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APR 29 1998

Supreme Court No. 980006

District Court No. 330

Renae L. Monson,

Plaintiff and Appellee,

vs.

Ronald L. Monson,

Defendant and Appellant.

ON APPEAL FROM THE JUDGMENT
OF THE DISTRICT COURT OF
WALSH COUNTY

BRIEF OF THE APPELLEE

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* References to the transcript in this Brief appear as follows:

TR I	Refers to the transcript of the 01-21-97 proceeding
TR II	Refers to the transcript of the 08-06-97 proceeding
TR III	Refers to the transcript of the 10-10-97 proceeding

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STATEMENT OF THE ISSUES

I. Ronald Monson had notice of trial

II. Ronald Monson had every opportunity to respond

III. Ronald Monson's ability to earn income was correctly calculated and the Court correctly established his child support obligation

IV. Renae Monson should recover her attorney's fees and costs incurred as a result of this appeal.

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STATEMENT OF THE CASE

A reading of the Appellant Ronald Monson's (hereinafter referred to as "Ron") statement of the case may lead the reader to believe the procedural facts of this divorce are straight forward and simple. That is simply not the case. In order to put this matter in perspective, it is necessary to begin review in April of 1995 when this action began.

The Appellee, Renae Monson (hereinafter referred to as "Renae") brought her action for legal separation in April of 1995 and in July, 1995 amended her Complaint to seek a divorce. She was represented by Attorney Ron Fischer. Ron retained Attorney Richard Olson. From commencement of the case until mid December, 1995, the record reveals little activity. While there was little activity in the legal proceeding, Ron was a busy man. During that time frame, Renae contended and proved at trial that Ron began a scheme, which in the end, resulted in the demise of the couple's business and lead to his claim that the parties had few or no assets. (TR II, 53, 64, 65). The Monson's business was a corporation called Big H Potato Sales, Inc. Big H was a commodity brokerage firm the Monson's purchased in 1985 for $30,0000.00. (TR II, 121). It was incorporated in 1985 with 100 shares of stock issued. Renae owned 50 of those shares as did Ron. (TR II, 121). On June 10, 1996, Big H had over a million dollars

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in receivables. (TR II, 32 and Trial Exhibit 9). Combining the business assets with the personal and farming assets of the Monson's would have lead anyone to the conclusion that the parties had significant assets and income. Certainly Ron knew that in April, 1995.

Rather than the matter moving forward toward divorce when Renae filed, Ron convinced her that reconciliation was possible. (TR II, 69). Wearing rose colored glasses, Renae believed him; perhaps because she wanted so much to keep her family together. She believed in him despite the fact that Ron had involved himself with a young women named Kendlyn Momerack who worked in the potato fields and with whom Ron had recently had a child. (TR II, 69).

The Monsons lived together during that reconciliation attempt for approximately a month. (TR II, 69). The practical effect of Ron's action was the obvious delay in the proceedings; including a delay in the discovery process.

In February, 1995 Renae hired new counsel and the matter became active again. Depositions were taken and investigation got underway. What the investigation revealed was Ron's systematic dismantling of the assets of Big H Potato Sales. (TR II, 12-14 & 59-65). On July, 1996, Ron discharged Richard Olson and retained Shirley A. Dvorak.

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Prior to the substitution of counsel, there was a temporary hearing scheduled before the Honorable M. Richard Geiger. As Judge Geiger was on vacation, the hearing was conducted by the Honorable Thomas Metelmann. Mr. Olson appeared at the time of hearing, but Ron did not. What resulted was entry of a Partial Temporary Order dated July 2, 1996 putting into effect the restraining orders which are now automatic as provided by service of a Summons in divorce action.

The temporary hearing was then continued to July 27, 1996; a time when Judge Geiger would be back on the bench. The hearing proceeded and Judge Geiger ruled on several issues from the bench. That resulted in a second partial temporary order. On October 1, 1996 Judge Geiger issued his written decision regarding the remaining temporary issues.

