

20110406

SUPREME COURT
OF THE
STATE OF NORTH DAKOTA
NO. 20100406

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 23 2011

STATE OF NORTH DAKOTA

JENNIFER MAKELKY,
PLAINTIFF, APPELLANT,

vs.

RICHARD MAKELKY,
DEFENDANT - APPELLEE,

REPLY BRIEF

Appeal from the October 28, 2010 Judgment,
of the District Court
Morton County
South Central District
Honorable Gail Hagerty
Case No. 30-08-C-946

Theresa L. Kellington
American Legal Services, P.C.
521 East Main Ave., Suite 400
Bismarck, ND 58501
(701) 258-1074
Fax: (701) 530-1943
ND State Bar #05385
Attorney for Plaintiff - Appellant

Richard Makelky
4200 McKenzie Drive SE, #107
Mandan, ND 58554
Defendant - Appellee

INDEX

| | <u>Page</u> |
|------------------|-------------|
| LAW AND ARGUMENT | 1 |
| CONCLUSION | 8 |

LAW AND ARGUMENT

Appellee, Richard Makelky, sets forth his argument in his Appellee's Brief by numbering each point he wishes the Court to consider. The Appellant herein, responds accordingly.

Attempt to Retry the Case: In paragraph 2 of Appellee's Brief, Richard argues, although weakly, that Jennifer is attempting to retry the case based solely on testimony from "biased witnesses." Subsequently, Richard clarifies "biased witnesses" by referencing Jennifer and Cameron. At the time of trial, these two people knew and lived with Richard for over nineteen (19) years. These individuals knew Richard the best. Jennifer is not attempting to retry the case. Rather, Jennifer firmly believes that a review of all evidence will cause this Court to have a firm and definite conviction that Judge Hagerty made a mistake. The evidence was overwhelmingly in Jennifer's favor. Yet, Judge Hagerty ruled otherwise.

Custody Investigator: In paragraph 3 of Appellee's Brief, Richard mistakenly refers to Lisa Stenehjem as Custody Evaluator. Ms. Stenehjem was appointed as the Custody Investigator to render an opinion as to residential responsibility and parenting time. She did so. The Court was and is not obligated to follow the recommendations of the Custody Investigator. Although this report was ultimately in favor of Richard, Ms. Stenehjem failed to contact several instrumental individuals such as Cameron, Richard's step son. Cameron had lived with Richard for many years commencing when Cameron was a small child. He had first hand experience and knowledge as to Richard's uncontrollable anger and rage. He was one major victim of Richard's unrestrained anger. Yet Lisa failed completely to

interview Cameron. Cross examination of Ms. Stenehjem shed some light as to her failure to do an adequate and/or thorough job in interviewing and investigation in this case which include, but is not limited to, the following:

* Richard unilaterally provided Ms. Stenehjem unrequested documents of which Jennifer was not aware nor advised. As such, she was not given an equal opportunity to respond thereto. (T. at p. 344, l. 21-25 and T. at p. 345, l. 1-13).

*Ms. Stenehjem failed to give Jennifer an opportunity to explain any of the material provided by the Mandan Police Department. In fact, Jennifer was totally unaware that Ms. Stenehjem had this information. Jennifer informed Ms. Stenehjem during a home visit that this case was a complicated one and that she would just give her some highlights. She made it clear that should issues arise that would require additional information and/or clarification, to so advise Jennifer. Jennifer was never so advised. In fact, although Ms. Stenehjem asked Jennifer about Kerry Bittner and the circumstances surrounding this relationship, Ms. Stenehjem indicated she knew about all the details and needed nothing further. (T. at p. 230, l. 14-21).

*Ms. Stenehjem failed to interview critical individuals, the names of whom were provided by Jennifer. These individuals knew Richard and Jennifer for 15 or more years. These people included Lorne Grasser, Sherri Steele and Katie Schimetz. (T. at p. 343, l. 15-25 and T. at p. 344, l. 1-10). She also failed to interview James Michels even after being advised that Jennifer would have to assist her in contacting him. (T. at p. 325, l. 11-16 and T. at p. 227, l. 19-25 and T. at p. 228, l. 1-5). She also failed to interview Cameron Ayestas. (T. at p. 343, l. 15-25 and T. at p. 344, l. 1-10). Ms. Stenehjem made one attempt only to

contact Jennifer's mother and only did within a few days of submitting her report. This left Janet Mueller, Jennifer's mother, without sufficient time to respond. (T. at p. 335, l. 10-22). She failed to interview Jennifer's counselor, Andrea Martin. (T. at p. 323, l. 2-9). She failed to interview the children's counselor Sue Herzog or even to request information from Ms. Herzog. (T. at p. 320, l. 7-25 and T. at p. 321, l. 13-14).

