20010135 ORIGINAL

IN SUPREME COURT

STATE OF NORTH DAKOTA

Jenese A. Peters-Riemers	)	**Supreme Court No. 20010135**
Plaintiff and Appellee	)	Ref. Traill County C-00-42
vs.	)	2002 ND 72
Roland C. Riemers	)	**APPELLANT'S PETITION FOR**
Defendant and Appellant	)	**REHEARING &/OR RECONSIDERATION**

I, Roland Riemers. the Defendant/Appellant in the above matter, hereby requests of the North Dakota Supreme Court a Rehearing &/or Reconsideration of their ruling of 14 May 2002.

I. Jury Trial

[¶¶5] "***N.D. Const. Art. I, §§ 13 "... preserves the right of trial by jury for all cases in which it could have been demanded as a matter of right at common law.***"

My Position: The right to a divorce has NEVER been a part of the North Dakota or Territory COMMON LAW! In 1862, Chapter 59, §1, p.390 of the General Laws of The Territory of Dakota (hereafter referred to as: Terr. Code), marriage is defined as a "*civil contract.*" In 1879 the progressive Western states defined divorce as "*a thing of purely modern statutory law.*" Green v. Green, 3 N.W. 430 (citing 2 Bishop on Marriage and Divorce, § 526). The Terr. Code established that: "*There shall be but one form of action, which shall be called a civil action.*" Chapter 8, §3, p.50 of Civil Procedure of Terr. Code of 1862. And while the Terr. Code did not state jury trial for divorce, it did state that issues of law were decided by the court, and issues of fact were tried by the jury. §260 & 261, p.90 Id. And while marriage was based on a "civil contract," the Code states that a jury trial may be waived by the parties in a contract action.§276, p.93-94 Id.

Jury trial was specifically called for in a divorce as early as 1877. Art. II, §236. p.478 of Code of Civil Procedure of Terr. Code of 1877. It also allowed for jury trials in contracts (and marriage was a contract). Art. VI, §265. p.483, Id.

In 1883 the Ter. Code made civil actions clear with: "*The distinctions between actions at law and suits in equity, and forms of all such actions and suits, heretofore existing, are abolished: and there shall be in this territory, hereafter, but one form of action for enforcement or protection of private rights and redress of private wrongs, which shall be denominated a civil action.*" Volume

I, Part II, Chapter V, §33, p. 9 of Terr. Code of 1883. The Code continued to require a divorce be tried by a jury. §237, p.70, Id. Facts were tried by jury, and law by court. §52 & 53, p.298, Id.

As correctly pointed out by the court, the specific §236 jury trial requirement for divorce was removed from the Code of Civil Procedure in 1885. I have reviewed all the original notes of 1885 and can find no public debate on that issue. I would suggest the following. Divorce is usually a combination of law and fact issues. The specific requirement for a divorce jury trial was in conflict with the general laws of jury trials for findings of fact, and the courts for findings of laws. Thus, prior to 1885 a local court could be required to have a divorce jury trial when there were no issues of fact for the jury to deliberate on. But, removing the specific requirement for jury trial in divorce, did not remove the right to a jury trial <u>on factual issues</u> in divorce as otherwise provided by law.

Did jury trials actually take place? On careful review of all appealed divorce cases from 1861, I can find little notice of any. There are minor hints, such as in 1895 in a divorce contract issue (but not the divorce itself), that a "*vital issue of fact thus presented on which the defendant had a legal right to have determined by a jury. . .*" <u>Sifton v. Sifton</u>, p. 187 of N.D. Reports.

In reviewing the next 60 years of non-electronic recorded cases in N.D. Reports, I again have not been able to find any examples of jury trials just in divorce itself. It does not mean that they did not exist though. During the post state constitution era courts listed actions as of law or fact. It is highly likely that jury trials occurred at the local court level, but were not appealed for review. These records are now mostly gone, and finding such cases would be near impossible. It might also be noted though, that in this early post constitutional era, appeals of divorces were also almost unheard of. There are many years, and often multiple years, of no appealed divorce cases.

Conclusion: **Just because a right has not been widely used, does not mean it ceased to exist. But it was NEVER a common law right as this Court argues. Nor did the 1885 amendment remove the right to a jury trial <u>on factual issues</u>, it just eliminated the unnecessary need for a jury trial on the law issues. That right existed under both the right to a jury trial for facts, and the right to jury trial on the marriage <u>contract</u>.**

II. Visitation Statutes

[¶¶7-8] *Are N.D.C.C. §§ 14-05-22(3) and N.D.C.C. §§ 14-09-06.2(1)(j) Unconstitutional?* ***Roland has failed to preserve this issue, and we decline to address it.***

My Position: As noted in my Reply Brief when this issue was first brought up, timely objection was made. See p.2, paragraph VI. of Defendant's Trial Objections (Roland's Apx. K), dated 28 March 2001. Thus the issue was preserved for appeal and must be addressed by this court.

