

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Danel Jacobs-Raak, n/k/a)	
Danel Jacobs,)	
)	Supreme Court Case No.:
Plaintiff-Appellee,)	20190123
)	
v.)	District Court Case No.:
)	08-2013-DM-00716
Daniel Raak,)	
)	
Defendant, Appellant,)	
)	
And)	
)	
State of North Dakota,)	
)	
Statutory Real Party in Interest,)	
Appellee)	

**Appeal from October 31, 2018, Order Denying Defendant's Motion to Redistribute
Property and Request for Hearing, February 15, 2019, Order on Contempt,
and May 13, 2019, Third Amended Judgment
District Court of Burleigh County
South Central Judicial District
Case No. 08-2013-DM-00716
The Honorable Bruce Romanick, District Judge, Presiding**

BRIEF OF APPELLEE, DANIEL JACOBS

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	3
STATEMENT OF THE ISSUES.....	4
STATEMENT OF THE CASE.....	¶1
STATEMENT OF THE FACTS.....	¶8
ARGUMENT.....	¶33
A. Standard of Review.....	¶33
B. The District Court properly denied Raak’s Motion to Redistribute Property	¶35
C. The District Court properly found Raak to be in contempt	¶38
D. The District Court’s child support findings and order was appropriate	¶49
E. The District Court properly did not consider any portion of a \$76,000 loan to be income of Jacobs	¶61
CONCLUSION.....	¶63

TABLE OF AUTHORITIES

Cases

<u>Brakke v. Brakke</u> , 525 N.W.2d 687	¶51
<u>Lauer v. Lauer</u> , 609 N.W.2d 450 , 2000 ND 82, ¶3	¶33
<u>Sall v. Sall</u> , 2011 ND 202, ¶7	¶34, 38
<u>Sonnenberg v. Sonnenberg</u> , 2010 ND 94.....	¶51

Statutes and Rules

<u>N.D. Cent. Code</u> , § 14-05-24(3)	¶36
<u>N.D.Admin.Code</u> §75-02-04.1-01	¶62
<u>N.D. Admin. Code</u> §75-02-04.1-05	¶56
<u>N.D.Admin.Code</u> §75-02-04.1-07(6)	¶55

STATEMENT OF THE ISSUES

- 1) Did the District Court err in denying Raak's Motion to Redistribute Property?
- 2) Did the District Court abuse its discretion in finding Raak to be in contempt?
- 3) Did the District Court err in entering its child support findings and in determining the child support obligations of the parties?
- 4) Did the District Court err when it determined that no portion of a \$76,000 loan Jacobs received from her parents was income of Jacobs for purposes of child support?

STATEMENT OF THE CASE

¶1 As a preliminary matter, it is noted that the husband's name in this action is Daniel Raak and the wife's name in this action is Danel Jacobs. As a result of the similarity of the parties' first names, and in an effort to try to eliminate confusion, this brief will identify the husband as Mr. Raak or Raak and identify the wife as Ms. Jacobs or Jacobs.

¶2 This is the continuation of a divorce which occurred in 2015 with the District Court (Honorable Judge Anderson) originally entering it's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Parenting Plan on October 6, 2015. Following an appeal which is for most purposes inconsequential to the matters being appealed herein, the case was remanded back down to address certain issues.

¶3 Thereafter, the District Court unfortunately remained active in this case, having to address motions related to Mr. Raak's failure to timely pay child support. As related to the instant appeal, in February of 2018 Raak filed motions to modify the Judgment and parenting plan as related to primary residential responsibility and parenting time of the minor child S.R., to modify child support, seeking an ex parte interim order and a for the court to prohibit public access to the file as related to the mental health information of the minor children.

¶4 Jacobs filed responses to said motions as well as her own motion seeking to amend the Judgment as to parenting time and to hold Raak in contempt as a result of his failure to pay certain child financial obligations as provided by the Judgment and Parenting Plan. Jacobs did not contest Raak's request to prohibit public access to the minor children's mental health information and further consented that primary residential

responsibility of S.R. should be awarded to Raak. The Honorable Sonna Anderson, presiding District Court Judge for this matter at the time, issued a Memorandum dated March 21, 2018 which, *inter alia*, accepted that the Jacobs was not contesting a change in primary residential responsibility of S.R.

¶5 Following the filing of the motions noted above, Raak filed a motion seeking to redistribute property. That motion was denied and addressed via the District Court's Order (Judge Bruce Romanick) dated October 31, 2018 (Appellant's Appendix (hereinafter App.) p.136). Raak verbally renewed that motion at the January 25, 2019 evidentiary hearing and said verbal motion was once again denied by the District Court.

¶6 An evidentiary hearing occurred on January 25, 2019 following which the District Court entered its Findings and Judgment. Following motions to reconsider, the District Court did reconsider and amend its Finding and Judgment as related to the child support obligations of the parties and their off-setting consequence.

