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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Daniel Tarver, Plaintiff and Cross-Appellant, vs. Sarah Tarver, Defendant and Appellant.	)	Supreme Court No. 20190073; District Court Case No. 08-2017-DM-00569

APPEAL FROM THE BURLEIGH COUNTY DISTRICT COURT MEMORANDUM OPINION AND ORDER DATED NOVEMBER 29, 2018 AND JUDGMENT DATED JANUARY 4, 2019

SOUTH CENTRAL JUDICIAL DISTRICT

BRIEF OF DEFENDANT AND APPELLANT,

SARAH TARVER

ORAL ARGUMENT REQUESTED

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I. JURISDICTIONAL STATEMENT.

[1] The District Court had jurisdiction pursuant to N.D. Const. Art. VI, § 8 and N.D.C.C. § 27-05-06. This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6 and N.D.C.C. § 28-27-01.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

[2]

A. Standard of Review.
B. The District Court Erred in Determining that the Agreement Which Was Read into the Record was Not Valid.
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F. The District Court Erred in Its Calculation of Spousal Support.

III. STATEMENT OF THE CASE AND ORAL ARGUMENT STATEMENT.

[3] This is an action for divorce between the above-captioned parties. Trial was originally scheduled for July 10, 2018. On that date the District Court permitted the parties to enter into settlement negotiations, and at the conclusion of such negotiations, the parties entered the stipulated terms onto the record. Although all the fundamental terms were agreed to on the record, during the drafting of the final Stipulation, a dispute arose between the parties as to the definition of income for Daniel Tarver. A second trial date was given to the parties and trial was held on all issues on the matter on October 18, 2018. This appeal follows. Defendant-Appellant is requesting Oral Argument as the interpretation of Rule 11.3 of the North Dakota Rules of Court appears to be a case of first impression with this Court.

IV. STATEMENT OF THE FACTS.

[4] The parties in this case were married in 2000 in Aberdeen, South Dakota and had remained husband and wife since that date. Trial Tr. 170:6-8 (October 18, 2018).

The parties dated for eight (8) years prior to the marriage. Id. 170:8-9. At the time of trial, Mr. Daniel Tarver was fifty-four (54) years old, and Ms. Sarah Tarver was forty-nine (49) years old. Id. 30:7-8, 13-14. Prior to the marriage, Mr. Tarver was a veterinarian. Id. 31:11-12. In the mid-1990s, as a veterinarian, Mr. Tarver was making between $50,000.00 and $75,000.00 per year. Id. 31:16-19. In approximately, 2004, Mr. Tarver decided to return to school to become a medical doctor. Id. 31:23-32:12, 33:7-9. Prior to the marriage, Ms. Sarah Tarver worked a variety of jobs, including in sales, in Daniel Tarver's veterinarian office, and as an analyst at 3M. Id. 33:10-16. The parties have three (3) children, the first having been born in 2002. Id. 33:23-34:17. While obtaining his training to become a medical doctor in Vermont, Mr. Tarver earned approximately $50,000.00. App. 129. Mr. Tarver's first position as a medical doctor was in 2014 with St. Alexius Medical Center, where in his first half-year working, he earned more than $245,000.00. App. 131. By the time of trial, Mr. Tarver was making nearly $600,000.00 per year. App. 134.

[5] As noted above, Ms. Tarver worked a series of part-time jobs, and also cared for the children and was a homemaker. Id. 141:16-142:18, 160:10-161:7, 180:2-18. In fact, Ms. Tarver quit her job at 3M, in part, to manage some of the parties' businesses part-time and to raise the children. Id. 180:15-18. There were times that raising the children caused difficulty for Ms. Tarver to obtain additional education. Id. 200:16-201:2. At the time of trial, Ms. Tarver noted that she maintains a good relationship with the children, and that she is still primarily responsible for them. Id. 181:10-20.

[6] Prior to the October 18, 2018 trial date, the parties had previously appeared before the same court for trial on July 10, 2018. At that time the District Court took a

recess to permit the parties to meet to attempt to reach a resolution of the matter, prior to trial on the matter. Settlement Hearing (hereinafter "S.H.") Tr. 4:4-14.

[7] As set forth further below, the parties reached stipulations on the following issues: (1) which home each party will receive, along with allocation of the debt for each respective home, (2) resolution regarding the Aberdeen property, "the farm," (3) the student debt, (4) the personal property of the parties including the vehicles, (5) allocation of the financial assets, (6) spousal support, (7) primary residential responsibility and parenting time (not at issue in this appeal and therefore not cited to below), (8) child support, (9) support of the children after turning eighteen (18), (10) insurance coverage to secure child support/spousal support, (11) allocation of the Douglas County land, and (12) use of Sarah's maiden name.

