

IN THE SUPREME COURT

**20090302**

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

Darnell Boeckel,	)	
	)	
Plaintiff-Appellee,	)	
	)	Supreme Court Case No.: 20090302
v.	)	
	)	District Court Case No.: 43-05-C-0868
Jocelyn Boeckel,	)	
	)	
Defendant-Appellant.	)	

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**APPEAL FROM THE DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
MORTON COUNTY, NORTH DAKOTA  
THE HONORABLE THOMAS J. SCHNEIDER, PRESIDING**

**BRIEF OF APPELLEE**

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## STATEMENT OF THE ISSUES

As this matter involves an appeal by appellant, and appellant's statement of the issues are very broad so as to cover virtually any portion of the trial of this matter, appellee makes no separate Statement of the Issues.

## STATEMENT OF THE CASE

(As a prefatory note, in this brief appellant will be referred to as "Ms. Boeckel" or "Jocelyn Boeckel", although she remarried in April of 2008 such that at the time of trial her actual legal name was, and still is, Jocelyn Barnes.)

This is a divorce case. The parties were married on July 23, 1994. Three children were born of the marriage, J.B., born in 1994, N.B., born in 1997, and S.B., born in 2000. In April of 2005 the parties separated with Mr. Boeckel thereafter commencing the divorce proceedings. On February 21, 2007, the District court entered Judgment granting the parties a divorce and resolving the issues of child custody, support and visitation. The Findings of Fact and Judgment confirmed that the Court was requested by the parties to "go ahead and enter a divorce, reserving and retaining jurisdiction over the equitable division of the martial estate and debts, which still remains to be determined." Findings of Fact, Conclusions of Law and Order for Judgment, February 21, 2007, Docket No. 65, pg 1. The Conclusions of Law confirmed that "The equitable division of the martial estate and the debts will be determined at a later date." Findings of Fact, Conclusions of Law and Order for Judgment, February 21, 2007, Docket No. 65, pg 7.

Both parties thereafter continued to reside in the Lemmon, South Dakota area until late December 2007 / early January of 2008 when defendant-appellant (hereinafter Ms. Boeckel) suddenly relocated to Williston, North Dakota with her boyfriend, Chad Barnes, taking the

children with her. Plaintiff-appellant (hereinafter “Mr. Boeckel”) thereafter filed a motion for modification of custody, after which several varying motions by the parties were filed.

On April 28 and 29, 2009, a trial was held during which the issues of custody / visitation of the parties’ three minor sons (based upon Mr. Boeckel’s motion for change of custody and Ms. Boeckel’s motion for modification of visitation), distribution of the assets and debts of the marital estate (based upon the February, 2007 Findings of Fact and partial Judgment) and a motion for contempt (as a result of a separate filing by Ms. Boeckel) were determined. The district court’s determination on apparently all of those issues excluding the motion for contempt is the basis for Ms. Boeckel’s appeal.

#### STATEMENT OF THE FACTS

Plaintiff and defendant were married on July 23, 1994. The parties have three children, all males, J.B., born in 1994, N.B., born in 1997, and S.B., born in 2000.

Throughout the course of the marriage the parties resided at a farm located approximately 12 miles Northeast of Lemmon, South Dakota. This is a farm which was gifted to Mr. Boeckel by his parents, Dale and Claudette Boeckel. Mr. Boeckel’s occupation and income was solely associated with the farm / ranch operation. Ms. Boeckel supported the farm/ranch by occasionally assisting on the farm and through occasional odd jobs including working at a grocery store and livestock yard. After the parties’ separation, Ms. Boeckel worked at a local jewelry manufacturing company.

Both parties testified at trial that the marriage was occasionally tumultuous, particularly in the last years of the marriage. Ms. Boeckel alleged abuse by Mr. Boeckel and obtained protection orders against him. Mr. Boeckel alleged that any physical altercations came about as

the result of Jocelyn Boeckel's outbursts and Mr. Boeckel defending himself and/or in a mutually combative situation.

In April of 2005, after approximately 11 years of marriage, the parties separated with Mr. Boeckel remaining on the farm and Ms. Boeckel moving to Lemmon. Ms. Boeckel attributed the break-up to the domestic violence in the home. Mr. Boeckel attributed the break-up to an affair which Ms. Boeckel had with a man by the name of "Sam" and entered into evidence at trial a letter written from Ms. Boeckel to Sam as evidence of the same. (Exhibit 39). Regardless of the reason for the break-up of the marriage, after April of 2005 the parties were split and began splitting time with their boys such that their children would spend roughly equal time between the residences. Plaintiff thereafter commenced these divorce proceedings, eventually filing the summons and complaint with the court in June of 2005.

