ORIGINAL (e-filed)

STATE OF NORTH DAKOTA
IN THE SUPREME COURT
SUPREME COURT NO. 20080114

20080114

Curtis L. Sailer,
Plaintiff/Appellee,
vs.
Sandra K. Sailer,
Defendant/Appellant.

Civil No. 08-06-C-2214

APPELLANT'S BRIEF

Appeal from Court Trial on December 20 and 21, 2007,
and Judgment, Dated March 18, 2008
Before the Honorable Thomas J. Schneider

Gregory Runge
Attorney for Plaintiff/Appellee
1983 E. Capitol Avenue
Bismarck, ND 58501
(701) 222-1808
State Bar ID#04724

Kent M. Morrow
Attorney for Defendant/Appellant
411 North 4th St., PO Box 2155
Bismarck, ND 58502
(701) 255-1344
State Bar ID#03503

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STATEMENT OF FACTS

1. Curtis Sailer "Curtis" and Sandra Sailer "Sandra" were married on May 2, 1993. Prior to the marriage, Curtis had a prenuptial agreement drafted by Attorney John Olson. Sandra did not have independent counsel but relied on the advice of Mr. Olson to sign the agreement.

2. The parties had three children, K.S., M.S., and C.S.. They resided in Hazen, North Dakota. Curtis worked for Dakota Gasification and was paid a substantial retirement account. Both prior to and during the marriage, Curtis accumulated a substantial fortune. Sandra was prohibited by Curtis from acquiring any education beyond high school and only worked several part-time entry level jobs during the marriage. During most of the marriage, Sandra remained at home to care for the children.

3. Irreconcilable differences arose between the parties. Sandra separated from Curtis and moved herself and the children to Bismarck.

STATEMENT OF PROCEEDINGS

4. On November 13, 2006, Curtis filed a complaint for divorce from Sandra. Sandra filed an answer and counterclaim on December 8, 2006. An interim order was issued by the Court, the Honorable Thomas J. Schneider presiding, on December 29, 2006. The interim order ordered that interim custody of the children be awarded to Curtis.

5. A Court trial was held on December 21-23, 2007. A memorandum opinion was entered February 5, 2008, awarding custody of the children to Curtis, enforcing the prenuptial agreement, and dividing the property and debt of the parties. A judgment was entered on March 18, 2008.

6. On May 16, 2008, a Notice of Appeal was filed with the North Dakota Supreme Court.

ISSUES

7. 1. Did the trial court err in its decision to enforce the Prenuptial Agreement?

2. Did the trial court err in failing to award spousal support to Sandra?

3. Did the trial court err in its decision to award Sandra an inequitable division of the marital estate?

4. Did the trial court err when it awarded primary custody of the minor children to Curtis?

LAW AND ARGUMENT

8. 1. The Prenuptial Agreement was unconscionable and the Court's decision to enforce it was clearly erroneous.

9. The initial issue is whether Sandra voluntarily entered into the agreement and was aware of the opportunity to seek the advice of counsel other than John Olson. It is uncontested that Sandra signed the agreement on May 16, 1993, a full 16 days before the May 29, 1993, wedding. It is equally uncontested that Curtis arranged for the services of Mr. Olson and paid for those services. Sandra was on public assistance and had no money with which to secure the advice or services of an attorney. Sandra testified to going to Mr. Olson's office only once – on May 13 – while Curtis testified that there were several meetings. What is significant and telling is that Curtis had neither John Olson nor Tracy Albers, the paralegal, testify at trial to shed any objective light on the issue.

