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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20170188
Williams County Civil No. 53-2014-DM-00262

Stephanie Grasser,	)
	)
Plaintiff - Appellee,	)
	)
vs.	)
	)
Gene Grasser,	)
	)
Defendant – Appellant.	)

APPELLANT'S BRIEF

ON APPEAL FROM THE JUDGMENT DATED MARCH 17, 2017, DOCKET NO. 292, THE HONORABLE JOSH B. RUSTAD PRESIDING IN WILLIAMS COUNTY DISTRICT COURT, NORTH WEST JUDICIAL DISTRICT

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¶1 STATEMENT OF THE CASE

¶2 This is a divorce action. The plaintiff is Stephanie Grasser, hereinafter referred to as Stephanie, and the defendant is Gene Grasser, hereinafter referred to as Gene. The summons and complaint was filed on July 22, 2014. **Docket No. 1 [A. 15] and 2 [A.17] .** The notice of assignment and case number was filed the next day, July 23, 2014. **Docket No. 3 [A. 19].** An Answer and Counterclaim was filed on July 23, 2014. **Docket No. 4 [A.20].** A two-day hearing was held on September 21, 2016 and September 23, 2016, before the Hon. Joshua Rustad. The court rendered its memorandum opinion, findings of fact, conclusions of law, and order for judgment on March 9, 2017, awarding primary residential responsibility to Stephanie, adopting a parenting plan, and dividing the property and debts of the parties. **Docket No. 288 [A.119]**. On March 17, 2017, and amended judgment was entered. **Docket No. 292 [A.152]**. On March 20, 2017, a notice of entry of judgment was entered. **Docket No. 293 [A.187]**. On May 19, 2017, Gene filed his notice of appeal. **Docket No. 297 [A.189]**.

¶3 STATEMENT OF THE FACTS

¶4 This is a divorce action. The parties were married on October 11, 2000, and were divorced on May 11, 2015. Basically every fact is disputed. We provide additional references to the facts and the record below at those points where the issue is being addressed. However, in order to comply with the rule, we provide the following listing of relevant and disputed facts:

Facts relevant to the issues:

1. Gene asserted that the district court had a "long-standing friendship" with his wife and her witnesses. **Docket No. 31 ¶2 and 32 [A. 40-45].**
2. The lower court refused to wait for proper briefing and failed to look into the allegation (except limiting the issue to whether he had dated his wife in high school) before ruling through an interim order. **T. 10-8-14, page 7 -19, 10-10-14, page 20-21.**
3. Gene was represented by Attorney Nicole Foster,
4. Gene was repeatedly sanctioned for failing to respond to discovery. **Docket No. 46, 74, 75**
5. The child does not get along with her mother. **Exhibit 18, pages 15 & 18, T. 242.**
6. The child wants to live with mother. **T. 414-17.**
7. Gene received substantial loans from his mother and his family trust for many years.
8. The lower Court, despite evidence from Gene, his mother, and his banker, refused to accept the reality of the loans made to Gene and failed to include such loans in the property and debt distribution.

Facts in dispute:

1. Attorney Nicole Foster failed to relay to Gene discovery requests, which was the reason Gene did not respond to the discovery requests.

2. The parenting investigator found alienation despite insufficient evidence, asserting the fact that the child wants to live with mother is the primary basis for this conclusion. **T.244-46.**
3. The lower court repeatedly ignored the testimony received at trial as it related to the close connection between Gene and his child.
4. The lower court basically ignored any testimony at trial that favored Gene, using instead unsupported conclusions and disputed facts against Gene.

¶5 ARGUMENT

¶6 Issue 1. Once the issue of a relationship with the opposing party and several witnesses was raised by Gene, did the lower court err in regards to properly addressing the motion for recusal.

¶7 Appellant Gene Grasser's first issue on appeal is the lower court failed to recuse itself or allow the party raising the issue to properly present it to the Court for consideration and decision. More specifically, once the issue of a relationship with the opposing party and several witnesses was raised by Gene, we assert that the lower court erred in regards to properly addressing the motion for recusal by appropriate inquiry as to the basis before denying the motion, failing to receive full briefing and supporting materials when the court failed to inquire fully as to the basis of the motion, and failing to properly resolve the issue before deciding any other issues before the court.

¶8 The lower court erred in regards to failing to recuse itself or at the very least allow a full presentation of the party's concerns once the issue of "long-standing friendship" with the other party and her witnesses was raised. Once the allegation was made, it is incumbent upon the Court to allow the concerned party to make a proper motion, present affidavits in support of the motion, and hold an evidentiary hearing. If the court fails to

recuse itself when it should its impartiality could be reasonably questioned later.