¶7 Raak appeals therefrom.

STATEMENT OF THE FACTS

¶8 This appeal surrounds two primary areas, that being the parties' child support obligation and the District Court's finding that Raak was in contempt. As such, Jacobs' Statement of Facts will focus on the facts relevant to those areas and to address "facts" which have been misconstrued in Raak's Statement of Facts.

¶9 Jacobs and Raak were married in September of 1999 and divorced in October of 2015. The parties have three children, a daughter, S.R., born in 2002; a son, D.R. born in 2004; and another son, A.R., born in 2006.

¶10 Raak is a Certified Public Accountant. As testified by Raak, he has over 35 years of experience in accounting and tax preparation. (Transcript of January 25, 2019 Hearing (Hereinafter "Tr") 102:18-23). This experience has included employment as an accounting officer for various firms in Sioux City, Iowa until 2008-2009, purchasing an accounting firm in Bismarck, North Dakota in 2009 and thereafter operating that business as Raak & Associates until November of 2014. (See App. 154, Tr 56:16-58:25). At the end of 2014, during the divorce case and without advising Jacobs or the Court of his intentions or actions, Raak merged Raak & Associates into another Bismarck accounting business, Capital Accounting. (See App. 154).

¶11 Raak continued his self-employment and business relationship with Capital Accounting Services for approximately one year until late 2015/early 2016 when he sold out to his business partners and made the decision to relocate to Spirit Lake, Iowa. (Tr 58:20-23). Raak actually moved from Bismarck to Spirit Lake, IA in approximately May of 2016. (Tr 58:23-25).

¶12 During the January 25, 2019 evidentiary hearing, no evidence was presented to indicate that Raak was terminated or forced to resign from Capital Accounting, nor that Capital Accounting was a defunct business. Neither was any evidence presented that Raak looked for employment in the Bismarck, North Dakota area or was unable to find the same after his decision to leave Capital Accounting. As determined by the District Court, “the decision made by Mr. Raak to leave his employment, leave Bismarck, ND and move approximately 500 miles and a roughly 8 hour drive away from his children was a voluntary one”. Findings of Fact, Conclusions of Law and Order for Judgment, (App. 154).

¶13 Regrettably, there are several areas of Raak’s Statement of Facts which are simply not accurate and are either distortions of the facts or are not supported at all by the facts and for which transcript citations are made in his brief which are entirely not supported by the actual transcript itself. Examples of some of these are as follows.

¶14 Contrary to Raak’s implications at ¶4 of the Appellant Brief (in which Raak states he was “forced to sell” his interest in Capital Accounting due to “unethical conduct” by a partner), Raak testified that he sold his interest in Capital Accounting and relocated to Spirit Lake Iowa for a variety of reasons, including having family in the Spirit Lake area (Tr 58:4-22), being unhappy living in North Dakota (Tr 83:5-6), being dissatisfied with North Dakota and the results of his divorce case as determined by the North Dakota Judicial System (Tr 83: 7-12), and his dissatisfaction with his business situation with Capital Accounting (Tr 86:17-24). The most significant reason Raak sold his business and moved was because he wanted to be closer to family and did not enjoy

his time in North Dakota. Raak described the decision to move as a “personal decision. I wanted to be by my family and I didn’t have any here.” (Tr 58:4-22).

¶15 Another area in which Raak’s Appellate brief is an entirely inaccurate and misleading representation of the evidence presented is at ¶4 of his brief and in which he states “Jacobs also agreed that the move was good for Raak’s business.”, citing Tr., p. 35, l.6, to p.36, l.10. This is absolutely not what Jacobs testified to or agreed upon. Rather, if one actually reads the transcript and looks at Jacobs’ affidavit as referenced therein, Jacobs’ affidavit and testimony was that she was not aware of there being any benefit to Raak moving to Spirit Lake, including no economic / business benefit.

¶16 At ¶5 of his brief, Raak comments about the reasons why it was agreed upon that the oldest daughter, S.R., would be allowed to move to Spirit Lake and live with her father. It has never been disputed that S.R. was allowed to move to Spirit Lake. Jacobs only notes that the reasons as communicated by Raak are distorted, apparently to try to influence the court since there is no other reason to even comment upon a non-disputed fact.

¶17 As another misleading statement, Raak’s brief at ¶6 states that “At Jacobs’ insistence, the Informal Agreement was not to be filed with the court...” To support his statement, Raak cites to “App., pp.139-141; Tr., p.41, l.10, to p.42, l.18, p.70, l.14, to p.71, l.2; Index ##205, 207.” The problem is that Jacobs never *insisted* that the informal agreement should not be filed with the court, the noted citations in Raak’s brief don’t support this statement, and there is no other evidence to support this. Certainly, the agreement of both of the parties was that the informal agreement would not be filed with

the court. That mutual agreement is indicated in the fourth full paragraph of the Agreement (App. 139).

