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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Shannon R. Dieterle,	)	
	)	Supreme Court Case No.:
Plaintiff-Appellee,	)	20120329
	)	
v.	)	District Court Case No.:
	)	42-2011-DM-00021
Angela L. Dieterle,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE JUDGMENT AND DECREE OF DIVORCE DATED AUGUST 17, 2012, THE HONORABLE DONALD L. JORGENSON, PRESIDING SOUTH CENTRAL JUDICIAL DISTRICT

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

As this matter involves an appeal by appellant, appellee makes no separate Statement of the Issues.

STATEMENT OF THE CASE

This is a divorce case involving issues of residential responsibility, property and debt distribution, and spousal support. The parties were married on February 20, 2009. One child was born of the marriage, B.D., born in 2010.

In July of 2011 the parties separated after a domestic altercation, with Shannon thereafter commencing divorce proceedings. As this divorce case progressed, the district court entered an Interim Order on November 15, 2011 which established interim parenting time rights (Interim Order, November 15, 2011), an Amended Interim Order which set forth more specific parenting time rights for Shannon as a result of Angela's failure to cooperate in allowing parenting time and which further authorized Angela to make farm expenditures, etc. (Amended Interim Order, January 6, 2012), and finally a Second Amended Interim Order which provided yet further details for a parenting time schedule for Shannon after he was forced to bring yet another motion to amend the interim order and to hold Angela in contempt for her failure to allow appropriate parenting time to Shannon. (Second Amended Interim Order, April 23, 2012).

Finally, trial occurred on June 19-20, 2012, after which the district court entered Judgment. In summary, the district court granted the parties a divorce, determined that Shannon should have primary residential responsibility, that Angela should have significant parenting time, made an equitable distribution of the marital assets and debts,

and ordered Shannon to pay rehabilitative spousal support. (Judgment and Decree of Divorce, August 17, 2012). Angela has appealed from virtually every aspect of that decision.

STATEMENT OF THE FACTS

This is a divorce case involving issues of residential responsibility, property and debt distribution, and spousal support. The parties were married on February 20, 2009. One child was born of the marriage, B.D., born in 2010. Between the date of the minor child's birth and the date of the parties' separation in late July, 2012, the parties lived together and raised B.D. together. In addition to raising their own child, B.D., Shannon co-parented and assisted in raising three other children Angela had as a result of two prior relationships she had. (Transcript, p 36–38).

Prior to the marriage, Angela had a significant history of being involved with various men, exposing her children to these men, alleging abuse against these men, and filing for protection orders against these men when things did not work out to her satisfaction[1]. Further, Angela also had a significant history of abusing her other children, primarily her son, Dillon (an adult at the time of trial)[2].

During the course of the marriage Angela demonstrated a continued prevalence towards making false allegations and being verbally and physically abusive. This

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[1] Angela's history with past relationships was addressed at various times throughout the trial, but is perhaps best summarized in the Parenting Investigator's Report, which is contained at Page 26 of the Appellant's Appendix. The plaintiff specifically refers this court to pages 33, 34, 37 and 38 of the Appendix. See also the testimony of Dillon Longnecker, Angela's son, pages 153-158 of the Transcript.

[2] Angela's proven history of abuse, "Services Required" findings by Social Services, etc. was addressed at various times throughout the trial, but is perhaps best summarized in the Parenting Investigator's Report, which is contained at Page 26 of the Appellant's Appendix. The plaintiff specifically refers this court to pages 40-41 of the Appendix. See also the testimony of Dillon Longnecker, Angela's son, pages 158-164 of the Transcript.

culminated in a domestic altercation occurring on July 23, 2011 after which Angela was arrested, charged with assault against Shannon, and eventually found guilty.

Subsequent getting out of jail after this incident, Angela filed for a protection order against Shannon which was initially granted on a temporary basis and then denied (Transcript, p 456). Shannon then commenced the divorce action. Thereafter, Angela filed for a second protection order which was granted (though even Angela admitted at the divorce trial that she was aware that an independent witness, as detailed in a police report, contradicted the entire factual basis for the protection order) (Transcript, p 456) and which provided for Angela to have residential responsibility of the parties' minor child, B.D.

After the commencement of the divorce proceedings, the district court entered an Interim Order on November 15, 2011 which continued residential responsibility with Angela and established interim parenting time rights for Shannon (Interim Order, November 15, 2011). A subsequent interim hearing occurred which, in part, addressed the problems Shannon was having with being able to see his daughter as a result of Angela's refusal to cooperate and allow him parenting time. Following this hearing, an Amended Interim Order was entered which set forth more specific parenting time rights for Shannon. This Amended Interim Order also authorized Angela to make farm expenditures as that was an issue which Angela sought to address in her filing for an Amended Interim Order. (Amended Interim Order, January 6, 2012). For roughly a month thereafter, Shannon did receive regular parenting time. This, however, changed again in February of 2012 when Angela again started denying Shannon parenting time and Shannon was forced to file a motion for contempt and for a second amended interim

order. As a result, a Second Amended Interim Order which provided yet further details for a parenting time schedule for Shannon was entered. (Second Amended Interim Order, April 23, 2012). It is further noted that during this time, Angela also made criminal complaints against Shannon for violations of the protection order based on false and misleading representations to law enforcement. One event occurred on February 10, 2012 when Shannon communicated to Angela, in advance and through attorneys, that he was going to be at a rodeo and he wanted to make sure she was also not present so there would be no concern about a violation of the protection order. Angela took advantage of this knowledge to show up at the rodeo, with her protection order in hand, and have Shannon arrested. (Transcript, p 75-79, 166-67)[3]. In addition to this, there was another occasion when Angela tried to get Shannon charged with violating the protection order but it was confirmed by law enforcement that he could not have violated the protection order because he was in Bismarck at the time (Transcript, p 79-80).

