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IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20000121

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

OCT 13 2000

STATE OF NORTH DAKOTA

Gregory Ian Runge,)
)
 Appellant,)
)
 vs.)
)
Karen Kathleen Runge,)
)
 Appellee.)
)

APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY CIVIL NO. 99-C-1085
THE HONORABLE RONALD L. HILDEN, PRESIDING

BRIEF OF THE APPELLEE

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STATEMENT OF THE ISSUES

- I. Did the trial court make findings of fact and conclusions of law?
- II. Is the trial court's property and debt division erroneous?
 - A. Did the trial court ignore debts in Greg's name?
 - B. Are the trial court's findings of fact concerning the value of assets erroneous?

STATEMENT OF CASE

Karen Runge adopts Greg Runge's statement of the case.

STATEMENT OF THE FACTS

The factual issues in this case revolved around the parties credibility. In this regard, each party submitted to the court a post-trial brief outlining his or her version of the facts. After hearing all of the evidence, the trial court found Karen's testimony to be more credible than Greg's. The evidence in the record supports the trial court's factual findings.

The trial evidence established that Greg acted in bad faith concerning identifying and valuing the parties' property and debts. Although there are multiple examples of Greg's bad faith, a few are highlighted below to fully inform this Court as to why the trial court disregarded Greg's valuation of the marital property and debts and accepted Karen's valuations.

During the pretrial preparations, Greg and his counsel failed to timely and adequately disclose two expert witnesses. (Transcript of September 30, 1999 hearing ("T") at 5-6; 14.)

Greg failed to list all of the personal property in his possession on the Rule 8.3 property and debt listing. (T at 106.) Personal property, including new furniture, acquired by Greg after separation was purposefully left off the property and debt listing. (T at 106, 121-122.) Karen knew Greg had purchased a new compact disc cabinet after they separated. She listed the cabinet on the property and debt listing under Greg's office furniture. Greg failed to value the item

because it was at his home rather than his office. (T at 119; 203-204.) Greg admitted his actions were not fair to Karen. (T at 204.) Greg failed to list financial accounts held in his name. (T at 168.) Greg failed to list all of the office equipment and furniture located at his office. (T at 184-185.)

As part of the discovery process, Greg provided Karen with values for his law office equipment and furniture. (T at 189-192; Exhibit G.) As part of his testimony to the court, and on the property and debt listing, Greg lowered the values of several items. (T at 192-196.)

Greg listed as a debt quarterly payroll taxes already paid or not yet due. (T at 147-148.)

Greg testified he should be awarded his insurance policies because they were needed for possible viatical purposes (T at 73), but then disingenuously testified the policies were debts with no value. (T at 170-176.)

Greg valued Karen's 1984 Buick as being worth \$2000 at the time of the trial even though in 1995, almost five years earlier, Greg represented to the Social Security Administration, under threat of criminal penalty, that the car was only worth \$1,500. (T at 179-181.)

During the hearing and as part of the property and debt listing, Greg valued his car, a 1993 GMC Jimmy, as being worth \$6,775 even though earlier in the case he submitted an affidavit to the court valuing the vehicle at \$11,000. (T at

182; Property and Debt Listing; Exhibit B.)

After the divorce started, but before trial, Karen withdrew \$4,185.24 from her Medcenter One Pension Plan. Greg was provided with a full accounting as required by law. (Appendix ("A") at 16.) The funds were used to pay attorney fees and for living expenses. (A at 16.) During trial Greg criticized Karen for withdrawing the money from her pension. Greg admitted, however, that prior to trial, he chose to purchase new furniture rather than pay his court ordered spousal support. (T at 204.) He also admitted that he withdrew money from a financial account and that he did not provide Karen with an accounting of the withdrawal as required by law. (T at 169.) Greg did not list the amount he withdrew as an asset to be divided.

Karen conducted pretrial discovery. Greg provided his valuation of the property as part of his answers to interrogatories. During his testimony and as part of the property and debt listing, Greg testified that some of the property was worth less than he previously said it was worth. (T at 178) (value of Christopher Runge promissory note); 194 (value of leather bound books); 195-96 (cherry wood desk and hutch); 196 (fish tank); 202 (value of judgments).