During the process of the divorce proceedings, roughly 4 months after the parties' separation and two months after the filing of the summons and complaint, in August of 2005 Ms. Boeckel's parents were tragically killed in an automobile accident. As a result of that circumstance, Ms. Boeckel inherited one half of the estate of her parents.

In early 2007 the parties entered into a written agreement on the issues of child custody, visitation and support. As the parties were unable to agree upon the distribution of assets and debts associated with the marital estate, which had become complicated by the probate / estate issue associated with the death of Ms. Boeckel's parents, the parties agreed to defer distribution of the marital estate until a later date and to agree upon getting a divorce and addressing the issues associated with the children.

On February 21, 2007, in accordance with the wishes and Stipulation of the parties, the district court entered Judgment granting the parties a divorce and resolving the issues of child

custody, support and visitation. The Findings of Fact and Judgment confirmed that the Court was requested by the parties to “go ahead and enter a divorce, reserving and retaining jurisdiction over the equitable division of *the martial estate and debts*, which still remains to be determined.” Findings of Fact, Conclusions of Law and Order for Judgment, February 21, 2007, Docket No. 65, pg 1 (emphasis added). The Conclusions of Law confirmed that “The equitable division of *the martial estate and the debts* will be determined at a later date.” Findings of Fact, Conclusions of Law and Order for Judgment, February 21, 2007, Docket No. 65, pg 7 (emphasis added).

The parties thereafter resided in relative separate harmony such that their children were in the custody of Ms. Boeckel while she resided in Lemmon, South Dakota but also had significant visitation with their father by simply riding the bus to and from the farm near Lemmon. The custody / visitation arrangement was such that Mr. Boeckel had the children approximately 11 out of every 28 days (roughly 40% of the time).

Unfortunately that relative harmony lasted for only a short time after the divorce when in late December of 2007 / early January of 2008 Ms. Boeckel suddenly relocated to Williston, North Dakota (a distance of approximately 220 miles). The primary reason for the relocation was that Ms. Boeckel’s boyfriend, Chad Barnes, (with whom she was living with the boys) had obtained a job in the Williston area. During the 2007 Christmas school break plaintiff suddenly moved with the boys to Williston. Ms. Boeckel testified that she gave no notice of this sudden move to Mr. Boeckel and that she in fact had spoken to her attorney at the time, Anne Summers, who had advised her not to tell Mr. Boeckel.

Mr. Boeckel was understandably displeased with the move. Not only had he not been adequately informed of the move, but as a result of the move his boys were now living 220 miles

away, were in a school system in a different state, and his substantial visitation time with boys as provided by the February, 2007 Judgment was being violated on literally a weekly basis. Mr. Boeckel started obtaining the boys for very limited times on alternating weekends (4 out of every 28 days)(approximately 15% of the time), rather than the 11 out of 28 days (approximately 40% of the time) he had been seeing them. Further, in order to get this visitation time Mr. Boeckel had to drive roughly 4 hours one way.

Mr. Boeckel filed a motion for modification of custody and subsequent motions by Ms. Boeckel, including a motion to modify visitation (because of her relocation), and motion to hold plaintiff in contempt, followed.

While the parties were regressing in the continuing divorce and custody matters, in April of 2008 Ms. Boeckel married Chad Barnes and became Jocelyn Barnes. Of further relevance, in October of 2008, roughly 20 months after the granting of the divorce and the partial judgment, and 6 months after Jocelyn Boeckel had married Chad Barnes to become Mrs. Barnes, Mr. Boeckel's mother passed away after a sudden diagnosis of terminal cancer. Mr. Boeckel is the sole beneficiary of his mother's estate, which at the time of trial was in the initial stages of probate.

The issues presented and tried to the court on April 28 and 29, 2009 were as follows: a) custody / visitation of the parties' three minor sons, b) distribution of the assets and debts of the marital estate, and c) defendant's motion for contempt. As indicated previously, the motion for contempt seems to be the one issue which Ms. Boeckel is not appealing and will not be further addressed herein. Mr. Boeckel will address additional facts and evidence presented as these relate to responding to Ms. Boeckel's appeal.



## LAW AND ARGUMENT

### A. Standard of Review

Appellee does not dispute the clearly erroneous standard of review as discussed by appellant relative to the issues of appeal in this matter. This court has explained on a multitude of occasions that the district court's determinations and findings of fact as relate to issues of custody and visitation "will not be reversed on appeal unless they are clearly erroneous."

Edwards v. Edwards, 2010 ND 2 ¶7 – N.W.2d --, citing Berg v. Berg, 2000 ND 36 ¶18, 606 N.W.2d 895 and Hogan v. Hogan, 2003 ND 105, ¶6, 665 N.W.2d 672.