¶18 At ¶7 of Raak's Statement of Facts he states that Jacobs was required to pay back \$425 to Raak under the informal agreement and emphasizes that Jacobs only made two payments. What Raak fails to mention is that the reason there were only two payments of \$425 made is because Raak only made two of the child support payments of \$1,452 that he was supposed to make (in September and October of 2017) and then he quit making his child support payments for many months. See Tr 96:11-97:15. Considering she was raising two children and was supposed to be receiving \$1,452 per month under the agreement, and further considering that Raak was (and is) thousands of dollars in arrears, it is slightly deceptive and hypocritical for Raak to complain about not receiving \$425 payments back from Jacobs.

¶19 At ¶10 of his brief Raak finally starts to discuss his perspective of income and his child support obligation. To address Raak's income and employment situation, it is noted that upon relocating to Spirit Lake, Raak commenced the process of setting up his own accounting practice. As related to Raak's income, in the original divorce Judgment the District Court had averaged Mr. Raak's income from 2012 and 2013, resulting in a gross income for child support purposes of \$60,924 with a resulting child support obligation for three children in the sum of \$1,452 per month. This support obligation was upheld by the North Dakota Supreme Court. (Raak-Jacobs v. Raak, 2016 N.D. 240, 888 N.W.2d 770 (Hereinafter "Raak I")

¶20 Raak complains that the District Court did not properly consider his income. However, Raak failed to present his 2014 income taxes for the court to consider.

He presented testimony that his taxable income was \$26,109, however Judge Anderson, in the original divorce trial, had also noted that a 2014 Profit and Loss Statement presented as evidence at the time of trial had shown that Mr. Raak had received an “officer’s salary” of \$36,523, which corresponded to the figure for Mr. Raak’s salary in 2013. (App. 155). As such, Raak’s testimony on his 2014 income was suspect and unreliable.

¶21 Raak presented his self-prepared income taxes for 2015 “which showed wages of \$45,173, business income of \$36,690 and total income of \$82,162” (App 155). His self-prepared income taxes for 2016 “showed wages of \$15,558, losses of 94,605, and total income of -\$37,555; and taxes for 2017 showed wages of \$12,304, gains of \$24,73, and total income of -\$10,256 as a result of carry over losses from 2016” (App 155). Raak testified that in 2018, although his taxes were not yet completed, he had been taking home approximately \$1,000 per month from his business. (Tr 62:16-18). He also testified that he had recently hired another accountant to assist in his growing Iowa business and was paying his new accountant roughly \$50,000, an amount which is over four times as much as Raak himself was allegedly drawing from the business while asserting that this was his sole income from such business. (Tr 137:11-15).

¶22 It was further noted that following two days of trial in the original divorce case, Judge Anderson commented that Raak “was less than forthright in disclosing his financial situation” (App. 156), that “Daniel’s credibility is tarnished” (App. 156) and that “Daniel would take cash payments from clients without depositing them in the firm account and without accounting for them in the Quickbooks program” (App. 156). Raak admitted at the January, 2019 hearing that he had previously taken cash payments without

reporting them (Tr 104:2-9). As such, there existed and continues to exist significant concerns over the accuracy and reliability of Raak's employment, income and credibility.

¶23 Per the parties' stipulation, the trial court received and took judicial notice that the average income for an experienced Accountant in the State of North Dakota is \$71,280.00 annually (App. 162). The court also noted that while the parties stipulated to income estimates for tax preparers, Raak's "business is that of an accountant, not strictly a tax preparer. His experience and education is also that of an accountant, not strictly a tax preparer." (App 162). Raak testified that he identified himself as an accountant, that he is in fact a Certified Public Accountant, and that he has worked 35 year as an accountant. (Tr 102:18-23; 140:4-17). Upon stipulation of the parties, the court took judicial notice of incomes for both tax preparers and accountants in North Dakota and appropriately accepted that the average income for an experienced accountant in the State of North Dakota is \$71,280.00 annually (App 162).

