

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Jennifer Marie Gwilliams,)	
)	Dist. Ct. File No. 02-2021-DM-00049
Plaintiff-Appellant,)	
)	Supreme Ct No. 20220149
vs.)	
)	
)	
Terry Lynn Gwilliams,)	
)	
Defendant-Appellee.)	
)	

On Appeal from the Corrected Opinion and Order Re: Plaintiff's Motion for Relief from
 Judgment entered January 20th, 2022 by the Honorable Jay Schmitz, Barnes County
 District Court, Southeast Judicial District

APPELLANT'S BRIEF

Kristin Angela Overboe (ID #06751)
 Overboe Law
 4225 38th St. SW, Suite 107
 Fargo, ND 58104
 (701)282-6111
kristin@overboelaw.com
 ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities	Pg. 3
Statement of the Issues	¶1
Statement of the Case	¶5
Statement of the Facts.....	¶6
Standard of Review	¶21
Law and Argument	¶26
1. The District Court misinterpreted N.D.R.Civ.P. 60(b).....	¶26
2. The District Court’s “division formula” was a misapplication of North Dakota law	¶30
3. Invited Error Does not Apply	¶27
4. Failure to award spousal support was a mistake.....	¶34
Certificate of Compliance	Pg. 26

TABLE OF AUTHORITIES

<u>Allery v. Whitebull</u> , 2022 ND 140	¶19, 25
<u>Anderson v. Anderson</u> , 368 N.W.2d 568	¶ 35
<u>Christianson v. Christianson</u> , 2003 ND 186, 671 N.W.2d 801.....	¶38
<u>City of Wahpeton v. Drake-Henne, Inc.</u> , 228 N.W.2d 324, 330 (N.D. 1975).....	¶26
<u>Darby v. Swenson Inc.</u> , 2009 ND 103, 767 N.W.2d 147	¶20
<u>DCI Credit Servs., Inc. v. Plemper</u> , 2021 ND 215, 966 N.W.2d 90	¶20
<u>Dronen v. Dronen</u> , 2009 ND 70, 746 N.W.2d 675	¶35
<u>Gaulrapp v. Gaulrapp</u> , 510 N.W.2d 620 (N.D. 1994).....	¶35
<u>Hagen v. ND Insurance Reserve Fund</u> , 2022 ND 53, 971 N.W.2d 833	¶26
<u>Hamburger v. Hamburger</u> , 2022 ND 154	¶19
<u>Heley v. Heley</u> , 506 N.W.2d 715.....	¶31
<u>Hildebrand v. Stoltz</u> , 2016 ND 225, 888 N.W.2d 197.....	¶25
<u>Hitz v. Hitz</u> , 2008 ND 58, 746 N.W.2d 732.....	¶31
<u>Hoverson v. Hoverson</u> , 2008 ND 14	¶22
<u>Krizan v. Krizan</u> , 1998 ND 186, 585 N.W.2d 576)	¶19
<u>Kuntz v. State</u> , 2019 ND 46, 923 N.W.2d 513)	¶26
<u>Lerfald v. Lerfald</u> , 2021 N.D. 150, 963 N.W.2d 244	¶31
<u>Lizakowski v. Lizakowski</u> , 2019 ND 177, 930 N.W.2d 609	¶29
<u>Lorenz v. Lorenz</u> , 2007 ND 49, 729 N.W.2d 692	¶22
<u>Production Credit Assn. v. Dobrovolny</u> , 415 N.W.2d 489, 492 (N.D. 1987)	¶25
<u>State v. Pemberton</u> , 2019 ND 157, 930 N.W.2d 125	¶34
<u>Swanson v. Swanson</u> , 2019 ND 25, 921 N.W.2d 666	¶29
<u>Ulsaker v. White</u> , 2006 ND 133, 717 N.W.2d 567	¶29
<u>Savre v. Santoyo</u> , 2015 ND 170, 865 N.W.2d 419.....	¶23
<u>Schmitz v. ND State Bd of Chiropractic Examiners</u> , 2022 ND 113, 974 N.W.2d 666....	¶16
<u>Tschider v. Tschider</u> , 2019 ND 112, 926 N.W.2d 126	¶23

US SUPREME COURT CASES

<u>Johnson v. Zerbst</u> , 304 U.S. 458, 464 (1938))	¶31
<u>Kemp v. United States</u> , 596 U.S. ____ (2022)	¶13
<u>Morgan v. Sundance, Inc.</u> 596 U.S. ____ (2022).	¶31
<u>Unicolors v. H & M Hennes & Mauritz, L.P.</u> , _____	¶31
<u>United States v. Olano</u> , 507 U.S. 725, 733 (1993)	¶31

CODES

N.D.C.C. § 14-05-23	¶28
N.D.C.C. § 14-05-24(1)	¶28
42 U.S.C. § 423(d)(1)(A)	¶37
42 U.S.C. § 1382c(A)(3)(A)	¶37
Session Laws, Territory of Dakota, Chap.1, Title VI, Chap. VI, § 127 (1867)	¶26

CIVIL RULES

N.D.R.Civ.P. 1	¶26
N.D.R.Civ.P. 60(b)	¶26
Fed. Rule Civ. Proc. 60(b) (1938)	¶26
Fed. Rule Civ Proc. 60(b) (1946)	¶26

STATEMENT OF THE ISSUES

[1.] Whether the Court abused its discretion when it determined that a district court's mistake of law does not justify setting the judgment aside under Rule 60(b).