The divorce trial occurred on June 19-20, 2012, after which the district court entered Judgment. In summary, the district court granted the parties a divorce, determined that Shannon should have primary residential responsibility, that Angela should have significant parenting time, made an equitable distribution of the marital assets and debts, and ordered Shannon to pay rehabilitative spousal support. (Judgment and Decree of Divorce, August 17, 2012). This appeal follows.

Further facts will be addressed as they are relevant to Shannon's argument and response to Angela's appeal hereafter.

[3] Subsequent to the divorce trial, these criminal charges against Shannon were dropped.

LAW AND ARGUMENT

A. Standard of Review

This court has explained on a multitude of occasions that the district court's determinations and findings of fact as relate to issues of residential responsibility and parenting time "will not be reversed on appeal unless it is clearly erroneous." Morris v. Moller, 2012 ND 74, ¶ 5, 815 N.W.2d 266, Deyle v. Deyle, 2012 ND 248, ¶4.

As recently explained in Deyle, "a finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or, although there is some evidence to support it, on the entire record, we are left with a definite and firm conviction a mistake has been made." Deyle v. Deyle, 2012 ND 248, ¶4.

In the course of reviewing a district court decision, this Court has clarified that it "will not retry a custody case or substitute [it's] judgment for a district court's initial custody decision merely because we might have reached a different result." Id.

The clearly erroneous standard is also applicable to review of the district court's decisions on property distribution. Wold v. Wold, 2008 ND 14 ¶6, 744 N.W.2d 541. This court has also explained on numerous occasions that the district court's determinations and findings on spousal support are to be reviewed "under the clearly erroneous standard of review". Dronen v. Dronen, 2009 ND 70 ¶41, 764 N.W.2d 675.

B. Whether the District Court failed to apply the best interest factors, failed to make sufficient or proper findings as to any of the best interest factors, and failed to make proper findings of fact in regards to domestic violence.

Angela asserts that the district court erred in applying, and discussing, each one of the best interest factors. This court has held, however, that in determining the best

interests of the child, it is not necessary for the court to make separate findings and discuss with specificity each and every one of the best interest factors.

> In determining the best interests of the child, the trial court has substantial discretion, but it must consider and evaluate the factors listed in NDCC 14-09-06.2. Although the trial court is not required to make a separate finding on each statutory factor, the court's findings should be stated with sufficient specificity so that we can understand the factual basis for its decision.

Severson v. Hansen, 529 N.W.2d 167, 168-169 (N.D. 1995). See also Hammeren v. Hammeren, 2012 ND 225.

Where the memorandum opinion and/or the findings of fact evaluate the evidence presented to the trial court in an analysis of the best interests of the child, and there is an indication of the evidentiary basis for the decision such that the appellate court is not left to speculate as to whether factors were or were not property considered, the findings and determination of the trial court are not clearly erroneous. See Clark v. Clark, 2005 ND 176, 704 N.W.2d 847.

In the instant matter, while the trial court did not detail point by point each best interest factor of NDCC 14-09-06.2, it did nonetheless evaluate the evidence presented and provided an evidentiary basis for it's decision such that this court is not left to speculate on whether the best interests factors were considered. The trial court commented on the defendant's history with adult males and the allegations she had made against them (Memorandum Decision, p. 3). This was supported by the testimony and parenting investigator's report which was submitted into evidence. The trial court discussed the verbal abuse of plaintiff and defendant's son by the defendant (Memorandum Decision, p. 3). This was supported by the testimony of the plaintiff, the defendant's adult child, Dillon, and the parenting investigator's report. The trial court

commented upon the abuse of Dillon by the defendant. (Memorandum Decision, p. 3), which was again supported by this similar evidence. The court commented upon the simple assault conviction of the defendant as a result of her biting the defendant on July 23, 2011 (Memorandum Decision, p. 3). The court commented upon the defendant's "willful pattern to manipulate and even interfere with parenting time". (Memorandum Decision, p. 3). This was supported by testimony of Shannon, Dillon, the parenting investigator and the fact that the trial court had three separate interim hearings during the course of the case during which the court had to emphasize the right of Shannon to have parenting time with his child. At the conclusion of the second interim hearing the trial court commented that it should "hold [Angela] in contempt of Court right now." Transcript of Hearing, December 20, 2011, p. 53. The trial court commented upon defendant's use of unsubstantiated allegations and protection orders to manipulate the court against the plaintiff (Memorandum Decision, p. 3-4). These were testified upon by Shannon, Dillon, the parenting investigator, and Angela herself and included but are not limited to the following:

