

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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James Steven Wagner,	)	
	)	
Plaintiff/Appellee	)	
and Cross-Appellant,	)	<b>BRIEF OF APPELLEE</b>
	)	<b>AND CROSS-APPELLANT</b>
vs.	)	
	)	
Marilee Gay Wagner,	)	<b>SUPREME Co. No. 20060124</b>
	)	
Defendant/Appellant	)	
and Cross-Appellee.	)	

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Appeal from Judgment and Decree  
of the Cass County District Court

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**I. STATEMENT OF THE ISSUES**

- A. Was the trial court's award of rehabilitative spousal support acceptable in light of a very favorable division of property and an amount of spousal support which exceeded the recipient's needs?
- B. Should the trial court have awarded an unequal division of property which favored the spouse who wasted marital assets?
- C. Is it proper for a trial court to award combined child support and spousal support which equals 85% of the obligor's net income?

## II. STATEMENT OF THE FACTS

James Steven Wagner (“Jim”) and Marilee Gay Wagner (“Marilee”) were married on June 2, 1979. Finding of Fact 4, App. at 111. They had four children during their marriage, only two of which were minors at the time of trial. Finding of Fact 5, App. at 111. The parties separated on February 8, 2005. Finding of Fact 7, App. at 111. Marilee continued to reside in the marital home with the minor children. Id.

At the time the parties separated, they had a money market account with approximately \$459,000 in it. Transcript at 84; Finding of Fact 12, App. at 112. All but \$10,000 from the account was transferred from the joint money market account to an account solely in Marilee’s name, without Jim’s knowledge or consent. Transcript at 86, 333. During the pendency of this matter, an additional \$20,000 was deposited into the account. Transcript at 88. By the time of trial, the \$469,000 that had been in the account was reduced to the sum of \$264,511. Conclusion of Law 24, App. at 122. Thus, from this account alone, Marilee spent almost \$205,000 between February 8, 2005 and January 9, 2006. Transcript at 88.

In addition to the funds expended from the joint money market account, Marilee received and spent approximately \$40,000 in child support between the months of February 2005 and December 2005. Transcript at 110. Jim testified that he believed that Marilee had wasted at least \$140,000 in marital assets during the parties’ separation. Transcript at 475. The court found that Marilee “dissipated marital assets contrary to the restraining order provisions of the divorce summons

and is unable to account for all of the money that she spent.” Finding of Fact 18, App. at 113.

Despite finding that Marilee had dissipated marital assets, the court awarded her marital assets of approximately \$765,000 while awarding Jim marital assets with a value of less than \$560,000. Conclusion of Law 24, App. at 121-22. Within the assets awarded to Marilee, she received a home worth \$310,000 that was unencumbered, bonds worth \$30,000, cash assets with a value in excess of \$130,000, and one-half of the parties’ retirement accounts. Id. The trial court noted:

The property division made by the Court is unequal.

The difference in property values is accounted for by the parties’ station in life, individual needs, present and future earning capacities. Marilee is unable to account for a substantial amount of money taken from the parties’ joint account. To the extent that she still has any of those funds or the proceeds of those funds, those assets are awarded to her.

Conclusion of Law 24, App. at 122.

Jim is a physician with Dakota Clinic in Fargo. Finding of Fact 13, App. at 112. Marilee has not worked outside the home since the birth of the parties’ first child. Finding of Fact 14, App. at 112-13. For the first 11 years of their marriage, the parties worked on their educational degrees. Jim attended the Mayo Medical School for four years to obtain his M.D. degree and then spent seven years in a

surgical internship and residency at Hennepin County Medical County in Minneapolis. Transcript at 14-15. For the first five and one-half years of their marriage, Marilee participated in a Ph.D. program at the University of Minnesota. Transcript at 297-302, 414. When the parties moved to Fargo in 1990, Marilee was offered a teaching position at Concordia College, but she turned it down. Transcript at 321.

Except for a short period of time in private practice, Jim has been employed at Dakota Clinic in Fargo. Transcript at 16-17. His income rose from a starting salary of \$90,000 in 1990, to an income of \$340,000 in 2003. Transcript at 23; Exhibit 8, App. at 48. However, since 2003, his income has been declining steadily. In 2004, his income dropped by over \$60,000 to approximately \$279,000. Exhibit 9, App. at 70. In 2005, his income dropped by more than \$40,000 to approximately \$238,000. Exhibit 10, App. at 95.

