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FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
MARCH 19, 2019  
STATE OF NORTH DAKOTA

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

Yuan Zuo,		
	Plaintiff/Appellant,	Supreme Court No.: 20180403
vs.		Grand Forks County District Court No.:
Yuanyuan Wang,		18-2016-DM-00450 <b>750</b>
	Defendant/Appellee.	

**BRIEF OF APPELLEE**

**Appeal from the District Court, County of Grand Forks,  
State of North Dakota, Northeast Central Judicial District  
The Honorable M. Jason McCarthy Presiding**

**Appeal from the Findings of Fact, Conclusions of Law, Order  
for Judgment dated the 5th day of September, 2018; and  
Judgment dated the 6th day of September, 2018**

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### **[¶3.] STATEMENT OF THE ISSUES**

- I. The district court's findings of fact regarding residential responsibility and decision-making are not clearly erroneous.**
- II. The district court did not abuse its discretion or rely on improper evidence when it found Frank committed domestic violence upon Nancy.**
- III. The district court did not abuse its discretion when it excluded the English translation of audio recordings into evidence.**
- IV. The district court did not err in awarding retroactive child support.**
- V. The district court properly analyzed the Ruff-Fischer factors in awarding spousal support to Nancy.**
- VI. The district court did not err by including an \$85,000.00 transfer to Frank's sister and A.Z.'s college savings account as part of the marital estate.**

### **[¶4.] STATEMENT OF THE FACTS**

[¶5.] The parties married on August 8, 1994, in Beijing, China. (Tr. p. 6, 413). Defendant ("Nancy") put herself through school without financial support from Plaintiff ("Frank"). (Tr. p. 419). In 1997, Nancy got a job in Zurich, Switzerland. (Tr. p. 422). Frank went with Nancy on a spouse visa. (Tr. p. 420). Nancy supported Frank during this time. (Tr. p. 422). Nancy paid for Frank's mother's funeral and paid off his father's debt. (Tr. p. 423-424, 646). Nancy paid for Frank's debt and his English classes. (Tr. p. 424). In 1998, Frank moved to the United States to become a full-time student while Nancy continued to work full-time in Australia and Hong Kong. (Tr. p. 425). Nancy continued to provide Frank with financial support while he was at UND. (Tr. p. 199, 418-419, 422-427, 430). Nancy hosted and paid for more than a dozen visits for Frank and his family to Beijing. (Tr. p. 187, 439-431, 649).

[¶6.] In November, 2008, Nancy moved to Grand Forks to join Frank and start a family. (Tr. p. 447). Between 2008 and 2011, Nancy was not able to work as she did not have a green card. (Tr. p. 460). Nancy supported Frank by proofreading papers, maintaining

good relationships with co-workers, and supporting him as he got promoted. (Tr. p.462-464). Frank became increasingly abusive. (Tr. p. 467-468).

[¶7.] At the end of 2011, Nancy got a green card and had a job at UND beginning January 1, 2012. (Tr. p. 468-469). Frank began talking about divorce so he could get a younger wife. (Tr. p. 475).

[¶8.] In January, 2013, Nancy agreed to go back to Hong Kong at Frank's request. (Tr. p. 477-478). In December 2013, Frank visited Nancy in Hong Kong and asked her to move back to the United States. (Tr. p. 482-483). In May and October, 2014, Frank transferred \$85,000.00 to his sister without Nancy's knowledge. (Tr. p. 185, 508-510, 517). Frank changed the mailing address for his bank accounts so the statements would not be mailed to the home. (Tr. p. 516-517, 556, 571-572).

[¶9.] At the end of 2014, A.Z. was born. (Tr. p. 518). In January, 2015, while Nancy was holding A.Z., Frank twisted her arm and squeezed her cheek, causing pain. (Tr. p. 523). Nancy was a stay-at-home mom, dedicated to caring for A.Z. (Tr. p. 521). Frank went back to work, making no changes in his routine. (Tr. p. 524, 528).

[¶10.] In May, 2015, Frank sponsored his nephew so he could attend a high school in Fargo, without Nancy's knowledge (Tr. p. 536-537). On Mother's Day, 2015, Frank informed Nancy he wanted a divorce. (Tr. p. 538). Frank wanted Nancy to go back to Hong Kong and have sister raise the baby. (Tr. p. 540). In August, 2015, Frank stated he was more determined than ever to get a divorce and to stop supporting Nancy financially. (Tr. p. 543-544). Nancy took money from the joint account and opened her own account as a safety net. (Tr. p. 544-545).

[¶11.] On August 20, 2015, Frank committed domestic abuse against Nancy. (Tr. p. 548-551). Frank was arrested and charged. (Tr. p. 552). Nancy received a temporary protection order but did not pursue a permanent protection order. (Tr. p. 553-554). Frank

pleaded guilty to his charges. (Tr. p. 554-555). In October, 2015, Nancy filed for divorce. (Tr. p. 557).

[¶12.] On November 17, 2015, Frank severely assaulted Nancy. (Tr. p. 559-561). Nancy did not report the incident because Frank told her A.Z. would be put in foster care, he would lose his green card, and he was still on probation. (Tr. p. 563, 565). The parties agreed to reconcile and the divorce was dropped. (Tr. p. 566, 569). Frank's behavior became worse again. (Tr. p. 572). On December 19, 2016, Frank filed for divorce, one year after the deferred imposition of sentence was off his record. (Tr. p. 584-585). Nancy transferred money into her own account to help finance the divorce. (Tr. p. 585-587). The parties agreed to continue to live together during the pendency of the divorce for the benefit of the minor child. (Tr. p. 585, 590).