¶9 Once the issue is raised, even if inartfully raised, the lower court should have taken whatever steps were necessary to allow the issue to be addressed through the normal process and not decide the motion without the benefit of briefs, supporting affidavits, and an evidentiary hearing if there are facts in dispute or the court's impartiality is reasonably questioned. In addition, the lower court should not have continued with the interim hearing until the issue of recusal was properly addressed, including the very at the very least the court making specific inquiry as to the basis of the request and advising the parties on the record or by proper decision why the potential conflict or bias does not exist.

¶10 Gene's attorney, Nicole Foster, sometime on October 6, 2014, attempted to file a motion for demand for change of judge specifically requesting that the court recuse itself, and brief in support. It appears that motion did not include a supporting affidavit. The motion *and* brief were not filed by the clerk of court, apparently because the motion (but not the supporting brief) was misnamed in the caption, with Attorney Foster naming the motion a "Motion to Continue," the same caption used in Doc. No. 19. See **Doc. No. 24, at page 2, Para. 8 [A. 35]** (according to Attorney Pippin).

¶11 In any event, an emergency telephonic hearing was held on October 8, 2014, with Attorney Foster appearing by phone as she was driving, without the participation of Gene. Attorney Pippin appeared on behalf of of Stephanie, with Stephanie present. During this hearing, references were made to the motion for change of judge, and Attorney Pippin forwarded the motion and supporting materials to the court during the emergency hearing. The motion (with correct caption) and brief was filed, apparently later on the same day of the hearing, October 8, 2014, but after the hearing had been concluded. **Docket No. 31 and 32 [A. 40-45].**

¶12 As indicated above, the motion and brief requesting that the lower court recuse itself are dated October 6, 2014. No affidavit in support of the motion was submitted, but the motion and the brief contain specific factual information properly raising the issue:

> The reason for this request is that the Defendant is concerned about the prior relationships between the court and the witnesses, additionally, the court and the parties included in this action.

Motion for Demand for Change of Judge Doc. No. 31, ¶2 [A. 40].

¶13 In the brief, Attorney Foster states that the factual basis for this request are the "reasons set forth in the Brief and Motion," specifically stating the following after reciting the applicable law:

> The Defendant has concerns about prior relationships between the court and the witnesses, as well as the prior relationship between the court and Stephanie Grasser, the Plaintiff to this action.

Brief in Support of Motion for Demand for Change of Judge Doc. No. 32, ¶1 & ¶4 [A. 42].

¶14 Attorney Pippin responded to the motion for recusal on October 7, 2014, and requested an emergency hearing, which was held on October 8, 2014. **Doc. 24 [A. 34].** Under Rule 3.2 of the Rules of Court, Attorney Foster had the option of filing of reply brief within seven days, as well as filing additional supporting materials, including an affidavit – in order to address Attorney Pippin's assertion that the request should automatically be denied if it does not include an affidavit in support of the motion. The lower court instead agreed to hold an emergency telephonic hearing while Attorney Foster was on the road and without the presence of Gene, the person making the claim and the only person who knew the details relating to his concern.

¶15 Attorney Foster relayed to the Court her client's concerns, as best she could:

> "[M]y client's perception is that there has been a long standing friendship between the Court and a couple of the affiants, as well as the Plaintiff. So he's perceiving that there may be some issues. [H]e really feels as though it would be better for someone else to hear this.

T. 10-8-14, page 7, lines 1-7. Attorney Foster went on to state

> it's my client's position that Your Honor has previously spent time, like quality time, with Stephanie, as well as a long standing friendship with her that stems from high school interaction, things like that, as well as Miss Aberle and one of the other affiants. I can't remember her name off the top of my head, but she's a paralegal. I can't remember the name off the top of my head. And I'm driving.

T. 10-8-14, page 8, line 25 & page 9, lines 1-7. The lower court took this to mean a romantic relationship, moving the focus aware from any personal relationship that may nonetheless require recusal: "So, you know, without couching -- and it's only a term -- some type of romantic dating relationship you are implying, or your client is indicating?" Attorney Foster replied, "Yes. Yes." **T. 10-8-14, page 10, lines 6-9.** Attorney Pippin responds, "There is no affidavit, there's nothing." **T. 10-8-14, page 12, lines 3-4.** Attorney Foster countered, "As to the motion, however deficient Attorney Pippin may think that it is, these are legitimate concerns of my client." **T. 10-8-14, page 18, lines 2-4.** The lower court, once again fixated on if there had been a dating relationship, stated "if the substance of this is some concerns about a dating relationship, I can indicate that never happened" but went on to admit that "I know who the Plaintiff is. I know who some of the proposed affiants are." **T. 10-8-14, page 19, lines 9-13.** The lower court went on to state:

> "I mean these are people that I know, that I believe I was two or three years older than. So whether it alleviates your client's concerns or not, I was never in any type of a -- any type of a relationship with Ms.

> Grasser, formerly known as Reiger. So I'm just pointing that out for the record.