10. Even though there is a presumption (by her signature) that she was aware of the agreement's contents and had read it, there was no evidence to contradict her testimony that Curtis took care of all the details, including what paragraphs were contained in the agreement. Exhibit A (the letter from John Olson) was addressed to Curtis Sailer. It addressed changes that he had conveyed to Mr. Olson. There was no carbon copy to Sandra. It expressed concerns about the guarantee of enforceability of the agreement. Had these concerns been conveyed to Sandra, she would likely have asked additional questions. Mr. Olson then would have been obligated to make a stronger insistence that she needed independent legal advice. John Olson was quite clearly an advocate for Curtis. Sandra was looking to Mr. Olson for advice if there were major disadvantages to the agreement. The mere recitation in the agreement that she had the opportunity to seek

independent counsel begins the inquiry, not ends it. In ***Lutz v. Schneider***, 1997 ND 82, 563 N.W.2d 90, 98, the North Dakota Supreme Court stated that:

> "documentation is the best evidence . . . to document the lawyer role in the situation, attorneys can write a letter explaining their role as an advocate for this client, or require such spouse to sign a written waiver that they were advised to obtain independent counsel and expressly waived their right to do so."

11. Curtis produced no documentation to suggest either alternative was explained or addressed. In fact, the other documentation produced by Sandra seems to suggest the opposite.

12. The evidence is consistent that Sandra's signature and agreement to the prenuptial was not voluntary and informed. The agreement should not be enforced.

13. A secondary issue (if the Court determines the prenuptial agreement to be valid and enforceable), is whether Curtis knowingly waived his right to enforce its provisions. Despite the language of Paragraph 7 on page 3 to keep all of his income and earnings as his separate property, he voluntarily chose to use his money to support not only the children, but Sandra. Section 14-07-03 NDCC requires each spouse to support the other during the marriage. Waiver is defined as "to relinquish voluntarily, as in a legal right." Webster's New Collegiate Dictionary.

14. The prenuptial agreement was designed to have Curtis and Sandra be husband and wife in all areas except financial matters. Sandra testified that she was given a $100.00 monthly allowance and required to use her money to pay for anything that she needed.

However, Curtis routinely used his money to support not only Sandra but her daughter Renae. He paid for braces for Renae and Sandra. He paid for part of Renae's vocational training. He bought other things for Sandra. His actions belied the existence of the prenuptial agreement and flew in the face of its stated purpose. Curtis's voluntary and knowing waiver of this paragraph can constitute a waiver of the enforceability of the entire agreement. In addition, Curtis told Sandra that he would "support her" in the marriage. This is also evidence of the lack of voluntariness by Sandra.

15. Section 14-03.1-07, NDCC provides as follows:

> "Notwithstanding the other provisions of this chapter, if a court finds that the enforcement of a premarital agreement would be clearly unconscionable, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provisions, or limit the application of an unconscionable provision to avoid an unconscionable result."

16. This section is an additional standard for when prenuptial agreements are unconscionable that supplements the standards in Section 14-03.1-06 and together they require complete factual findings about relative property values, a spouse's other resources, and her foreseeable needs. ***Lutz v. Schneider,*** 1997 ND 82, 563 N.W.2d 90. In ***Lutz,*** the North Dakota Supreme Court reviewed a prenuptial agreement not only on the basis of procedural enforceability, but also substantive enforceability. Procedural enforceability rests on issues of voluntariness discussed above. Substantive enforceability rests on issues of "harshness and one-sidedness." Under NDCC §14-03.1-

06(3), the substantive enforceability of prenuptial agreements is a matter of law to be decided by the Court. If enforced, the agreement between Curtis and Sandra leaves Curtis with a net marital distribution in excess of $800,000.00 and Sandra with a possibility of an equitable division of the 2004 GMC Suburban and the household goods and furnishings (total value of $50,000.00 to $77,000.00).

17. "Unconscionable" has been defined as "excessible, unreasonable, and "shockingly unfair or unjust." Webster's New Collegiate Dictionary (1980). It has also been defined as "unconscionable bargain or contract is one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other." Black's Law Dictionary, Revised Fourth Edition.

18. Does the prenuptial agreement shock the Court's conscience? Sandra believes that there are many parts of it that are so one-sided that to enforce it in its entirety would be unconscionable.

19. The final issue, in determining the enforceability of the prenuptial agreement, is whether the enforceability enforcement would likely cause Sandra to seek public assistance. Section 14-03.1-06(2), NDCC. Sandra testified that, since the separation, she had received public assistance. She does not receive it currently as she held down three jobs.