[¶13.] In January, 2017, Frank continued to be hostile and odd. (Tr. p. 590). On January 22, 2017, Frank continued his aggressive behavior so Nancy called the police. (Tr. p. 592-594). After police interviewed the parties, Frank was arrested, told to leave University Housing, and ordered to undergo a risk assessment. (Tr. p. 92, 595-596). Frank opened up a college savings account without discussing it with Nancy. (Tr. p. 572-573). In February, 2017, Nancy and A.Z. moved out and got their own apartment. (Tr. p. 597).

[¶14.] In March, 2017, the parties stipulated to a parenting schedule and an interim order. (Tr. p. 597; App. p. 35-40). The trial dates were scheduled three times. (Index # 62, 67, 87). The trial was finally held on April 17-19, 2018. (App. p. 164). Rebuttal was held on May 25, 2018. (App. p. 164).

#### [¶15.] **LAW AND ARGUMENT**

[¶16.] **I. The district court's findings of fact regarding residential responsibility and decision-making are not clearly erroneous.**

[¶17.] **A. Standard of Review.**



[¶18.] "This Court's standard of review of a custody determination is well-established:

We exercise a limited review of child custody awards. A district court's decisions on child custody, including an initial award of custody, are treated as findings of fact and will not be set aside on appeal unless clearly erroneous. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the entire evidence, is left with a definite and firm conviction a mistake has been made. Under the clearly erroneous standard of review, we do not reweigh the evidence or reassess the credibility of witnesses, and we will not retry a custody case or substitute our judgment for a district court's initial custody decision merely because we might have reached a different result. A choice between two permissible views of the weight of the evidence is not clearly erroneous, and our deferential review is especially applicable for a difficult child custody decision involving two fit parents."

Sorenson v. Slater, 2010 ND 146, ¶ 7, 786 N.W.2d 739 (quoting Koble v. Koble, 2008 ND 11, ¶ 6, 743 N.W.2d 797). "On appeal, the complaining party bears the burden of proving a finding of fact is clearly erroneous." Swanson (quoting Koble).

[¶19.] **B. Argument.**

[¶20.] "District courts must award primary residential responsibility of children to the party who will best promote the children's best interests and welfare." Dick v. Erman, 2019 ND 54, ¶ 7, 923 N.W.2d 137 (quoting Morris v. Moller, 2012 ND 74, ¶ 6, 815 N.W.2d 266). "A district court has broad discretion in awarding primary residential responsibility, but the court must consider all of the relevant factors under N.D.C.C. § 14-09-06.2(1)." Dick. Frank argues the court's findings of fact regarding best interest factors (b), (d), (e), (f), (h), (j), and (m) are all clearly erroneous. The court's findings are not clearly erroneous and the award of primary residential responsibility was made in the child's best interest.

[¶21.] "The district court is neither required to make a separate finding on each best interest factor nor to address each minute detail presented in the evidence, . . ." Law v. Whittet, 2014 ND 69, ¶ 10, 844 N.W.2d 885. In this case, the judge made a separate finding

on each of the best interest factors, providing detail on his reasoning for each factor. "This Court has never held that the trial court must address every piece of testimony and evidence." Datz v. Dosch, 2013 ND 148, ¶ 34, 836 N.W.2d 598 (J. Maring dissenting). Frank wants the trial court to address and explain every piece of evidence. That is not required.

[¶22.] It is also true ". . . the court may not wholly ignore and fail to acknowledge or explain significant evidence clearly favoring one party." Law, at ¶ 12. The court did not ignore relevant evidence. Frank has not presented "significant evidence clearly favoring" his position. Each best interest factor refuted by Frank is addressed more fully as follows:

[¶23.] 1. **Factor (b) - The ability to provide food, clothing, shelter, medical care, and a safe environment.**

[¶24.] The court mentions in its analysis of N.D.C.C. § 14-09-06.2(1)(b) that Frank perpetrated domestic violence upon Nancy while A.Z. was present. (App. p. 168, ¶ 18). Frank is bothered the court did not address the domestic violence in detail under subsection (b). The court stated "as further explained below," when referring to the domestic violence. (App. p. 168, ¶ 18). The court provided great detail regarding the domestic violence in subsection (j).

[¶25.] Frank is upset the court did not consider his allegation of abuse perpetrated by Nancy. Frank claims this "testimony was corroborated with audio recordings that were admitted into evidence." (Appellant's Br. ¶ 31). The audio recordings are in Mandarin and cannot be deciphered by the court; therefore, he cannot claim the audio recordings corroborate his testimony. Defendant continues to argue for admission of the English translations of the audio recordings to establish Nancy committed domestic violence. These translations were properly excluded as addressed below. The recordings were viewed by the court as "an effort to create prejudicial evidence" and the content not nearly as probative as Frank would like. (App. p. 176, ¶ 36). This does not support the argument the court ignored evidence in his favor.

[¶26.] Frank admitted photos that purport to show a scratch on his cheek. (App. p. 322-334). The injury is barely discernable and certainly not conclusive evidence that Nancy assaulted Frank. Nancy testified she had no idea how the injury occurred. (Tr. p. 615-616). This is not a major injury or evidence indicative of a pattern of domestic abuse perpetrated by Nancy against Frank.

