

STATE OF NORTH DAKOTA
IN THE SUPREME COURT
Supreme Court Number 20100264
District Court Number 45-02C-118

Deborah L. Krueger,)
nka Deborah L. Bentz,)
)
Plaintiff/Appellee,)
)
vs.)
)
Gregory S. Krueger,)
)
Defendant/Appellant.)

BRIEF OF APPELLEE

Diane F. Melbye
MELBYE LAW OFFICE
Attorney for the Appellee
229 First Street W, PO Box 1136
Dickinson, ND 58602-1136
701.483.1700

TABLE OF CONTENTS

Table of Contents.....	2
Table of Authorities.....	3
Statement of Facts.....¶	1
Statement of the Case.....¶	3
Statement of the Issues.....¶	23
Law and Argument.....¶	26,69
Conclusion.....¶	72
Affidavit of Service by Electronic Mail.....	23

TABLE OF AUTHORITIES

NORTH DAKOTA CASES:

<u>Ackerman v. Ackerman</u> , 1999 ND 13,596 N.W.2d 332.....	¶ 31
<u>Berge v. Berge</u> , 2006 ND 46, 710 N.W. 2d 417.....	¶ 35
<u>Eberhardt v. Eberhardt</u> , 2003 ND 199,672 N.W.2d 659.....	¶ 54
<u>Hanson v. Hanson</u> , 1987 ND 404 N.W. 2d 460.....	¶ 36
<u>Hendrickson v. Hendrickson</u> , 2000 ND 1, 603 N.W. 2d 896.....	¶ 38
<u>Johnson v. Schlotman</u> , 1993 ND, 502 N.W. 2d831, 835.....	¶ 34
<u>Litoff v. Pinter</u> , 2003 ND 172, 670 N.W.2d 860.....	¶ 33,40,65
<u>Marquette v. Marquette</u> , 2006 ND 154, 719N.W. 2d 32.....	¶ 35
<u>Negard v. Negard</u> , 2002 ND 70, 642 N.W. 2d 916.....	¶ 32
<u>Paulson v. Paulson</u> , 2005 ND 72,§12,701N.W. 2d 880.....	¶ 29,35
<u>Simberger v. Simberger</u> , 2005 ND 139,701 N.W.2d 654.....	¶ 32,61
<u>Stoppler v. Stoppler</u> , 2001 ND 148,633 N.W. 2d 113.....	¶ 31
<u>Wigginton v. Wigginton</u> , 2005 ND 31,692 N.W.2d 108.....	¶ 33
<u>Wilson v. Ybarra</u> , 2006 ND 151, 152, 718 N.W. 2d 568.....	¶ 38,40

NON-NORTH DAKOTA CASES:

<u>Coursey v. Superior Court (Coursey)</u> , 1987 Cal 194, App.3d 147,239.....	¶ 42
Cal.Rptr.365	
<u>Yvonne S. v. Wesley H.</u> , No.S-13562 245P.3d 430(Alaska 2011).....	¶44

STATUTES:

N.D. Admin. Code Section 14-05-22(2) N.D.C.C.....	¶27,55,61
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1. STATEMENT OF FACTS:

2. Debbie Krueger (nka Debbie Bentz) and Gregory Krueger were married and had one child together whose name is LK, (hereafter LAK). LAK was born in 1994. He is now 17 years of age.

3. STATEMENT OF THE CASE:

4. In 1999, Debbie Krueger and Gregory Krueger entered into a stipulated settlement agreement for a divorce. Williams County District Judge Gerald Rustad granted the divorce. (Appendix pp. 8-17) Pursuant to the parties' stipulation, Debbie Krueger would have residential placement of the minor child. Gregory Krueger was granted reasonable parenting time with his son to include alternating weekends, extended summertime and holiday visitations.

5. In 2000, Debbie Krueger married Lance Bentz. In 2002, Gregory Krueger filed a motion to change custody which resulted in an Amended Judgment (Appendix pp. 18-25). While exercising his parenting time, Gregory Krueger and his mother Lois Krueger took the child to counseling sessions with Dr. Mark Doerner, PhD in Bismarck, ND. The minor child was simultaneously counseling with Dr. Renee Boomgaarden, PhD, in Dickinson. The minor child was asked not to tell his mother that he was counseling with Dr. Doerner. LAK began experiencing physical symptoms of stress including stomach aches, and insomnia.

