

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20080174

Christopher A. Lindberg,

Plaintiff and Appellant

v.

Sherri L. Lindberg,

Defendant and Appellee.

BRIEF OF APPELLEE

Supreme Court No. 20080174

District Court No. 09-03-C-03902

FILED
IN THE OFFICE OF THE
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STATE OF NORTH DAKOTA

Appeal from the Findings of Fact, Conclusions of Law, and Order for Judgment
entered May 14, 2008; and from the Judgment and Decree
entered May 16, 2008

Cass County District Court - East Central Judicial District
The Honorable Cynthia Rothe-Seeger, Presiding

STEPHEN R. DAWSON

Dawson Law Office

2108 South University Drive, Suite 103

Fargo, ND 58103

(701) 293-3400

Attorney for the Appellee

Attorney Registration Number - 04638

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STATEMENT OF THE ISSUES

1. Whether the trial court was justified in awarding Sherri sole, physical custody of the minor children.
2. Whether the trial court erred in awarding Sherri spousal support.

STATEMENT OF THE CASE

Christopher A. Lindberg (hereinafter "Christopher") filed for divorce from Sherri L. Lindberg (hereinafter "Sherri") on December 5, 2008. (Appellant's Appendix pg. 9, docket 1). Christopher filed a Notice of Motion and Motion for Interim Relief and supporting affidavits on December 5, 2008. (Appellant's Appendix pg. 9, dockets 2, 3, 4, and 5). Sherri filed her Answer and Counterclaim on December 8, 2005, (Appellant's Appendix pg. 9, docket 9), and her affidavits in response to Christopher's Motion for Interim Relief. (Appellant's Appendix pg. 8, docket 10 and 11). An Interim Order was entered on December 13, 2005. (Appellant's Appendix pg. 8, docket 16). An Amended Interim Order was entered on December 20, 2005, revising the Interim Order entered December 13, 2005, by adding language regarding the pick up and drop off place. (Appellant's Appendix pg. 8, docket 18). Christopher filed a Notice of Motion for Interim Order and supporting affidavit on November 15, 2006. (Appellant's Appendix pg. 8, docket 31, 32, and 34). An Order was entered on December 7, 2006. (Appellant's Appendix pg. 8, docket 41). Christopher filed a Notice of Motion and Motion for Temporary Relief and to Amend Interim Child Support and supporting affidavits on August 31, 2007. (Appellant's Appendix pg. 7, docket 44, 45, and 46). A Second Amended Interim Order was entered on October 30, 2007. (Appellant's Appendix pg. 7, docket 56). The trial was held on

February 8, 2008, and April 8, 2008, before the Honorable Cynthia Rothe-Seeger. The Findings of Fact, Conclusions of Law, and Order for Judgment were entered May 12, 2008, and the Judgment and Decree was entered May 16, 2008.

STATEMENT OF THE FACTS

The parties married on February 4, 1994. Christopher was a member of the military service on active duty. Immediately following their marriage, Christopher was sent to Fort Benning, Georgia, for one year for military officers training and thereafter, Christopher was deployed to South Korea for another year. (Findings of Fact ¶17(d), Appellant's Appendix P77). After Christopher's return from South Korea, Sherri joined Christopher in Fort Hood, Texas, for approximately two and one-half years where their first son, M.C.L. was born in March, 1998. (Findings of Fact ¶17(d), Appellant's Appendix P77). The parties moved to Fort Benning, Georgia, for six (6) to eight (8) months with M.C.L. (Findings of Fact ¶17(d), Appellant's Appendix P77). Christopher then moved to Fort Leavenworth, Kansas, for Command Staff training for a period of six (6) weeks without Sherri and the child. (Findings of Fact #17(d), Appellant's Appendix P77). Upon completion of that training, Christopher, Sherri and the child moved to Fort Bragg, North Carolina where Sherri and the child stayed for approximately six (6) months of a one (1) year posting. (Findings of Fact ¶17(d), Appellant's Appendix P77). While living in Fort Bragg, North Carolina, the

parties second child, D.W.L., was born in November, 1999. (Findings of Fact ¶17(d), Appellant's Appendix P77).

Christopher resigned from active duty in 2000 and the parties returned to Fargo where Christopher began employment at Phoenix International in 2000, and the parties lived with Sherri's parents until February, 2001 when the parties bought a home. (Findings of Fact ¶17(d), Appellant's Appendix P78).