- Allegations that Shannon was the perpetrator of violence on July 23, 2011 when Angela was in fact the one charged and convicted.
- Allegations that when Angela got B.D. back after her jail time in July, 2011, she had bumps on the head, was not walking normally, etc. when this in fact was refuted by the physician who saw B.D. (Transcript p. 457-58)
- Efforts to get a protection order after the July 23, 2011 incident which was later dismissed by the court. (Transcript, p 456)
- Making criminal complaints against Shannon for violations of the protection order on February 10, 2012 when Shannon communicated to Angela, in advance and through attorneys, that he was going to be at a rodeo and he wanted to make sure she was also not present so there would be no concern about a violation of the protection order. Angela took

advantage of this knowledge to show up at the rodeo, with her protection order in hand, and have Shannon arrested. (Transcript, p 75-79, 166-67).

- Making a report to law enforcement that Shannon was violating the protection order in April, 2012 which was investigated by law enforcement and determined that Shannon could not have done this because he was in Bismarck at the time (Transcript, p 79-80).

- Angela asking the father of her other daughters to make a false affidavit against Shannon (See Parenting Investigator's Report, Appendix p. 52) as a precondition of her allowing this other father to see his daughters.

- Making allegations about Shannon abusing alcohol when Angela reported just the opposite in the course of an earlier psychological evaluation (Transcript p. 445-46)

- Making allegations that Shannon was abusive throughout the marriage when in fact she had never reported such abuse to her medical providers as of July, 2011. (Transcript p. 447)

The court commented upon the "evidence of domestic violence presented to the court" (Memorandum Decision, p. 4). This is referenced throughout the parenting investigator's report and was the subject of testimony throughout the trial by Shannon, Angela, Dillon and Barb Oliger, the parenting investigator. The court commented upon Angela's "manipulation and interference with parenting time" (Memorandum Decision, p. 4). These were the subject of multiple hearings as referenced previously and were discussed at length by Shannon, Angela and the parenting investigator both at trial an in the hearings leading up to trial.

The fact is that the trial court did consider the best interest factors and overwhelmingly considered the evidence as associated with factors. This included:

a) The love, affection, and other emotional ties existing between the parents and child and the *ability of each parent to provide the child with nurture, love, affection, and*

guidance (certainly domestic violence, prior child abuse, and other such evidence as admitted at trial and addressed by the trial court goes towards this factor),

b) The ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and *a safe environment* (certainly domestic violence, prior child abuse, and other such evidence as admitted at trial and addressed by the trial court goes towards this factor),

d) The sufficiency and *stability of each parent's home environment*, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community (certainly bouncing in and out of relationships, domestic violence, prior child abuse, etc. goes towards this factor)

e) *The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child* (certainly the evidence and testimony on Angela's interfering with Shannon's parenting time goes to this factor),

f) The moral fitness of the parents, as that fitness impacts the child (certainly all of the above commentary, evidence, the credibility issues of Angela, her coaching of her children, etc. go towards this factor),

j) Evidence of domestic violence (this was specifically found and addressed in a multitude of evidence at trial), and

l) The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02 (again, the making of false allegations, etc. was specifically addressed by the trial court).

At a minimum 7 of the 12 identified best interest factors were addressed by trial court. The court's findings of fact "should be stated with sufficient specificity so that [this Court] can understand the factual basis for its decision." Severson v. Hansen, 529 N.W.2d 167, 168-169 (N.D. 1995). Plaintiff asserts that the trial court did make findings which allow the court to understand the factual basis for the trial court's decision.

Angela asserts that the trial court failed to make findings of domestic violence committed by Shannon against Angela and the child as described by Angela and her two other daughters. Brief of Appellant, p. 14. The fact is that the trial court found that there was absolutely no credibility in virtually anything Angela or her other minor daughters said. Some of Angela's coaching of her other daughters and inconsistent statements by Angela's other minor daughters, can be noted in the evidence presented as follows:

- Daughters saying Shannon "never" changed a diaper when in fact even Angela admitted that he did (Transcript, p. 437).
- 11 year old girls using the term "residential responsibility" in affidavits (Transcript p. 437-38).
- The daughters' affidavits stating they were beaten every day by Shannon when Angela's own distorted testimony doesn't support this (Transcript p. 439-440) and Dillon says he never saw Shannon do anything physically aggressive towards the girls (Transcript p. 168) and in fact Dillon says he saw Angela abusing the girls (Transcript p. 163-64).
- During a Social Services forensic interview of Angela's other daughters, Social Services determined that Angela had been coaching the girls and that Angela's credibility was suspect. (Transcript p. 450).