District Judge Allan Schmalenberger appointed Patricia Garrity as the child's Guardian Ad Litem. Patricia Garrity submitted an extensive GAL report to the Court, and included several Stark County Social Service Board reports of Suspected Child Abuse or Neglect on behalf of LAK. (Appellant's Appendix Register of Actions, pp. 3). In the Oct. 04, 2009, report there was a finding of NO SERVICES REQUIRED, however the Team did have some recommendations which included "(2) Greg be aware of his mother's behavior and how it affects LAK and (5) Greg stop placing LAK in the middle of divorce issues." A second Stark County Social Service Board determination of June 13, 2002, resulted in a decision of SERVICES REQUIRED. In that letter addressed to Greg Krueger, Social Services instructed that the "following is being REQUIRED of your family:

- Due to LAK being caught in the middle of his parents' divorce and custody issues, LAK should continue receiving mental health services with Dr. Renee Boomgaarden to address the effects of the divorce/custody issues is having on his mental health.
- As a parent it is your responsibility to ensure you do not put LAK in the middle of your divorce/custody issues. Through the assessment it was found, there has been undermining of the other parent in front of LAK, argue (directly and indirectly) in front of LAK, telling LAK what to say to professionals and/or any other individuals to help improve your custody fight."

6. The contested custody hearing was held on Feb. 11, 2003, in Stark County. District Judge Schmalenberger denied Gregory Krueger's motion to change residential placement and ordered visitation exchanges to take place at the Family Connection Safe Visitation Center. The Court further provided a specific visitation schedule and ordered that "Debbie shall be responsible for all non-emergency medical, emotional or counseling treatment of LAK and Greg shall not seek the same." (Appendix pp. 21-22)

7. In August 2007, LAK was becoming more reluctant to visit with his father. Greg's business had taken off faster than what he thought. Deb Bentz encouraged her son to go for a visitation with his dad. She told LAK that his dad had this vacation planned. She tried to make it as exciting as possible for LAK.

8. LAK went for the August 2007 visitation. He was then thirteen years of age. Greg and LAK engaged in a physical altercation during this visitation which involved Greg spanking LAK while Greg's mother held LAK down. According to LAK his father and grandmother were yelling at him, telling him he was "lazy and worthless." LAK ran and hid in a field until his mother came and got him approximately an hour and a half later. (Appendix pp. 29-30)

9. In August of 2008, Gregory Krueger filed a motion to further amend the Judgment, entered on July 26, 1999, requesting a more detailed specific visitation schedule. (Appendix pp. 26-27)

10. At the request of Gregory Krueger, District Judge Allan Schmalenberger appointed, Dr. Shelly Goodrich, (nka Dr. Shelly Hall). “Gregory strongly believes that LAK will benefit from seeing a new counselor and start the process over.” (Appendix p. 34).

11. District Judge Allan Schmalenberger’s March, 2009, Order required (1) LAK meet with Dr. Shelly Hall “for sessions to build trust and familiarity for LAK.” (Appendix p 35) (2) Dr. Hall shall next determine that LAK and Gregory shall meet jointly with Dr. Hall for as many sessions of counseling as recommended by Dr. Hall. The sessions shall address all unresolved issues in the relationship between LAK and Gregory.”

12. Dr. Hall met with LAK six (6) times total. The first session was a get acquainted session. The second and third sessions entailed working “on some of the issues that LAK has with his father and his resistance to continuing visitation with his father.” (Transcript pp. 10-11). The fourth session involved “planning for a visit with LAK and his father.”

13. According to Dr. Hall, at the 4th session, LAK “was very upset.” He was crying. I did bring mother into the session. “She was very encouraging as far as—that he should meet with his father and that it would be fine.” (Transcript p. 12)

14. The fifth session Dad was present. The sixth session Dr. Hall was trying to assess if LAK would be willing to continue these sessions. LIK “was refusing any further sessions with his father.” (Transcript. p. 11) “He would not be meeting with his dad again.” (Transcript. p. 14) Dr. Hall talked about consequences, benefits of having a relationship. LAK was adamant “that he would not attend another session with his father, and that he would not have visitation with his father.” By LAK’s self report, “He has never had a good relationship with his father.” (Transcript p. 16) He would run away if forced to return to weekend visits with Dad. ((Transcript p. 17)

15. According to Dr. Hall’s testimony “I gave him the option to come back . . . I did not feel that any further sessions were going to benefit . . . were going to cause any changes in him or benefit anything.” (Transcript p. 14) “Encouraging a kid to have contact with both parents is beneficial. Forcing it is a different issue.” (Transcript p. 22)

16. Dr. Hall then talked with Greg Krueger and encouraged him to try to maintain contact with LAK by calling, sending cards or letters, leaving a message to have lunch, go fishing, do something together. “Then I think eventually LAK might come around.” (Transcript p. 15).

