable rights allowed the non-custodial parent. **Muraskin vs. Muraskin** 336 N.W.2d 332, 336 (ND 1983)
The primary purpose of visitation is to promote the best interest of the child not the wishes or desires of the parent.

Amanda states that a restriction on visitation must be placed on a preponderance of the evidence and be accompanied by a detailed demonstration of physical or emotional harm. Amanda has failed to produce such evidence.

Amanda has denied Kendel visitation and contact with the children as has been stated. Amanda has only brought the minor children to visit Kendel (4) four times since his incarceration which was once a month for the first four months.

Amanda also claims that Kendel has not placed a parenting plan in his brief. Kendel has done this via of **N.D.Cent.Code 14-09-32**.

The court also erred when the court failed to comply with **N.D.Cent. Code 14-09-30(2)** to court shall include in an order establishing or modifying parental rights and responsibilities.

When the court when the court awarded Amanda the sole desecration which goes against **Marquette vs. Marquette** 2006 ND 154, 10, 719 N.W. 2d 321, 324-325 "A district court generally cannot delegate to anyone the power to decide questions of child custody or related issues.

Under the **N.D.Cent.Code 14-09-30(2)** Parental Rights and

Responsibilities gives the court the power to modify the parental rights, the court needs to modify the divorce decree to state that there is no seen harm in allowing Kendel to have contact with the minor children via the following statute; N.D.Cent.Code 14-09-32 (a-f).

(a) Right to access and obtain copies of the child's educational 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 a serious illness...

(e) Duty to inform the other parent of the residential telephone numbers, and address, and any change to the same.

(f) Duty to keep the other parent informed of the name and the address of the school the child attends.

Amanda is in violation of the district court's divorce decree; concerning Kendel's parenting time, N.D.Cent.Code 14-09-32(c) Right to reasonable access to the child by written, telephonic, and electronic means.

This is yet another example that the district court erred and ruled against this Supreme Court as is stated in **Marquette vs.**

Marquette.

Kendel has sent phone applications, to Amanda but she has refused to have them filled out correctly, this was done deliberately by Amanda, by refusing to comply with the parental rights which Kendel is

entitled to as well as the decree of divorce, which is concerning Kendel's parenting time, and parental rights.

Amanda is already going against the district court's direct order as is stated in the App. page 000003 lines 21 - 24. **N.D.Cent.Code 14-09-32(d)** Duty to inform the other parent of a serious accident or serious illness for which the child receives health care treatment... When one child had to go to Minnesota for health care treatment. Amanda failed to notify Kendel of this, which goes against the statute **N.D.Cent.Code 14-09-32(d)**. This violates not only the statute but the district courts ruling when it stated that Kendel has parental rights. But the district court failed to advise Amanda what all those rights are. That is another error on the district court's part, for failing to advise Amanda of those rights. Here the district court failed to advise both parties of their substantial parental rights (parenting time, parenting plan). That shows that the court violated Kendel's substantial parental rights and failed to follow this State Supreme Court's ruling as is stated in **Marquette vs. Marquette**.

Amanda is also is in violation of **N.D.Cent.Code 14-09-32(e)** Duty to inform the other parent of the residential, telephone numbers, and address and any changes to the same.

Amanda has already violated the divorce decree when she has failed to properly fill out the phone applications which Kendel has sent to her. This is a direct violation of the Parental rights which Kendel is entitled to, and more importantly these are violation of the rights in which their minor children are entitled to. The right to have contact with their father.

These are all direct violations of the Supreme Court's

ruling in **Marquette vs. Marquette**, and Amanda is violating the parental rights which Kendel is to be granted.

The district court should of warned Amanda of such actions that could of taken against Amanda, such as in Arizona statute 25-414

Violation of visitation or parenting time rights, penalties. A. If the court based on a verified petition and after it gives reasonable notice to an alleged violating parent and an opportunity to be heard, finds that a parent has refused without good cause to comply with a visitation or parenting time order, the court shall do at least one of the following:

1. Find the violating parent in contempt of court.
2. Order visitation or parenting time to make up for missed sessions.
3. Order parent education at the violating parent's expense.
4. Order family counseling at the violating parent's expense.
5. Order civil penalties of not to exceed one hundred dollars for each violation.
6. Order both parent's to participate in mediation or some other appropriate form of alternative dispute resolution at the violating parent's expense.
7. Make any other order that may promote the best interest of child or children involved.