[2.] Whether the Court incorrectly applied North Dakota law in calculating and distributing the marital estate.

[3.] Whether the Court abused its discretion in finding that plaintiff invited error in regards to the legal errors applied to the disposition of the marital home.

[4.] Whether the Court abused its discretion by not awarding spousal support to the plaintiff.

STATEMENT OF THE CASE

[5.] This is an action for divorce that was commenced in June of 2021. Following a contested trial, the Court issued Findings of Fact, Conclusions of Law and Order for Judgment on January 20th, 2022. A Judgment was subsequently entered. The appellant, ("Jennifer") moved for relief under Rule 60(b) due to factual and legal mistakes made by the district court. Jennifer's position was that the court's original rulings were incorrect under North Dakota law. The Court denied her relief finding that a mistake of law by a judge does not justify setting the judgment aside under Rule 60(b). Jennifer appeals from this decision.

STATEMENT OF THE FACTS

[6.] This is an action for divorce. The parties met and began cohabitating in 2009. They were married on July 14th, 2012. Both parties have children from previous marriages. In

March of 2021 Terry told Jennifer that he wanted a divorce, and Jennifer out of the family home. This divorce action was commenced in June of 2021.

[7.] Terry testified that he was divorced from the children's mother in 2004. (R:99:116:3-4). After his divorce he was sitting "horribly" financially, he "pretty much didn't have any money" and their "house was being foreclosed on..." (R:99:116:5-7). In his divorce Terry received full custody of their two children. His ex-wife has not had any contact with them since. (R:99:116:18-24). Following their divorce Terry was providing for two children on only his income. (R:99:114:5-22). He only received \$100 in child support payments for three to five months following his divorce. (R:99:117:1-7).

[8.] In 2009, after Terry and Jennifer began living together he no longer had to raise two children on just one income, as the parties began sharing the family expenses (R:99:121:1-25), and according to Terry, their contributions were somewhat equal. (R:99:122:1-2). After they married in 2012, Jennifer legally adopted Terry's two children in 2013. The children lived at home with them until they were adults. When asked, Terry testified that Jennifer helped to raise his children and love them as her own. (R:99:158:8-11). He further testified that moving in with Jennifer greatly benefited his life. (R:99:158:12-14). Jennifer's two children lived with their father during the school year, and with them during the summers, weekends, breaks and holidays throughout the year. Jennifer pays \$460 per month in child support for her son who is still a minor child.

[9.] Terry has been employed by the US Fish & Wildlife Service as a fire technician since 2001. His employment takes him out of state for wildfire season, which is typically mandatory, from June until late September or October. (R:99:114:5-22). Terry testified that he is required to do mandatory overtime during wildfire season unless there is "a pretty

good reason why you can't go." (R:99:142:3-6). He testified that in the past before he met Jennifer he didn't go because he "didn't have daycare." (R:99:142:6-8). When the parties began cohabitating Terry was able to work longer hours and during wildfire season. (R:99:159:6-10). This allowed him to earn substantially more income due to the overtime hours. During the relationship the parties' income was nearly equal. At the end of the relationship, Jennifer's income decreased substantially to \$1,046 per month in disability payments. Terry's gross income increased significantly, and at the end of October was over \$82,000, [R:29]. Terry's income was significantly more than his average yearly earnings in the five preceding years.

[10.] Jennifer has been in nursing for 20 years. During the parties relationship, Jennifer held nursing positions at Sanford, Essentia, Sheyenne Care Center, Legacy Place, Mercy Hospital, Noridian and the Jamestown Regional Medical Center. Jennifer often had to change jobs to accommodate for the minor children at home and Terry working out of town during wildfire season. (R:99:13:20-25). Both parties testified that if Jennifer had to work nights and weekends, it was not a good fit due to having children at home, and Terry being away during wildfire season. Terry testified that it would not work for Jennifer to work overnights because if he is gone they would have to find a "babysitter." (R:99:125:1-2). He further testified that if she works on the weekends, trying to keep four kids quiet "is tough during the day time." (R:99:125:4-6).

[11.] In 2016 Jennifer's immune system began to break down, which progressed until she was no longer able to work. Because her condition was getting worse, it was no longer safe to continue patient care. Jennifer was ultimately diagnosed with a genetic, connective tissue disorder referred to as Ehlers-Danlos Syndrome ("EDS") which primarily affects the

skin, joints, and blood vessels. Her last day at work was January 11th, 2019. One of the last positions Jennifer held was the director of nursing at the Legacy Place in Valley City. Jennifer was deemed fully disabled by the Social Security Administration.