17. Dr. Shelly Hall, PhD sent a letter to the District Court dated July 23, 2009, informing the Court that LAK refused to further meet with his father. (Appendix

p. 39). LAK filed an affidavit requesting that he be allowed to talk to the Judge alone in chambers.

18. In 2009, Greg Krueger requested that his child support be reviewed. Southwest Area Child Support Enforcement Unit filed a motion, brief and affidavit of the Administrator of the Southwest Area Child Support Enforcement Unit to amend Judgment and Stipulation. (Appendix pp. 42-58)

19. A hearing on all pending motions was held before District Judge H. Patrick Weir on March 10, 2010, and continued on May 10, 2010. LAK was represented by Attorney Kelly Armstrong. Southwest Child Support Attorney Rhonda Ehliis was briefly present. All parties agreed to an in-camera interview of LAK in chambers. (Transcript p. 5) District Judge Weir interviewed the child from approximately 1:38 to 1:55 in chambers. After the interview, Judge Weir opined “LAK has been in the middle of this all his life, with the exception of approximately 4 years.” (Transcript p. 6) “This young man has about had it with counselors, and interviews with experts and the kind of prodding and pushing that he has been subject to,” (Transcript p. 7).

20. During the two days of hearings, Judge Weir heard extensive witness testimony, conducted an in-camera interview with LAK, and heard the uncontroverted testimony of Dr. Shelly Hall PhD. Judge Weir issued an oral Memorandum decision on May 10, 2010. Findings and Order denying Motion

was executed on June 26, 2010. (Transcript pp. 71-74) A Second Amendment to Judgment concerning child support was signed by Judge Weir on July 6, 2010. (Appendix pp. 75-77).

21. Greg Krueger filed his Notice of Appeal on August. 4th 2010, from the visitation and child support issues.

22. LAK is now seventeen (17) years of age.

23. STATEMENT OF ISSUES:

24. ISSUE ONE: Was the district court's decision on visitation concerning a 16 ½ , now 17 year old young man clearly erroneous?

25. ISSUE TWO: Did the Court commit reversible error by modifying Gregory Krueger's child support obligation?

26. LAW AND ARGUMENT – ISSUE ONE:

27. After a custody decision has been made, visitation is governed by N.D.C.C sec. 14-05-22(2), which provides:

28. “After making an award of custody, the court shall, upon request of the noncustodial parent, grant such rights of visitation as will enable the child and the noncustodial parent to maintain a parent-child relationship that will be beneficial to the child, unless the court finds, after a hearing, that visitation is likely to endanger the child's physical or emotional health.”

29. A district court's decision on visitation is a finding of fact and will not be reversed unless it is clearly erroneous. Paulson v. Paulson, 2005 ND 72 § 12, 701 N.W.2d 880.

30. The issue for the North Dakota Supreme Court of whether a district court must force a 17 year old to exercise visitation with his non-residential parent against the young man's resistance to continuing visitation appears to be one of first impression for the North Dakota Supreme Court.

31. Concerning this visitation issue, the court cases cited in Greg Krueger's brief include the following: In Stoppler v. Stoppler, 2001 ND 148, 633 N.W. 2d 113, the child was 8 years of age. In Ackerman v. Ackerman, 1999 ND 13, 596 N.W. 2d 332 the children were ages 7 and 5. In Ackerman paragraph 13, the Supreme Court opined "the court . . . may give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper."

32. It is difficult to determine the ages of the children in Simberger v. Simberger, 2005 ND 139, 701 N.W. 2d 654; and in Negard v. Negard, 2002 ND 70, 642 N.W.2d 916.

33. Litoff v. Pinter, 2003 ND 172 ¶ 12, 670 N.W.2d 860, involved a 13 year old daughter. The Court held that visitation can be controlled or eliminated entirely if it is likely to endanger the child's physical or emotional health. That

same holding is found in Wigginton v. Wigginton, 2005 ND 31, ¶ 9, 692 N.W.2d 108, which involved two children born during a ten year marriage. In Litoff, the residential parent was given significant control over the non-residential parent's visitations.