T. 10-8-14, page 19, lines 15-20. The lower court, moments later, states:

> I did receive the motion and I did review it, and frankly at this point I am not inclined to grant the demand for a change of judge due to a recusal. Obviously if Attorney Foster can have some affidavits that -- other than the fact that I knew – or that I know who these people are, or that at one point I may have known them is not going to be sufficient. So I'm not going to grant the motion to recuse.

T. 10-8-14, page 19, lines 23-25, page 20, lines 1-5.

¶16 At the interim hearing two days later, the lower court indicated that the demand for recusal were heard and was denied on the record, and then proceeded to deal with the motion for interim relief. **T. 10-10-14, page 2, lines 18-21.** Following the lower court making a ruling on the interim order, the lower court once again discussed the motion for recusal, and once again focused on a dating relationship, as opposed to a personal relationship that would require recusal:

> But as far as based on what was presented, any type of dating or relationship thing of that nature, for those reasons I denied that, because that's just not the case. So -- but that doesn't -- if you've got other information that you think is relevant, you can certainly present that in any motions. But it'd be very surprising to me if there was any information along those lines, because as indicated I do take the appearance of impropriety very seriously. And there's just nothing to that as far as I am concerned, based on the grounds that have been presented.

10-10-14, page 20, lines 21-25, page 21, lines 1-6.

¶17 The lower court, by reframing the issue as one of dating relationship, improperly limited the scope of review in regards to whether recusal was necessary, and then based on this reframing of the issue found against Gene, even though his initial assertion related to a close, long standing relationship with Stephanie and the witnesses who were supporting her in this divorce case. The reframing the issue into one relating to high school years is important in light of the fact that Gene's concern related not to just the court's knowledge or potential friendship of the witnesses when they were in high school, but specifically related to a long-term relationship that continue throughout the years and presently existed. In other words, Gene asserts his concern (through his lawyer) the existence of a present relationship or a present bias. Given the circumstances and the concern relayed through his lawyer, the lower court should have – before taking any further steps and the case, inquired at the beginning of the interim order hearing, the basis of the concern – and then specifically disclose to both parties any connections or relationships with the party, or witnesses, and the persons who had submitted affidavits in support of Stephanie. By the same token, the court should have inquired of Gene at that time the specific individuals to whom he had a concern, and ask about the specific allegations is making and requests specificity as to those concerns, and then disclose

that information and determine if Gene had any further concerns. If so, then the court should not have proceeded any further in the case, and waited for the issue to be properly briefed and a hearing as to the issue held if necessary.

¶18 The importance of requiring the Court to properly deal with the issue, even when the movant's attorney has not yet fully presented the issue through briefing and supporting affidavits, is most plainly showed here, in this case. By failing to properly address the issue and allowed the discussion to play out, the lower court has created a taint that pervades the entire process, and – at least in the mind of the party raising the concern – provides the basis for conclusion that the court is and has been biased throughout the case. This is especially true when the person who has raised this concern is repeatedly subjected to monetary sanctions of attorney fees, combined with a decision rendered by the court that totally disregards most if not all of the facts supporting this party's position, including many facts which were undisputed.

¶19 Instead of providing an opportunity for the attorney for Gene Grasser to re-file the motion for recusal with the correct title on the document and provide to the court a more detailed affidavit in support of the attempted motion, the court concluded – without the benefit of the motion or

supporting affidavits – that if he had not actually dated or had an actual physical romantic relationship with the other party (or her affiant or her potential witnesses) recusal was not necessary.

¶20 ISSUE 2. The lower court erred in regards to reimbursing sanctions or awards of costs or attorney fees against Gene.

¶21 This lower court occasionally required Gene to pay attorney fees to Attorney Pippin for Gene's failure to provide full and complete discovery – at a time when his lawyer at the time was failing to properly represent him. This Court is well-aware of Ms. Foster's "disappearing" from her responsibilities. See **Disciplinary Board v. Foster**, 2015 ND 114, 863 N.W.2d 241 , **Disciplinary Board v. Foster**, 2017 ND 161, 896 N.W.2d 911 , **Disciplinary Board v. Foster**, 2017 ND 113, 894 N.W.2d 378. Gene was one of many victims of this attorney's failure to represent her clients. Despite this reality and knowledge by both Attorney Pippin and the lower court, Gene was repeatedly sanctioned for failure to comply with deadlines, including many he knew nothing about.

¶22 While Gene was represented by Attorney Foster, Attorney Pippin made three motion for Gene to be held in contempt [**Docket No. 43, 47, 54**] in which the court issued three orders awarding sanctions [**Docket No. 46, 74, 75]**. While Gene was represented by the new attorney out of

Mandan, Attorney Pippin made two more motions for sanctions [**Docket No. 105, 137**], which resulted in two more orders for sanctions [**Docket No. 133, 152**]. In January 2016, Attorney Kristen Redmann took over the case, discovered a scheduling conflict which prevented her from continuing, at which time Mr. Boughey took over the case. Throughout 2016 Attorneys Redman and Boughey worked diligently to provide all discovery answers and prevent the making of anymore motion for sanctions by Attorney Pippin.

