20130125

IN THE NORTH DAKOTA SUPREME COURT

Trista Marie Conzemius,	)	
	)	Supreme Court #20130125
Plaintiff, Appellant and Cross- Appellee,	)	Cass County
vs.	)	#09-2012-DM-00040
Chad Thomas Conzemius,	)	
Defendant, Appellee and Cross-Appellant.	)	

APPEAL FROM THE DISTRICT COURT,

CASS COUNTY, NORTH DAKOTA

EAST CENTRAL JUDICIAL DISTRICT

THE HONORABLE WICKHAM CORWIN, PRESIDING

APPELLANT'S BRIEF

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I.

Statement of Supreme Court's Jurisdictional Grounds

[1] "Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law." North Dakota Constitution, Article VI, Section 6. "A judgment or order in a civil action...may be removed to the Supreme Court by appeal as provided in this chapter." N.D.C.C., § 28-27-01. Divorce judgments are appealable. N.D.C.C., § 28-27-02.

II.

Statement of Issues

[2] ***Alcohol Restriction?*** To Trista, Chad's alcohol abuse was and is a central issue. Through Chad's own admissions, she proved his perpetual drinking, frequent blackouts, and accompanying abuse and anger. The District Court dismissively breezed past the issue. Should it, at least, have restrained Chad from being under the influence of alcohol during his parenting time?

[3] ***Expanded Summer Parenting Time?*** Chad abuses alcohol daily. He didn't exercise two-thirds of the midweek visits or any of the extended summer parenting time awarded him by interim order. Did the District Court clearly err in: (a) awarding Chad six weeks of expanded summer parenting time; (b) refusing to allow the parties' son to re-testify, after learning his dad didn't exercise four weeks of summer parenting time; and (c) allowing Chad to dictate Trista's summer schedule?

[4] ***Equitable Distribution Errors?*** Did the District Court clearly err in its asset and debt distribution by: (a) ignoring the tax impact on the parties' tax-deferred retirement accounts; (b) ignoring Chad's waste and dissipation; and

(c) under-valuing the parties' 20% interest in a closely held water-hauling business, Schiele Mobility?

[5] ***Errors in Child and Spousal Support Findings?*** Did the District Court clearly err in understating Chad's gross annual income for support purposes?

[6] ***Spousal Support Errors?*** Did the District Court clearly err by not awarding Trista spousal support?

III.

Statement of the Case

[7] Trista Conzemius commenced this action on October 24, 2011 [App. 14]. Chad ignored the proceeding for months [App. 89]. For lack of information—mostly about two closely held businesses—Trista was unable to process a default.

[8] To obtain the necessary information, Trista served standard discovery. Chad ignored that, too [App. 17]. On February 21, 2012, Trista served a Motion to Compel Discovery [App. 17-22].

[9] On February 27, 2012, the Court entered its Scheduling Order, setting a Pretrial Conference for June 4, 2012 [App. 23-25]. Chad had still not answered or appeared.

[10] On March 9, 2012, Trista served a Motion for Interim Order and Contempt [App. 27-88].

[11] On March 15, 2012, the day before hearing on Trista's Motion to Compel, Chad finally served a 22-page Answer and Counterclaim. He promised discovery responses before March 30, 2012 [App. 117].

[12] Trista moved to continue the Pretrial Conference because of Chad's evasive discovery responses and his failure to undergo an alcohol assessment (in which Trista could participate)[App. 185-188]. The Court continued the Pretrial Conference until August 27, 2012.

[13] Trial was held over the course of three days in December, 2012. Of necessity, Trista tried her case through hostile witnesses, including: Chad; Tina Fonder (Chad's live-in girlfriend); Brad Schiele (Chad's best friend and 60% owner of Schiele Mobility); and Heidi Borud (Brad and Chad's bookkeeper/accountant).

[14] Everything was contested: residential responsibility; parenting time (duration and restrictions); Chad's true income (for child and spousal support purposes); the value of Wayne's Electric (Chad's business); the value and earning capacity of Schiele Mobility; how to equitably distribute the marital estate; whether Chad should pay spousal support and, if so, the terms and duration.

[15] Judgment was entered on February 27, 2013. Notice of Appeal was served and filed on April 22, 2013.

IV.

Statement of Facts

[16] Trista and Chad married when they were young and penniless [App. 28].

[17] They are the parents of a 16-year-old son, DTC.

[18] When judgment issued, Trista and Chad were in their nineteenth year of marriage [App. 11].

[19] Trista teaches graphic design at the Minnesota State University, Moorhead [App. 34].

[20] Chad is a licensed electrician who owns his own business, Wayne's Electric, in Fargo [App. 34].

[21] The parties separated in August of 2009 [T. 548]. They sold their home and Trista bought a condominium in her own name [T. 557].

[22] Trista and Chad briefly reconciled. During the reconciliation, Chad wanted $30,000 to invest in an oil field water-hauling business (Schiele Mobility) with his best friend, Brad Schiele [T. 189]. He convinced Trista to borrow the $30,000, using her condominium as collateral and her father as a co-signor [T. 369, 557, 558]. The parties permanently separated just months later, in August 2011 [App. 29].

[23] Chad and Brad (whose own divorce was also approaching) drafted bylaws for Schiele Mobility that prevented their spouses from ever owning shares of its stock [App. 256, 260-261]. If spouses were ever awarded any shares, it would be deemed an "involuntary transfer" [App. 256] and Chad, Brad, and a third investor, Brad's brother, could buy the shares back at a price of their choosing [App. 260-261; T. 234].

[24] Wayne's Electric and Schiele Mobility were the only marital assets with present earning capacity. To Chad, the Court awarded 100% of both businesses [App. 634, 663, 678]. To Trista, it distributed liability for the $30,000 Schiele Mobility start up loan [App. 635, 663, 678].

[25] By its reckoning, the Court determined the parties' net marital estate was worth $466,026 and that equity required an ***equal*** distribution [App. 625, 653]. To reach this result, it awarded Chad $344,107 (51%) and Trista $326,840 (49%) of the parties' assets. Though the Court found that Chad earned $105,000 per year [App. 617, 645] and Trista earned $63,310 each year [App. 618, 646], it required Chad to pay $14,823 (7.2%) and Trista to pay **$190,098 (92.8%)** of the parties' debts [App. 635, 664, 678-679].

