

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Danel Jacobs-Raak,
Plaintiff and Appellee,

vs.

Daniel Raak,
Defendant and Appellant,
And

State of North Dakota,
Statutory Real Party in Interest and
Appellee.

Case No. 20190123

Appellant's Reply Brief

**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**

ORAL ARGUMENT REQUESTED

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I. Raak did Not Misconstrue Any of the Facts in his Statement of Facts contained in Appellant’s Brief, and it is the Appellees who have misrepresented the facts in their Appellee’s Briefs

[¶1] There was no evidence offered at evidentiary hearing that supports a finding Jacobs is required to repay to her parents any of the more than \$76,000 financial aid that was given to her by her parents since the February of 2015 divorce trial in this matter. See Tr., pp.5-179. Jacobs testified she only had to make payments on the amount she admitted to owing her parents at the time of the hearing, when she decided she could afford to make a payment, and acknowledged no interest accrued on the amount and that the more than \$34,000 her parents had paid for the purchase of her 2016 Blazer in November of 2016 was not included in the approximate \$42,000 she admitted to her mother having reported to her as being owed by Jacobs to her parents at the time of the hearing, and that the only written record of the alleged loan consists of her “mother keeps track of that information.” Tr., p. 173, l. 6, to p. 174, l. 1. Also see *Kohanowski v. Burkhardt*, 2012 ND 199, ¶¶ 9–13, 821 N.W.2d 740 (An oral loan agreement providing for repayment extending for a period longer than one year, and which does not include express terms governing prepayment, is barred by the statute of frauds).

[¶2] Jacobs testified she used the money given to her by her parents since the divorce trial, over and above the \$34,000 that her parents had paid for the purchase of Jacobs’ 2016 Blazer, to pay “all [her] bills,” which included her “living expenses” and her past and ongoing attorney fees. Tr., p. 36, l. 11-25; p. 172, l. 15-19; p. 173, l. 6, to p. 174, l. 1.

[¶3] Any lack of clarity that exists regarding the dates and amounts of financial aid that has been received by Jacobs from her parents since the 2015 trial arise from Jacobs’ attorney advising Jacobs’ father not to appear at the January 25, 2019, hearing in response to a subpoena that had been served on Jacobs’ father prior to the hearing, and the District Court’s subsequent erroneous ruling that evidence regarding the money given to Jacobs by

her parents since the trial was not relevant to the child support issues before the District Court. Tr., p. 11, l. 16, to p.15., l. 11 & p. 36, l. 11, to p. 41, l. 8.

[¶4] Raak was forced to sell his share in Capital Accounting, due to the undisputed facts that one of Raak's two partners in the business was physically violent to Raak and the clients of the business and that partner also was sending out false invoices to the clients, and the refusal of the other partner in the business to agree with Raak to fire the violent, unethical partner and then the subsequent vote of the partners to sell Capital Accounting. Tr., p. 86, l.14-24; p. 141, l. 16, to p.142, l. 6.

[¶5] Jacobs did in fact admit at the hearing that Jacobs had, prior to the hearing, stated she was "not aware of any better business situation for [Raak], or better occupational opportunities for [Raak] in the Spirit Lake, Iowa area." Tr. p. 35, l. 6, to p. 36, l. 10. The time and place for Jacobs to contradict that statement was at the hearing, not now on appeal based on information that was not admitted as evidence at the hearing, which, if allowed, would deny Raak the opportunity to enter additional evidence on the subject.

[¶6] Any lack of clarity regarding the negotiations that occurred in connection with the drafting of the September 2017 Informal Agreement with respect to whether the child support provisions contained therein are consistent with the Child Support Guidelines and which party did not want the agreement to be filed with the District Court, arise from the District Court's erroneous decision to sustain Jacob's objection to allowing Raak to call the parties' attorneys to testify about the negotiations that occurred entirely through emails for the purpose of having all the emails involved in the negotiations admitted as evidence at the hearing. Tr. p. 9, l. 7, to p. 11, l. 15. That evidence was relevant and not precluded by N.D.R.Ev. 408; Also see *Mahoney v. Mahoney*, 516 N.W.2d 656, 662 (N.D. Ct. App.

1994) (An appellate court is not bound by a trial court's findings of fact when those findings are based on an erroneous conception of the law. *See Manz v. Bohara*, 367 N.W.2d 743, 746 (N.D. 1985); *Young v. Hamilton*, 332 N.W.2d 237, 243 (N.D. 1983); *Diemert v. Johnson*, 299 N.W.2d 546, 548 (N.D. 1980)).