Sherri moved out of the marital home in September, 2004 and has lived with her parents since that time. Sherri gave birth to their third child, A.J.L. in March, 2005, at that time, Christopher signed up to help with predeployment which transferred him from Colorado National Guard to the Minnesota National Guard so he could help with predeployment for a possible mission going to Iraq. (Tr. 2/8/08, pg. 18, ln 10). Christopher volunteered for that transfer and knew that he would likely be called up on deployment probably a year later. (Tr. 2/8/08, pg. 20, ln 24-25, and pg. 21, ln 1). Prior to his deployment to Iraq, Christopher was sent to Camp Shelby, Mississippi, for six (6) months from September, 2005 to March, 2006. (Findings of Fact ¶17(d), Appellant's Appendix P78). Christopher was deployed to Iraq in March, 2006 until July, 2007. Findings of Fact ¶17(d), Appellant's Appendix P78).

Up to the parties separation in 2004, the parties had lived together as a family for approximately five (5) of the ten (10) years of marriage. (Findings of

Fact ¶17(d), Appellant's Appendix P78). Sherri has been the primary care giver of the children. (Findings of Fact ¶17, Appellant's Appendix P76).

ARGUMENT

I. The trial court did not err in awarding Sherri sole, physical custody of the parties minor children.

A finding regarding child custody is a finding of fact. 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 the witnesses.” N.D.R.Civ.P. 52(a). This Court has said, “Our scope of review on this issue [of child custody] is properly limited by the clearly erroneous rule because the trial court, which had an opportunity to listen to and observe the demeanor of the witnesses, is in a much better position to ascertain the true facts than is this appellate court, which must rely on a cold record.” Schestler v. Schestler, 486 N.W. 2d 509, 513 (N.D. 1992).

This Court has summarized its process of limited review of a trial court's custody award under N.D.R.Civ.P. 52(a), as follows: "In a divorce proceeding, the trial court must award custody of the minor children based upon a determination of the best interests and welfare of the children. The trial court is vested with substantial discretion in matters of custody and in the determination of what is in the best interests of the children. A trial court's custody determination is a finding of fact that will not be set aside on appeal unless it is clearly erroneous. A trial court's findings of fact are presumptively correct. The

complaining party bears the burden of demonstrating on appeal that a finding of fact is clearly erroneous. In reviewing findings of fact, we must view the evidence in the light most favorable to the findings. A choice between two permissible views of the evidence is not clearly erroneous. Simply because we might view the evidence differently does not entitle us to reverse the trial court. A finding of fact is clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made." Coons v. Coons, 2003 ND 115, ¶ 6, 665 N.W. 2d 60 (2003).

In the matter now before this Court, the trial court found it to be in the best interest of the three minor children that Sherri be awarded the sole, physical custody of the parties minor children.

Christopher states in his brief “[d]uring a six-month period prior to being mobilized in 2005, Chris struggled to see the children because Sherri refused visitation numerous times during that period prior to December 2005 (A3). In one month, Sherri only allowed Chris to see the children for a total of twelve hours (A2).” (Appellant’s Brief ¶12). Christopher references Appendix 3 (meaning Appendix item #3, Appendix page 12) which is his affidavit dated December 2, 2005, and Appendix 2 (meaning Appendix item #2, Appendix page 10) which is his affidavit dated September 27, 2007. Neither of these affidavits were made a part of the trial record. Sherri testified that before visitation was even

established she and her mother would drive and meet in Alexandria, and Christopher would take the two older boys. (Tr. 04/8/08, pg. 67, ln 24-25 and pg. 68, ln. 1). Further, Sherri testified she would call Christopher and tell him when she was coming down to the cities to see her sister and whether or not he would like to see the boys. (Tr. 4/8/08, pg. 68, ln. 2-4). There were times when Christopher elected not to see the children, usually dependent on his work. (Tr. 4/8/08, pg. 68, ln. 7-10).

Christopher states in his brief, "Sherri further refused to allow Chris to see the children for a period of two weeks prior to going to Iraq when he had leave for Christmas in December of 2005." (Appellant's Brief ¶13.) Sherri testified at the time of trial that "A.J.L. was nine months I believe or eight months, and I wanted him to come to the house, even both times, both situations, I said would you come to the house and you can hold A.J.L., be with him, you can spend the day with him. But as an infant, I didn't want him leaving; the other two it was fine. if they went up with Christopher to see their grandparents." (Tr. 4/8/08, pg. 65, ln. 2-8). Sherri was not denying Christopher visitation. Due to A.J.L.'s young age, Sherri wanted visitation to be in A.J.L.'s home in an environment familiar to A.J.L. A.J.L.'s contact with Christopher was minimal up to that point in time, as Christopher had transferred to the Minnesota National Guard, at his request, in

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March, 2005, when A.J.L. was just born and Christopher had moved to Minneapolis.