*Although Ms. Stenehjem did not stay throughout the entire divorce proceeding and thus did not hear all the evidence, she still claimed that her opinion and/or recommendation would not change. She was not present for the testimonies of Debbie Wivholm, Detective Jon Vanderhoef or additional testimony given by Richard.

Testimony by Sue Herzog. In paragraph 5 of Appellee's Brief, he attempts to place a great deal of unwarranted weight to Ms. Herzog's reference to Jennifer and her alleged ability to handle A.M. Sue Herzog testified throughout her testimony that both parents were concerned about handling A.M. and that both were consistently seeking guidance. The fact remained that Jennifer was the parent who sought out help and guidance from Ms. Herzog to better manage A.M. and his outbursts. It was not until after Jennifer made the contact with Ms. Herzog and the sessions started did Richard decide to participate. (T. at p. 7, l. 18-21).

Anger Management Issues: In paragraph 7 of Richard's brief, he argues that no evidence was submitted that he ever hurt anyone. However, the threat and the serious and real potential for injury was always present. There was clear and undisputed evidence of the mental and emotional injury caused to Jennifer and Cameron by Richard. In fact, Jennifer sought out counseling throughout her relationship with Richard and she did for R.M. and A.M.

Richard throughout his testimony blamed Jennifer for absolutely everything, including his own inappropriate behavior. He claims he was in a difficult position due to Jennifer and it left him with less than ideal choices for parenting. However, Jennifer admitted to not interfering enough when Richard displayed his extreme and inappropriate parenting and/or behavior towards the children. (T. at p. 211, l. 10-17).

Richard disrespectfully references that Jennifer and Cameron played victims. However, the fact clearly remains that Jennifer and Cameron were victims of abuse by the hand of Richard. Dr. Podrygula testified that Jennifer suffered from Adjustment Disorder. However, she has in all respects, recovered. (T. at p. 301, l. 1-8).

Richard admitted that he dealt with issues inappropriately and that his behavior is consistent with anger control issues.

Alleged Conflicting Testimony given by Cameron Aystas. Richard submitted transcripts from two interim hearings, one which occurred on May 26, 2009 and August 9, 2010. He does so apparently in an attempt to discredit the testimony given by Cameron at time of trial. Referencing these transcripts is inappropriate in this appeal. The appropriate time to impeach Cameron, or any other witness, was at time of trial. These transcripts could have been introduced at time of trial during cross examination of Cameron. Richard cannot not do what he should have done at time of trial.

In paragraph 9 of his brief, Richard also attempts to impeach Jennifer by referencing the transcripts from interim hearings which occurred May 26, 2009 and August 9, 2010. Jennifer wasn't concerned about the safety of the children at the time of the May 2009 hearing because she had the children in her primary care. Jennifer testified at time of trial

that she was definitely concerned with Richard having the children given his trouble or inability to manage his anger especially after having the children for long periods of time with no breaks. (T. at p. 240, l. 1-21). Richard loses his cool with the children if he does not get a break. (T. at P. 136, l 2-10).

Richard also references Debbie Wivholm's testimony. He states that Debbie Wivholm testified that Jennifer wrote an affidavit for her to sign stating she witnessed something that she did not in fact witness. However, no such affidavit was presented at time of trial. Jennifer asked Debbie to testify about what she saw. Debbie simply could not recall the incident. This misunderstanding was resolved at the time of trial.

Richard, on the other hand, write an affidavit for detective Jon Vanderhoef for him to sign. Mr. Vanderhoef recanted the affidavit at time of trial. (T. at p. 371, l. 1-22), at which time the transcripts from the previous hearings could have been read to Cameron.