[12.] Jennifer described EDS as an umbrella with multiple comorbidities, which include a diagnosis of POTS, Mast Cell Activation Syndrome, gastroparesis, and premenstrual dysphoric disorder. (R:99:28). As a result of gastroparesis her stomach is paralyzed, and doesn't move food through her system naturally. Because of the gastroparesis she is malnourished as her body doesn't absorb nutrients which requires supplementing the vitamins and minerals she is lacking. In addition to EDS, Jennifer is also diagnosed with depression and anxiety. When describing the physical aspects of her disorder, Jennifer explained that it made her joints "hypermobility," which requires her to pay close attention to her body positioning at all times. Jennifer testified that her condition has a huge impact on her daily life. The symptoms she described daily include pain, headaches, stomach pain, nausea, exhaustion, drastic heart rate changes, limited activity, issues with temperature changes, low blood pressure, brain fog, cognitive problems, trouble staying organized, trouble keeping up with routines, and forgetfulness. (R:99:31). Due to low blood pressure, she requires IV fluids twice a week. The IV fluids include the infusion of saline to replace the sodium to regulate her electrolytes which assists with blood pressure regulation. Jennifer testified that she is able to stand for 10 minutes at a time. She does not expect to ever be able to work as a nurse again.

[13.] Jennifer testified that when she could no longer work, Terry was very upset with her. Terry quit talking to her and no longer wanted to engage in conversations with her. She was not allowed to buy things because she wasn't making any money. Terry testified

that he asked Jennifer for a divorce because he “just couldn’t deal with things anymore.” (R:99:186:5-7). He testified that he could not deal with things in general, not necessarily all her ailments, but just the money situation. The money situation was a big one. We just had differences in the way we wanted to control our money, and so it’s been like that for a long time. Terry testified that when Jennifer no longer had a regular income “it was just kind of a – I guess the straw, if you will.” (R:99:186:16-20).

[14.] Terry testified that he would like to keep the parties home as part of this divorce proceeding. (R:99:136:15-17). Prior to getting married in 2012 he had a house in Jamestown and he used the funds from the sale of that home of \$46,788 as a down payment on the parties home that was purchased on a contract for deed from Jennifer’s parents. He proposed that this should be considered nonmarital property and wants full credit for that amount.

[15.] He testified that he has a Thrift Savings Plan with a value of \$185,335 and that the “marital equity” was \$141,000. He requested that the court give him credit for what he brought into the marriage on the TSP, but he did not know what the amount was and offered no evidence as to its value. (R:99:165:21-24). With regards to Jennifer’s expenses, Terry requested that the court not consider Jennifer’s \$460 child support obligation because it is for her children from another marriage. Terry requested that Jennifer’s disability check be considered marital property because she received the backpay check shortly after they separated, and it was for funds she should have received during the marriage. Terry testified that he can afford to pay Jennifer spousal support. (R:99:177:1-3). While Terry admitted that he had no qualification to determine whether Jennifer could work, he argued that he shouldn’t be penalized with spousal support. (R:99:164).

[16.] Following trial, the Court issued Findings of Fact, Conclusions of Law, and Order for Judgment on December 10th, 2021. In the findings the Court held that “since the parties lived together for 12 years, and were married for almost nine, the marriage was relatively long-term, and that the division of the marital estate should be close to 50:50.”

[17.] The Court then valued only what it considered “the significant marital assets,” including the family home, Terry’s TSP Retirement Account, the Wells Fargo Savings Account, and the Skid Loader. The Court excluded \$46,788 as Terry’s pre-marital property interest, then divided the remaining equity in half between the parties.

[18.] The Court made concluded that “Terry’s TSP retirement account on the date of marriage should be equal to the value of Jennifer’s premarital retirement account with Essentia, i.e. \$24,240.” This conclusion is not supported by rational findings, and this is not a sound conclusion. The Court subtracted \$24,240 from \$185,335 and concluded that it “results in a marital asset of \$161,095.” The Court held that Jennifer’s share was one-half of that value, or \$80,547.50.

[19.] Next, the Court determined the value of the Wells Fargo Savings Account and the Skidsteer loader together were \$26,487. The Court deemed Jennifer’s share to be \$13,243.50. The Court concluded that “Jennifer’s marital share” in these items “to be \$118,497 (24,706 + 80,547.50 + 13,243.50).” This is wrong. The Court is required to value the entire marital estate.

[20.] The Court concluded that no value or division was necessary for the vehicles, guns, and hunting equipment and excluded them marital estate. The Court excluded the medical debt, credit card debt and student loans from the marital estate. Finally, the Court concluded that Terry’s FERS annuity was nonmarital property. Jennifer requested relief

under Rule 60(b) due to judicial errors of law. The Court denied her relief concluding that a mistake of law does not justify setting the judgment aside under Rule 60(b). Jennifer appeals from this decision.