¶23 At trial Gene testified that often his former lawyer failed to even tell him something was due and asked that the court returned the sanctions awarded to Stephanie and Attorney Pippin. Gene strongly believes that the sanctions that were imposed on him and the money that he was required to pay Attorney Pippin was unjustified and due to his former lawyer's actions and inactions, and that the lower court should have required Stephanie and Attorney Pippin to return to Gene those funds. The lower court did not do so. As a result, given the fact that the lower court left attorney fees to each of the parties and given Attorney Foster's actions, we request that this court reduce the payment required to be made by Gene by the amount of fees or sanctions previously awarded to Stephanie.

¶24 **ISSUE 3 -- Primary Residential Responsibility of the Child, S. G.**

¶25 **Summary of Argument** A close reading of the trial court's decision relating to custody demonstrates the court's continued use of non-recent information, a misapplication of the best interest factors (by placing outdated or incorrect information in factor f moral fitness), and a clear twisting of the facts, even those facts which favor Gene and were either undisputed or almost entirely in Gene's favor. The lower court found eight factors favoring neither party, even though – as shown below – the evidence clearly indicated that many of these factors favor Gene. As to the factors that supposedly favored Stephanie, the court indicated that two of those factors favored Stephanie only "slightly" – and of the other two, the lower court totally misapplied factor f moral fitness. The other factor used against Gene was factor g mental health, and the information contained therein was based on non-recent information. The information used by the court to find against Gene as to factor g – his mental health – were not recent, no longer applied, and more importantly is not shown to impact the child.

¶26 Attorney Pippin spent a lot of time going over Gene's recordings and actions that occurred years ago, when the divorce was initially begun. However, none of these recordings were recent. Once Gene separated from his wife, over five years ago, he has had little or no contact

with her except in regards to the child, as Stephanie admits. Gene has sought and received counseling during the last four to five years, and has acted appropriately towards Stephanie throughout the last several years. The incident with Gene's mother Arla did not involve the child. This is also true of the other allegations repeatedly raised by Attorney Pippin relating to third persons. The simple fact of the matter is that Gene has a close and good relationship with his daughter, and Stephanie does not. The counseling records clearly indicate that Gene is doing well and that these types of incidences have ceased.

¶27 The information used to find against Gene and factor f – moral fitness – clearly was evidence that would go to factor j – domestic violence – but the lower court, realizing that that evidence is not current, instead used that non-current information in factor f – moral fitness. As can be seen by looking at each of the listings of evidence used in factor f, the information was non-recent, didn't impact the child, or both. Indeed, the only recent information noted by the court in its findings as to moral fitness is found in the course last sentence regarding this factor, with the court notes that Gene "is active in his church." **A. 122**, **Doc. No. 288 at page 4**. Gene asserts that the bias of the court in this case is shown most clearly in the courts misuse of factor f, where the court refers to numerous non-recent conduct (the

parties separated five years before the date of trial, the protection orders were years before, and Gene has had nothing to do with Stephanie for many years prior to the date of the trial) or more recent conduct not involving Stephanie or the child whatsoever. It is instructive to note that the information that the lower court used in factor f was not used in factor j – domestic violence – because none of it was current or "within a proximate time of the trial given the duration of the separation" is indicated in the court's discussion of factor j – domestic violence. **A. 123, Doc. No. 288 at page 5.**

¶28 The lower court repeatedly ignored the testimony received at trial as it related to the close connection between Gene and his child. They clearly favor Gene, such as factor a – the love and affection, and other emotional ties –, factor c – the child's developmental needs and the ability of each parent to meet those needs, factor d – sufficiency and stability of each parent's home environment, including the fact that the parties have shared the child equally for many years, and that Gene has received the child more than half the time since this divorce matter was filed. We will now review the evidence that clearly indicates that the court misapplied to factors in this case, and ignored not only the evidence that supports Gene as to custody, but also ignored substantial evidence presented by Gene that was undisputed.

¶29 **How the child is doing** The child has indicated her well-reasoned and strong desire to live with her father, not her mother. She is 11 years old and is sufficiently mature to provide this preference to the court. The child is doing very well in school, has many friends, and has performed well academically; she has no behavioral issues at school and is an A student. **Exhibit 18, page 18, Bates number 331.** The parenting investigator specifically concluded that the child is mature ("SG is a mature young lad.") and S.G. fully articulated her preference to live with her father. **Exhibit 18, page 20, Bates number 333**.