¶24 It appears the primary issue which Raak has with how the Trial Court determined Jacobs income for purposes of child support was declining to include loans she has received from her parents as "income". As to these loans, Jacobs testified that she received roughly \$24,000 in loans from her parents to help her pay for various bills when she was not receiving child support from Raak during the time of the divorce (Tr 36:20-25). Jacobs testified that she has received loans from her parents to buy Christmas gifts and that she was expected to pay these back (Tr 172:13-173:1). Jacobs testified that while her parents do not charge her interest nor obligate her to make payments every month, there is a written document in which her mother tracks the amount loaned to her and details the remaining balance of the loans made to Jacobs (Tr 173:6-174:25). Jacobs

further testified to, and/or provided proof of \$4,400 in payments which had been made on the loans. (Tr 174:1-175:25)

¶25 As relevant to the contempt finding against Raak, Jacobs had filed a motion seeking to hold Raak in contempt for his failure to abide by the Judgment and pay numerous child-related expenses. ¶III(F) of the Judgment / Parenting Plan (in it's relevant part, emphasis added) states as follows:

The parties shall *equally split any extra-curricular costs of the children for these extra-curricular activities which they mutually agree the children may engage in.* If the parties disagree as to whether the children can participate in an activity or event, the party who does not agree to allow the children to participate shall be responsible for informing the children as to the reason and the other parent shall simply communicate that this is a joint decision.

(App. 33)

¶26 ¶13 of the Judgment / Parenting Plan (in it's relevant part, emphasis added) states as follows:

The parties shall *equally split all out of pocket health, prescription, counseling, vision (as reasonable / necessary, not for purposes of fashion, etc.), dental and orthodontic care costs of the minor children* not otherwise covered by health insurance or any other such responsible/third party payee.

(App. 38)

¶27 Jacobs, to support her motion for contempt, provided an Exhibit (Exhibit T, Index #269), which detailed all of the expenses which had been incurred and which Raak had failed to pay as required by the Judgment. Jacobs also submitted exhibits and testified to her multiple efforts to get Raak to pay the expenses and Raak's refusal to acknowledge and pay for the same (Exhibit V, Index #270; Tr 168:18-169:11). As to expenses for extra-curricular activities, Raak testified that he was aware of the requirements of the Judgment and of the children being involved in extra-curricular

activities and events (Tr 107:12-108:3). However, when going through those expenses, Raak's position on what he should and should not pay for was illogical and haphazard. Although prior to the hearing he had failed to pay for any of the submitted expenses, at the hearing and under cross examination, he agreed he should pay for things like sports physicals (Tr 109:5-11) but he refused to pay for items such as the team t-shirt or duffel bag (Tr 109:12-18). When asked if he ever tried to clarify or communicate with Jacobs as to what he believed he should or should not pay relative to extra-curricular events, Raak's response was that he did not recall (Tr 109:19-110:10). Raak testified that he agreed the children would need a glove to play baseball and basketball shoes to play basketball (Tr 110:11-24) but he nonetheless did not make those payments and denied the same. When pushed on the simple subject of the basketball shoes which he had earlier in his testimony admitted were necessary for basketball, Raak justified his denial in paying for them by arguing that they were for "school" basketball rather than basketball outside of school. When asked how he knew this was "school" basketball (thus apparently justifying his denial of these expenses in his mind) rather than some other basketball, his response was "I don't know" (Tr 112:17-114:3).

¶28 As to health care expenses, he was also aware of the terms of the Judgment requiring the parties to equally pay for those expenses (Tr 108:4-10). However, Raak refused to pay for eyeglasses because he chose to classify them as unnecessary "fashion" glasses (Tr 111:18-21). Raak believed that his daughter could have gotten free or cheaper glasses but when asked if he had that discussion with either his daughter or Jacobs to explain his position and discuss getting cheaper glasses, his response was that he did not recall (Tr 111:22-112:16). Raak had refused to pay for a

dental and eye examinations even though on cross and in his responsive documents, he admitted he would now pay for it. (Tr 115:24-116:13) His apparent justification for not paying it until agreeing to do so at the January hearing was that he felt Jacobs should have had dental and vision insurance on the kids. (Id)

¶29 Raak continued to be elusive and justify failing to pay for half of very simple expenses such as crickets for a lizard / gecko which he allowed his son to have this pet but then apparently expected Jacobs to feed it. (Tr 114:19-115:23).

¶30 Raak also refused to pay for 50% of the counseling expenses for the children and continued to refuse to do so at trial. During cross he stated he was initially okay with counseling for the children but then fell out of favor with it. When asked if he ever communicated to Jacobs that he was no longer in favor of counseling so she would be notified he did not want to pay for it, his response was that he did not recall if he ever told Jacobs of the same. (Tr 116:17-117:23). Nonetheless, Raak refused to pay for any counseling of any nature for the children (Id). This similarly occurred with expenses such as Boy Scouts where Raak recognized that he was aware of, and allowed, the boys to attend but then at some unknown point in time decided he was no longer going to share in the expense and failed to advise Jacobs of the same (Tr 118:2-24)

¶31 Raak refused and failed to pay his share for things as basic as urology appointments. Even though this same documentation had been provided to him by Jacobs, it was only after cross examination and pointing out to him that the documentation provided by Jacobs clearly identified that these were charges for his child, that he agreed to pay for them (Tr 119:3-25). Raak refused to pay for bills from the Eye Center of the Dakota for the children because he believes he had a credit with the Eye

Center which got applied to the bill, even though he has no proof of the same and never provided proof of the same to Jacobs or the court (Tr 120:11-122:11).