**[¶27.] 2. Factor (d) - The sufficiency of each parent's home environment. . .**

[¶28.] The court found this factor favored Nancy "slightly." (App. p. 169, ¶ 21). The court also found "the home environment provided by Frank is sufficient and stable." (App. p. 169, ¶ 20). The court did not need to weigh which parent planned activities. Nancy submits, though, that many of the activities he engaged in with A.Z. were planned or set up by her. (Tr. p. 612). Most of the photos Frank presented to the court were taken by Nancy. (Tr. p. 155). Most of the activities in the baby care log were performed by Nancy and only recorded by Frank. (Tr. p. 609-610). She washed most of the baby clothes and bibs. (Tr. p. 156, 525-526). She made all but one doctor's appointment. (Tr. p. 157, 603-204, 719-720). Frank submits he "enrolled and paid for A.Z.'s numerous extra-curricular activities and enrolled and solely paid for her daycare." (Appellant's Br. ¶ 34). In fact, Nancy, while not working and receiving no child support or spousal support, paid for extra-curricular activities and lessons (except for ballet). (Tr. p. 603, 719, 730-733).

[¶29.] The court noted Nancy had primary residential responsibility of A.Z. during the interim period of the divorce. (App. p. 169, ¶ 20). The parenting schedule during the interim gave Nancy nine out of every fourteen days. (App. p. 41). This schedule was agreed to by the parties. (App. p. 35-40). Frank believes it was error for the court to consider this fact. (Appellant's Br. ¶ 36). As addressed in Kjelland v. Kjelland, 2000 ND 86, ¶ 10, 622 N.W.2d 186, the court did not rely solely on the care-taking role performed by Nancy during the interim but referred to the fact that Frank was not around much the first six months of

A.Z.'s life. (App. p. 169, ¶ 20). The court looked at A.Z.'s entire life span when addressing this factor, not just the interim period.

[¶30.] Nancy was the primary caretaker for A.Z. "The primary caretaker is generally the parent who provides the child with daily nurturance, care and support . . . ." Reeves v. Chupulis, 1999 ND 63, ¶ 17, 591 N.W.2d 791. "The primary caretaker rule has not been given presumptive status in this state; however, it is a relevant factor to be considered by the trial court at its review under N.D.C.C. § 14-09-06.2." Id. Nancy was a stay at home mom who had not spent more than a couple hours away from her child until the interim order was in effect. (Tr. p. 145, 521, 534-535). She was the primary caretaker before the divorce and provided a greater share of the care during the interim. It was not improper for the court to consider this fact.

[¶31.] Frank reasserts his claims that Nancy threatened to return to China/Hong Kong with the minor child. (Appellant's Br. ¶ 37). The court found there was nothing to indicate Nancy planned to leave the country. (App. p. 169, ¶ 21). Regardless of what Nancy may or may not have said during fights, her actions showed her commitment to the court process. She entered into an interim agreement and followed that agreement. Nancy stated "if the court orders me to stay in Grand Forks, forever, I will do that." (Tr. p. 296, 619). There was additional information that Nancy had the ability to apply for a Hong Kong passport for A.Z. but did not do so. (Tr. p. 412-413). Frank's arguments were addressed by the court. The fact that Frank disagrees with the analysis is hardly proof the court's finding is "clearly erroneous."

[¶32.] **3. Factor (e) - Facilitating a close relationship.**

[¶33.] In its findings, the court specifically addressed Frank's claims that Nancy was interfering with his relationship with A.Z. The court found "the evidence reflects that she invites him to activities, tells him about activities, changed an activity time to accommodate his schedule, invited him to participate in Halloween activities, and invited him to A.Z.'s

birthday party at her house." (App. p. 170, ¶ 22). In addition, Nancy agreed to give Frank additional parenting time in the interim order - beyond the minimal supervised visits at Kids First Frank was allowed in the no contact order. (Tr. p. 166, 596-597).

[¶34.] There is no evidence to demonstrate how Frank would encourage a relationship between Nancy and A.Z. In fact, the record shows just the opposite. Frank continually made comments that Nancy did not have biological ties to A.Z. (Tr. p. 507, 538, 540). He threatened that Nancy would "never see the baby again." (Tr. p. 532, 540-541). He had a plan to replace Nancy with his sister. (Tr. p. 532, 541). He kept the birth certificate from Nancy. (Tr. p. 521, 676). Frank's goal was to eliminate Nancy from A.Z.'s life.

[¶35.] Frank claims "[t]he court ignored the evidence related to Nancy's aggressive behavior in front of A.Z." (Appellant's Br. ¶ 39). Once again, Frank refers to the audio recordings to support his claim. These are recordings that Frank picked to put him in the best light, admitting that some recordings had been destroyed. (Tr. p. 284-285). The context of the recordings is not clear and highly suspect.

[¶36.] As for the access by telephonic and electronic means, the court addressed this claiming that Nancy's explanations made sense. (App. p. 170, ¶ 23). Frank ignores that Nancy did not want to have daily contact with him, a man who had abused her. (Tr. p. 621). Regardless, the court addressed this factor and found Nancy to be credible. Just because Frank does not agree does not make the court's findings "clearly erroneous."

[¶37.] **4. Factor (f) - Moral fitness.**

[¶38.] Defendant submits that because he pleaded to charges that did not specifically refer to domestic violence the court erred in analyzing this factor. As the court noted, "Frank has committed acts of domestic violence but denies perpetrating any acts of violence." (App. p. 170, ¶ 24). The court went on to state "Frank plead guilty to multiple charges stemming from physical altercations with Nancy. Frank's denials are not believable." (App. p. 170-171, ¶ 24). Even now, Frank continues to downplay his abusive acts. It is irrelevant why

Frank pleaded guilty to criminal charges. The evidence is he did plead guilty to charges stemming from altercations with Nancy. As addressed throughout the court's findings, Frank perpetrated acts of domestic violence against Nancy in front of A.Z. (App. p. 164-201). Nancy had a domestic violence expert testify regarding the negative impact domestic violence can have on the developing brains of babies and infants. (Tr. p. 387-388).