As recently explained in Edwards, "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 evidence we are left with a definite and firm conviction a mistake has been made." Edwards, 2010 ND 2 ¶7 – N.W.2d --, citing Berg v. Berg, 2000 ND 36 ¶18, 606 N.W.2d 895.

As further correctly pointed out by Appellant, "under the clearly erroneous standard of review, [the courts does] not reweigh the evidence or reassess the credibility of witnesses, and [the court] will not retry a custody case or substitute our judgment for a district court's initial custody decision merely because [the court] might have reached a different result." Lindberg v. Lindberg, 2009 ND 136 ¶4, 770 N.W.2d 252, citing Jelsing v. Peterson, 2007 ND 41, ¶ 11, 729 N.W.2d 157.

The clearly erroneous standard is also applicable to review of the district court's decisions on property distribution. Wold v. Wold, 2008 ND 14 ¶6, 744 N.W.2d 541. As with examining findings of fact in custody determinations, this court has stated that "[a] finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to

support it, or if, although there is some evidence to support it, on the entire evidence a reviewing court is left with a definite and firm conviction a mistake has been made.” Id. quoting Kautzman v. Kautzman, 1998 ND 192, ¶ 8, 585 N.W.2d 561.

B. Whether the lower court erred in changing custody of the three children from Jocelyn to Darnell

Mr. Boeckel asserts that the lower court’s judgment relative to the modification of custody was not clearly erroneous. Rather, that decision was based upon sound and due consideration of all of the evidence presented, including, but not limited to, the reports of the custody investigator. There was no erroneous view of law and there was most certainly evidence present to support the trial court’s custody decision. As such, the only remaining avenue for a finding of clear error is this court’s determination is that in examining the “entire evidence” it is left with a “definite and firm conviction a mistake has been made” Berg v. Berg, 2000 ND 36 ¶18, 606 N.W.2d 895.

While it is not Mr. Boeckel’s intention, nor desire (even if it were feasible), to summarize and examine all of the evidence presented in this matter, Mr. Boeckel does find it necessary to examine some of the testimony and evidence to confirm to this court that the trial court’s determination was supported by ample evidence and no clear error has been made.

As has been discussed, the issue of custody re-surfaced in this divorce case as a result of a motion for change of custody by Mr. Boeckel, which motion was then tried in conjunction with the property issues. The initial custody determination in February of 2007 had resulted from a stipulated agreement. Less than a year later, Ms. Boeckel violated that Judgment and virtually every parental right of Mr. Boeckel when she suddenly, and lacking any notice, moved the children from Lemmon, South Dakota to Williston, North Dakota. That move alone, much less other changes in the children’s lives, including the addition of Chad Barnes (the boyfriend and

eventual husband of Jocelyn Boeckel) to the household, was unquestionably a material change in circumstances providing for a motion for change of custody and hearing upon the same as provided by N.D.C.C. §14-09-06.6. Further, due to the relocation and entry of Mr. Barnes into the picture, there existed substantial grounds for a change of custody including but not limited to denial and/or interference with parenting time and an environment which exposed the children to physical or emotional health.

Having established appropriate grounds, the district court granted a hearing on Mr. Boeckel's motion for change of custody and tried the same in conjunction with the remaining property issues which were held over from the February, 2007 divorce judgment. At the April 28 and 29, 2009 trial, the court appropriately and carefully heard all testimony and received evidence to address the best interest factors as provided by N.D.C.C. §14-09-06.2 in determining in whose custody the children should be placed.

During the initial divorce proceedings and prior to entry of the divorce judgment in February of 2007 the court had appointed Barbara Oliger as Custody Investigator. In association with Mr. Boeckel's motion for change of custody, the court again re-appointed Ms. Oliger for purposes of a renewed custody investigation. As such, the custody investigator had a very thorough knowledge of the case. In her initial custody report and investigation Ms. Oliger had recommended custody of the children be placed with Ms. Boeckel. As a result of her further custody investigation, at the time of the April 28, 2009 trial of this matter, Ms. Oliger changed her recommendation and recommended that custody of the boys be placed with Mr. Boeckel and that the boys return to live on the farm in the Lemmon, SD area.

With respect to Ms. Oliger's investigation, report (Exhibit 34) and testimony, Mr. Boeckel notes that Ms. Oliger interviewed the parties, their children and their spouses /

significant others on several occasions (4 separate visits with the children by the time of trial and one additional brief visit on the second day of trial), reviewed various court files, reviewed and spoke to numerous persons concerning four separate social services reports which had occurred during the applicable time period, reviewed the depositions and affidavits of the parties and their children, obtained and reviewed questionnaires from nine third parties, had phone or in-person contact with thirty third parties, and reviewed six teacher questionnaires. Clearly, Ms. Oliger put substantial effort and had a substantial basis for her evaluations and recommendations and her comments and recommendations were given some, but certainly not sole, consideration by the trial court.