[¶7] As indicated in Raak's testimony and in the certified copy of the child support ledger that was admitted as Defendant's Exhibit 4, Raak was current on all of his child support payments that he owed under the then existing judgment as of May 23, 2018, while Jacobs as of that date and the January 25, 2019, date of the hearing, had only paid Raak two of the \$425 monthly payments she owed to Raak under the September 2017 Informal Agreement. Index # 251; Tr., p. 95, l. 18, to p. 99, l. 25.

[¶8] Raak did not sell to his business partners his interest in Capital Accounting, in which he had merged his accounting practice on November 1, 2014, prior to the February 2015 trial dates in this action, as alleged by Jacobs in ¶ 11 and ¶ 20 of her Appellee Brief. Raak sold his interest in Capital Accounting to another individual in January of 2016, after neither of his then existing other two partners agreed to fire the violent, unethical partner and voted instead to the dissolve the partnership through sale of the business. Tr., p. 86, l.14, to p. 87. l. 3; p. 141, l. 16, to p.142, l. 6.

II. Raak's income from prior to 2016 is not relevant to the determination of his child support obligations from August of 2017 to present

[¶9] It is undisputed that Raak has not operated his tax preparing business on "a substantially similar scale," since he was forced to sell his interest in Capital Accounting early in 2016, due to the violent and unethical behavior of one of his partners and the desire of the other partner to sell the business rather than fire the violent and unethical partner. N.D. Admin. Code § 75-02-04.1-05(4) does not allow for the averaging of self-

employment income unless the self-employment activity is “undertaken on a substantially similar scale,” and imputing income based on an obligor’s past earnings under N.D. Admin. Code § 75-02-04.1-07 is limited to only the obligor’s earnings “in the current calendar year and the two previous calendar years before the commencement of the proceeding before the court.” See, Subsections 3(c), 6(c), & 7 of N.D. Admin. Code § 75-02-04.1-07.

[¶10] Because these proceedings were commenced upon the filing of Raak’s motion on February 1, 2018, N.D. Admin. Code § 75-02-04.1-07 requires that income be imputed based upon Raak’s highest earnings in a consecutive twelve-month period, commencing on or after January 1, 2016, for which reliable evidence was provided. See N.D. Admin. Code § 75-02-04.1-07; *Boehm v. Boehm*, 2002 ND 144, ¶¶ 19-20, 651 N.W.2d 672. Raak’s 2016, 2017, and 2018 income, which were introduced at the hearing as Defendant’s Exhibit Nos. 13, 14, and 15, respectively (See Index ## 260, 261, and 263), indicate Raak incurred losses in each of those years, as he had to start from scratch in rebuilding his tax preparing business once he sold his interest in Capital Accounting and re-started his tax preparing business in Spirit Lake, Iowa, where he moved to be close to his extended family members with the hope it would help him deal with the depression he suffered as the result of his divorce and the loss of his children. Tr., p. 83, l. 2, to p. 85, l.6; p. 55, l. 22, to p. 59, l. 4-22; p. 83, l. 13-22; p. 141, l. 5 to p. 142, l. 19. However, since Raak’s income in each of those years, 2016, 2017, and 2018, did not exceed 60% of this State’s statewide average earnings for a tax preparer, the profession in which Raak had been primarily involved for approximately 35 years prior to the hearing and, since he had not worked as an auditor for approximately 25 years prior to the hearing, Tr. p. 55, l. 22, to p. 56, l. 15; p.140, l. 7-15,

Raak must be considered, under the Child Support Guidelines, to be underemployed and income must be imputed to Raak at the greatest of :

- a. An 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 in any twelve consecutive month's included in the current calendar year and the two previous calendar years before the commencement of the proceeding before the court., for which reliable evidence is provided.