[¶39.] In addition to committing acts of domestic violence, Frank continues to deny those acts. The court obviously found Frank's testimony not credible. This is another moral factor that certainly would weigh against Frank in a best interests analysis.

[¶40.] **5. Factor (h) - Records of the child and the effect of change.**

[¶41.] The parties had a routine in place for over fifteen months while this divorce was pending. That routine appeared to be working well for A.Z. and there were no indications she was struggling or having difficulties. While no one can predict how a change in routine is going to impact a child, when a child is doing well, it makes sense not to disrupt that schedule.

[¶42.] Frank refers to his extracurricular activities summary, the fact he paid for daycare, and Nancy's comments about wanting to leave Grand Forks to claim the court was "clearly erroneous" in finding this factor in Nancy's favor. All of these issues have already been addressed and don't weigh in Frank's favor. Comments about wanting to leave are not the same as actions to leave. Nancy agreed to language prohibiting her from getting a passport or leaving the country without Frank's permission. (Tr. p. 622). She applied for U.S. citizenship. (Tr. p. 410-411). Frank had not. (Tr. p. 176). There is no evidence Nancy had immediate plans to move or uproot the child. While Frank might not like the court's analysis, there is no evidence to indicate it was "clearly erroneous."

[¶43.] **6. Factor (j) - Evidence of domestic violence. . . .**

[¶44.] The court provided detailed findings regarding the issue of domestic violence in the marriage. (App. p. 172-175). Domestic violence is defined in N.D.C.C. § 14-07.1-

01(2) to include "physical harm, bodily injury, sexual activity compelled by force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members." The court found domestic violence occurred in the marriage and determined these actions were a "pattern of abusive behavior perpetrated by Frank against Nancy." (App. p. 175, ¶ 33). When the court finds a pattern of abuse exists, it establishes a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child.

When evidence of domestic violence exists, the district court must make specific and detailed findings of fact regarding the effect the allegations of domestic violence have on the rebuttable presumption against custody under N.D.C.C. § 14-09-06.2(1)(j). A trial court cannot simply ignore evidence of family abuse, but must make specific findings on evidence of domestic violence in making its decision on primary residential responsibility. Even if the evidence of domestic violence does not trigger the statutory presumption under N.D.C.C. § 14-09-06.2(1)(j) the violence must still be considered as one of the factors in deciding primary residential responsibility, and when credible evidence of domestic violence exists it 'dominates the hierarchy of factors to be considered' when determining the best interests of the child under N.D.C.C. § 14-09-06.2.

Law, at ¶ 17 (citations omitted).

[¶45.] Frank does not agree with the court's interpretation of the evidence presented. As addressed in the standard of review above, "On appeal, we do not reweigh conflicts in the evidence. We give due regard to the district court's opportunity to judge the credibility of the witnesses." Knudson v. Kylo, 2012 ND 155, ¶ 9, 819 N.W.2d 511 (citation omitted). The court found Nancy and her witnesses' testimony to be credible. (App. p. 174, ¶ 30). Frank refers to inconsistencies in Nancy's testimony to support his argument her testimony is not be credible. Nancy had multiple witnesses who corroborated the abuse. First, in reference to the August 20, 2015, case, Nancy presented testimony from Officer Jayson Waltz who confirmed seeing redness and swelling on her face, consistent with a slap. (Tr. p. 355). Officer Waltz provided additional testimony when called on rebuttal by Frank, that

Nancy said more than once she was afraid for herself and for her baby. (Tr. p. 770). Nancy filled out a lethality assessment which ended up in a referral to the Community Violence Intervention Center. (Tr. p. 359-363). This information is consistent with Nancy's statements she was abused by Frank.

[¶46.] Frank also attacks Nancy's credibility regarding the incident on November 17, 2015. While Nancy may not have had the correct date, she consistently testified the incident occurred on Tuesday right after A.Z.'s doctor's appointment. (Tr. p. 558, 563, 699-700). Nancy had multiple witnesses who provided corroborating testimony about Nancy's account of what happened and the bruises on her face. (Tr. p. 320-321, 330-332). The court found their testimony to be credible and it helped corroborate Nancy's statements. Frank submits that Nancy's decision not to tell her attorney about the assault is improbable. (Appellant's Br. ¶ 53; Tr. p. 566). Nancy's domestic violence expert explained it is common for victims to hide abuse, cover for their abuser, and believe their abuser will change. (Tr. p. 391-393, 396-397, 566).

[¶47.] Once again, Frank refers to the English translations of his recordings, believing they prove he is right. (Appellant's Br. ¶ 55). First, the translations are not part of the record. Second, the recordings do not support Frank's proposition. Frank admitted he only submitted certain recordings and others were deleted or not disclosed. (Tr. p. 284-285). Frank knew he was being recorded and was able to present himself in a positive manner. There is a noticeable gap of seven months when no recordings were presented. These seven months are critical as it was around the time of the assault on November 17, 2015, and while the parties were discussing reconciliation. (Tr. p. 287-288). Frank's reliance on the recordings is misplaced.

[¶48.] As for the money transfers, Nancy is unclear how that is relevant to a finding of domestic violence. Nancy's withdrawals were addressed and explained on the record. (Tr.



p. 585-587). Her withdrawals support her testimony about the sequence of events regarding Frank's abuse and demands for divorce.