Exhibit 34 also disclosed Ms. Oliger's contemplation of North Dakota's best interest factors which were also taken into consideration in the trial court's findings on the best interests of the children. Again, as a broad statement, Mr. Boeckel asserts that the trial court carefully contemplated all of the evidence and applied this evidence, including but certainly not limited to Ms. Oliger's report, to North Dakota's best interests factors. The court's contemplation of these best interest factors is located at Dockets 236 (Memorandum Opinion and Order), 239 (Findings of Fact, Conclusions of Law, and Order for Amended Judgment) and 240 (Amended Judgment and Decree of Divorce).

Ms. Boeckel seems to focus upon two primary issues in her appeal as the reason the court's decision is clearly erroneous. First, she complains that the court failed to appropriately consider evidence of domestic violence and the custody presumptions which she argues should be given under North Dakota law. Second, she complains that the court improperly focused upon her current husband, Chad Barnes. Ms. Boeckel glosses over the fact that there are 12 factors and one catch-all factor, including a multitude of evidence associated with these factors,

which the district court contemplated and weighed. No one of these factors was the sole basis for the trial court's decision on custody. The Memorandum Opinion and Findings of Fact clearly illustrate that the court weighed and concerned all evidence in addressing the best interest factors.

The issue of prior domestic violence which occurred during the marriage was indeed contemplated and considered by the court. Ms. Oliger's custody investigations addressed the same and there was testimony at trial concerning the same. As commented upon by the court in its Findings of Fact under the factor relative to evidence of domestic violence:

j) Evidence of Domestic Violence When Darnell and Jocelyn were still married and living together, Darnell perpetrated domestic violence against Jocelyn. She obtained at least two Protection Orders against Darnell. Darnell's domestic violence against Jocelyn occurred several years ago prior to the parties' divorce. This factor favors Jocelyn.

Findings of Fact, Conclusions of Law and Order for Judgment, August 10, 2009, Docket No. 240.

In addition to contemplating this factor and noting that the domestic violence occurred several years prior to the parties' divorce, the trial court specifically found that this factor weighed in favor of Ms. Boeckel. With respect to the rebuttable presumption contemplated by N.D.C.C. §14-09-06.2(j), such statute read (at the time of this trial), in applicable part, as follows:

If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence *which resulted in serious bodily injury* or involved the use of a dangerous weapon or there exists a pattern of domestic violence *within a reasonable time proximate to the proceeding*, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as a custodial parent.

N.D.C.C. §14-09-06.2(j)(emphasis added). Even assuming arguendo that there was

domestic violence prior to the separation that resulted in serious bodily injury (which is certainly not admitted by Mr. Boeckel), it is adamantly clear that any domestic violence did not occur “within a reasonable time proximate to the proceeding”. N.D.C.C. §14-09-06.2(j). In fact the trial court commented that the domestic violence against Jocelyn occurred several years prior to the parties divorce. It should be recalled that in addition to the alleged violence occurring several years prior to the divorce, the divorce occurred several years prior to the trial on the issue of the change of custody and as such there is absolutely no proximity as required by the statute.

Other issues associated with domestic violence have indeed been glossed over by Ms. Boeckel in her appeal. It is clear from even the custody investigator’s comments that this was a tumultuous marriage and if there was abuse, it went both ways. Ms. Boeckel threw objects at Mr. Boeckel and she admitted to pushing and shoving Mr. Boeckel. (See Exhibit 34, pg. 25). Even at trial, Ms. Boeckel admitted to pushing and shoving Mr. Boeckel (See Transcript pg. 365). Ms. Boeckel also admitted that other than giving spankings, Mr. Boeckel has never struck the boys and that she has in fact also given spankings to the boys (Transcript, pg. 347-48).

Beyond the remote allegations of abuse as relate to Mr. Boeckel, what the trial court also needed to contemplate, and did contemplate, was the issue of abuse and domestic violence to which Jocelyn Boeckel was exposing the boys, and continued to expose the boys, while residing in her new home with her husband Chad Barnes. The custody investigator’s report documented and discussed four separate reports of abuse and neglect which had been made to Social Services starting in March of 2008 and continuing virtually up to the date of trial. All of these incidents surrounded allegations against Ms. Boeckel, her husband, Chad Barnes, and the treatment to which they (especially Mr. Barnes, but with the knowledge of Ms. Boeckel) were subjecting the boys. Again, these incidents are significant and are detailed in Exhibit 34 as well as having been

testified upon by Ms. Oliger.