The evidence at trial established that Greg was not credible concerning the value of the parties' property and debts.

After listening to all of the testimony from the parties and their witnesses,

reviewing multiple exhibits, including the parties' Rule 8.3 property and debt listing, and receiving written briefs from the parties, the trial court made factual findings as to the proper value of the parties' marital property and debts. The trial court then equitably divided the property by awarding Karen net assets of \$34,306.01 and Greg net assets of \$35,824.67. The trial court awarded Greg slightly more than one half of the marital assets listed on the parties Rule 8.3 property and debt listing. Greg's award, was actually higher because he failed to list on the property and debt list items of property acquired after the parties separated but before the trial, and he failed to list all of the equipment and furniture located at his law office.

STANDARD OF REVIEW

Upon granting a divorce¹, the trial court is required by N.D.C.C. § 14-05-24 to make an equitable distribution of the marital estate. Gibbon v. Gibbon, 1997 ND 210, ¶ 6, 569 N.W.2d 707. All of the real and personal property accumulated by the parties, regardless of the source, must be included in the marital estate. Gaulrapp v. Gaulrapp, 510 N.W.2d 620, 621 (N.D.1994). There is no set formula for dividing a marital estate, but the trial court must equitably divide the property, based upon the circumstances of the particular case. Nelson v. Nelson, 1998 ND 176, ¶ 6, 584 N.W.2d 527.

A property distribution need not be equal to be equitable, but a substantial disparity must be explained. Fisher v. Fisher, 1997 ND 176, ¶ 15, 568 N.W.2d 728. A homemaker's contributions deserve equivalent recognition in a property distribution upon dissolution, Young v. Young, 1998 ND 83, ¶ 15, 578 N.W.2d 111, and a lengthy marriage generally supports an equal division of all marital assets. Glander v. Glander, 1997 ND 192, ¶ 11, 569 N.W.2d 262. The court's valuation and division of property are findings of fact and will not be reversed on appeal unless they are clearly erroneous under N.D.R.Civ.P. 52(a). Wilhelm v. Wilhelm, 1998 ND 140, ¶ 11, 582 N.W.2d 6. A finding of fact is clearly erroneous 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, we are left with a

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As noted in the Judgment, in this case the parties requested the trial court order a permanent legal separation under N.D.C.C. ch. 14-06. This Court has previously recognized that the rules pertaining to the division of property are the same in a separation action as in a divorce action. Thus a division of property at the time the separation judgment is issued must be an equitable one. Fedora v. Fedora, 403 N.W.2d 10, 14 (N.D. 1987).

definite and firm conviction a mistake has been made.
Keller v. Keller, 1998 ND 179, ¶ 10, 584 N.W.2d 509.

Fox v. Fox, 1999 ND 68, ¶¶ 6 & 7; 592 N.W.2d 541, 544-545.

The trial court's valuation and division of the marital property are presumed to be correct unless Greg meets his burden of showing the trial court's valuation and division are clearly erroneous. Zuger v. Zuger, 1997 ND 97, ¶6; 563 N.W.2d 804, 807.

ARGUMENT AND LAW

I. THE TRIAL COURT MADE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Greg argues the trial court did not make findings of fact or conclusions of law. Greg is mistaken. The trial court valued all of the parties assets and debts and then distributed the assets and debts nearly equally. Furthermore, the trial court indicated it was adopting, for the most part, Karen's proposed property and debt allocation. Karen's post-trial brief, which was incorporated by reference in the trial court's decision, provides further support for the trial court's valuation and division of the parties' assets and debts.

II. THE TRIAL COURT'S PROPERTY AND DEBT DIVISION IS NOT ERRONEOUS.

Karen believes Greg is challenging the trial court's division of debt because he believes he should have received one half of the equity in the marital

home, in addition to the property awarded to him by the trial court.

Based on the post-trial briefs of the parties, the parties basically agreed as to the distribution of the assets and debts, except for the marital home.

The parties' three major financial assets are the marital home, Karen's retirement account and Greg's law office. Greg contends his law office is not an asset but only a debt.²

The trial court awarded Greg his law office and awarded Karen the marital home. The trial court equally divided Karen's retirement account.