On January 21, 1997 trial began. Renae called Ron as her first witness. What was apparent from Ron's testimony was that he had taken substantial amounts of money intended to pay receivables due Big H Potato Sales, endorsed them himself and used them for his own benefit. (TR I, 39, 54, 55, 60, 61, 69). It was learned during those first hours of trial that Ron had taken, cashed and used for his own benefit the following sums: (1) $156,713.34 which was transferred from

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a Big H account to him via a cashier's check; (2) $8,661.25 in a check from a Big H customer; (3) $15,020.85 in a check from a Big H customer; (4) $37,732.07 in a check from a Big H customer; and (5) $29,385.00 in a check from a Big H customer. (TR I, 39, 54, 55, 60, 61, 69). It also became clear that Ron had no respect for the authority of the Court. He admitted violation of previous court orders by (1) selling assets; (2) failing to keep insurance in effect; (3) failing to account regarding business transactions; (4) failing to pay child support; (5) failing to pay spousal support; and (6) failing to pay temporary attorney's fees. (TR I, 11-16).

A recess occurred to give the parties an opportunity to discuss settlement and trial was to resume the following day.

As happened so many times during the winter of 1997, a blizzard hit and travel to Grafton for the second day of trial was impossible.

Although the Court's proceedings were at a standstill, Ron's activities were not. On January 23, 1997, only 3 days after the first day of trial, Renae learned that Ron had sold cattle worth $16,908.00 despite the order restraining dissipation of assets. (TR II, 267). She immediately made an application to the Court to escrow the funds.

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It was during the telephone conference regarding Renae's request that Judge Geiger indicated to counsel he intended to recuse himself. Argument ensued and the Judge, despite having heard the temporary proceeding as well as the first day of trial, stepped down.

The Honorable Donovan Foughty was assigned and trial was scheduled for April 28, 1997. The chaos caused by the Red River Valley flooding caused yet more delay and the April 28, 1997 date was continued as a matter of necessity.

What occurred next was Ms. Dvorak withdrew as Ron's attorney.

Thereafter, Ms. Dvorak argued for more delay because of her decision to withdraw.

On June 26, 1997, the Court issued its Notice to Appear setting the continued trial for August 6, 1997; over 30 days following Ms. Dvorak's withdrawal. (App. 25).

The notice was served on Ms. Dvorak and she forwarded it to Ron. (App. 26, 27). Renae's counsel served a copy of the Order allowing withdrawal upon Ron (App. 22-24). Ms. Dvorak also served a copy of the Order allowing withdrawal on Ron. (App. 26, 27).

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On August 6, 1997, everyone except Ron, appeared at the Walsh County Courthouse in Grafton to complete the trial. What Ron did rather than appear was to call the Clerk's office. In that call, he claimed that he was not aware of the trial date. (TR II, 5). A conference was held, off the record, between the Court and Ron. Following that conference the trial went forward.

Two witnesses were called and completed their testimony. (TR II, 9-25). Renae was called and during her testimony, Ron appeared. (TR II, 101). After discussions in the courtroom, he refused to participate in trial and was absent for the remainder of the day. (TR II, 101-194).

Shortly following trial, Ron's third attorney appeared and made a request for a further proceeding. His request was granted and trial was continued to October 10, 1997. Prior to trial, Ron's new attorney had the benefit of a prepared transcript of all prior proceedings. Ron's action had, at that time, effectively delayed the trial from January 21, 1997 when it was initially scheduled for another nine months.

On October 10, 1997, Ron had his day in Court. He testified for hours resulting in 300 pages of testimony and he introduced 17 exhibits. His lawyer subpoenaed no one, asked to call no witnesses other than Ron and rested after

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Ron's examination. He made no offers of proof regarding any additional testimony, nor did he present any argument or statement regarding a desire to present further testimony. (TR II, 273). The Judge allowed additional time for Ron's attorney to complete and submit argument and proposals. On November 20, 1997, the Court entered it's Findings of Fact, Conclusions of Law, Order for Judgment, and finally; over 2 years from Renae's commencement of this action, a Judgment was entered in accordance with those Findings and Conclusions. Supplemental Findings were issued by the Court on November 20, 1997 to deal with the issue of Ron's notice of trial.

Ron now appeals claiming lack of notice of the trial. His argument belies logic since he had notice, was allowed his day in Court, he failed to call additional witnesses and failed to preserve the record by making any offers of proof regarding any alleged additional testimony he desired.

Renae provides this brief in response to the Appeal, asks that the Court affirm Judge Foughty's decision as well as order Ron to pay the attorney's fees and Court costs she has incurred in responding to this Appeal.