20. The Court made no specific findings on Sandra's claim that to enforce the prenuptial agreement would likely cause her to seek public assistance. Without any findings, this Court cannot truly state that the trial court did consider this factor. Sandra testified that she did, at the time of trial, work three jobs to make ends meet. (Tr. p. 182, ln. 21-25; p. 183 ln. 1-5).

21. Section 14-03.1 06(2) NDCC states:

> "If a provision of a marital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility."

22. At the time of the trial. Sandra was working three jobs. She was barely making over minimum wage at each position. Prior to the marriage, Sandra acquired a two year associate degree in Applied Sciences. She and Curtis talked about her returning to school after the marriage to achieve her degree. (Tr. p. 178, ln. 8-14). After the marriage, Curtis refused to honor his agreement and refused to pay for school, as he felt it was too far to drive from Hazen to Bismarck each day. (Tr. p. 178, ln. 14-22). Her work history during the marriage was a part-time assistant in an insurance office, (Tr. p. 179, ln. 22-25), at a grocery store and Ben Franklin in Beulah. She looked into self-employment doing medical transcription but Curtis refused to pay for the training. (Tr. p. 182, ln. 1-9). Curtis`s refusal to pay for any other education doomed Sandra to a life of minimum wage jobs. All of the jobs she qualifies for are part-time. (Tr. p. 183, ln. 6-16).

23. Her child support obligation of $232.00 per month is based upon minimum wage computation or $860.05 per month, or $10,320.60 annually. Her income places her at or below the poverty level guidelines. The financial affidavit filed by Sandra in November, 2006 showed income of $573.00 per month from TANF and WIC. She was qualified for public assistance at the commencement of this action and her financial situation changed little or any during the pendency. The Court's decision to refuse to consider an award of

spousal support for Sandra, based upon Section 14-03.1 06(2), was clearly erroneous.

24. 2. The trial court erred in failing to award spousal support to Sandra.

25. Once the Court determines either that the prenuptial agreement should not be enforced, or that Sandra could receive spousal support, the Court must examine whether Sandra is eligible for spousal support, in what amount, and for what period of time.

26. A husband and wife have a mutual duty to support each other out of the individual property and labor. Section 14-07-03, NDCC.

27. Section 14-05-23, NDCC provides a statutory basis for an award of spousal support.

> "When determining whether spousal support should be awarded, the district court must apply the ***Ruff-Fischer*** guidelines, which require the court to consider the following factors: the respective age 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 conditions; 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."

Shields v. Shields, 2003 ND 16, ¶7, 656 N.W.2d 712 (quoting ***Mellum v. Mellum,*** 2000 ND 47, ¶ 15, 607 N.W.2d 580).

28. In considering the ***Ruff-Fischer*** guidelines, "[t]he district court's decision should be rationally based, but it is not required to make specific findings on each factor." ***Ingebretson***, at ¶7. ***Demers v. Demers***, 2006 ND 142, 717 N.W.2d 545, 553-554.

29. A review of all factors reveals a substantial basis for an award of spousal support to Sandra. Her earning ability is well below that of Curtis. He earns $78,000.00 per year. She makes $6.75 per hour. The marriage is a long-term one. Her conduct during the marriage was to stay home, not pursue further education or training as it would cost too much, and to care for her children. Their combined financial circumstances are considerable. If the Court enforces the agreement, Sandra will be left with little or nothing and will likely be forced to seek public assistance of some sort.

30. 3. The trial court committed reversible error when it failed to make an equitable division of the marital estate.

31. Curtis and Sandra were married on May 29, 1993. They were married until the entry of the divorce judgment on March 18, 2008, or nearly 15 years. This is generally considered by the courts to be a long-term marriage.

