

20110370

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

**FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 2, 2012
STATE OF NORTH DAKOTA**

SUPREME COURT NO. 20110370

Kathryn Skachenko,

Plaintiff-Appellees

-vs-

Roger Skachenko,

Respondent-Appellant

APPEAL FROM JUDGMENT ENTERED DECEMBER 16, 2011
SOUTH CENTRAL JUDICIAL DISTRICT
MORTON COUNTY CR. NO. 08-10-C-2717
THE HONORABLE GAIL HAGERTY, PRESIDING

BRIEF

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NDCC

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ABBREVIATIONS

Appendix - App.

Page - P.

Plaintiff's 2 - P-2

Plaintiff's 3 - P-3

Plaintiff's 10 - P-10

Plaintiff's 23 - P-23

Plaintiff's 28 - P-28

ISSUES

[¶1] ISSUE I: Did the trial court err when prior to trial it refused Roger D. Skachenko's (Roger) Motion to use funds from the marital estate to pay for an evaluation of Kathryn Skachenko's (Kathryn) business, Speciality Sling Company?

[¶2] ISSUE II: Did the trial court err when it refused to include in the Rule 8.3 N.D.R. Ct Property and Debt Listing as an asset of the marital estate a \$82,057.00 loan owed by Specialty Sling Company to Kathryn?

[¶3] ISSUE III: Did the trial court err when it ordered Roger to pay Kathryn's attorney fees of \$16,450.00?

NATURE OF THE CASE

[¶4] This is an appeal from Money Judgment entered on December 16, 2011, in Burleigh County District Court, District Judge Gail Hagerty presiding.

[¶5] The Appellant Roger D. Skachenko (Roger) is appealing the trial courts:

(1) refusal to allow him to use funds from the marital estate to pay for an evaluation of a business owned solely by Kathryn Skachenko (Kathryn), Specialty Sling Company.

(2) refused to include an \$82,057.00 loan owed by Specialty Sling Company to Kathryn as an asset of the marital estate.

(3) order requiring him to pay Kathryn's attorney fees of \$16,450.00.

STATEMENT OF FACTS

[¶6] Kathryn Skachenko (Kathryn) moved out of the marital home when Roger D. Skachenko (Roger) was served with the Summons and Complaint. Roger lived in

the marital home for a short time after he was served with the Summons and Complaint. Then Roger decided to move in with his son Michael Skachenko. After Roger moved out of the marital home it was sold.

[¶7] While Roger was living with his son Michael, he decided he wanted to buy a condo. In order to buy a condo, Roger needed to get financing from a bank. When Roger tried to get financing he found out banks wouldn't finance him because he was getting a divorce.

[¶8] Roger then decided on a plan to purchase the condo by having his son Michael get the financing. This plan required Roger to take \$34,500.00 from the marital estate and give it to Michael, who would then get financing from the bank. \$24,000.00 of this financing was obtained by a check from Roger to Michael. After the word memo on this check the word gift appears. P-10 App. P.163.

[¶9] When Kathryn learned about Roger's acquiring of the condo she realized Roger's answers to her interrogatories weren't complete. Therefore, she made a Motion to the trial court that required Roger to give her all of the information regarding what he had done with marital estate money and to stop him from using any marital estate money in the future unless he had the trial court's permissions. App. P.11. The trial court granted Kathryn's motion. App. P. 109.

[¶10] After the trial court made the above ruling Roger needed money from the marital estate to have Kathryn's solely owned business Specialty Sling Company evaluated. In order to get this money, Roger made a Motion to be allowed to take money from the marital estate to evaluate Kathryn's solely owned business, Specialty

Sling Company. App. P.113. The trial court refused Roger's Motion App. P. 132. Because of this refusal at trial there was no professional evaluation of Kathryn's business, Specialty Sling Company. The only evaluations of Specialty Sling Company at trial were from Kathryn in the amount of \$83,854.39 and Roger in the amount of \$500,000.00. The trial court in its Opinion and Order App. P.191 decided the value of Specialty Sling Company was \$120,000.00.