Even in her own testimony under cross, Ms. Boeckel confirmed that while in her new home with Mr. Barnes, the boys have been subjected to (i.e. either witnessing or being the recipient of) yelling, screaming, swearing, derogatory comments towards their father, Mr. Boeckel, aggressive physical contact, etc. While in the care of Ms. Boeckel and her new husband, the boys have been poked in the chest to the point that it has caused bruises, have been thrown to the floor, and have even been choked by Mr. Barnes. (Trial Testimony of Ms. Boeckel, Transcript pg. 348 – 354). Prior to trial, Ms. Boeckel in fact got her own protection order against Mr. Barnes which, at that time, was set to expire in October of 2009. (Trial Testimony of Ms. Boeckel, Transcript pg. 348 – 354). Mr. Barnes was in fact criminally charged for simple assault as a result of his aggressive actions towards Ms. Boeckel (Trial Testimony of Ms. Boeckel, Transcript pg. 356). This and much more evidence is what the court heard and contemplated when it examined the issue of domestic violence.

It is truly the epitome of the pot calling the kettle black that Ms. Boeckel would argue that evidence of domestic violence as contemplated by N.D.C.C. §14-09-06.2(j) raises a presumption in her favor for custody when the actual evidence is that: a) Any alleged domestic violence occurred many years prior to this custody determination, b) The trial court's custody determination being appealed was in association with a motion for modification of custody during which applicable time there was absolutely no evidence of domestic violence by Mr. Boeckel, c) Ms. Boeckel's testimony was that Mr. Boeckel never physically abused the children (unless spanking is physical abuse, at which point both Mr. and Mrs. Boeckel would be guilty of abusing the children), and d) All evidence pointed to the fact that Ms. Boeckel had, at a minimum, allowed on-going abuse of the boys by her husband, Chad Barnes.

Ms. Boeckel relies primarily upon the testimony given, and evidence gathered, by the custody investigator to support her allegations of abuse. However, in the next breath she argues the trial court should disregard the majority of the remaining testimony and evidence presented through that same custody investigator which raises substantial concerns of current domestic violence and abusive situations in Ms. Boeckel's household. Exhibit 34, pgs. 7-11, 23-29. It is somewhat surprising that Ms. Boeckel would even bring up the issue of domestic violence in light of the plethora of evidence against her in this regard.

Ms. Boeckel's next primary argument seems to be that the court focused too significantly upon the possibility of Mr. Barnes returning to the home. The fact is that Mr. Barnes had been subjecting the children to abuse, swearing, threats, and a virtual multitude of inappropriate and abusive conduct for well over a year and that Ms. Boeckel had done virtually nothing to prevent it. Furthermore, similar to the situation with Mr. Boeckel, Jocelyn stood virtually toe to toe with Mr. Barnes in delivering the abusive behavior back by screaming, yelling, swearing, etc. (Trial Testimony of Ms. Boeckel, Transcript pg. 348 – 354). When asked about whether she was intending upon reconciling with Mr. Barnes, Ms. Boeckel indicated that it was indeed her desire to reconcile. (Trial Testimony of Ms. Boeckel, Transcript pg. 355-56). In fact, it appears that this has occurred. It is and was entirely appropriate for the court to take into consideration the abuse, neglect, and multitude of allegations concerning inappropriate behavior to which the children were subjected while living with Ms. Boeckel and Mr. Barnes. In fact given the severity of the issues which were occurring in Ms. Boeckel's home and to which the children were subjected, it would have been clear error not to take this into consideration.

This court can very well review the Findings of Fact of the trial court and see that the trial court appropriately and deliberately considered all of the testimony and evidence, and applied the



same appropriately to the best interest factors in coming to a custody determination. In weighing such factors, the court commented that factors a, c, and g favored neither party; factors b and j favored Ms. Boeckel and factors d, e, h, and i favored Mr. Beockel.

Ms. Boeckel picks and chooses other items from which to critique the trial court's decision but again conveniently overlooks the fact that the trial court appropriately considered all evidence and contemplated all best interest factors in making a custodial decision. Some of the selected items of evidence which Ms. Boeckel chooses to focus on which she argues favored a custody determination for her include the reasonable preference of the children. However, the oldest child, (14 at the time of trial) and one best able to express a preference advised the custody investigator and the court that his preference was to reside with his father. The second oldest child (12 at the time of trial) expressed a preference to reside with his father to the custody investigator on several occasions prior to the trial but by the time of trial, expressed a preference to reside with his mother. The youngest child (9 at the time of trial) did not testify at trial but did express a preference to reside with his father to the custody investigator.

