

OCT 18 99

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

990277

Nora Weigel,

Plaintiff/Appellee,

vs.

Robert Weigel,

Defendant/Appellant.

SUPREME COURT NO. 990277

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

OCT 18 1999

STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
MORTON COUNTY CIVIL NO. 96-C-1610  
THE HONORABLE ROBERT O. WEFALD

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BRIEF OF THE APPELLANT

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**STATEMENT OF THE ISSUES**

1. **WAS IT CLEARLY ERRONEOUS FOR THE TRIAL COURT TO AWARD SPOUSAL SUPPORT FOR A TERM OF SIX YEARS, FOLLOWING A MARRIAGE THAT LASTED LESS THAN THREE YEARS?**
  
2. **IN A SHORT TERM MARRIAGE, WAS THE PROPERTY DIVISION GIVING NORA ONE-HALF THE EQUITY FROM THE PROCEEDS OF ROBERT'S PRE-MARITAL HOME CLEARLY ERRONEOUS?**

## STATEMENT OF THE PROCEEDINGS

Robert Weigel appeals from a judgment of separation from Nora Weigel dated July 29, 1999, challenging the award of spousal support and the division of property.

This case was originally tried to the Honorable Dennis A. Schneider on August 14-15, 1997. Judge Schneider issued his memorandum opinion on December 16, 1997. Judge Schneider signed findings of fact proposed by both parties and then at a subsequent hearing, vacated the amended and original findings of fact, conclusions of law and orders for judgment and the amended and original judgments. Then on February 26, 1998, Judge Gail Hagerty, although not the trial judge and not having certified that she reviewed the record, signed a new findings of fact, conclusions of law and order for judgment. That judgment was entered on March 3, 1998.

Robert appealed that judgment raising issues of property division, spousal support and denial of due process: a violation of Rule 63, North Dakota Rules of Civil Procedure. The Supreme Court, by judgment dated March 24, 1999, reversed the separation judgment and remanded the matter back for proceedings to comply with Rule 63, North Dakota Rules of Civil Procedure.

The case was assigned to Judge Robert O. Wefald who filed his Rule 63 certification by successor judge (App. p. 18), and subsequently issued his findings of fact, conclusions of law and order for judgment (App. p. 20), and ultimately the judgment on July 29, 1999 (App. p. 36).

### STATEMENT OF THE FACTS

Robert and Nora were married on November 27, 1993 (Tr. p. 4, line 3). Robert and Nora had no children together, but Nora brought three children into the marriage. Robert adopted the youngest child, Charlotte who is six years old. Nora's other two daughters were fifteen and sixteen years of age at the time of the separation (Tr. p. 5, lines 16-22). These older daughters receive \$161.00 in child support from their natural father, which Nora gives directly to them for spending money (Tr. p. 57, lines 2-13).

When Nora filed for separation on October 30, 1996, (App. p. 5), the parties had been married less than three years. Both Robert and Nora are Jehovah's Witnesses (Tr. p. 6, line 8). Nora was 36 years old (Tr. p. 6, line 13), and Robert was 44 years old (Tr. p. 151, line 11). The parties had discussed their respective roles in the marriage according to their religious viewpoints (Tr. p. 8, line 17). Robert was to be the provider and Nora would continue to pioneer (Tr. p. 162, line 25), and be the caretaker of the children and the home (Tr. p. 8, line 23). She would be staying at home caring for her three children, including the child adopted by Robert. Before the marriage, Nora did daycare in the home (Tr. p. 9, line 10); she did nothing else (Tr. p. 9, line 12). She also did daycare for a short period after they were married (Tr. p. 9, line 19). At the time the parties met, Nora was pioneering which was full-time voluntary ministry, 60-90 hours per month (Tr. p. 162, line 9).

Robert is employed with Bridgeman Dairy, first in Grand Forks for over 15½ years and following a short layoff, resumed again in Bismarck several months before their marriage (Tr. p. 152, line 14).

The parties bought a home in Mandan three months after the marriage using proceeds

from Robert's home sale in Grand Forks (Tr. p. 101, line 2). Nora made no contribution (Tr. p. 100, lines 19-24). These net proceeds from the sale of the home in Mandan were deposited with the clerk on January 6, 1998 (App. p. 22).

During the course of the marriage, Nora enrolled in a massage therapy correspondence course (Tr. p. 36, line 19; Tr. p. 38, line 12) with vague plans to either start her own business or work for someone else (Tr. p. 37, line 23). The course was expected to take about three years (Tr. p. 38, line 6). Nora works part-time for a janitorial service and for a school (Tr. p. 41, line 24; Tr. p. 42, line 7). She is not looking for full-time work because she wants to continue to home-school her two older daughters (Tr. p. 43, line 2). She plans to send Charlotte, Robert's adopted daughter, to public school (Tr. p. 46, line 8). Nora works her "on call" jobs and earns approximately \$65.00 per month. (Tr. p. 99, lines 19-25).