[¶49.] Frank's claim he was scratched and had a finger pointed at him, if true, hardly rise to the level of domestic abuse on the scale Nancy endured. She was beaten enough that blood was gushing over her clothing and on the carpet. The court's findings are not clearly erroneous.

[¶50.] 7. **Factor (m) - Any other factors considered by the court.**

[¶51.] Frank did have a scheme to divorce Nancy. In December, 2013, Frank went to Hong Kong to ask Nancy to move back to the United States with him, admitting to Nancy that his efforts to find a younger wife had failed, he could not trust anyone but Nancy to be his wife, and he wanted to stay married to her even without a child. (Tr. p. 482-483). Nancy moved back to Grand Forks in June, 2014. (Tr. p. 483, 493-494). In August, 2014, Frank stopped all physical intimacy (Tr. p. 515). Frank refused to discuss purchasing a house. (Tr. p. 514). Frank told Nancy a house would be too troublesome to divide during a divorce. (Tr. p. 513-514). Frank made large cash transfers to his sister totaling over \$85,000.00. (Tr. p. 508-510, 517). In May, 2017, Frank announced he wanted a divorce. (Tr. p. 538). During their fights about the divorce, Frank admitted he intended for his sister to move in and look after A.Z. and his nephew. (Tr. p. 540). This chain of events could not be more self-explanatory and supports the court's findings that Frank "had an agenda to undermine Nancy both in the marriage and as a parent." (App. p. 176, ¶ 36). This is another example of Frank not agreeing with the conclusions but they are not clearly erroneous.

[¶52.] Frank refuses to acknowledge his audio recordings are not conclusive evidence. Frank believes the recordings show Nancy is the aggressor. Instead, the court viewed these recordings as prejudicial to Frank. (App. p. 176, ¶ 36). Frank controlled when, where, how, and what to record. He later decided what recordings to use as evidence, admitting there were other recordings not disclosed. (Tr. p. 284-285). The court was not

focusing on the content of those recordings but on the method in which those recordings were obtained. The recordings prove nothing and Frank has not submitted sufficient evidence to show the court's finding was "clearly erroneous."

**[¶53.] II. The district court did not abuse its discretion or rely on improper evidence when it found Frank committed domestic violence upon Nancy.**

**[¶54.] A. Standard of Review.**

[¶55.] "[A] district court has broad discretion on evidentiary matters, and this court will not reverse a lower court's decisions to admit or exclude evidence absent an abuse of discretion." Johnson, et al. v. Buskohl Construction Inc., et.al., 2015 ND 268, ¶ 18, 871 N.W.2d 459 (quoting Interest of J.S.L., 2009 ND 43, ¶ 18, 763 N.W.2d 783). "A court abuses its discretion when it acts in an arbitrary, unreasonable or unconscionable manner, or if it misinterprets or misapplies the law." Johnson (quoting Interest of J.S.L., at ¶ 18).

[¶56.] "Even if the trial court commits an error on an evidentiary matter, N.D.R.Civ.P. 61 provides that "[n]o error in either the admission or the exclusion of evidence . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." Davis v. Killu, et. al., 2006 ND 32, ¶ 6, 710 N.W.2d 118.

**[¶57.] B. Argument.**

[¶58.] Frank argues the testimony and evidence presented by Hong Liu and Tatjyana Richards was hearsay and incompetent. Frank is not specific about what statements he is claiming were hearsay evidence. "We have repeatedly stated we are not ferrets and we will not consider an argument that is not adequately articulated, supported and briefed." Johnson, at ¶ 19 (quoting Hale v. State, 2012 ND 148, ¶ 12, 818 N.W.2d 684). It is impossible for Nancy to respond to this argument when we cannot discern what statements are specifically being claimed as hearsay.

[¶59.] It is not hearsay for a witness to testify to their personal knowledge and observation. Hong Liu and Tatjyana Richards both testified about personal observation and knowledge. Further, it is not hearsay when the person who made the statement is subject to cross-examination and the statement is being made to rehabilitate the declarant's credibility. See N.D.R.Evid. 801(d)(1)(B)(i) and (ii). These statements were admissible because Nancy was available to cross-examine regarding the statements. Additionally, the statements were being offered to rebut charges that Nancy was lying about her testimony and to rehabilitate her credibility.

[¶60.] Regardless, the argument whether the testimony provided by Hong Liu and Tatjyana Richards is hearsay, is not properly before this court. Pursuant to N.D.R.Evid. 103(a)(1)(A), in order to preserve a claim of error the parties are required to timely object. There was no objection made during the testimony of either of these witnesses in order to preserve this issue for appellate review. "A failure to object at trial 'acts as a waiver of the claim of error.'" State v. Steen, 2015 ND 66, ¶ 5, 860 N.W.2d 470 (quoting State v. Anderson, 2003 ND 30, ¶ 6, 657 N.W.2d 245).

[¶61.] **III. The district court did not abuse its discretion when it excluded the English translation of audio recordings into evidence.**

[¶62.] **A. Standard of Review.**

[¶63.] "[A] district court has broad discretion on evidentiary matters, and this court will not reverse a lower court's decisions to admit or exclude evidence absent an abuse of discretion." Johnson, 2015 ND 268, ¶ 18, 871 N.W.2d 459 (quoting Interest of J.S.L., 2009 ND 43, ¶ 18, 763 N.W.2d 783). "A court abuses its discretion when it acts in an arbitrary, unreasonable or unconscionable manner, or if it misinterprets or misapplies the law." Johnson (quoting Interest of J.S.L., at ¶ 18).