The statements made in Ms. Boeckel's brief at ¶13 that the "two youngest children have indicated through testimony .... that the preference is to stay in Williston" and at ¶14 that "there was testimony showing that [staying with the mother] was SB's preference as well" is incorrect. As indicated above, the custody investigator spoke and met with the children four times between October of 2008 and March of 2009 (Trial Testimony of Barb Oliger, Transcript pg. 531-32) and on these occasions the children had expressed preferences to live with their father. See Exhibit 34, pg. 22. "All three of the boys reported a desire to move in with their father". By the time of trial, the middle child, NB, did express a preference to reside with his mother as indicated above. Then, by the second day of trial, the custody investigator spoke again with the children and the

youngest child, SB, expressed mixed feelings about where he wanted to go (Trial Testimony of Barb Oliger, Transcript pg. 532, 540). As such, it is inaccurate that the youngest two children expressed a desire to stay with their mother. If anything, the circumstances of what occurred (all three children expressing preferences to live with their father up until the day of trial and then waffling on the day of trial) are an indicator of inappropriate pressure being applied by Ms. Boeckel upon the children.

Ms. Boeckel emphasizes concerns about Mr. Boeckel's value towards education and while this was a concern expressed by the custody investigator, and was taken into significant consideration by both her and the court, it did not override the other factors favoring placement with Mr. Boeckel. Further, there was significant testimony and evidence that Mr. Boeckel did value education. This included his own testimony and the testimony of Clyde Schulz and Codi Soland. Three educators from the Williston school system also testified for Ms. Boeckel and none of them indicated they felt Mr. Boeckel did not value education. Ms. Boeckel relies upon an apparent statement made to a Lemmon, SD educator during which Mr. Boeckel allegedly stated that homework should be done in school. However, this same educator and witness for Ms. Boeckel also testified that she thereafter had both of the younger Boeckel children in her class, sent homework home with them, and was never asked by Mr. Boeckel why she sent homework home. (Trial Testimony of Sherry Anderson, Transcript pg. 549).

The above is the best evidence which Ms. Boeckel can apparently locate in the record to support her position that the trial court clearly erred in its custody decision. She does not go through the plethora of other evidence the court took into consideration. Ms. Boeckel is effectively asking this court to pick and choose miscellaneous statements, testimony and evidence which are purportedly in her favor while overlooking the majority of the evidence and

testimony which favors Mr. Boeckel and then make a determination in this re-trial of the case, to conclude that the trial court's decision was clearly erroneous. Mr. Boeckel asserts that the trial court's decision was not clearly erroneous. Rather, as provided by the Findings of Fact, the trial court deliberately and appropriately applied all of the evidence in discussing the best interest factors and coming to a custodial decision in this matter.

As this court has expressed in various cases in the past, the trial court has substantial and significant discretion in making custody decisions. See Cox v. Cox, 613 N.W.2d 516, 2000 ND 144. Further, although the trial court must consider all of the statutory best interest factors, it is not necessary to make specific findings on each factor. See Cox v. Cox, 613 N.W.2d 516, 2000 ND 144 and Ackerman v. Ackerman, 596 N.W.2d 332, 1999 ND 135. While the trial court should give each factor equal weight, this is not the simple adding and subtracting of factors. This court has recognized that “[w]hile each factor relevant to a child should be given equal consideration, some factors may prove to be more important in one situation than in another with different circumstances. The best interests of the child is a fact-intensive test which must be examined on a case-by-case basis.” P.A. v. A.H.O., 757 N.W.2d 58, 2008 ND 194, ¶15.

Appellee, Darnell Boeckel, asserts that the trial court's decision on custody was not clearly erroneous and the Judgment in this matter should be upheld.

C. Whether the lower court erred in the distribution of property and debts, including attorneys fees.

Ms. Boeckel argues that the trial court erred by failing to include in the distribution of marital assets and debts the property that Mr. Boeckel may inherit as a result of the death of his mother. Mr. Boeckel again asserts that the lower court's judgment relative to the distribution of assets and debts, as well as the award of fees, should be upheld.

