20190077
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 17, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Julie Lessard,	)	
	)	Dist. Ct. #09-2018-DM-00159
Plaintiff-Appellee,	)	
	)	
vs.	)	Supreme Court #20190077
	)	
	)	
Kevin Johnson,	)	
	)	
Defendant-Appellant,	)	
	)	
_____	)	

APPEAL FROM THE DISTRICT COURT, CASS COUNTY,
NORTH DAKOTA, THE HON. FRANK L RACEK PRESIDING

Appeal from:

Order Denying Request for Continuance;
Findings of Fact, Conclusions of Law, Order for Entry of Judgment;
Judgment;
Order Denying Motion for New Trial, et al.;
Order Denying Motion for Contempt.

Appellee's Brief

Michael L. Gjesdahl (ND Atty. ID 04658)
Gjesdahl Law, P.C.
Insight Professional Offices
1375 N. 21st Avenue
Fargo, ND 58102
701-237-3009
Mike@Gjesdahllaw.com
Attorney for Plaintiff/Appellee

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Julie's Argument

A.

First, Some Preliminaries

1.

Of Ferrets and Findings

[1] Some preliminary words before the countering begins:

[2] In his brief, Kevin makes a number of central factual assertions...without any accompanying attribution to this case's record. He says, for example:

> The Rule 8.3 Property and Debt Listing was signed by both Lessard and Johnson on September 18, 2018. Additions and corrections were made to the 8.3 Property and Debt Listing ***and agreed to at trial.***

Kevin's Brief, ¶ 32 (emphasis supplied).

[3] However, there was no agreement between the parties that any updates to the September 18, 2018 8.3 List would be binding on the parties or the court. Nothing in the record supports Kevin's strawman claim.

[4] Likewise, Kevin says:

> Without making findings on the value of the marital estate, the District Court noted that Kevin will receive a property distribution in excess of $1.5 million, while Julie was awarded a net marital estate of $1,800,000. The award of property had a substantial disparity of approximately $300,000 that the court did not explain.

Kevin's Brief, ¶ 33.

[5] Again, these un-attributed claims of "facts" the trial court found or "noted" are very simply un-true. Rather, they are "facts" the court did *not* find, facts the court did *not* note. In other words, they are not facts at all: they are fiction.

[6] Kevin's lack of attribution does a disservice to Julie. For each unattributed "factual" reference Kevin makes, must she scour an entire record to point out inaccuracies, lack of context, cherry-picking, shading, falsehood?

[7] Kevin's failure to connect his brief's factual assertions to the trial court's record does a disservice to this court, too: For how can it assess his faithfulness to truth, to accuracy, without the ability to check "facts" against record.

[8] Ultimately, Kevin's failure to source fact to record undermines his own appeal and brings to mind this court's ferrets. Yes, them again.

[9] This Court refers to them often, always to make the same point, namely, "you need to help the court before the court can—or will—help you":

> [J]udges are not ferrets who engage in unassisted searches of the record for evidence to support a litigant's position." (citations omitted).
>
> ("We have repeatedly stated we are not ferrets and we will not consider an argument that is not adequately articulated, supported, and briefed.") (quotations omitted).

In re N.C.M., 2013 ND 132, ¶ 37, 834 N.W.2d 270.

[10] Blind to his own failure to leave a competent trail of factual breadcrumbs, Kevin curiously accuses the trial court of the same infirmity. He complains the record doesn't disclose that it addressed certain best interest factors. He grouses the district court didn't identify the value of the estate it divided.

[11] But, in truth, the District Court did just fine. In this court's attempt to understand that court's reasoning, its search can expand beyond the narrow confines of the trial court's *written* findings of fact.

[12] In the case at hand, at four junctures during trial, the Hon. Frank L. Racek shared soliloquies that disclosed the court's decisional rationales. They

begin, respectively, at transcript pages 4, 114, 203, and 308. Of course, this court can consider "trial court's oral findings...if they do not conflict with the written findings...(citation omitted)." Holtz v. Holtz, 1999 ND 105, ¶ 28, 595 N.W.2d 1; see also, In Interest of P.T.D., 2017 ND 248, ¶ 8, 903 N.W.2d 83.

[13] Lastly, this appeal was stayed, for a brief moment, while Kevin brought a hodge-podge of post-trial motions. There was—oddly—a full-on change-of-custody motion, brought after his own Notice of Appeal had been filed (and ignoring this state's 2-year moratorium against such motions). There was a contempt motion, accusing Julie of being generally unkind. And there was a Rule 59 Motion, grumbling about "irregularities" in the trial proceedings. All of Kevin's motions were denied and, again, the explanations the District Court shared in its denying orders are accessible to this Court in its own discernment process.

2.

One of These Accounts is Not Like the Others

[14] In the usual case, North Dakota divorces involve a single Rule 8.3 Joint Asset and Debt List. And, here, there was the best of all such statements, one signed by both parties, in which they agreed upon the value of *every asset*, and *every debt* and, therefore, the exact, to-the-penny, value of their *entire marital estate*! Kevin's Appx. 76.

[15] Per North Dakota Century Code, Section 14-05-24(1), the valuation date here was December 4, 2017 (when the parties separated). T. 11. A 100% stipulated estate and the valuation date aside, Judge Racek, nevertheless, insisted that the parties provide the court current, *date-of-trial*, financial account balances.

[16] Julie's counsel fussed. Referring to the stipulated 8.3 Asset and Debt List, he explained to the court:

> MR. GJESDAHL: We are using the valuation date...and these numbers were developed during a mediation...where the parties used the statutory valuation date. So there have been changes. All of the financial numbers that you see are probably different, you know, eight, nine, ten months later.

T. 6.

[17] So why, counsel pressed, would the court require updated account balances?

Judge Racek responded with a puff of air in his first soliloquy, T. 4-21:

> THE COURT: Okay. So here is my problem. I can't divide a puff of air. So I want to know what the exact balances are today, because if I am giving somebody "X" number of dollars that doesn't even exist, I can't factor that in. So we can consider this as to what is equitable, but I need to know if it is there and what amounts are there.

T. 6.

[18] And so, per the Court's instructions, the trial didn't start until the parties each updated Exhibit 1, the stipulated 8.3 Asset and Debt List, and provided as-of-trial balances for all of their respective financial accounts.