[8] Subsequently, the parties disagreed to the manner and terms, essentially, as to the definition of Daniel Tarver's income. App. 49, ¶¶ 4-5. Ms. Tarver attempted to enter into evidence at the October hearing what the alleged problems with the settlement agreement were over objection from Daniel Tarver's counsel. Trial Tr. 188:8-190:20. Upon her examination, Sarah contended that the only remaining issue, subsequent to the July 10, 2018 Settlement Hearing, was regarding the definition of income upon Daniel Tarver's retirement. Id. 193:5-10.

V. PROCEDURAL BACKGROUND.

[9] This matter came before the trial court for determination of a divorce first on July 10, 2018. As noted above, instead of holding trial, the District Court permitted the parties to enter settlement negotiations, the results of which were placed on the record. Subsequently, Sarah Tarver sought to enforce the agreement entered into on the record.

App. 13-47. The District Court rescheduled the trial for October 18, 2018 and full trial was held on the matter. Throughout trial, Sarah Tarver, through legal counsel, maintained that a stipulation had been entered into the record on the July 10, 2018 date. Subsequent to the October trial, the Court requested both parties brief so the court could consider the applicability of Rule 11.3 of the North Dakota Rules of Court. The District Court determined Rule 11.3 did not apply, and thereafter made an equitable allocation of the assets and a determination of spousal and child support.

VI. LEGAL ARGUMENT.

A. Standard of Review.

[10] The North Dakota Supreme Court reviews "'a district court's determinations regarding the division of property as findings of fact, and [the Supreme Court] will not reverse unless the findings are clearly erroneous.'" Lorenz v. Lorenz, 2007 ND 49, ¶ 5, 729 N.W.2d 692 quoting Dvorak v. Dvorak, 2005 ND 66, ¶ 20, 693 N.W.2d 646 ("'A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence the reviewing court is left with a definite and firm conviction a mistake has been made.'"). Crandall v. Crandall, 2011 ND 136, ¶ 19, 799 N.W.2d 388 quoting Lorenz, ¶ 5, 729 N.W.2d at 695.

[11] "'A [district] court's findings of fact are presumptively correct, and we view the evidence in the light most favorable to the findings.'" Lorenz, ¶5, 729 N.W.2d at 695 citing Striefel v. Striefel, 2004 ND 210, ¶ 8, 689 N.W.2d 415 (quoting Reineke v. Reineke, 2003 ND 167, ¶ 12, 670 N.W.2d 841).

[12] The standard of review in analyzing a question of law on appeal is fully reviewable by the Supreme Court. Hamilton v. Hamilton, 410 N.W.2d 508, 510 (N.D. 1987). Thus, questions of law are subject to the de novo standard of review. Kelly v. Kelly, 2011 ND 167, ¶ 12, 806 N.W.2d 133 citing Wigginton v. Wigginton, 2005 ND 31, ¶ 13, 692 N.W.2d 108. "The interpretation of a court rule or statute is a question of law that we review de novo." Garaas v. Cass Cty. Joint Water Res. Dist., 2016 ND 148, ¶ 7, 883 N.W.2d 436, 439 (citations omitted).

[13] Sarah appeals this matter on both factual grounds and legal grounds, maintaining that the issues surrounding North Dakota Rule of Court 11.3 should be reviewed de novo, and, if this Court does not agree with her analysis regarding Rule 11.3, that the remainder of the issues would be reviewed under a clearly erroneous standard of review.

B. The District Court Erred in Determining that the Agreement Which Was Read into the Record was Not Valid.

[14] Sarah urges the Supreme Court to recognize the validity of the stipulations which were read into the record at the July 10, 2018 court proceeding and that only those items which were not stipulated to should have been addressed during further court proceedings as necessary. "The interpretation of a court rule or statute is a question of law that we review de novo." Garaas., ¶ 7 citing State v. Chacano, 2012 ND 113, ¶ 10, 817 N.W.2d 369.

> "[The North Dakota Supreme Court] appl[ies] principles of statutory construction to ascertain intent when interpreting rules by:
>
> [L]ooking first to the language of the rule, where words are construed in accordance with their plain, ordinary, and commonly understood meaning. If possible, we construe rules as a whole to give meaning to each word and phrase. We also consider the actual language, its connection with other

> clauses, and the words or expressions which obviously are by design omitted. In construing statutes and rules, the law is what is said, not what is unsaid, and the mention of one thing implies exclusion of another."

Id. citing Sanderson v. Walsh Cty., 2006 ND 83, ¶ 16, 712 N.W.2d 842. The interpretation of Rule 11.3 appears to be a case of first impression before this Court. Sarah Tarver urges this Court to recognize that once the Rule is followed and stipulation read into the record, that the agreement should be upheld by the District Court and only those items which were not stipulated to should be the subject of further determinations by the District Court.