¶30 **The child does not get along with her mother** The evidence shows, through the child's testimony, the mother's own testimony, and parenting investigator's report, that the child does not get along with her mother, and that they constantly argue. **Exhibit 18, pages 15 & 18, Bates number 328 & 331**: "SG will be become argumentative and doesn't care what Stephanie has to say." "SG was rude to her mother and did not listen." "SG reported that she is kind of mean to her mom when her mom tries to parent her." The parenting investigator confirmed in her testimony the child argues with the mother and was rude to the mother in her presence. **T.242.** The parenting investigator also indicated in her report that the child "is a mature young lady," has sufficient maturity to provide her preference, and

her clear preference is to live with her father. **Exhibit 18, page 20, Bates number 333**. The parenting investigator, without any factual basis, has asserted that Gene has in some way alienated the child from her mother. Mr. Boughey repeatedly asked for any factual evidence to support the investigator's conclusion that Gene has alienated the child from the mother, and all she could point to was petty or frivolous statements of the child in her journal and that the statements made by the child parallel the father's views. **T.244-46.** There is no real basis for the allegation of alienation. There's no evidence that the father has said anything negative about the mother in the child's presence, nor is there sufficient proof of any alienation. The simple fact of the matter is that the child prefers to live with the father. The child specifically told the parenting investigator that she prefers to live on the farm, that she does not get along with her mother, and that she gets along well with her father. **Exhibit 18, page 14, 18, Bates number 327, 331:** SG "enjoys country life better than city life."

¶31 **The child's preference** The child's own testimony makes her preference, and reasoning, clear: She wants more time with her Dad, more than half **[T.414]**; she would want to be with her Dad Monday through Friday during school year **[T.415]**; she would like the present scheduled "flipped" so she is primarily with her Dad **[T.415]**. S.G. also testified that

she argues with her Mom every time she is with her (usually four-day increments), four times or more each time she is there **[T.415 line 2-3, Vol. II]**; she testified that they argue over "anything and everything" [**T.417]** and that her mother snaps at her and she snaps back [**T.417]** . Other witnesses testified that the child wants to live with her Dad, that Gene has a good relationship with the child, and that she is in a safe and appropriate environment while at Gene's farm, including Arla Grasser, Stacy Galasso, Kathy Rosenquist, Colleen Jones, and Gene Grasser. Even the custody investigator confirmed this fact. Under these circumstances, primary residential responsibility should be with the Dad, or at the very least he should receive equal parenting responsibility (split custody).

¶32 **The love, affection, and other emotional ties** Stephanie asserts that factor a supports her, apparently based on her allegation that the child spends most of the time with her. Her assumption is incorrect, as is her attempt to ignore the real facts in this case. It is clear from the testimony from basically everyone who testified that the greater love, affection, and other emotional ties go to Gene, not Stephanie. Moreover, Gene had the child at least half time until the matter was sued out, and with the added days he receives when Stephanie works or decides to go to social events (car races, etc.) Gene has had approximately one-half of the time with the child.

More importantly, unlike Stephanie, Gene's time is quality time. The evidence was clear. The evidence shows, through the child's testimony, the mother's own testimony, and parenting investigator's report, that the child does not get along with her mother, and that they constantly argue. **Exhibit 18, pages 15 & 18, Bates number 328 & 331**.

¶33 The child's developmental needs and the ability of each parent to meet those needs

¶34 Stephanie asserts that factor c favors her because she's more involved with the extra curricular activities of the child. Ironically, this factor works against Stephanie because Stephanie is forcing the child to participate in activities that she doesn't want to partake in. As to the assertion that Gene's temperament is a factor here, we need merely assert that there is nothing in the testimony relating to Gene's temperament that indicates that this has been a factor towards a child, and even Stephanie's admits this has not been a recent problem. The testimony demonstrates that Gene is better able to assist the child in regards to her developmental needs and to meet those needs. This factor favors Gene, not Stephanie.

¶35 The sufficiency and stability of each parent's home environment and the desirability of maintaining continuity

¶36 Stephanie once again claims at page 3 that the child has been primarily living with her, despite the fact that the parties split custody until

the divorce was filed, and following the divorce Gene received approximately one half of the time with the child. As to stability, and continuity, the child prefers the farm, which has always been her preference and is in her mind reflective of long-term, family stability. Since the child prefers the farm, this factor favors Gene, not Stephanie, even slightly.

¶37 Willingness to facilitate relationship between the other parent and the child

¶38 Stephanie asserts at page 3 that this factor does not favor either party, simply asserting that the interim order was followed. However, there was evidence that Stephanie thwarted contact of the child with Gene. The Court ignored this evidence.