These are just some examples in which the district court could of told Amanda of what might happen if she fails to comply with the **N.D.Cent.Code(s) 14-09-30, 14-09-32** but the district erred by not giving Amanda such warnings.

DID THE DISTRICT COURT
FAIL TO MAKE AMANDA FOLLOW
THE COURT RULES WHEN
FILLING FOR DIVORCE?

When Amanda filed for the divorce she failed to properly list all of the debts and property. When the divorce was filed Amanda failed to list the household goods. When making a list of all household goods it is the standard practice to list the items in amounts around twenty (\$20.00) dollars, unless such items are more valuable. Such is the case of the guns that were not listed on the Property and Debt Listing when a party fails to properly file a debt listing it brings reasonable doubt to that party's credibility. Amanda failed to list items such as tvs., washer and dryer, 1- .22 Remington rifle/scope, 1- 22.250 rifle, etc., these and other property items should have been listed on a form very similar to the form which is in the Appellant's Appx. page 000005, 000006. This is copy out of the North Dakota Court Rules book which shows that Amanda failed to follow the N.D.R.Ct. 8.3. The court needs to have Amanda to do a list of all the property in the household and send a copy of it to Kendel. Then allow Kendel to make arrangements to have a family member pick up the property.

This is a long term marriage and the district court failed to properly apply the Ruff-Fischer guidelines had the district court properly applied the guidelines then Amanda would of been ordered to equally divide the marital property.

Amanda failed to even file the Property and Debt Listings, cause of this error the district court should of had Amanda re-file the divorce.

CONCLUSION

Amanda has made little or no attempt to follow the divorce decree, and parental rights and responsibilities which the children and Kendel are entitled to receive.

Kendel is not asking for a court order to force Amanda to bring the minor children to the penitentiary to visit. Kendel is asking that the court order the following parenting plan to take effect immediately. That Kendel be allowed to call the minor children up to three (3) times a month, including on Kendel's birthday, as well as the children's birthdays even if Kendel is incarcerated or not. That Kendel be granted all of the privileges stated in N.D.Cent.Code 14-09-32(a-f).

Upon Kendel's release from incarceration that the following parenting plan be in placed, Kendel shall have unerupted parenting time as follows: every other weekend, every other holiday, every other birthday, on all of Kendel's birthdays, summer visitation from May 28, through August 17.

That Amanda be made fully aware of the legal ramifications for failing to comply with the parenting plan. That if either parent interferes with the other parent's parenting time that they are in violation of a sign agreement as well as a written court order. That the court take into consideration the Arizona statute 25-414.

That Amanda be ordered to equally divide the marital property seeing as she failed to do the vital form of (Property and Debt Listing) as is showed in the Appx. page 000005. More important the part that is set aside for Household goods. Amanda failed to list such items as guns, washer and dryer, tvs. etc.

CERTIFICATION OF COMPLIANCE:

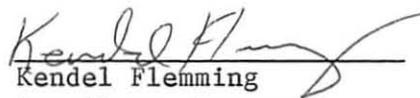
Pursuant to North Dakota Rules of Appellate Procedure, Rule 28, I certify that this brief complies with the requirements.

CERTIFICATE OF SERVICE

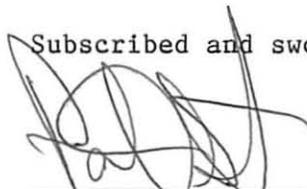
I hereby certify a true and correct copy of the foregoing document along with copy of the Appendix, was served by US First Class Mail on the 9 day of August, 2010 and addressed to:

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Subscribed and sworn before me this 9th day of August 2010.



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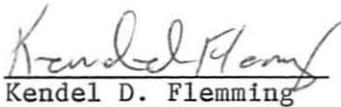
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Notary Public
State of North Dakota
My Commission Expires Oct. 31, 2014
~~My Commission Expires On~~

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CERTIFICATION OF COPIES

The Appellant Kendel D. Flemming hereby swears that the enclosed briefs were not prepared with the use of a computer or word processor, that they were prepared with the use of a typewriter. Therefore making these briefs in compliance with the Rules of Appellate Procedure Rule 31(b)(1)(C).

Dated this 9 day of August, 2010



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