The Court stated that "Christopher relies on a visitation exchange at Sauk Center, MN where Sherri did not allow A.J.L. to go with him." (Findings of Fact ¶17(m), Appellant's Appendix P80). The Court found that "[a]t the time, A.J.L. was very young and really didn't know Christopher." (Findings of Fact ¶17(m), Appellant's Appendix P80). When asked about this incident at trial, Sherri testified as follows:

"[w]hen he [Christopher] came back [from Iraq], I said that's fine, take them [kids], because you've been in Iraq and it was really hot. And I said, you know, A.J.L. is not going to go this time because he was fussy, he was tired, he had just been away for the last two weekends. And we got there, and he [Christopher] took A.J.L. in the car with the boys and they sat there, and it was not forty-five minutes, it was like an hour and a half, because the boys would come into the car and say mom when are we going to go. And Christopher just sat there with A.J.L. on his lap."

No Order for custody or visitation was in place until October, 2007. The previous orders were regarding visitation during the Christmas holiday only. Nevertheless, Sherri made numerous accommodations to encourage and facilitate visitation

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between the children and Christopher. As the Court stated in its Findings of Fact “Sherri has nearly always allowed Christopher's schedule to dictate the times and places for contact.” (Findings of Fact ¶17(m), Appellant's Appendix P80). Christopher was either living in Minneapolis, training in Mississippi, or deployed to Iraq for a period from March, 2005 through July, 2007. Sherri does her best to allow Christopher visitation which she knows is in the best interests of the minor children and has reaffirmed this belief with her many accommodations to Christopher's work schedule.

Sherri does not believe that weekday overnights are in the best interests of the children. Sherri testified at trial, “I just don't feel its in the best interests of the children. They have school the next day, they are on schedules, and they've implied that to me also. I've done their homework every night with them, except now that Christopher's back he does it Tuesdays and Thursdays as much as he can get done.” (Tr. 4/8/08, pg. 98, ln. 20-25). Sherri did not say that “she would never allow Chris to keep the children overnight on a Tuesday or Thursday after Chris' repeated requests” as stated by Christopher in his Appellant's Brief, paragraph 13. Sherri testified that “I told him [Christopher] when the kids don't have school the next day that I would appreciate it. And I talked to the children about this too, that he not ask to keep them longer or over night when they have school the next day. When they don't – in fact they didn't on one Monday and

they stayed over night and he's had them until 9:00 sometimes when they haven't had school the next day. That's okay with me.” (Tr. 4/8/08, pg. 48, ln. 2-9). Sherri is more than willing to provide Christopher with extended visitation when it does not interfere with the children’s sleep and school schedule and it is in the best interests of the children.

Christopher states in the Appellant's Brief, paragraph 13, that “[d]uring trial, Chris stated he had a log twenty-eight pages long documenting all the times Sherri had refused visitation.” This log was never offered as an exhibit; it was only mentioned by Christopher during the trial. (See Tr. 2/8/08, pg. 128, ln. 12-15). The Court has no way of knowing what visitations, if any, were refused.

In the Findings of Fact, paragraph ¶17(m), the Court stated “[b]oth parties agree the current visitation schedule, pursuant to the interim order, is working well. (Appellant's Appendix P80-P81). However, Sherri testified at the time of trial, “because it's hard when they [kids] come back. There's a transition time they're frustrated sometimes, and if there's any homework that didn't get done – because I like to have [the kids] in bed by 8:00, 8:30, if I can.” (Tr. 4/8/08, pg. 47, ln. 19-22). The court adopted Sherri's proposed visitation schedule (Appellee's Appendix pg. 3) with the exception of the Tuesday and Thursday evening visitation which remained at 7:00 p.m. Christopher's visitation was only reduced by one hour every two weeks. Christopher's Tuesday and Thursday

evening visitation followed the visitation ordered in the Interim Order October 30, 2007. (Appellant's Appendix P23)

The trial court made specific findings regarding each of the best interest factors and noted: "Sherri and the children resided in Fargo with her parents since the parties separated in September, 2004. The children have lived in a stable satisfactory environment consistently with Sherri and it is desirable that the continuity be maintained." (Findings of Fact ¶17(d), Appellant's Appendix. P78-P79).

