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STATE OF NORTH DAKOTA

SUPREME COURT

STATE OF NORTH DAKOTA

CASE NO. 20100406

JENNIFER MAKELKY,

PLAINTIFF, APPELLANT

vs.

RICHARD MAKELKY

DEFENDANT, APPELLEE

APPELLEE'S BRIEF

In response to the appeal from

The October 28, 2010 Judgment of the District Court,

Morton County, South Central District

By Honorable Gail Hagerty

Case No. 30-08-C-946

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APPELLEE'S RESPONSE TO APPELLANT'S STATEMENTS

1. Jennifer Makelky, by and through her attorney, Theresa Kellington, contends that the Honorable Gail Hagerty's Opinion, rendered from the Divorce proceedings of August 24th and 25th of 2010, were in error. They also contend that this error is reversible under the standard of review listed by Theresa Kellington in her Brief. She leads her argument with the following from H.E.A v. A.H.O., 2008, 757 N.W .2d 58, a child custody award is a finding of fact that will not be set aside unless "clearly erroneous" that is, if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if the reviewing Court, on the entire evidence, has a definite and firm conviction the trial court made a mistake. I have no doubt that if the North Dakota Supreme Court choses to simply review the "entire evidence" it would easily come to the same conclusion as the Honorable Gail Hagerty. I believe that this effort is easily avoided if the North Dakota Supreme Court would review the points that I will list below. I will not take the time to refute all of Ms. Kellington's statements in her brief as almost all of them were heard by Honorable Gail Hagerty, and were refuted in the proceedings. I will note that a review of just a few of Mrs. Kellington's statements cross-checked with the actual testimony will illustrate the lack of accuracy of those statements.

2. In the Appellant's brief, the attempt is made to retry the case based solely on testimony from biased witnesses. Notwithstanding the fundamental flaw with this approach, the testimony provided is insufficient to lead to a finding that Judge Gail Hagerty's ruling was erroneous in any way. I will, through my brief, point out the inconsistency present in several of the witnesses' statements. I will also reference the testimony which refutes the main points of the Appellant's argument. I believe that the independent witness testimony, which I will cite, will make it very clear that the Honorable Gail Hagerty's decision was, without question, the appropriate one.

ARGUMENT

3. At the basis of the Appellant's appeal are the best interest factors as set forth in North Dakota Century Code 14-09-06.2. The thirteen areas outlined in this piece of law are the very factors used by the Custody Evaluator to decide which parent is best suited to provide for the best interests of the children. At the close of the first Interim Hearing on May 26th 2009, the Honorable Gail Hagerty suggested that a guardian ad litem be chosen to represent the children's interests. A Custody Evaluator was agreed upon instead for this purpose (Transcript 5/26/09, p.48 line 5-15). Lisa Stenehjem was unilaterally chosen for this task.

4. My first statement is that the findings of Lisa Stenehjem, following these thirteen guidelines, were overwhelmingly in my favor. In fact, Jennifer Makelky failed to be favored on any of the thirteen criteria. During the August 24th and 25th, 2010 hearing, Theresa Kellington attempted to mitigate Ms. Stenehjem's findings. Through all of her efforts, Mrs. Kellington failed to show where Ms. Stenehjem was in error on any significant portion of her conclusions. The Custody evaluation should, in my opinion, be given the utmost consideration in this matter, as Ms.

Stenehjem had access to documents, witnesses and other information that was not presented in the trial for various reasons. Ms. Stenehjem's expertise allowed her to draw her conclusion from the volume of evidence provided to her that would have otherwise been overly burdensome to the trial process. For example, this evidence included discussions with teachers, who would otherwise be hesitant if not unavailable to testify in court on such matters, as directed by their supervisors. She also had a great deal of documents that I provided, including my family medical leave slips, which were simply too numerous to go over in the trial process. Jennifer Makelky and her Attorney had the same opportunity to present Ms. Stenehjem with documentation of their own, or to refute the documents given to her. Ms. Stenehjem was present for all of the Plaintiff's witnesses' testimonies, and when asked if any of the testimonies that she heard changed her opinion of the custody issue, she stated "It has not" (Transcript 8/25/10, p. 328 lines 5-10). As a certified, court appointed Custody Evaluator; Ms. Stenehjem's findings should be of the foremost consideration in this matter.