[¶64.] "Even if the trial court commits an error on an evidentiary matter, N.D.R.Civ.P. 61 provides that '[n]o error in either the admission or the exclusion of evidence

... is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.'" Davis, 2006 ND 32, ¶ 6, 710 N.W.2d 118.

**[¶65.] B. Argument.**

[¶66.] The court did not abuse its discretion when it decided not to allow the English translation of the recordings offered as evidence in this case. One of the tenants of any trial is that the parties disclose evidence in a timely manner so that the other party has adequate time to respond. "Trial by ambush, and last minute oppression do not comport with notions of fairness or due process." Martin v. Trinity Hosp., 2008 ND 176, ¶ 24, 755 N.W.2d 176 (agreeing with the district court's rationale for quashing a subpoena due to non-compliance with the discovery process). As addressed on the record, Frank disclosed the recordings in February or March but the translations were not provided until the Friday before trial. (Tr. p. 39). The certification of those translations was not provided until the afternoon before trial. (Tr. p. 37). Pursuant to the Scheduling Order, all exhibits were to be exchanged five days before trial. (Index # 83). An objection was made due to the late disclosure. (Tr. p. 37-40). A party cannot be surprised with evidence at the last minute. This created unfair prejudice to Nancy and she had no time to rebut the evidence.

[¶67.] In addition to the late disclosure, the certificate itself was questionable. The certificate was not clear if the translation was made of the actual recordings or of a written transcript of the recordings. (App. p. 337). Frank was asked questions about that and was unable to provide an answer to that question. (Tr. p. 37). Nancy was not able to determine whether one person translated the recording into Mandarin and then into English or if two separate persons had been involved in the translation. When the origins of the translation itself were in question it was proper for the court to exclude it.

[¶68.] Within the translations there were a number of parenthetical entries providing commentary regarding what was occurring on the audio. (App. p. 726-836). For example,

there were parenthetical comments that refer to the tone of voice that Nancy was using or explained a sound. (App. p. 726-836). The documents themselves showed their unreliability and provided grounds for the court to refuse to admit them into evidence.

[¶69.] Frank's case law addresses challenging authenticity of a translation by presenting an alternate transcript. (Appellant's Br. ¶ 72). However, the case law also states another way to challenge authenticity is to address specific inaccuracies. United States v. Font-Ramirez, 944 F.2d 42, 47-49 (1st Cir. 1991). Nancy did not present an alternate transcript but did refer to inaccuracies. Nancy received the transcripts two days before trial and the certificate of translation the afternoon before trial. Because of the late disclosure of the certificate of translation, Nancy did not have sufficient time to get her own translations. Additionally, because the translations were not admitted, there was no need for Nancy to testify regarding the inaccuracies. The case law addresses that it is the finder-of-fact that must decide on the accuracy of the translations and determine reliability. See United States v. Gutierrez, 757 F.3d 785, 789 (8th Cir. 2014). The judge was the fact-finder and made the determination the translations were not reliable.

[¶70.] Rule 901(a), N.D.R.Evid., states that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." "The question of whether evidence should be excluded for lack of authentication is primarily within the sound discretion of the trial court." R & D Amusement Corp. v. Christianson, 392 N.W.2d 385, 386 (N.D. 1986). Nancy made sufficient showing to the court the evidence being presented was not authentic or reliable and the trial court properly used its discretion to exclude the evidence.

[¶71.] Frank wanted Ming C. Lee to appear telephonically during his rebuttal case to present testimony regarding the translations. (App. p. 48). This was Frank's opportunity to rebut evidence presented in Nancy's case-in-chief, not to re-offer evidence excluded during

his case-in-chief. If these translations had been received by the court, Nancy would not have had an opportunity to respond to that evidence since her case was closed. That would have created extreme prejudice to Nancy. (App. p. 48-55).

[¶72.] The court's ruling on this issue makes it clear his decision was based on the fact the translations were questionable, the certificate of translation was not clear, and due to the late disclosure. (Tr. p. 40). Those are all valid reasons for the court to decide not to admit the English translations and no abuse of discretion occurred.

**[¶73.] IV. The district court did not err in awarding retroactive child support.**

**[¶74.] A. Standard of Review.**

[¶75.] "Child support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to the abuse of discretion standard of review." Grossman v. Lerud, 2014 ND 235, ¶ 6, 857 N.W.2d 92 (quoting State ex rel. K.B. v. Bauer, 2009 ND 45, ¶ 8, 763 N.W.2d 462).

**[¶76.] B. Argument.**

[¶77.] It is correct that the interim order did include an agreement that child support would not be backdated or made retroactive. (App. p. 37). It is also correct Frank was paying A.Z.'s daycare expenses. (App. p. 36). Other than that, Frank provided no financial support to Nancy or A.Z. during the pendency of the divorce. Despite that, Nancy does not believe the court made an error in backdating child support. The stipulated agreement in the interim order is not enforceable. Pursuant to N.D.C.C. § 14-09-09.32, "An agreement purporting to relieve any obligor of any current or future duty of child support is void and may not be enforced. . . ." While the interim order was a temporary agreement, it was an agreement to relieve Frank of his current duty to provide child support and should not have been approved. Frank had an obligation to support his child which went unfulfilled for over fifteen months.