STANDARD OF REVIEW

[21.] The court’s decision to deny relief under N.D.R.Civ.P. 60(b) will not be overturned on appeal absent an abuse of discretion. Allery v. Whitebull, 2022 ND 140 (quoting Carroll v. Carroll, 2017 ND 73, ¶ 8, 892 N.W.2d 173); See also Hamburger v. Hamburger, 2022 ND 154, ¶5 (citing Krizan v. Krizan, 1998 ND 186, ¶ 13, 585 N.W.2d 576).

[22.] The court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process leading to a reasoned determination. Darby v. Swenson Inc., 2009 ND 103, ¶ 12, 767 N.W.2d 147.

[23.] A court abuses its discretion when it when it misinterprets or misapplies the law. DCI Credit Servs., Inc. v. Plemper, 2021 ND 215, ¶ 7, 966 N.W.2d 904.

[24.] The decision whether to award spousal support is a finding of fact and will not be set aside on appeal unless it is clearly erroneous. Hoverson v. Hoverson, 2008 ND 14 at ¶¶ 14-15 (citing Lorenz v. Lorenz, 2007 ND 49, ¶ 31, 729 N.W.2d 692).

[25.] The “existence or absence of waiver is generally a question of fact.” Tschider v. Tschider, 2019 ND 112, 926 N.W.2d 126 (quoting Savre v. Santoyo, 2015 ND 170, ¶21, 865 N.W.2d 419).

LAW AND ARGUMENT

[26.] **The Court abused its discretion by misinterpreting N.D.R.Civ.P. 60(b).**

[27.] The district court held that “a mistake of law does not justify setting the judgment aside under Rule 60(b).” Production Credit Assn. v. Dobrovolny, 415 N.W.2d 489, 492

(N.D. 1987).” N.D.R.Civ.P. 60(b) provides that the district court may relieve a party from a final judgment for: “(1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; [or] . . . (6) any other reason that justifies relief.” Allery v. Whitebull, 2022 ND 140, ¶ 6. See also Hildebrand v. Stoltz, 2016 ND 225, ¶ 16, 888 N.W.2d 197; and City of Wahpeton v. Drake-Henne, Inc., 228 N.W.2d 324, 330 (N.D. 1975)).

[28.] Contrary to the Court’s ruling, Rule 60(b) does not have a limitation on whose mistakes qualify. Including mistakes of law by a judge. When interpreting a rule “words and phrases” must be construed in accordance with context and “the rules of grammar...” Hagen v. North Dakota Insurance Reserve Fund, 2022 ND 53 ¶12, 971 N.W.2d 833 (quoting Kuntz v. State, 2019 ND 46 ¶31, 923 N.W.2d 513). In looking at the history of the rule, originally the provision providing grounds for relief from a judgment did not include judicial mistakes of law. Prior to the adoption of the rules of civil procedure in 1957, the provision stated, in relevant part:

“Sec. 127. Relief in case of mistake. The court may likewise, in its discretion, and upon such terms as may be just ... relieve a party from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding...”

Session Laws, Territory of Dakota, Chap.1, Title VI, Chap. VI, § 127 (1867). After Rule 60(b) of North Dakota Rules of Civil Procedure was adopted in 1957, the pronoun “his” was removed from the rule. The removal of this pronoun removed the limitation on whose mistakes could qualify. The U.S. Supreme Court recently addressed the issue of whether a “mistake” under Rule 60(b)(1) includes a judge’s errors of law. See Kemp v. United States, 596 U.S. ____ (2022). In an opinion authored by Justice Clarence Thomas, on June

13th, 2022, the Supreme Court held that “[t]he ordinary meaning of the term “mistake” in Rule 60(b)(1) includes a judge’s legal errors.” In its analysis, the Supreme Court noted that in the past, mistakes of law by judges were excluded because in 1938 Rule 60(b) initially referred to a party’s mistake by referring to “his” – “mistake.” Fed. Rule Civ. Proc. 60(b) (1938). However, in 1946, the Rule was amended which deleted the word “his.” See Fed. Rule Civ Proc. 60(b)(1) (1946). Consequently, the removal of this pronoun removed any limitation on whose mistakes could qualify. The Supreme Court held that, as currently written, “mistakes” under Rule 60(b)(1) include legal errors made by judges. *Id.* Because of the similarities between N.D.R.Civ.P. 60 and F.R.Civ.P. 60 this court is guided by the interpretations by federal courts. See Rule 1, N.D.R.Civ.P. (Explanatory notes).

[29.] While the district court disagrees in its interpretation, it is not alone in its view. In fact, Justice Gorsuch in his dissent stated that “granting review was a questionable use of judicial resources,” referring to the majority opinion as “a doubtful interpretive project focused on a pronoun dropped in 1946...” Fortunately, that is why we call it a “dissenting opinion.”