[19] Julie provided 10 updated account balances in Exhibit 60, this action's second 8.3 Asset and Debt List. T. 71-72; Kevin's Appx. 95. She updated line items 4, 5, 6, 10, 11, 12, 13, 14, 18, and 20. Kevin provided 4 updated account balances in Exhibit 160, this action's third 8.3 Asset and Debt List. T. 50-51, Kevin's Appx. 111. He updated line items 17, 18, 19, and 20. Though the court did not ask for post-valuation date updates about *debt* balances, *Kevin also attempted to include 2 revised debt balances in his supplemental 8.3*. Kevin's Appx. 120.

[20] Although the parties provided current account balances to accommodate the court's concern about distributing depleted accounts, *at no point did the parties agree the court would or should use the updated account balances* (essentially, to change the valuation date to date of trial).

[21] There was no change in either party's supplemented 8.3 Asset and Debt List to any of the other 316 items and valuation entries in the original, stipulated 8.3 List.

[22] Except for one account, *none* of the updated accounts experienced a significant or remarkable valuation change. Most had been without activity during the parties' separation and experienced change due only to interest accrual or market fluctuation.

[23] However, one account was unlike the others, and that was line item 5, Julie's Bank of the West Savings Account. This account was quite different in that:

(a) as of the parties' separation date its balance was $173,341;

(b) during the life of the action, *that $173,341 was entirely consumed* as Julie paid all of her living expenses, all of Kevin's living expenses, Kevin's alcohol and counseling expenses, her attorney's fees, and Kevin's attorney's fees; and

(c) its date-of-trial balance, $181,164, represented new, post-valuation-date deposits Julie had made from her earnings, during the action's life.

T. 200-201.

[24] This outlier account pops up in various places throughout this appeal and must be remembered.

B.

A Party's Self-Created Problems Aren't the Court's Irregularities

[25] Kevin claims the District Court should have granted him a continuance after his attorney withdrew and that its failure to do so was a fatal irregularity.

[26] This matter's trial was originally set to try on October 2 and 3, 2018, but was scheduled as a "back-up" trial. Because the lead-off trial didn't settle, Julie's and Kevin's attorneys, together, sought a continuance. Julie's Appx.21-23. Trial was re-set for December 6 and 7, 2018.

[27] On October 30, 2018, Kevin's first attorney served and filed a Motion to Withdraw because "Defendant has become unreasonably difficult..." Julie's Appx. 26. "Over the past few weeks there has...been a deterioration of my attorney-client relationship." Julie's Appx. 28.

[28] The court granted her motion the very next day, on October 31, 2018. Trial was over 5 weeks away.

[29] Thus, at the very core of Kevin's argument is the claim that his loss of counsel for being difficult establishes a positive ground for delay—docket currency standards be darned, that the case had been ready to try for months be disregarded, and the prejudice to Julie be ignored.

[30] Then, on November 30, 2018, Kevin's two new co-counsel filed their respective Notices of Appearance. Julie's Appx. 31-32. Neither they nor Kevin ever disclosed when he'd first contacted them, when he'd hired them, or how much he'd paid them. We only know when they officially appeared.

[31] Their appearance was followed, four days later, on December 4, 2018—2 days before trial—by a Request for Continuance, *a request unsupported by affidavit.*

[32] Kevin identifies four reasons the continuance should have been granted, none of them valid:

[33] ***First, Kevin says 5 weeks wasn't enough time to hire new counsel and bring them up to speed.*** However, in seeking her withdrawal, Kevin's first attorney represented there would be no "materially adverse effects on the interests of the client as trial in this matter is over a month away and the client's folder is well-organized and can be easily transferred to new counsel." Julie's Appx. 28.

[34] There was no complexity in identifying the parties' estate or its value. Again, they'd stipulated to the value of each and every asset and debt in their estate. Not one item was contested.

[35] At neither the district court level, nor here, did Kevin ever describe the efforts he made to obtain new counsel between October 31, 2018 and November 30, 2018. How many lawyers did he call? Email? Visit? When did he call, email, or visit them? What diligence did he demonstrate? He offered no evidence from which we can know.

[36] ***Second, Kevin says he didn't have money with which to hire new counsel and that there was plenty of money in a marital account.*** However, by then, Kevin was employed, earning nearly $80,000/year, and was on the brink of a $1.6M distribution. T. 11. Attorneys don't deflect cases like that: they line up for them.

[37] How many lawyers declined Kevin's case for lack of funds? Was there even one? Who were they? What retainer amount did they seek? Were their requests reasonable? Again, Kevin offered no evidence from which we can know.

[38] Kevin's complaint that Julie withheld funds that should have been available to him to hire new counsel is a first reference to item #5, Julie's Bank of the West Savings Account. Again, Julie explained that any funds that had been in that account as of the valuation date had long since been depleted. Kevin had no claim to the deposits she'd made in that account after the valuation date. Kevin's Appx. 104.

[39] ***Third, Kevin says 2 days wasn't enough time to try this case.*** However, at the matter's original Pretrial Conference, both Kevin's original attorney and Julie's agreed: two days would be sufficient. The December 6 and 7, 2018 trial was orderly and complete. Kevin makes no claim, much less a showing, a new trial would have been, or would be, materially different, much less better.

[40] ***Fourth, Kevin claims he had an outstanding discovery request that he needed answered before trial***. The court can find Kevin's inconsequential request, and Julie's response to it, at Kevin's Appendix, pages 33 and 34. Kevin's first attorney issued a pro forma request for supplementation of Julie's earlier discovery responses, and Julie responded that her original discovery remained sound. She'd provided that response although, as Judge Racek noted, discovery in the case had long since closed. Kevin's Appx. 133.

[41] In denying Kevin' motion, the District Court explained:

> On December 4, 2018, defendant served and filed a Motion to Continue Trial. His motion was unsupported by sworn affidavit. It was based on conclusory allegations, assertions contradicted by defendant's prior attorneys, and statements convincingly refuted by Plaintiff...
>
> Defendant has not provided compelling justification from which the Court can conclude that good cause exists to continue the scheduled trial.

Kevin's Appx. 27.