¶32 These are but some of the examples of Raak's justifications for not being responsible for 50% of the children's bills that he was required to pay per the Judgment. Other examples are littered through the transcript. Raak further justified his refusal to pay for 50% of the children's expenses as required by the Judgment by asserting, without proof or documentation, and without having filed any motion to hold Raak in contempt, that he was owed expenses back from Jacobs. Once again, this position as taken by Raak was unjustifiable and illogical. Perhaps the most glaring example of that is him reducing the amount he feels he owes to Jacobs by \$4,500 because he feels he did not receive all of the scrapbooks which he feels Jacobs should have turned over to him via the distribution of personal property in the divorce. (Tr 128:17-129:16)

ARGUMENT

A. Standards of Review

¶33 With respect to child support issues, this court has stated that

[c]hild support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to the abuse of discretion standard of review. A court errs as a matter of law when it fails to comply with the requirements of the child support guidelines in determining an obligor's child support obligation. As a matter of law, the district court must clearly set forth how it arrived at the amount of income and level of support. The trial court's findings of fact in making its child support determination are overturned on appeal only if they are clearly erroneous.

Lauer v. Lauer, 609 N.W.2d 450, 2000 ND 82, ¶3 (citations omitted)

¶34 With respect to contempt appeals, this court has stated as follows:

We have explained that the district court "has broad discretion in deciding whether to hold a person in contempt," and this Court's review of the district court's determination on contempt "is very limited,Determining whether a contempt has been committed lies within the district court's sound discretion, which will not be overturned on appeal absent an abuse of that discretion. [A] court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner or when it misinterprets or misapplies the law.

Sall v. Sall, 2011 ND 202, ¶7 (citations omitted)

B. The District Court properly denied Raak's Motion to Redistribute Property

¶35 Raak filed, and verbally renewed, a motion to redistribute property based on his assertion that he was supposed to receive half of the family scrapbooks made by Jacobs but that he has not receive the same. The trial court appropriately denied such motion.

¶36 Raak cites N.D.C.C. § 14-05-24(3) as being supportive of his motion. This section allows the trial court to "redistribute property and debts in a postjudgment proceeding if a party has failed to disclose property and debts as required by rules adopted by the supreme court or the party fails to comply with the terms of a court order distributing property and debts." N.D. Cent. Code, § 14-05-24(3). There is no assertion of improper disclosure. Rather, Raak asserts that Jacobs failed to comply with the terms of the Judgment in distributing property, namely some scrapbooks. Jacobs filed a response to Raak's motion seeking re-distribution which detailed the relevant evidence presented at trial associated with these scrapbooks, which disproved the assertions of Raak's motion for re-distribution (such as confirming that there was no testimony at trial that there were at least 12 original scrapbooks as of August, 2013 and further disproving Raaks assertion that he had not received any of the scrapbooks / photo albums).

¶37 The trial court considered all appropriate evidence and circumstances, reviewed the motion, the response, affidavits, the original Judgment and further considered the appeal that had occurred. In fully evaluating the matter and considering the motions, the trial court noted that there was insufficient basis to redistribute property, and no evidence to support that Jacobs had failed “to comply with the terms of a court order distributing property and debts” as required by N.D. Cent. Code, § 14-05-24(3). Notably, the trial court also left open the door to Raak to file a motion to hold Jacobs in contempt if he believed there were grounds to do so. Raak had plenty of time to file such a motion prior to the January, 2019 hearing date but failed to do so. Raak makes no showing that the trial court failed to appropriately consider the motions and affidavits in denying the same. Jacobs respectfully submits that the trial court’s order as associated with Raak’s motion to re-distribute property was appropriate.

C. The District Court properly found Raak to be in contempt

¶38 This Court has confirmed that trial courts have broad discretion and determining whether parties are in contempt and this Court’s review of the trial court’s findings on contempt is “very limited” and must involve and abuse of discretion in overturning such decision. “[A] court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner or when it misinterprets or misapplies the law.” Sall v. Sall, 2011 ND 202, ¶7.

¶39 Simply put, there were multiple and significant basis upon which to hold Raak in contempt and the trial court to justify a finding of the same.

¶40 As detailed more specifically in ¶¶25-32 above, the parenting plan and Judgment required the parties to “equally split any extra-curricular costs of the children

for these extra-curricular activities which they mutually agree the children may engage in” and to “equally split all out of pocket health, prescription, counseling, vision (as reasonable / necessary, not for purposes of fashion, etc.), dental and orthodontic care costs of the minor children not otherwise covered by health insurance or any other such responsible/third party payee.” (See App. 33 and 38).