And even if I had not preserved it, as this Court has previously noted, ***"If a defendant fails to preserve an issue for appeal, our standard of review requires a showing of "obvious error which affects substantial rights of the defendant.*** State v. Glass, 2000 ND 212, 620 N.W.2d 146, Page 148. The U.S. Supreme Court and even this court has declared that family rights, and visitation, as FUNDAMENTAL RIGHTS. See: *generally* **Troxel v. Granville, *530 U.S. 57* (2000).**

Furthermore, the denial of these fundamental rights, without meaningful due process, causes a serious injustice not only to myself and my son, but hundreds of other innocent North Dakota citizens. *"We exercise our power to consider* ***obvious error*** *cautiously and only in* ***`exceptional situations where the defendant has suffered serious injustice.'"*** State v. Ash, *526 N.W.2d 473, 482 (N.D. 1995) (quoting* State v. Smuda, *419 N.W.2d 166, 168 (N.D. 1988)).*

III. Location of Trial Proceedings

[¶¶9] *"**Roland failed to make timely objection of change of venue per N.D.C.C. §§ 28-04-10.***

My Position: I was misled by court that the facilities at Fargo were necessary, and not being experienced with the Fargo courtrooms, I did not know that this was in fact false.

While under *28-04-10. "Notwithstanding any other provision of law, in any civil trial the court may change the place of the trial from the location in which the matter was originally to be heard. If any party files an objection to the change of trial no later than ten days after the date of notice of assignment or reassignment of a judge for trial of the case*" (emphasis added). Please note the requirement of "assignment or reassignment of a judge. In this case Judge Leclerc was assigned to the case early in the year 2000, but didn't order the change of place of trial till months later on 29 December 2000. As it was then IMPOSSIBLE for me to meet the ten day objection after notice of assignment of judge, and thus it was therefore a denial of my due process rights for the judge to so order.

IV. Testimony of Minor and Appointment of Guardian Ad Litem

[¶¶10] ***Court had discretion not to allow Johnathan to testify or have GAL protect his rights.***

My Position:. "*Every person is competent to be a witness except as otherwise provided in these rules.*" Rule 601 of N.D.R.Ev. Of course, any testimony would then have to be evaluated by the court just like it would do in any other witness. But, Johnathan is a PERSON. I had the right to call him as a witness for whatever useful information he could give. In this case, Johnathan was present in the car when Jenese tried to have us all killed by stopping the car in front of a train. Johnathan had good memory of this scary event and thus his testimony would have been useful.

At the April 2000 Interim Hearing the court found that there was a "*special concern*" for the rights of my son Johnathan. Once establishing that need, the court abused its discretion by not insuring this need was met. Under 1 4-09-06.4 the court may appoint a guardian ad litem and have the county pay for it. My only objection to the GAL initially appointed was he was without previous experience and wanted to charge $150 per hour. I found that unreasonable so requested an alternative selection which was denied by the court. Failure to insure a experience and competent GAL was a gross denial of the basic rights of my son Johnathan and a abuse of discretion.

VI. Domestic Violence

[¶¶14 - 17] "***Trial court made the following specific findings regarding Roland committing domestic violence against Jenese, all of which are supported by the evidence***"

My Position: I disagree. The evidence does NOT support the findings, they just support Gjesdahl's unsupported pleadings and one-sided - blindly signed off - judicial findings.

1. ***In 1997 Roland slapped and punched Jenese!***

Utterly false. Testimonial supporting me was given by a police officer. A deposition, signed by Jenese under oath (and previously submitted as supporting evidence to this Court in the past), confirmed that she chased me with a knife and twice threatened to kill me, and that she was only knocked in the face when she had me pinned on the bed so I could get away. She was only kicked in the stomach when I was on the couch calling 911 when she again attacked me to prevent the phone call and I had to kick at her to keep her away. I also fully testified on this. Another officer would have testified to this as well except for my inability to properly secure witness from Grand Forks to Fargo caused by the courts change of venue to a more distant court.