N.D.C.C. § 14-09-06.2 (1) establishes that a court, when determining issues of child custody, consider and evaluate various best interest factors. The trial court made specific findings regarding each of the best interest factors. In regards to the best interest factors the trial court found:

- a. **The love, affection and other emotional ties existing between the parents and child.** This factor favored neither party. Both Christopher and Sherri love and show affection to their children. (Findings of Fact ¶17(a), Appellant's Appendix P76).
- b. **The capacity and disposition of the parents to give the child love, affection and guidance and to continue the education of the child.** The Court is not denying that Christopher has love, affection and guidance and has the disposition to continue the education of the

child. Christopher testified to his disposition at the time of trial and the Court is aware of the same. Sherri testified that she loves her children, they have love and affection for her, and their father. (Tr. 4/8/08, pg. 55, ln. 12-19). The Court found that both parents have the capacity and disposition to give the children love, affection, and guidance and to continue the education of the children. (Findings of Fact ¶17(b), Appellant's Appendix P77). This factor favored neither party. There is no evidence that Christopher has more capacity and disposition than Sherri to give the children love, affection and guidance, and to continue their education.

c. **The disposition of the parents to provide the children with food, clothing, medical care or other remedial care and material needs.** The court found that both parents are clearly capable and disposed to do so. (Findings of Fact ¶17(c), Appellant's Appendix P77).

d. **The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.**

Christopher states that he left active military duty so that the children would have a more stable environment and that he is living in the house the two oldest children grew up in since 2000. (Appellant's

Brief ¶25). Although Christopher left active military duty in 2000, he was deployed to Bosnia from 2003 to 2004 (Tr. 2/8/08, pg. 14, ln.5-6) for a period of approximately six (6) months (Findings of Fact ¶17(d), Appellant's Appendix P78); transferred from the Colorado National Guard to the Minnesota National Guard wherein Christopher subsequently moved to Minneapolis in March, 2005 (Tr. 2/8/08, pg. 17. ln. 24-25); sent to Camp Shelby, Mississippi for training prior to deploying to Iraq for a period of six (6) months from September, 2005 to March, 2006 (Tr. 2/8/08, pg. 22, ln. 19-22); and was deployed to Iraq from March, 2006 to July, 2007 (Tr. 2/8/08, pg. 22, ln. 24-25 and pg. 23, ln. 1-3). The parties moved into the marital home in 2001 and since 2003, Christopher has been gone approximately 34 months which is almost three years. Sherri moved out of the marital home with the children in September, 2004, and since that time has lived with her parents. (Findings of Fact ¶17(d), Appellant's Appendix P78). The Court found that the children have lived in a stable satisfactory environment consistently with Sherri and it is desirable that continuity be maintained. (Findings of Fact ¶17(d), Appellant's Appendix P79).

Christopher states his physical deployment was neither his choice nor fault and should not be used as justification that he does not provide support or stability for his family. (Appellant's Brief ¶29). Christopher fails to mention that his deployment to Iraq was his choice. Christopher knew at the time he volunteered to transfer from the National Guard in Colorado to the National Guard in Minnesota that he would likely be called up on deployment a year later. (Tr. 2/8/08, pg. 20, ln. 24-25 and pg. 21, ln. 1). Sherri had no say in this transfer. Sherri testified that the first time she heard of any transfer was when she was in the hospital after giving birth to their third son in early March, 2005. (Tr. 2/8/08, pg. 202, ln. 2-4).

Christopher states that the Court erred in finding that Sherri is “the more constant, stable, and consistent parent” based on that she has lived in the same location and had the same part-time employment for nearly four years, because he had been employed with Phoenix International since 2000 which was nearly 8 years at the time of trial. (See Appellant's Brief ¶28). However, the Court did evaluate Christopher employment and stated as follows:

“Christopher has been regular career Army, then resigned from the Army to National Guard status, then an engineer at

Phoenix International, then a volunteer active duty at National guard, then regular National Guard, and most recently, again, an engineer at Phoenix International. He is also pursuing an advanced degree in business administration through University of Mary. He continues to explore other options for employment.”

(Findings of Fact ¶17(m), Appellant's Brief P81). This finding shows that Christopher has not been constant, stable, and consistent in his employment throughout the marriage. Christopher testified that he would rather have a much more active career and meaningful career and he had explored other options since he started at Phoenix International. (Tr. 2/8/2008, pg. 23, ln 22-24.)