[15] This case was originally set for trial July 10, 2018. At the time of the hearing, the parties requested time to meet to see if stipulations, or agreements, could be reached. S.H. Tr. 4:4-11. The court granted a recess and the parties subsequently returned to the courtroom. Thereafter the following exchanges, in relevant part, were entered into the record:

> MR. BOLINSKE: Okay….
> Number one, Sarah Tarver will assume 1254 West Highland Acres Road home, Bismarck, North Dakota, as her residence and assume the debt thereon.
> Number two, Dan Tarver will assume 4550 Crestwood Drive, Bismarck, North Dakota.

Tr. 5:16-20.

> MR. BOLINSKE: That's right. And each will assume the debt on their respective homes.

Tr. 5:24-25.

> MR. BOLINSKE: The farm at -- and -- at -- I will just say the 124th Street, Aberdeen, South Dakota, will be sold and the proceeds will be divided 50/50.

Tr. 6:1-3.

MR. BOLINSKE: Well…Your Honor, in the sense that the student debt that the parties have accumulated, that is now in Mr. Tarver's name, will be paid out of the proceeds of the sale of the farm and the balance distributed equally between them.

Tr. 6:21-25.

MR. BOLINSKE: The personal property at each residence will go with the residence, except the cash, one half of which will go to Sarah immediately, and there is more on that later. The farm equipment will be Dan Tarver's. The 2018 West -- Atlas will be Sarah Tarver's, along with the debt. In other words, any of the vehicles in the parties' respective possession is theirs together with any debt thereon. Half of Mr. Tarver's retirement pension and checking, savings accounts will be paid to Sarah Tarver, balances -- now, I guess we didn't talk about this. I have balances as of the date of settlement.

Tr. 7:5-16.

MR. BOLINSKE: …Spousal support will be 15,000 per year for 14 years, subject to if Dan -- Mr. Tarver retires after 62, spousal support will go down proportionately, depending on his income. And there is a little problem with the definition of income, but the idea is that if he wants to retire at 62 and he's making 600,000 and it goes down to 300,000, that spousal support would be diminished in a proportionate 50 percent amount. Am I right about that?
MS. BROSSART: And in the same manner, if he chooses to just fully retire and his employment income becomes zero, then he has no obligation to pay spousal support at that time.
MR. BOLINSKE: Except that that would be subject to it being a good faith retirement, and they'll have to fight that out down the road, and we'll have to work out the specific language of that. It has to be reasonable and in good faith. Agreed?
MS. BROSSART: Yes.

Tr. 8:13-9:4.

MR. BOLINSKE: Next, child support will be $5,000 per year, but for --
THE COURT: Per year?
MR. BOLINSKE: Per -- I'm sorry. Per month. I'm

sorry.
MR. BOLINSKE: Thank you. But if they -- any of the children continue to live with Sarah and go to college in Bismarck, the spousal support -- or I'm sorry, the child support would continue for that period of time, not to exceed four years.

Tr. 9:22-10:1.

MS. BROSSART: Now, what the agreement is, is that in the event that any of the minor children decide to live at either parent's residence while they're attending a college in Bismarck, that the opposite parent who is not residing with the children while they're going to school will pay 1,667 per month to the other parent for a period of no longer than four years.

Tr. 10:17-22.

MR. BOLINSKE: And I'm sorry I'm not giving you numbers of paragraphs, but the next is that insurance on Mr. Tarver's life, to cover the obligations in the settlement that we have reached, we have agreed that there will be a policy purchased of two million dollars, a term life insurance, to last over ten years. The quote we have is $540.77 per month, and it is agreed that Mr. Tarver will, in the event that that quote doesn't prove accurate, be not obligated to pay more than $300 a month toward that policy.

Tr. 13:10-18.

MR. BOLINSKE: And back to the two million, I think we agreed that he will name Sarah, and I'm not an insurance expert, as the beneficiary for three-fourths of it and the children as to one-fourth or 25 percent.
MS. BROSSART: Yes.
THE COURT: How long is the term? The term policy, how long will that be in effect?
MS. BROSSART: Ten years.

Tr. 14:3-10.

MR. BOLINSKE: … Your Honor, there is land that the parties have in Douglas County, I believe it's 80 acres, it's Mr. Tarver's mother's land, as I understand, and Mrs. Tarver is willing to waive any and all right to that land and dot -- assign any quitclaim deed or other device that they

request.

Tr. 14:13-18.

> [MR. BOLINSKE]: Each party to pay their own attorney's fees and costs.
> ….
> The student loans that were accumulated by the parties to get Mr. Tarver's degree, and I think that amount is like 160 to 170,000, is that right?
> MS. BROSSART: Approximately that, yes.
> MR. BOLINSKE: Will be paid from the sale of the farm and the balance split between the parties. The way that the farm will be sold is contained -- the procedure is contained in a partial proposal that Ms. Brossart has drafted to that effect, that they both seek and select an appraiser and it's set forth in there and so we want to adopt that language into the final stipulation.
> …
> MR. BOLINSKE: Each of the parties will be responsible for their individual debt, except for the debt on the student loan.

Tr. 14:23-15:14.

> MR. BOLINSKE: …
> And Sarah Tarver wishes to retain her -- the name Sarah Tarver.