2. ***In October 1999 Roland slapped Jenese in the face!***

Although what led up to the slap is strongly disputed, it ended when I slapped Jenese once in the face as a result. But, Jenese gave no testimony that this put her in fear. She did not suffer bodily injury as a result. It is also a long standing point of law that: "*Married persons must submit to the ordinary consequences of human infirmities and unwise mating, and the misconduct which will be ground for a divorce as constituting cruelty must be serious. Mere austerity of temper, petulance of manners, rudeness of language, or even occasional sallies of passion, if they do not threaten bodily harm or impairment of health, do not as a general rule amount to cruelty.*" Miller v. Miller, 1952 N.D. 161, 166, 55 N.W.3d 218. Also: "*Single acts of cruelty is not sufficient grounds for divorce. Acts of cruelty must be persistent and frequent. Cruelty must inflict grievous bodily injury or grievous mental suffering.*" Ruff v. Ruff, 1952 N.D. 775, 777, 52 NW2d 107.

3. ***In January 2000 Roland kicked Jenese on her butt after she destroyed his property!***

I did not dispute I gave Jenese a boot in the butt. But refer to the same argument as #2.

4. ***Roland would not let Jenese leave with Johnathan resulting in altercation and injury to Jenese's face and Roland's hand!***

It is undisputed even with Jenese's testimony that Roland was just trying to protect Johnathan. This court in various pleadings have seen pictures of my scratched up chest that prove I had taken a pounding before hitting Jenese back. The 911 record shows I called 911. Under 14-07.1-01, violence committed in self-defense is not domestic violence. In the past, even this Court has stated it was obvious that domestic violence has occurred on both sides in this case.

5. ***After a fully contested hearing an Adult Abuse Protection Order was issued!***

This ruling was appealed to this court, and you found that the "*district court misapplied the law and abused its discretion in excluding this evidence.*" Riemers v. Riemers, 2000 N.D. 62, [¶¶8] Thus, it could not have been a "*fully contested hearing.*" Also, only evidence of a felony conviction can be used to prove an essential fact to sustain a judgment.

6. ***On October 6, 2000, Roland pled guilty to the reduced charge of misdemeanor assault, admitting that a factual basis existed for that plea!***

Yes I did plead guilty. But factual bases? What were these facts? That I had hit Jenese? That my name was Roland? That I was arrested? The only thing the plea proved was that it was less expensive to just plead guilty and not take the remote chance of a guilty verdict. Also, under Rule 201 of the N.D.R.Ev. only facts that are not subject to reasonable dispute may be used as evidence.

Thus this reference proves NOTHING and is a violation of your own Rules of Evidence.

VII. Alleged Domestic Violence By Jenese

[¶¶16] Court made specific findings on Jenese's domestic violence! Jenese may have hit or scratched Roland. But, her actions were of a less serious nature than Roland's domestic violence and were in self defense!

A slap and butt boot is more serious then threatening to kill me with knifes, guns, and even a train? If we are to have "specific findings" why aren't these incidents even mentioned by the court? Often they were not even disputed by Jenese's testimony, but supported by my witnesses.

VIII. Extreme Cruelty

[¶¶17] ***Court found extreme cruelty, grievous mental suffering, extramarital affairs, and physical abuse of Jenese by Roland.***

My Position: N.D.C.C.14-05-05 covers "*one party of the marriage*." You don't give divorces for premarital conduct! Well, at least they didn't until now. There is utterly NO proof of adultery during the marriage. It was denied by me. Never testified to by Jenese. And any premarital conduct would have been condoned by the eventually marriage!

Is a broken check bone or a fractured finger in a one time altercation "grievous bodily injury?" Especially if done in self-defense and defense of my son? No! Similar injuries and worse could have occurred in numerous sporting events. Is a one time provoked slap in face and butt boot grievous bodily injury or grievous mental suffering. No! And although the 1997 incident, was serious (especially if you ignore police testimony, my testimony ,and Jenese's own deposition) it also happen before the marriage and certainly the act of marriage has to be condonation by both of us.

IX. Premarital Agreement

[¶¶18-19] ***The court found the premarital contract unconscionable and unenforceable because:***

1. ***Failed to disclose?*** While it was admitted by me that some of my loan applications (following the premarital contract) showed inflated numbers in order to obtain loans, in the real world of disclosure, the FIGURES FOR THE PREMARITAL CONTRACT AND THE FINAL AGREED ON 8.3 STATEMENT ARE ALMOST EXACTLY THE SAME! The was a no failure to disclose! It is all Gjesdahl bull! Look at the contract and the final 8.3 and see for yourself! Why

would I even want to not disclose if I knew it would be grounds for voiding the premarital contract?