[42] In denying Kevin's post-trial, Rule 59 motion, the court further explained:

> On July 13, 2018, the Court entered a "Pretrial Order and Trial Notice." The Order indicated that trial was set as a back-up trial on October 2 and 3, 2018. It specifically stated, "[a]ll parties are responsible to...be ready for trial on the above date." The estimated length of trial in the Order was two days. Written discovery was also closed at that time.
>
> The parties engaged in two rounds of mediation. Johnson attests that as of the September 17 and 18, 2018 second mediation, the financial terms of the divorce were essentially agreed upon...
>
> Johnson has failed to show how the failure to grant a continuance for the trial... "prevented a party from having a fair trial." The Court allowed each party equal time to present their cases. The Court accepted almost all of each party's exhibits. The Court allowed each party to testify. The failure to grant the continuance did not prevent Johnson from having a fair trial.

Kevin's Appx. 133-134.

[43] Kevin's case is a little like Boehm v. Boehm, 2002 ND 144, 651 N.W.2d 672, where this court affirmed a district court's denial of a motion to continue in a divorce case. Husband's business burned down in June and he waited until the cusp of its September trial to bring his motion. Here, Kevin's attorney was discharged on October 31, 2018 and he waited until December 4, 2018, just 2 days before trial, to bring his motion.

[44] This case is even more like Fahlsing v. Fahlsing, 552 N.W.2d 87 (N.D. 1996), a custody case, in which a district court denied a motion to continue and was, also, affirmed. There, the movants failed to demonstrate how a continuance would have materially improved the quality of their trial. Kevin's motion bore the same defect. Had a continuance been granted, what additional, case-turning exhibit would he have offered? What game-changing witness would he have discovered? He didn't tell us...and, as Judge Racek noted, in truth, there would have been no difference. Kevin testified fully and virtually all of his exhibits were received.

[45] This case is *not at all like* Kjonaas v. Kjonaas, 1999 ND 50, 590 N.W.2d 440. There, the wife, whose request to continue had been denied, was the victim of husband's dirty tricks. Husband had sold farmland during the divorce and denied the sale in sworn discovery responses. Only upon being confronted with evidence he'd lied did husband confess it; and, even then, he withheld an appraisal and revised financial statement until the eve of trial, too late for wife to contend with them. Her appeal focused on those dirty tricks, not on details surrounding a late change of counsel:

> Josephine asserts the trial court abused its discretion when it failed to grant a continuance the day before trial ***based upon Curtis's discovery abuses,*** which denied her a fair opportunity to prepare for trial. We agree.

Id., at ¶ 10 (emphasis added).

[46] Kevin Johnson had a fair trial. Julie pulled no stunt that made his trial preparations harder. Any difficulty he faced was self-created. Kevin suffered no prejudice by the denial of his tardy motion to continue. The trial court did not

abuse its discretion in either denying that motion or Kevin's redundant Rule 59 motion.

C.

Residential Responsibility: The District Court Got it Right

[47] The District Court awarded Julie primary residential responsibility of the parties' three children. It awarded Kevin a traditional, "regular dad," unsupervised parenting schedule:

a. every Tuesday, from 3 p.m. to 7 p.m.;
b. every Friday, from 3 p.m. to Saturday at 9 a.m.;
c. every other weekend, from 3 p.m. Friday to 8 a.m. Monday;
d. every other week, during eight of the summer weeks; and
e. alternating holidays.

Kevin's Appx. 41-43.

[48] Kevin complains that, in reaching this decision, the District Court: didn't address factors b, d, f, h, and i; paid too much attention to his alcoholism and its impact on his functioning and familial impact ("a moot issue," he says); spent too much time parsing the past; and over-emphasized domestic violence incidents he claims never happened. Kevin is wrong.

1.

The District Court's Custody Rationale was Clearly Expressed

[49] Of course, in resolving custody disputes, district courts need not make separate findings on each and every best interest factor. Rather, the obligation is to make findings with sufficient specificity that, upon review, this court can understand its reasoning. Clark v. Clark, 2005 ND 176, 704 N.W.2d 847.

[50] Judge Racek couldn't have been more clear. He did consider all the factors, but Kevin's alcoholism was the predominant differentiator. Kevin's Appx. 136. It impaired virtually every aspect of his life and family dynamic.

[51] Addressing factor g, comparing the parties' mental and physical health, the District Court said:

> 25. Kevin is an alcoholic who has been an active drinker throughout the parties' marriage. He has been diagnosed as suffering "Alcohol Use Disorder, Severe," and has been in recovery for approximately one year having enrolled in treatment after being removed from the parties' home.
>
> 26. Kevin's drinking adversely affected his relationship with Julie, with daughter GLJ, with NMJ, and with son GLJ. It impaired Kevin's abilities to devote his positive energies and attributes to being a husband and father and, worse, made him, at times, surly, mean, and self-absorbed.
>
> 27. This is the predominant best interest factor in this case. It strongly favors Julie.

Kevin's Appx. 39.

[52] Judge Racek articulated the court's parenting schedule in his fourth soliloquy. T. 307-311. There he commented that "dad's recovery is fairly recent." T. 308.

[53] In addressing factor a, comparing the emotional ties between children and parents, the District Court said:

> 12. The Court is certain that both parties dearly love their children and that the children love each parent. It is fairly certain, too, however, that Kevin's drinking, and its effect on his temperament, judgment, and focus, impaired the children's emotional ties with him and his ability to provide them emotional sustenance and guidance.
>
> 13. Kevin drank most during the evening hours, from 5 p.m. to bedtime.
>
> 14. This factor favors Julie.

Kevin's Appx. 37.

[54] In addressing factor c, comparing the parties' respective abilities to meet their children's developmental needs, the District Court found:

> 15. During the marriage, both parties surely contributed to tending the children's developmental needs. However, Julie's contributions exceeded Kevin's. Again, his drinking likely impaired his abilities.
>
> 16. Julie played a stronger role in the children's educational and social lives, perhaps a child's two most significant developmental realms. She found, scheduled, and enrolled the children in activities and arranged their play dates. Kevin, a reclusive man, was not entirely supportive of the children making and maintaining friendships.
>
> 17. This factor favors Julie.

Kevin's Appx. 37-38.