Tr. 15:22-23.

> MR. BOLINSKE: Your Honor, can I go down and ask the parties if they agree at this point?
> THE COURT: Sure.
> MR. BOLINSKE: Mr. Tarver, do you agree to what I have stated?
> MR. TARVER: Yes.
> THE COURT: Ms. Brossart?
> MS. BROSSART: Yes.
> MR. BOLINSKE: Ms. Tarver?
> MS. TARVER: Yes.
> MR. BOLINSKE: Okay. And I do also, Your Honor.
> THE COURT: Okay. So it's on the record…

Tr. 17:18-18:4; App. 149.

[16] Sarah urges this Court to recognize the preference, especially in family law cases, for amicable resolution of disputes. See Mongeon v. Burkebile, 79 N.D. 234, 243, 55 N.W.2d 445, 450–51 (1952) ("Stipulations which eliminate questions of fact should be encouraged rather than discouraged by the courts."); Knutson v. Knutson, 2002 ND 29, ¶ 8, 639 N.W.2d 495, 498 ("This Court encourages peaceful settlements of disputes in divorce matters, and the strong public policy favoring prompt and peaceful resolution of divorce disputes generates judicial favor of the adoption of a stipulated agreement of the parties."); Schwab v. Zajac, 2012 ND 239, ¶ 13, 823 N.W.2d 737, 745 ("Rule 408, N.D.R.Ev., furthers a well-recognized public policy encouraging out-of-court compromise and settlement of disputed claims to avoid costly and time-consuming litigation." (quoting City of Bismarck v. Mariner Constr., Inc., 2006 ND 108, ¶ 22, 714 N.W.2d 484.)) Regarding stipulations, the North Dakota Rules of Court set out that:

> "No agreement or consent between the parties or their attorneys with respect to proceedings in court is binding, in case of a dispute as to its terms, unless reduced to writing and signed by the parties or their respective attorneys or made in open court and read into the record of the proceedings."

N.D. R. Ct. 11.3 (emphasis added). Regarding Rule 11.3, it is noteworthy that there is no Explanatory Note to the Rule, however, a "stipulation" as relevant here, is defined as "[a] voluntary agreement between opposing parties concerning some relevant point, especially an agreement relating to a proceeding, made by attorneys representing adverse parties to the proceeding." Black's Law Dictionary, 8th Ed. (2004). This Court has previously ruled on several occasions regarding stipulations in open court. Without analyzing Rule 11.3, this court has noted "…[w]hen a controversy is settled, the stipulation of settlement becomes a binding contract." Matter of Estate of Hedstrom, 472 N.W.2d 454, 456 (N.D.

1991) citing Bohlman v. Big River Oil Company, 124 N.W.2d 835 (N.D.1963). "That contract is final and conclusive absent fraud, duress, undue influence or other facts that would warrant rescission of a contract." Id. In Hedstrom, the Supreme Court recognized: "[a] party cannot remain silent in open court, failing to voice an objection, when a settlement agreement is proposed to the court, and then attempt to avoid being bound by it, without adequate explanation, after the settlement has been approved by the court." Id. citing Michigan Bell Telephone Co. v. Sfat, 177 Mich.App. 506, 442 N.W.2d 720 (1989). This legal principle was also recognized in Aaker v. Aaker, with this Court ruling, "[o]ral stipulations of the parties in the presence of the court are generally held to be binding, especially when acted upon or entered on the court's records. Such a stipulation need not be signed by the parties or their attorneys." Aaker v. Aaker, 338 N.W.2d 645, 647 (N.D. 1983) citing 73 Am.Jur.2d *Stipulations* § 3, p. 537. The Aaker court continued: "[s]tatutes and court rules requiring stipulations to be in writing do not apply to stipulations made in open court or before a master; nevertheless, the better practice is to have them reduced to writing and signed." Id. citing 83 C.J.S. *Stipulations* § 4, p. 6.

[17] As noted above, the attorney for Defendant Sarah Tarver went through the fundamental terms of the stipulation on the record. All parties, and their respective legal counsel, approved said agreement on the record. Subsequent to the recitation on the record on July 10, 2018, the parties discussed the particular language of the settlement agreement. While nearly all parts of the stipulations were agreed upon, a dispute arose as to the definition of Daniel Tarver's income for purposes of cessation of spousal support upon his retirement. Thereafter, Sarah Tarver, on or about September 14, 2018 filed a

Motion for an Order Entering Judgment on Binding Stipulation of the Parties. App. 13-47. The District Court denied the Motion stating that, "final details needed to be worked out between the parties and it was the mutual understanding of all involved that if the details were not resolved a trial would be held." App. 48, ¶ 2. At trial, Sarah attempted to enter certain documents evidencing the nature of the particular stipulation language at court, as well as testimony regarding the same, over objection by Plaintiff. Subsequent to that, the District Court requested the parties brief the issue of stipulations considering Rule 11.3 of the North Dakota Rules of Court. Both parties briefed the issue. The Court, thereafter ruled that "…it is clear that the parties were hopeful that a final settlement would be reached. However, both parties requested that the Court schedule another trial date as quickly as possible if a final agreement could not be reached. More negotiations were necessary. An agreement was not reached." App. 66, ¶ 9.