2. ***Contract sprung on Jenese just three days before our marriage?*** In my briefs I fully cite Jenese's own testimony to prove she saw drafts well before the signing. But, Gjesdahl put this in his findings. and Leclerc just signed them off. And even IF they had been sprung on Jenese 3 days before the wedding, this court has upheld premarital contracts signed the day of the wedding!

3. ***Jenese's reading of the agreement was cursory, and her understanding of its consequences limited!*** Utterly no testimony to support this position. Exactly WHAT consequence did she not understand? The law presumes the signer knows what he/she is signing. Jenese has the burden of proof. She submitted no. zero. nada proof. She fully understood it.

4. ***Jenese did not have independent legal advice prior to signing!*** True. But. she knowingly signed off on that right. Nor did she give any testimony how that would have affected her understanding of the agreement. The burden is on her to prove. She has not done so.

5. ***Roland and his attorney sat in the room with the agreement.*** Bull! I testified I was not even in the office that afternoon. If you don't believe me call Simonson the drafting attorney?

6. ***Roland did not file taxes, and his representation of his income were not reliable!*** My filed tax returns were in Trail Exhibit 80. This court has that exhibit. If this court can't believe the testimony. then at least look at the actual exhibits. All there. signed, and in evidence.

The premarital contract was honest. done by licensed attorney and should be upheld.

X. Unconstitutional Division of Marital Property

[¶¶21] ***Married parties to maintain their own separate property:***

My position: While I would agree that under 14-05-24 the court has the authority to make an equitable distribution of the parties marital property. And that to do so it can take into consideration separate and marital property as allowed in 14-05-24. BUT, it appears that there is confusion in the law caused by use of general terms like "*property of the parties.*" But does this term contain just marital property, or does it include separate property as well? A more proper distinction should be used such a "*joint marital property*" and "*separate property.*"

At the time of our state constitution in 1889, on divorce, the husband kept the homestead, children and property, and was obligated to support his ex wife. As pointed out in the Court's opinion, neither husband nor wife were obligated for the debts of each other "*before marriage*" and this is codified under N.D.C.C. §§ 14-07-08. But, this court leaves out the critical wording of

"*before or after marriage.*" Id. (4). I have to wonder about this court's omission of the critical word "*after*"? I would also disagree that these various statutes are "*not part of our divorce laws.*" These same basic laws on separate property have been part of our marital and divorce laws for over a hundred years. For instance, in the right and privileges of separate property, 14-07-04 now spells it out. It is based on §2766 of the 1899 Code and at that time it clearly stated separate property can only be used for support purposes. This is obviously a divorce and marriage concern.

As cited earlier, marriage and divorce are purely statutory. The change in separate to marital property has not been statutory, but by court fiat the last 50 years. The separate property position is most clearly spelled out in 1953 when this court stated: "*The plaintiff (wife) did nothing in reference thereto to give her a share in that property or its income. Except for necessary support the wife has no interest in the property of her husband.*" Fleck v. Fleck, 79 N.D. 561, 574, 58 NW 2d 765, This court then went on to state with approval: *"The rule is well settled in this state that the status of property as community or separate is to be determined as of the date of its acquisition, and that if it is separate property at that time it will remain separate property through all of its changes and transitions as long as it can be traced and identified; and, further, that its rents, issues and profits remain separate property."* In Burch v. Rice, 37 Wn.2d 185, 222 P.2d 847. See also Schlak v. Schlak, 51 N.D. 897, 201 N.W. 832; Buchanan v. Buchanan, 69 N.D. 208, 285 N.W. 75; McLean v. McLean, 69 N.D. 665, 290 N.W. 913. This Court also upheld separate property in 1965 with: "*All of the property which the defendant acquired prior to the marriage remains her separate property. . .* Bolt v. Bolt, 134 N.W. 506, 511 (1965), citing Fleck, 58 NW2d 765.

But the right to separate property gave way to Justice Pederson's desire to include it in marital property division. In 1976, without a change to statutory law, and ignoring common law, this Court ruled that: ". . . *as to the jurisdiction of the court in a divorce action . . . it is now well settled that the court has such power, even when that separate property was acquired before the marriage.*" Fine v. Fine, 248 N.W.2d 838, 840 (N.D. 1976). Interestingly, there were 3 opinions on this matter in 1976. All supported each other and upheld tossing separate property into the marital property pot.