[26] Its approach, thus, awarded Chad $329,284 (70.66%) and Trista $136,742 (29.34%) of the net marital estate.

[27] To "equalize" the net distribution, the Court also required Chad to pay Trista $96,271 over a five year period, at 5% interest per annum [App. 636, 664, 679]. It "secured" this payment with two IRA's it awarded to Chad, having a combined, untaxed value of $23,757 [App. 631, 636-637, 660, 664, 675, 679, 681].

V.

Argument

A.

The District Court Ignored Overwhelming Evidence of Chad's Alcohol Abuse and Failed To Protect The Parties' Son

[28] At both interim proceedings and at trial, Trista went to great lengths to share her and DTC's history of contending with Chad's alcohol abuse. Her evidence was uncontested.

[29] When DTC was born, Chad's drinking increased and caused strife [T. 493]. In the last five or six years, Chad's alcohol abuse worsened [T. 494]: he'd drink 10 to 24 beers a day [T. 112, 502-503]; he'd drink more days than not [T. 112]; he'd blackout on a monthly basis [T. 112]; Trista and DTC would find Chad passed out [T. 499, 500]. When drinking, Chad would break things, yell, and call Trista names. He'd demean her for not drinking with him [T. 108, 504, 548; App. 424]. In DTC's presence, Chad punched a hole in a wall [T. 530-531].

[30] After drinking alcohol, Chad would have DTC drive him home [T. 527-529]. To conceal his drinking, Chad would hide alcohol [T. 498] and lie about his whereabouts [T. 497, 499]. Chad drinks in virtually every setting: at home [T. 526]; as part of his work life [T. 290-293; App. 383]; while golfing [T. 496]; on hunting trips [T. 528-529]; while boating [T. 526]. He incorporates alcohol into every facet of his life.

[31] Chad and Trista separated, for the first time, on August 8, 2009, due to Chad's drinking [T. 548].

[32] In May or June, 2011, after Chad's multiple anger outbursts and tirades, family members convinced him to begin a counseling relationship with Sanford Psychiatric, where he was prescribed anxiety medication and urged to engage in additional diagnostics [T. 392-397; App. 419]. Chad ignored those recommendations and failed to attend any further Sanford appointments [T. 397; App. 65].

[33] On September 11, 2011, at the urging of a physician family member, Chad underwent an alcohol assessment at Prairie St. John's [T. 93, 102; App. 414-426]. Evaluator Susan Cagle noted that Chad experienced anxiety and worry

[T. 110; App. 420] and, when drinking, displayed bizarre and inappropriate behaviors [T. 110; App. 423], frequently blacked out [App. 424], spent entire nights out drinking [T. 111; App. 423], was verbally abusive to Trista [T. 108; App. 424], threw things at Trista [T. 108; App. 420], and drove while intoxicated [T. 112; App. 424]. Her findings were based on Chad's self-report [App. 417; T. 397-398].

[34] Ms. Cagle referred Chad for more clinical diagnostics and a full chemical dependency evaluation [T. 115]. Chad ignored her recommendations.

[35] Chad testified that, during the action, he'd undergone an alcohol evaluation at Prairie St. John's [T. 399]. However, he did not share its results: He provided no testimony or report from anyone at Prairie St. John's about this alleged evaluation. Moreover, he admitted that his alleged evaluation was based entirely upon his self-report and that the evaluator received no information from any collateral source [T. 404-405].

[36] Trista was concerned about the many risks Chad's alcohol abuse posed to DTC, including the poor modeling it gives an impressionable teen [T. 652]. The approach she suggested to balance Chad's parenting time rights with justifiable safety concerns was to keep Chad's parenting periods relatively short...and to include this prohibition in the judgment:

> Chad is specifically restrained from drinking alcoholic beverages, or being under the influence of alcohol, at any time DTC is in his care. If credible evidence exists that Chad is in violation of this restraining provision, DTC shall be immediately returned to Trista' care, that parenting time period shall be deemed waived or forfeited, and the parties are encouraged to bring the matter to the Court's attention.

[App. 578].

[37] Despite all of the time, energy, and money involved in bringing this issue to the Court's attention, and despite cast-iron evidence—sourced mostly to Chad—the entirety of the District Court's response was this dismissive statement:

> *At trial, much attention was devoted to Chad's drinking and emotional stability. There are indications of both alcohol abuse and emotional stress or anger. Some or all of this may well be due to the divorce...*

[App., 613, 641].

[38] The Court's first sentence was startlingly spare. The cause-and-effect order of its second was betrayed even by Chad: He testified not that his drinking and anger was caused *by* marital difficulties, but that his drinking and anger *caused* the marital difficulties:

> Q. Have you and Trista experienced marital difficulties due to your use of alcohol?
>
> A. Yes.
>
> Q. Okay. Have you and Trista experienced marital difficulties due to your anger?
>
> A. Yes.

[T. 278-279].

[39] North Dakota Century Code Section 14-05-22(2) provides:

> After making an award of primary residential responsibility, the court, upon request of the other parent, shall grant such rights of parenting time as will enable the child to maintain a parent-child relationship that will be beneficial to the child, ***unless the court finds, after a hearing, that such rights of parenting time are likely to endanger the child's physical or emotional health.***

N.D.C.C. §14-05-22(2) (emphasis added).

[40] This Court says:

> The primary purpose of visitation is to promote the best interests of children." Eberhardt v. Eberhardt, 2003 ND 199, ¶ 19, 672 N.W.2d 659. "A restriction on visitation must be based on a preponderance of the evidence and accompanied by a detailed demonstration of the physical or emotional harm likely to result from visitation." Wigginton, 2005 ND 31, ¶ 9, 692 N.W.2d 108.

Simburger v. Simburger, 2005 ND 139, ¶ 14, 701 N.W.2d 880.

[41] Alcohol abuse is a factor that the Court must consider when awarding primary residential responsibility and restricting parenting time. "A parent's inability to control alcoholism is a highly relevant factor a trial court can consider in child custody determinations." Nefzger v. Nefzger, 1999 ND 119, ¶6, 595 N.W.2d 583. This Court has even affirmed decisions to modify primary custody because of the custodial parent's alcohol abuse. Ramstad v. Biewer, 1999 ND 93, ¶19, 589 N.W.2d 905.