As indicated above, the following factual timeline is applicable to the distribution of the

marital estate:

- April, 2005 - Parties separate.
- June, 2005 - Divorce filed with court.
- August, 2005 - Ms. Boeckel's parents are tragically killed in an automobile accident, resulting in her having inheritance rights.
- February 21, 2007 - Pursuant to a signed Stipulation, the district court enters Judgment granting the parties a divorce and resolving the issues of child custody, support and visitation. The Findings of Fact and Judgment state that the Court was requested by the parties to "go ahead and enter a divorce, reserving and retaining jurisdiction over the equitable division *of the marital estate* and debts, which still remains to be determined." The Conclusions of Law confirm that "The equitable division *of the marital estate* and the debts will be determined at a later date." Findings of Fact, Conclusions of Law and Order for Judgment, February 21, 2007, Docket No. 65, pg 1, 7 (emphasis added).
- April, 2008 - Ms. Boeckel marries Chad Barnes and becomes Jocelyn Barnes.
- October, 2008 - Mr. Boeckel's mother passes away after a sudden diagnosis of terminal cancer. Mr. Boeckel is the sole beneficiary of his mother's estate.
- April 28, 2009 - Trial

As emphasized in the timeline above, on February 21, 2007 the trial court entered

Judgment granting the parties a divorce and resolving the issues of child custody, support and visitation. This Judgment was entered pursuant to stipulation of the parties. The Findings of Fact and Judgment confirmed that the Court was requested by the parties to “go ahead and enter a divorce, reserving and retaining jurisdiction over the equitable division of the marital estate and debts, which still remains to be determined.” Findings of Fact, Conclusions of Law and Order for Judgment, p. 1 (February 21, 2007). The Conclusions of Law confirmed that “The equitable division of the marital estate and the debts will be determined at a later date.” Findings of Fact, Conclusions of Law and Order for Judgment, p. 7 (February 21, 2007).

It seems adamantly clear that as of February 21, 2007 the parties were divorced and the only issue remaining was that of the equitable division of the marital estate and the debts which existed as of February 21, 2007. After this Judgment was entered and the divorce was granted, Jocelyn Boeckel certainly considered herself divorced since she married Chad Barnes in April of 2008. After entry of divorce and after Ms. Boeckel had married Chad Barnes, in October of 2008, Mr. Boeckel’s mother passed away after a sudden diagnosis of terminal cancer. It is not disputed that Mr. Boeckel is the sole beneficiary of her estate.

As the parties were preparing for trial, Ms. Boeckel sought to add property associated with the estate of Mr. Boeckel’s mother to the Rule 8.3 Property and Debt listing for the trial court’s consideration in distributing the marital estate. Mr. Boeckel brought an in limine motion asserting that the assets which he would be receiving through his mother’s estate were not subject to distribution through the marital estate of the parties and the efforts to provide testimony, exhibits or other such evidence as to the value of this assets should be quashed as irrelevant. The trial court permitted testimony and the presentation of evidence associated with the assets held in the estate of Mr. Boeckel’s mother but determined via it’s Memorandum

Opinion and Order that these assets were in fact after acquired property and were not part of the marital estate (Memorandum Opinion and Order, June 10, 2009, pg. 9). Mr. Boeckel asserts that this was a proper decision by the trial court.

North Dakota Law provides that marriage is dissolved “*by a judgment of a court of competent jurisdiction decreeing a divorce of the parties.*” N.D.C.C. §§ 14-05-01 (emphasis added). As such, on or about February 21, 2007 Mr. and Mrs. Boeckel were divorced and their marriage ended. Certainly an issue which was held over was the distribution of marital estate, i.e. the property and assets of the parties as existed at the time of the divorce.

As provided by North Dakota Century Code section 14-05-24,

- 1. When a divorce is granted, the court shall make an equitable distribution of the property and debts of the parties.*
2. The court may redistribute property and debts in a postjudgment proceeding 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.

N.D.C.C. §§ 14-05-24 (emphasis added). It is very clear that the marital estate which existed at the time of the divorce should be considered in the “equitable distribution of the property and debts of the parties.” However, there is no statutory authority, law or legal basis otherwise for distributing assets and debts of the parties which were acquired *after* the parties have been divorced.

Clearly, North Dakota has established that all assets, whether separately obtained or inherited property, are to be considered part of the marital estate and that this even includes property acquired *prior* to the marriage by one spouse. See e.g. Ulsaker v. White, 2006 ND 133, 717 N.W.2d 567. Further, this court has clarified that inherited property and other such property acquired *before* the marriage can be divided between the parties to provide an equitable

distribution. See Winter v. Winter, 338 N.W.2d 819 (ND 1983) and Fine v. Fine, 248 N.W.2d 838 (ND 1976). However, there is no case law, nor statutory law, supporting the consideration or distribution of assets and debts acquired after the divorce has occurred.

Certainly, in cases such as Marschner v. Marschner, 2001 ND 4, 621 N.W.2d 339 this court, citing N.D.C.C. §14-05-24, confirmed that assets acquired while parties are separated but still married are includable in the marital estate. This has been previously confirmed by this court in Zuger v. Zuger, 1997 ND 97, 563 N.W.2d 804. However, in order to find that the estate which Mr. Boeckel inherited is a marital asset, this court would need to determine that property acquired after a divorce has been granted is marital property. This is simply not the law in this state and this argument is so far off the map that the appellant is unaware of any law in any state which directs this.

