

ORIGINAL

20060352

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

IN SUPREME COURT
STATE OF NORTH DAKOTA

MAR 5 2007

Pamela Jane Kostelecky,)
)
Plaintiff/Appellee.)
)
vs.)
)
Kim Wayne Kostelecky,)
)
Defendant/Appellant.)

STATE OF NORTH DAKOTA

20060352

Supreme Court No. ~~20050231~~

APPEAL FROM THE DISTRICT COURT,
SOUTHWEST JUDICIAL DISTRICT, COUNTY OF STARK,
STATE OF NORTH DAKOTA, HONORABLE RONALD L. HILDEN

BRIEF OF APPELLEE

Mary E. Nordsven ID #04367
Hardy, Maus & Nordsven, P.C.
137 1st Avenue West
P.O. Box 570
Dickinson, ND 58601-0570
(701) 483-4500

Attorney for Appellee

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii, iii

Statement of the Issues 1

Statement of the Case 2

Statement of the Facts 5

Legal Argument 10

Conclusion 22

Certificate of Compliance 23

Certificate of Service 24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<u>Barth v. Barth</u> , 1999 ND 91, ¶8, 593 N.W.2d 359	15, 16
<u>Bladow v. Bladow</u> , 2003 ND 123, ¶8, 665 N.W.2d 724	167
<u>Boehm v. Boehm</u> , 2002 ND 144, ¶9, ¶13 651 N.W.2d 672	10, 12
<u>Brandner v. Brandner</u> , 2005 ND 111, ¶7, 698 N.W.2d 259	15
<u>Dufner v. Dufner</u> , 2002 ND 47, ¶11, 640 N.W.2d 694	19
<u>Emter v. Emter</u> , 1999 ND 102, ¶10, 595 N.W.2d 16	15
<u>Fischer v. Fischer</u> , 139 N.W.2d 845 (N.D. 1966)	11
<u>Fox v. Fox</u> , 2001 ND 88, ¶14, 626 N.W.2d 660	14
<u>Halvorson v. Halvorson</u> , 482 N.W.2d 859, 871 (N.D. 1992)	18
<u>Heley v. Heley</u> , 506 N.W.2d 715, 718 (N.D. 1993)	17
<u>Horner v. Horner</u> , 2004 ND 165, ¶8, 686 N.W.2d 131	10
<u>Hoverson v. Hoverson</u> , 2001 ND 124, ¶13, 629 N.W.2d 573	13
<u>Lill v. Lill</u> , 520 N.W.2d 855, 857 (N.D. 1994)	17, 19, 20
<u>Mees v. Mees</u> , 325 N.W.2d 207, 208, (N.D. 1982)	10, 19, 20
<u>Mellum v. Mellum</u> , 2000 ND 47, ¶14, 607 N.W.2d 580	15
<u>Nelson v. Nelson</u> , 1998 ND 176, ¶6, 584 N.W.2d 527	15
<u>Peterson v. Peterson</u> , 1999 ND 191, ¶6, 600 N.W.2d 851	15
<u>Routledge v. Routledge</u> , 377 N.W.2d 542 (N.D.1985)	19
<u>Ruff v. Ruff</u> , 78 N.D. 775, 52 N.W.2d 107 (N.D. 1952)	11

<u>Schmidkunz v. Schmidkunz</u> , 529 N.W.2d 857, 858 (N.D. 1995)	11. 19. 20
<u>Sommers v. Sommers</u> , 2003 ND 77, ¶17. 660 N.W.2d 586	19
<u>Volk v. Volk</u> , 404 N.W.2d 495, 498 (N.D. 1987)	17
<u>Wald v. Wald</u> , 556 N.W.2d 291, 294(N.D. 1996)	15
<u>Walker v. Walker</u> , 2002 ND 187, ¶7. 653 N.W.2d 722	11
<u>Young v. Young</u> , 1998 ND 83, ¶13, 578 N.W.2d 111	19

Statutes Cited

N.D.C.C. §14-05-24(1)	15
-----------------------------	----

STATEMENT OF THE ISSUES

1. Whether the District Court's new finding of abuse is clearly erroneous.
2. Whether the District Court erred in granting the Plaintiff \$100,200.00 as part of the division of the marital estate despite the Court's finding that it was a short-term marriage.

STATEMENT OF THE CASE

This was a divorce action commenced by the Plaintiff/Appellee, Pamela Kostelecky, now known as Pamela Barrett, hereinafter referred to as "Pam". by the filing of a Summons and Complaint dated March 19, 2004. The Defendant/Appellant, Kim Wayne Kostelecky, hereinafter referred to as "Kim", filed an Answer on April 30, 2004.