At trial, the Chief Administrative Officer at Dakota Clinic, Larry Solberg, testified about Jim's expected income in 2006. Transcript at 91. Larry Solberg testified that Jim could expect an additional 10-15% decrease for 2006. Transcript at 95. Jim testified that he hoped to hold the decrease to 10%. Transcript at 135. This would suggest that his income in 2006 would be approximately \$200,000-\$215,000.

The trial court did not make a finding as to Jim's anticipated 2006 income. However, the court found that Jim's income has been trending downward. Finding of Fact 19, App. at 113. Jim testified that if he had *no* decrease in his income, his net monthly income would be \$12,814. Transcript at 139. However, he noted that

he was never permitted to take home more than 80% of his expected income, so his anticipated net monthly income would be approximately \$10,000. Id.

Each party submitted exhibits which outlined their estimated monthly expenses. Marilee testified that she anticipated that her monthly expenses would be \$9,020 per month. Transcript at 387; Exhibit 18. The trial court found that “Marilee’s estimate of her monthly expenses greatly exceeds the expenses of the parties prior to separation and does not accurately reflect the actual cost of the household which no longer includes a monthly mortgage payment, the same having been paid-in-full.” Finding of Fact 17, App. at 113.

Jim testified that he anticipated monthly living expenses of \$6,450. Transcript at 145-48; Exhibit 11. Many of Jim’s expenses included costs related to his practice of medicine, such as continuing medical education and professional memberships and subscription materials. Transcript at 146-47. Jim also included costs for the children’s uncovered medical expenses. Transcript at 146. The court did not make a specific finding of fact regarding Jim’s monthly expenses, but did not make a finding that the expenses were unreasonable.

The trial court awarded Marilee spousal support in the amount of \$5,000 per month for a period of five years. Conclusion of Law 25, App. at 122-23. The court based this upon a finding that Marilee was intelligent, articulate and in apparent good health. Finding of Fact 15, App. at 113. The court further found that Marilee was capable of employment and capable of further education which would enable her to achieve adequate or appropriate self-support. Id. The court concluded that the combination of the spousal support and favorable property distribution would

allow Marilee to rehabilitate herself within 60 months from the date of the order. Conclusion of Law 25, App. at 122-23.

Marilee has filed an appeal contending that the length of the spousal support is inadequate. It is Jim's contention that the length of the spousal support is appropriate in light of the amount of spousal support and child support Marilee is receiving, as well as the disproportionately high amount of the property division she was awarded. However, Jim has cross-appealed in the event that the length of the spousal support is found to be inadequate. If the spousal support ruling is reversed, it is Jim's contention that the division of property is inequitable and that the amount of spousal support which Jim has to pay is inappropriate in that, when combined with his child support, he is left with approximately 15% of his net monthly income.

### **III. ARGUMENT**

#### **A. The Trial Court Properly Awarded Rehabilitative Spousal Support**

##### **1. Standard for Award of Spousal Support**

North Dakota statutorily provides that a trial court may award spousal support for any period of time, after taking into consideration the circumstances of the parties. N.D. Cent. Code § 14-05-24.1. The parties' circumstances are considered by analyzing the Ruff-Fischer guidelines. Ingebretson v. Ingebretson, 2005 N.D. 41, ¶7, 693 N.W.2d 1. The Ruff-Fischer guidelines include a consideration of the following factors:

the respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material.

Id., citing Ruff v. Ruff, 78 N.D. 775, 52 N.W.2d 107 (1952) and Fischer v. Fischer, 139 N.W.2d 845 (N.D. 1966). It is no longer necessary to find that a party is disadvantaged in order to award spousal support. Sack v. Sack, 2006 N.D. 57, ¶14, 711 N.W.2d 157.

If a court finds that spousal support is appropriate, the court must determine whether to award rehabilitative or permanent spousal support. Each is a distinct remedy. Sommer v. Sommer, 2001 N.D. 191, ¶14, 636 N.W.2d 423. Permanent spousal support is generally awarded when a spouse cannot be rehabilitated or if adequate rehabilitation is unlikely. Id. On the other hand, rehabilitative spousal support is appropriate when the disadvantaged spouse can be restored to independent economic status or to equalize the burden of divorce by increasing the disadvantaged spouse's earning capacity. Id., citing Riehl v. Riehl, 1999 N.D. 107, ¶12, 595 N.W.2d 10.