To add insult to injury, Ms. Boeckel married Chad Barnes in April of 2008, six months prior to Mr. Boeckel having any type of interest in his mother's estate because his mother was not only alive at that time, but had not even been diagnosed with terminal cancer. This court would need to determine that property acquired on dates *after subsequent marriages of the parties* is marital property. Again, the argument and position of the appellant is so far removed from reality and any case law existing that it almost beyond conception and it is exceptionally frivolous. Mr. Boeckel asserts that this portion of the appeal is nothing if not frivolous.

As this court is aware, under North Dakota's Rules of Appellate Procedure, "[i]f the court determines that an appeal is frivolous, or that any party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs, including reasonable attorney's fees." N.D.R.App.P. 38. This court has commented that "[a]n appeal is frivolous if it is

flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which evidences bad faith.” Healy v. Healy, 397 N.W.2d 71, 76 (ND 1986).

Appellee respectfully submits that Ms. Boeckel’s appeal on the property issues, which is based on her argument that Mr. Boeckel’s inheritance is marital property, is indeed frivolous. This portion of the appeal is indeed flagrantly groundless and/or devoid of merit. Not only do none of the case cited by appellant provide any legal support for her argument, but appellee is unaware of any cases nationally that provide any support for an argument that property acquired after a divorce, and further after one of the divorced parties have remarried, is still marital property.

Ms. Boeckel cites cases such as Zuger v. Zuger, 1997 ND 97, 563 N.W.2d 804 and Kautzman v. Kautzman, 1998 ND 192, 585 N.W.2d 561 for support that assets accumulated after separation, but prior to divorce, are included in the marital estate. This is a contra-intuitive argument given that the alleged assets were accumulated *after* the divorce and, as Ms. Boeckel is exceptionally aware, her inheritance was acquired after the separation but prior to the divorce. As this court can see, the trial court in fact distributed a net marital estate of \$135,412.50 to Mr. Boeckel while it distributed a net marital estate of \$479,107.73 to Ms. Boeckel because it virtually disregarded as marital property the assets inherited by Ms. Boeckel after separation but prior to divorce. Frankly, this exceptionally great disparity provided potential grounds for appeal by Mr. Boeckel but he chose to not pursue an appeal in an effort to allow this divorce to be done. It is disingenuous of Ms. Boeckel to argue for an inequitable and clearly erroneous distribution of the marital estate in light of this great disparity in her favor.

In the same breath, there is no substantive basis for an argument that the trial court erred in not awarding attorney’s fees to Ms. Boeckel. Ms. Boeckel’s argument seems to be that since



Ms. Summers testified that “a great deal of her time” was spent in dealing with visitation issues, Ms. Boeckel should have been awarded fees. There is an absence of any proof or showing that Mr. Boeckel was at fault in any capacity in prolonging litigation, causing visitation issues, etc. In fact it must be recalled that Ms. Boeckel is the one who violated the February 21, 2007 Judgment which awarded Mr. Boeckel substantial visitation time (11 out of every 28 days) by relocating to Williston and not providing Mr. Boeckel any notice. One would suspect that moving the children over 200 miles away, not giving the non-custodial parent any notice, and then cutting his visitation time down from 11 days a month to 4 days a month, may result in there being visitation issues, which would increase the cost of litigation. If there were increased costs of litigation due to visitation issues, this is the fault of Ms. Boeckel and her attorney, not of Mr. Boeckel. As referenced previously, Ms. Boeckel herself even testified that she gave no notice of this sudden move to Mr. Boeckel and that it was her attorney, Anne Summers, who had advised her not to tell Mr. Boeckel of her move! Ms. Boeckel testified to the following when asked by her own attorney, Mr. Boughey:

Q: Did you talk to Darnell about moving to Williston before doing so?

A: I did not.

Q: Why not?

A: I informed my lawyer at the time; and she said when the time was right, she would let his lawyer know.

Trial Testimony of Jocelyn Barnes. Transcript, pg. 254.

It is somewhat incredulous that Ms. Boeckel would now apparently argue that she should be awarded attorneys fees paid to Ms. Summers when the evidence is that it was appellant (either

acting alone or on the advice of her attorney) who caused the visitation issues in the first place.  
Again, if anybody should be seeking fees, it is appellee.

### CONCLUSION

Based on the aforementioned law and reasoning, Appellee respectfully requests the Supreme Court uphold the District Court's Judgment, in its entirety, in this matter and further award Appellee his attorneys fees and costs associated with this appeal, particularly as related to the issue of the distribution of the marital estate.

Respectfully submitted this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

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