The matter was tried to the Honorable Ronald L. Hilden on November 24, 2004. On December 27, 2004, the district court made Findings of Fact, Conclusions of Law and Order for Partial Judgment of Divorce. The district court found that the parties were entitled to an absolute decree of divorce based on irreconcilable differences and restored the surname of "Barrett" to Pam. The district court retained jurisdiction over the parties' property and debts until it issued a Memorandum Opinion and complete Findings of Fact, Conclusions of Law and Order for Judgment. The partial Judgment of Divorce was entered on December 28, 2004.

On March 31, 2005, the district court issued its Memorandum Opinion. The district court determined the Plaintiff was worth approximately \$100,000 and the Defendant seemed to be worth about \$650,000. Initially, the district court determined that the brevity of the marriage should result in the parties leaving the marriage with what they brought to the marriage. The district court made no findings of what each party brought to the marriage. However, because of the contributions made by Pam to the marriage, the district court determined that would not be fair either. Consequently, the court determined the Plaintiff should receive \$15,000 for each of the six years she was married to the Defendant

or "\$90,000". The district court in its first Memorandum Opinion labeled the payments "spousal support".

The district court signed the proposed Findings prepared by counsel for Kim and invited counsel for Pam to submit supplemental proposed Findings. Before counsel for Pam had time to submit supplemental Findings, the Clerk of Court, on April 6, 2005, executed the Judgment which incorporated the Findings prepared by Kim's counsel. Thereafter, on April 8, 2005, Pam moved the court to vacate the Judgment because the Judgment and Decree did not reflect the Memorandum Opinion of the district court dated March 31, 2005. Furthermore, the district court had specifically invited Pam to prepare supplemental Findings, and those supplemental Findings should have been incorporated into the Judgment.

On April 12, 2005, the district court vacated the Judgment and Decree dated April 6, 2005, and entered Supplemental Findings and Order for Judgment. Thereafter on May 27, 2005, the court executed Supplemental Findings which incorporated the material provisions of the Memorandum Opinion dated March 31, 2005. Final Judgment was entered on June 1, 2005. Pam, appealed the decision of the district court. Notice of Appeal was filed on July 13, 2005. Thereafter, on July 19, 2005, Kim filed a Notice of Cross Appeal.

The issues on appeal and cross appeal were briefed and argued to the Supreme Court of the State of North Dakota. The Supreme Court issued its decision affirming the District Court's valuation of the parties' marital property. However, the Supreme Court

remanded the case for further explanation of the spousal support award under the Ruff-Fischer guidelines. Because spousal support is intertwined with the property distribution, the Supreme Court also remanded for the trial court's consideration the distribution of the parties marital property. Finally, the Supreme Court instructed the district court to consider the specific requests that the parties made regarding distribution of particular items of personal property.

Subsequent to the Supreme Court's decision to reverse and remand, the parties prepared simultaneous briefs for the district court. Oral argument was held on August 21, 2006. Thereafter, on August 31, 2006, the district court issued its order. In the order, the district court explained that the \$90,000 awarded to Pam in the first Judgment was intended to be part of the property division of the marital estate. The district court also found that the Plaintiff was in need of a vehicle. The district court awarded to her \$10,000.00 for a vehicle. Finally, the district court awarded to Pam the sum of \$200.00 for fishing tackle stating "further exchange or negotiation being impossible."

On October 11, 2006, the district court made Findings of Fact, Conclusions of Law and Order for Amended Judgment after remand. The district court found that during the course of the marriage the Plaintiff and children were subjected to verbal, emotional and physical abuse by the Defendant. The district court found that the Plaintiff left the Defendant after he verbally assaulted her when she requested that she and her children spend the Thanksgiving holiday of 2003 with her mother who was dying of cancer at the time. The district court found that the Defendant refused to allow the Plaintiff to leave the

marital household with a motor vehicle and the Plaintiff is in need of a motor vehicle. The district court found that the Defendant consistently refused to provide the Plaintiff and minor children with their personal effects including the children's fishing gear, having the approximate value of \$200.00. The district court found that the Plaintiff brought a motor vehicle into the marriage which was traded on a vehicle for which the Defendant placed only his name. The district court found that the Plaintiff made significant contribution to the marriage which helped the Defendant expand his agricultural operation. The Plaintiff and the children assisted the Defendant with the agricultural operation, maintained the home and managed Masterpiece Gifts and Floral. The district court went on to find that the Plaintiff did not request spousal support, but was entitled to an equitable share of the marital property. It noted that "the court's initial award of spousal support was a mistake. It was clearly meant to be part of the property division of the marital estate." The Judgment after remand was docketed on October 13, 2006.

On October 13, 2006, the Defendant/Appellant filed his Notice of Appeal. The Plaintiff did not elect to cross-appeal.