**The District Court’s “division formula” was a
misapplication of North Dakota law**

[30.] Under N.D.C.C. § 14-05-23 the court may issue an order requiring a party to pay support as necessary for the support of a party and for payment of attorney fees. When a divorce is granted, the court shall make an equitable distribution of the marital estate. N.D.C.C. § 14-05-24(1). The Court made findings that “since the parties lived together for 12 years, and were married for almost nine, the marriage was relatively long-term, and that the division of the marital estate should be close to 50:50.” (R:61:1:¶3). While Jennifer took no issue with this finding, she argues that the Court’s “division formula” was an

improper application of North Dakota law, and because of the Court's improper method of valuation, the distribution was not equal. Jennifer argues that the Court clearly erred by excluding property and debt from the marital estate as pre-marital or nonmarital, prior to valuation and distribution.

[31.] In North Dakota, the Court must first determine value of the marital estate. In doing so, all property owned by the parties must be included in the valuation of the marital estate. Lizakowski v. Lizakowski, 2019 ND 177, 930 N.W.2d 609; See also Swanson v. Swanson, 2019 ND 25, ¶ 9, 921 N.W.2d 666; Hitz v. Hitz, 2008 ND 58, ¶ 14, 746 N.W.2d 732; Ulsaker v. White, 2006 ND 133, ¶ 12, 717 N.W.2d 567. Once all the assets and debts are included in the valuation of the marital estate, the court must then consider the Ruff-Fischer guidelines before setting property aside to one party. Swanson, at ¶ 6. The *Ruff-Fischer* guidelines include the following factors:

[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.

[32.] It's not until after the marital estate is properly valued that the Court may designate property to one party as part of its analysis under the Ruff-Fischer guidelines. If the Court's distribution results in a substantial disparity, then the Court must explain its reasons for the disparity. The North Dakota Supreme Court has long held that "[e]xcluding values... from the marital estate as separate property is clear error." Gaulrapp v. Gaulrapp, 510 N.W.2d 620 (N.D. 1994) (citing Heley v. Heley, 506 N.W.2d 715, 718; and Anderson v. Anderson, 368 N.W.2d 568, 569). In Heley, the trial court was reversed for clear error because it

excluded what it described as “pre-marital property.” Id. at 718. In Anderson, the trial court was reversed for clear error because it “excluded farmland and mineral interests from the marital estate and divided the remaining assets approximately equally.” Id. at 569. A determination that the FERS annuity is nonmarital is clear error. See Dronen v. Dronen, 2009 ND 70, 746 N.W.2d 675 (where a FERS annuity was determined to be marital property).

[33.] The Court arbitrarily attempted to justify its erroneous ruling by concluding that Jennifer invited the error because that it was “what Jennifer agreed should be done. [R:61:¶8 (“the parties agree... that the value of [Terry’s] premarital interest is \$46,788)].” The Court bases this on Jennifer’s testimony on cross examination, as follows:

Q: “So you’re willing to give [Terry] full credit for what he brought into the marriage on that home, correct?”

A: “For the \$46,788, yes,”

[34.] The invited error doctrine does not apply when there is a “clear deviation from an applicable legal rule under current law.” State v. Pemberton, 2019 ND 157, ¶ 8, 930 N.W.2d 125. The invited error doctrine is when a party waives the errors they invited. Lerfald v. Lerfald, 2021 N.D. 150 ¶ 14, 963 N.W.2d 244. Waiver is an intentional relinquishment or abandonment of a known right. United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). “[K]nowledge” means the “fact or condition of being aware of something.” Unicolors v. H & M Hennes & Mauritz, L.P., _____. The Court must focus on the actions of the person who held the right. Morgan v. Sundance, Inc., 596 U.S. ____ (2022).

[35.] Here, a review of the trial transcript does not support a conclusion that Jennifer waived her rights by inviting error. The district court arbitrarily cherry picked a portion of Jennifer's testimony to claim that she invited the error. The Court abuses its discretion when it acts arbitrarily. A review of Jennifer's testimony shows that she did not understand her rights. Her testimony is as follows:

Q. (BY MS. ANDREWS) Okay. So you're willing to give him the full credit for what he brought into the marriage on that home, correct?

A. (BY JENNIFER) For the 46,788, yes.

Q. Okay. His FERS account, how did you come up with a 30 percent value that you would like the court to give you when he retires?

A. He's been working there for a little over 20 years, and I've been part of that for 12 years, 10 years married. And that's where that came from.

Q. I just want to clarify, are you asking that the court give you 30 percent of his monthly benefit when he retires?

A. Of whatever it says in here.

Q. I don't know what it says in here, so can you explain what that would be?

A. Well, it's the same thing that I have what you have, right?

(R:99:81:8-25)

Q. Well, this says 30 percent, split marital, and I'm asking what that means because we need specificity on what you're requesting.

THE COURT: I don't see the 30 percent. Where do you see the 30 percent?

MS. ANDREWS: Your Honor, I believe she had testified that she was asking for approximately 30 percent.

Q. (BY MS. ANDREWS) Is that correct?

A. That's -- I believe so.

Q. This is your request to the court, so I need to know what you're asking for.

A. I don't remember all the numbers there.

....