¶39 The moral fitness of the parents, as that fitness impacts the child

¶40 The court unfortunately incorrectly adopted Mr. Pippin's use of a litany of statements made by Gene to Stephanie many years ago, totally ignoring the fact that any of this conduct can be relevant only if it impacts the child. Gene's comments, however distasteful, were directed at Stephanie, without the child being present. That is undisputed; Stephanie admitted that anytime they argued, which is over five years ago when they separated, she and Gene would leave the home and go outside. None of the repeated litany presented by Mr. Pippin ad nausea impacts the child, and as such should be

given no weight. The evidence that does apply relates to Gene being active in his church, with his daughter, and providing proper moral instruction to his child.

¶41 Mental and physical health of the parents, as that health impacts the child

¶42 The lower court finally acknowledged the counseling records submitted by Gene in reference to his mental health, which clearly indicate that he is participating in counseling, that he has improved dramatically over the last 3 to 4 years, and is doing very well handling his anxiety and stress over this divorce. However, the court nonetheless went back many, many years as to genes prior conduct and statements – none of which were in the presence of the child – and found a way to use those non-recent statements against him in the paragraph relating to morality.

¶43 Home, school, and community records of the child and the potential effect of any change

¶44 Stephanie once again at page 4 asserts incorrectly that the child is primarily with her, and as such she should automatically win this factor. As stated above, the time is essentially equal, and the child is doing well due to the efforts of both parents. Gene testified that this factor is a tossup, and therefore favors neither party. That remains the case.

¶45 Preference of the mature child

¶46 Stephanie admitted at trial that the child prefers to live with her father, but asserts that this preference was somehow due to the father's actions, disregarding the child's clear and mature testimony, and Stephanie's own admissions that she doesn't get along well with her child and they argue often. Stephanie asserts that this factor slightly favors Gene, but in reality is the most important factor before the court, particularly given the maturity of the child, her reasoning wanting to live with her father, and the poor relationship she has with her mother. If the court awards primary residential responsibility to the mother, this case, and the child's life, will turn into a mess. This factor favors Gene.

¶47 Evidence of domestic violence

¶48 Stephanie asserts that Gene's threats of violence towards Stephanie many years ago constitutes domestic violence that the court can consider. However, this was not recent domestic violence. In regards to the other assertions relating to Gene's mother and some girlfriend, none of those relate to domestic violence. Although Gene's actions were not commendable, and he agrees that they were not commendable, they do not put into play this factor. As such, this factor is not applicable and favors neither party.

¶49 Interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household

¶50 Stephanie asserts at page 5 that this factor does not apply. However, Gene testified that the child interacts with his mother, as well as other adults. This factor favors Gene.

¶51 Parenting Investigator's Report

¶52 The information contained in the parenting investigator's report, along with the testimony of the parenting investigator and the child, clearly demonstrates that the child has a poor relationship with her mother and should be placed with the father. **Exhibit 18.** According to the parenting investigator, the child wants to be with her father at least 50% of the time. The parenting investigator confirmed that the farm is an appropriate residential setting and indicated that it is an appropriate and safe environment for the child. The parenting investigator describes the home as spacious, that the child has her own bedroom, that the environment is a farm/ranch setting, that the child has a four wheeler, that she enjoys the farm animals, that the child enjoys the farm, and that she prefers country life to city life. **Exhibit 18 at page 14, Bates number 327.** The child has a close relationship with the father, and often calls him on the phone when she is with her mother. **Exhibit 18, page 14, Bates number 327.** As to the relationship between the child and the mother, Stephanie herself admits that the child becomes argumentative and doesn't care what Stephanie has to say.

Exhibit 18, page 15, Bates number 328. More significantly, while visiting Stephanie's home in the presence of the child, the custody investigator indicated that the child was rude to her mother and did not listen, that the child is mad at her mother for taking away some of the time with her dad. **Exhibit 18, page 18, Bates number 331.**

¶53 Although the parenting investigator describes the literature relating to parental alienation, she failed to provide any facts to support her conclusions, except the weak listing of two or three insignificant items – the child prefers her father, she is supposedly enmeshed with her father, and the father and the child talk about each other as one. The parenting investigator's assertion of alienation is not only unsupported, but is really nothing more than an excuse to justify her conclusion that the child should be placed with the mother; the parenting investigator was unable to provide any substantive factual basis for her assertion and pointed to no facts whatsoever that Gene has taken any specific actions to alienate the child from the mother. The simple fact of the matter is that the child does not get along with her mother, she hasn't for years, and she prefers to be with her father. There is absolutely no evidence that the father has made statements to the child against the mother, or taken any other actions that would be considered alienation. The parenting investigator's bald assertion that Gene

has alienated the child from the mother is simply unfounded and is presented merely to justify ignoring the daughter's strong preference to be with her father. As shown by the testimony of the child, and particularly during the examination by Attorney Pippin, the child has strong reasons in a very specific desire to live with her father, and not her mother. Mr. Pippin attempted to twist the facts and manipulate the child's answers, to no avail. The child's testimony was mature, specific, and convincing. Even Stephanie admitted that she does not get along with her daughter, that they are prone to arguing, and that the child wants to be placed with her father. Under the facts of this case, that is exactly what should occur. And at the very least, if the court does not place the child full time with the father, then the evidence supports splitting the parenting responsibility equally between the two parents.