[¶78.] This Court has stated many times that "the right to support belongs to the child and the custodial parent has only a representative right to collect support on behalf of the child." Haroldson v. Haroldson, 2012 ND 44, ¶ 8, 813 N.W.2d 539 (citing Thornton v. Klose, 2010 ND 141, ¶ 22, 785 N.W.2d 891). "As a matter of public policy, we take a dim view of agreements purporting to allow parties to avoid or limit their child support obligations." Haroldson (citing Lee v. Lee, 2005 ND 129, ¶ 8, 699 N.W.2d 842). "[T]he best interests of the children require child support obligors to provide adequate support and maintenance for their minor child." Lee (quoting Smith v. Smith, 538 N.W.2d 222, 226 (N.D. 1995)). "There is a rebuttable presumption that the amount of child support that would result from the application of the child support guidelines is the correct amount of child support." N.D.C.C. § 14-09-09.7(3). During the fifteen month interim period in this case, the parties agreed Nancy would have primary residential responsibility of A.Z. Therefore, Frank had an obligation to provide child support. We know his child support obligation is \$1,335.00 a month based on application of the child support guidelines. (App. p. 177, ¶ 39). So, while an argument can be made that Frank was providing support in the form of daycare payments, it did not come close to the amount he should have been paying in child support. Because the parties should not have been allowed to "waive" child support during the pendency of this action, it was an improper order. Therefore, the court was within its rights to order retroactive child support consistent with the North Dakota Child Support Guidelines.

[¶79.] The court has the ability to determine the start date for child support. "[T]he court was not bound to follow the terms of the parties' agreement concerning child custody or support." Jacobs-Raak v. Raak, 2016 ND 240, ¶ 29, 888 N.W.2d 770 (holding the court could disregard the parties agreement for retroactive child support). "This court has often stated that a trial court is not bound to accept stipulations which purport to determine questions regarding the custody and care of the children of a marriage if it finds that it is not

in the best interests of the children to do so." Tiokasin v. Haas, 370 N.W.2d 559, 562 (N.D. 1985).

Because a parental stipulation relating to child support is a legitimate incident of parental authority and control, it is entitled to serious consideration by the court. But such a stipulation need be accepted by the court only if, in the exercise of the court's judgment, it is deemed consonant with the child's best interests. To give a parental stipulation conclusive effect would abrogate the courts' traditional duty, arising from statute and case law, to independently monitor the best interests of the children of divorce. This we decline to do.

Id. Likewise, "the court has discretion to set the date of the commencement of a child support obligation." Jacobs-Raak, at ¶ 30 (finding the court could set a different start date for child support than that agreed to by the parties). The court is within its rights to set aside the parties agreement and set a child support commencement date with the best interests of the child in mind.

[¶80.] Franks argues his choice to set aside \$600.00 per month into a college savings account for A.Z. should be considered support for the child. (Appellant's Br. ¶ 76). He also claims he should get credit for providing insurance even though it is provided at no cost through his employment. (App. p. 177, ¶ 39). There is no basis to these claims. A college account does not replace the support needed to raise a child. As for the insurance, he dropped the vision and dental insurance during the pendency of this divorce. (Tr. p. 212-213). Furthermore, insurance payments are taken into consideration when calculating child support. Frank's argument has little merit.

[¶81.] Nancy cannot deny she signed a stipulation agreeing to waive child support. Regardless of her agreement, the law does not support it. Parties are not supposed to be able to use child support as a bargaining tool. The support is for the benefit of the minor child and the court's decision to require Frank to provide that support was not wrong.

[¶82.] V.       **The district court properly analyzed the Ruff-Fischer factors in awarding spousal support to Nancy.**

[¶83.] A.       **Standard of Review.**



[¶84.] "This court will not reverse the district court's decision related to both property distribution and spousal support unless the findings are clearly erroneous." Berg v. Berg, 2018 ND 79, ¶ 6, 908 N.W.2d 705 (citing Thompson v. Thompson, 2018 ND 21, ¶ 29, 905 N.W.2d 772). "A finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, if there is no evidence to support a finding, or if, although there is some evidence to support it, on the entire evidence, we are left with a firm conviction a mistake has been made." Thompson.

[¶85.] **B. Argument.**

[¶86.] Frank has not articulated exactly how the court's analysis of the Ruff-Fischer guidelines is clearly erroneous. Instead, Frank refers to evidence not admitted at trial. The written translations were not allowed into evidence but the recordings were. Frank had the ability to testify in detail regarding their conversations. He failed to do so. Additionally, the court made findings it found the nature of those recordings to be prejudicial to Frank. (App. p. 176, ¶ 36). Frank recorded his wife without her knowledge over the course of 1.5 years. There were only nineteen recordings he felt were worthy of submitting to the court. Frank admitted there were other recordings he destroyed. (Tr. p. 284-285). Therefore, even if the judge read the transcripts of these recordings, it is not likely to have changed the outcome of this case.

[¶87.] Frank also claims the court failed to address evidence of Frank's parent's financial support and the fact he provided for Nancy's education. There is a plethora of evidence to show how Nancy supported Frank during the first years of their marriage and while he was getting his education. (Tr. p. 422-427). Additionally, Nancy supported his family throughout the marriage. (Tr. p. 422-427, 430). The court addressed the Ruff-Fischer guidelines in detail in its findings of fact. (App. p. 178-181). Frank has failed to establish how the court's analysis of the Ruff-Fischer guidelines is clearly erroneous.