Defendant, in her brief, goes through each of the best interest factors, giving her tainted, and unsubstantiated, position. As an example, she states as to Factor A that the evidence "clearly indicated ... that Angie had a closer connection to the child and that the child had been diagnosed with separation anxiety". Brief of Appellant, p. 15. This is not

accurate. The "separation anxiety" was never in fact diagnosed[4] and a simple review of the parenting investigator's report shows that there is much to dispute about the "clear" "closer connection" of the minor child to Angela. (See Appendix p. 39-47). Angela's brief simply gives her perspective of why these factors weigh in her favor and yet provides no actual substantive evidence as to why they favor her. In no capacity does Angela meet her significant burden of establishing that the trial court's decision was "clearly erroneous". This court need look no further than the testimony of Shannon, Dillon, Barb Oliger and Ms. Oliger's report, to see that the trial court's decision was not "clearly erroneous" and in fact was supported by an overwhelming plethora of evidence that Angela was abusive, manipulative, untruthful, and alienating in her actions across the board, not only to Shannon, but to prior relationships, Social Services, her children, law enforcement and the trial courts of this state. Perhaps the closest Angela gets to actually making an evidentiary statement is when she comments as to factor g that "the evidence did indicate that Shannon had a drinking problem". Brief of Appellant, p. 17. Not only is this statement untrue, it was not even supported by Angela's own statements to her medical providers (See Transcript, p. 446).

Defendant criticizes the court for making an untrue statement when the court commented that "Defendant has secured various domestic violence protection orders on a temporary basis, with the issuing Court terminating the same prior to granting permanent status for such protection orders." (See Brief of Appellant, p. 20, citing Memorandum Decision, p. 3, Appendix p. 136). The fact is that Angela did secure a temporary

[4] While Angela did testify that the child was "diagnosed with separation anxiety and adjustment disorder due to the visitations" (Brief of Appellant, p. 8) her testimony was false because the child was never in fact diagnosed separation anxiety. (See Parenting Investigation Report, Appendix, p. 55).

protection order against Shannon after the July 23, 2011 incident which the court terminated prior to granting a permanent order.

Angela states that the "only evidence" supporting the trial court's conclusion that Angela was verbally abusive to prior partners is the "hearsay testimony of Shannon which was not allowed and the hearsay evidence in the parenting investigator's report". Brief of Appellant, p. 22. This is also not accurate. Shannon testified as to the verbal abuse he received, Dillon testified about the verbal abuse he sustained (Transcript, p. 159), and the verbal abuse Shannon sustained (Transcript, p. 166). Additionally, the parenting investigator's report, with the plethora of information on this and other damaging subjects for Angela, was admitted into evidence. No objection was made as to any "hearsay" evidence in the report, and any such objection would have been properly overruled under Rule 803(8) of the North Dakota Rules of Evidence.

Angela complains that the district court ignored Angela's and her daughter's version of the domestic altercation which occurred on July 23, 2011. The fact is that not only did the divorce trial court, but so did the criminal court which convicted Angela of assault. Both courts heard Angela and her daughter's version, compared these versions with the other evidence presented, and determined that Angela had no credibility and that she had coached her daughter. As this court has commented, in applying the clearly erroneous standard, this court "will not reweigh evidence, reassess witness credibility" Hammeren v. Hammeren, 2012 ND 225, ¶8.

In summary, Angela makes very broad and general assertions, but does nothing to uphold her burden of establishing that the trial court's findings were clearly erroneous.

C. Whether the District Court erred in awarding Primary Residential Responsibility to Shannon.

Angela has a duty to prove to this court that the trial court's decision on primary residential responsibility was clearly erroneous. Absent such a showing, there is no basis to reverse the trial court's findings.

Findings are "clearly erroneous if [they are] is induced by an erroneous view of the law, if no evidence exists to support it, or, although there is some evidence to support it, on the entire record, we are left with a definite and firm conviction a mistake has been made." Deyle v. Deyle, 2012 ND 248, ¶4.

Angela makes the broad assertion that there was no evidence that her care was deficient and as such residential care should not have been granted to Shannon. Even if it were true that Angela's care was not "deficient", Shannon is unaware of any case law in the state of North Dakota which provides that this is the standard for awarding primary residential responsibility. The fact is that there was a multitude of evidence presented which provided for the trial court's decision on primary residential responsibility. Some of this has been previously mentioned and is referenced in the trial court's Findings and Memorandum Decision. Shannon, Dillon, Barb Oliger and others testified and provided evidence on the basis for awarding primary residential responsibility to Shannon. Some of the general grounds for the trial court's decision included:

- Frustration of parenting time by Angela,
- False allegations made by Angela,
- Past abuse of children by Angela,
- Past verbal and physical abuse towards others by Angela,

- Credibility issues, lies, and manipulation of the court system, law enforcement, etc. by Angela

The evidence against awarding Angela primary residential responsibility, and the basis for the court's decision, is encapsulated in the parenting investigator's report which was submitted to the trial court and which was corroborated and testified upon by Shannon and his witnesses, as well as via the cross-examination of Angela. There can be no more detrimental care than abuse of children, alienation and frustration of parenting time, etc.

Angela effectively wants this court to retry the case and re-weigh evidence. That is something this court has clarified that it will not do. Deyle v. Deyle, 2012 ND 248, ¶4. Angela's statements in support of her argument are so broad and vague it is not feasible to specifically point to the issues she feels were not appropriately considered or which findings were "clearly erroneous". Angela states that "many of the conclusions reached by the district court were not supported by evidence" Brief of Appellant, p. 26. However, she fails to point out even one conclusion or finding that is not supported by evidence. Plaintiff would challenge the defendant to find one such conclusion as she has suggested.