32. The district court is not required to make specific findings on each ***Ruff-Fischer*** factor, but must explain the rationale for its decision. ***Kostelecky***, 2006 ND 120, 13, 714 N.W.2d 845; ***Bladow***, 2003 ND 123, 7, 665 N.W.2d 724. Although the property division need not be equal to be equitable, the district court must explain any substantial disparity. ***Kostelecky***, at 13. [11] "North Dakota law does not mandate a set formula or method to determine how marital property is to be divided; rather, the division is based on the particular circumstances of each case." ***Holden***, 2007 ND 29, 10, 728 N.W.2d 312 (citing ***Ulsaker v. White***, 2006 ND 133, 14, 717 N.W.2d 567). The Supreme Court has

recognized that a long-term marriage supports an equal distribution of property. ***Holden***, at 10 (quoting 11, 725 N.W.2d 905). See also ***Wagner v. Wagner***, 2007 ND 101, 733 N.W.2d 593.

33. This Court reviews a district court's determinations regarding the distribution of property as a finding of fact, and we will not reverse unless the court's findings are clearly erroneous. ***Dvorak v. Dvorak***, 2006 ND 171, 719 N.W.2d 362. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence the reviewing court is left with a definite and firm conviction a mistake has been made." ***Kautzman v. Kautzman***, 1998 ND 192, 585 N.W.2d 561.

34. Sandra is aware that the prenuptial agreement does play a significant part in the accumulated assets of the two parties. However, even assuming that these premarital assets are excluded from the equitable division equation, the award of virtually no asset to Sandra by the Court (including the assets that Curtis agreed were specifically excluded by the prenuptial agreement and assets jointly acquired during the marriage) was clearly erroneous. The parties agreed at trial that the household goods and furnishings and the 2004 Suburban vehicle should be divided equitably. (Tr. p. 91, ln. 16-25).

35. The Suburban was valued at $26,550.00 by Curtis and $27,325.00 by Sandra. The Court did not determine a value but awarded it to Curtis. The Court seemed to "justify" its decision by awarding Sandra the 2000 Chevy Malibu LS, worth $800.00. Sandra did testify that she did not want the Suburban due to its high gas consumption, but did want an equitable division of the value of the Suburban. (Tr. p. 220, ln. 7-13).

36. The household goods and furnishings were specifically excluded, by its very terms, from the effects of the prenuptial agreement. (See paragraph 4 of May 13, 1993

Prenuptial Agreement). The agreement specifically stated, "All household goods and furnishings acquired by the parties during the period of their marriage, including replacements of existing items, shall be considered to be owned jointly between them." Curtis conceded at trial that the household goods and furnishings, including furniture, had been purchased during the marriage. (Tr. p. 91, ln. 16-25).

37. Curtis valued the household goods and furnishings at $23,500.00 and Sandra valued the same at $50,000.00. (Tr. p. 212, ln. 23-25, p. 213, ln. 1-16).

38. Despite requests by Sandra to equitably divide the household goods, furnishings and furniture, and Curtis's concession that the current items were excluded from the prenuptial agreement, the Court committed clear error by awarding all of the items to Curtis, with no corresponding or countervailing award of property or equivalent values to Sandra. The Court seems to have lumped all property together as "Curtis's assets" under Paragraph 7 of the Judgment and declined to award Sandra any assets or monetary equivalent.

39. Sandra was awarded no property under the Judgment. She simply got the few items of clothing and personal property that she took when she left the home. It is extremely incomprehensible how a reasoning Judge could consider an award of all of the assets of the parties to Curtis and none to Sandra and it be considered a reasonable and equitable division. In addition, the Court did not explain the substantial disparity. The Court also failed to discuss the ***Ruff-Fischer*** guidelines and how they impacted its decision.

40. The Court's award of property between Curtis and Sandra was clearly erroneous and should be reversed and remanded.

41. 4. The trial court erred when it awarded primary custody of the minor children to Curtis.

42. Section 14-09-06.2, NDCC provides the framework for the Court's determination of custody:

14-09-06.2. Best interests and welfare of child – Court consideration – Factors.

1. For the purposes of custody, the best interests and welfare of the child is determined by the court's consideration and evaluation of all factors affecting the best interests and welfare of the child. These factors include all of the following when applicable:

43. a. The love, affection, and other emotional ties existing between the parents and child.

44. b. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.

45. c. The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

46. d. The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.