In this case, Judge Irby awarded Marilee rehabilitative spousal support. Judge Irby found that Marilee “is capable of employment and is capable of further education which will enable her to achieve adequate or appropriate self-support.” Finding of Fact 15, App. at 113. Judge Irby’s findings are to be upheld unless clearly erroneous. Sommer, at ¶8. A finding is not clearly erroneous unless it is induced by an erroneous view of the law, there is no evidence to support it or a review of the entire record convinces this court that a mistake has been made. Ingebretson, at ¶6.

## **2. Rehabilitative Support Can Be Appropriate Even in Long-Term Marriages**

This court has noted that rehabilitative spousal support is preferred over permanent spousal support. Fox v. Fox, 1999 N.D. 68, ¶21, 592 N.W.2d 541. Judge Irby awarded rehabilitative spousal support, and gave his reasons for doing so in both the Findings of Fact and the Conclusions of Law. In Finding of Fact 15, Judge Irby described Marilee as intelligent, articulate and in apparent good health. App. at 113. In Conclusion of Law 25, Judge Irby found again that Marilee was educated and in apparent good health, and noted that she was 49 years of age. Conclusion of Law 25, App. at 122. Judge Irby also found that the award of spousal support and the favorable property distribution would allow Marilee to rehabilitate herself within 60 months. Id., App. 123. Judge Irby believed that Marilee would achieve adequate self-support. Id.

Judge Irby did not specifically enumerate the Ruff-Fischer guidelines in his findings on each of the guideline factors. Nonetheless, his findings addressed the

factors of Marilee's age, the duration of the marriage, the parties' health and physical condition and their financial circumstances. A court is not required to make specific findings on each factor of the Ruff-Fischer guidelines. DeMers v. DeMers, 2006 N.D. 142, ¶23, 717 N.W.2d 545. In this case, it is clear that Judge Irby considered the Ruff-Fischer guidelines when he fashioned the award of rehabilitative support.

Simply because parties have been married for a long time does not mean that an award of permanent spousal support is mandated. For example, in Sommers v. Sommers, 2003 N.D. 77, 616 N.W.2d 586, the parties had been married for approximately 25 years. The husband was a dentist and the wife did not work outside the home for approximately the last 20 years of the marriage. Id. at ¶2. However, the trial court's award of rehabilitative spousal support was approved, in light of the substantial property award to the wife, as well as the trial court's finding that the wife was capable of rehabilitation. Id. at ¶17. This court noted that a trial court's findings on property division and spousal support "cannot be considered separately or in a vacuum" and have to be analyzed together. Id. at ¶15.

Similarly, in Walker v. Walker, 2002 N.D. 187, 653 N.W.2d 722, a trial court had to analyze whether spousal support should be rehabilitative or permanent, after a long-term marriage. The parties had been married for 26 years and both were 63 years old at the time of trial. Id. at ¶2. Both before and during the marriage, the wife did not work outside the home. Id. at ¶3. The wife was awarded the bulk of the marital estate. Id. at ¶18. Even though the wife had serious health problems,

had been a stay-at-home mom and the parties had a lengthy marriage, the court awarded rehabilitative spousal support. Id. at ¶17-18. This court affirmed that award, in major part because the wife received the bulk of the marital estate. Id. at ¶19.

In another case which discussed an award of rehabilitative spousal support after a lengthy marriage, the court in Staley v. Staley, 2004 N.D. 195, 688 N.W.2d 182, affirmed an award of rehabilitative support for 2 years after a 32-year marriage. The parties were in their early fifties. Id. at ¶3. The wife stayed home during the marriage, then worked at jobs which paid significantly less than the husband's job. Id. Although the trial court found that the wife was economically disadvantaged by the divorce, the trial court found that the wife had the ability to work and had education and work experience that would allow her to support herself. Id. at ¶12. Even though the wife was unemployed at the time of the divorce, this court affirmed the rehabilitative support award, and concluded that the Ruff-Fischer guidelines had been considered and appropriately applied. Id. at ¶17.

Thus, a lengthy marriage, alone, does not mandate permanent spousal support. If a party has been awarded a significant portion of the marital estate, the Ruff-Fischer factors can still weigh in favor of rehabilitative support.