Q. (BY MS. ANDREWS) You understand that the FERS payment only is received when Terry retires and it's only a monthly benefit; there's no lump sum there?

A. No, I don't understand the account. I don't know what that is.

Q. Okay.

A. So I can't answer your question.

Q. So if -- It's kind of a hypothetical, but this is how the FERS accounts work is if he gets a monthly benefit when he retires, your request to the court is that you receive 30 percent of that benefit whenever he retires whatever that amount is?

A. I don't know how that works.

Q. But I'm asking you what your request to the court is.

A. I don't know how it works so I can't request something that I don't know how it works.

Q. And the problem here is if you're making a request to the court, I can't defend my client and see what you're asking for if you don't know what your request to the court is.

A. Okay. I don't know how that account works. I've never had that kind of account, I don't know what the rules are, I don't know what the parameters are. I don't know.

Q. Okay. But what are you asking for from the court to be awarded as part of this divorce?

A. Well, for the FERS there is no value put down, so I can't answer that question.

Q. How do you expect the judge to award a number if you don't know how much you're requesting?

A. I'm assuming my lawyer has a number, a chart.

Q. But that's what we're here for today to discover.

A. Well, I can't give you a number that –

MS. GEHRIG: Your Honor, I think –

THE COURT: All right. We're going in a big circle.

A. I can't give you a number if I don't know the number.

MS. ANDREWS: And, Judge, I understand we're going in a circle, but it's an issue if I don't know what she's even requesting of the judge to know what her request came from, what the amount is, what the percentage is.

THE COURT: But like I said, we can keep hammering on it all day, but we're not going to get anywhere.

A. I don't have a number so I don't know.

Q. (BY MS. ANDREWS) So you don't know how much you're requesting out of the FERS account?

MS. GEHRIG: Your Honor, she's asking for one-third of it. It's already – she's already testified to that. It's a pension. It's an annuity. You get a monthly payment and then – and she's asking for a third of that. And we don't know that that monthly payment is until he retires. That's how these work. There's going to be a qualified domestic relation's order related to this.

THE COURT: Well, I can testify about it too based on my understanding of it, but we'll just move on.

Q. (BY MS. ANDREWS) So do you agree then with your attorney that you are requesting a third of the FERS monthly payment when he retires?

A. If that's how it works, then yes.

Q. Okay. So if he works for --

THE COURT: There's one question I do want to ask. How long has he been in the federal employment system?

THE WITNESS: I believe a little over 20 years.

THE COURT: All right. Thank you.

(R:99:16-25).

[36.] Jennifer's testimony, as set forth above, does not support a finding that she knowingly, expressly, and definitively waived her rights and invited error by the Court. The Schmitz v. North Dakota State Board of Chiropractic Examiners, 2022 ND 113, ¶16, 974 N.W.2d 666 (waiver of a substantial right should be done "expressly and definitively"). Jennifer stated multiple times that she "didn't know" how it works and "what the rules" were. The questions being presented were misleading and attempted to invite error in the proceedings. Jennifer's Complaint requests an equitable division of property and debt. Terry's Answer and Counterclaim requests that "the assets and debts... be equitably distributed and divided in accordance with North Dakota law." The Court did not follow North Dakota law. Even she invited the error (which she did not), it doesn't change the fact that the Court's method of distribution is still a misapplication of the law requiring reversal.

Failure to award spousal support was a mistake.

[37.] The Court abused its discretion in its findings regarding spousal support. While the Court acknowledges that Jennifer is "fully and permanently disabled," the court finds (based on Jennifer's testimony) that she has never been told by a doctor that she is unable to work and has not tried to find suitable employment." (R:61: 2: ¶3). Neither the law nor the evidence support the Court's findings. In fact, her testimony shows the opposite. The

only trace of this irrational finding comes from the closing argument by opposing counsel which states:

She also hasn't made any efforts to try to get any additional income, which even an hour or two or five a week would be able to supplement what she has for income. She indicated that she wouldn't be able to work in a nursing facility again, but hasn't indicated that she's pursued, or has any interest, apparently, in pursuing any kind of outside employment to supplement her income in any way. So we have random requests for spousal support because of a reason that's not supported by the law...

(R:99:208:19-25; R:99:209:1-4.). Arguments of counsel are not evidence. Jennifer testified that “[her] job limitations signed by [her] physician are so restrictive that working would be a liability...” and future plans for employment will depend “on if the physician is able to help [her] with some of [her] symptoms...” (R:99:97:2-19). This testimony directly conflicts with the Court’s finding that “[Jennifer] has not ... had a medical provider tell her she is unable to work.” (R:61:3:¶6). In addition to that, neither party disputes the fact that Jennifer was deemed fully disabled by the Social Security Administration. Neither party disputes the fact that Jennifer is receiving social security benefits based on her disability. The Social Security Act (“the Act”) provides that to be eligible for benefits based on a disability, the claimant must show that she suffers from a medically determinable physical or mental impairment that prohibits her from engaging in any substantial gainful activity. 42 U.S.C. § 423(d)(1)(A); 42 U.S.C. § 1382c(A)(3)(A). Jennifer’s disability status results in a presumption of her inability to work. The burden was on Terry to rebut that presumption, and he failed to do that.