The trial court relied upon sound and appropriate evidence in making it's decision on primary residential responsibility. That decision should not be overturned or remanded.

D. Whether the District Court improperly delegated it's authority to the parenting coordinator.

N.D.C.C. §14-09.2-02 addresses the appointment of parenting coordinators and states as follows:

> In any action for divorce, legal separation, paternity, or guardianship in which children are involved, the court, upon its own motion or by motion or agreement of the parties, may appoint a parenting coordinator to assist the parties in resolving issues or disputes related to parenting time. A party, at any time before the appointment of a parenting coordinator, may file a written objection to the appointment on the basis of domestic violence having been committed by another party against the objecting party or a child who is a subject of the action. After the objection is filed, a parenting coordinator may not be appointed unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If a parenting coordinator is appointed, the court shall order appropriate measures be taken to ensure the physical and emotional safety of all parties and children.

N.D. Cent. Code, § 14-09.2-02. This section provides that the parenting coordinator appointed by the court may "assist the parties in resolving issues or disputes related to parenting time". The trial court entered an Order appointing Allison Mahoney as parenting coordinator and directing that the parenting coordinator develop a parenting time plan for Angela which permitted her reasonable time with the minor child while Shannon was employed and was structured so as to allow time with the minor child's step sisters. Order Appointing Parenting Coordinator, July 17, 2012.

The trial court's Judgment provided that

> Defendant, Angela Dieterle, shall be entitled to parenting time with B.D. on a weekly basis, such parenting time occurring when the Plaintiff is employed. In addition to weekly parenting time, Defendant shall be entitled to weekend parenting time on two weekends of each month, again coordinated with Plaintiff's employment. The parties shall also rotate alternate holidays for parenting time. Upon the child's entry into a regular academic school term, the parties shall share equally the Christmas holiday with the minor child. Each of Plaintiff and Defendant shall be entitled to exclusive parenting time with the minor child for one week at a time during the summer months and when the parent is exercising their vacation time from employment. Extended parenting time shall be coordinated with the non-parenting parent to include the whereabouts of the child during such extended parenting time. The parties are expressly directed to develop a parenting plan by and through a parenting coordinator, and shall have the same accomplished not later than August 1, 2012. Costs for the services of said parenting coordinator shall be shared equally between the parties.

Judgment, August 17, 2012, p. 2-3.

N.D. Cent. Code, § 14-09.2-01 provides that parenting coordinators "[s]hall attempt to resolve a parenting time dispute by facilitating negotiations between the parties to promote settlement and, if it becomes apparent that the dispute cannot be resolved by an agreement of the parties, *shall make a decision resolving the dispute.*" N.D. Cent. Code, § 14-09.2-01(3). Further, N.D. Cent. Code, § 14-09.2-04 provides that parenting coordinators have the power to make decisions which are binding upon the parties unless the court orders otherwise.

The advent of parenting coordinators in North Dakota is somewhat new. It is unclear if the law permits trial courts to delegate the authority to parenting coordinators to make at least partial parenting plan schedules for the parties. Certainly the trial court here entered an order which awarded primary residential responsibility to Shannon and set some boundaries for Angela's parenting time as provided by the language of the Judgment. The more specific details of a parenting time plan for Angela within the framework of the court's parenting time order were left for the parties to work out either independently or through a parenting coordinator.

Angela untruthfully states that Shannon "does not consider it necessary to abide by the plan". The truth is just the opposite. Shannon has been following the plan and it is Angela who is consistently manipulating the child, Shannon, the parenting coordinator, etc. in an effort to make life as miserable as possible for all in her effort to get the minor child back. Nonetheless, that is a subject for a motion for contempt, not the subject of an appeal and Angela's gratuitous and untruthful comments are misplaced.

As noted by Angela, Rule 8.11 of North Dakota's Rules of Court provides that parenting coordinators have the power to:

...

(2) Monitor implementation of a voluntary or court-ordered parenting plan or parenting schedule as requested by the families or the court;

(3) Facilitate the resolution of disputes regarding the implementation of the parenting plan, the schedule, or parenting time issues provided such resolution does not involve a substantive change to the court's order;

N.D.R. Ct. Rule 8.11.

Whether North Dakota's parenting coordinator rules / laws as set forth herein allow for the trial court to direct a parenting coordinator to set forth the specific details of a plan within the framework it has set out, is again unclear. There is no statutory or case law which directs that this is, or is not, appropriate. In Wolt v. Wolt, the father argued that the court improperly delegated it's authority to a counselor to determine changes in a visitation schedule. This court, in reviewing the language of the trial court, however, determined that the language simply permitted the counselors to make recommendations for the court's consideration, noting that the language of the Judgment did not place limitations on the father's access to the court in seeking a change in the visitation schedule. Wolt v. Wolt, 2010 ND 26 ¶40, 778 N.W.2d 786.