STATEMENT OF THE FACTS

The parties to this action were married on November 19, 1997, in Dickinson, North Dakota. (Trial Tr. p.7.) Pam had two children from a previous marriage, a daughter, Brooklyn and a son, Remington. (Trial Tr. p.8.)

Throughout the marriage, Kim was verbally and emotionally abusive to Pam and at times, physically abusive to her children. (Trial Tr. p. 39, App. pp. 94-98, 115-117.)

Pam had informed friends and relatives of the abuse but wasn't sure anyone believed her. (Trial Tr. p. 39.) On November 24, 2003, Kim erupted over a disagreement as to where the parties and Pam's children would spend the Thanksgiving holiday. Pam, without Kim's knowledge, pushed the redial on her cell phone and as a consequence her sister, Corrine Pavlicek, hereinafter referred to as "Corrine", heard Kim's verbal assault on Pam. (App. pp.94-98.)

Because Corrine Pavlicek could not appear at the trial, her testimony was taken by deposition on November 17, 2004. The deposition, in its entirety, was offered and received into evidence at the time of trial. (Trial Tr. p. 2.) In her deposition, Corrine testified,

"I heard Kim yelling, saying, 'Your God damn family is first. That is all you ever think about is your God damn family. We are always second. Nobody can ever tell you anything. You are so are so God damn dumb, so God damn stupid. Your are just a stupid bonehead. And nobody can see how dumb you are..... I put up with this shit for the last five years. I am tired of it. I am not going to do it anymore. Just get the hell out. You're so God damn dumb, just get the hell out.' " (App. p. 95.)

During Kim's tirade, Pam's son Remington was in the home. (Trial Tr. p. 37.) At Corrine's request, Pam put Kim on the telephone and in a normal voice he greeted Corrine. (App. p. 96.) Subsequent to Kim's conversation with Corrine, he told Pam to get out and stated that she was not to take the parties' vehicle she customarily drove. (Trial Tr. p. 38) Kim then went to the garage and threw everything out of the car, he broke things, locked the car, took the keys and told Pam to get out of the marital home. (Trial Tr. p. 38) Even though he demanded she leave, he prevented her from doing so by taking away her means of transportation. Kim testified that the entire ordeal was a "set up" by Pam and that

Corrine lied about what she had heard. (Trial Tr. p. 160, 162, 166-167.) Pam testified that the November 24, 2003 verbal assault was not an isolated occurrence. (Trial Tr. p. 39.) However, it was the first time she had taken steps to have someone other than her children witness the verbal attack. (Trial Tr. p. 39.) Additionally, Pam testified that Kim called her and the children names. (Trial Tr. p. 40.) Sometimes this occurred on a daily basis. (Trial Tr. p. 40.)

Pam testified to the physical abuse that the children sustained from Kim. She stated that when Kim wrestled with Remington it would always escalate to a point where Remington was injured. She noted, "It was like he couldn't stop and it was always to the point of them being pinched or squeezed or to the point of getting a black and blue mark." (Trial Tr. p. 41.) Pam testified that at one time, Kim put a pin in Remington's lower buttocks. When Pam intervened, she was told to stay out of it. (Trial Tr. p. 41.) Pam testified that Kim justified his actions by stating "Well, kids did that once to me when I was a kid. They would put a tack on my chair." (Trial Tr. p. 41.) Kim denied that the incident ever occurred. (Trial Tr. p. 128.)

At times, Kim would brush his crotch area against Brooklyn or grab her butt cheeks. (Trial Tr. p. 42.) When Pam or Brooklyn complained, Kim would state "That's what Dads do." (Trial Tr. p. 42.) Kim denied any inappropriate touching. (Trial Tr. p. 128.)

Pam testified that Kim would jab his fork into the children's hands if they chewed with their mouths open or whacked the top of their knuckles. (Trial Tr. p. 42.) She testified that Kim would slam his foot down on Brooklyn's bare foot if she accidentally touched his

foot while they sat at the dinner table. (Trial Tr. p. 42.) Pam testified that Kim used a cattle prod on the children and thought it was funny. (Trial Tr. p. 43.)

In 2002, the parties purchased a Toyota Camry. Initially, Pam did not realize that her name was not on the title. When it was brought to her attention she asked Kim about it. At that time, Kim became angry and told Pam that she didn't deserve anything in her name until she proved herself to him. When Pam asked what she needed to do to prove herself to Kim, he didn't immediately answer, but then wrote an emotionally abusive letter to Pam. (Trial Tr. p. 33, App. pp. 115-117.)

Pam was 44 years of age and had a high school diploma. (Trial Tr. pp. 6,8.) Kim was 49 years of age and had a Bachelor of Science degree in Agricultural Economics from North Dakota State University. (Trial Tr. p. 9.)