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LAW AND ARGUMENT

I. The Defendant received adequate notice under Rule 5 of the North Dakota Rules of Civil Procedure.

Ron relies upon Rule 5 of the North Dakota Rules of Civil Procedure in support of this Appeal. That Rule provides,

> "(a) **Service-When required.** Except as otherwise provided in these rules, every order required by its terms to be served, and, unless otherwise ordered by the court, every pleading subsequent to the original complaint, ... and every written notice, appearance, ... must be served on each of the parties.
>
> (b) **Service-How made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service must be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney, or upon a party must be made by delivering a copy to the attorney or party, or by facsimile transmission if available to the attorney or party, or by mailing a copy to the attorney or party at the attorney's party's last known address... service by mail is complete upon mailing."

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This Court has examined the type of service required by Rule 5 and has clearly found that, "service by a non-attorney using regular mail meets the requirements of North Dakota Rules of Civil Procedure". See: State v. Wolfe, 512 N.W.2d 670 (N.D. 1994); Moe v. Moe, 460 N.W.2d 411 (N.D. App. 1990).

In State v. Wolfe, Supra., a Defendant complained that he had received no notice of an amended protection order. The order had been amended and then mailed by an employee of the Abused Adult Research Center to the Defendant at his current address. In rejecting his claim, this Court emphasized that, "the kind of service required by Rule 4 for Service of Process is not required for service of this order." Id. at 647. Rule 4 of the North Dakota Rules of Civil Procedure provides the specifics for proper service of a Summons. Although Rule 5 allows the service prescribed by Rule 4, it does not require such service for things other than process. Id. at 647.

In the Wolfe case, this Court considered just what type of service was required to provide notice of an amended judgment. This Court determined that Rule 5 service was adequate. Wolfe, 512 N.W.2d 670,674. This Court clearly stated;

Rule 5(b) outlines how service of other papers is made upon a person not represented by counsel. Service upon the ... party must be made by delivering a copy to the ... party or mailing it to the ... party at the ... parties last know address ... *Service by Mail is complete upon mailing*. Rule 5(b) (emphasis added)

... Nowhere in Rule 5 does it require that mailing be done by certified or registered mail. Wolfe bases his argument on a provision of Rule 5 which states, "proof of service under this Rule may be made as provided in Rule 4 or by certificate of an attorney showing that the attorney has made service pursuant to subdivision b". Rule 5(f)(emphasis added). May is the operative word in subsection (f) although Rule 4 proof of service in the form of an affidavit of mailing does require that a return receipt be attached, (see, Rule 4 (J), a Rule 5 affidavit of mailing does not. Rule 5 Proof of Service is not limited to what is allowed under 4, and non attorneys are not limited to register or certified mail in order to serve papers other than process. Id. at 674.

It is clear that service of papers other than process may be accomplished by mailing the papers to the parties' current addresses or to his or her attorney.

Ron claims that he was not afforded proper service under Rule 5. This is simply not the case. The trial court found, based upon all the evidence that Ron did, in fact, have notice of trial. (App. 56). Ron is now challenging a finding of fact of the trial court. In Withey vs. Hager, 571 N.W.2d 142 (N.D. 1997), this Court explained the standard in challenging a finding of fact.

> The complaining party on appeal bears the burden of demonstrating a finding of fact is clearly erroneous. A finding of fact is clearly erroneous only when the reviewing court, on the entire evidence, it left with a definite and firm conviction a mistake has been made. Id. at 143. [citations omitted].

In attempting to determining whether Judge Foughty's finding regarding Ron's notice of the trial was clearly erroneous, the record must be examined. This Court should start with examining the issue of Ms. Dvorak's withdrawal as Ron's attorney. Ron was questioned directly by the Court on August 8th upon his appearance in the courthouse. The examination went as follows:

> THE COURT: Okay. And you're saying you never got ant correspondence from Ms. Dvorak withdrawing as counsel?
>
> MR. MONSON: No, I did not.
>
> THE COURT: Well, if you didn't get notice of --

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from her, didn't you continue to contact her as your attorney then?

MS. MONSON: Twice I have called her and asked her if she was getting information to Mr. Thompson that he had requested. And she told me that a lot these paper were wet and it was going to take a while. She was also for lack of a better --

THE COURT: What's your mailing address?

MR. MONSON: Pardon?

THE COURT: Route 1, Box 26, Leonard, Minnesota 56652.

THE COURT: How long you been there?

MR. MONSON: Approximately a year. I have not received anything from Ms. Jensen. I have not received anything -- (TR II, 101-102).