Angela notes case law of other states which implies that delegation of this type of authority to third parties is improper. The undersigned has not reviewed each and every case. However, it is noted that at least one of the cases which Angela cites, Meyr v. Meyr, 195 Md. App. 524, 548-549 (Md. Ct. Spec. App. 2010), appears to be to stand for something other, or in addition to, what is represented. In Meyr, the court commented as follows on the delegation of authority:

> We find Yates v. Yates, 2008 PA Super 296, 963 A.2d 535 (Pa. Super. Ct. 2008), to be instructive in this regard. In that case, the Superior Court of Pennsylvania rejected the argument that the appointment of a parenting coordinator constituted an improper delegation of judicial decision-making authority. Id. at 540. The trial court had resolved the primary issues relating to legal custody, physical custody, and visitation. Id. The parenting coordinator was empowered merely to resolve "ancillary" custody disputes, such as 'determining temporary variances in the custody schedule, exchanging information and communication, and coordinating [the daughter's] recreational and extracurricular activities.' Id. The appellate court held that, because the trial court had 'resolved the central custody issues and retained judicial review over the parenting coordinator's decisions concerning the ancillary issues,' there was not an improper delegation of judicial decision-making authority to the parenting coordinator. Id. at 541. The court noted that, 'if the parties are dissatisfied with the parenting coordinator's decision, they can appeal it to the trial court,' which would review the contested decision de novo. Id.
>
> Meyr v. Meyr, 195 Md. App. 524, 548-549 (Md. Ct. Spec. App. 2010)

Shannon notes that the trial court did establish that he was to have primary residential responsibility, that Angela was to have parenting time on a weekly basis when Shannon was employed, that Angela was to have weekend parenting time on two weekends of each month, those weekends coordinating with Shannon's employment, that the parties alternate holidays, and that each party would be entitled to one week of exclusive parenting time one week at a time during the summer months. Judgment, August 17, 2012, p. 2-3. Certainly, this provided a significant framework within which the parties and parenting coordinator were to operate in developing a more specific plan. Shannon leaves it to this court's discretion as to whether a parenting coordinator is authorized to work within this framework in setting up a more specific parenting time schedule.

E. Whether the District Court made mistakes in awarding property, failed to take into account differences in income, and failed to consider evidence.

Angela asserts that the trial court did not advance through the Ruff-Fischer factors in making it's property distribution. As this court, the parties, and the trial court is aware,

> Under N.D.C.C. § 14-05-24(1), a district court must make an equitable division of the parties' marital estate in a divorce action. In making an equitable distribution of marital property, a court must consider all of the parties' assets. After including all of the parties' [marital assets in the marital estate, the court must consider the following factors emanating from Ruff v. Ruff, 78 N.D. 775, 52 N.W.2d 107 (1952), and Fischer v. Fischer, 139 N.W.2d 845 (N.D. 1966), in its distribution of the parties' assets:
>
> . . . 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. The trial court is not required to make specific findings, but it must specify a rationale for its determination.
>
> Kosobud v. Kosobud, 2012 ND 122, ¶6.

Shannon asserts that the trial court did in fact take into consideration the Ruff-Fischer factors in making an equitable distribution of marital property. The court was aware of the respective ages of the parties, that having been testified upon at trial. The court was aware of the earning abilities of the parties and commented upon the same (Memorandum Decision, p. 2). The trial court was aware of the duration of the marriage and commented upon the same (Memorandum Decision, p. 1, 5). The trial court, throughout it's Memorandum Decision and Findings commented upon the conduct of the parties during the marriage. The station in life of the parties, as well as the circumstances and necessities of each was commented upon by the trial court (Memorandum Decision, p. 2, 5-8). The physical condition of the parties was testified upon and as both were healthy and capable, the court made no commentary thereon. The financial circumstances as shown by the property owned at the time, it's value, it's income

producing capacity, and whether it was accumulated before or after the marriage was commented upon by the trial court in entering it's Memorandum Decision and Findings (Memorandum Decision, p. 2, 5-8). While the trial court did not specifically write out that it was now addressing the first factor, second factor, etc., certainly the Ruff-Fischer factors were addressed and commented upon throughout the trial court's Memorandum Decision and Findings in the course of making both it's Findings concerning property distribution and the award of spousal support. Angela's assertions to the contrary are disingenuous and ignore the language of the trial court's decision.

Angela asserts that the trial court did not consider differences in income. That is also completely untrue. The trial court, at page 2 of the Memorandum Decision specifically noted Shannon's income at $70,000.00. The court recognized that it received into evidence the income taxes for Angela from 2008 (prior to the marriage) through 2010 (after the marriage), that Angela was employed as a freight broker, horse trainer and breeder. (Memorandum Decision, p. 2). Clearly the court was aware of the income and disparity in income.

Angela asserts that the trial court did not take into consideration Shannon's insistence that Angela quit her job. This is also not true. Shannon's testimony was that he did not encourage Angela to quit any job and that this decision was Angela's alone (Transcript p. 41 - 42). This is not an "obvious mistake" as asserted by Angela, but rather was the trial court's deliberate consideration of the evidence. The further fact is that Angela's income (as shown by Exhibit 4 and her testimony (Transcript p. 469-471)) is right around minimum wage and has never been significantly higher, even before she was married to Shannon. At the time of trial in mid-June, 2012, Angela had not filed her

2011 income taxes and since she insisted on staying at home, living off child and spousal support, and not looking for employment, her true income potential is unknown, but is at least minimum wage. The trial court was very aware of this and did take it into consideration.