Prior to the marriage, in September of 1991, Pam started a business known as Masterpiece Ceramics and Crafts. (Trial Tr. p. 9.) In order to do so, she secured a \$10,000.00 loan from her sister and brother-in-law, Corrine and Lee Pavlicek. (Trial Tr. p. 11.) Initially the business was operated out of her home. (Trial Tr. p. 10.) At the time of the divorce, the business was known as Masterpiece Gifts and Floral and was operated out of a building Pam purchased in 1999. (Trial Tr. p. 11.) At the time of trial, Pam owed the sum of \$85,574.58 to Community First on the building. (App. p. 123.) Pam worked approximately four days a week at the gift shop. Pam also helped Kim with the parties' farm and ranch operation. (Trial Tr. p. 24.) She drove truck. (Trial Tr. p. 24) She worked with the cattle. (Trial Tr. pp. 24, 98.) She pulled calves. (Trial Tr. p. 24.) She took fuel to

the fields. (Trial Tr. p. 24.) She checked grain in bins. (Trial Tr. p. 24.) Pam testified that Kim would make her leave her business to help on the farm. (Trial Tr. p. 24.) Additionally, Pam's children and father assisted Kim. (Trial Tr. pp. 24, 25, 26, 30, 123)

Prior to the marriage, Kim had been involved in farming and ranching. His net equity approximately nine months after the marriage was \$600,000.00. (App p. 133.) He brought debt of \$387,000.00 to the marriage. (App. p. 133.)

In February of 2001, Pam was hurt in a farm accident. While sorting cattle her hand was crushed between a gate and a railroad tie. (Trial Tr. p. 27.) The nerves of her hand were damaged and she continued to have problems up to the date of trial. At that time, she was participating in physical therapy. (Trial Tr. p. 27.) The injury impaired her ability to repair statues, an activity that was associated with her business. (Trial Tr. p. 27.) Pam reported that Kim had refused to allow her to submit a claim to his insurance for the injury. (Trial Tr. p. 29.)

While the divorce was pending, the Trial Court ordered Kim to allow Pam to drive the parties' Camry which was titled in Kim's name. (App. p. 23.) Upon delivery of the vehicle to Pam, she discovered that the registration and insurance cards were missing from the glove compartment of the vehicle. Because Kim refused to produce the cards, Pam had to move the district court to secure an order directing Kim to produce the cards. (App. pp. 25-28.) The vehicle was awarded to Kim in the first Judgment. (App. p. 53.) Because Pam was left without a vehicle, the district court ordered Kim to pay an additional \$10,000.00 to Pam in the Judgment after Remand so that she could purchase a vehicle.

While the case was pending before the district court, Pam requested items of personal property located at the lake cabin which was under Kim's control. Kim assured the court at the pretrial conference that the items would be delivered. At trial, Pam testified that Kim had not performed as promised. (Trial Tr. p. 64.)

ARGUMENT

I. The district court's finding that the Plaintiff and children were subjected to abuse by the Defendant was supported by the evidence presented in this case.

A district court's decision regarding division of property is a Finding of Fact reversible on appeal only if clearly erroneous. Horner v. Horner, 2004 ND 165, ¶8, 686 N.W.2d 131. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although some evidence supports it, on the entire evidence the Appellant Court is left with the definite and firm conviction that a mistake has been made. Boehm v. Boehm, 2002 ND 144, ¶9, 651 N.W.2d 672. The party challenging the finding of fact on appeal bears the burden of demonstrating that the finding is clearly erroneous. Mees v. Mees, 325 N.W.2d 207, 208, (N.D. 1982) Although there is no set formula for dividing a marital estate, the trial court must equitably divide the property based on the circumstances of the particular case judged in light of the Ruff-Fischer guidelines, which include: the respective ages of the parties to the marriage; their earning abilities; the duration of the marriage and the conduct of each 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 and income producing capacity, if any, and whether it was accumulated or acquired before or after the marriage: and such other matters as may be material. Walker v. Walker, 2002 ND 187. ¶7. 653 N.W.2d 722. See also Ruff v. Ruff, 78 N.D. 775, 52 N.W.2d 107 (N.D. 1952); Fischer v. Fischer, 139 N.W.2d 845 (N.D. 1966).