Nora testified about some incidents she claimed to be domestic violence (Tr. p. 15, line 17; Tr. p. 23, line 3), while Robert countered with his own explanations (Tr. pp. 168, 169, 170).

### **LAW AND ARGUMENT**

**1. WAS IT CLEARLY ERRONEOUS FOR THE TRIAL COURT TO AWARD SPOUSAL SUPPORT FOR A TERM OF SIX YEARS, FOLLOWING A MARRIAGE THAT LASTED LESS THAN THREE YEARS?**

"A finding of fact is clearly erroneous under North Dakota Rules of Civil Procedure 52(a) only if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support

it, on the entire evidence the court is left with a firm conviction that a mistake has been made."

VanKlootwyk v. VanKlootwyk, 1997 ND 88, 563 N.W.2d 377, 379-380.

The Ruff-Fisher guidelines are applicable to both property division and spousal support. Lohstreter v. Lohstreter, 1998 ND 7, 574 N.W.2d 790, 795.

There are two types of spousal support: Permanent and rehabilitative. VanKlootwyk, at 379. This court has adopted the "equitable doctrine" of rehabilitative spousal support as opposed to the "minimalist doctrine". Id. at 380. The "equitable doctrine" tries to enable the disadvantaged spouse to obtain "adequate" self-support after considering the standard of living established during the marriage, the duration of the marriage, the parties' earning capacities, the value of the property, and other factors. Id. at 380. Gierke v. Gierke, 1998 ND 100, 578 N.W.2d 522.

"Rehabilitative spousal support is intended to restore an economically disadvantaged spouse to an independent status or to equalize the burden of the divorce."

Lohstreter at 795.

The amended interim order in December 1996, ordered Robert to pay spousal support in the amount of \$600.00 per month in addition to his child support payments (App. p. 14). The Trial Court in its order on remand memorandum opinion (App. p. 20) determined that the amended interim order would continue in force until the judgment was effective. At the time the new judgment became effective, Robert had already paid almost three years spousal support. The new judgment ordered Robert to pay spousal support in the amount of \$500.00



per month for three years commencing in August 1999 (App. p. 37). The end result is that Robert, from a marriage of less than three years, will be paying spousal support for almost six years. Of his monthly net income of \$2,227.00 (App. p. 33), Robert is paying \$443.00 per month in child support (App. p. 33) and \$500.00 per month in spousal support (App. p. 34), together with one-half of Nora's attorney's fees (App. p. 34), one-half of the net proceeds from the sale of the home in Mandan, \$16,277.87, (App. p. 22) and the guardian ad litem fees (App. p. 22). This is a man who came into a marriage owning a home and personal property with no children, and in less than three years, he had an adopted daughter, was separated, had to give one-half of his real property and almost all of his personal property away, as well as pay a long list of debts, his attorney fees, one-half of her attorney fees, and is burdened with six years of spousal support, together with the full spectrum of child support and the cost of visitation until the adopted daughter turns 18 years of age (App. p. 36). This is not equitable based upon the facts of this case.

a. **Nora was not disadvantaged in this marriage.** In *VanKlootwyk* at 380, this Court indicated that:

"... a spouse is 'disadvantaged' who has foregone opportunities or lost advantages as a consequence of the marriage and who has contributed during the marriage to the supporting spouse's increased earning capacity. . . . A valid consideration in awarding spousal support is balancing the burdens created by the divorce."

Nora did not forego any opportunities. She was not working outside the home before the marriage, but was doing pioneering, volunteering 60-90 hours per month (Tr. p. 162, line 9). She was doing some daycare in her home, both before the marriage (Tr. p. 9, line 10) and

during the marriage for about one year (Tr. p. 35, line 22). She enrolled in a massage therapy correspondence course during the marriage (Tr. p. 36, line 19; Tr. p. 38, line 12). She was not looking for full-time employment outside the home, but wanted to stay home and continue to home-school her children (Tr. p. 43, line 2). She is not looking for full-time work because she wants to continue to home-school her two older daughters (Tr. p. 43, line 2). The children that are home-schooled are not Robert's children. Nora's youngest child, Charlotte, who Robert adopted, is six years of age, was not in school and it is Nora's intent that this child go to public school (Tr. p. 46, line 8).

There is no evidence that Nora contributed to an increase in Robert's earning ability. He had the same employer, did not change job descriptions, did not get more education or training, or acquire any skill that enhanced his income.

**b. Nora's needs and Robert's ability to pay.**

"An award of spousal support must be made in light of the disadvantaged spouse's needs and the supporting spouse's needs and ability to pay."