However, while denying notice of Ms. Dvorak's withdrawal, seconds earlier when being examined by the Court, Ron admitted contacting attorney Neil Thompson. (TR II, 101). Neil Thompson then contacted Judge Foughty on Ron's behalf (App. 56). One must wonder just why Ron would have been seeking counsel from Mr. Thompson if he did not know of Ms. Dvorak's withdrawal.

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In determining the creditability of Ron's statements regarding his notice of the withdrawal of Ms. Dvorak, the Court need look only to the fact that Ms. Dvorak mailed notice of the withdrawal to Ron at his Leonard, Minnesota address on July 1, 1997. (App. 20, 21). Her July 1st notice also included a letter wherein she references sending him the notice of the trial. (App. 27). In addition, even before Ms. Dvorak had a signed copy of the Order of Withdrawal, she notified Ron, by correspondence, that the withdrawal had been granted. (App. 26). To solidify the fact that Ron had notice of the order regarding withdrawal, this Court should look to pages 22, 23 and 24 of the Appendix as that is the Notice of Entry of Order and Affidavit of Service forwarded by Renae's council to Ron at his Leonard, Minnesota address.

As discussed, Rule 5 requires that service by mail is complete upon mailing. Ron's prior attorney, Shirley Dvorak, mailed correspondence informing him of the new trial date and serving the notice to his current address. He was given sufficient notice under Rule 5 and he has not proven that Judge Foughty's finding was clearly erroneous.

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In addition, Ron had actual notice of the date of the trial. This Court in past rulings regarding notice has held that, "Strict compliance may be excused if the party can demonstrate that actual service has been accomplished." See: Messmer v. Olstad, 529 N.W.2d 873,875,) (N.D. 1995) (quoting Berg v. Burke, 46 N.W.2d 786) (N.D. 1951). While the Berg case dealt with compliance to statutorily required notice, the underlying theory of the case is the same as the instant case; ... The purpose of the statute has been actually, not constructively accomplished. The fact that the envelope contained thereon an incorrect street address which did not interfere with the delivery will not defeat that accomplishment.

Berg v. Burke, 46 N.W.2d 786, 791.

In the instant case, the trial court detailed its reasons which lead it to finding that Ron had received actual notice of the new trial date. The rationale for the trial court's decision can be found in the record, in the exhibits, and through the use of judging creditability of Ron. There were sufficient facts to indicate Ron received actual notice of the trial. These facts as stated by the Court included the following:

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> ...Mr. Monson received a letter from his former attorney, Shirley Dvorak. This letter was sent to him on or about July 1st, 1997. In that letter... she makes reference to the notice of hearing and trial in the letter and also sends an attached notice to Mr. Monson. I believe those are the facts. They were sent to his address. (TR II, 5).

In assessing this issue, Judge Foughty also faced the task of judging Ron's creditability. The record is replete with information from which this Court could determine Ron lacked creditability in his statements under oath.

Judge Foughty's findings as well as the totality of facts in this case show, without doubt, that Ron had notice of the August, 1997 trial. That notice consisted of both Rule 5 notice by virtue of Ms. Dvorak's serving the Notice of Entry of the Order of Withdrawal and a copy of the Notice of Trial as well as actual notice as found by the Court. His argument that he was lacking notice is without merit.

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II. **The Ron was given an opportunity to present evidence.**

Ron cites the case of McWethey vs. McWethey, 366 N.W.2d 796 (N.D. 1985) in support of his contention that he did not have notice and that he was denied an opportunity to present his case.

At page 798 of McWethey, this Court stated,

> Judicial decision on motion of one party, without notice to an opportunity to be heard by the other party, is contrary to fundamental principal of justice and due process, **except under exigent or special circumstances with reasonably prompt subsequent notice and opportunity to be heard.** (emphasis added).

In Ron's case, not only did he have notice, he was present at the first day of trial refused to participate and, when he asked for an additional time for trial to be continued, the Court granted his request.

At the onset of the final day of trial, Judge Foughty stated,

> The record should reflect that this essentially at least the Court has taken the position that this is a continuation of the previous trial in Monson vs. Monson which was held in Walsh County. At that - at the time that the trial was initially held, Mr.

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Monson did not have counsel. He did not wish to participate in the trial. Since that date, he has obtained counsel. Counsel has asked that we have some hearings so that he could present his case to the Court. At this point, that request was granted... (TR III, 4).

The discussion between the Court and counsel continued with Renae's counsel seeking sequestration of witnesses . (TR III, 5). After the sequestration request was made the Court stated,

Any witnesses that are in the courtroom other than Mr. Monson, are to be sequestered. That means that you have to leave the courtroom to be called later. (TR III, 5).