[42] This Court once reviewed a custody judgment that stated: *"...the custody of the minor child...by the Defendant is expressly conditioned upon the Defendant refraining from any use of any controlled substances including alcohol..."* Gravning v. Gravning, 389 N.W.2d 621, 622 (N.D. 1986). Its affirming response was that "[t]he use of conditions for continuing custody may be an additional way to insure that divorced parents fulfill their obligations to their children," Id., a statement it supported with this reference:

> "Indeed, the belief among courts is growing that the conditioning of remedies is 'one of the better means available' to deter recalcitrant parental behavior and to coerce compliance with postdivorce obligations." Comment, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 Colum.L.Rev. 1059, 1062 (1984).

Id., footnote 2.

[43] This Court will not reverse an order involving parenting time conditions unless it is clearly erroneous. Marquette v. Marquette, 2006 ND 154, ¶ 8, 719 N.W.2d 321. Here, Trista provided the Court more than enough evidence to justify a very modest, common-sensical, safety condition. In the face of such evidence, coupled with approving law, "clearly erroneous" aptly describes the District Court's dismissive work.

B.

Extended Summer Parenting Time:
The District Court's Three Mistakes

[44] With this language, the District Court granted Chad extended summer parenting time with DTC:

> *During the summer months, a maximum of six weeks, to be exercised no more than two consecutive weeks at a time. Chad shall notify Trista of his intentions for the coming summer by no later than May 15 of each year.*

[App. 669].

i.

Clear Error #1: Granting Chad Any
Extended Summer Parenting Time.

[45] ***Absent a reason for denying it***, some form of extended summer visitation with a fit non-custodial parent is routinely awarded if the child is old enough.

Dschaak v. Dschaak, 479 N.W.2d 484, 487 (N.D. 1987)(emphasis added); See also, Tibor v. Tibor, 2001 ND 43, ¶ 14, 623 N.W.2d 12; Schiff v. Schiff, 2000 ND 113, ¶ 30, 611 N.W.2d 191; Deyle v. Deyle, 2012 ND 248, ¶ 19, 825 N.W.2d 245;

[46] Here, the Court clearly erred in not finding "a reason for denying it."

[47] A first "reason for denying" Chad six weeks of extended parenting time with DTC was his history of, and active, alcohol abuse, discussed above. Chad cannot go more than brief periods without drinking.

[48] A second "reason for denying" Chad six weeks of extending parenting time was his failure to exercise the four weeks of summer parenting time the Interim Order gave him.

[49] At the interim stage, as at trial, Chad sought equal parenting time. [T. 23-24] Likewise, at both stages, Trista pointedly opposed Chad's requests due to his alcohol abuse and his long periods of absence. [T. 25; App. 50-55].

[50] The Court's interim ruling ignored Trista's evidence and granted Chad four weeks of extended summer parenting time, "never more than two weeks at a time." [T., 28; App. 178, 181].

[51] As his own testimony established, Chad then fulfilled Trista's prophecy: he did not, or could not, exercise extended summer parenting time because of the requirements of the summer construction season:

> Q. Okay. And then the interim order also granted you the right to spend four full weeks of extended parenting time with D.C. during the summer; isn't that true?
>
> A. Yes.
>
> Q. And the truth is that you never exercised the extended parenting time that the order provided you?
>
> A. That's my busiest time of the year. No, I did not.

[T. 392; See also, T. 103, 649].

[52] Relevantly, Chad did, however, make time to take his live-in girlfriend on a number of trips, many during the summer. He took her to Duluth [T. 198], Bemidji [T. 198], Sturgis [T. 198], Cass Lake [p. 209], and Phoenix [T. 197].

[53] Chad has neither the time nor inclination to exercise extended summer parenting time. Chad abuses alcohol. It was clearly erroneous to award him extended parenting time.

ii.

Clear Error #2: Refusing to Allow DTC to Re-testify

[54] Against Trista's wishes, Chad called DTC to testify during trial [T. 74-76]. He was examined in chambers, by the Court. The parties were not present, but their attorneys were.

[55] When Trista's counsel spoke with DTC, this exchange unfolded:

Q. Okay. Did you know that Judge Corwin also entered an order that granted your dad four weeks of parenting time with you this summer? Did you know that?

A. No.

Q. Okay. Am I right that your dad didn't exercise four weeks of parenting time with you this summer?

A. Like –

Q. Like did you spend four weeks of time with him like in consecutive, say, weekly or two-week long blocks?

A. No. I don't think so.

[T. 523].

[56] The next day, Trista attempted to re-call DTC [T. 580]. She explained that, after testifying the day before, he was upset that his dad didn't exercise his four weeks of summer parenting time [T. 581-582]. DTC wanted to recant his preference for an alternating week arrangement in favor of the Interim Order's alternating weekend arrangement [T. 585-586].

[57] The Court would not allow DTC to testify, whether during Trista's case-in-chief or on rebuttal [T. 583-585]. Nor would it allow Trista to provide foundational testimony [T. 661-663].

[58] This Court has expressed its approach to such matters like this:

> A district court has broad discretion on evidentiary matters, and we will not overturn its admission or exclusion of evidence on appeal unless that discretion has been abused." Forster v. West Dakota Veterinary Clinic, Inc., 2004 ND 207, ¶ 40, 689 N.W.2d 366. Under N.D.R.Ev. 103(a)(2), "[e]rror may not be predicated upon a ruling which ... excludes evidence unless a substantial right of the party is affected, and ... [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." *See also* N.D.R.Civ.P. 61("no error in admitting or excluding evidence ... is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order").

Schwab v Zajac, 2012 ND 239, ¶ 19, 823 N.W.2d 737.

[59] The District Court's refusal to honor DTC's request to testify affected both his substantial right to be fully heard and Trista's substantial right to present evidence. The Court did not attribute its refusal to time limitations. Instead, its decision was that, "I'm just not going to put him [DTC] through anything further" [T. 585]. In other words, the Court spared DTC an experience from which he did not want to be spared. In doing so, it abused its discretion.

iii.

Clear Error #3: Giving Chad Control of Trista's Summer Schedule

[60] The District Court empowered Chad with unilateral control to dictate when, during the summer, he'd choose to visit DTC:

> *Chad shall notify Trista of his intentions for the coming summer by no later than May 15 of each year.*

[App. 669].