Young v. Young, 1998 ND 83, 578 N.W.2d 111, 113.

The Court made no finding as to Nora's needs or Robert's ability to pay. No rationale was given for amount, term, or need for support. The Court simply decided that "... to achieve equity in the division of the marital estate, to take into account Robert's conduct, and recognize the differences of earning ability between Robert and Nora, Robert shall pay spousal support for a period of time. Although Nora testified about her plans to become a massage therapist, whether or not that becomes her job, she will be disadvantaged for a period of time as a result of this marriage." (App. p. 31). That is not a determination with

any specificity or rationale as the disadvantaged spouse's needs or the supporting spouse's ability to pay. She had nearly three years of spousal support at \$600.00 per month and did nothing to rehabilitate herself. Why is she getting an additional three years of spousal support at \$500.00 per month? What is she rehabilitating? Prior to this marriage, she had nothing, she did nothing and she is not doing anything now. Nora incurred no burden as a result of this separation.

c.     **Short-term marriage.** This was a short-term marriage; less than three years. It was short in quality as well as length. It began to break down due to religious differences (App. p. 27). It had already disintegrated before the domestic violence (App. p. 26).

This short interruption in Nora's life did not cause any disadvantage, only advantage. Nora brought nothing to the marriage, other than three children, one of whom Robert adopted. He supported the other two for almost three years. Nora gave up no career and continued to home-school as she had done before the marriage. The parties have very little property other than what Robert brought to the marriage, including equity from his prior home.

d.     **Conduct of the parties.** Although the Court found domestic violence had occurred, it does not tell us what that domestic violence was (App. p. 24). The memorandum opinion (App. p. 22) does not help. The Court also determined that their common religion and different reactions to that religion contributed to the break-up of the marriage (App. p. 27). Although domestic violence is defined by statute, § 14-07.1-01, N.D.C.C., the spectrum of the underlying facts may vary greatly in degree, frequency and severity. Domestic violence to one person may not be domestic violence to another. Without setting forth its rationale

as to quality and quantity of this domestic violence, a reviewing Court is unable to determine the degree of that domestic violence and whether it warrants the ultimate Ruff-Fisher weight given to it by the Trial Court.

Rule 52, North Dakota Rules of Civil Procedure provides in part that:

"Findings of fact. . .shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Trial Court to judge the credibility of witnesses." [emphasis added].

In this case, the judge certified that he had read the transcript. The Court did not observe the testimony of any of the witnesses or parties with regard to any facts, including domestic violence. It did not have the opportunity to judge their demeanor, credibility, exaggeration or truthfulness. The Court's conclusion of domestic violence does not set forth any supporting facts, only a conclusion. It is interesting to note that Judge Schneider, in his memorandum opinion (App. p. 10), makes no mention of domestic violence. He was the judge who, under Rule 52(a), observed the parties.

Robert had his own explanation and version of the incidents described as domestic violence (Tr. pp. 168-172) and evidence of Nora's abusive actions appear in the transcript (Tr. p. 108, line 9; Tr. p. 109, line 2; Tr. p. 110, line 3). Both parties may have inflicted domestic violence to some degree. Both should bear the burden or penalty, not just Robert. Conduct of the parties is only one factor. *Ratajczak v. Ratajczak*, 1997 ND 122, 565 N.W.2d 491.

Additionally, the Court finds that the religion fall-out contributed to the break-up of the marriage. It then indicates that this difference in religious opinion should be blamed on

Robert and the Ruff-Fischer guidelines weighted accordingly in Nora's favor (App. p. 28). Why is Robert being blamed for religious differences? Who is to judge whether Robert's or Nora's religious views are right or wrong? This is especially important when the judge is not part of that same religion.

Misconduct of the parties, if any, as it relates to spousal support, may be limited to economic misconduct. *Erickson v. Erickson*, 384 N.W.2d 659, 662-663 (N.D. 1986). Here there is no evidence of economic misconduct by Robert. He provided for his wife; her three children, one of whom he adopted; worked; and contributed all of his property.

In this case, two different District Court Judges at different times had looked at the facts. One District Judge, Judge Schneider, had originally ordered spousal support for a three-year period at the rate of \$600.00. On remand, the second District Judge who did not see the parties, added an additional three years spousal support. The facts did not change at all in that time since the second judge relied on the transcript of the first trial. Obviously, what may be equitable to one person may not be equitable to another person, but the disparity between these two District Judges based upon the same facts, lends clear support that someone is making a mistake.