5. The next most obvious contribution to the custody matter was provided by the Plaintiff's witness, Mrs. Sue Herzog. This testimony is also very important as Mrs. Herzog was the children's counselor throughout the separation, and most definitely an unbiased professional witness. When asked who was better suited to meet the special needs of child A.M. and to ensure the safety of R.M. and S.M. Sue responded that she was not concerned with my ability to handle A.M.'s outbursts, but she was concerned with Jennifer's ability to handle them (Transcript 8/24/10, p. 16 lines 10-25, 17 lines 1-2).

6. The majority of testimony cited by Theresa Kellington in her brief was from the Plaintiff's witnesses called during the proceedings. In the following, I will draw attention to the inconsistency present in two of those witnesses' testimonies, illustrating my position that they should not be considered reliable.

7. First and foremost is the attempt throughout the proceeding of Theresa Kellington to portray me as having an anger management problem. She cites testimony primarily from Cameron Ayestas and Jennifer Makelky. Throughout the proceedings, no incidents were cited and no evidence was put forth that indicated I had ever hurt anyone. Theresa Kellington references several physical altercations between me and Cameron Ayestas during his teenage years, none of which resulted in any physical harm to Cameron Ayestas. Mrs. Kellington's brief is itself inaccurate and full of dramatization. The Honorable Gail Hagerty, in her discussion on the area of the children's developmental needs and the ability of each parent to meet those needs both in the present and the future, discussed the unsupported role of authority that I was tasked with in the family. I will provide the references to testimony which illustrate the difficult role I was placed in, which led to the less than ideal choices I made with Cameron Ayestas.

8. During the Hearing on 8/24/10, both Cameron Ayestas (Transcript 8/24/10, p. 136 lines 2-10) and Jennifer Makelky (Transcript 8/24/11, p. 213 lines 1-6) testified that they had concerns for the children's safety while in my care.

9. Cameron Ayestas had testified in the hearing on May 26th, 2009, that he did not fear for his siblings' safety when they were with me (Transcript 5/26/09, p. 41 lines 22-24). This complete reversal of view is unexplained anywhere in testimony, and he in fact states that he spent almost no time with me since I had moved out (Transcript 8/24/10, p. 118 lines 16-25). Additionally, when questioned during the Interim hearing, Cameron stated that he was not physically intimidated by me, nor did he fear for his safety when he was with me (Transcript 5/26/09, p. 41 lines 17-21) Again, this is in direct contrast to his testimony during the latter divorce proceedings (Transcript 8/24/10, p. 118 lines 10-16). Cameron Ayestas was clearly compelled to express this sentiment as he stated in his text to me (8/24/10, exhibit 39). When questioned about this text, he admits to hating the fact that he had to sign it, but then goes on to answer a question that was not asked, and states "I wrote it out though" (Transcript 8/24/10, p. 143 line 9). This is presumably referring to his affidavit. It is my assertion that this unsolicited answer is more likely to be false than it is to be true. I support this with the statement of Debbie Wivholm, who testified that Ms. Makelky had prepared an affidavit for her to sign on an event that she, Mrs. Wivholm didn't witness (Transcript 8/25/10, p. 360 lines 5-15). This fact is important because I feel it further illustrates that Cameron Ayestas was indeed compelled to provide specific testimony not made of his own volition.

10. Jennifer's concerns about my supposed anger management issue expressed during the August 24th 2010 hearing was never mentioned in the May 26th 2009 hearing. In fact, Jennifer's only concern during that hearing was for "His moral concerns. What he does with his extracurricular time. Who he spends his extra time with and the lie he tells about it. Yeah." (Transcript 5/26/09, p.33 lines 3-21). If my anger management was truly an issue, it is rather inconceivable that she would not have mentioned any concern regarding this issue at that time. This is further illustrated, as the Honorable Gail Hagerty noted in her findings, that Jennifer was clearly unconcerned for the children's safety while in my care when she readily allowed A.M. to live with me full time during the first six months of the separation as well as R.M. and S.M. to stay with me half time. I also find it noteworthy that if Jennifer Makelky were to be judged by her own concerns as expressed (Transcript 5/26/09, p. 33, lines 7-9) she would have to concede concern for her own fitness to care for the children. Ms. Makelky testifies to allowing an individual who had, by her own accusation, committed sexual assault against her on three separate occasions, and was abusing drugs in the home, stay at the residence where our children resided (Transcript 8/25/10, p. 276 lines 13-25 to p. 281 lines1-9). Jennifer Makelky is then asked if she ever let Kerry watch our children to which she responds "never". A text is then introduced where she had told me that she was comfortable with Kerry watching the children (Transcript 8/25/10, p. 281 lines 10-18 and Exhibit Defendant's 31). During the interim period, Jennifer was engaged in a relationship that she describes as "a friendship that had romantic possibilities" with an inmate at the ND State Penitentiary named Todd Frank (Transcript 8/24/10, p. 195 9-22). Ms. Makelky admits to having visited him on multiple occasions at the Penitentiary (Transcript 8/24/09, p. 195 lines 23-24). Jennifer Makelky claims that during those visits, the children were with me (Transcript 8/24/10, p. 196 lines 6-8). Jennifer Makelky then