[61] No good reason existed to vest such unilateral authority with Chad. He exercises his parenting time only erratically, skipping two-thirds of his every-Wednesday visits and all of his extend summertime [T. 649]. He does not communicate with Trista about parenting times and, instead, makes plans directly with DTC [T. 523-525]. Chad admits that when he talks to Trista, he gets frustrated, aggressive, and calls her names [T. 390].

[62] Every good reason exists to do something *other than* give Chad unilateral control over Trista's and DTC's summer calendar. *If* it makes sense that one party should have unilateral control over the summer calendar, it should be the custodial parent. A better approach, however, is to be neutral: the Court, for example, could have outlined a specific default schedule (eg., alternating one-week blocks), but permitted the parties to depart from the schedule upon ***mutual*** agreement.

[63] Chad's history tells us that giving him sole authority to identify summer time blocks of parenting time is unlikely to work. Even if it were to work, it is an abuse of discretion to place Trista's and DTC's summer schedules entirely within Chad's control.

[64] On Chad's particular history, and the strong record of this case, this aspect of the Court's work was unthinking and clearly erroneous.

C.

Equitable Distribution Errors

[65] The Supreme Court reviews District Court decisions about asset values and equitable distribution of marital estates with the clearly erroneous standard. Stephenson v. Stephenson, 2011 ND 57, ¶17, 795 N.W.2d 357; Amsbaugh v. Amsbaugh, 2004 ND 11, ¶ 51, 673 N.W.2d 601.

i.

Clear Error #1: The District Court Ignored the Tax Impact on the Parties' Tax-Deferred Retirement Accounts

[66] The District Court determined that "[t]he marital estate should be divided equally between the parties" [App. 625, 653]. Because of the way it distributed the parties' tax-deferred retirement accounts, however, it did not accomplish its even-Steven aim. With respect to such assets, here are the Court's values and its distribution:

Exhibit #1 Item no.	Description	To Trista	To Chad
14	Trista's Roth IRA	$11,655	
15	Trista's TIAA CREF	$151,925	
16	Chad's Roth IRA		$9,843
17	Chad's IRA		$13,914
		$163,580	$23,757

[App. 631, 660].

[67] In valuing and distributing these retirement assets, the Court used their gross (pre-tax) value. The two-fold effect of doing so was: (1) to award Trista a disproportionate tax impact; and (2) to make its ultimate distribution unequal.

[68] Assume, for example, that the retirement assets awarded each party will, ultimately, be taxed at that same rate...such as 25%. The $163,580 awarded to Trista would, thus, be $122,685 (after tax) and the $23,757 awarded to Chad would be $17,818 (after tax).

[69] Leaving all of the remainder of the Court's values unchanged and unchallenged, and using the net, or after-tax, values for the parties' tax-deferred retirement accounts, it actually awarded Trista only $192,118 and Chad $227,074 of the marital estate (the rest of which was set forth in net, or after tax, value). Obviously, these amounts are not equal. Thus, the Court did not fulfill its own stated intent.

ii.

Clear Error #2: The District Court Ignored Chad's Waste and Dissipation

[70] Trista devoted abundant time, effort, and evidence to establishing Chad's economic waste. She established that, while he was over $6,000 in child support arrears [App. 630; 658; 673], Chad supplied his girlfriend free living space [T. 217, 310] and paid her way on trips [T. 210]. She proved that Chad's net monthly income significantly exceeded his net monthly living expenses for the 14 months the parties' divorce was pending and that the marital estate should have included the significant excess. She provided the Court with years' worth of

checking and credit card statements to identify amounts Chad wasted on alcohol. Again, the Court's finding was dismissive and expressed in a single, un-explaining, sentence:

> *His lifestyle and expenditures are not found to rise to the level of economic fault or waste.*

[App. 618, 646].

[71] Dissipation of Tina Fonder's Good Deal: Chad admitted lying in formal discovery about his affair with Tina Fonder [T. 332-336]. During her testimony, Tina initially lied about where she lived [T. 196]. During cross-examination, however, both admitted that Tina lived, for free, with Chad [T. 200-201; 217, 310]. Meanwhile, Chad did not pay Trista child support, as required by the Court's Interim Order [App. 630; 658; 673] and she was unable to pay her monthly expenses [T. 555-556; App. 469-471]. Tina should have paid rent for the value of the housing Chad gave her. Her rent would have been a marital asset included in the marital estate.

[72] Dissipation of Chad's Excess Income: The Court found—Trista believes errantly—that Chad's gross annual income was $105,000 [App. 617, 624, 645, 652] and that his net monthly income was $6,500 [App. 624, 652]. Trista argued that Chad's net monthly income was nearer to $9,600 [App. 571]. Throughout the action, Chad staunchly maintained that his personal monthly expenses were $1,805.09, an oddly precise number [App. 150-154, 472; T. 306-310]. Regardless of whether one uses the Court's or Trista's income conclusions, Chad should have accrued a substantial amount of excess, disposable funds—a marital asset—during the fourteen months the action was pending:

Using Court's Conclusion of Chad's Net Monthly Income

Net Monthly Income:	$6,500 x 14 months =	$91,000
Personal Monthly Expenses:	$1,805.09 x 14 months =	$ 25,271
Excess funds =		$65,729

Using Trista's Conclusion of Chad's Net Monthly Income

Net Monthly Income:	$9,600 x 14 months =	$134,400
Personal Monthly Expenses:	$1,805.09 x 14 months =	$ 25,271
Excess funds =		$109,129

[73] The excess income should have been accounted for in the Court's findings. It should have been included in the marital estate.

[74] Dissipation of Dollars Lost Through Barter: Throughout the summer, Chad traded electrical work for the use of an unnecessary summer lake cottage [T. 204; 376-377]. Had Chad, instead, received dollars for his work, they would have increased the marital estate. Working on trade artificially reduced it, instead. Whether Chad paid for the frivolous second home—a lake cottage—with dollars or with otherwise uncompensated labor, either method resulted in loss to the parties' marital estate. The Court should have recognized the dissipation, but didn't.