The courts have always had the ability to use separate property for support. That is clearly spelled out in N.D.C.C. §2766 of 1899. But, under statute and the state Constitution (and Code excludes common law per N.D.C.C. 1-01-016), other then support or as a means of achieving an equitable division of the Joint Marital Property, husband and wife have the continued right to their own separate property before, during and after divorce.

On rehearing, I would like to more fully develop a brief in this area.

XI. Property Distribution -- Math Computation

[¶¶23-24] **No error in property division.**
My position: Correcting for the $111,888 math error, the property distribution is currently:
Courts inflated Net Estate (excluding HUD and large mortgages given in evidence) = $628,831
Jenese's property award of $531,518, plus $10,051 pilfered, plus $30,000 spousal = $571,569
Roland's property award of -110,906, minus $21,000 Post Separation Capitol Loss, and
also minus $30,000 owed to Jenese for 5 years of Support at $500/month = ---$162,906

And while a choice between two permissible views of the evidence is not clearly erroneous when the trial court's findings are based upon physical or documentary evidence, inferences from other facts, or on credibility determinations. **Fox v. Fox**, 2001 ND 88, ¶¶ **14**, 626 N.W.2d 660. In this instance, how can the court possibly describe $628,831 vs. -- $162,906 not clearly erroneous? And it is not a matter of two permissible views. Jenese did NOT present ANY conflicting evidence on these values. So there was not a conflicting view.

What happen to the need of the court to follow the Ruff-Fischer guidelines?

XII. Spousal Support

[¶¶26-27] ***Jenese disadvantaged and in need of support!***

My position: Jenese was moved from a hand to mouth existence from Belieze. Given a free college education. Awarded over a half a million dollars in property. Deprived because she had to leave a well appointed house, but then awarded the well appointed house she was deprived of. Has gone from $200 a month in Belieze, to currently over $6,000 a month gross. I am imputed with an income of $110,000 based on wild speculations on loans and selling of assets, but only had a $37,000 filed taxable income. Nor, was the income averaged over 5 years as required for the self employed. And Jenese is still disadvantaged and in need of additional support? Lets get real!

XIII. Life Insurance

[¶¶28] ***Court did not error in requiring life insurance.***

The error is with my age. The cost of such insurance will become prohibitive. Also, in case of my death Johnathan would be fully covered and supported by SSI. Thus the insurance is not needed.

XIV. Health Insurance

[¶¶29-30] *"No evidence is in the record to support even an inference that Jenese has available to her health insurance coverage for Johnathan at no or nominal cost."*

My position: At the time of trial Johnathan was covered by Jenese's health insurance through her work. The court made no inquiry, nor was there any evidence presented of health care costs to either party. Reasonable cost is defined by N.D.C.C.14-09-08.15 as: "*For purposes of this chapter, health insurance is considered reasonable in cost if it is available to the obligor on a group basis or through an employer or union, regardless of service delivery mechanism.*" The court needs to follow this law, and not its own view on what is reasonable.

XV. Conclusion

[¶¶31] ***"Roland has raised additional issues which we find are devoid of merit and do not warrant further discussion."***.

My position: Article IV, §.5. "When a judgment or order is reversed, modified, or confirmed by the supreme court, the reasons shall be concisely stated in writing . . ." The court is obligated to rule on all these issues, not just the ones it finds interesting. I ask this court to do its job!

MY CONCLUSIONS:

I have on numerous occasions stood before Judge Leclerc. I have found him to be a likeable fellow off the bench, but a tyrant to those he dislikes. On the other hand I have stood twice before this court and know from your keen questions that you suffer no such infirmities. Frankly, I expected much more from you. If this ruling stands as is, it will show to the public and the legislature your total disregard to your oath of office to uphold the law and the constitutions of the United States and the State of North Dakota. Adultery based on sex 2 years before the marriage? No Ruff-Fischer guidelines? Abuse a slap on the face? Premarital agreement invalid for non-disclosure even when the premarital values almost totally agree with the 8.3 values? The legal and Constitutional right to keep separate property, but no remedy for this right?

I really have no ambition to spend my life as the great North Dakota court reformer. You have been elected and are already paid for such duties. But, I will do what must be done to get justice for me and my son, and for the many other parents and children who are being harmed by your actions.

I ask that you grant this petition, as well as assume your full duties and responsibilities to the office you hold. Protect our families and children by doing what is true, instead of what is politically expedient. To do otherwise will only bring further disrespect to our system and yourself personally.

Dated: 24 May 2002 By: _____

Roland Riemers, Pro Se, Appellant, Loving Father