**2. IN A SHORT-TERM MARRIAGE, WAS THE PROPERTY DIVISION GIVING NORA ONE-HALF THE EQUITY FROM THE PROCEEDS OF ROBERT'S PRE-MARITAL HOME CLEARLY ERRONEOUS?**

The same standard of review, clearly erroneous, and the same guidelines, Ruff-Fisher, apply to the property division as they do to the spousal support issue. *Lohstreter* at 795.

a. **Nora should not receive one-half of the equity from the home purchased with Robert's pre-marital equity.** The parties' home was purchased about three months

after they were married with proceeds from the sale of Robert's pre-marital home in Grand Forks (Tr. p. 100, line 17; Tr. p. 100, line 23). Nora made no contribution (Tr. p. 100, line 19). Robert had worked for sixteen years to buy his home in Grand Forks (Tr. p. 178, line 12). The separation judgment and judgment of 7/29/99 ordered the home in Mandan which had been purchased with the pre-marital proceeds to be sold and the equity split (App. p. 37).

The Court's decision of the home equity was clearly erroneous. The Court found that "their home and some of the personal property was acquired after they were married. Robert brought more property into the marriage than Nora. Application of this factor does not favor either party." (App. p. 27). The Court failed to recognize the house was purchased three months after the marriage with the proceeds from Robert's pre-marital home. The Court decided that the short marriage did not favor a greater split to either party (App. p. 26). A short marriage is a factor when one party brings in all the property. It is not fair to divide it equally. The Court recognized this concept as to Robert's retirement. "Given the short duration of the time the parties lived together as husband and wife, the Court finds it is equitable that Robert's pension plan should not be divided and should be retained by Robert." (App. p. 30). The same equities apply to the home purchased in Mandan with pre-marital home sale proceeds.

The only factors of the Ruff-Fisher guidelines that the Court determined were the earning ability of the parties, the conduct of Robert, and their differences in religion which he found favored Nora. It did not consider the short-term marriage as a factor or that Robert brought the home to the marriage. Additionally, although the marriage lasted for approximately three years, the quality of the marriage was of a much shorter duration. The

Court specifically found "... this family never really came together as a family unit." (App. p. 28). This apparently was because of a miscue between the two of them on their religious beliefs. Yet the Court blamed their dispute in religion on Robert and gave this factor to Nora.

b. **Attorney's fees.** Judge Schneider's Amended Interim Order of December 6, 1996 (App. p. 17), at paragraph XI provided that each party shall be responsible for their own attorneys' fees and expenses to date. Judge Wefald determined on remand that this Amended Interim Order remains in effect until a final determination (App. p. 20). Judge Wefald apparently adopted Judge Schneider's ruling that each party would be responsible for their own attorneys' fees to the date of amended interim order, December 6, 1996. However, in his final order, Judge Wefald awarded Nora one-half of her attorney's fees including the period of 10/25/96 through 10/31/96 (App. p. 51). Although the amended interim order is not a final judgment, it seems that both judges felt that it was dispositive of the issue of attorney's fees prior to the date of the amended interim order. Additional attorney's fees after the date would then be subject to final judgment determinations.

c. **Summary of property division.** The Court's property division is clearly erroneous. Considering the Ruff-Fisher guidelines, this was a short-term marriage of less than three years. The majority of the assets came from Robert's pre-marital efforts, including a home he sold in Grand Forks, which was rolled into the new home in this marriage. Nora made no contribution to the pre-marital home or to the new home in Mandan.

Additionally, the Court blamed Robert for the break-up of the marriage based on their different reactions to their common religion and erroneously found that the home was "acquired" during the marriage, although it was acquired three months after the marriage with pre-marital assets.

### CONCLUSION

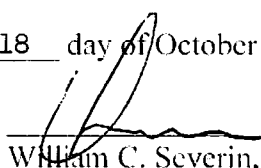
The property division and the spousal support awards are clearly erroneous. There was no apparent consideration given to the source of the assets. Robert's prior home equity or to the extremely short marriage in time and quality.

The overall equity must be considered. If the Ruff-Fisher guidelines are to be applied to both spousal support and property division, then the result of that application should again be reviewed to determine the equity. Four hits at the same target (Robert), spousal and child support, property division, and attorney's fees do not result in final equity in this case, but in punishment. Punishment either because of a religious conflict or some undefined level of domestic violence.

Based upon the entire evidence, there is a compelling and nagging conclusion that a mistake has been made. The results of the combined support and property division are not equitable.

Robert respectfully asks this Court to modify the lower Court's judgment to end spousal support, to award Robert all proceeds from the sale of the home which represents the sale of his pre-marital home, return of all his pre-marital personal property, to cancel the award of attorney's fees to Nora, to order reimbursement of the monies already paid in property division and attorney's fees, and such other relief that may be equitable.

Respectfully submitted this 18 day of October 1999.



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**CERTIFICATE OF SERVICE**

True and correct copies of the **BRIEF OF THE APPELLANT** and **APPENDIX** were mailed to the following this 18 day of October 1999:

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