¶41 Jacobs, to support her motion for contempt, provided an Exhibit (Exhibit T, Index #269), which detailed all of the expenses which had been incurred and which Raak had failed to pay as required by the Judgment. Jacobs also submitted exhibits and testified to her multiple efforts to get Raak to pay the expenses and Raak’s refusal to acknowledge and pay for the same (Exhibit V, Index #270; Tr 168:18-169:11).

¶42 Raak tried to justify his contempt with multiple excuses and explanations which the trial court simply, and appropriately, found to lack in credibility or appropriate justification.

¶43 As detailed above, as to expenses for extra-curricular activities, Raak testified that he was aware of the requirements of the Judgment and of the children being involved in extra-curricular activities and events (Tr 107:12-108:3). However, when going through those expenses, Raak’s position on what he should and should not pay for was illogical and haphazard. Under cross examination, he agreed he should pay for things like sports physicals (Tr 109:5-11) (even though he had not previously compensated Jacobs for this expenses) but he refused to pay for items such as the team t-shirt or duffel bag (Tr 109:12-18). When asked if he ever tried to clarify or communicate with Jacobs as to what he believed he should or should not pay relative to extra-curricular events, Raak’s response was that he did not recall (Tr 109:19-110:10). Raak testified that

he agreed the children would need a glove to play baseball and basketball shoes to play basketball (Tr 110:11-24) but he nonetheless did not make those payments and denied the same (See Exhibit V, Index #270). When pushed on the simple subject of the basketball shoes which he admitted were necessary for basketball, he justified his denial in paying for them by arguing that they were for “school” basketball rather than basketball outside of school. When asked how he knew this was “school” basketball (thus apparently justifying his denial of these expenses in his mind) rather than some other basketball, his response was “I don’t know” (Tr 112:17-114:3).

¶44 As to health care expenses, he was also aware of the terms of the Judgment requiring the parties to equally pay for those expenses (Tr 108:4-10). However, Raak refused to pay for eyeglasses because he chose to classify them as unnecessary “fashion” glasses (Tr 111:18-21). Raak believed that his daughter could have gotten free or cheaper glasses but when asked if he had that discussion with either his daughter or Jacobs to explain his position and discuss getting cheaper glasses, his response was that he did not recall (Tr 111:22-112:16). Raak had refused to pay for a dental and eye examinations even though on cross and in his responsive documents, he admitted he would now pay for it (Tr 115:24-116:13). His apparent justification for not paying it until agreeing to do so at the January hearing was that he felt Jacobs should have had dental and vision insurance on the kids. (sic)

¶45 Raak refused to pay for 50% of the counseling expenses for the children and continued to refuse to do so at trial. During cross he stated he was initially okay with counseling for the children but then fell out of favor with it. When asked if he ever communicated to Jacobs that he was no longer in favor of counseling so she would be

notified he did not want to pay for it, his response was that he did not recall if he ever told Jacobs of the same. Nonetheless, Raak refused to pay for any counseling of any nature for the children (Tr 116:17-117:23). This similarly occurred with expenses such as Boy Scouts where Raak recognized that he was aware of, and allowed, the boys to attend but then at some unknown point in time decided he was no longer going to share in the expense and failed to advise Jacobs of the same (Tr 118:2-24)

¶46 Raak refused and failed to pay his share for things as basic as urology appointments. Even though this same documentation had been provided to him by Jacobs, it was only after cross examination and pointing out to him that the documentation clearly identified that these were charges for his child, that he agreed to pay for them (Tr 119:3-25). Raak refused to pay for bills from the Eye Center of the Dakota for the children because he believes he had a credit with the Eye Center which got applied to the bill, even though he has no proof of the same and never provided proof of the same to Jacobs or the court (Tr 120:11-122:11).

¶47 Again, these are but some of the examples of Raak's justifications for not being responsible for 50% of the children's bills that he was required to pay per the Judgment. Raak further justified his refusal to pay for 50% of the children's expenses as required by the Judgment by asserting, without proof or documentation, and without having filed any motion to hold Raak in contempt, that he was owed expenses back from Jacobs. Once again, this position as taken by Raak was unjustifiable and illogical. Perhaps the most glaring example of that was him reducing the amount he feels he owes to Jacobs by \$4,500 because he feels he did not receive all of the scrapbooks which he

feels Jacobs should have turned over to him via the distribution of personal property in the divorce. (Tr 128:17-129:16)

¶48 Simply put, there was ample basis for the trial court's contempt finding and order and the trial court most certainly did not abuse its discretion.

D. The District Court's child support findings and order was appropriate.

¶49 The Trial Court was placed into a difficult situation in trying to appropriately calculate child support and did the best it could, as objectively as it could, by breaking down child support into three different periods of time.