[18] Here, the parties meticulously set forth the terms regarding resolution of the property, debts, and spousal support on the record. Defendant's counsel inquired of all parties whether they agreed with the terms of the stipulation. All parties and the respective legal counsel confirmed, on the record, that they agreed to the terms of the stipulation set forth and read into the record during the July 10, 2018 proceeding. The plain meaning of the Rule is that all stipulations entered into the record, at the proceeding, become valid and binding on the parties. As such, the parameters of the stipulation were set forth by the parties in accordance with the Rule, agreed to by the parties and their respective legal counsel, and were made in open court and read into the record of the proceedings, thus satisfying the requirements of Rule 11.3. In this case, the record clearly sets forth the terms of the stipulation between the parties. The record is

also plain that all parties agreed to the stipulation set forth on the record. If any ambiguity or term uncertain remained, then that issue, and only that issue, should have been brought before the court, not a full trial on all issues.

[19] Based on the clear language of Rule 11.3 of the North Dakota Rules of Court, and this Court's previous determinations of agreements on record in open court, the terms of the agreement between the parties which was read into open court should be in all things considered binding, and as such, the terms of the agreement should be upheld. Sarah maintains that the binding agreement read into the record should be made part of the Judgment in this matter, and the matter be remanded for entry of Judgment on the stipulated terms and thereafter a hearing held only for a determination of any issues which the parties' could not agree.

[20] If this Court agrees that Rule 11.3 of the North Dakota Rules of Court should apply and that Rule 11.3 was satisfied and stipulations were made, the remaining issues briefed herein need not be addressed.

C. The District Court Erred in Calculating the Property Equalization Payment.

[21] Ms. Tarver further appeals the District Court's Determination of the Property Equalization Payment.

[22] Sarah further appeals the payment of the $47,364.50. In this case, the court ordered Daniel to pay $47,364.50 out of cash money he had attempted to hide from Sarah. App. 66, ¶ 35. The District Court had previously accepted Daniel's Proposed Property and Debt Distribution. Id. ¶ 33. However, throughout the course of the proceedings it became evident that Daniel was attempting to hide assets. First, Daniel attempted to hide the ownership interest in land in South Dakota, but far more

troublesome, was the fact that Daniel attempted to hide more than $56,000.00 in cash from Sarah and the court. It is clear that the District Court was troubled by Daniel's attempt to hide this money. Within the District Court's Memorandum Opinion, it is unclear whether the ordered payment is related to Daniel's attempt to hide assets or for property equalization. The District Court appears to take the position that $47,364.50 is meant as a sanction as consequence for Daniel's attempt to hide assets. However, Sarah maintains that the District Court's explanation is unclear on this point. The District Court's Memorandum Opinion makes the following recitation: "[t]he Court is concerned about Daniel's attempt to hide the Cash on Hand, $56,500, from Sarah. In order to equalize the property distribution, Daniel will pay the $47,364.50 out of the Cash on Hand. Then, the balance of the Cash on Hand shall be split equally between the parties." App. 66, ¶ 35. The District Court had previously accepted Daniel's proposed allocation of Property Distribution. Id. ¶ 33. In this case, the Cash at Hand was to all be awarded to Daniel pursuant to the Property Distribution. However, the net result of the District Court's order is simply that there is an equal distribution of the Property and Debts of the parties.

[23] Although unclear, Sarah maintains that the court intended, based on Daniel's attempts to hide assets and his significantly greater earning capacity, to sanction Daniel and to award her the $47,364.50. After the sanction, the remaining assets should have been divided equally. Sarah discerns the Court's meaning in this regard based on the District Court noting that it was "concerned about Daniel's attempt to hide the Cash on Hand" and the District Court's further notion that the "the balance of the Cash on Hand shall be split equally between the parties." App. 66, ¶ 35.

[24] Because the District Court's decision on this point appears ambiguous, Sarah urges this Court to remand that issue back for further clarification to the District Court.

D. The District Court Erred in Valuing the Property.

[25] Defendant further urges the court, under the clearly erroneous standard of review, to find error in the District Court's calculation of the value of Sarah's Pension. The District Court, having accepted Plaintiff's Proposed Property Distribution, App. 138, set the value of Sarah's pension at $56,354.00. However, that value is based on the value of the pension in 2034, not as of the date of divorce nor as of the date of the Summons.

[26] "A district court's valuation of property is a finding of fact and will only be reversed on appeal if it is clearly erroneous." Dronen v. Dronen, 2009 ND 70, ¶ 23, 764 N.W.2d 675, 686 (citation omitted). "After the district court has included all of the marital assets and debts, the district court must apply the *Ruff–Fischer* guidelines. The *Ruff–Fischer* guidelines require that the district court consider

> the respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, ***its value at the time***, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material.

