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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Application of Niccole Anne Bjerke, On Behalf of C.R.J.O. For a Change of Name to: C.R.J.B. _____ Blair Radomski, Appellant v. Niccole Anne Bjerke, Appellee	)))))))))))	Supreme Court No. 20110022 Cass Co. No. 09-2010-CV-1815

APPELLEE'S BRIEF

APPEAL FROM FINDINGS OF FACT AND ORDER GRANTING NAME CHANGE

DATED NOVEMBER 15, 2010

THE DISTRCT COURT, EAST CENTRAL JUDICIAL DISTRICT

COUNTY OF CASS, STATE OF NORTH DAKOTA

THE HONORABLE DOUGLAS R. HERMAN, PRESIDING

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¶ 1 In light of the best interests of the child, did the district court abuse its discretion in finding proper and reasonable cause to grant Bjerke's petition to change the surname of the parties' minor child from C.R.J.O. to C.R.J.B.

The district court ruled in the negative.

STATEMENT OF THE CASE

¶ 2 A hearing was held before The Honorable Douglas R. Herman on November 10, 2010 based upon Bjerke's Application filed May 21, 2010. Affidavits were submitted and the court heard testimony from Radomski and Bjerke. Following the hearing, Judge Herman considered the best interests of C.R.J.O. and found proper and reasonable cause existed under NDCC 32.28.02 to grant Bjerke's request to change the surname of C.R.J.O. to Bjerke.

¶ 3 This appeal arises from The Honorable Douglas R. Herman's Findings of Fact and Order Granting Name Change entered November 15, 2010 changing the surname of the parties' minor child from C.R.J.O. to Bjerke.

STATEMENT OF FACTS

¶ 4 Blair Radomski and Niccole Bjerke, formerly Niccole Olson, have one child in common, five-year-old C.R.J.O. (Petition for Name Change Hearing Transcript at 5:25; 6:1, November 10, 2010)[1]. Radomski and Bjerke never married. At the time of birth, C.R.J.O. was given his mother's maiden name of Olson. C.R.J.O. has always had the surname of Olson and has never had the surname of Radomski. (T at 7:8-10).

¶ 5 Bjerke has had primary physical care, custody, and control of C.R.J.O. since birth. (T at 13:12-15). C.R.J.O. was born in Fargo and has always lived in Fargo. Shortly after C.R.J.O.'s birth, Radomski moved from Fargo to Mandan. (T at 16:8-10). Radomski does not have any immediate family in Fargo, save perhaps a cousin who does not share the same last name. (T at 13:16-21; 16:6-7).

¶ 6 Bjerke married in October, 2008 and legally changed her last name to Bjerke. (T at 6:10-11). Bjerke and her husband had a baby girl together in early 2010. (T at 13:23-25). Bjerke's daughter shares her married last name of Bjerke. (T at 7:1-2). Bjerke and her husband are planning on having more children in the future. (T at 14:5-7). It is foreseeable that C.R.J.O. and Bjerke's other children will go to the same school together. (T at 14:1-4). Bjerke and her husband are not planning on getting divorced. (T at 10:20-21).

[1] Hereinafter, "T" refers to the Petition Hearing transcript from November 10, 2010.

¶ 7 Radomski currently exercises visitation with C.R.J.O. on the first and third weekends of every month and for a week during each of the summer months of June, July, and August. (T at 15:5-19). Radomski has developed a tight bond with his son, despite the fact that they have never shared the same last name. (T at 15:25; 16:1-5).

¶ 8 Bjerke testified she felt it was in C.R.J.O.'s best interests to share the same last name of the family that he lives with full-time. (T at 7:6-8). Bjerke testified she felt that the risk of awkward questions would be minimized if C.R.J.O. had the same last name as his custodial family. (T at 7:9-12; 11:21-25).

ARGUMENT

I. Because the district court property considered the best interests of the child, it did not abuse its discretion in finding proper and reasonable cause to change C.R.J.O.'s surname to Bjerke.

¶ 9 Although there has been some debate, decisions on whether to grant a petition for a minor name change under N.D.C.C. ch. 32.28 is subject to an abuse of discretion standard of review. *Hartleib v. Simes*, 2009 ND 205, ¶ 41, 776 N.W.2d 717; *see also, Grad v. Jepson*, 2002 ND 153 ¶ 5, 652 N.W.2d 324; *Edwardson v. Lauer*, 2004 ND 218 ¶ 5, 689 N.W.2d 407. A determination of whether there is proper and reasonable cause to change a minor's surname requires examination of the best interests of the child. *Hartleib*, at ¶ 40; *Grad*, at ¶ 7.

¶ 10 The district court recognized the similarities in Bjerke's Petition to the fact scenario in *Hartleib.* The parties in *Hartleib* were never married. *Hartleib*, at ¶ 2. At the time of the petition, the minor child did not have the surname of either of

his natural parents. *Hartleib*, at ¶ 42. After sifting through an explanation on the proper standard of review, this Court concluded that under either the clearly erroneous or abuse of discretion standard, the district court did not err in changing the minor child's surname to match his custodial parent's. *Hartleib*, at ¶ 42. Changing the surname would "enhance the child's sense of belonging and security both at home and at school . . . and would prevent confusion and embarrassment to the child and promote a sense of family identity." *Id.*

¶ 11 As in *Hartleib*, Bjerke and Radomski were never married. At the time of Bjerke's Petition, the minor child's last name did not match either of his natural parents. Bjerke is the custodial parent and has had primary physical care, custody, and control of the minor child since his birth. Bjerke and her husband have a baby girl together who shares her married surname. It is very likely that these two children will go to the same schools together. Based on these factors, and relying on *Hartleib*, the district court did not abuse its discretion in finding that changing C.R.J.O.'s surname to the surname of his custodial parent would enhance the child's sense of belonging and security, both at home and at school because it will match the surname of his family unit and siblings thereby reducing the chance that questions will arise concerning the child's surname.