In the present case, the trial court relied on a number of factors set forth under the Ruff-Fischer guidelines to arrive at a division of the marital estate. One of the factors the district court considered in arriving at an equitable distribution was the abusive conduct of Kim during the marriage. The district court found that during the marriage, the Plaintiff and children were subjected to verbal, emotional and physical abuse by the Defendant. (App. p. 289.) Although the district court did not mention the abuse in the Memorandum of Opinion of the court issued on March 31, 2005, and did not mention abuse in the original Findings signed by the court on March 30, 2005, there was ample evidence in the record to support the district court's finding of abuse. (App. pp. 35-57.) When the court affixes its signature to the findings, they become the findings of the court and if they adequately explain the basis of the court's decision, it will be upheld. Schmidkunz v. Schmidkunz, 529 N.W.2d 857. 858 (N.D. 1995)

Pam and her sister, Corrine, presented significant testimony regarding the verbal abuse of Pam by Kim that took place on November 24, 2003. (Trial Tr. p. 39, App. pp. 94-98.) In addition, Pam testified at length, regarding the physical, emotional and verbal abuse she and the children sustained during the marriage. Kim denied any abusive conduct on his part. The trial court is in the best position to ascertain the true facts because it has

the opportunity to observe the demeanor and credibility of the witnesses. Boehm v. Boehm, 2002 N.D. 144, at ¶ 13.

At trial, Pam testified to specific instances of abusive conduct on the part of Kim. Her testimony regarding the verbal abuse that took place on November 24, 2003, was corroborated by her sister, Corrine Pavlicek. (Trial Tr. pp. 35-40. App. pp. 94-98.) The testimony of Corrine demonstrated that what took place was more than an argument. In addition, the district court received into evidence Exhibit 1, a letter written by Kim to Pam in which he justifies his refusal to include Pam's name on the title to the Toyota Camry purchased during the marriage. (App. pp. 115-117.) In this letter, Kim tells Pam among other things that after four years of marriage she had "no right to assume that she was an equal partner." (App. p. 115.) The tone of the letter is degrading and clearly illustrated Kim's abusive attitude toward Pam.

In addition to the verbal abuse of November 24, 2003, testified to by Pam and Corrine, Pam testified that Kim called the children and Pam names, sometimes on a daily basis. (Trial Tr. p. 40.) She testified that Kim stuck Remington in the buttocks with a pin. (Trial Tr. p. 41.) She testified to inappropriate touching of Brooklyn by Kim. (Trial Tr. p. 42.) She testified that Kim used a cattle prod on the children and found it to be humorous. (Trial Tr. p. 43.) She testified that Kim jabbed the children's hands with a fork or wacked the top of their knuckles if they chewed with their mouths open. (Trial Tr. p. 42.) She testified to Kim stomping on Brooklyn's bare feet. (Trial Tr. p. 42.) She reported the bruising of Remington by Kim when horseplay escalated. (Trial Tr. p. 41.) She testified

to Kim's repeated forcing of the children and herself to read the manual to the dishwasher if the dishes were not loaded properly.(Trial Tr. p. 112.) Her testimony portrayed a pattern of verbal, emotional and physical abuse perpetrated by Kim during the marriage.

In his brief, Kim summarized the testimony that was presented to the district court that demonstrated that Kim acted appropriately at times. (Brief of Appellant p. 14.) There is no question that Kim was capable of engaging in "fun" activities with Pam's children. (Trial Tr. p. 77.) However, the fact that Kim taught the children to waterski, hunt, fish and drive pickups, motorcycles and four wheelers does not mean the children and Pam did not experience abuse at his hands. The positive behavior does not negate the existence of abusive conduct. The district court was not persuaded by Kim's self serving testimony. The district court was in the best position to judge the credibility of the parties.

Furthermore, Kim's denial of the abuse and his allegation that Pam and Corrine lied does not mean the abuse did not occur. It would be unlikely that the perpetrator of abuse would acknowledge it. Kim argued that there were only personal perceptions and hearsay testimony to prove there was any kind of domestic violence or abuse in the marriage. (Brief of Appellant p. 15.) Pam and Corrine spoke from first hand experience. Perhaps all testimony is based on a witness's perceptions. However, the detail and corroboration here demonstrated their perceptions were based on reality. It is the duty of the trial court to determine whether the perceptions of a witness are based in reality and credible, a trial court having the opportunity to observe demeanor and credibility is in a better position than an appellate court to ascertain the true facts. Hoverson v. Hoverson, 2001 ND 124. ¶ 13, 629

N.W.2d 573. a choice between two permissible views of the evidence is not clearly erroneous when the trial court's findings are based on physical or documentary evidence, or inferences from other facts or credibility determinations. Fox v. Fox, 2001 ND 88, ¶14. 626 N.W.2d 660. In this case, the trial court found Pam to be more credible than Kim.

In this case, the district court dealt with Kim's lack of credibility as early as the time of the interim hearing. When Pam asked the court to grant to her use of the Toyota Camry, Kim resisted the motion indicating he couldn't get along without the Toyota Camry because his 1976 pickup couldn't be driven and his hired man needed to drive his 1993 pickup. (App. p. 17.) The affidavits of the Lee Pavlicek and Isadore Pavlicek demonstrated that the 1976 pickup was drivable and in fact just prior to the execution of his affidavit, the Defendant had been observed driving the vehicle. (App. pp. 21-22.)