Lynnes v. Lynnes, 2008 ND 71, ¶ 14, 747 N.W.2d 93, 99 (emphasis added) citing Staley v. Staley, 2004 ND 195, ¶ 8, 688 N.W.2d 182. "…Retirement benefits may be divided at the time of divorce by either awarding the present value of the benefits, or when there are insufficient assets for a present division or when present valuation is too speculative, by awarding a percentage of future payments. van Oosting v. van Oosting, 521 N.W.2d 93,

98 (N.D. 1994); Zander v. Zander, 470 N.W.2d 603, 605 (N.D.1991). In this case, the District Court valued Ms. Tarver's pension as of the date of its availability on March 1, 2034, and not as value present value as required by the law. As such, the District Court erred and the case should be remanded back for consideration of the value of the pension at the time of the divorce.

E. The District Court Erred in Not Granting Defendant-Appellant's Request for Plaintiff-Cross-Appellant to Pay for Life Insurance.

[27] Sarah urges this Court to find that the District Court erred by not addressing the security for child and spousal support.

> Section 14–08.1–03, N.D.C.C. expressly provides that the court may make suitable provision for the future care and support of the child, and may require "reasonable security" for child support payments. This Court has held that the statute authorizes a district court to order a child support obligor to purchase and maintain a life insurance policy as security for court-ordered child support payments in a divorce judgment. Similarly, N.D.C.C. § 14–05–25 authorizes the district court to require "reasonable security" for spousal support payments ordered in a divorce judgment. Under N.D.C.C. § 14–05–25, the district court may order a spousal support obligor to maintain an insurance policy as security for future support payments in a divorce judgment. The determination whether to order security for a support obligation lies within the sound discretion of the district court, and its decision will be reversed only for an abuse of discretion.

Seay v. Seay, 2012 ND 179, ¶ 9, 820 N.W.2d 705, 710 (citations omitted). Sarah urged the District Court, that if the agreement was not upheld, to order Plaintiff to maintain term life and disability insurance as insurance for future spousal and child support payments. In the Memorandum Opinion and Order, the Court did not address this request. The District Court set forth no rationale for denying the request, as such, review by this court is impossible whether the District Court abused its discretion. Therefore, Sarah respectfully requests remand back to the District Court to address this issue.

F. The District Court Erred in Its Calculation of Spousal Support.

[28] The District Court concluded in this case that Plaintiff should pay to Defendant of and for spousal support the amount of $8,800.00 per month. Subject to the argument set forth above regarding the agreement of the parties, Sarah urges the court that the District Court's determination regarding spousal support is clearly erroneous and she is requesting $15,000.00 per month in permanent spousal support.

[29] "Under N.D.C.C. § 14–05–24.1, a trial court in a divorce case 'may require one party to pay spousal support to the other party for any period of time.'" Pearson v. Pearson, 2009 ND 154, ¶ 5, 771 N.W.2d 288, 291; Reineke v. Reineke, 2003 ND 167, ¶ 6, 670 N.W.2d 841 quoting Sommers v. Sommers, 2003 ND 77, ¶ 15, 660 N.W.2d 586. "An award of spousal support is a 'finding of fact which will not be set aside on appeal unless clearly erroneous.'" Id. citing Solem v. Solem, 2008 ND 211, ¶ 5, 757 N.W.2d 748. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after a review of the entire record, we are left with a definite and firm conviction a mistake has been made." Id. citing Krueger v. Krueger, 2008 ND 90, ¶ 7, 748 N.W.2d 671 (Krueger I). "The district court must consider the relevant factors under the *Ruff–Fischer* guidelines when determining if an award of spousal support is appropriate." Id. ¶ 6, 771 N.W.2d 288, 291–92 citing Overland v. Overland, 2008 ND 6, ¶ 16, 744 N.W.2d 67; Fischer v. Fischer, 139 N.W.2d 845 (N.D.1966); Ruff v. Ruff, 78 N.D. 775, 52 N.W.2d 107 (1952). "Factors to consider under the *Ruff–Fischer* guidelines include:

> "[T]he respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at

> the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material."

Id. citing Krueger I, ¶ 8, 748 N.W.2d at 674 citing Sommer v. Sommer, 2001 ND 191, ¶ 9 636 N.W.2d 423. "Spousal support awards must also be made in consideration of the needs of the spouse seeking support and of the supporting spouse's needs and ability to pay." Id. (citation omitted).