[75] Dissipation by Alcohol Abuse: Trista did more than provide the Court abundant evidence of Chad's drinking *behavior*. She also provided it abundant evidence of the *amounts* he'd spent on that behavior. She provided the Court Chad's checking account records [Docket #204, #206, #210, #212] and summaries thereof [App. 372, 374, 376, 380]. She provided the Court Chad's credit card statements [Docket #214, #216] and summaries thereof [App. 383, 387]. One doesn't drink 10 to 24 beers a day for free. Although evidence of this truth shouldn't be needed, Trista tried to provide it.

[76] "This Court has long recognized that economic fault is a proper factor for the trial court to consider in dividing marital property." Hoverson v. Hoverson, 2001 ND 124, ¶ 17, 629 N.W.2d 573; Peterson v. Peterson, 1999 ND 191, ¶ 9-10, 600 N.W.2d 851; Bell v. Bell, 540 N.W.2d 602, 605 (N.D.1995). "A party's dissipation of marital assets is a particularly relevant factor in arriving at an equitable distribution of the property." Halvorson v. Halvorson, 482 N.W.2d 869, 871 (N.D.1992); see also Barth v. Barth, 1999 ND 91, ¶ 16, 593 N.W.2d 359; Theis v. Theis, 534 N.W.2d 26, 28 (N.D.1995). Horner v. Horner, 2004 ND 165, ¶16, 686 N.W.2d 131.

[77] The District Court's indifferent work in this case did not comport with this Court's conclusion that dissipation is particularly relevant to identifying an equitable distribution. It was disinterested in, thus ignored: (1) the value Chad gave Tina in free lodging, (2) the amount by which Chad's income exceeded his living expenses, (3) the value of the compensable time he dissipated on an unnecessary lake cabin, and (4) amounts he wasted on liquor.

iii.

Clear Error #3: The Court Undervalued the Parties' Interest in Schiele Mobility

[78] Chad, Brad Schiele, and Brad's brother, Steve, incorporated Schiele Mobility, a water-hauling business in 2010 [App. 253-256]. Brad owned 60% of the stock. The others owned 20% each [App. 253-256].

[79] The Court received into evidence a valuation report for Schiele Mobility that had been generated for use in Brad Schiele's divorce [App. 344-351]. The report was based on Schiele Mobility's **2011** year-end numbers [App, 344-351]. By time of trial, almost twelve months later, substantial, objective, accounting information existed, disclosing Schiele's continued ascendant value and meteoric earnings [App. 275, 277, 279, 283, 285, 287]. The Court ignored such evidence in favor of the remote valuation report [App. 620-622, 648-650].

[80] By time of trial, the most recent accounting data, produced by Schiele Mobility's own accountant, was from the end of August, 2012 [App. 279-280, 287-288]. Those documents evidenced startling increases on every front.

[81] Schiele's Profit and Loss Statements recorded -$126,949 earnings in 2010, $271,575 a year later in 2011, and $308,379 by August 31, 2012, just three-fourths into the year.

[82] Schiele's Balance Sheets recorded these skyrocketing numbers:

Line item	***12/31/10 App. 283***	***12/31/11 App. 285***	***8/31/12 App. 287***
Total assets	$18,085	$322,267	**$551,279**
Total other current assets	$18,055	$293,284	**$523,393**
Total equity	-$56,949	$44,626	**$150,506**

[83] Comparing the essential December 31, 2011 figures from the valuation report with August 31, 2012 balance sheet entries, disclosed a $229,012 increase in Schiele's total assets and a $105,880 increase in its total equity...in just eight months:

Line item	*12/31/11 App. 285, 348*	*8/31/12 App. 287*	*Difference*
Total assets	$322,267	$551,279	**+$229,012**
Total equity	$44,626	$150,506	**+$105,880**

[84] The 2011 valuation report valued Schiele Mobility at $684,000 [App. 351]. 20% of such amount is $136,800, the amount the Court assigned to the Conzemius' interest [App. 622, 650]. Trista suggested a valuation of $200,000 which reflected the proportionate increase evidenced in the 2012 accounting documents [App. 565]. The Court gave three reasons for rejecting Trista's position.

[85] Brad Schiele's Credibility: The Court leaned on Brad Schiele's testimony that "the business is worth less today than it was when Sliwoski valued it" and "Brad...appeared to be a candid and credible witness" [App. 621, 649]. Yet, Brad identified himself as Chad's best and closest friend [T. 178-182]. When asked, "[w]ould you admit that between these two people you're biased in favor of your friend Chad," Brad answered, *"well, it's pretty evident, yes"* [T. 182]. To contend with Brad's evasiveness during Trista's questioning, the Court deemed him "hostile and adverse" and, though called by Trista, allowed him to be cross-examined with leading questions [T. 231].

[86] Loans to Brad: The infant business, Schiele Mobility, was generating cash and income at such a rapid clip that, in just its second full year, in addition to his distributions and income, Brad Schiele drew out $385,000, as a loan [T. 140-142. ;App. 285, 287] Rather than seeing this as a sign of Schiele's vital health, the Court found that "these transfers have adversely impacted Schiele Mobility. They have created cash flow problems and left the business

short of operating capital." The lapse in the Court's reasoning was that: (1) these loans were already reflected in Schiele's August 31, 2012 accounting materials which—despite the self-loans—still noted skyrocketing equity and asset values [App. 287]; and (2) whatever else Brad testified to, he *did not* claim that his self-loans diminished Schiele Mobility's value.

[87] Lack of Marketability: The Court fully founded its valuation of Schiele Mobility upon Leonard Sliwoski's report [App. 620-622, 648-650]. Nonetheless, and despite no supporting testimony, the Court criticized the same report for "...a very significant consideration Sliwoski did not address":

> Brad owns the controlling interest, and he freely exercises control over the operations of the company. Sliwoski concluded no discount was warranted for lack of marketability...It is well established that minority interests in closely held corporations are hard to sell.

[App. 621, 649].

[88] The Court's problem in engaging in such conjecture? There was no evidence in the record to support it. Worse, the only evidence the record contained on the issue actually refuted it. Sliwoski's report ended with a rosy conclusion that:

> It is our opinion that no discount for lack of marketability is warranted in valuing 6,000 shares of common stock in Schiele Mobility, Inc. This opinion is based on the fact that as of December 31, 2011 skilled truck drivers are badly needed in the western North Dakota oil field. A business with these type of truck drivers would likely sell at full value or possibly a premium.

[App. 350].