### **3. Marilee is an Appropriate Candidate for Rehabilitative Spousal Support**

As noted above, the issues of property division and spousal support must be examined and dealt with together. Fox, 1999 N.D. 68, ¶22. In this case, Marilee received significant property. She received a home that had no mortgage against

it, which was valued at \$310,000. Conclusion of Law 24, App. at 121. In addition, she received bonds worth \$30,000, and money market funds with a value in excess of \$130,000. Id., App. at 122. The debt assigned to her was minimal. Id. The property she received had a net value in excess of \$765,000, while the property assigned to Jim had a value of under \$560,000. Id.

The property awarded to Marilee gives her the luxury of a paid-for home in a nice neighborhood, liquid assets and a significant retirement account. Marilee will not have to service debt, and should be able to realize income from the investment of her financial assets. An award of a greater percentage of the marital estate can decrease or eliminate the need for spousal support. Mellum v. Mellum, 2000 N.D. 47, ¶19, 607 N.W.2d 580. In Marilee's case, it makes the award of rehabilitative support reasonable.

In addition to a generous property division, Marilee was awarded significant monthly support. The child support award is \$3,543 per month. Conclusion of Law 10, App. at 117. The spousal support award is \$5,000 per month. Conclusion of Law 25, App. at 122. Thus, Marilee will have \$8,543 per month to meet her monthly expenses.

Historically, when Jim was living with Marilee and the children in the home, the parties never spent more than \$5,500 to \$6,000 per month. Transcript at 144. Jim usually brought home between \$6,000 and \$7,000 per month. Transcript at 143. From that, the parties paid a mortgage payment of \$1,800 to \$1,900 each month. Transcript at 144. In addition, the parties generally had debts which were paid off each year with a bonus payment. Id. Those debts were usually between

\$10,000 to \$15,000 per year. Id. Thus, after paying the mortgage, the family generally lived on \$5,500 to \$6,000 per month. Id. This was when both Jim and his older daughter were living in the home with Marilee and the two younger sons. The family lived a comfortable, but not extravagant lifestyle. Transcript at 143.

Marilee contended that her monthly expenses would be \$9,020 per month. Transcript at 387. However, Marilee admitted that some of the expenses on the estimated monthly expenses were exaggerated. For example, she indicated that her estimate of \$900 per month for clothing was from a year in which she replaced her wardrobe on more than one occasion and when the estimate included clothing for five family members. Transcript at 389-90. She also admitted that the \$600 per month for uncovered medical expenses would not be that high in the future. Transcript at 396. Judge Irby found “Marilee’s estimate of her monthly expenses greatly exceeds the expenses of the parties prior to separation and does not accurately reflect the actual cost of the household which no longer includes a monthly mortgage payment, the same having been paid in full.” Finding of Fact 17, App. at 113. Nonetheless, Judge Irby awarded her total support that was only \$477 less than Marilee’s exaggerated monthly expenses.

It is reasonable to believe that the amount awarded to Marilee exceeds her monthly expenses by at least \$3,000. The family historically spent \$5,500 to \$6,000 for a family that also included Jim and the older daughter, Rachel. With those persons no longer in the house, and with Jim paying the children’s uncovered medical expenses, it is not unreasonable to conclude that Judge Irby awarded Marilee \$3,000 per month more than she requires to meet her monthly expenses.

Given Marilee's background, the lop-sided property division and extremely generous spousal support will allow Marilee sufficient time, income and assets to become self-supporting. Although it has been some time since she has been in school, Marilee's history of being accepted into a Ph.D. program and nearly obtaining that Ph.D. shows her to be a bright, competent woman. Marilee testified that she devoted "hours upon hours" per day to volunteer work while all four of the children were in the home. Transcript at 407, 417-18. Thus, Marilee has demonstrated that she is able to devote time to outside activities and still be organized enough to maintain a home. The court found Marilee to be bright and articulate. Most importantly, Marilee herself anticipates that she will obtain further education and employment. She testified that she would like a career. Transcript at 407, 418. She also testified that she believes she has an obligation to seek training to obtain a career. Transcript at 445. Given this expressed desire for future employment, Judge Irby crafted a favorable division of property and a very favorable spousal support amount which would enable Marilee to achieve her goal.

Marilee posits several reasons to support her argument that she should have been awarded permanent spousal support. She implies that she gave up a chance to be a doctor when she married Jim. Appellant's Brief at 3, 5. Judge Irby did not make a finding of fact which supports this argument. Jim testified that there was no discussion about Marilee going to medical school, nor any discussion about them having a two-doctor family. Transcript at 155, 465.