¶54 Gene went through every best interest factor and demonstrated that the majority of these factors favor him in regards to placement of the child. T.358 - 373.

¶55 ISSUE 4 -- Property and Debt Division

¶56 Although Attorney Pippin spent a lot of time attempting to show that Gene owns substantial assets, the reality is that at this time the

majority of the Grasser assets are held in the Grasser Family Trust, and as such are not owned by Gene. **Testimony of Adam Natwick and Exhibit 12, particularly page 8, Bates number 196.** As can be seen by the review of Exhibit 12 in the testimony of the representative of Titan Resources Inc., Gene owns only three tracks of land individually; all the rest of the land is owned by the trust. **Exhibit 12, Bates number 196.** As shown by the other exhibits and Gene's answers to interrogatories Exhibit Number 41, Gene owns only four tracks of land, consisting of 80 acres in Section 25, 80 acres in Section 9, 29.9 acres in Section 30, and 62.8 acres in Section 29. **Exhibit Number 41, page 43.** And although Gene has some selected mineral interests, he does not own the farm and owns the small amount of land. The mineral interests that Gene owns are listed in Exhibit 16, which clearly indicates that Gene's mineral interests are only those listed in Schedule A and consist of only a one-third interest of those listed in Schedule A. **Exhibit 16, Bates number 296 and 303.**

¶57 The district court, at pages eight and nine of its decision **[Doc. No. 292, A.126-27]**, failed to include <u>any</u> of the loans that Gene has received over the years from his family. The failure of the District Court to include these undisputed loans is error. The lower court used Gene's financial statement dated May 11, 2015 Exhibit 32 against him, even though that

financial statement was to his normal bank, and the bank officer testified, understand that he knew about the loans and indeed Gene testified that the loans were done through the bank and through that bank officer. Although Gene's prior lawyer did not include this debt in the 2015 supplemental discovery, once Mr. Boughey took over the case and prepare the matter for trial, that information was provided to opposing counsel to the 8.3 property and debt listing.

¶58 The lower court also asserted "that there were absolutely no writings of any kind" evidencing the loans. **[Doc. No. 292, A.126.]** This is clearly incorrect. Given the fact that the bank loan officer testified as to the loans from the family to Gene, and the transferring of funds from the family to Gene were done through his bank. **T. 396**. Nor is it appropriate for the lower court to ignore the undisputed evidence from Gene and his mother and the banker by use the statute requiring that loan amounts over $25,000 must be in writing, or that the applicable statute of limitations may apply **[Doc. No. 292, A.126-27].** Gene testified that the loans existed, that fact was confirmed by his mother and the banker, and Gene further testified that he had a filial obligation to repay his family. The money was received. This evidence is undisputed, yet the court refused to include Gene's obligations to his family is a valid debt in conjunction with the distribution of property and

debts in this matter. The evidence that the loans were provided is undisputed. The family banker testified in regards to the fact that Gene owes his mother (more specifically the family trust) substantial sums of money. Gene's 8.3 Property and Debt Listing, along with his listing in the exhibit showing the amounts he owes the trust and his mother, demonstrates that Gene's assets are nowhere near what Attorney Pippin alleges. Attorney Pippin attempted to assert that this debt does not exist due to the simple fact that there are no written loan documents or any legal requirement for Gene to pay back the substantial sums on to his parents and the trust. As stated by the banker Adam Natwick, this is often the case between parents and their children. **T. 396**. Gene specifically testified that he has both a legal and moral obligation to pay back his parents, and the fact that these loans occurred over many years and are based on oral contracts does not change the fact of the matter that these debts exist and Gene intends to honor these oral contracts between him and his parents. As to the value of Gene's assets, Gene is more familiar with the actual form property (land and equipment) and his valuations should take precedence over the appraisals provided by Attorney Pippin.

¶59 The marriage at issue was a relatively short one, and indeed Stephanie had left the home several times and for extended periods before

she finally left the home permanently in 2010. The parties were married on October 21, 2000, and according to the testimony received at trial, Stephanie left the home numerous times for substantial periods of time until finally leaving permanently. The child at issue was born in 2004, and Stephanie moved out in August 2005, returned to the home, and moved out permanently in June 2010. She left in 2010, but did not file for divorce until 2014. **Exhibit 18, page 6, Bates number 319.** Significantly, until she filed for divorce, the parties had joint custody of the child and equal time. Stephanie did not provide the Court with any specificity as to the amount of assets that she is requesting in this matter. Stephanie also testified that she is receiving substantial funds and a home to live in from her parents, who are quite wealthy. In our view, Stephanie should not be provided any assets from Gene; she is in the same enviable position that Gene is in: she will at some point receive an inheritance and substantial sums of money and has no need to receive any Gene's assets.