34. Greg Krueger's brief cited Johnson v. Schlotman, 502 N.W.2d 831, 835 (N.D. 1993), which involved 14 and 11 year old children's refusal to visit with their mother who was living in a same sex relationship. The Court was initially concerned that the trial court overstepped its bounds by terminating all visitations. Such a restriction appears punitive to the lesbian mother. Because the district court had issued further orders providing for regularly-scheduled visitation, the Supreme Court did not consider the issue further.

35. Appellant's brief similarly relied on the following three cases: Marquette v. Marquette, 2006 ND 154, 719 N.W. 2d 32; Berge v. Berge, 2006 ND46, ¶ 8, 710 N.W. 2d 417; and Paulson v. Paulson, 2005 ND 72 ¶ 19, 694. The Berge and Marquette cases involve younger children and visitation issues. Paulson involved a 2 year old son.

36. Appellant's only cited case which similarly involves a 17 year old and a visitation issue is the Hanson v. Hanson case, 404 N.W.2d 460 (N.D. 1987). The District Court prohibited the non-residential parent from taking the 2 younger children, one of whom was 17, to his Pentecostal Apostolic Church. The children

had been raised in the Roman Catholic religion. That decision was reversed (and remanded)

37. "We hold that the court's decision does not affect appellant's constitutional right to freedom of religion. Although appellant's wish to involve the children in his religious activities is now subject to respondent's consent while they are minors, appellant is, and always has been, free to practice his religious beliefs as he sees fit."

38. The remaining visitation cases cited by Appellant include Hendrickson v. Hendrickson, 2000 ND 1, 603 N.W.2d 896, and Wilson v. Ybarra, 2006 ND 151, 718 N.W.2d 568. Both cases involve younger children, and both held that supervised visitation should be granted to the nonresidential parent.

39. These cases cited by Appellant may legally apply to all visitation cases, but equitably, they are not applicable to a 17 year old who expresses his own opinions and refuses visitation.

40. North Dakota statutes and case law "clearly recognize that visitation with a non custodial parent may be curtailed or eliminated entirely if it is likely to endanger the child's physical or emotional health. Litoff v. Pinter, 2003 Nd172, ¶ 12, 670 N.W.2d 108. "Our precedents demonstrate that a complete denial of visitation to a noncustodial parent is a drastic measure that should be exercised

only under the most compelling of circumstances.” Wilson v. Ibarra, 2006 ND 152 ¶ 10, 718 N.W.2d 568.

41. Although the issue of forcing visitation on a 16-17 year old against his resistance to continuing visitation with his non-residential parent may be a case of first impression for the North Dakota Supreme Court, other state district courts have been confronted with this issue:

42. In Coursey v. Superior Court (Coursey), 1987 Cal 194, App.3d 147,239 Cal.Rptr.365; it is noted that the resolution of whether a child is under the control of a parent is a factual question to be determined by the trial court under all the circumstances.

43. Judge Weir interviewed LAK in chambers. Unfortunately, that transcript is not available. Based on that interview, other testimony, and pleadings, Judge Weir equitably decided that that child had been subjected to enough legal pleadings and psychological probing. The Judge opted not to continue the trauma for the child.

44. Regarding a 16 year old, in the Supreme Court of Alaska, Yvonne S. v. Wesley H., No.S-13562 245P.3d 430 (Alaska 2011); the court opined: The child’s strong desire, her age and maturity, and the fact that there were no allegations of drug abuse, risky behavior or mental illness of the teenager, weighed heavily in the court’s decision.

45. In similar fashion, there are no allegations of risky behaviors on behalf of LAK. Further, LAK is a mature teenager with a strong preference against forced visitation.

46. The parents of LAK have been divorced from each other since July 26, 1999. LAK is 17 years of age as of February of 2011.

47. Issues concerning custody and visitation by Gregory Krueger have been ongoing since the divorce was granted in 1999.

48. One of the present issues before this Court is the visitation between the young man and the defendant, Gregory Krueger.

49. During this twelve year time frame, the parties have engaged counselors, a Guardian at Litem has been appointed, and a Custody Investigator has been hired. Most recently at the request of Gregory Krueger, Dr. Shelly Hall has been engaged to counsel with the minor child in order to reunify the child with his non-residential parent.