Marilee also argues that she was pressured to start a family, forcing her to leave her Ph.D. program. Appellant's Brief at 4. Again, Judge Irby made no finding

of fact to support this contention. Jim testified strongly that he absolutely did not put pressure on Marilee to get pregnant. Transcript at 465.

Marilee also argues that she is entitled to permanent spousal support because the parties made a joint decision that Marilee would never go back to work and that only Jim would be employed. Appellant's Brief at 5. Again, Judge Irby made no finding of fact which supports this argument. Jim testified that Marilee made a unilateral decision to abandon her career. Transcript at 157. If any plan existed, it was that Marilee would seek further education or work after the children were in school. Transcript at 158. Jim testified the parties did not have a plan for Marilee to stay home indefinitely. Transcript at 468.

Marilee relies upon several cases to support her contention that she should have been awarded permanent spousal support. One of the cases is Sommer. However, the facts of Sommer are very different from Marilee's situation. In Sommer, the wife had been injured in a car accident. 2001 N.D. 191, ¶5. She was not permitted to work additional hours at her employment and was physically not able to carry full-time hours. Id. Additionally, the wife in that case was a victim of domestic violence. Id. at ¶12. The wife's physical inability to work was a strong contributing factor to the decision to award spousal support. Id. at ¶16. Marilee has no similar physical limitations. Thus, Sommer is not persuasive support for Marilee's argument.

Marilee also relies upon Orgaard v. Orgaard, 1997 N.D. 34, 559 N.W.2d 546. In that case, the wife had an eighth grade education and was 48 years old. Id. at ¶2. The husband abused alcohol, physically abused the wife, and verbally

abused the wife and her children. Id. at ¶3. In fact, the husband had caused his wife to suffer chronic lower back pain because of his physical abuse of her. Id. The trial court found that because of the wife's health and lack of education, she had "literally no earning capacity" and awarded permanent spousal support. Id. at ¶11. In contrast, Marilee's health is excellent and she has shown herself capable of advanced education. Orgaard is not persuasive support for Marilee's argument.

Marilee also relies upon Heinz v. Heinz, 2001 N.D. 147, 632 N.W.2d 443. Although some of the facts in Heinz are similar to those in the Wagner case, there are two significant differences. First, the property division in Heinz was roughly equal. Id. at ¶7. Additionally, the amount awarded to the wife was not a significant amount of support. Id. at ¶13. In contrast, Marilee has far more of the marital property and has support in excess of the amount needed to meet her monthly living expenses.

Marilee also relies upon the case of van Oosting v. van Oosting, 521 N.W.2d 93 (N.D. 1994). In van Oosting, the parties had been married for about 25 years. Id. at 95. The wife suffered from multiple sclerosis. Id. In reversing an award of temporary spousal support, this court noted the significance that the health and physical condition of the parties had in determining support. Id. at 101. Because of the wife's "financial position, lack of skills and training, limited prospects for future employment and her incurable, progressively debilitating disease", permanent spousal support was warranted. Id. at 100. In contrast, Marilee is healthy and has shown an ability to pursue further education.

This is not to suggest that Marilee could return to college to continue work on her Ph.D. As noted by Marilee's testimony, that opportunity no longer exists. However, there are numerous careers and jobs for which Marilee is either qualified at this time or for which she could be qualified within five years. The factors in van Oosting which supported an award of permanent spousal support are not present in this case.

Judge Irby's Findings of Fact regarding the issues of spousal support are not clearly erroneous. In light of the substantial property settlement which she received, and the extraordinarily generous spousal support she was awarded, Marilee has the ability to become self-supporting. Judge Irby crafted a judgment which would enable Marilee to achieve her goal of obtaining employment. Marilee's children are nearly grown, so she has the time to explore options for rehabilitation and entry into the job market. She will not have financial pressures because she has almost no debt and has significant liquid assets. Under the circumstances, Judge Irby's decision to award temporary spousal support should be affirmed.

**B. The Division of Property Was Inequitable**

**1. Legal Basis and Standard for Review**

Jim has filed a cross-appeal in this matter. If this court determines that the spousal support award should be reversed, Jim requests that the property division also be reversed as inequitable. On the other hand, if the court finds that the spousal support award was appropriate, Jim withdraws his cross-appeal. It is only because of the intertwined nature of property division and spousal support that Jim is pursuing a cross-appeal.