The Court continued and specifically asked Ron's counsel, **Do you have any witnesses that you will be calling?** (TR III, 5).

Mr. Omdahl replied No, your honor. (TR III, 5). (emphasis added).

Discussion continued and Renae's counsel asked that the Court reconsider its ruling regarding the continuance granted to Ron. (TR III, 10-11). The Court listened to argument but allowed Ron to present his case.

At this time, Ron was free to subpena witnesses and present his case.

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Ron and his counsel fully participated in this continuance and presented his case. At no time did they ask to call additional witnesses or make offers of proof to establish a record.

Rule 103 of the North Dakota Rules of Evidence clearly states;

> (a) **Effects of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) **Objection.** In the case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of the objection, if the specific ground is not apparent from the context; or
>
> (2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context of the questions asked.

The purpose of the rule is to create a record which will permit informed appellate review. See: Wagner v. Peterson, 430 N.W.2d 331 (N.D. 1988).

In a case similar to the Monson case, this Court stated, "In the absence of evidence in the record that the testimonial issue should be decided differently, which we would assume would be the subject of an offer of proof, we cannot conclude that the trial court abuse its discretion." Gorsuch v. Gorsuch, 392 N.W.2d 392, 394 (N.D. 1986). Without an offer of proof this Court is unable to review the matter because it has no idea what the substance of the evidence was.

Not only did Ron fail to make an offer of proof, he told the Court he sought additional witnesses or evidence.

Nowhere in the record or even in the Ron's brief does he indicate how he was materially affected by the way the trial court conducted the trial. No offers of proof were given to demonstrate what evidence was left out of the record. In short Ron's claim that he should be granted a new trial due to lack of opportunity to present his case at the trial level is wholly without merit.

Although Ron does not delineate it as an issue, he appears to argue that this Court can infer a lack of adequate opportunity to present a case based upon the distribution of assets made by Judge Foughty. Property distribution in North Dakota Divorce Law is governed by Section 14-05-24 of our Century Code which provides, in pertinent part,

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"When a divorce is granted, the Court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper..."

It is well settled that Section 14-05-24 does not require an equal distribution of property; but rather that there be an equitable distribution. See: Haberstroh vs. Haberstroh, 258 N.W.2d 669 (N.D. 1977).

The trial court's first task in any property distribution case is to determine whether full disclosure has been made; its second determination is to determine the appropriate value of each piece of property; and the third to determine an appropriate distribution. It is the distribution Judge Foughty made which Ron complains is not fair.

The standard on review is as follows:

A trial court's spousal support and property division determinations are findings of fact that are subject to the clearly erroneous standard of review. Under this standard, we reverse only if there is no evidence to support a findings or if, upon a review of the entire evidence, we are left

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with the definite and firm conviction that the trial court has made a mistake. A trial court's findings of fact are presumptively correct. See: Fenske vs. Fenske, 542 N.W.2d 98, 102 (N.D. 1996) [citations omitted].

In an extreme property division case brought before this Court, in 1995, a convicted child molester argued that a Court may not consider fault in awarding property while his ex-wife asserted that a property division awarding every asset to one party and all debt to the other can be equitable if the misconduct is extreme. Bell vs. Bell, 540 N.W.2d 602 (N.D. 1995). The Bell case, although extreme, does stand for the proposition that the trial court has the authority, under existing North Dakota Law, to award a disproportionate share of property to one or another party as long as any, "substantial disparity" is explained. 540 N.W.2d 602 at 604 (N.D. 1995).

The Court's Findings of Fact are replete with explanations for a disproportionate award. (App. 42-44).

Another case decided by this Court and instructive herein is documented at 534 N.W.2d 26 (N.D. 1995). In Theis vs. Theis, Ms. Theis argued that there was a substantial disparity in the property distribution which necessitated reversal.

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The Court discussed Ms. Theis' claim of error and emphasized that she had dissipated marital assets, that there was a issue of physical health and current disparity in the parties' earnings which was enough to justify the disparity.

In Schatke vs. Schatke, 520 N.W.2d 833 (N.D. 1994), Mr. Schatke complained that the property distribution the Court had made should be reversed because Ms. Schatke received more than 50% of the assets. Again, our Supreme Court emphasized that the property division need not be equal to be equitable but that it is the trial court's obligation to explain any substantial disparity. The Court then affirmed a trial court's net property award the wife of nearly twice that awarded to the husband.