[55] In addressing factor e, the willingness to support the other's relationship with the children, Judge Racek said of Kevin:

> 19. Kevin is largely unable to encourage Julie's and the children's relationship. His singular focus on understanding himself to be her victim—which, in turn, rests upon rationalizing away his contributions to the relational disarray—leaves no energy to provide such encouragement. Instead, he disrupts Julie's relationship with the kids by invading her time with them, for example, on trips, at church, and during get-ready-for-school hours. He views her time with the kids not as a need he must support, but as a cost against his own time with them.

Kevin's Appx. 38.

[56] And, about factor j, domestic violence, Judge Racek found:

> 28. Julie shared a photograph (Exhibit 40) of significant red marks on NMJ's back inflicted a few years ago. On December 4, 2017, Kevin threw NMJ off him, and into an object, causing pain on NMJ's head. Social Services investigated. On other occasions, after drinking, Kevin threatened to hit the children with a belt and otherwise instilled in them an immediate fear of an imminent physical event.
>
> 29. Kevin denies these events occurred but, in light of the evidence in the Court's record, his denials are not credible.

30. The domestic violence involved in this case is insufficient to trigger the statutory presumptions. Nevertheless, these acts have had an effect on the family.

31. It is the Court's belief—and hope—that such behaviors bore a direct nexus to Kevin's drinking and that, with his sobriety, they will never happen again.

32. This factor favors Julie.

Kevin's Appx. 39.

2.

The Trial Record Supports the District Court's Findings

[57] Abundant evidence in the trial record supports Judge Racek's findings. It brims with information establishing Kevin's alcoholic behaviors, the soundness of the Alcohol Use Disorder Severe diagnosis, and the effect of Kevin's behaviors on his wife and children.

[58] Kevin testified about his alcoholism and treatment. T. 12-13, 26-27, 63, 130, 131, and 137. He confessed that his drinking interfered with family relationships, made him miss out on evening family time, and made him waste time and money on booze. T. 144. He conceded he'd tried on "many" occasions to gain sobriety and failed. T. 148. He admitted sending Julie an email telling her he'd put a gun to his head. T. 123. And he authenticated his own June 21, 2017 text to Julie, in which he scolded:

> Fourteen days of no alcohol. June 6-20, 2017. That is the longest I've gone in about 5 years. Do you even comprehend what that is? When I've spent 25 years drinking? That's 9,125 days of drinking and 14 days sober. Whoop! Whoop! It would be like YOU going 14 days with no food, or no water, or no air. You have no clue. Again, stop and think about it. 14 days with no food! I'm sure that you still have no clue about addiction.

Julie's Appx. 81, T. 149.

[59] Julie testified that: Kevin tried and failed to gain sobriety on "many" occasions. T. 159. Kevin snuck alcohol along on trips. T. 161. Kevin hid his alcohol around the house. T. 161. She stopped sleeping with Kevin because "he reeked" of alcohol. T. 162. Kevin would fill up a tumbler with booze and go sleep with their son, G.L.J. T. 162. Kevin's drinking contributed to him being mean and mad with the kids. T. 164. Kevin sent her a long email in which he said, at some point, he was going to commit suicide. T. 168.

[60] Kevin's First Step Recovery records, full of Kevin's self-reporting, tells the same tale:

> ...he does struggle with alcohol use...drinking relieves the stress of the day...not spending enough time with the kids.
>
> ...he is drinking almost daily; up to 6-10 oz. of rum a day, with coke. He starts drinking around 5 p.m. until bedtime, roughly 8:30-9:30 p.m.
>
> ...he has blacked out or had fuzzy moments, maybe 1x per month. He voices Monday night [December 4, 2017] things were a little fuzzy.
>
> Substantial time devoted to use...daily use.
>
> Recurrent use resulting in failure to fulfill major role obligations at work, school, or home...
>
> Continued use despite having persistent or recurrent social or interpersonal problems or exacerbated by the effects of use.
>
> He voices he has had suicidal thoughts and states, "hasn't everyone at some point?"
>
> Kevin has little recognition or understanding of substance abuse relapse issues, and has poor skills to cope with and interrupt addiction problems.
>
> Kevin appears to have an inability to abstain from using alcohol. He appears to lack behavioral control...

Julie's Appx. 161-162.

[61] About domestic violence, Julie testified about an event that occurred in the evening of May 10, 2014, where son, N.M.J. was crying, had a big bruise on his back, and said, "Daddy hit me." The court received a photo of the boy's bruises. T. 172; Trial Exhibit 40. She described another virtually identical event from the evening of October 2014 and, again, shared photos with the court. T. 173-174.

[62] She testified Kevin would threaten to hit the kids with his belt and that "I'll kick your ass." T. 175-176.

[63] Julie testified about her and Kevin's last night together, when he threw their older son—always the older son—onto the floor, where he hit his head on a hockey helmet and again came running to her. T. 88-90.

[64] Curiously, it was Kevin who introduced into evidence the police report from that evening in which Officer Kerr describes his conversation with the boy:

> I asked xxxxx if Kevin Johnson has hit him at any time in the past. Xxxxx said that it has happened within the last few months. Xxxxx said that xxxxxx Kevin has punched him in the past. I asked xxxxx how frequently it happens and xxxxx says sometimes it will happen once a month, sometimes it won't happen for a month.
>
> I asked xxxxx if he thought Kevin did this because he was playing around or because he was mad and xxxxx thought it was because xxxxxxx was mad at him.

Kevin's Appx. 106.

[65] A second policeman, Officer Gunther, described how Kevin first suggested he sleep in a tent in the back yard that night. The officers, instead, required him to leave the premises. "Officer Kerr explained to Kevin that we would not allow him to drive since he appeared too intoxicated to be driving," so the officers drove him to a motel. Kevin's Appx. 110.

[66] A week later, Julie initiated a counseling relationship between N.M.J. and the Village Family Service Center. T. 177. Kevin didn't support such counseling. T. 178. The Village records report about N.M.J.:

> Self-reports of being injured by caregiver coupled with feelings of fear and social withdrawal.
>
> Sleep disturbances (e.g., difficulty falling asleep, refusal to sleep alone, night terrors, recurrent distressing nightmares).

Julie's Appx. 94.

> Client reports he is present because "dad is mean to him" about twice a month.