¶ 12 Radomski relies heavily on *Grad* for the proposition that the district court abused its discretion in changing the minor child's surname. However, *Grad* is easily distinguishable from this case in that the district court in *Grad* stated it did not consider the petition in the context of the best interests of the child. *Grad*, at ¶

12.

¶ 13 The petitioner in *Grad* based her request largely on the fact that the minor child's surname has always been the same as hers and should continue to be the same. *Grad*, at ¶8. The court concluded that this, by itself, is an insufficient basis for changing a minor child's surname. *Id*. Also, the petitioner in *Grad* testified the minor child's surname would remain that of her then ex-husband in the event of a divorce. Admittedly, the court did conclude that it would be confusing for the minor child to explain that she has the surname of a man who is not her biological father than to explain she has her mother's maiden name. *Id*. However, Justice Maring's dissent eschewed that rationale and this Court has seemed to adopt Justice Maring's stance in its decision in *Hartleib*.

¶ 14 Unlike *Grad*, the district court explicitly made findings on the record that it is in the best interests of C.R.J.O. to change his surname to match that of his custodial family. Also, unlike *Grad*, Bjerke testified that she had no intention of divorcing her husband and that she would essentially cross that bridge when and if she came to it.

¶ 15 Finally, unlike *Grad*, Bjerke relies on much more than simply a desire that the minor child's surname continue to match hers. Bjerke testified that she was worried about the irreparable emotional harm to C.R.J.O. if he had to go to school with a different last name than his siblings and if his last name did not match the family that he lived with. While this issue may have been considered to some extent by the district court in *Grad*, it was not properly analyzed in the context of

the best interests of the child.

¶ 16 Justice Maring's dissent in *Grad* properly considered the best interests of the child in the context of the risk of emotionally damaging questions and situations the minor child would face if his surname did not match either of his natural parents. In such a situation, the child, "[W]ill consequently be placed in the position of revealing that she is illegitimate. Placing the child in this position is not in her best interests." *Id.* As is the case here, Justice Maring failed to see how questions would arise concerning the minor child's surname if it was the child's mother's current surname and the surname of the child's family unit.

¶ 17 Radomski proposes an unworkable standard in asking this Court to create a bright line rule that can be uniformly applied to these cases, and presumably, to similar cases involving minor children, such as custody issues, parenting time issues, child support, etc. If there was such an easy solution to these cases, it is reasonable to assume that one would have already been established, either by legislative or judicial action.

¶ 18 The outcome of these cases depends on the best interests of the minor child, not on the personal biases and prejudices of a trial judge as Radomski suggests. No two cases are alike. It is not realistic to think that a single bright line rule can be applied to every case involving a request to change a minor child's surname. The best interest factors were created for a reason, to enable a trial judge to make the most informed and reasonable decision she can based on the application of the best interest factors to each unique case.

¶ 19 It is not that the trial judge preferred the reasoning of *Hartleib* over *Grad* in this case; rather, it is that the trial judge properly considered the best interests of C.R.J.O., unlike the trial judge in *Grad*, and found that those factors supported proper and reasonable cause to grant Bjerke's request to change the minor child's surname.

¶ 20 Radomski is correct that a name should be more than just an address – it should be an identity. And that identity should be shared amongst a family. Families have identities. Its individual members become known as "the Jones family," or "the Johnsons." If C.R.J.O. were not allowed to share in his custodial family's surname, in its identity, it is readily apparent how emotionally damaging this could become. If Radomski truly recognizes the value to his son of being who he is, then he needs to see him as Bjerke's custodial son and understand that his son is now a part of a larger custodial family.

¶ 21 Radomski is seeking to keep the minor child's surname as Olson, a name which would not match either of his natural parents, nor any of his custodial family members. Surely such a situation cannot be in the child's best interests. Questions are bound to arise concerning the minor child's last name if it were to remain Olson. Changing the minor child's last name to Bjerke greatly minimizes the risk of confusion and embarrassment to the child. Not that the child would have any reason to be embarrassed about either of his parents, but the mere chance that he could be placed in an awkward situation of trying to explain to a group of kids why he does not have his custodial family's surname carries a great risk of

making the child feel like an outcast. In essence, he would be singled out among his own family. He would feel like an outsider.

¶ 22 Radomski testified he has developed a tight bond with his son, despite the fact that he and his son have never shared the same surname. Radomski enjoys liberal visitation and exercises his visitation with his son. If this bond has developed between Radomski and his son despite not sharing in a surname, there is no reason to believe that the bond will be diminished or weakened if C.R.J.O.'s surname is changed.

¶ 23 Understandably, it must be tough to see your child's surname changed to the surname of an individual with no biological tie to the child; but the issue the Court should focus on is not what is best for the parent, but rather, what is best for the child. Allowing the minor child's surname to match that of his custodial parent, even if the custodial parent marries or remarries, drastically reduces the risk of emotional harm to the child.

¶ 24 This Court got it right in *Hartleib* and the district court got it right in following that decision when it found that changing the minor child's surname to match his custodial family's is in his best interests because it promotes a sense of belonging and security. To hold that the district court abused its discretion in this case would effectively overrule *Hartleib* and erase any guiding principles that are to be gleaned from that case.

CONCLUSION

¶ 25 The district court did not abuse its discretion in finding that the best interest factors supported proper and reasonable cause to change C.R.J.O.'s surname to that of his custodial family's.

Dated this 27th day of April, 2011

Respectfully Submitted,

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