[¶11] Federal corporate tax returns for Specialty Sling Company were entered into evidence by Kathryn for tax year 2006, 2007, 2008, 2009 and 2010. App. P.153. These Federal corporate tax returns show the yearly profit or loss for these years. These federal corporate tax returns also show a loan from Specialty Sling Company to Kathryn in 2006. At the start of the year Kathryn had loaned \$80,150.00 to Specialty Sling Company. The amounts of this loan changed each year and by 2010 the loan was \$90,761.00. At that point \$8,704.00 was paid to Kathryn and left \$82,057.00 still owing from Specialty Sling Company to Kathryn.

[¶12] Roger made a 3.2 Motion after the trial ended and before the trial court entered its Order and Opinion requesting that \$82,057.00 be added to the 8.3 Listing. App. P. 188. The trial court denied Roger's Motion. App. P.195.

[¶13] The trial court found that Roger failed to cooperate during discovery that his attempts to transfer funds from the marital assets of the parties increased the cost of litigation, and his failure to allow Kathryn to retrieve property added to the cost of Kathryn's doing business. Therefore the trial court rather than place an amount on these added costs required Roger to pay \$16,450.00, which was all of Kathryn's attorney's fees. App. P.164 and P.196.

[¶14] ISSUE I: Did the trial court err when prior to trial it refused Roger D. Skachenko's (Roger) Motion to use funds from the marital estate to pay for an evaluation of Kathryn Skachenko's (Kathryn) business, Speciality Sling Company?

ARGUMENT

[¶15] In North Dakota the following law is applicable when a trial courts evaluation of a business is questioned:

A trial court's property valuation is presumed correct and will not be reversed on appeal unless it is clearly erroneous. Evenson v. Evenson, 2007 ND 194, ¶ 6, 742 N.W.2d 829. "Marital property valuations within the range of evidence presented to the trial court are not clearly erroneous." Id. (quoting Olson v. Olson, 2002 ND 30, ¶ 7, 639 N.W.2d 701). A trial court's findings of fact are presumed to be correct. In re Estate of Helling, 510 N.W.2d 595, 597 (N.D. 1994). (quoting Olson v. Olson, 2002 ND 30, ¶ 7, 639 N.W.2d 701).

"Ultimately, the district court is in a better position than this Court to judge the credibility and observe the demeanor of witnesses and to determine property values." Kostelecky v. Kostelecky, 2006 ND 120, ¶ 9, 714 N.W.2d 845. The value a trial court places on marital property depends on the evidence presented by the parties. Evenson at ¶ 6. Ordinarily, the proper method of valuing property in a divorce is the fair market value as of the date of trial. Hoverson v. Hoverson, 2001 ND 124, ¶ 12, 629 N.W.2d 573. Barth v. Barth, 1999 ND 91, ¶ 8, 593 N.W.2d 359. "Business property need not be liquidated for a distribution to be equitable." Holden v. Holden, 2007 ND 29, ¶ 14, 728 N.W.2d 312. "It is

not usually wrong for a trial court to accept valuations submitted by one spouse over the others, or to weigh one spouse's value testimony more heavily. "Braun v. Braun, 532 N.W.2d 367, 370 (N.D. 1995).

[¶16] The above law makes no mention of what happens when a trial court's order refuses to allow a party to use any of that party's funds in the marital estate to evaluate the other party's solely owned business.

[¶17] In the case now before the court, of the Trial Courts Order App. P.132 denying Roger's request to use his funds for an evaluation states:

1. The funds requested are in Roger's bank accounts
2. The funds Roger is requesting have been frozen by the Court.
3. The trial court has decided not to allow Roger to use these funds to pay for an evaluation.
4. The trial court has decided Roger has delayed progress in this case.
5. The trial court doesn't believe Roger has properly accounted for the funds he has had access to.

[¶18] When 1 through 5 above are considered it is apparent that the trial court in its Order knows that there are funds available but won't let Roger use them. The problem with such a court order is that all the money used for the evaluation could have been taken out of funds that would later have awarded to Roger from the marital estate. Therefore such an evaluation could be made and cost Kathryn nothing. Also the order prevented Roger from getting an evaluation of the fair market value of Kathryn's solely owned business Specialty Slings Company.