Julie's Appx. 100.

> Individual therapy services are recommended to address grief and adjustment to divorce ***and physical abuse***.

Julie's Appx. 105 (emphasis supplied).

> Wants to sleep with mom every night over the last year. Client states he "feels better" there.
>
> Client stated in session dad is meanest to him out of the other family members.

Julie's Appx. 101.

[67] That same week, Julie and Kevin signed a personally crafted "Safety Agreement." T. 132-134; T. 136; Kevin's Appx. 89-90. It provided that: Kevin would live at the parties' lake home; he'd visit the kids at the marital residence under Julie's general supervision; he'd blow into a personal breathalyzer at the start and end of his visits; and he'd behave and speak respectfully.

[68] A Social Services investigation did, eventually, result in a "No Services Required" finding. However, its findings were aligned with Julie's

reports, the officer's conclusions, N.M.J.'s reports, and the Village's comments in recognizing Kevin's drinking and aggression as central problems. It had also been made aware of the parties' safety plan and that Kevin had commenced alcohol evaluation and treatment.

[69] With that information at hand, and assured the obvious safety assurances were already in place, Social Services issued its concluding letter:

> The Child Protection Report has been staffed with a determination of No Services Required. During the assessment, it was determined that dad and the boys were playing rough. Ultimately, N.M.J.'s head was injured ***by aggressive behavior of dad.*** Safety Plan was developed. Parents both agreed to follow the plan. We expect parents to work together addressing conflict/frustrations without the use of force...
>
> Kevin appears to be addressing his chemical misuse. We expect Kevin will continue addressing his chemical misuse to ensure the safety of his children.

Julie's Appx. 67 (emphasis supplied).

[70] Again, the trial record is chock-full of factual support of the findings Judge Racek made in clearly articulating the basis for the court's decision.

3.

Case Law Supported the District Court's Focus and Findings, Too

[71] While the facts support the trial court's decision, the law does, too. This court has said, "a trial court does not err in considering the effect of any parental habit on the best interests of the child," Heck v. Reed, 529 N.W.2d 155, 165 (N.D. 1995), and that "a parent's inability to control his or her alcoholism is a highly relevant factor that a trial court can properly consider in child-custody determinations." Freed v. Freed, 454 N.W.2d 516, 519 (N.D. 1990); See also, Cross v. Cross, 374 N.W.2d 346 (N.D. 1985)(mother's inability to control her alcoholism sufficient to support finding of material change of circumstances in change-of-

custody proceeding); Ramstad v. Biewer, 1999 ND 23, 589 N.W.2d 905 (alcoholic father was actively drinking and had struck son with wire brush); Haag v. Haag, 2016 ND 34, 875 N.W.2d 539 (father had serious problems with drugs and alcohol and was physically and emotionally abusive to family).

4.

Past is Prologue

[72] Kevin complains that the district court gave his relationship with alcohol inappropriate primacy in making its custody decision. His past is "moot," Kevin claims. This court, though, has said the exact opposite. It says, "[w]hat is past is prologue." Morton County Social Service Bd. v. Cramer, 2010 ND 58, ¶ 39, 780 N.W.2d 688; see also, Hentz v Hentz, 2001 ND 69, ¶ 12, 624 N.W.2d 694.

[73] One of the factual settings in which "past is prologue" is not just a statement, but a judicial refrain, is when the court addresses the relationship between a parent's addiction and their children's best interest.

[74] Thus, in In re D.R., 2001 ND 183, ¶ 16, 636 N.W.2d 412, this court referenced a mom's "long history of drug addiction, parenting failures, and unsuccessful treatment" to predict the risk she posed to her children. And in In re D.F.G., 1999 ND 216, ¶ 21, 602 N.W.2d 697, it found that mom's "history of failing alcohol and mental health treatment attempts" helped predict her child's future deprivation.

[75] With such a tide of factual and legal support, no rational mind could conclude the District Court abused its discretion in awarding Julie primary residential responsibility of the parties' children.

D.

The Estate Distribution: A Harmless Half

[76] As far as Julie can discern, Kevin centers his complaints about District Court's estate distribution on three errant assertions: first, that the district court didn't accurately identify the estate and its value in its findings; second, that he was awarded less than half the estate; and, third, that the court didn't address a $15,227 Cabela's card debt and a $22,000 promissory note. All of Kevin's premises are wrong.

1.

The District Court Did Identify the Marital Estate

[77] What is true is that the district court did not list in its written findings each of the parties' assets and debts and did not assign a value to each.

[78] However, what is also true is that doing so would have been redundant and was unnecessary. *Again, the parties stipulated, in Exhibit 1, to every asset to include in the estate*, every debt to include in the estate, and the value of each as of the statutory valuation date. Kevin's Appx. 76. Why would the court need to make findings regarding uncontested facts? See Judge Racek's comments, at Kevin's Appx. 138, ¶ 27.

[79] In Judge Racek's third soliloquy, T. 204-210, he confirmed he was using the parties' stipulated values, was using the valuation date values (except as to Julie's outlier account), and shared his estate-distribution decision:

> THE COURT: Here is what I would like you to go about crafting for proposed findings...This is going on numbers I have been able to put together...

So, number one, the "College Save" accounts for the children's future education stay in the same legal form and kept for the children's benefit just as they are established.

Two, each party pay their own outstanding attorney's fees balances and costs outstanding and any debts incurred in their own names since separation.

So, ***using Exhibit 1***, that leaves us a joint estate of three million one hundred and two thousand after I take the college accounts off the total.

MR. GJESDAHL: [Referring to Julie's depleted account] Judge, we are asking, can you make a record on that last hundred and eighty thousand dollars that—

THE COURT: ***I'm using Exhibit 1 as the total***.

I understand what you are asking. Yeah, I understand what you are asking.

MR GJESDAHL: Thank you.

THE COURT: But the net estate I am working with is three million one hundred and two thousand. I understand part of it was used to replenish for expenses and attorney's fees during the course of the action, but this is what I am going to consider equitable.

So, number four, one-half of this number, one million five hundred and fifty-one thousand.

MR. GJESDAHL: One-half to each somehow; is that what you're saying?

THE COURT: Yes...