N.D. Admin. Code § 75-02-04.1-07(3). And, since the greatest of these amounts is six-tenths of this state's statewide average annual earnings for tax preparers of \$28,386, which is 60% times \$47,310, the average annual wages paid to a tax preparer in 2017 in the State of North Dakota. Defendant's Exhibit 12, Index # 259; Also See *Allmon v. Allmon*, 2017 ND 122, ¶23, 894 N.W.2d 869 (Evidence that obligor had been sanctioned for refusing to comply with discovery requests was sufficient to require district court to impute income under the provisions of N.D. Admin. Code § 75-02-04.1-07(6) that requires proof the obligor failed to furnish reliable information concerning the obligor's gross income from earnings in response to a reasonable request made in the proceedings for such information, before income may be imputed to the obligor at 100% of this state's statewide average earnings for persons with similar work history and occupational qualifications); *Mahoney v. Mahoney*, 516 N.W.2d 656, 662 (N.D. Ct. App. 1994), *supra* (¶ 6 of this Brief).

[¶11] For the foregoing reasons, evidence of Raak's income from prior to 2016 is not relevant to these proceedings.

III. Raak Offered Reliable Information about his 2018 Gross Income from Earnings

[¶12] Since IRS was not accepting for filing any 2018 income tax returns at the time of the hearing and the January 30, 2019, deadline for issuing of notices of income issued in

2018 had not yet expired by the time of the hearing, Raak offered a draft of his 2018 income tax return that showed all the income he earned in 2018, which he intended to file with the IRS once he received notice of all his 2018 income and tax withholding information from all of his 2018 income sources and the IRS began accepting such filings. Tr, p. 60, l. 1, to p. 63, l. 5; p. 130, l. 24, to p. 134, l. 5. Though the District Court accepted the draft of Raak's draft of his 2018 income tax return into evidence, the District Court ultimately declared the draft of the return as not being reliable information of Raak's 2018 income because it was not a file draft of his 2018 return. Id; App., p. 161-163, ¶¶28-33. After some questioning regarding the accuracy of his draft, Raak also offered into evidence the Schedule K-1 that he had prepared as the sole owner of his tax preparing business and issued to himself to further support the information contained in his draft of his 2018 income tax return. Tr., p. 134, l. 8, to p. 139, l. 18; p. 143, l. 1, to p. 144, l. 20. There also was no evidence offered at the hearing to support a finding that prior to the hearing Raak had been served with any kind of request for production of anything regarding his 2018 income or that the information in his 2018 draft income tax return was not accurate, other than the fact it had not yet been filed. Tr., pp. 1-179. And, with the IRS not accepting for filing any 2018 returns at the time of the hearing and the deadline for service of reports of income issued in 2018 not yet expired as of the time of the hearing, and with Raak not having received any request for production of any information at the hearing regarding his 2018 gross income from earnings, the District Court had no legal grounds not to accept Raak's draft of his 2018 income tax returns as evidence of his 2018 gross income from earnings, as any fault in not producing a final draft of Raak's 2018 income tax return or other information regarding his 2018 gross income from earnings did not fall on Raak,

Thus, there exists no grounds to impute income to Raak under N.D. Admin. Code § 75-02-04.1-07(6). See *Mahoney v. Mahoney*, 516 N.W.2d 656, 662 (N.D. Ct. App. 1994) *supra* (¶ 6 of this Brief).

IV. The Evidence Introduced at the Hearing regarding the Income Jacob would receive from Job Services of North Dakota and Menards in 2019, was not too Speculative or Unreliable to allow for a projection of Jacobs' 2019 gross income from those Employers

[¶13] In *Boehm v. Boehm*, 2002 ND 144, ¶ 19, 651 N.W.2d 672, this Court stated:

"Courts, by necessity, rely on past information about a child support obligor's income when calculating child support amounts." *Helbling v. Helbling*, 541 N.W.2d 443, 447 (N.D. 1995). "Past income is generally the best predictor of future income and child support is based upon income." *Id.* The child support guidelines clearly express this principle in N.D. Admin. Code § 75-02-04.1-02(8)....

[¶14] The undisputed evidence on this issue is that at the time of the hearing Jacobs was being paid \$3,399 a month from her full time job with Job Services, having received a 3% raise sometime in 2018 after only starting to work there in April of 2018, Tr., p. 25, l. 9, to p. 30, l. 5; Index ## 255 & 256, and at least 10 cents more a hour than she had been paid at the beginning of 2018 from her part time job with Menards, Tr., p. 22, l. 23, to p. 25, l. 8; p.30, l. 6-9; Index ## 253 & 254, both of which jobs Jacobs indicated an intent to continue to work throughout 2019, Tr., p. 163, l. 3, to p, 165, l. 7. Thus, based on the most recent information available, it is appropriate, at a minimum, to project Jacobs' 2019 gross income to be that of the aggregate of 12 months times \$3,399, or \$40,788 for her projected income from her Job Services job, plus another \$5,293 from her Mendards' job, which is the same amount she grossed in 2018 from working part time at Menards throughout 2018, plus an additional \$633 a month arising from the more than \$76,000 financial windfall she received from her parents since the February 2015 trial in this divorce action.