¶60 At trial, Stephanie did not request any specific monetary sum, simply left the matter to the court. Obviously she changed her mind in regards to the post-trial documents. The marriage at issue was a relatively short one, and indeed Stephanie had left the home several times and for extended periods before she finally left the home permanently in 2010. The

parties were married on October 21, 2000, and according to the testimony received at trial, Stephanie left the home numerous times for substantial periods of time until finally leaving permanently. The child at issue was born in 2004, and Stephanie moved out in August 2005, returned to the home, and moved out permanently in June 2010. She left in 2010, but did not file for divorce until 2014.

¶61 In regard to debts, the lower court failed to apply the debt that Gene owes his parents and the Grasser family trust. Everyone involved, Gene, Arla, and the banker, all agreed that these debts exist and Gene would at some point have to pay them back. **T. 325, 334, 373-378.** To ignore this debt is to ignore the reality of the situation. By ignoring the debt, Mr. Pippin intends to assert that his client should receive a cash payment of $500,000. The evidence is undisputed that Gene owes his parents this money, and the evidence is undisputed as to the property he leased, the loans he received from his parents, and his obligation to pay those funds back. Ignoring these debts would be clearly erroneous, and results in an unjustified payment to Stephanie. The lower court, by totally ignoring this debt, substantially increased the total assets of Gene, and then awarded Stephanie just a little under one half of those assets. The court's refusal to include the loans and leases received from his family resulted in Stephanie receiving $656,000

when she should have received substantially less, if any at all. As noted above, this marriage was a short-term marriage, Stephanie physically left the marriage in a short time, and the property owned by Gene came almost entirely from his family.

¶62 Application of the Ruff-Fischer Guidelines
Ruff-Fischer guidelines

¶63 The lower court found most of the Ruff-Fischer guidelines to be the same as to both parties, but there are several instances where the court clearly ignored the actual facts in the case.

¶64 Length Of Marriage The primary significance in regards to the Ruff-Fischer guidelines is the lower court's reference to this being a long-term marriage, stating that the parties were married on October 11, 2000, and were divorced on May 11, 2015, totally ignoring the fact that Stephanie had left the home several times and for extended periods before she finally left the home permanently in June of 2010, five years before the divorce was entered. The child at issue was born in 2004, and Stephanie moved out in August 2005, returned to the home, and moved out permanently in June 2010.

¶65 Property The lower court improperly states that the "vast majority of the property or debt has been accumulated during the course of the marriage." As can be seen from the 8.3 property and debt listing and the

court's decision [**A.136-38**], the majority of the property is the farm equipment, which was in Gene's family. While indicating that the property was acquired during the marriage, the court totally ignores the debt to Gene owes his family.

¶66 Health and physical condition of the parties lower court once again looked to evidence that was non-recent, much of which was at least five years old, in regards to Gene's mental health. As indicated by the records submitted to the lower court, for several years now Gene was doing quite well, did not have the prior issues which are repeatedly mentioned by the court as if they are present conditions.

¶67 Debts The lower court refused entirely to apply the debts Gene listed, including $2,207,394.26 to his parents, $500,000 to the Grasser state, $12,137.50 to Don Peterson, and $34,000 to TJ Halverson. As discussed above, the family debts were shown to exist and should have been included, and it was undisputed that the other debts also existed. Gene testified to each of these debts, and Stephanie was unable to provide any evidence contrary to that testimony. By refusing to include these debts, the lower court found Gene to have $1.2 million of net assets, when in reality he has none at all.

¶68 CONCLUSION

¶69 For the reasons stated above, Gene Grasser requests that this Court reversed the lower court for failing to properly resolve the issue of recusal and remand this case to be heard by a different judge; if this does not occur, and Gene requests that this Court order that Stephanie reimburse him all attorney fees previously paid, that he be awarded primary residential responsibility of the child, or in the alternative, receive split parenting time; and that the property and debt distribution be modified as requested above, and most particularly include the debts to Gene's mother and family trust.

¶70 Dated this 4th day of december, 2017.

____/s/_____
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20170188
Williams County Civil No. 53-2014-DM-00262

Stephanie Grasser,	)
	)
Plaintiff – Appellee,	)
	)
vs.	)
	)
Gene Grasser,	)
	)
Defendant – Appellant.	)

CERTIFICATE OF SERVICE

¶1 I hereby certify that the following document (s):

Appellant's Brief (Revised)

was served upon the above-named Plaintiff by filing and serving true and correct copies of the above-listed document on the 27th day of November, 2017, via email cc to:

Harry Malcolm Pippin malcolm@pippinlawfirm.com

¶2 Dated this 4th day of December, 2017.

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CORRECTED CERTIFICATE OF SERVICE

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