[¶19] The advantages and the knowledge a trial court gets from an expert evaluation become apparent when P-2 App. P.146 the expert evaluation on the value of the oil well involved in this case is examined.

[¶20] Without an expert evaluation the trial court in this case had only two evaluations to look at. The first evaluation was made by Kathryn P-28 App.P.187. This evaluation is an account book appraisal that makes no mention of such things as the true value of depreciated property or the value of the client's list that Specialty Sling Company had developed. The second is Roger's and is \$500,000.00. This evaluation is Roger's opinion and it isn't supported by any documentation.

[¶21] The court didn't accept either of the two above evaluations and decided to place a value on a client's list and raises the value of Specialty Sling Company to \$120,000.00. Had a professional evaluation been done there would not only have been a value placed on a client's list but a fair market value for the entire Specialty Sling Company business.

¶22] The current financial shape of Specialty Sling Company is found in U.S. corporate tax return for 2010. On the front of form 1120S P-3 App. P.161 shows;

1. in 2010 the gross receipts of Specialty sling Company were \$470,935.00;
2. Kathryn was paid \$31,220.00; and
3. after all bills were paid the ordinary business income is \$41,255.00.

[¶23] Kathryn testified that Specialty Sling Company business is increasing. In 2010 the ordinary business income was \$41,255.00 and if the business is increasing a

similar amount in 2011 when added together will almost equal Kathryn valuation of \$83,854.39. This means ordinary business income every two years would equal Kathryn's valuation of Specialty Sling Company. Therefore it would appear the fair market value of Specialty Sling Company is much greater than \$83,854.39.

[¶24] Without an experts evaluation the trial court in this case didn't have any information to determine a fair market value of Specialty Sling Company. All the trial court had to do to get an experts opinion on the fair market value of Specialty Sling Company was to allow Roger's Motion for funds for such an evaluation from the marital estate. The court erred when it denied Roger's Motion.

[¶25] ISSUE II: Did the trial court err when it refused to include in the Rule 8.3 N.D.R. Ct Property and Debt Listing as an asset of the marital estate a \$82,057.00 loan owed by Specialty Sling Company to Kathryn?

[¶26] In this case evidence offered by Kathryn P-3 App. P.153 was received into evidence and that evidence showed that Kathryn has loaned money to Specialty Sling Company. In 2010 some of the money Kathryn loaned to Specialty Sling Company was repaid to her, and she at the end of 2010 is still owed \$82,057.00 by Specialty Sling company.

[¶27] During the trial no questions were asked of Kathryn by either side about the loans in P-3 App. P.153 that she had loaned to Specialty Sling Company. Roger after the trial and before the court ruled made a 3.2 Motion requesting that Kathryn's \$82,057.00 be added to the 8.3 Listing. App. P.188 The trial court denied Rogers Motion App. P.195.

[¶28] The following pages and lines in P-3 of Specialty Sling Company's sub chapter S return shows the loan and what has occurred from 2006 to 2010.

The loans begin at page 4 of the 2006 sub Chapter S return. On line 19 of page 4 the share holders at the start of the year had loaned Specialty Sling Corporation (Sling) \$80,150.00 and by years end that amount had risen to \$83,309.00. The only share holder of Sling is Kathryn.

Page 4 of the 2007 sub chapter S return on line 19 shows at the start of 2007 there was \$83,309.00 loaned to Sling and at years end there was \$86,420.00 loaned to Sling.

Page 4 of the 2008 sub chapter S return. Line 19 shows \$80,420.00 was loaned by the share holders at the start of the years and at years ends \$90,032.00 was loaned.

Page 4 of the 2009 sub chapter S return on line 19 shows \$90,032.00 was loaned to Sling at the start of 2009 and \$90,761.00 was loaned at the end of 2009.

Page 4 of the 2010 sub chapter S return on line 19 shows \$90,761.00 was loaned at the start of 2010 and the end \$82,057.00 was still owed.

\$82,057.00 is owed to Kathryn and is an asset of Kathryn's. Therefore it should be listed as a business asset in the 8.3 listing.