- e. **The permanence, as a family unit, of the existing or proposed custodial home.** The court found that Sherri's present home consists of her mother, father, herself, and the children, and she continues to be the primary parent for the children. (Findings of Fact ¶17(e), Appellant's Appendix P79). The children have resided with Sherri at her parents' home since September, 2004 which was a period of 44 months at the time of entry of Judgment. The marital home was purchased in February, 2001 (Findings of Fact ¶17(d), Appellant's

Appendix P78). and two (2) of the minor children only lived there for a period of 43 months up to September, 2004. The youngest child has never resided in the marital home.

- f. **The moral fitness of the parents.** The Court found that both parents were morally fit. (Findings of Fact ¶17(f), Appellant's Appendix P79). The Court is not disputing that Christopher has religious and moral values, but is also not putting any weight towards Christopher's claims of verbal and physical abuse and that Sherri has a history of swearing in front of the children. Sherri disputes these allegations and the court found that there was no clear evidence that domestic violence had occurred, or that it rose to the level of a rebuttable presumption relating to the custody of the children. (Findings of fact ¶17(j), Appellant's Appendix P79-80).
- g. **The mental and physical health of the parents.** Christopher states in his brief that Sherri has been diagnosed in the past with dysthymia, major depressive disorder-recurrent, bulimia, generalized anxiety disorder, and social phobia. (Appellant's Brief ¶34). These diagnoses came from medical records from 1994. (Tr. 4/8/08, pg. 94, ln.3-4). Sherri testified she had bulimia in 1987 but that problem had been resolved. (Tr. 4/8/08, pg. 93, ln.13-16). Sherri further

testified that she knew she had anxiety and depression but doesn't recall her diagnosis of Social Phobia. (Tr. 4/8/08, pg. 96, ln. 5-10).

The Court found both parents to be physically and mentally healthy and acknowledged that Sherri had been diagnosed as borderline asymptomatic and had mild depression in which she takes medication, but that Sherri's ability to parent the children had not been adversely affected. (Findings of Fact ¶17(g), Appellant's Appendix P79).

- h. **The home, school, and community record of the child.** The Court found the children to be doing well at school and in their activities in the community. (Findings of Fact ¶17(h), Appellant's Appendix P79). Christopher states in his brief that "Chris had encouraged M.C.L. to pursue his interest in scouting, but Sherri refused to do it. (Appellant's Brief, ¶36). Sherri does not deny the fact that Christopher encouraged M.C.L. to pursue cub scouts. At the time of trial, Sherri testified that she had the forms filled out but that M.C.L. was involved in Taekwondo and swimming lesson and he wants to get home, unwind, and get his homework done and relax. (Tr. 4/8/08, pg. 61, ln. 17-21). Christopher states in his brief "the children have improved with Chris' return from Iraq". (Appellant's

Brief ¶36). Sherri testified that even when Christopher was in Iraq M.C.L. was doing fine as far as his academics. (Tr. 4/8/08, pg. 106, ln. 4-6). Sherri further testified she felt that grades were improving because M.C.L. was maturing. (Tr. 4/8/08, pg. 106, ln. 7-9).

- i. The reasonable preference of the child, if the Court deems the child to be of sufficient intelligence, understanding, and experience to express a preference. The Court did not give any weight to the testimony of Christopher wherein Christopher indicated the children would have no issue with equal parenting time because there is no evidence to support this testimony. It is Christopher's word only. Sherri also testified to certain statements made by the children but the Court did not give that testimony any weight either as she did not have any evidence of those statements. The Court simply found the children to be too young to express a reasonable preference. (Findings of Fact ¶17(j), Appellant's Appendix P79).
- j. Evidence of domestic violence. Sherri denies the abuse alleged by Christopher. Sherri does not recall scratching Christopher while he was driving. (Tr. 4/8/08, pg. 12, ln. 14). Sherri does not deny that the door closed on Christopher at the Sauk Center exchange but

Christopher pushed it open and continued to remove the child from the car seat even though the child was crying. (Tr. 4/8/08, pg. 67, ln. 8-10). Sherri does not deny that Christopher called the police, however, Christopher called the police because Sherri refused to leave the marital home. (Tr. 4/8/08, pg. 110, ln. 16-18). The court found that there was no clear evidence that domestic violence had occurred, or that it rose to the level of a rebuttable presumption relating to the custody of the children. (Findings of fact ¶17(j), Appellant's Appendix P79-80).