[¶88.] VI.      **The district court did not err by including an \$85,000.00 transfer to Frank's sister and A.Z.'s college savings account as part of the marital estate.**

[¶89.] A.      **Standard of Review.**

[¶90.] "This court will not reverse the district court's decision related to both property distribution and spousal support unless the findings are clearly erroneous." Berg, 2018 ND 79, ¶ 6, 908 N.W.2d 705 (citing Thompson, 2018 ND 21, ¶ 29, 905 N.W.2d 772). "A finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, if there is no evidence to support a finding, or if, although there is some evidence to support it, on the entire evidence, we are left with a firm conviction a mistake has been made." Thompson.

[¶91.] B.      **Argument.**

[¶92.] When making an equitable distribution of the marital estate, the court chose to include \$85,000.00 in cash Frank transferred to his sister in 2014 as well as the value of the college savings account Frank set up for A.Z. (App. p. 200). Frank disagrees with the court's decision to include these assets in the marital estate but fails to provide any case law to support this was in error.

[¶93.] In Swanson v. Swanson, 2019 ND 25, ¶ 11, 921 N.W.2d 666, the district court determined transfers made by the wife to her children were attempts to transfer the property out of the marital estate so included them in the equitable distribution. In this case, the district court found Frank's transfer of \$85,000.00 to his sister in 2014 was done in contemplation of divorce and to conceal money. (App. p. 181, ¶ 55). "[A] trial court, having the opportunity to observe demeanor and credibility, is in a far better position than an appellate court in ascertaining the true facts regarding property value." Swanson, at ¶ 7 (quoting Hitz v. Hitz, 2008 ND 58, ¶ 13, 746 N.W.2d 732). "A choice between two permissible views of the evidence is not clearly erroneous when the trial court's findings are based either on physical or documentary evidence, or inference from other facts, or on

credibility determinations." Swanson (quoting Fox v. Fox, 2001 ND 88, ¶ 14, 626 N.W.2d 660).

[¶94.] Frank submits he sent this money to his sister to support his father. (Tr. p. 185). This is not credible. The more credible evidence showed he made these transfers in secret without disclosing them to his wife. (Tr. p. 185, 508-510). He changed the mailing address for the accounts so statements would not be delivered to the house. (Tr. p. 516-517, 556, 571-572). This occurred around the same time Frank stopped all physical intimacy with Nancy and refused to buy a house. (Tr. p. 513-514, 515-516). Earlier in the marriage, Frank also claimed he was forwarding money to his sister to help his dad buy a house. (Tr. p. 433-434). Nancy also sent money to assist with those efforts. (Tr. p. 434). No house was ever purchased. (Tr. p. 444). The court was in the position to gauge credibility of the witnesses and found Nancy's interpretation of the evidence to be more credible.

[¶95.] There is no dispute both parties sent money to support their families. There was no dispute both parties sponsored a niece or nephew to come to the United States for their education. Nancy was especially bothered by the \$85,000.00 transfer to Frank's sister because she believed it was done to hide assets in contemplation of divorce. (Tr. p. 510-511). The court agreed.

[¶96.] Frank is also upset that the college save account was included as a marital asset. The account is in Frank's name. (Tr. p. 111-112, 572-573). It is an asset that must be included in the marital estate. "The trial court must start with a presumption that all property held by either party, whether held jointly or individually, is to be considered marital property." Swanson, 2019 ND 25, ¶ 9, 921 N.W.2d 666 (citing Berg, 2018 ND 79, ¶ 7, 908 N.W.2d 705).

[¶97.] Frank contributed \$600.00 a month to this account. He was not paying child support and he was not providing financial assistance to his wife. Instead, he transferred \$44,919.97 into a college save account. Had Frank not set up that account, that \$44,919.97

would have been part of the marital estate subject to distribution to the parties. Frank is trying to take credit for planning for A.Z.'s future while also trying to benefit by not having that money included in the marital estate. The court correctly included the value of that account when determining an equitable distribution of the marital estate.

[¶98.] Frank argues that because the college account can only be used by A.Z., it resulted in the distribution not being equitable. As this Court has stated repeatedly, "a property division need not be equal to be equitable, but a substantial disparity must be explained." Dvorak v. Dvorak, 2006 ND 171, ¶ 19, 719 N.W.2d 362 (citing Amsbaugh v. Amsbaugh, 2004 ND 11, ¶ 23, 673 N.W.2d 601). "North Dakota law does not mandate a set formula or method to determine how marital property is to be divided." Swanson, 2019 ND 25, ¶ 9, 921 N.W.2d 666 (citing Brew v. Brew, 2017 ND 242, ¶ 15, 903 N.W.2d 72). "Rather, the division is based on the particular circumstances of each case." Swanson. Just because Frank cannot actively use the \$44,919.97 in the college savings account does not mean the division of assets was not equitable. He is not bound to continue to contribute to that account but can manage it for the benefit of A.Z. These are marital funds that Frank's chose to invest in an account that has no value to Nancy. This account is appropriately part of the marital estate and is appropriately attributed to Frank in the property distribution. The court's findings are not clearly erroneous.

#### [¶99.] CONCLUSION

[¶100.] For the above-stated reasons, Nancy respectfully requests this Court affirm the Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment of the district court and deny Frank his request for relief.

Dated this 19th day of March, 2019.

/s/ Kristi P. Venhuizen  
\_\_\_\_\_  
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**[¶101.] CERTIFICATE OF SERVICE**

[¶102.] I hereby certify that on the 19th day of March, 2019, a copy of the foregoing Brief of Appellee was served electronically on Kelsey Hankey at the following email address:

Kelsey Hankey  
khankeylaw@gmail.com

[¶103.] I hereby certify that on the 19th day of March, 2019, a copy of the foregoing Brief of Appellee was filed electronically with the Supreme Court at the following email address:

Clerk of Supreme Court  
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