[30] In this case throughout the marriage Sarah has been primarily a stay-at-home mom by agreement of the parties. Meanwhile, Daniel is an interventional radiologist. Currently, Sarah is a Realtor that makes around $40,000.00 per year. Meanwhile Daniel made more than $575,000.00 in 2017, and was expected to make even more in 2018. There is no indication that Daniel has any medical concerns which would preclude him from continuing to work. While the District Court noted Daniel's wages while living in Vermont prior to 2014, those wages were for his continued medical training and are not indicative of his current earning capacity. Conversely, the record shows that Daniel has the ability to earn more than $575,000.00 per year, or nearly $48,000.00 per month.

[31] At the time of trial Sarah was 49 years old, and Daniel was 54 years old. Daniel was, admittedly and by agreement between the spouses, later in life in attending medical school. However, it is evident that Sarah believed in the fruits of that decision and the parties' respective hard work would reap rewards in the future for both parties. The parties have 3 children that Sarah was primarily responsible for raising. Further, Sarah managed the household and made sacrifices in lifestyle so that Daniel could attend and succeed in his chosen profession, both as a veterinarian and as a physician. It is noteworthy that prior to Daniel making the decision to go to medical school, the parties

enjoyed a comfortable lifestyle as Daniel had a successful veterinarian practice and, besides being the homemaker and raising the children, Sarah was working at 3M. Sarah left 3M primarily to raise the children. Through medical school, both the parties anticipated a greater earning and as such, additional income. Sarah supported Daniel throughout his medical school endeavors. Although the parties testified to differing facts regarding their time in South Dakota with the veterinarian practice, they did own fairly significant assets in South Dakota prior to Daniel attending medical school. These assets were slowly sold away during Daniel's medical school attendance to pay for the various bills of the parties.

[32] This Court has recognized that a party foregoing employment prospects in order to further the other party's career and care for minor children is a consideration for spousal support. See Stock v. Stock, 2016 ND 1, ¶ 12, 873 N.W.2d 38, 44 ("[A] spouse who remains out of the workforce to provide child care "has foregone opportunities and has lost advantages that accrue from work experience and employment history.") citing Weigel v. Weigel, 2000 ND 16, ¶ 13, 604 N.W.2d 462. "[This Court has] further recognized 'a difference in earning power can be considered when determining spousal support.'" Id. citing Ingebretson v. Ingebretson, 2005 ND 41, ¶ 9, 693 N.W.2d 1. In this case, Daniel Tarver and Sarah Tarver both testified that Sarah Tarver gave up a position at 3M to further Daniel's career and also to raise the parties' children. Although Stock was addressing when a District Court could award permanent versus temporary spousal support, Sarah urges the court to recognize the same principle here.

[33] Sarah maintains that increased spousal support is necessary for a number of reasons. First, Sarah maintains that additional spousal support is necessary to continue

her standard of living. "Continuing a standard of living is a valid support consideration in a long-term marriage, as is 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) citing Wahlberg v. Wahlberg, 479 N.W.2d 143 (N.D.1992); see also Krueger I, 2008 ND 90, ¶ 9, 748 N.W.2d 671.

[34] Next, Sarah maintains that spousal support should be increased because of her limited retirement funds and her foregoing of job training, experience, and retirement accumulation in favor of Daniel's career. "Permanent spousal support is appropriate when an economically disadvantaged spouse cannot be equitably rehabilitated to make up for opportunities lost during the course of a marriage, while rehabilitative spousal support is appropriate when it is possible to restore an economically disadvantaged spouse to independent economic status, or to equalize the burden of a divorce by increasing the disadvantaged spouse's earning capacity." Krueger I, ¶ 9, 748 N.W.2d at 674 citing Ingebretson, ¶ 9, 693 N.W.2d at 5. At the time of the divorce, Sarah has a mere $27,000.00 saved for retirement at the age of the forty-nine (49). Daniel has been the primary earner for years in this marriage and he has much greater income, and a much greater earning capacity, than does Sarah. At this stage of her life, Sarah has little ability for further education and almost zero ability to obtain the education and experience Daniel has obtained over the past eighteen years. Sarah presented evidence that her monthly expenses range from almost $10,000.00 per month to nearly $17,000.00 per month. This does not include extraordinary expenses, such as purchasing a new vehicle, nor does it include saving for retirement.

[35] Conversely, Daniel claimed expenses of approximately $6,520.43 for only one person against a monthly salary of approximately $48,000.00 per month. App. 135. Daniel submitted exhibit 10(c) as a demonstrative exhibit alleging showing the monthly expenses and available net income for Daniel. That exhibit shows that, monthly, Daniel has available to him nearly $23,000.00 in income after child support, with as set forth in the exhibits, additional increases possible for him at his occupation.