Kim argued that his abusive conduct was not so destructive to the marriage that it entitled Pam to an additional \$102,000.00. (Brief of Appellant p. 15.) In fact, the trial court made an award of \$100,200.00 to Pam. This award was made in addition to the properties that Pam had in her possession and under her control. In doing so, the court relied on a number of the Ruff-Fischer guidelines. The abusive conduct of Kim was only one factor that supported the trial court's distribution of the marital assets in this marriage. In conclusion, it is clear there was ample evidence to support the trial court's finding of abuse. The finding of abuse was not clearly erroneous and should not be reversed by this court.

II. The district court did not err in granting the Plaintiff \$100,200.00 as part of the division of the marital estate, despite the court finding that it was a short

term marriage.

Under N.D.C.C. §14-05-24(1). "when a divorce is granted, the court shall make an equitable distribution of the property and the debts of the parties." There is no set formula for dividing a marital estate, but the trial court must equitably divide the property based upon the circumstances of the particular case. Nelson v. Nelson, 1998 ND 176, ¶6, 584 N.W.2d 527. With property distribution, equitable does not mean equal, but a substantial disparity must be explained. Wald v. Wald, 556 N.W.2d 291, 294(N.D. 1996). The trial court's determinations regarding division of property are treated as Findings of Fact and will not be reversed unless they are clearly erroneous. Mellum v. Mellum, 2000 ND 47, ¶14, 607 N.W.2d 580. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although some evidence supports it, on the entire evidence this Court is left with a definite and firm conviction a mistake has been made. Peterson v. Peterson, 1999 ND 191, ¶6, 600 N.W.2d 851.

When the trial court distributes property, the court must use the Ruff-Fischer guidelines. The trial court must consider all property accumulated by the parties, whether jointly or individually owned. Barth v. Barth, 1999 ND 91, ¶8, 593 N.W.2d 359. The whole distribution of property must be equitable, not each individual asset. Emter v. Emter, 1999 ND 102, ¶10, 595 N.W.2d 16. In dividing marital property, the trial court generally starts with the view that marital property should be divided equally and although the division need not be equal to be equitable the trial court must explain any substantial disparity. Brandner v. Brandner, 2005 ND 111, ¶7, 698 N.W.2d 259.

In this case, the marital property was not divided equally between Pam and Kim. After applying the Ruff-Fischer guidelines, the court awarded to Pam. net equity in the amount of \$256,799.97 and to Kim. net equity of \$594,287.40. In order to arrive at this distribution, each party was granted the property in their possession and Kim was ordered to pay to Pam. the sum of \$100,200.00. This payment was to be made within 90 days of Judgment.

The court explained and justified the unequal distribution because of the length of the marriage. Kim and Pam were married on November 17, 1997, and the divorce action was commenced on March 19, 2004. Kim argued that he should not be required to pay to Pam, \$102,000.00. because he brought significant properties to the marriage and he should leave with those properties.¹ (Appellant's Brief p. 16.) In making his argument, Kim implies that the entire farming operation was brought to the marriage. In fact during the marriage, additional real property was purchased and the farming operation was expanded.

The origin of property is not the sole or necessarily the controlling factor under the Ruff-Fischer guidelines. Bladow v. Bladow, 2003 ND 123, ¶8, 665 N.W.2d 724. All property, regardless of source is to be considered marital property. Property held individually, rather than jointly, does not preclude the inclusion of the property in the marital estate. Barth v. Barth, 1999 ND 91, at ¶8. Property brought into the marriage by one party, and separate property acquired by gift, inheritance or otherwise, must be included

¹ The actual amount ordered by the trial court to be paid to Pam was the sum of \$100,200.00. Throughout the Appellant's Brief there is an erroneous suggestion that the award was \$102,000.00.

in the marital estate and is subject to distribution. Id. Even property acquired prior to the marriage by one spouse is considered as part of the marital estate in determining an equitable division. Heley v. Heley, 506 N.W.2d 715, 718 (N.D. 1993)

A trial court must start with the presumption that all property held by either party whether held jointly or individually is to be considered marital property. The trial court must determine the total value of the marital estate in order to make an equitable division of the property. In this case, the trial court found the total net value of the marital estate to be \$851,087.37.