Greg requests this Court reverse the trial court decision and remand this case for: 1) a new trial; 2) factual findings; or 3) for a redistribution of the property.

Greg is not entitled to a new trial. All of the valuation issues were fully litigated during the first trial.

A remand for further factual findings is not warranted. As is explained below, the trial court's decision making process is evident from the trial court's decision. In any event, a remand would not serve any purpose because the only real dispute between the parties is the award of the marital home. The trial court

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On the 8.3, Greg claimed his law firm had an asset value of \$2,233.00. Greg claimed his law office had debts of \$3,217. Additionally Greg claimed he owed the IRS and the North Dakota Tax Department \$4,400 for unpaid taxes attributable to his business. According to Greg, even though his law office is his only source of income, it is a net liability of \$5,384.

awarded the marital home to Karen. Greg believes the trial court should have awarded one half of the home to him, in addition to his law practice and one half of Karen's retirement account. As outlined below, Greg's request is improper because the trial court properly considered the testimony of the parties and equitably distributed the marital property and debts.

A. The Trial Court Did Not Ignore Debts In Greg's Name.

Greg contends that the trial court ignored some of the debts in his name.

Greg's contention is mistaken. The Rule 8.3 property and debt listing lists twenty-one debts:

189	Fleet Mortgage Group	AWARDED TO KAREN
190	Sears	AWARDED TO KAREN
191	Medcenter One	AWARDED TO KAREN
192	Q & R Clinic	AWARDED TO KAREN
193	Kapsner & Oliver	EACH SIDE PAY OWN ATTORNEY
194	William Ford Student Loan	EXPLAINED BELOW
195	Community Credit Union	AWARDED TO GREG
196	Social Security	AWARDED TO GREG
197- 201a	Prudential Insurance Policies	EXPLAINED BELOW
202	Karen's Parents	EXPLAINED BELOW
203	Greg's Parents	EXPLAINED BELOW
204	Discover Credit Card	AWARDED TO GREG
205	Internal Revenue Service	EXPLAINED BELOW
206	N.D. State Tax Department	EXPLAINED BELOW
207	John Emter	AWARDED TO GREG
208	Dr. Ted Becker	AWARDED TO GREG
209	Deborah Carpenter	EACH SIDE PAY OWN ATTORNEY

1. William Ford Student Loan.

Greg's portion of the 8.3 property and debt listing included student loan debt in the amount of \$86,137. As part of this appeal, Greg argues that the trial court erred in not giving him credit for this debt.

Although not explicitly stated in the trial court's decision, the trial court did not include Greg's loan as a debt because the testimony at trial established that, due to Greg's illness, the debt will be forgiven and Greg will not have to repay this loan.

As noted in the deposition testimony of Dr. Nicholas H. Neumann, Greg has a serious, life-threatening condition. Dr. Nicholas testified that if Greg does not receive a lung transplant, his condition likely will cause his death in two years. (T at 165.) Even with a lung transplant, Greg's likely life expectancy is only five years. (T at 165.)

Greg testified that one of two things will occur based on his medical condition. First, his health will deteriorate to the point that he will no longer be able to work. If that happens, he will go on disability benefits. Greg testified that he had already been advised to apply for social security benefits. (T at 153.)

The second option is that Greg will receive a lung transplant. Greg testified that if this occurs he will be unable to work and will need to apply for social security benefits. (T at 206.)

Under the regulations for the William Ford Loan program, based on his health condition, Greg will not be required to repay his student loan. Exhibit I is 34 C.F.R. 685, William D. Ford Federal Direct Loan Program. 34 C.F.R. 685.212 provides:

- (a) Death. If the Secretary receives acceptable documentation that a borrower . . . has died, the Secretary discharges the obligation of the borrower and any endorser to make any further payment on the loan.
- (b) Total and permanent disability. (1) If the Secretary receives acceptable documentation that a borrower has become totally and permanently disabled, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan.

34 C.F.R. 685.212.

Based on Greg's testimony and the federal regulations for the loan program, the trial court properly concluded that Greg's student loan debt will not be repaid by either party and, therefore, should not be included as a debt of the marriage. The trial court's determination was not clearly erroneous.