47. e. The permanence, as a family unit, of the existing or proposed custodial home.

48. f. The moral fitness of the parents.

49. g. The mental and physical health of the parents.

50. h. The home, school, and community record of the child.

51. i. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

52. j. Evidence of domestic violence. In awarding custody or granting rights of visitation, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as a custodial parent. The court shall cite specific findings of fact to show that the custody or visitation arrangement best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary to protect the welfare of the child, custody may be awarded to a suitable third person, provided that the person would not allow access to a violent parent except as ordered by the court. If the court awards custody to a third person, the court shall give priority to the child's nearest suitable adult relative. The fact that the abused parent suffers from the effects of abuse may not be grounds for denying that parent custody. As used in this subdivision, "domestic violence" means domestic violence as defined in Section 14-07.1-01. A court may consider, but is not bound by, a finding of

domestic violence in another proceeding under Chapter 14-07.1.

53. k. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.

54. l. The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in Section 50-25.1-02.

55. m. Any other factors considered by the court to be relevant to a particular child custody dispute.

56. Even though the court appointed custody investigator, Lisa Stenehjem, recommended an award of custody to Curtis, Sandra believes that her reasoning is flawed and not supported by the facts of the marriage and the role of both parents.

57. The analysis of the "best interests" factors will concentrate solely on the ones for which Ms. Stenehjem favored Curtis.

58. a. <u>The love and affection, and other emotional ties existing between parents and children.</u>

59. Ms. Stenehjem commences the discussion by stating that each parent loves their children. She only explained the relationship from December, 2006, until the present, and gave little weight to the preceding years.

60. The testimony (at worst for Sandra) showed equal caring for the children. At best, there was considerably greater caring by Sandra than Curtis, in the children's earlier

years. The twins hate to leave Sandra when a visitation is over. Ms. Stenehjem appeared to put weight on the revelation that Curtis would come and take the kids to the doctor at Sandra's request. Sandra testified that she called Curtis only because he offered assistance.

This factor should be equal.

61. b. The capacity and disposition to give the children love, affection, guidance, and to continue the education of the children.

62. There is no evidence to support Ms. Stenehjem's favoring of Curtis on this factor. Both parents clearly have the capacity to provide these intangible gifts to the children. Ms. Stenehjem appears to imply that Curtis has a greater disposition to do so. Once again, she places greater emphasis on the "benefits" gained by C.S. in the past year. These gains are the result of being in one school on a sustained basis. Both parents are involved and concerned about C.S.'s academic progress.

This factor should be equal.

63. c. The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

64. The sole reason for favoring Curtis on this factor seems to be the amount of time spent with the children being equaled to the amount of money spent on the children. The emphasis is on financial ability to provide basic necessities. With Curtis's obvious greater income, he will naturally have more assets to provide. Once again, the focus is on the "disposition" of the parents. There is no evidence that either parent is disposed to not providing the children with the basic needs.

This factor should be equal.

65. d. The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.

66. Once again, Ms. Stenehjem equates the financial and economic situation of each parent to the providing of a stable environment. There is no evidence that Sandra's residence is in any way unsatisfactory or dangerous to the children. They all do well there and enjoy spending time with Sandra.

67. Ms. Stenehjem testified at trial that she did give greater weight to Curtis because he lived in a family home rather than an apartment. This is clearly economic bias that is unacceptable and unsupportable. Environment goes beyond the four walls of a house.

This factor should favor Sandra.

68. h. The home, school, and community record of the child.

Ms. Stenehjem cited nothing to really favor Curtis. She seems to base her favoring Curtis solely on the greater academic progress made by C.S. in the past year, even though Sandra had not yet had the opportunity to parent C.S. for a full academic year.

This factor is equal.

69. j. The existence of domestic violence.

The favoring of Curtis on this factor is puzzling and disturbing. Even though Ms. Stenehjem acknowledged awareness of the definition of "domestic violence" and that no incident by Sandra or Curtis rose to this level, she still favors Curtis because of an incident in 1994.