[¶29] The argument Kathryn made during trial was that all assets were jointly held with Roger. The court in its Opinion and Order App. P. 195 said the distribution is very close to equal. Therefore all assets in the marital estate should be equally

divided and Roger is entitled to \$41,028.50 which is one half of the \$82,057.00 asset owed to Kathryn by Specialty Sling Company.

[¶30] In order to accomplish the above division, this case should be remanded to the trial court with an order requiring that \$41,028.50 from Kathryn's loan of \$82,057.00 to Specialty Sling Company be paid to Roger.

[¶31] ISSUE III. Did the trial court err when it ordered Roger to pay Kathryn's attorney fees of \$16,450.00?

[¶32] Before the district courts awards attorney fees it must consider NDCC §14-05-23: Temporary support, attorney's fees, and parental rights and responsibilities. During any time in which an action for separation or divorce is pending, the court, upon application of a party, may issue an order requiring a party to pay such support as may be necessary for the support of a party and minor children of the parties and for the payment of attorney's fees...

[¶33] According to Martinson vs Martinson 2010 ND 110, 783 NW2d 633 [15]. An award of attorney fees is within the court's discretion and will not be disturbed on appeal unless the court abuses its discretion. Heinle, 2010 ND 5, ¶ 32, 777 N.W.2d 590. The court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, misinterprets or misapplies the law, or its decision is not the product of a rational mental process leading to a reasoned determination. Berg v. Berg, 2000 ND 36, ¶ 22, 606 N.W.2d 895. "A [district] court acts in an arbitrary, unreasonable, or unconscionable manner when its decision is not the product of a rational mental process by which the facts and law relied on are stated and considered

together for the purpose of achieving a reasoned and reasonable determination.” Terry v. Terry, 2002 ND 2, ¶ 4, 638 N.W.2d 11.

[¶34] Additional consideration before the awarding of attorney fees are found in Martinson Supra: Id. (quoting Reiser v. Reiser, 2001 ND 6, ¶15, 621 N.W.2d 348) (citations omitted). A court must make specific findings supported by evidence of the parties’ financial needs and conditions to award attorney fees. Lautt v. Lautt, 2006 ND 1612, ¶12, 718 N.W.2d 563. “An award of attorney fees must generally be supported by evidence upon which the court can determine the requested fees are reasonable and legitimate.” Whitmire v. Whitmire, 1999 ND 56, ¶14, 591 N.W.2d 126.

[¶35] In the case now before court, the trial court in its Opinion and Order regarding attorney fees stated: “Mr. Skachenko’s failure to cooperate during discovery and his attempts to transfer funds from the marital assets of the parties increased the cost of this litigation. His failure to allow Ms. Skachenko to retrieve property in a reasonable manner added to her cost of doing business. He will be required to pay \$16,450 of her attorney fees and costs, and that amount will be taken directly from the net proceeds from sale of the former marital home.” The attorney fees and costs for Kathryn and found at P-23, App. P.164.

[¶36] From the above it is apparent Roger did things that the trial court concluded increased Kathryn’s cost of litigation and cost of doing business. The trial court makes no determination of what the cost of these increases were or about the financial needs and conditions of the parties. Therefore there is no way of knowing what part of Kathryn’s attorney fees were increased because of Roger’s action and what the fees Kathryn would have been if Roger’s actions hadn’t increased her fees.

[¶37] Roger believes that he should only have to pay for the increase in fees caused by his actions and that Kathryn should have to pay whatever her fees would have been had Roger's actions not increased her fees.

CONCLUSION

[¶38] For the above and foregoing reasons this matter should be remanded to the district court for:

1. An expert evaluation of Kathryn's solely owned business, Specialty Sling Company;
2. The adding of Kathryn's \$82,057.00 to the 8.3 listing and the awarding of one-half of the \$82,057.00 to Roger;
3. An explanation of costs of the increase of Kathryn's attorney fees because of Rogers actions, the financial conditions of the parties and evidence explaining the trial court determination of the portion of Kathryn's attorney fees Roger should pay.

DATED this 2nd day of March, 2012.

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing documents were served electronically on the following individual on this 2nd day of March, 2012.

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/s/ Sharon Renfrow
Sharon Renfrow