[89] In addition, other objective facts existed not only to refute the Court's pessimistic speculations, but to affirm the optimistic trending of Schiele Mobility's own accounting reports, namely:

a. In each of its three years of existence, Schiele Mobility increased the number of tractors and trailers it has leased [App. 274, T. 140].

b. In each of its three years of existence, Schiele Mobility increased the number of drivers it employs [T. 140].

c. None of Schiele Mobility's owners want to sell their interest and, in fact, each has done all possible to defend themselves against the prospect of losing their ownership interest [T. 234, 267; App. 260-261].

d. Schiele Mobility signed 5-year equipment leases, indicating faith in a long-term future [T. 129].

e. By May 11, 2012, Schiele Mobility's owners had already distributed $202,500 to themselves ($121,500 to Brad Schiele, $40,500 to Chad Conzemius, and $40,500 to Steve Schiele). [App. 343].

f. Though Sliwoski didn't include it in his valuation, the owners recognized the existence of Schiele Mobility's significant good will value [App. 273].

[90] The best, most recent, most objective evidence the Court received regarding the Schiele Mobility's value was its August 31, 2012 accounting documents, which indicated continued stratospheric growth after the Sliwoski valuation date. Ownership behaviors and decisions affirmed continued faith in that trend. The Court clearly erred in rejecting such ironclad evidence in favor of biased testimony or its own, unsupported conjecture.

D.

The District Court Under-Stated Chad's Annual Income

[91] The Court erred by somehow determining Chad's annual income for child support purposes to be less than ***either*** Trista or Chad contended it to be. It found that "Chad's gross annual income from all sources is determined to be $105,000" [App. 616, 645].

[92] Before trial, during interim proceedings, Chad argued that his "gross income is averaged to be $108,876 with a net income of $76,960" [Docket, #78]. After trial, in his proposed Findings of Fact, Chad argued that "there exists a gross annual income of $111,733 and an annual net income from self-employment of $87,871.00" [Docket #296, p. 25].

[93] For her part, during interim proceedings, Trista contended that Chad's gross annual income was $140,000 [App. 175]. After trial, she contended it was $162,564 [App. 570].

[94] During trial, Chad confessed that he'd concealed a loan application, despite Trista's direct discovery request [T. 298-299; App. 368]. On the application he signed on April 20, 2012—just 11 days after hearing on Trista's interim motion—Chad certified to a bank that he earned income of $140,000 [App. 368-371], matching Trista's contention at that time. Oddly, the Court forgave Chad this representation by assuming he'd lied ("*[s]uch estimates are often inflated*") [App 615, fn. 2, 645, fn. 2].

[95] The District Court heard abundant testimony that Chad runs substantial amounts of personal expenses through Wayne's Electric. It even found that *"[t]he vehicles he uses for business purposes are also available for his personal use. The lines between business and personal expenses are not always bright...Chad clearly does use business accounts to pay non-business expenses"* [App. 615, 643].

[96] The District Court heard testimony about how Chad would reduce his taxable income by exchanging electrical work for undisclosed trade [T. 296, 608]. The Court even found that Chad *"is also able to barter by trading services for non-monetary compensation"* [App. 615,643].

[97] The District Court heard consistent testimony about Chad's intentionally primitive and informal bookkeeping for Wayne's Electric. Chad bragged to Trista about the "creative bookkeeping" he used to hide taxable income [T. 559-560]. Chad confirmed his use of that term [T. 295-296]. Thus, the Court found Chad's *"bookkeeping system is lacking to non-existent"* [App. 615, 643].

[98] Trista carefully provided the Court Chad's own financial records, and summarized them, to identify the personal expenses he used to reduce his annual income in 2009, 2010, 2011, and 2012 [App. 394]:

Year	Personal expenses paid by Wayne's Electric
2009	$53,178 [App. 394]
2010	$22,310 [App. 394]
2011	$28,904 [App. 394]
2012	$22,564 [App. 394]

[99] As she shared this evidence, the Court declared its disinterest: *"...I will tell you this, I would not spend much time on it because I don't think I'm going to be very persuaded by what happened in 2009"* [T. 563].

[100] Then, despite its own findings about Chad's "lacking to non-existent" bookkeeping, and its disinterest in his true historical expense records, the Court's ultimate approach to identifying Chad's income—inexplicably—was to average five years of his tax records [App. 617, 644]. It, thus, anchored its findings in what even it deemed to be fiction.

[101] To its averaged number ($53,380), it then took Chad's [undocumented] word that he received $6,000 a year in personal vehicle benefit. Lastly, it added a meager $5,620 per year ($468/mo.) to capture all of the personal expenses Chad improperly wrote off and all of his undeclared barter [App. 617, 644].

[102] To Chad's income from Wayne's Electric, the District Court added only $40,000 in annual income from Schiele Mobility, apparently by referencing the $40,500 in distributions Chad had received from Schiele as of August 31, 2012 [App. 617-618, 644-645]. In this respect, the Court confused an S Corp's *distribution* with the taxable *income* derived from that corporation.

[103] In truth, as of August 31, 2012, Chad had already earned **$61,675** from Schiele Mobility. Its own accounting records identified $308,379 in corporate earnings, 20% of which are Chad's [App. 280].

[104] The Court could not have reasonably relied upon Wayne's Electric's tax returns. It provided no basis for the nominal amount of improper personal expenses it identified and for bypassing the hard evidence of Chad' own bank and credit card records. Its forgiveness and dismissal of Chad's own loan application was inexplicable. It flat misunderstood and misstated Chad's 2012 Schiele Mobility income.

[105] The sum total of its work constitutes clear error.

E.

The District Court's Worst Work:
It Failed to Award Trista Spousal Support

[106] For Trista, the most significant financial issue in this case was her claim for spousal support. Its importance derived from four primary considerations: (1) her after tax income would be insufficient to meet her reasonable monthly expenses; (2) because so much of the estate's value was pooled into two business interests that could only be distributed to Chad, the estate could not be distributed equally—at least not without reliance upon a future payment approach; (3) the assets to be distributed to Chad didn't include enough to secure any equalization payment; and (4) the only way to distribute the earning capacity connected with Schiele Mobility was through an award of spousal support, an issue Trista repeatedly briefed to the District Court [App. 230-233, 560, 561-5654, 569, 571-573].