- k. **The interaction and interrelationship or the potential therefore, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests.** Christopher states in his brief “at the time of trial, Chris had a girlfriend but he was not intending to introduce her to the children because he did not feel they were ready for that.” (Appellant's Brief ¶42). The Court does not deny this statement and in fact, made a finding of the same. (Findings of Fact ¶17(k), Appellant's Appendix P80). Further, Christopher states in his brief “Chris's father lives in Saginaw, Minnesota, in the summer and the children enjoy going to visit him.” The Court does not deny

that Christopher's father lives in Saginaw, MN in the summer. (Findings of Fact ¶17(k), Appellant's Appendix P80). However, the Court also found that Sherri continues to reside with her parents; has extended family including her sister and aunt and uncle living in Fargo; and the children get along with Sherri's parents who help with the children and pick them up from school or daycare. (Findings of Fact ¶17(k), Appellant's Appendix P80).

- l. **The making of false allegations not made in good faith by one parent against the other, of harm to the child.** The Court found this to be not applicable.
- m. **Any other factors considered by the Court to be relevant to the custody dispute.** The trial court referenced allegations by Christopher of Sherri's attempts to frustrate his visits with the children. The trial court found, however, that based upon the evidence presented, "Sherri has nearly always allowed Christopher's schedule to dictate the times and places for contact." (Findings of Fact ¶17(m), Appellant's Appendix P80). And, "Sherri has shown a willingness to facilitate visitation, and it is important that she continue to do so." (Findings of Fact ¶17(m), Appellant's Appendix P81).

Based upon the Court's analysis of the evidence presented and the Court's analysis of the best interest factors, including its finding that Sherri, "...is the more constant, stable and consistent parent", the court awarded physical custody of the minor children to Sherri. (Findings of Fact ¶17, Appellant's Appendix P81).

These findings are supported by the evidence and are not clearly erroneous and, therefore, should not be disturbed on appeal.

II. The amount of spousal support awarded to Sherri is not clearly erroneous.

A district court's spousal support determination is treated as a finding of fact that will not be set aside on appeal unless clearly erroneous. Brown v. Brown, 1999 N.D. 199 ¶ 30, 600 N.W.2d 869. In making spousal support determinations, the Ruff-Fischer guidelines must be used. Riehl v. Riehl, 1999 ND 107, ¶ 8, 595 N.W.2d 10. "The factors to be considered include: the respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material." Brown v. Brown, supra at 31 (citations omitted).

Here, the Court found that Sherri has anticipated monthly living expenses of \$2,915.00 and the need for spousal support. (Findings of Fact ¶28 and ¶29, Appellant's Appendix P92). The Trial Court noted that Sherri testified that she planned on moving out of her parent's home once the divorce was finalized. Christopher relies on a portion of Sherri's cross examination in which she noted that her parents want her to continue to reside in their home and she indicated it

was her dream to stay home with her children as a stay-at-home mother. That is, Christopher is asking this Court to reject the Trial Court's interpretation of the evidence and its findings of fact and to supplant this Court's own interpretation of the evidence. The mere fact that there are two or more possible interpretations of the evidence does not rise to the level of "clearly erroneous". As this Court has noted many times, including at Gillmore v. Morelli, 472 N.W, 2d 738 (ND 1991), "We give due regard to the trial court's opportunity to assess the credibility of the witnesses, and a choice between two permissible views of the evidence is not clearly erroneous." Id. at 740.

The Trial Court also found that Christopher has gross earnings from Phoenix International (also known as John Deere) of approximately \$4,584.00 per month and gross earnings from the Army National Guard of \$1,036.00 per month. (Findings of Fact ¶13, Appellant's Appendix P76).

Christopher testified at the time of trial that his gross monthly salary was \$2,292.00 per pay period. (Tr. 2/8/08, pg. 27, ln. 17-20 and Appellee's Appendix pg. 2). Christopher is paid twice per month. (Tr. 2/8/08, pg. 27, ln. 24).