¶50 The first period of time was from September, 2017 through January of 2018. In August of 2017 the parties minor, child, S.R. was permitted to relocate to Iowa by agreement of the parties. (App 139) This agreement, including specific terms as to how child support should be managed, was executed while both parties were being represented by counsel, and was an effort to allow a "trial" period during which the parties could evaluate how S.R. adapted to the change. The trial court accepted that the parties could, on their own accord, come to a child support agreement and the trial court would thereafter not retroactively modify that agreement.

¶51 It is noteworthy that this is not the first time this type of situation has occurred in this case. In Raak I, both parties appealed the Trial Court's child support award. Jacob's appeal of child support in Raak I was centered around a different written agreement the parties had entered at the very commencement of their divorce case and which provided that Raak would pay Jacobs \$767 per month in child support. When the parties later went to trial and evidence was entered that Raak's actual income equated to a child support obligation of \$1,452 per month, Jacobs argued that the Raak should have

had to pay the difference between a support obligation which was actually based on his income (\$1,452) and the amount the parties had agreed upon (\$767). Jacobs argument in Raak I included her position that the first agreement was based on an incorrect representation of Raak's income and that the agreement entered at that time also specifically provided that child support would be adjusted to confirm to his actual income if it was later determined to be different. (See Raak I) This Court in Raak I upheld the District Court's decision to leave the agreement of the parties in place and not require Raak to pay the difference between what was agreed upon (\$767) and what his income actually showed as being the correct amount at trial (\$1,452). Now that the shoe is on the other foot, Raak argues that the agreement he entered on child support should not be enforced and the court should retroactively modify the child support prior to the date of his February, 2018 motion. Jacobs cites Raak I, Sonnenberg v. Sonnenberg, 2010 ND 94 and Brakke v. Brakke, 525 N.W.2d 687 as supportive of the Trial Court's decision on the child support obligation prior to Raak's motion being filed in February of 2018. Jacobs could have argued that she should have no support obligation prior to Raak's motion in February, 2018 (because there was no court order or Judgment requiring the same, but only the written agreement of the parties). In the interest of justice and upholding the agreement of the parties, she didn't and doesn't make such argument.

¶52 The second period of time for which the trial court considered the parties support obligation was from February, 2018 through the end of 2018. February of 2018 was the month in which Raak first filed his motion to amend. Additionally, 2018 was a year during which Jacobs underwent changes in employment such that commencing in January of 2019 it was appropriate to consider a different support obligation for Jacobs

based on her employment changes which had, by January of 2019, resulted in permanent employment.

¶53 As a result of Raak's actions, the Trial Court was initially placed in an untenable position in trying to determine a child support obligation for Raak which was consistent with North Dakota law and which did not reward Raak for voluntary changes in employment, deception in reporting his income, manipulation of his business situation and income, and frankly his complete disregard and lack of effort in trying to obtain employment and earn an income which he is and was capable of earning.

¶54 As noted by the Trial Court

while it is common for the court to look at a five year averaging (2014-2018 in this case) in self-employment situations, that is not feasible in this situation since Mr. Raak has merged Raak & Associates into Capital Accounting, sold his interest in Capital Accounting, and started a new business in Iowa during this period of time. Further, there are no 2014 income taxes to rely upon, Mr. Raak's taxes for 2 of the 3 years between 2015 and 2017 show losses, and Mr. Raak did not have his 2018 income taxes done at the time of trial (even though he was aware of the upcoming hearing and prepares his own taxes as he is a CPA and tax preparer). There is simply no recent evidence upon which the court can appropriately utilize in determining Mr. Raak's income or upon which to average his income.

(App. 161)

¶55 Finding that there was no reliable evidence of income upon which the court could rely for Raak in calculating his income, the Court turned to the stipulated exhibit on statewide income averages for accountants to determine that Raak, as an accountant with 35 years of experience, had the ability to earn the statewide average of \$71,280.00. N.D.Admin.Code §75-02-04.1-07(6) allows a court to impute income when an obligor fails to provide reliable information. This was initially Raak's motion on child support. He could have and should have provided reliable information but he did not.

The trial court appropriately imputed income and allowed a reduction of this imputed amount consistent with Raak's stated earnings of \$12,000 annually.

¶56 To say that this matter became complicated by Mr. Raak's actions including voluntary changes in businesses and employments, voluntary reductions in income, failure to provide income taxes, etc. would be an understatement. Further, as this court is aware, the administrative guidelines relative to self-employment includes the following language:

4. Self-employment activities may experience significant changes in production and income over time. **To the extent that information is reasonably available**, the average of the most recent five years of each self-employment activity, **if undertaken on a substantially similar scale**, must be used to determine self-employment income. When self-employment activity has not been operated on a substantially similar scale for five years, a shorter period may be used.