50. Mr. Krueger has not had unsupervised visitation since a physical occurrence happened at his rural residence in August of 2007, which the child described as an argument that started when the child didn't do the dishes as he was asked. His father and grandmother yelled at him and told him he was worthless and lazy. He tried to get to a phone to call his mother to come get him. Pushing took place. His father threw the cell phone and broke it. The child went to a

house phone to make the call. After the call was finished, his father took him to the ground, spanking him, while grandmother, Lois, held him down and covered his mouth with her hand to quiet his screams or protect his braces. The child escaped and fled into an agricultural field. LAK waited there until his mother arrived. On the way home in his mother's car, LAK was curled up in a fetal position.

51. In 2009, Gregory Krueger requested a fresh start with a new counselor. At his request, Dr. Shelly Hall was court appointed to meet with the child and to try to resolve his issues with his father. After 6 sessions with the child, one of which involved Gregory Krueger, Dr. Shelly Hall's written recommendation to the Court, in relevant part, reads as follows: "At this point, another appointment was not scheduled. I do not feel it would be beneficial to force him to have a relationship. Forcing him to do this will likely only create even more resistance to this. I also do not feel that further individual sessions are going to be productive in changing his mind, at this time. He was informed he is welcome to schedule an appointment anytime he would like to discuss his difficulties or would like to meet with his father."

52. Judge Schmalenberger's Order filed in the District court, dated March 26, 2009, part 3 states: " Once Dr. Hall determines that the original visitation

outlined in the Judgment (or any amendments thereto) is beneficial, the said visitation shall resume as previously ordered.”

53. It is apparent from Dr. Hall’s statement and her testimony that she does not recommend continued counseling for Gregory Krueger and LAK. She does not suggest that counseling will be beneficial to reunify this older teenager with his non-residential parent. She is concerned that LAK will run away if he is forced to return to his father for weekend visitations. That is not a good thing to risk with a teenager. That is very dangerous. (Transcript p. 17) If LAK is forced, he will become more resistant and more angry. It will be much better for LAK to initiate visits when he’s ready.”

54. The primary purpose of visitation is to promote the best interests of children.” Eberhardt v. Eberhardt, 2003 ND 199 ¶ 19, 672 N.W. 2d 659. A restriction on visitation must be based on a preponderance of the evidence and accompanied by a detailed demonstration of the physical or emotional harm likely to result from visitation.

55. After making an award of custody, the court shall, upon request of the nonresidential parent, grant such rights of parenting time as will enable the child and the nonresidential parent to maintain a parent-child relationship that ***will be beneficial to the child***, unless the court finds, after a hearing, that visitation is

likely to endanger the child's physical or emotional health. (emphasis mine)

N.D.C.C. Section 14-05-22(2).

56. Prior to issuing his memorandum decision on the record, the Court reviewed the entire file of twelve years duration. In this Court file, there are reports by the Guardian ad Litem, Custody Investigator Barb Oligor, and psychologists, Dr. Doerner, Dr. Boomgaarden, Dr. Alan Fehr, Dr. Shelly Hall and Social Services, that LAK has suffered from bouts of insomnia, stomach ailments and anxiety.

57. This case, involving LAK, has been ongoing for over twelve years. After an in-camera interview with the young man, LAK, the Court stated: "This young man has about had it with counselors and interviews with experts, and the kind of prodding and pushing that he has been subject to." (Transcript p. 7) Dr. Hall opined that forcing LAK to have contact with Dad would generally create more resistance. It is not going to create a positive relationship.

58. Dr. Hall's testimony is uncontroverted.

59. In its decision, the Court acknowledged that at this point with LAK being close to 18 years of age, he should be able to enjoy his last years of an uncomplicated childhood. The record is replete with LAK suffering symptoms of emotional abuse, i.e., stomach problems and insomnia. LAK should be allowed to concentrate on his education, sports and doing what he needs to do to emancipate

himself , and grow into a healthy young man. The Court acknowledged that a young person of this age has definite feelings and opinions that need to be respected.

60. The Court also acknowledged that if it would impose a visitation schedule on LAK, this could not be easily accomplished. The young man cannot be physically manhandled. The Sheriff or Police should not force visitation. The court appeared to recognize that there comes a time with family law issues that the court system does not have the solution. This is why family law is a mixture of legal and equitable law.

61. The Court acted within the parameters of statutory law. In addition, the court has a great deal of equitable discretion. Simburger v. Simburger, 2005 ND 139, ¶ 13, refers to Subsection 2, NDCC § 14-05-22, which requires the court to direct such visitation as will be “beneficial to the child”.