Christopher's Phoenix International net salary is calculated as follows based upon Christopher's pay stub (Appellee's Appendix pg. 2):

Gross Earnings per pay period	\$2,292.00
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Plus (Employer's portions paid for Employee):

Medical Co Credit +\$ 407.05
(See Tr. 2/8/08, pg. 28, ln. 12-18)

Dental Co Credit +\$ 44.60
(See Tr. 2/8/08, pg. 28, ln. 25 and pg. 29, ln. 1-2)

Taxable Life Insurance Premium +\$ 2.32
(See Tr. 2/8/08, pg. 29, ln. 10-13)

SIP Co Match - 1st 2% +\$ 137.52
(See Tr. 2/8/08, pg. 29, ln. 15-25)

SIP Co Match - Over 2% +\$ 91.68
(See Tr. 2/8/08, pg. 29, ln. 15-25)

Total Employer's portions paid for Employee: +\$ 683.17

Total Compensation before Deduction (\$2,292.00 + \$683.17): \$2,975.17

Minus Taxes:

FICA - Med -\$ 24.93
FICA-OASDI -\$ 106.60
Fed Income Tax -\$ 8.20
MN State Income Tax -\$ 6.00

Minus Total Taxes: -\$ 145.73

Minus Deductions:

Medical Employee Price -\$ 470.25
(See Tr. 2/8/08, pg. 28, ln. 17)

Dental Employee's Price -\$ 56.25
(See Tr. 2/8/08, pg. 29, ln. 3-5)

Taxable Life Insurance Premium (See. Tr. 2/8/08, pg. 29, ln. 10-13)	-\$ 2.32
SIP 1 st 2% Matched	-\$ 45.84
SIP Over 2% Matched (See Tr. 2/8/08, pg. 29, ln. 15-25)	-\$ 91.68
SIP Co Match - 1 st 2% (See Tr. 2/8/08, pg. 29, ln. 15-25)	-\$ 137.52
SIP Co Match - Over 2% (See Tr. 2/8/08, pg. 29, ln. 15-25)	-\$ 91.68
Option Life Insurance - Dependents	-\$ 7.59
Optional Life Insurance - Employee	-\$ 11.04
Minus Total Deductions:	-\$ 914.17
Total Net Income per pay period (\$2975.17-145.73-914.17):	\$1,915.27
TOTAL MONTHLY NET INCOME (\$1,915.27 X 2):	\$3,830.54

Under deductions Military Active Duty of \$500.00 and Child Support of \$820.80 was not included in the above calculations to show Christopher's actual income. Christopher testified at the time of trial that the deduction of \$500.00 was due to the fact that while Christopher was in Iraq he wanted to continue contributing to his 401(k) even though he was not receiving a paycheck from Phoenix International. (Tr.2/8/08, pg.31, ln. 17-23). Therefore, Phoenix International is withdrawing \$500.00 from Christopher's paycheck to repay Phoenix International for the contributions made to his 401(k) while Christopher

was not working for them. (Tr. 2/8/08, pg. 32, ln. 5-7). Christopher testified at the time of trial that the remaining amount owed to Phoenix International was \$2,500.00 and there were only five more pay periods before this would be paid in full. (Tr. 2/8/08, pg. 32, ln. 12-18). At the time of the Findings of Fact, Conclusions of Law, and Order for Judgment was entered on May 14, 2008, Christopher, based on his testimony, should have had the \$2,500.00 loan paid back in full and the \$500.00 should no longer be withheld from his paycheck.

Christopher testified at the time of trial that his income from the National Guard was \$858.00 per month as reflected on his pay stub for January, 2008. (Tr. 2/8/08, pg. 34, ln. 4-6 and Appellee's Appendix pg. 1). However, during his annual training Christopher receives approximately \$3,000 for that month. (Tr. 2/8/08, pg. 35, ln. 4-7). The Court found that Christopher's monthly income from the National Guard is \$1,036.00 per month which is the average of \$858.00 per month for 11 months and \$3,000.00 for one month. (Findings of Fact ¶13, Appellant's Appendix P76). Christopher's net monthly income from the National Guard is calculated as follows:

Gross Earnings from National Guard	\$1,036.00
<u>Minus Deductions:</u>	
Federal Income Tax (Average of 11 months at \$72.84 and one month at \$255.00)	-\$ 88.02

State Income Tax:	- \$ 79.52
(Average of 11 months at \$65.89 and one month at \$229.50)	
SGLI	- \$ 29.00
TSP Contribution	- \$ 10.37
(Average of 11 months at \$8.59 and one month at \$30.00)	
Minus Total Deductions:	- \$ 206.91
TOTAL MONTHLY NET INCOME:	\$829.09

Christopher's net monthly income from all sources is \$4,659.63. (Phoenix International net income of \$3,830.54 plus National Guard net income of \$829.09).