.....

7. When **three or more years were averaged** under subsection 4, **a loss resulting from the averaging may be used to reduce other income that is not related to the self-employment activity that produced the loss only if** the loss is not related to a hobby activity, **losses were calculated for no more than forty percent of the years averaged**, and monthly gross income, reduced by one-twelfth of the average annual self-employment loss, equals or exceeds the greatest of:

- a. A monthly amount equal to one hundred sixty-seven times the hourly federal minimum wage;
- b. An amount equal to six-tenths of this state's statewide average earnings for persons with similar work history and occupational qualifications; or
- c. An amount equal to ninety percent of the obligor's greatest average gross monthly earnings, calculated without using self-employment losses, in any twelve consecutive months included in the current calendar year and the two previous calendar years before commencement of the proceeding before the court.

8. **For purposes of subsections 6 and 7, an activity is presumed to be a hobby activity if the result from averaging is a loss.** The presumption may be rebutted if the obligor shows that the activity is not done primarily for enjoyment purposes, is a vocation and not an avocation and, in the context of the child support

obligation, there is a reasonable expectation that the children will receive long-term benefits.

N.D. Admin. Code §75-02-04.1-05(4), (7) and (8)(emphasis added).

¶57 These administrative code provisions weighed against using Raak's 2016-2017 income as a basis upon which to calculate his support obligation. Not only was Raak's evidence unreliable, but additionally the losses in 2 of the 3 years of taxes provided made it such that these losses and this income should not be utilized for purposes of determining defendant's income.

¶58 Further, as detailed above, there was clearly evidence to support a finding that there was a voluntary change of employment by Raak, that Raak was underemployed, and that under application of N.D. Admin. Code 75-02-04.1-07(7) the Court was entitled to use 100% of the prevailing average wage for an experienced C.P.A.

¶59 As to Jacob's income and support obligation, the court utilized her 2018 income taxes as a reliable indicator of her income for purposes of child support. There is simply nothing erroneous about doing so.

¶60 The final period of time for which the court calculated the parties' child support obligations was from January of 2019 and moving forward. The trial court used the same reasoning as the 2018 period of time to calculate Raak's income and support obligation. However, since Jacobs was now employed with Job Service full time, the court utilized that monthly income and annualized the same to project her income and support obligation. Jacobs takes no issue with the same.

E. **The District Court properly did not consider any portion of a \$76,000 loan to be income of Jacobs**

¶61 Lastly, Raak argues that the trial court should have found various loans to be income of Jacobs and this increased her child support obligation.

¶62 Simply put, there was and is no evidence that Jacobs received any gifts from her parents which would increase her income and thus her support as allowed by N.D.Admin.Code §75-02-04.1-01(4)(b). As detailed above, Jacobs testified that she has received roughly \$24,000 in loans from her parents to help her pay for various bills when she was not receiving child support from Raak during the time of the divorce (Tr 36:20-25). Jacobs testified that she has received loans from her parents to buy Christmas gifts and that she was expected to pay these back (Tr 172:13-173:1). Jacobs testified that while her parents do not charge her interest nor obligate her to make payments every month, there is a written document in which her mother tracks the amount loaned to her and details the remaining balance of the loans made to Jacobs (Tr 173:6-174:25). Jacobs further testified to, and/or provided proof of \$4,400 in payments which had been made on the loans. (Tr 174:1-175:25). There is and was no evidence that these were gifts and there is no basis for Raak's assertion that these loans should be treated as income to her for purposes of child support.

CONCLUSION

¶63 Based on the aforementioned law and reasoning, Appellee respectfully requests that this court uphold, in full, and without modification or remand, the decisions of the District Court.

CERTIFICATE OF COMPLIANCE

¶64 Attorney certifies that this Brief complies with Rule 31(a)(8) of the North Dakota Rules of Appellate Procedure.

Respectfully submitted this 9th day of October, 2019.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Danel Jacobs-Raak, n/k/a)	
Danel Jacobs,)	
)	Supreme Court Case No.:
Plaintiff-Appellee,)	20190123
)	
v.)	District Court Case No.:
)	08-2013-DM-00716
Daniel Raak,)	
)	
Defendant, Appellant,)	
)	
And)	
)	
State of North Dakota,)	
)	
Statutory Real Party in Interest,)	
Appellee)	

Certificate of Service

¶1 The undersigned certifies, pursuant to Rule 5 (f) of the North Dakota Rules of Civil Procedure, that on October 9, 2019, a true and correct copy of the following document(s):

- 1) BRIEF OF APPELLEE, DANIEL JACOBS; and
- 2) Certificate of Service.

was e-filed and served, via the Odyssey System’s electronic service, and the electronic mail service upon the following:

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