As to the ranch, it is correct that Shannon proposed that Angela keep the ranch so long as Angela paid half of the equity in the ranch ($78,000) and if she could not pay it, then the ranch be sold. (Transcript p. 122-123). Shannon made additional proposals concerning the equitable distribution of property as detailed in Exhibit 52 which he offered. Nonetheless, the trial court made a determination that the ranch should be sold and the equity split. Simply because the trial court decided to sell an asset rather than have one party pay equity in an asset to the other is not beyond the scope of a trial court's authority and is not a clearly erroneous decision.

Angela makes the general and hypothetical commentary that if she received primary residential responsibility she would "most likely" be able to afford to remain on the ranch. Brief of Appellant, p. 38. Apparently, even though Angela has failed to make any child support payments to Shannon since the date of the Judgment and has thus not had this expense yet, she feels the prospective future receipt of child support from Shannon will allow her to continue to live on the ranch. Whether Angela can or will be able to afford to live on the ranch is not pertinent to this Court's consideration of whether the trial court clearly erred in making it's decision.

Angela asserts that the district court's division of property is inequitable because Shannon received a net estate of $112,423.31 whereas Angela received a net estate of $24,184.04. This was a short term marriage which lasted two years. The court split the

primary marital asset (the ranch) and the debt associated therewith. The court awarded the majority of the personal property to Angela and awarded Shannon his Retirement Account, which he had in place prior to the marriage. Even though Shannon had helped pay off debt of Angela and had been the primary breadwinner for the duration of the marriage, the net distribution of assets was $180,590.81 to Shannon and $162,592.47 to Angela. In awarding debts, besides slitting the mortgage on the ranch, the court ordered that Angela pay the debts that she came into the marriage with and which continued to exist at the time of divorce. Shannon testified that debts identified in Items 132-135 were incurred by Angela prior to the marriage. (Transcript, p. 118-119) As one example, the $43,000.00 debt identified in #134 is for a mortgage on Angela's property owned in Balfour, ND. This asset was listed on the property and debt listing (#3) but was not taken into consideration in the court's accounting and was rather simply awarded to Angela as she continued to receive payments on the sale of this property. As such, merely looking at the numbers identified in the court's Memorandum Decision, and the accounting, does not take into appropriate consideration the court's full order on property and debt distribution which was indeed MORE than equitable in Angela's favor. A full review of the trial court's Findings and Memorandum Decision demonstrates that, if anything, the trial court was more favorable to Angela that to Shannon.

After the Memorandum Decision was entered, in late July, 2012 Angela sent a letter to the court to address concerns in the property and debt distribution. In response to the same, Shannon also felt the need to respond and address concerns with the trial court's Memorandum Opinion as related to property and debt distribution. In response to these letters, the trial court sent both counsel the following e-mail on August 9, 2012:

"Judge wants a motion to amend the findings and hearing, unless the parties can agree otherwise." E-mail from Joyce Harnden, Court Reporter for Honorable Judge Jorgenson, August 9, 2012. Clearly the trial court invited both parties to make a motion to amend the findings if they felt the same was necessary.

As this court is aware, Rule 60 of the North Dakota Rules of Civil Procedure allows for parties to seek relief from a Judgment due to mistakes, etc. N.D.R.Civ.P. 60(b). Under Rule 59(j) either party has a right to file a motion to amend a Judgment. Neither party filed such a motion, even after invitation by the trial court. N.D.R.Civ.P. 59(j).

Shannon finally quickly notes that he does not agree that all of the property items Angela asserts should have been addressed, or needed to be addressed, by the trial court. As some examples of this, Items #1, 21, 22, 25, 73 (and other items) were testified upon has having been sold. As such, there was no property in existence to distribute or for the trial court to address. As another example, Item #6 is a dog which has no monetary value and which Shannon communicated to Angela she could have.

F. Whether the District Court failed take into consideration evidence in it's award of spousal support and should have awarded more support.

Angela's appeal makes a blanket statement that the spousal support was insufficient to allow her to remain on the ranch, "something that both parties stated should happen." Brief of Appellant, p. 41. To be clear, Shannon never agreed that Angela should be awarded any degree of spousal support and only agreed that she could have the ranch if she paid him 50% of the equity in the ranch. Whether a party is entitled to spousal support is not dependent upon whether they have sufficient property or income

to remain on a ranch, in a home, or elsewhere. As this court is very aware, in awarding, or modifying, spousal support, the district court must consider the relevant factors of the Ruff-Fischer guidelines. These factors 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. The needs of the spouse seeking support and the supporting spouse's needs and ability to pay must also be considered." Peterson v. Peterson, 2010 ND 165, ¶13, 788 N.W.2d 296 (citations omitted).