In dividing property, a trial court is to equitably distribute the property and debts of the parties. N.D. Cent. Code § 14-05-24(1). After deciding the extent of the parties' property and debts, the trial court must analyze the Ruff-Fischer guidelines to distribute the property and debts. Kostelecky v. Kostelecky, 2006 N.D. 120, ¶12, 714 N.W.2d 845. A trial court does not have to make specific findings of fact on each factor, but must explain the rationale for its decision. Bladow v. Bladow, 2003 N.D. 123, ¶7, 665 N.W.2d 724. A trial court's findings with respect to division of marital property will not be reversed unless they are clearly erroneous. Kostelecky at ¶8.

## **2. Jim Was Entitled to a Larger Percentage of the Marital Estate**

Judge Irby divided the parties' property such that Marilee received \$765,057.50 in net assets and Jim received \$559,5531.50 in marital assets. Conclusion of Law 24, App. at 121-22. However, the court also found that Marilee dissipated marital assets contrary to the restraining order provisions of the divorce summons and that she was unable to account for all of the money she spent. Finding of Fact 18, App. at 113. The only explanation the court gave for awarding Marilee over \$200,000 more than Jim, even though she had dissipated marital assets, was that the division of property "is accounted for by the parties' station in life, individual needs, present and future earning capacities." Conclusion of Law 24, App. at 122.

The testimony at trial was quite clear with respect to Marilee's dissipation of marital assets. Marilee had exclusive control of an account that was valued at approximately \$449,000 when she received it and had \$20,000 deposited into it

during the 11 months that the case was pending. Transcript at 84-88. At the time of trial, that account was worth only \$264,511. Conclusion of Law 24, App. at 122. In spite of repeated requests for accountings, Marilee failed to provide an adequate accounting. Transcript at 474. At the trial of this matter in January 2006, Marilee was even unable to describe how she spent \$20,000 in the month of December 2005. Transcript at 438-39. Marilee also admitted that she failed to account for numerous withdrawals of cash and checks from the Bremer account. Transcript at 429-30.

Although the court did not indicate how much of the marital assets had been dissipated by Marilee, Jim testified he believed that Marilee wasted approximately \$140,000. Transcript at 475. For that reason, Jim requested that he be awarded \$105,000 more in property than would be awarded to Marilee. Transcript at 120. Instead, Judge Irby awarded Marilee approximately \$205,000 more than Jim received.

A court's property division does not need to be equal to be equitable. But a court must explain a substantial disparity. Bladow, ¶7. In a long-term marriage, an equal division of marital property is a logical starting point. Ulsaker v. White, 2006 N.D. 133, ¶14, 717 N.W.2d 567.

The basis for Jim's request for a greater proportion of the marital property was Marilee's dissipation of assets. A court can consider economic fault as a factor when dividing marital property. Horner v. Horner, 2004 N.D. 165, ¶ 16, 686 N.W.2d 131. In fact, a dissipation of marital assets is a particularly relevant factor which dividing marital property. Id. In Horner, this court affirmed an unequal division of

property which was based upon the husband's attempt to hide or wrongfully gift assets. Id. at ¶ 6. The difference in the property awarded in Horner reflected the amount that the husband had dissipated. Id.

A similar conclusion was reached in Halvorson v. Halvorson, 482 N.W.2d 869 (N.D. 1992). In Halvorson, the husband transferred assets without consideration and without the wife's consent. Id. at 871. This court affirmed the trial court's decision to unequally divide the property because of the dissipation of the marital assets. Id. at 871-72.

The only possible explanation for the court's refusal to penalize Marilee for her dissipation of marital assets is the court's decision to award Marilee only temporary spousal support. Therefore, if the spousal support determination is reversed, it would be inequitable for Jim to receive such a small percentage of the marital estate. Thus, because spousal support and property distribution are so intertwined, if the spousal support award is reversed, the property division should also be reversed as inequitable. Kostelecky, at ¶22.

**C. The Amount of the Spousal Support Award is Inequitable**

When awarding spousal support, a court is to consider the needs of the disadvantaged party as well as the supporting spouse's needs and ability to pay. Sateren v. Sateren, 488 N.W.2d 631, 634 (N.D. 1992). In this case, Judge Irby awarded Marilee \$3,543 per month in child support and \$5,000 per month in spousal support, for a total monthly support amount of \$8,543. Marilee indicated her anticipated monthly expenses were \$9,020, but the court found those expenses to be greatly exaggerated. Finding of Fact 17, App. at 113.