[38.] The Court conclusion that Terry is not obligated to pay spousal support is (R:61:3:¶6) is not supported by the Court’s findings when applied correctly to the law. Spousal support must be determined in consideration of the requesting spouse’s needs and

the supporting spouse's needs and ability to pay. Christianson v. Christianson, 2003 ND 186, ¶ 17, 671 N.W.2d 801. The court must perform a comprehensive analysis under the Ruff-Fischer factors:

[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.

[39.] The Court considered the parties needs. The Court made findings that Jennifer's monthly living expenses (\$2,600) significantly exceed her monthly disability income of \$1,047. (R:61:7:¶17). The Court made findings regarding Jennifer's health and physical condition noting that Jennifer stopped working in January 2019 due to a variety of health issues, in particular Ehlos-Danlers Syndrome. [R:56]. The Court noted her testimony that this syndrome causes instability in her joints, increasing the risk of injury or falls, and that she is frequently fatigued.

[40.] The Court considered the parties ages (Jennifer is 49 years old; Terry is 43). Terry is six years younger than Jennifer. The Court's findings provide that [Terry] is in good health, and that he is at the peak of his earning ability. The Court noted that that Terry's gross income at the end of October 2021 of \$82,000 was significantly more than his average yearly earnings in the five preceding years. The Court concluded that Terry does have the ability to pay spousal support if ordered. (R:61:7:¶18). The Court considered the duration of the marriage and made findings that the marriage was relatively long-term. [R:61:2: ¶3].

[41.] These facts strongly support an award of permanent spousal support.

[42.] The Court made findings that a few of Jennifer's expenses "seem excessive" such as her child support obligation "from a previous marriage," and a \$290-per-month cell phone bill. Jennifer adopted Terry's children, loved and supported them as her own into adulthood. The children's mother was absent to the point where the parties couldn't locate her. This allowed Terry to advance his career as a fire fighter, and work out of town during wild fire season. (R:99:11:2-18). While Terry is now washing his hands of any parental duties towards Jennifer's children, Jennifer has provided for all the children and has not attempted to shirk those duties. Jennifer sacrificed several employment advancement opportunities because of her responsibilities to the children.

[43.] The Court concluded that Jennifer was not a disadvantaged spouse. This is not a rational decision leading to a reasoned determination. Over the course of the relationship Jennifer's contributions far outweigh Terry's. She provided the home, the childcare, equal family income, while Terry spent a substantial amount of money on hunting and fishing, and a substantial amount of time building his career. As a registered nurse Jennifer held a succession of jobs over the course of the marriage. She left job opportunities because they were not a good fit due to having children at home and Terry begin away during wildfire season. Terry agreed that night shifts were "not good" due to the children at home. Her annual income was approximately equal to Terry's during most of the marriage. [R:18-20]. Jennifer stopped working in January 2019 due to a variety of health issues. Once Jennifer became disabled, Terry wanted out of the relationship. He asked for a divorce, and she moved out of the home in March of 2021. Again, the only reason the parties have this home is because of help from Jennifer's family. While Terry knows Jennifer is disabled, he claims she can do something to earn money despite the contrary opinion of the social

security administration. Terry even wants Jennifer's disability payments to be considered marital property. Terry argues that the disability payments which Jennifer received in June 2021, totaling \$29,571, should be deemed marital property because they were paid on account of her lost income due to disability during the marriage. The Court correctly concluded that disability payments were not a marital asset.

[44.] The Court abused its discretion in concluding that Jennifer did not prove she was the disadvantaged spouse in the marriage, i.e., that career opportunities or development were lost due to her marital responsibilities. The Court found no evidence that he ever asked or expected Jennifer to forego a job because it would interfere with her ability to care for the children. That is incorrect. Terry testified that it wouldn't work for Jennifer to work nights when he is out of town because they would have to find a babysitter. He testified that it is difficult keeping four kids quiet when she is working on weekends. The parties had approximately equal incomes during the marriage until Jennifer stopped working due to her medical maladies, which are the cause of her loss of career opportunities and development – not any action by Terry. Both parents had obligations and duties to care for their children. Jennifer had no other option but to change her life around to care for their children.

[45.] The Court erred in finding that there was no evidence of misconduct by either party during the marriage. That's false. There is ample evidence of misconduct. Terry took advantage of Jennifer because she basically took care of him and their children. Once she was ill and needed his help he no longer saw a benefit to him, and he discarded her taking the family home, and making her move when she was in no condition to do so.

[46.] Jennifer is requesting permanent spousal support. Permanent spousal support is generally appropriate when a spouse cannot be equitably rehabilitated to make up for the opportunities lost in the course of the marriage Sommer v. Sommer, 2001 ND 191, ¶ 14, 636 N.W.2d 423. Even when a spouse is capable of rehabilitation, permanent spousal support may be appropriate to ensure the parties share the overall reduction in their separate standards of living. Id. Permanent spousal support may also be appropriate when a spouse cannot be equitably rehabilitated. Id.