[36] Finally, Sarah's further concern is this Court's holding, on several occasions, regarding modification of spousal support. Regarding termination of spousal support, Sarah notes this Court's statement in Krueger v. Krueger (Krueger II): "Our opinion does not mean Albert Krueger may not seek modification of his spousal support obligation when he does retire; but rather, that the record in this case merely shows that he has not yet actually retired." Krueger II, 2013 ND 245, ¶ 15, 840 N.W.2d 613, 618. Generally, a "party seeking modification of spousal support bears the burden of showing a material change in circumstances warrants modification." Ebach v. Ebach, 2005 ND 123, ¶ 9, 700 N.W.2d 684 (Ebach I). "A material change in circumstances is something that substantially affects the parties' financial abilities or needs, and the reasons for the changes in income must be examined as well as the extent to which the changes were contemplated by the parties at the time of the initial decree." Id. "'A material change in circumstances [is] something which substantially affects the parties' financial abilities or needs, and the reasons for changes in income must be examined as well as the extent the changes were contemplated by the parties at the time of the initial decree or a subsequent modification.'" Ebach v. Ebach, 2008 ND 187, ¶ 10, 700 N.W.2d 684 (Ebach II) citing Quamme v. Bellino, 2002 ND 159, ¶ 14, 652 N.W.2d 360. "A change contemplated at

the time of the initial decree or at the time of a prior modification is not a material change in circumstances." Id. (citations omitted). The factors the court can consider have been outlined in Ebach I as follows:

> There are a variety of factors which should be considered in analyzing whether such changed circumstances do, in fact, exist as would justify a modification of [spousal support]. A court may consider, for instance, the age gap between the parties; whether at the time of the initial [spousal support] award any attention was given by the parties to the possibility of future retirement; whether the particular retirement was mandatory or voluntary; whether the particular retirement occurred earlier than might have been anticipated at the time [spousal support] was awarded; and the financial impact of that retirement upon the respective financial positions of the parties. It should also assess the motivation which led to the decision to retire, i.e., was it reasonable under all the circumstances or motivated primarily by a desire to reduce the [spousal support] of a former spouse.

Ebach I, ¶ 12, 700 N.W.2d 684, 688 citing Silvan v. Sylvan, 267 N.J.Super. 578, 632 A.2d 528, 530 (App.Div. 1993) (brackets and emphasis in original).

[37] These decisions seem to indicate that Daniel could modify his spousal support upon retirement. Here, Daniel, having gone back to school later in life, will be eligible for retirement in as little as eight (8) years. Sarah notes that there is no guarantee that her spousal support will continue beyond that date, as the Judgment in this case provides "[t]he Court shall retain jurisdiction over the matter of spousal support and may revisit the matter after a material change in circumstances and/or motion of either party." App. 75, ¶ 70. Thus, Sarah could find that the $8,800.00 per month in spousal support may end in as little as eight (8) years. The Court awarded Sarah $8,800.00 per month in spousal support. With the Court's award of child and spousal support, and including her average income, Sarah will be earning around $17,000.00 per month. While certainly Sarah must concede that this is a fairly large sum of money per month, nearly 1/3 of that

income will diminish each year as one of her children graduates from high school. Further, assuming that Daniel would retire at the age of 62 and would move to modify his retirement, then Sarah would have had only eight (8) years of spousal support to save for retirement. Depending on her expenses, this leaves Sarah a maximum of approximately $739,200.00 with a minimum of $163,200.00 in retirement. While the first number seems like a significant amount, with her monthly expenses, and current age, Sarah's best case (not calculating for interest income or market fluctuations) based on her monthly expenses would be that she would run out of savings by the time she was 63 years old. This further assumes that Sarah will not enjoy the life she likely would have with Daniel utilizing virtually nothing for travel, and other discretionary spending. This, coupled with the fact that Sarah will never come close to Daniel's earning capacity favors additional spousal support.

[38] Based on her contributions to the marriage, the significant disparity in earning capacity, and the other factors to be considered by the court, Sarah urges this Court to overturn the decision of the District Court and find that Sarah should be entitled to $15,000.00 per month in permanent spousal support or until further order of the District Court.

VII. CONCLUSION.

[39] For the foregoing reasons, Sarah urges this court to reverse the decision of the District Court and remand the matter back to the District Court for approval of the stipulation entered into on the record. Alternatively, if the stipulations are found by this Court to be invalid, to reverse and remand the case back to the District Court for a determination of the present value of Sarah's retirement, clarification of the payment of

$47,364.50, a determination of insurance coverage for the future spousal and child support payments, and for a determination of spousal support.

Dated this 24th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Defendant and Appellant, Sarah Tarver was on the 24th day of April, 2019, served electronically to the following:

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Daniel Tarver,	)	
	)	
	)	
Plaintiff and Cross-Appellant,	)	Supreme Court No. 20190073;
	)	District Court Case No. 08-2017-DM-00569
	)	
vs.	)	
	)	
Sarah Tarver,	)	
	)	
	)	
Defendant and Appellant.	)	
	)	

CERTIFICATE OF COMPLIANCE

[1] The undersigned hereby certifies that the Brief of Defendant and Appellant, is in compliance with Rule 32 of North Dakota Rules of Appellate Procedure and the brief contains 30 pages.

Dated this 24th day of April, 2019.

/s/Thomas M. Jackson
Thomas M. Jackson (05947)