Ron had every opportunity to present his case, he did so with one witness and rested. He cannot now complain. Also, the Court's application and discussion of the Ruff-Fischer factors clearly justifies the distribution.

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III. The trial court was not clearly erroneous in establishing the Defendant's Child Support amount.

Determinations of child support are findings of fact, and governed by the "clearly erroneous" standard of review. N.D.R.Civ.P. 52(a); Nelson v. Nelson, 547 N.W.2d 741, 743 (N.D. 1996); Dalin v. Dalin, 545 N.W.2d 785, 788 (N.D. 1996). The instant case presents an unfortunate problem for the trial court. The Court's admittedly had problem in determining Ron's income. Judge Foughty stated,

> Ron's earning ability has decreased because of injuries sustained in a framing accident. His reputation as a potato broker has been significantly damaged because of his own actions; of mismanagement of Big H and diverting funds from that corporate entity.
>
> Ron has provided insufficient information to the Court regarding his current expenses. ...
>
> The Court cannot rely upon Ron's veracity with respect to property which exists. He has been less than candid with the court regarding the extent of his assets. ...
>
> By his own admission, he owns, in his own name, in excess of $300,000 in unencumbered real property. ...

In fact, Ron's own brief indicates, "There was no evidence presented indicating the amount of Ron's current net monthly [income] except his own testimony". (See Appellant's Brief page 10).

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It was due to the lack of information provided by Ron, his untrustworthy conduct, and his decreased earnings due to accident, that the trial court fixed an approximate income. The Court admitted, "It is difficult to determine what the defendant's income will be. Because of his own acts his business reputation has been damaged. The Court will determine that he has the ability to earn after taxes between 2,000 -3,000 dollars...". (App. 50).

It is clear from both the record and the Findings of Fact that the trial court attempted to determine the net worth of the defendant and his earning ability. The Court was then forced to make a determination as to earning ability based on these finding due to a lack of credible information from Ron. Deference must be given to the trial court's determination in this situation and it should not be over-turned unless it is clearly erroneous.

Ron had the record was clear that at the time of trial, great deal of assets, both real and personal. He also working at the time to a limited extent on the farm and as a potato broker. Based on these finding, it is not clearly erroneous for the trial court to approximate the his income ability at $2,000 - $3,000 and order the corresponding guideline amount.

If Ron truly believed the Court was incorrect, he always has the option of filing a request for review and modification.

IV. Renae should be awarded the attorney's fees and costs which she has incurred in this appeal.

NDCC Section 14-05-23 authorizes this Court to award attorney's fees in divorce litigation at any stage of the proceeding.

The principal standard for an award of attorney's fees are one spousal's needs and the other spouse ability to pay.

In addition, this Court can consider the conduct of the parties through litigation and whether it increased the fees. See: Pozarnski vs. Pozarnski, 494 N.W.2d 148 (N.D. 1992).

Renae had incurred substantial attorney's fees; both in the underlying proceeding and because of this appeal. She respectfully asks that this Court remand the issue of the award of attorney's fees to the trial judge.

CONCLUSIONS

Renae respectfully asks that this Court affirm the trial judge's decision and remand this matter for a determination of an appropriate award of attorney's fees.

DATED this 21 day of April, 1998.

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STATE OF NORTH DAKOTA

STATE OF MINNESOTA)
) SS
COUNTY OF POLK)

AFFIDAVIT OF SERVICE BY MAIL

RE: ***Renae L. Monson vs. Ronald L. Monson***

SUPREME COURT NO. 980006
DISTRICT COURT NO. 330

The undersigned, being first duly sworn, says that a copy of the attached:

Brief of the Appellee

was served upon:

Thomas V. Omdahl
Attorney at Law
424 Demers Avenue
Grand Forks, ND 58201

by enclosing the same in an envelope addressed to such party at the above address with postage fully prepaid and depositing said envelope in a United States Postal Service mailbox at East Grand Forks, Minnesota on the 27th day of April, 1998.

Lynette Joraanstad
Lynette Joraanstad

Subscribed and sworn to before me on this 27th day of April, 1998.

JEANNE A. PETERSON
NOTARY PUBLIC - MINNESOTA
POLK COUNTY
My Commission Expires Jan. 31, 2000

Jeanne A. Peterson
Notary Public
Polk County, Minnesota
My Commission Expires: 1-31-2000

(AFFS-RM.doc/Patti10-98jp)