T. 203-204 (emphasis supplied).

[80] So, let's double-check Judge Racek's math:

Total value of estate at valuation date per the parties fully agreed upon 8.3 Statement, Trial Exhibit #1:		$3,268,147
Less the kids' three College Save accounts:		
Item #7, G.L.G. account:	$99,284	
Item #8, N.M.J. account:	$32,867	
Item #9, G.L.G. account:	$33,928	
Subtotal:	$166,079	$166,079

Remaining distributable estate:	$3,102,068
Divided by 2	$1,551,034

[81] In Kevin's Brief, again, *without attribution to the record*, Kevin says: "Kevin's net award of marital assets was approximately $1,546,688" ($4,346 less than the District Court's $1,551,034 target figure).

2.

4 Quick Points

[82] In light of these clearly-discernible-from-the-record facts, these 4 quick additional points emerge:

a.

No $300,000 Disparity

[83] If the court's ultimate award, indeed, shorted Kevin from a pure half by $4,346, it could not have exceeded a pure half to Julie by more than that same $4,346. Third grade math betrays Kevin's unsubstantiated claim that the district court awarded Julie $300,000 more than it awarded her.

b.

Julie's $183,000 Shouldn't Have Been Included in the Estate

[84] Judge Racek's concern about distributing a "puff of air," really a concern about distributing to someone an account depleted since the statutory valuation date, should have led him to handle Julie's Bank of the West Savings account differently. To include that $181,164 in the final distribution was to disregard North Dakota's valuation date:

> If the parties do not mutually agree upon a valuation date, the valuation date for marital property is the date of service of a summons in an action for divorce or separation or the date on which the parties last separated, whichever occurs first.

N.D.C.C., § 14-05-24(1).

[85] In other words, if anyone should be complaining about how the district court divided the estate, *it should be Julie*. Over $90,000 of her post-separation funds were awarded to Kevin...and shouldn't have been.

c.

Kevin's 2 Post-Separation Debts Were Correctly Excluded

[86] Kevin complains that the district court didn't include in the distributable estate a $15,277 Cabela's Visa Credit Card debt and a "promissory note/loan in the amount of $22,000." Kevin's Brief, ¶ 33.

[87] However, neither of these debts was included in Exhibit 1, the parties' stipulated, as-of-valuation-date, estate. Kevin's Appx. 76-86. Instead, they showed up, for the first time, as of the date of trial, when Judge Racek asked for updated *financial account* information and Kevin decided to slip in some updated *debt information*, too.

[88] These post-separation-date debts were rightly excluded from the parties' distributable estate and were, in fact, addressed by the district court, when it said:

> Two, each party pay their own outstanding attorney's fees balances and costs outstanding *and any debts incurred in their own names since separation*.

T. 203 (emphasis supplied).

d.

.001401 is Mathematically Insignificant or, in Legal Terms, Harmless Error

[89] Kevin says he received a distribution of $1,546,688, despite the district court identifying one-half of the distributable estate as $1,551,034, or a difference of $4,346.

[90] $4,346 of a $3,102,068 estate is .001401 of that estate. In other words, if—as he says—Kevin received $1,546,688 of that $3,102,068 estate, he received 49.85989% of it. These figures call to mind our doctrine of harmless error:

> Unless justice requires otherwise, no error in admitting or excluding evidence, or any other error by the court or a party, is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

N.D.R.Civ.P., Rule 61.

> It is well-settled in this state that, on appeal, the appellant has the burden to prove that not only did the trial court err, but the its error was highly prejudicial to his or her cause.

Filloon v. Stenseth, 498 N.W.2d 353, 356 (N.D. 1993); Allen v. Kleven, 306 N.W.2d 629, 634 (N.D. 1981).

3.

Half the Estate in a Long-Term Marriage is the North Dakota Standard

[91] The parties were married on January 20, 2006, Kevin's Appx. 36, and were divorced nearly 13 years later, on December 27, 2018, Kevin's Appx. 75.

[92] This court consistently instructs District Courts to employ an initial presumption in dividing estates in long term marriages, that *"[a]n equal division*

of marital property is a logical starting point...." van Oosting v. van Oosting, 521 N.W.2d 93, 99 (N.D. 1994); Linrud v. Linrud, 552 N.W.2d 342, 346 (N.D. 1996); Kluck v. Kluck, 1997 ND 41, ¶25, 561 N.W.2d 263.

[93] Thus, you've said, "we begin with the view that marital property ***should be*** equally divided..." Kautzman vs. Kautzman, 1998 ND 192, ¶ 21, 585 N.W.2d. 561 (estate divided equally after seven year marriage, preceded by ten years of living together) (emphasis added). See also: Bladow v. Bladow, 2003 ND 123, 665 N.W.2d 724 (equal division upheld in 16-year marriage where estate consisted almost entirely of wife's personal $430,000 personal injury settlement); Christmann v. Christmann, 1997 ND 209, ¶ 6, 570 N.W.2d 221; Schoenwald v. Schoenwald, 1999 ND 93, 593 N.W.2d 350 (equal division upheld in 21-year marriage).

[94] Judge Racek was clearly in line with North Dakota's normative distribution approach in awarding Kevin half the parties' estate. He certainly didn't abuse the court's discretion.

E.

No Evidence, No Need, No Rehabilitation, No Spousal Support

[95] Kevin wishes this court would remand this case for a second chance at making out a spousal support claim. However, he had that chance, presented his evidence (though poorly), and the district court reached the right conclusion. No abuse of discretion entitles him to a do-over.

[96] Kevin's first run at explaining his spousal support claim to the court was—well—inauspicious:

BY MR. GJESDAHL:

Q. ...How much are you asking the Court to require Julie to pay you each month in spousal support?

A. I would have to discuss it with my counsel. I am not sure. I mean, because this –

Q. Is it that you don't – do not know?

A. I'm not sure.

T. 53.

[97] In the end, the District Court found:

38. Kevin asks for $12,200/mo. in rehabilitative spousal support for a period of 12 years. His request is unreasonable. His projected monthly budget is larded with expenses he does not, and will not, incur. He will receive a property distribution in excess of $1.5M. He is well-employed. He is well-educated and a professional engineer. His earning capacity does not need "rehabilitating" and he is engaged in no effort to re-educate or seek more highly compensated employment.