While a court may unequally divide property in a short term marriage and award the parties what each brought into the marriage, marriages of longer duration generally support an equal distribution of property. Despite these generalities, duration of marriage is only one factor of the Ruff-Fischer guidelines and is only one factor to be considered in the distribution of marital property. Lill v. Lill, 520 N.W.2d 855, 857 (N.D. 1994) In this case, it is clear that the trial court did take into consideration that length of the marriage. However, the trial court also took into consideration other Ruff-Fischer guidelines in making its distribution. Specifically, the trial court found that Pam had made significant contributions to the marriage. She maintained the marital home, promoted her separate business and helped Kim expand his agricultural operation. (App. p. 290.) This Court has recognized that a homemaker's contributions are an asset to the enterprise of marriage and should be recognized in a property distribution upon a dissolution of that marriage. Volk v. Volk, 404 N.W.2d 495, 498 (N.D. 1987)

The record supports the trial court's findings. Pam, her children and her father assisted Kim with the farming operation. In fact, Kim's friend, Arthur Tandesksy testified that after Pam left Kim, his services were needed on a more frequent basis. (Trial Tr. p. 101.) Kim in his testimony, admitted that Pam and her children assisted with the farming operation. (Trial Tr. p. 123.) The March 31, 2005 Memorandum Opinion of the court, demonstrated that the court was concerned that an equal distribution of the property would not be fair. The court stated that would result in Pam's contributions going "unrecognized and unrewarded." (App. p. 36.) The court awarded Pam \$90,000.00 and erroneously termed it "spousal support." In the second Memorandum Opinion of the court, the court stated that use of the "spousal support" was a mistake. (App. p. 280.) The district court's intention all along was to make the distribution equitable. Certainly, the court could look at the contributions made by Pam during the marriage.

In addition to the contributions that Pam and her children made to the farming operation, the district court found that the environment that Pam and the children endured was abusive and hostile. A majority of this Court has held that fault whether, economic or non-economic, is a relevant factor in division of marital property. Halvorson v. Halvorson, 482 N.W.2d 859, 871 (N.D. 1992) The Defendant argued that the conduct that took place between the parties in this case was not significant enough to alter a division of property. (Brief of Appellant p. 21.) The trial court heard the testimony and deemed otherwise. Although Kim denied abusive conduct, as noted *infra* it was well supported by the record.

In this case, the court was careful to preserve for Kim his family farm. The importance of preserving a family farm justifies a significant disparity in the amounts of the marital estate awarded to the parties provided that the other spouse receives an offsetting monetary award. Young v. Young, 1998 ND 83, ¶13, 578 N.W.2d 111. In Dufner v. Dufner, 2002 ND 47, ¶11, 640 N.W.2d 694, this court supported the concept of including the land in the net marital estate and dividing the estate equally, with a cash settlement for the wife and farm assets going to the husband. In this case, like Dufner, Kim's farming operation was preserved for him. However, in order to make the division equitable, the court determined that a cash settlement was necessary to Pam.

Kim argued that the court has upheld decisions awarding one party the majority of the marital assets and this case should be no different. (Brief of Appellant p. 20.) Appellant cited: Routledge v. Routledge, 377 N.W.2d 542 (N.D.1985); Lill v. Lill, 520 N.W.2d 855,857 (N.D. 1994); Mees v. Mees, 325 N.W.2d 207 (N.D. 1982); Schmidkunz v. Schmidkunz, 529 N.W.2d 857 (N.D. 1995). The cases can be distinguished from this case.

In Routledge, the trial court awarded to each party the assets they brought to the marriage. However, unlike this case, the husband in Routledge was required to pay to the wife the sum of \$500.00 per month spousal support and the wife's medical insurance of \$163.45 per month. Spousal support and the distribution of marital property are intertwined. Property division and spousal support ordinarily must be examined and dealt with together. Sommers v. Sommers, 2003 ND 77, ¶17, 660 N.W.2d 586. In this case, the

Amended Judgment After Remand does not require a spousal support payment from Kim to Pam. (App. pp. 297-303.)

In Lill, the parties were married less than one year unlike the five years marriage in this case. Despite the short duration of the marriage, this Court affirmed a lump sum award of \$5,000.00 from the husband to the wife. This Court stated, "Duration of the marriage is only one factor of the Ruff-Fischer guidelines; the guidelines also direct trial courts to consider other matters as may be material; Lill v. Lill, 520 N.W.2d 857."

In Mees, the court was faced with determining whether an award of spousal support was sufficient after a short term marriage. The issue of property distribution was not an issue on appeal. In Mees, the court upheld the spousal support award, modifying the district court's judgment to eliminate an automatic two-year limitation that had been placed on the award of spousal support. In this case, on remand, the district court clarified that it always intended to make a distribution of property rather than award spousal support. (App. p. 280.)