As referenced in subpart D above, the court did address the Ruff-Fischer factors in the course of making both it's property distribution and it's spousal support award. It was after consideration of these factors, and commentary upon the same throughout the trial court's Memorandum Decision, that the trial court determined that Angela was entitled to rehabilitative support of $750.00 per month for a period of 12 months.

Angela has failed to uphold her burden of showing how the trial court's decision on spousal support was clearly erroneous.

G. Whether the District Court Judge should be removed as a result of bias in the event of remand.

Shannon initially asserts that this is not an issue for appeal.

Like every other person or entity who has not sided with her, Angela seeks to remove that party from further contact and in order to do so alleges that these parties are

biased. This has happened with Shannon, prior men, social services, exchange monitors, the parenting coordinator in this case, her own son, Dillon, the state's attorney, law enforcement, and now, the Judge.

The trial court had this case in front of it for 10 months during which time there were three different motions to implement and amend interim orders, a motion for contempt, a two day trial, etc. It became adamantly clear over time that Angela was refusing to follow the directives of the court, refusing to allow parenting time to Shannon, and effectively looking for any and every excuse possible to create a situation in which Shannon was entirely removed from the minor child's life. The trial court did not ignore countervailing evidence. In fact, just the opposite occurred. Over objection of Shannon's attorney (Transcript, p. 264-65), the trial court allowed Angela's two other minor children to testify in chambers. Over further objection of Shannon's attorney, the trial court refused to allow Shannon's attorney the opportunity to cross-examine the daughters (Transcript, p. 278-79). If anything, the trial court showed an overwhelming and great deference to Angela throughout the entire case even though she was frustrating Shannon's parenting time, making false allegations, etc. Even though Shannon provided ample evidence for dramatically limiting Angela's parenting time, the trial court gave great deference to Angela in entering a parenting time order which gave Angela very significant time with the minor child.

The trial court did make well-justified, critical commentary on Angela's credibility and the lack thereof. Shannon would challenge Angela to give one specific example of where the court made a finding on credibility that was not supported by not only one fact or piece of evidence, but by a multitude of evidence.

Angela seeks to have the Trial Judge removed in this case in the event the matter is remanded back down to the trial court. The trial court has not made any commentary or finding in it's Memorandum Decision which is not founded in fact. Certainly, Angela may not agree with the facts, but that does not mean the Trial Judge is biased and should be removed.

> Although a judge has a duty to recuse when required by the Code, a judge also has an 'equally strong duty not to recuse when the circumstances do not require recusal.' See Center for Professional Responsibility, American Bar Association, Annotated Model Code of Judicial Conduct 187 (2004); cf. Brakke, 512 N.W.2d 718 (holding a judge should not disqualify when a party brings a frivolous lawsuit against the judge for the purpose of disqualifying him from the proceeding). Canon 3(B)(1), N.D. Code Jud. Conduct, imposes on a judge the duty to 'hear and decide matters assigned to the judge except those in which disqualification is required.' Canon 3(B)(1) was added to the Code 'to emphasize the judicial duty to sit and to minimize potential abuse of the disqualification process.' Center for Professional Responsibility, supra, at 188 (quoting ABA Standing Committee on 1990 Code, Legislative Draft 15 (1990)).
>
> Woodward v. Woodward, 2010 ND 143, ¶9.

Angela states that the court failed to interpret facts fairly, (Brief of Appellant, p. 43) yet she fails to point to even one fact which the court found which was not well supported by the evidence presented to it. She states that the Judge ignored contrary evidence (Brief of Appellant, p. 43), yet fails to specific what contrary evidence was ignored and / or fails to recognize that it is inherit in the job of a trial judge to make credibility determinations. She states that the court decided B.D.'s fate based upon the court's dislike for the mother rather than the best interests of the child (Brief of Appellant, p. 43), but fails to demonstrate the facts or overwhelming evidence which the court ignored to make such a clearly erroneous decision.

In this matter, Judge Jorgenson relied upon ample evidence, testimony of witnesses including the parenting investigator and the adult child of Angela, a well-

reasoned parenting investigation report, etc. to make appropriate and well-reasoned findings.

While there are general allegations by Angela that the court is biased, there is no actual substance to these allegations. This court should not abide by Angela's request to require a different district judge be appointed if this case is indeed remanded back down in any capacity.

CONCLUSION

Based on the aforementioned law and reasoning, Appellee respectfully requests the Supreme Court uphold the District Court's Judgment and further award Appellee his attorneys fees and costs associated with this appeal.

Respectfully submitted this 10 day of January, 2013.

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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF SHERIDAN

SOUTH CENTRAL JUDICIAL DISTRICT

Shannon R. Dieterle,

Plaintiff,

v.

Angela L. Dieterle,

Defendant.

District Court Case No. 42-2011-DM-00021
Supreme Court Case No.: 20120329

CERTIFICATE OF SERVICE

The undersigned certifies, pursuant to Rule 5 (f) of the North Dakota Rules of Civil Procedure, that on January 10, 2013, a true and correct copy of the following document(s):

1. Brief of Appellee.

was served, via deposit in United States Mail, upon the following:

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Dated this 10 day of January, 2013.

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