39. Kevin does not need spousal support, whether permanent or rehabilitative. There is no need to retain jurisdiction to award such support later.

Kevin's Appx. 41., See also, T. 207

[98] Those findings were well-supported by the evidence of record.

[99] Even during his time as a self-proclaimed stay-at-home dad, Kevin represented to others that, "I have extensive skill and experience from my years of being an engineer." T. 40. During that period, Kevin kept current with his continuing education requirements, maintained his licenses, and kept his membership in professional organizations. T. 41-42.

[100] Kevin testified that, at time of trial, he was earning a $79,500 annual salary, working as a Civil Engineer. T. 11. Julie introduced into evidence the report

of Vocational Expert, Dr. David Perry, who said Kevin could be earning $90,000 to $110,000 a year. Julie's Appx. 136.

[101] Kevin's employer provides him generous benefits, including: paid time-off (at the 11-year employee level, 160 hrs./year); 100% paid family health insurance; an HSA ($2,700/person, $5,400 per family, 100% match); 100% paid dental and vision insurance; 401K participation; ESOP participation after 1 year; discretionary bonuses; $50K life insurance policy. T. 42-45; Julie's Appx. 116-123.

[102] As for Kevin's monthly expenses, his presentation was confused. The court received into evidence the $12,200 monthly budget Kevin identified during discovery. T. 52; Julie's Appx. 58-59. During his case-in-chief, Kevin submitted a different budget, un-totaled, with different line item representations.

[103] When cross-examined about his $12,200 monthly budget, Kevin disavowed his own representations. He admitted:

a. He wasn't really sure what he spends on clothes. T. 57.

b. He doesn't really spend $350/mo. on insurance as he claimed. T. 57, 8-10.

c. He doesn't really spend the $1,200/mo. he claimed on transportation. T. 57, 11-13.

d. He doesn't really spend $1,625/mo. for childcare. T. 57-58.

e. He really shouldn't ask Julie to pay for his entertainment, or charitable donations. T. 58.

f. He didn't remember what his $2,000 in "miscellaneous" expenses related to. T. 58.

[104] Kevin's $12,200 budget also included a $2,000 monthly expense for a "House/Rent payment." Julie's Appx. 58-59. However, neither Kevin, nor the court, ever expected he'd incur that expense.

[105] Kevin testified that he intended to receive equity from the parties' lake home sufficient for him to buy, outright, a nice home in the same neighborhood where Julie and the kids live. T. 34-35. Judge Racek explained his expectation in "soliloquy #2":

> You are probably going to have to pay a sum of money in cash to your husband, you know. It's going to be in the ballpark of like $600,000, probably. I don't know that. I haven't studied. I haven't done the penciling and the numbering and everything.
>
> Then, he can buy his house, he can buy his furniture, he can buy his new car, he can have a big huge contingency fund. He can control his destiny. You will have plenty of assets.
>
> The expectation he will then end up buying a bigger house then because he has to compete with a physician – it will be paid for...

T. 117-118.

[106] This evidence fully supports the District Court's findings that Kevin is self-sufficient: his income well exceeds his expenses.

[107] Significantly, with respect to any efforts to "rehabilitate" his earnings, Kevin testified that he was neither looking for a different job nor engaged in any education with the goal of obtaining a higher annual salary. T. 55, 7-10.

[108] Lastly, and directly relevant to this issue, the District Court liberated Kevin from virtually any obligation to financially support his children. It found that Kevin's presumptively correct guideline child support obligation to Julie for 3 children was $1,725 each month, *then freed of him that obligation with an equivalent downward departure.* Kevin's Appx. 40; 48.

[109] The court made Julie *solely* responsible for *all* of the children's "additional expenses," including daycare (even Kevin's), school lunches, and

activities. Kevin's Appx. 50. And it made Julie responsible for 100% of the children's uninsured health care expenses. Kevin's Appx. 51.

[110] By freeing Kevin of over $2,000 each month in child-related expenses, the court clearly intended to reduce his "need," if any, for spousal support.

F.

Attorney's Fees: A Deal's a Deal

[111] Kevin complains the District Court made him pay his own fees, cites N.D.C.C, § 14-05-23, and wrongly claims the court did not make essential findings. What he doesn't do is share two dispositive facts:

1. At trial, he offered neither testimony nor exhibits to identify the amount of his outstanding fees or the work involved in incurring them; and

2. Earlier in the action, the parties agreed that, in the end, ***they'd each bear their own fees and costs,*** an agreement with which the court's decision was consistent.

[112] On July 24, 2018, in a signed and notarized written stipulation, while represented by counsel, Julie and Kevin agreed to entry of an Interim Order, containing this term:

> Until the divorce is finalized, both parties' attorneys' fees shall be paid from marital funds. Upon finalization of the divorce, the parties will each be allocated the attorney's fees they incurred throughout this process from their respective distribution.

Julie's Appx. 17; Kevin's Appx. 22.

[113] Spoiler alert! Here comes another reference to item #5, Julie's Bank of the West Savings account. "Marital funds," as Julie interpreted the phrase, meant funds accumulated *before* the statutory valuation date. Indeed, she testified

that she'd depleted the funds in item #5, her Bank of the West savings account, to pay, among other things, both her and Kevin's attorney's fees. T. 200-201.

[114] Otherwise, per the parties' agreement, whatever fees they incurred during the action were, ultimately, to be assigned to them, separately. They'd each be responsible for their own fees...which is precisely what the court ordered:

> **Attorney's Fees**: Each party shall be responsible for his or her own attorney's fees and costs incurred herein.

Kevin's Appx. 22.

[115] Whether Kevin's fees were (1) paid before judgment, then "settled up" in the final halving calculus, or (2) *not paid* before judgment, while each paid their own fees from their own half, the math would have worked out identically either way. This issue is one where any difference in procedural approach is without mathematical distinction.

[116] To summarize, Kevin appeals an issue on which he offered no evidence and on which the court ruled consistently with his own agreement. The District Court did not abuse its discretion in its handling of the parties' attorney's fees.

G.

But You Forgot to Ask!