62. In the present case, the non-residential parent appears to be completely incapable of stepping back and questioning (whoa) “What have I done to contribute to this problem, and how can I make it better?” Dr. Hall suggested that Gregory Krueger continue to phone LAK, ask him to join him at McDonald’s, ask him to go fishing. Gregory Krueger’s solution is to look to the court to try to force a relationship with a young man who wants no relationship, at present, although the Court is hopeful that with time this will change.

63. The District Court's decision regarding visitation is not erroneous. The Court avoided taking any action that may further alienate this young man from his parents or from the legal system. The Court cannot force a 17 year old to have a relationship with his father at this time when he wants NO relationship.

64. In a short year, when LAK turns 18, LAK can decide for himself. The Court rightfully refused to put him through further trauma during the remainder of his high school years.

65. In Litoff v. Pinter, 670 N.W.2d 860 ¶ 6, the court found that the teenage child had suffered emotional harm from her father's conduct. The court recommended that no more visitations occur until the child agreed to it. The court found that visitation at this time would be harmful to her emotional, mental and physical health. This decision was upheld by the North Dakota Supreme Court.

66. In similar fashion, the District Court agreed with Dr. Hall, that forcing LAK to resume visits with his Dad is a dangerous risk when the child has threatened to run away if such visits are forced. At the same time, the Court acknowledged that encouraging a child to have contact with both parents and their families is beneficial. The Court instructed Appellant's attorney to draft an order, allowing for grandparent visitation.

67. At the end of the May, 2010 hearing, the Court stated, "The Court is absolutely uninterested, from a legal standpoint, about the parents and their

situation. My entire focus has to be, in this case, on what is in LAK's best interests. What is in LAK's best interests, in the long run, is for him to establish a relationship, again, with his father and with his father's extended family. The problem the Court has, is after 12-and-a-half years of him being the object of these continuing battles, is how in the world can the Court craft an order forcing a 16-and-a-half-year-old young man to reestablish, with the help of sheriff's deputies, or whatever, relationships. That simply, in the real world, isn't going to happen. What is going to happen, I believe, based on my conversations with the young man, is that given some time, some feeling on his own or having some autonomy, and some ability to make decisions that are important to him, it will happen, but that is about all the Court can do." (Transcript pp.36-37)

68. The District Court's decision regarding visitation was not clearly erroneous. The lower court's decision should be upheld in its entirety.

69. LAW AND ARGUMENT – ISSUE TWO:

70. Debbie Bentz did not request a child support review. Gregory Krueger did request the review. At the 2010 hearings, Deb Bentz took no position on the child support issue. Southwest Area Child Support conducted their review and obtained access to financial records that are not available to Debbie Bentz or her counsel. The court acknowledged that Ms. Ehli—she's submitted her papers on the child support issues, and "I have Mr. Krueger's papers on that." (Transcript p. 37)

Debbie Bentz took no position on the child support issue. “We’re comfortable with whatever the Court finds.”

71. The child support issue should thus be briefed and argued by Attorney Ehliis on behalf of the Southwest Regional Child Support Unit.

72. CONCLUSION:

73. The district court decision should be affirmed.

Respectfully submitted this 3rd day of March, 2011.

MELBYE LAW OFFICE
Attorney for Appellee, Deborah L. Bentz
229 First Street West
Post Office Box 1136
Dickinson, North Dakota 58602-1136

/s/
Diane F. Melbye, #03680

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court Number 20100264
District Court Number 45-02C-118

Deborah L. Krueger, nka Deborah L.)
Bentz,)
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Plaintiff/ Appellee,)
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vs.)
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Gregory S. Krueger,)
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Defendant/Appellant.)

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF STARK)

Patricia A. Curran, being first duly sworn on oath, deposes and says that on the 3rd day of March, 2011, she served the attached:

1. **Reply Brief of the Appellee, Deborah Bentz; and**
2. **Affidavit of Service by Electronic Mail**

upon the following individuals via electronic mail to:

Mr. Kent Morrow
morrow@midconetwork.com

Penny Miller
Clerk of the Supreme Court
supclerkofcourt@ndcourts.gov

Rhonda R. Ehlis
SW Area Child Support Enforcement Unit
rehlis@nd.gov

Kelly Armstrong
Attorney at Law
kelly@reichertlaw.com

/s/
Patricia A. Curran

Subscribed and sworn to before me this 3rd day of March, 2011.

(SEAL)

/s/
Diane F. Melbye, Notary Public
State of North Dakota
My Commission Expires: 06/21/14.