Jennifer's Alleged Failure to Discuss Anger Issues in Previous Hearings. Again, in paragraph 10 of Richard's brief, he attempts to impeach the testimony of Jennifer as given at time of trial, by referencing two previous hearings on motions for interim order. Again, Jennifer was not concerned about the safety of the children at the time of the May 2009 hearing as she had primary care over the children at that time. However, at time of trial, Jennifer made it abundantly clear that she was very concerned about Richard having the primary care over the children because of his extreme difficulty, if not impossibility of managing his anger. Jennifer allowed A.M. to stay with Richard because she had the children most of the time anyways. (T. at p. 240, l. 17-21).

Richard states that Jennifer texted him that she was comfortable with Kerry Bittner

watching the children. However, this text was sent prior to Jennifer becoming aware of Mr. Bittner's behavior. There was not one scintilla of evidence presented that Jennifer left the children with Mr. Bittner after becoming aware of his behavior. (T. at p. 281, l. 10-12).

Contrary to Richard's statements, the evidence presented reflected that the children were not exposed to Todd Frank. They never went to the prison and only met him in passing. (T. At 288, l. 11-23).

Abuse by Jennifer. In paragraph 11 of Richard's brief, he attempts to argue that it is in fact Jennifer with the anger problems and history of perpetrating domestic violence. During one incident, during which Richard was giving explicit details of his affairs to Jennifer, Jennifer slapped him. This was one isolated incident in a 17 year relationship. (T. at p. 251, l. 23-25). Richard also mis states the testimony. There is nothing on page 251 of the transcript that states anything about this.

Relationship between Richard and Cameron. In paragraph 12 of Richard's brief, he again attempts to blame others for his violent behavior. He claims basically that it was because Cameron was a testosterone driven teenager, he was placed in a more difficult position than any other father. However, there was little evidence presented as to what specifically Cameron did to make parenting more difficult for Richard than any other teenage male. The only piece of evidence was Cameron taking Richard's car without asking. Richard wanted Cameron arrested for this minor infraction and Jennifer did in fact intervene. (T. at p. 343, l. 15-25 and T. at p. 344, l 1-10).

Slapping of S.M. Richard, in paragraph 14 of his brief, attempts, again, to explain away his inappropriate disciplinary actions by claiming he spanked her "excessively partly

out of frustration, but I did not lose control.” This makes no sense. Richard is stating that he did spank her excessively but it was done with complete control. If so, this causes one even greater concern about Richard’s mentality towards corporal punishment. Additionally, the evidence was that this child was three years old and had been toilet trained. Hence, she was not in diapers. There was no testimony given that this child was in diapers at the time of this incident.

Incident of Reported Abuse. Richard argues in paragraph 16 of his brief, that the only incident of reported abuse was made against Jennifer. He stated that services were recommended. This is not entirely true. Nothing was actually recommended other than for Jennifer to continue what she was already doing. (T. at p. 327, l. 12-20).

Foreclosure of Home. In paragraph 18 of Richard’s brief, he discusses the foreclosure on the home. Testimony was given that Jennifer believed, from conversations with the mortgage company, that she needed a quit claim deed signed by Richard to move forward with the loan modification process. Without Richard’s cooperation, she would need a divorce decree. Jennifer attempted to bring the loan current until the time of trial but encountered unsurmountable obstacles.

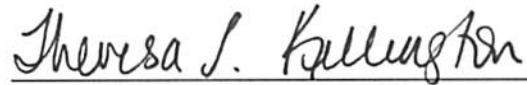
Cooperation by Jennifer. In paragraph 19 of Richard’s brief, attempts to argue that given Jennifer had Cameron testify, this was direct evidence that she would fail to encourage a relationship between Richard and the children. This logic fails completely. During the time Jennifer had the residential responsibility over the children, she not only encouraged a relationship between Richard and the children but did so by allowing daddy dates outside of his time. There was no evidence presented that Jennifer interfered in any way with the

children's relationship with their father. (T. at p. 348, l. 18-25).

CONCLUSION

In light of the foregoing, Jennifer renews her request that the Order from the District Court be vacated.

Dated this 23 Day of May, 2011.



Theresa L. Kellington
American Legal Services, P.C.
521 East Main Avenue, Suite 400
Bismarck, ND 58501
(701) 258-1074
ND State Bar #05385
Attorney for Appellant and Plaintiff,
Jennifer Makelky