states that the children have not spent any time with Mr. Frank (Transcript 8/24/09, p. 196 lines 19-20). Later, under cross examination, Jennifer Makelky admits that the children were exposed to Mr. Frank at the home, and that Mr. Frank had sent our daughter a Birthday card from prison (Transcript 8/25/10, p. 288 lines 22-25 and p. 289 lines 1-6). Jennifer Makelky also admits to having James Michaels watch the children while she visited Mr. Frank in prison (Transcript 8/25/10, p. 291 lines 3-4). She also admits to having had a sexual relationship with Mr. Frank (Transcript 8/25/10, p. 292 lines 10-20).

11. Not only was Mrs. Kellington inaccurate in her attempt to portray me as having a terrible temper, it was actually proved otherwise through the plaintiff's own testimony. Jennifer Makelky testified to having perpetrated the only incident of domestic violence in the marriage. She admits to striking me in the face (Transcript 8/24/10, p. 251 lines 20-25). The most notable portion of the story is what is missing, namely any discussion of retaliation or reaction. If I had the temper Mrs. Kellington would have you believe I did, Jennifer Makelky would have had a lot more to testify about on that incident.

12. Mrs. Kellington attempted to attribute 2 episodes in 18 years, of physical contact between Cameron and me to a terrible temper. I very clearly described the cause of the physical altercations between Cameron and me more accurately in my testimony (Transcript 8/24/10, p. 110 lines 16-25 to p. 111 lines 1-17). The two events discussed happened after all other avenues for maintaining some sense of order in my home had been eliminated. I had no support from Jennifer Makelky in matters of enforcing rules and discipline. I was told by the police that I couldn't even have Cameron Ayestas charged for stealing my car or being an unruly child due to the fact that he wasn't my biological son. This lack of consequences for a testosterone driven teenage boy, coupled with his Mother's and Grandmother's enabling behaviors and encouraging a victim mentality created a chaotic household. Jan Mueller testified that Jennifer Makelky told Cameron to stay with her, Jan Mueller, until I cooled down (Transcript 8/24/10, p. 171 lines 12-22). Mr. Ayestas also testifies about this incident, stating that I told him to leave, and that he came home but his Mother instructed him to stay with Grandma until I calmed down (Transcript 8/24/10, p. 123 lines 19-25). This refusal on both Ms. Makelky's and Mrs. Mueller's parts to support the expectation that Cameron simply follow the rules only served to encourage his misbehavior. I testified that he wasn't kicked out at all, that all he needed to do to return home was to simply agree to follow the rules (Transcript 8/24/10, p. 72 lines 12-25 to p. 73 lines 1-7).

13. In my testimony, I describe the incidents that happened with Cameron (Transcript 8/24/10, p. 67 lines 22-25 to p. 72 lines 1-18). The incident where I destroyed Cameron's amp was not done in anger, it was, as I stated, a deliberate action done in an attempt to protect my things, my family heirlooms, while I was not physically home to do so. The two times that I used physical contact with Cameron, it was to get his attention, to try and bring some order where there was none. While I am not attempting to describe the incidents as role model parenting, I would contend that my actions were at least somewhat understandable given the circumstances I've outlined above.