The Court found Christopher's monthly expenses to be \$2,510.00. (Findings of Fact ¶27, Appellant's Appendix P92) However, Christopher states in his brief that the Court's finding of \$2,510.00 was clearly erroneous and his monthly living expenses were \$2,381.00 not including child support. (Appellant's Brief ¶87). That is, Christopher seems to argue that the Trial Court's findings are more favorable to him, although erroneous. Under either scenario, Christopher has the ability to pay spousal support.

At the time of trial, before any spousal support payment, Christopher's disposable income was as follows:

Christopher's net monthly income from all sources:	\$4,659.63
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Minus:

Christopher's monthly living expenses: -\$2,510.00

Christopher's child support obligation: -\$1,368.00

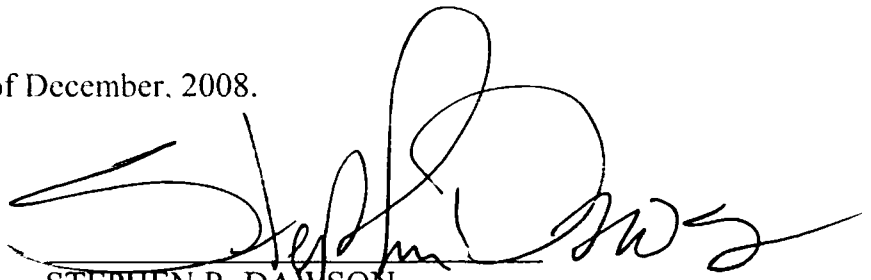
Total Income available for spousal support: \$781.63

The Court's finding that Christopher has the ability to pay spousal support is not clearly erroneous. At the time of trial, his income minus his expenses supported his ability to pay spousal support to Sherri.

CONCLUSION

In the matter now before this Court, there is sufficient evidence to support the trial court's awarding Sherri the sole physical custody of the minor children and the award of spousal support to Sherri. Sherri respectfully requests this Court deny Christopher's appeal and requests that this Court affirm the judgment of the trial court.

Dated this 12th day of December, 2008.

A large, stylized handwritten signature in black ink, appearing to read 'Stephen Dawson', is written over the printed name and address.

STEPHEN R. DAWSON
Attorney for the Appellee
2108 South University Drive
Suite 103
Fargo, North Dakota 58103
(701) 293-3400
Attorney Registration Number - 04638

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Christopher A. Lindberg, Plaintiff and Appellant, vs. Sherri L. Lindberg, Defendant and Appellee.	AFFIDAVIT OF SERVICE BY US MAIL Supreme Court No. 20080174 Civil No. 09-05-C-03902
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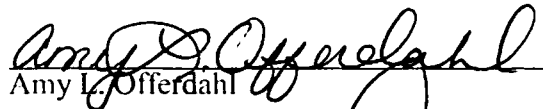
Amy L. Offerdahl, being first duly sworn, says that she is of legal age, is a resident of Richland County, North Dakota, and that she served the attached:

1) BRIEF OF APPELLEE

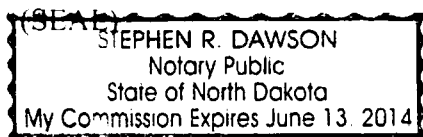
upon:

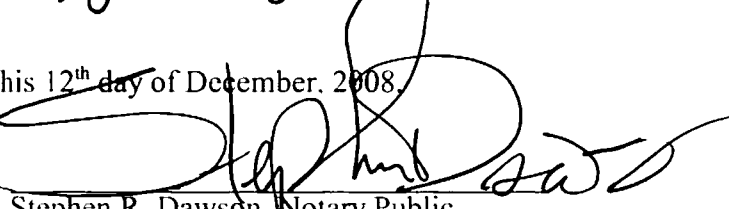
Christopher Lindberg
Pro Se, Appellant/Plaintiff
3061 24th Avenue South
Fargo, North Dakota 58103-5098

by depositing in the United States Post Office at Fargo, North Dakota, on the 12th day of December, 2008, a true and correct copy thereof enclosed in separate, sealed envelopes, with postage prepaid for first class mail, addressed to each person above named at each address specified above and by electronic means to each person named above at each electronic address specified above. That the undersigned knows the person or persons served to be the person or persons named in the papers served, and said person or persons intended to be served.


Amy L. Offerdahl

Subscribed and sworn to before me this 12th day of December, 2008.




Stephen R. Dawson, Notary Public
Cass County, North Dakota
My commission expires: 06/13/2014