¶15] The undersigned initially read Defendant's Exhibit No. 9, Index #56, Jacob's last pay check stub in 2018 from her Job Services job, incorrectly, to indicate she was being paid \$3,999 a month at the end of 2018, which mistake will require a recalculation of Jacobs' 2019 child support obligation, on remand of this appeal to the District Court, just as a recalculation of Raak's child support obligation is needed on remand as a result of the failure of the District Court to abide by the Child Support Guidelines in determining Raak's gross monthly income based on the undisputed and relevant evidence on that issue.

V. The Arguments made by the State in Opposition to Raak's Arguments are Not Supported by the Relevant Undisputed Facts or the Applicable Law

¶16] Under the holdings in *Helbling v. Helbling*, 541 N.W.2d 443, 446-447 (N.D. 1995) and *Dupay v. Dupay*, 2010 N.D. 87, ¶¶ 9-14, 782 N.W.2d 42, the more than \$76,000 that Jacobs' parents gave to Jacobs in financial aid to pay her living expenses, in debt forgiveness to cover her attorney fees, and in purchasing a newer vehicle for Jacobs, after the original divorce trial, that Jacobs has not yet repaid to her parents, constitutes a financial windfall, in light of the fact none of the money that was given to Jacobs has to be paid back to her parents by Jacobs by her own admission, requiring, at a minimum, that at least \$76,000 of that windfall be treated as a financial windfall as a matter of law in the determination of Jacobs' child support obligation that Jacobs must pay to Raak now that S.R. is living and has been living with Raak in Spirit Lake, Iowa, since August 5, 2017. As required by *Helbling*, at 447 and *Dupay*, at ¶¶ 9-14, the District Court must direct that all of the children of the parties receive some portion of that \$76,000 while also ordering a future reduction in support when the effect of the windfall ceases. The rulings in *Wilson v. Wilson*, 2014, 855 N.W.2d 105, *Hagel v. Hegal*, 206 ND 181, 721 N.W.2d 1, and *Interest of S.L.W.*, 2010 ND 172, 788 N.W.2d 328, are not applicable to this appeal in light of the

fact none of these cases involve a motion for relief under N.D.R.Civ.P, 60 that is based on the actual consensual transfer of primary residential responsibility of a child from the custodial parent to the noncustodial parent and the unwillingness of the custodial parent to agree to stipulate to modify the judgment to address the change in the primary residential responsibility of the child and a change in the child support obligations that arise from the change in primary residential responsibility of the child in accord with the Child Support Guidelines.

[¶17] Due to the page limitation imposed on this brief, Raak relies on the arguments presented in his *Appellant's Brief* and in the other parts of this brief, and which will be presented at oral arguments to address all other issues raised by the Appellees in each of their respective *Appellee Brief*.

VI. Conclusion and Prayer for Relief

[¶18] For all of the foregoing reasons, the reasons previously set forth in *Appellant's Brief*, and as may be argued at oral arguments, it is respectfully requested that this Court grant Raak the relief sought in paragraph no. 30 of his September 19, 2019, *Appellant's Brief*, subject to the need, as acknowledged by the undersigned therein, to recalculate each of the parties' child support obligation in accord with this Court's order of remand on the issues raised in this appeal.

[¶19] Dated this 14th day of November, 2019.

[¶20]

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Certificate of Compliance with Page Limitation

¶21 I hereby certify that the foregoing document, *Appellant's Reply Brief*, complies with the 12 page limit set out in Rule 32(a)(8)(A), N.D.R.App.P., if the cover page and table of contents are not included in the page count.

/s/ Arnold V. Fleck
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Certificate of Service

¶22 I hereby certify that on the 12th day of November, 2019, the foregoing document, *Appellant's Reply Brief*, was served on Sheila Keller, the attorney of record for the State of North Dakota, and Rodney Pagel, the attorney of record for the Appellee/Plaintiff, by emailing a digital/electronic copy of the *Brief in PDF* to the last known email addresses of each attorney as set out below and by requesting service of the document on each such attorney through the North Dakota Supreme Court E-Filing Portal operated by the North Dakota Court System at:

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