[107] A trial court's spousal support determination is treated as a finding of fact which will not be set aside on appeal unless clearly erroneous. Riehl v. Riehl, 1999 ND 107, 595 N.W.2d 10. Although a trial court need not make specific findings as to each Ruff-Fischer factor, the rationale for its decisions must be discernible. Van Klootwyk v. Van Klootwyk, 1997 ND 88, ¶ 14, 563 N.W.2d 377.

i.

First, Some Context

[108] Historically, society understood husbands to accept a lifetime obligation to support their wives. "Alimony" was the judicial tool used to enforce this obligation during separation or after divorce. "Alimony Theory," Family Law Quarterly, Volume 45, Number 2, Summer 2011, p. 276.

[109] As society's understanding of gender roles has changed, courts have struggled to articulate today's theoretical basis for "spousal support." The struggle to identify underlying theory has resulted in muddled law.

[110] North Dakota's case law exemplifies this statement. It identifies numerous, seemingly free-standing, even conflicting bases for spousal support awards, never attempting to connect any of them to a larger theoretical framework. We say, for example:

> Spousal support is aimed at balancing the burdens and disadvantages created by the divorce.

Riehl v. Riehl, 1999 ND 107, 595 N.W.2d 10.

> ...it is important to consider "[c]ontinuing a standard of living ... [or] balancing the burdens created by the separation when it is impossible to maintain two households at the predivorce standard of living."

Gronland v. Gronland, 527 N.W.2d 250, 253 (N.D.1995).

> ...permanent spousal support may be an appropriate remedy to ensure the parties equitably share the overall reduction in their separate standards of living.

Duff v. Kearns–Duff, 2010 ND 247, ¶ 15, 792 N.W.2d 916; Becker v. Becker, 2011 ND 107, ¶ 30, 799 N.W.2d 53.

> ...when there is substantial disparity between the spouse's incomes that cannot be readily adjusted by property division or rehabilitative support, it may be appropriate for the court to award indefinite permanent support to maintain the disadvantaged spouse.

Fox v. Fox, 1999 ND 68, ¶ 21, 592 N.W.2d 541.

> A difference in earning power is an important factor in both spousal support and property division determinations.

Gaulrapp v. Gaulrapp, 510 N.W.2d 620, 622 (N.D.1994).

> ...spousal support is appropriate when it is not possible to restore a spouse to independent economic status or to equalize the burden of the divorce by increasing that spouse's earning capacity.

Wold v. Wold, 2008 ND 14, ¶ 14, 744 N.W.2d 541.

> A traditional homemaker's contributions are an asset to the enterprise of marriage and should be recognized...upon dissolution of the marriage.

Kautzman v. Kautzman, 1998 ND 192, ¶ 11, 585 N.W.2d 561.

[111] Yet, this Court—like most—hasn't recognized that such expressions fit within the three classic contract interests of expectation, reliance, and restitution or, as some commentators reframe: (1) Gain Theory (emphasizing expected return on a marital investment), (2) Loss theory (emphasizing compensation for the loss experienced at divorce), or (3) Contribution Theory (emphasizing reimbursement for marital contributions). "Alimony Theory," Family Law Quarterly, Volume 45, Number 2, Summer 2011, p. 279.

[112] Viewing this Court's free-standing support justifications through the lens of these theories helps reconcile what might seem to be—but which are not necessarily—inconsistent spousal support rationales. In fact, consistency can be found in the fact that, today, spousal support is based upon contract principles. Those principles, in turn, are founded upon recognition that *marriage is an economic partnership.* Amsbaugh v. Amsbaugh, 2004 ND 11, ¶ 51, 673 N.W.2d 601. This case provides the Court another chance to share such needed reconciling with this state's District Courts and family law practitioners.

ii.

Clear Error #1: Ability to Pay and Need

[113] First and foremost, spousal support awards must be made in consideration of the needs of the spouse seeking support and of the supporting spouse's needs and ability to pay. Overland v. Overland, 2008 ND 6, ¶ 16, 744 N.W.2d 67. Both are a function of the same equation, namely, a parties' disposable income less reasonable expenses. Here, the District Court expended insufficient effort to identify either Chad's ability to pay or Trista's need.

[114] Again, the Court, errantly, found that "Chad's gross annual income from all sources is determined to be $105,000" [App. 616, 645] and that his net monthly income was $6,427.

[115] It correctly found that Trista's gross annual income was $63,310 but, though it took notice of relevant tax tables [App. 205-226; T. 87-88], made no effort to identify her yearly or monthly disposable income. In her proposed Findings, Trista shared such calculation [App. 571]. Her disposable monthly income is $3,837.

[116] Throughout the entire action, Chad staunchly and repeatedly testified that his personal monthly expenses—the ones he didn't run through his business—are $1,805.09 [App. 150-154, 472; T. 306-310].

[117] At trial, Trista provided uncontradicted evidence that her reasonable monthly expenses were more than $5,200, *even before payment of a number of installment debts the Court distributed to her* [App. 470, T. 665].

[118] Collected together, along with Chad's child support payment, the parties' "ability to pay" and "need"—largely using the Court's own findings—look like this:

	Chad	***Trista***
Income	$6,427[1]	$3,837
Child support payment	-$1,145	+$1,145
Net disposable income	$5,282	$4,982
Less		
Monthly expenses	$1,805	$5,237
	$3,477 (ability)	-$ 255 (need)

[119] After Chad's child support obligation ends, assuming current income and expense levels, the parties' respective ability to pay and need would be as follows:

	Chad	***Trista***
Income	$6,427	$3,837
Less		
Monthly expenses	$1,805	$5,237
=	$4,622 (ability)	-$1,400 (need)

[1] Again, according to Trista, Chad's net monthly income is nearer $9,600. [App. 571]

[120] Despite hard evidence to contradict it, and despite its own recognition that *both parties* agreed Trista's monthly expenses greatly exceeded Chad's, the District Court, flippantly concluded:

> According to ***their*** respective estimates, Trista' monthly expenses are much higher than Chad's. For various reasons, these estimates are not considered to be controlling. Chad's is probably low and Trista's high.

[App. 618-619, 646-647](emphasis supplied).

[121] After making this finding—unimpeded by the evidence—the Court loosely concluded:

> Logically, in the future, it should cost Trista and Chad roughly the same to maintain comparable standards of living.