[47.] Jennifer's cross examination appeared to be an attempt to make Jennifer look like she was "living beyond her means." She was asked about a \$4,600 disability payment that she received and what she did with the money. The questioning was as follows:

Q. (BY MS. ANDREWS) Is it fair to say that you were living beyond your means these few months if you only had social security disability payments but you were racking up thousands of dollars in bills?

A. (BY JENNIFER) I was paying off debts, paying off things that had not been paid off before, so I used that money to pay off debts.

[48.] Jennifer is disabled. She has spent her entire life as a wife, mother, and medical professional catering to the necessities of others. The one person who vowed to be there through sickness and health "couldn't deal with it" and asked for a divorce. Then he moved her out of the home. Terry has shown that he is fine with leaving Jennifer with no money, no income, and no home. She has accrued substantial debt. Jennifer is not living beyond her means. Jennifer is in survival mode. She needs help financially because her monthly expenses exceed her monthly income from disability. She can no longer work in

the field that she dedicated her life to. Her daily level of functioning calls into question how long she will live. Normal daily activity is difficult for Jennifer. She testified that while she is able to stand for about 10 minutes at a time, she does not expect to ever be able to work as a nurse ever again. Jennifer receives \$1,046.80 monthly after child support and insurance. This is her only source of income.

[49.] In regards to conduct Jennifer testified that when she could no longer work, and had to stay home, Terry was very upset with her. Jennifer testified that change in money always makes him upset and it was hard on her. (R:99:18). After Jennifer became sick and unable to work, Terry became very upset. He quit talking to her and no longer wanted to have conversations with her. She was not allowed to buy things because she wasn't making any money. Jennifer tried to be compliant with his demands. Terry's testified that he would "come home after being on the road for weeks and Jennifer hadn't prepared food for him. (R:99:187:6-17). He "was concerned" when there was "dishes in the sink," or the "home hadn't been cleaned." (R:99:187:18-22).

[50.] Finally, the Court concluded that irreconcilable differences existed to justify a decree of divorce, but it did not make findings regarding the grounds for divorce.

[51.] WHEREFORE, the Appellant prays for the following relief:

- a. Reverse and remand to the district court to revise its "division formula" in accordance with the proper application of North Dakota law;
- b. Remand to the district court to make findings regarding the grounds for divorce in accordance with the North Dakota Century Code;
- c. Remand for attorney fees and costs;
- d. For any further relief the court deems appropriate.

CERTIFICATE OF COMPLIANCE

[52.] I, Kristin Angela Overboe, the attorney for the appellant, Jennifer Gwilliams, certify that this brief complies with Rule 32(a)(8)A) of the North Dakota Rules of Appellate Procedure, as it contains 25 pages.

[53.] Dated this 16th day of August, 2022.

/s/ Kristin Overboe

Kristin A. Overboe (ND #06751)
4225 38th St. SW, Suite 107
Fargo, ND 58104
T: (701) 282-6111
kristin@overboelaw.com
ATTORNEY FOR APPELLANT

)	
Jennifer Marie Gwilliams,)	
)	Case No. 02-2021-DM-00049
Plaintiff/Appellant,)	S.Ct. No. 20220149
)	
vs.)	
)	
Terry Lynn Gwilliams,)	Certificate of Service
)	
Defendant/Appellee.)	
)	

- 1. Appellant's Brief; and**
- 2. Certificate of Service.**

- Krista Andrews
Kandrews@andersonbottrell.com

- /s/ Kristin A. Overboe**
Kristin A. Overboe (#06751)
Attorney for Plaintiff
4225 38th St. SW, Suite 107
Fargo, North Dakota 58104
T: (701) 282-6111
Kristin@overboelaw.com

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Jennifer Marie Gwilliams,

Plaintiff/Appellant,

vs.

Terry Lynn Gwilliams,

Defendant/Appellee.

Case No. 02-2021-DM-00049

S.Ct. No. 20220149

Certificate of Service

1. I, Kristin A. Overboe, state, pursuant to Rule 5(f) of the North Dakota Rules of Civil Procedure, that I am an attorney licensed in the State of North Dakota. I further state that:
2. On the 17 day of August, 2022, I sent by electronic mail a true and correct copy of the following:

- 1. Appellant's Brief; and**
- 2. Certificate of Service.**

3. Copies of the foregoing were sent by electronic mail to the following address:

Krista Andrews
Kandrews@andersonbottrell.com
 And
kandrews@abstlaw.net

4. To the best of my knowledge, the above listed address is the actual address of the party intended to be served or his attorney.

Dated this 17th day of August, 2022.

/s/ Kristin A. Overboe

Kristin A. Overboe (#06751)
 Attorney for Plaintiff
 4225 38th St. SW, Suite 107
 Fargo, North Dakota 58104
 T: (701) 282-6111
Kristin@overboelaw.com