[117] In denying Kevin's post-judgment contempt motion, Judge Racek—coincidentally? —refers to one of the seven appeals brought by the notorious Mark Rath, a litigant to whom, in his contentiousness and persistence, Kevin bears significant resemblance. Kevin's Appx. 143. As Judge Racek noted, Kevin wanted Julie found in contempt for:

a. publicly demeaning and disrespecting him, while violating his personal boundaries;

b. failing to insulate the children from adult quarrels and disputes;

c. communicating with him inappropriately and disrespectfully about child-related issues;

d. not using her best efforts to foster and promote a loving relationship between the children and Kevin;

e. obstructing phone communication between Kevin and the children (though, as Julie explained, Kevin had instructed his son to use his phone to video Julie's bedroom);

f. degrading Kevin in public; and

g. not honoring the judgment's requisites about dividing personal property.

Kevin's Appx. 142-143.

[118] Judge Racek explained that Julie had responded to, and refuted, Kevin's sock drawer of allegations. He held that Kevin failed his burden to "clearly and satisfactorily show" that the alleged contempt occurred. And he reminded Kevin that the contempt statutes are "not intended to attempt to regulate and adjudicate every loss of temper, angry word, or quarrel between persons connected by familial relationship. (citing Rath v. Rath, 2013 ND 243, ¶ 11, 840 N.W.2d 656)". Kevin's Appx. 141.

[119] But Kevin doesn't fuss on this appeal about any of that substantive stuff. Instead, his grievance is procedural: The district court, Kevin complains, just charged right ahead and denied his contempt motion...without so much as granting him a hearing!

[120] What Kevin forgets to tell this court, however, is that *he never asked for a hearing before the district court ruled on his contempt motion.*

[121] On March 6, 2019, Kevin served a desperate flurry of three post-judgment motions, just one of which was his "Motion to Amend Judgment and for Contempt of Court." Docket, #446. With his flurry, Kevin served and filed but two notices, one entitled, "3.2 Notice of Prima Facie Motion to Modify," Docket, #435, the other entitled, "Notice of Motion." Docket, #444.

[122] It is difficult to discern which notice is affiliated with which motion, but that difficulty doesn't matter. Both notices instruct that there will be no hearing unless a party makes a timely request:

> ...the motion is deemed submitted to the Court, unless a party timely requests oral argument or the taking of testimony. Docket, #435.
>
> This motion will be decided on briefs unless oral argument or the taking of testimony is timely requested by a party or required by the court. Docket, #444.

[123] The district court waited until April 3, 2019—a full 28 days after Kevin served and filed his motions—before entering an order denying his contempt motion. At no point during those 28 intervening days did Kevin request or schedule oral argument or hearing.

[124] And so, like a man mad at the world when he loses his own keys, Kevin appeals to this court to "fix" his own forgetfulness. However, and of course, this court has often said:

> "[W]e will not address issues raised for the first time on appeal." (citations omitted). "One of the touchstones for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court so it could intelligently rule on it." (citations omitted). "The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories." (citations omitted).

Chapman v. Chapman, 2004 ND 22, ¶ 7, 673 N.W.2d 920.

H.

Conclusion

[125] The District Court's work should be affirmed in all respects. Kevin is entitled to no fees.

I.

Page Limit Certification

[126] I hereby certify that this brief is 38 pages in length and complies with the page limit requirements of North Dakota Rules of Appellate Procedure, Rule 32.

Respectfully submitted this 16th day of July 2019.

Gjesdahl Law, P.C.

Michael L. Gjesdahl (ND ID # 04658)
1375 21st Avenue N.
Fargo, ND 58102
(701) 237-3009
(701) 239-1724 (fax)
Mike@GjesdahlLaw.com
Attorney for Plaintiff/Appellee

In the Supreme Court, in and for the State of North Dakota

Julie Lessard,	)	
	)	Dist. Ct. #09-2018-DM-00159
Plaintiff-Appellee,	)	
	)	
vs.	)	Supreme Court #20190077
	)	
	)	
Kevin Johnson,	)	
	)	
Defendant-Appellant,	)	
	)	
_____	)	

1. I, Tiffany Plutowski, swear that I am at least 18 years of age, not a party to or interested in the above action, and that on the 17th day of July 2019, I served a copy of the following document(s) upon the below-listed individual(s):

   a) Appellee's Brief; and
   b) Appellee's Appendix.

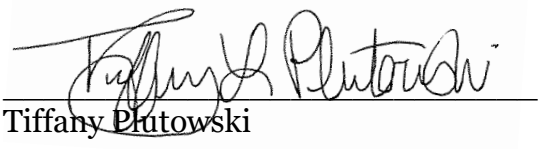
2. A copy of the foregoing was emailed upon the following individual(s):

   Kristin Overboe, Esq.
   Attorney for Defendant-Appellant
   Email: kristin@overboelaw.com

3. To the best of my knowledge, the email address given is the actual email address of the party intended to be so served.

4. I certify under penalty of perjury that the foregoing is true and correct.

Dated this 17th day of July 2019.



Tiffany Plutowski

20190077
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 23, 2019
STATE OF NORTH DAKOTA

In the Supreme Court, in and for the State of North Dakota

Julie Lessard,	)	
	)	Dist. Ct. #09-2018-DM-00159
Plaintiff-Appellee,	)	
	)	
vs.	)	Supreme Court #20190077
	)	
	)	
Kevin Johnson,	)	
	)	
Defendant-Appellant,	)	
	)	
_____	)	

1. I, Tiffany Plutowski, swear that I am at least 18 years of age, not a party to or interested in the above action, and that on the 23rd day of July 2019, I served a copy of the following document(s) upon the below-listed individual(s):

   a) Table of Contents

2. A copy of the foregoing was emailed upon the following individual(s):

   Kristin Overboe, Esq.
   Attorney for Defendant-Appellant
   Email: kristin@overboelaw.com

3. To the best of my knowledge, the email address given is the actual email address of the party intended to be so served.

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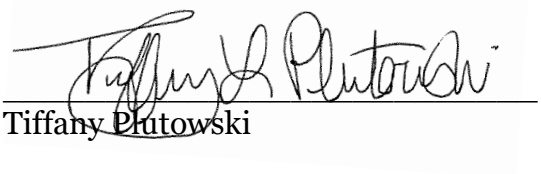
Dated this 23rd day of July 2019.



Tiffany Plutowski