Id.

[122] This "logic," however, overlooked virtually all the relevant facts, even as the Court found them. Chad earns more money with which to meet his monthly expenses. Chad's personal expenses are largely run through his business (artificially reducing his income). The Court required Trista to pay $190,098 (92.8%) and Chad to pay only $14,823 (7.2%) of the parties' debts [App. 635, 664, 678-679]. All of these facts are incompatible with a finding that the parties are able to "maintain comparable standards of living." The reasoning for the Court's loose "ability to pay" and "need" conclusions cannot be discerned...and those conclusions are clearly erroneous.

iii.

Clear Error #2: Of Cake and Double-Dipping

[123] Trista argued throughout that the only way the Court could contend with, and share, the "earning capacity" of the parties' business interests was through a spousal support award [App. 572]—which is also justified by virtually all of the free-standing considerations recited above.

[124] In this testimonial exchange, even Chad agreed:

> Q. ...in your view doesn't fairness require that the income producing capacity of those assets be shared between both you and Trista?
>
> A. Yes.

[125] Yet, the Court disagreed...first by ignoring the hard evidence of Schiele Mobility's accounting trends and the owner's behaviors in favor of a list of conjectural "likelies" and "coulds":

> *Changes in technology or delivery* ***could*** *destroy the niche it currently exploits. Competition is* ***likely*** *to increase. Alternatively, customers* ***could*** *acquire internal hauling capacity. Something* ***could*** *happen to Brad Schiele, or to his relationship with Chad.*

[App. 619, 647](emphasis added).

[126] The Court followed this with a finding that it could not both distribute the value of Schiele Mobility as part of an estate distribution AND recognize its earning capacity is assessing spousal support:

> *...even if there was a reasonably certain basis for estimating further distributions over the long haul, it would not follow Trista is entitled to half the present value plus a lifetime of future payments. This violates the adage you can not have your cake and eat it too.*

[App. 619, 647].

[127] With this bromide, the Court committed two legal errors. First, it declined to consider the issue of earning capacity which this Court insists is relevant as it relates to: (1) disparity between the parties, Wahlberg v. Wahlberg, 479 N.W.2d 143, 145 (N.D.1992); (2) one parties' contribution to the other's capacity, Riehl v. Riehl, 1999 ND 107, ¶ 18, 595 N.W.2d 10; and (3) the assets distributed to each, Freed vs. Freed, 454 N.W.2d. 516, 520 n.3 (N.D. 1990).

[128] Second, it misperceived, misunderstood, and mis-applied the notion of "double-dipping," a concept applied to the seeming injustice that occurs when property is awarded to one spouse then considered as a source of income for purposes of imposing support obligations. The injustice is real where the asset IS the income, such as a retirement accounts and pension plans. "Sizing Up the Pension Pot," 24 Fam.Advoc. 12 (Fall 2001). It is NOT appropriate, however, when, as here, applied to a business, which retains its appraised value regardless of the income it generates year by year. McReath v. McReath, 335 Wis.2d 643, 800 N.W.2d 399 (2011); "Double Dipping": A Good Theory Gone Bad, 25 J.Am.Acad.Matrim.Law. 133 (2012).

VI.

Conclusion

[129] This case should be reversed and remanded with instructions to: (a) impose the alcohol restrictions Trista sought on Chad's parenting time; and (b) eliminate his extended summer parenting time.

[130] It should be reversed due to the Court's equitable distribution errors and remanded with instructions to: (a) recognize the effect of taxes on the retirement accounts awarded the parties; (b) include Chad's waste in the marital estate and award those sums to Chad; and (c) correctly value Schiele Mobility.

[131] This case should be remanded with instructions that the Court: (a) correctly determine Chad's annual income (for both child and spousal support determinations); (b) correctly identify the parties' disposable incomes and reasonable monthly expenses; and (c) correctly include, recognize, analyze, and distribute the earning capacity associate with the parties' assets (through an award of permanent and substantial spousal support).

Dated: August 22, 2013.

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IN THE NORTH DAKOTA SUPREME COURT

Trista Marie Conzemius, Plaintiff and Appellant, vs. Chad Thomas Conzemius, Defendant and Appellee	)	Supreme Court #20130125 Cass County #09-2012-DM-00040 ***Affidavit of Personal and Electronic Service***

I, Tiffany L. Plutowski, swear that I am at least 18 years of age, not a party to or interested in the above action, and that on the 22nd day of August 2013, I served a copy of the following document(s):

Appellant's Brief
Appellant's Appendix

by personally delivering a true and correct copy upon the following individual(s):

Mr. Jonathan T. Garaas
Garaas Law Firm
DeMores Office Park
1314 23rd Street South
Fargo, ND 58103-3796
Email: garaaslawfirm@ideaone.net

I further state that a true and correct copy of the **Appellant's Brief** was emailed to Mr. Jonathan T. Garass. To the best of my knowledge, the email address given above is the actual email address of the party intended to be so served.

Tiffany L. Plutowski

Subscribed and sworn to before me this 22nd day of August 2013 in the County of Cass, State of North Dakota.

Notary Public

LISA JOPPRU
Notary Public
State of North Dakota
My Commission Expires Sept. 12, 2018

IN THE NORTH DAKOTA SUPREME COURT

Trista Marie Conzemius, Plaintiff, Appellant and Cross- Appellee, vs. Chad Thomas Conzemius, Defendant, Appellee and Cross-Appellant.	)	Supreme Court #20130125 Cass County #09-2012-DM-00040 **Affidavit of Service by Mail and Electronically**

I, Tiffany Plutowski, swear that I am at least 18 years of age, not a party to or interested in the above action, and that on this date, I served the following document(s) upon the below-listed individual(s) by depositing such documents, postage prepaid, in the U.S. Mails, addressed to such person's usual place of residence:

Appellant's Brief
Appellant's Appendix (Cover Only)

I mailed such document(s) on this date to the following address(es):

Mr. Jonathan T. Garaas
Garaas Law Firm
DeMores Office Park
1314 23rd Street South
Fargo, ND 58103-3796
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Tiffany L. Plutowski

Subscribed and sworn to before me this 5th day of September 2013 in the County of Cass, State of North Dakota.

Notary Public

LISA JOPPRU
Notary Public
State of North Dakota
My Commission Expires Sept. 12, 2018