In Schmidkunz, there was not a substantial amount of marital property. The wife received assets of \$15,022.50 and the husband received assets of \$19,491.50. The origin of the property was one factor that the trial court took into consideration. In addition, the trial court found the wife was earning more than the husband. Furthermore, the husband was 43 years old while the wife was 27 years old, so she presumably had both greater income and presumably more years to accumulate an estate. In this case, the court took the origin of the property and the length of marriage into consideration. However, it also

considered other Ruff-Fisher guidelines which supported the unequal award it made, including Kim's misconduct in the marriage and the significant contributions made by Pam as a homemaker, business woman and partner in the farming operation.

Kim argued that the trial court's division gave to Pam well over half of the net gain acquired during the marriage. (Brief of Appellant p. 19.) He cited no case which requires the trial court to divide the gain between the parties. Arguably, it was the contributions of Pam and her children which helped Kim keep the farming operation intact. The district court, applied the Ruff-Fischer guidelines and arrived at a distribution it deemed to be equitable. Although the distribution was not equal the discrepancy was adequately explained.

In the Memorandum Opinion dated March 31, 2005, the district court expressed a hope that Kim would "overcome petty rancor and give her [Pam] those small wares and goods which she wants ever recalling that he doesn't have to repurchase one half of his land." (App. p. 36.) On remand this Court instructed the district court to consider the specific requests that the parties made regarding distribution of particular items of personal property. Rather than attempt to force Kim to cooperate, the district court awarded the sum of \$10,000.00 to Pam so that she could secure a vehicle. Prior to the marriage, Pam was purchasing a car from her father which she brought to the marriage. (Trial Tr. p. 78.) After the marriage, Kim wrote a check to her father for the balance left owing on the car and put the car in his name. (Trial Tr. p. 78.) The car was traded on the Toyota Camry. During the interim, Pam drove the Camry and assisted in making the payments for its purchase as well

as paid the insurance. (App. p. 23.) In order to assist Pam in the purchase of a substitute vehicle, the court awarded her \$10,000.00.

Finally, rather than try to force Kim to give to Pam's children their fishing gear, the district court awarded to Pam the sum of \$200.00 noting "further exchange or negotiation being impossible." (App. p. 281.) The district court had dealt with the parties to this action for more than two years. The district court was justified in concluding that it would be easier to award Pam a monetary sum rather than try to pry from Kim control of those few items equity required go to Pam. The Court in making in its distribution took into consideration relevant Ruff-Fischer guidelines. It adequately explained its rationale for an unequal distribution.

CONCLUSION

The district court's finding that Pam and her children were subjected to verbal, emotional and physical abuse was not clearly erroneous. The division of the marital estate was explained and supported by application of the Ruff-Fischer guidelines. This court should affirm the Amended Judgment After Remand in its entirety.

Dated this 5th day of March, 2007.

HARDY, MAUS & NORDSVEN, P.C.

By 

Mary E. Nordsven

137 1st Avenue West
P.O. Box 570
Dickinson, ND 58602-0570

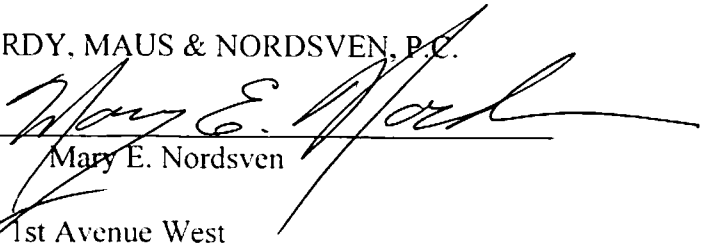
CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Plaintiff/Appellant, in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, including words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 6,665.

Dated this 5th day of March, 2007.

HARDY, MAUS & NORDSVEN, P.C.

By


Mary E. Nordsven

137 1st Avenue West
P.O. Box 570
Dickinson, ND 58602-0570

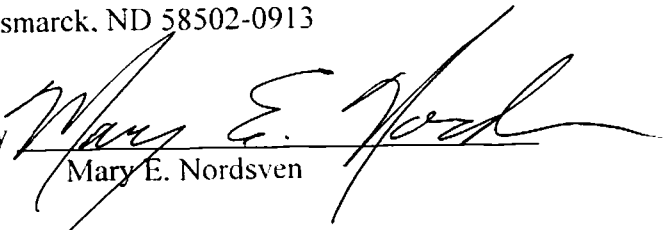
CERTIFICATE OF SERVICE

I do hereby Certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was on the 5th day of March, 2007, placed in the United States Postal Service addressed and delivered to the following:

Laroy Baird
109 4th Street, Suite 300
P.O. Box 913
Bismarck, ND 58502-0913

Bonnie L. Storbakken
109 4th Street, Suite 300
P.O. Box 913
Bismarck, ND 58502-0913

By


Mary E. Nordsven