The court found that Jim's income has been trending downward. Finding of Fact 19, Appt. at 113. His gross income in 2005 was approximately \$238,000. Exhibit 10, App. at 95. His income for 2006 was projected to be a 10-15% decrease from that amount. Transcript at 95. Thus, Jim's expected income for 2006 was projected to be between \$200,000 and \$215,000.

As an employee of the clinic, Jim is not paid a salary each month, but is, instead, permitted to draw against his salary. Transcript at 99. However, a physician is not entitled to draw the entire amount of their expected income, but only can draw a certain percentage. Transcript at 101. Jim testified that the most he could expect to bring home in his regular paycheck was approximately \$10,000 per month. Transcript at 139. Thus, the combined child support and spousal support payment constitute approximately 85% of Jim's net take-home pay.

Jim indicated that his anticipated monthly expenses would be \$6,454. Exhibit 11, Docket #45. Judge Irby did not make any findings of fact as to the reasonableness of Jim's anticipated monthly expenses. However, unlike the negative comment regarding Marilee's excessive monthly expenses, there was no finding that Jim's monthly expenses were unreasonable. If Jim's monthly expenses of \$6,454 per month were reasonable, leaving him with only about \$1,500 per month after the payment of child support and spousal support cannot be acceptable, as it does not take into consideration Jim's ability to pay that amount of support.

As noted above with respect to the appeal on the question of division of property, Jim does not ask the court to reach the question of the reasonableness of

the amount of spousal support if the spousal support decision is affirmed. Jim is willing to accept a lesser amount of property and to pay an excessive amount of spousal support if the term of the spousal support is kept to five years. However, if the term of the spousal support is reversed, the amount of spousal support awarded to Marilee is excessive and this court should find that the judge's ruling is clearly erroneous.

#### **IV. CONCLUSION**

Marilee Wagner was awarded the majority of the parties' property and a significant percentage of Jim Wagner's net monthly income. This would have been an inequitable result had the court not limited Marilee's spousal support to a five-year term. However, considering the division of property and the large amount of spousal support, short-term rehabilitative spousal support is appropriate because Marilee is bright, well-educated, healthy and capable of seeking the additional education which will enable her to become self-supporting. On the other hand, if the court should, for any reason, determine that the spousal support term is inappropriate, the property division is clearly erroneous in that it awards far more property to a person who dissipated marital assets. Also, the spousal support award is clearly erroneous because it consumes almost 85% of Jim's net monthly income, leaving him unable to meet his monthly expenses.

Therefore, Jim Wagner asks that the court affirm the trial court's decision and not reach the merits of his appeal. If the court should reverse the term of spousal support, Jim respectfully requests that the court's findings as to property division and amount of spousal support be reversed.

Dated this 28<sup>th</sup> day of September, 2006.

/s/ Maureen Holman

Maureen Holman (ND No. 04084)

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**AFFIDAVIT OF SERVICE BY ELECTRONIC MEANS**

**James Steven Wagner**

v.

**Marilee Gay Wagner**

**Cass County File No. 09-05-C-01009**

**Supreme Court File No. 20060124**

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

Sydney A. Linton, being duly sworn, deposes and says that she is a resident of the City of Fargo, State of North Dakota, is of legal age; and that she served the within

**BRIEF OF APPELLEE AND CROSS-APPELLANT**

on September 28, 2006 by sending a true and correct copy thereof by electronic means to the following e-mail address, to-wit:

**James R. Brothers  
Wold Johnson, P.C.  
400 Gate City Building  
500 Second Avenue North  
PO Box 1680  
Fargo, ND 58107-1680  
E-Mail: *JBrothers@WoldLaw.com***

and depositing the same with postage prepaid in the United States mail at Fargo, North Dakota.

To the best of affiant's knowledge, the e-mail address above given is the actual e-mail address of the party intended to be so served as published in the North Dakota Supreme Court's on-line directory. The above document was e-mailed in accordance with the provisions of the North Dakota Rules of Appellate Procedure and Administrative Order 14.

/s/ Sydney A. Linton  
Sydney A. Linton

Subscribed and sworn to before me this 28<sup>TH</sup> day of September, 2006.

/s/ Carmen D. Rohr  
Notary Public  
Cass County, North Dakota  
Commission Expires:

(SEAL)