2. Prudential Insurance Policies.

The parties disagreed on whether the Prudential life insurance policies were a financial asset or debt. Greg requested that the court award to him his life insurance policies so he could use them to pay for his lung transplant. Despite this request, Greg disingenuously maintained that the policies were debts and not assets.

Karen maintained, and the trial court properly found, the Prudential policies are an asset based on the small cash value of each policy. The trial court awarded Karen's policies and two of Greg's policies to Karen and awarded two of Greg's policies to Greg. Each policy was included as an asset based on the policies cash value at the time of trial. The trial court's determination was not clearly erroneous.

3. Debts To Karen's And Greg's Parents.

Both parties testified that during the marriage their parents contributed money and other support to their marriage. Karen Testified her parents provided food and provided cash contributions, including an investment of over \$5,000. (T. at 242) The testimony indicated the debts to the parties' parents were moral and not legal obligations. The trial court recognized the contingent nature of the debt and ordered that each party be responsible for the moral obligations to his or her parents. The trial court's determination was not clearly erroneous.

4. Debt To IRS And North Dakota State Tax Department.

The trial court did not ignore Greg's claimed debt to the IRS and North Dakota Tax Department. Rather, the trial court properly found, based on Greg's testimony, that Greg did not, at the time of trial, have any debt to the IRS and North Dakota Tax Department. (T at 147-148.)

It appears that what Greg listed as a debt was a guess as to what his end of the year tax obligation would be. Greg computed this guess, not based on his year-

to-date 1999 income, but rather, based on his 1998 income. Greg's expected 1999 income, however, was significantly lower than his 1998 income. (T. at 209, 210.) Greg testified he did not know whether he was going to get a refund or owe more at the end of the year. (T. at 211.)

The trial court properly concluded that Greg did not establish that his tax figures were accurate. The trial court's findings were not clearly erroneous.

B. The Trial Court's Findings Of Fact Concerning The Value Of Assets Was Not Erroneous.

1. Greg's Books.

Greg owns approximately 250 Eaton Press books. Testimony at trial indicated that these books were purchased new by Greg for approximately \$45.00 each, including shipping. (T. at 12.) Greg continued to receive and pay for these books up to the eve of trial. (T. at 200.)

During the hearing, Greg claimed that these 250, leather-bound, brand new books, had only sentimental value. Karen valued the books at \$35.00, each based on their new price, the excellent condition of Greg's books, and the fact that Eaton Press continues to sell and distribute these books.

The trial court heard the testimony and agreed with Karen's valuation.

The trial court's finding is not clearly erroneous.

2. Law Practice.

Like with his books, Greg claimed his law practice had no value. Karen, on the other hand, after inspecting the contents of the law office and based on Greg's answers to interrogatories, listed an asset value of just over \$30,000. (8.3 Property and Debt Listing.) Karen's valuation did not include good will for the business and did not include items which Greg failed to put on the property and debt listing.

Greg objects to the trial court's refusal to accept his testimony that his law office had no value. Greg's expert, however, had never previously done a written evaluation for a law office. (T. at 25.) On the other hand, the trial court indicated that after twenty-five years, he had a pretty good idea of what a law practice is worth. (T. at 14.)

After hearing the evidence, the trial court adopted Karen's valuation. The trial court's determination was not clearly erroneous.

3. Retirement Conversion

As noted above, during the pendency of this case, Karen was forced to make a withdrawal from her retirement account to pay attorney fees and living expenses. Greg was provided with an accounting. Greg insisted that he should be entitled to credit for half of the withdrawal. Greg provides no legal support for his position.

Rule 8.4, North Dakota Rules of Court, indicates that the parties to a

divorce may dispose of property for necessities and to pay attorneys. The Rule also requires that an accounting be given to the other spouse. Karen complied with the Rule. The trial court's decision not to give Greg a credit was not clearly erroneous.

CONCLUSION

The trial court's findings of fact are support by the evidence in the record. The trial court's judgment should be affirmed.

Dated this 13th day of October, 2000.



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