14. The incident in which I spanked my daughter S.M. is one that I take very seriously. I gave a full and accurate description of that event (Transcript 8/24/10, p. 95 lines 17-25 to p.96 lines 1-23). Throughout her questioning of me, and in future questioning of Jennifer Makelky, Mrs. Kellington attempted to exaggerate the incident. She refers to "slaps" (Transcript 8/24/10, p. 238 line 23). She leads Jennifer to testify that S.M. had a "puffy butt" although Ms. Makelky follows that statement up with the statement that she doesn't recall what her butt looked like (Transcript 8/24/10, p. 239 lines 5-9). As I stated in my testimony, I spanked S.M. excessively, partly out of frustration, but I did not lose control. She was three at the time and wore diapers; there was no bruising or "puffiness". This one incident does not indicate an anger management problem. It is a mistake that I made, that I regret and that I learned from.
15. So, if Mrs. Kellington's portrayal of me is inaccurate, what sort of a father am I? Ms. Makelky answers this at the first interim hearing when she testifies that I am an "exceptional father" (Transcript 5/26/09 p. 32 lines 25 to p. 33 lines1-2). Jan Mueller testified that I love my children very much (Transcript 8/24/10, p. 170 lines 11-12). Plaintiff's witness, Danielle Kouba testified that I am very caring, and protective, caring about their wellbeing (Transcript 8/25/10, p. 316 lines 18-23). Plaintiff's witness Kathy Baerlocher testifies to Jennifer having talked about my parenting as me doing family things, spending one on one time with the kids including Daddy dates (Transcript 8/25/10, p. 339 lines 23-25 to p. 340 lines 1-8). Plaintiff's witness, Sue Herzog, described me as very consistent in bringing the children, in talking and following through with recommendations and requesting assistance on what I can do better (Transcript 8/24/10, p. 14 lines 9-15).

16. I would also like to call attention to the fact that the only incident of reported abuse against either parent that was made by a third party, and services were recommended was the 960 report filed on Ms. Makelky. In that report Social Services recommended services for psychological and emotional maltreatment by Ms. Makelky (Transcript 8/25/10 p. 326 line 25 to p. 327 lines 1-20).

17. One issue that requires notation is Jennifer's inability to manage A.M. The most telling example of this is her having Alex come stay with me when he was being difficult (Transcript 8/24/10, p. 138 lines 17-25 to p. 139 lines 1-19). Jennifer had also discussed her struggles with managing A.M. with Sue Herzog (Transcript 8/24/10, p.16 lines 17-25 to p. 17 lines 1-2).

18. The Honorable Gail Hagerty missed one obvious conclusion in her findings in the following area: The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community. In spite of Jennifer not having made a single payment on the house after I moved out, and the house having gone through multiple foreclosure auction dates then postponements, the court still awarded the home to Ms. Makelky as though she had any real intention of securing a mortgage in her own name. At the interim hearing on August 9th, 2010, Ms. Makelky attempted to get the court to force me to sign

a renegotiated mortgage which would have tied me to the mortgage on the marital home that she was attempting to get in the divorce, for another 30 years. In this attempt, Ms. Makelky claims that her mother would be willing to co-sign in order for her to obtain a new mortgage (Transcript 8/9/10, p. 5 lines 18-20). If Ms. Makelky had any intention of getting a mortgage in her name, she would have done so by the time of the 8/24/10 trial when at that time she had a quit claim deed from me, the interim court order giving her the home and a co-signer. Ultimately, the home will go back into foreclosure after another court date where I intend to request that Honorable Judge Hagerty's ruling requiring the home to be refinanced in Ms. Makelky's name only be enforced. It is unclear where Jennifer will live when this happens, and also what potential affect that may have on the home, school and community record of the children. At that point, the only stability lies in their home with me, where we have resided for just under three years now, and where they will be able to continue going to the same schools that they have been attending.

19. In the area of the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, the Honorable Gail Hagerty failed to recognize one piece of evidence on this matter. Jennifer's decision to compel Mr. Ayestas to testify impacted our relationship (Transcript 8/24/10, p. 143 lines 10-12). Cameron's testimony was unnecessary as he did not testify to any pertinent incidents that I did not freely discuss in my own testimony. Jennifer has shown through this action that she is not likely to encourage a close and continuing relationship between myself and the other children.

CONCLUSION

20. The appeal before the court is simply without merit. Mrs. Kellington's statements of the case are rife with dramatic inferences and misstated quotes. She takes the testimony of Ms. Makelky and states it as fact, when in fact; Ms. Makelky's testimony was inconsistent throughout the proceedings and at times bordered on being false testimony. Ms. Stenehjem's findings were overwhelmingly in my favor, and remained unchanged after hearing the Plaintiff's witnesses testify. The children's counselor, Mrs. Sue Herzog, felt that the children's safety would be best met by me. There is simply no compelling testimony cited in Mrs. Kellington's brief that would suggest that Honorable Judge Hagerty was somehow erroneous in her findings. I ask that the North Dakota Supreme Court uphold the findings of The Honorable Gail Hagerty and dismiss this appeal. I also ask that the Supreme Court awards me court filing and postage fees in the amount of $245, to be paid by the Appellant.

Respectfully

Richard Makelky

Defendant and Appellee

May 1, 2011.