70. Her reasoning is flawed and clearly erroneous.

71. In fact, Sandra should be favored on this factor, due to Curtis's forced, involuntary sexual intercourse with Sandra during the marriage.

72. Sandra believes that a full and complete examination of the 13 "best interests" factors should support an award of custody to her. She is better able to promote the best interests of all the children.

73. By adopting the analysis and conclusions of the custody investigator, (see paragraph 3 of Memorandum Opinion and Order), the Court improperly ceded its decision-making authority to her. The Court failed to make any sort of analysis of the "best interests" factors under 14-9-06.2 NDCC. The Court simply adopted Ms. Stenehjem's analysis that "factors a, b, c, d, h, and j favor the plaintiff." As stated above, the lack of logic by Ms. Stenehjem in her analysis was predominant in her report.

74. Factor (a) was found to favor Curtis, despite Ms. Stenehjem's finding that both Curtis and Sandra love their children. The factor concentrates on the "love, affection and other emotional ties existing between parents and children." (Emphasis added). Ms. Stenehjem based her conclusion on "the times since they went back to Curt. . ." She claimed that Sandra had the children return home after a visit early, without any consultation with Curtis. (Tr. p. 314, ln. 1-11). Ms. Stenehjem erred when she failed, or refused, to consider any displays of love and affection between Sandra and her children before the entry of the interim order awarding interim custody to Curtis. The testimony was replete with references to the relationship between Sandra and the children, and the love displayed by both. There is no logical reason why Curtis was favored.

75. Factor (b) was again found to favor Curtis, despite Ms. Stenehjem's acknowledgment that both Curtis and Sandra have the capacity and disposition to give the children love, affection and guidance. Once there is recognition of the equal capacity and disposition by both parents, the inquiry should have ended.

76. Factor (c) was once again found to favor Curtis. Sandra was found to have the

disposition to provide the children with food, clothing, medical needs and other remedial care and other material things. This factor is to focus on a parent's disposition, and not their financial ability to provide. Ms. Stenehjem took exception to Sandra providing food that was not "home-cooked." (Tr. p. 316, ln. 7-15). For her written report, Ms. Stenehjem stated:

77. "The disposition of the parents to provide food and clothing is shared by the parents, however, since Curt has the children more often, he does provide for the majority of the children's needs."

78. Clearly, an undisguised attempt by Ms. Stenehjem to equate financial resources with disposition. This is an unacceptable basis for a finding favoring Curtis.

79. Factor (h) focused on the home, school, and community record of the children. Ms. Stenehjem favored Curtis because "C.S. made greater academic progress when he was with Curt. . ." She failed to consider any concerns or record of the children prior to the Interim Order. There was insufficient evidence to support favoring Curtis on this factor.

80. The final factor favoring Curtis was factor (j). . .i.e. the existence of domestic violence. Ms. Stenehjem focused on one incident over ten years ago. She even conceded at trial that the incident occurred before the children were born. (Tr. p. 319 ln. 17-24). She admitted candidly that there was no incident that met the definition of "domestic violence." (Tr. p. 321, ln. 14-20). Therefore, her conclusion that there was domestic violence favoring Curtis was legally unsupportable and factually incorrect. The Court's reliance on her analysis was clearly erroneous and must be reversed.

CONCLUSION

81. The trial court erred when it ruled that the prenuptial agreement was enforceable and valid.

82. The trial court erred in failing to award spousal support to Sandra.

83. The trial court erred in failing to award an equitable division of property to Sandra.

84. The trial court erred in awarding custody of the minor children to Curtis.

85. Respectfully submitted to the court.

86. Dated this 22nd day of October, 2008.

/s/ Kent M. Morrow
Kent. M. Morrow #03503
Attorney for Defendant/Appellant
411 N. 4th Street, P. O. Box 2155
Bismarck, ND 58502-2155
(701) 255-1344

CERTIFICATE OF SERVICE

87. On the 22nd day of October, 2008, copies of the **APPELLANT'S BRIEF and APPENDIX** were served upon Gregory Runge by email at the following address:

Gregory Runge
Attorney at Law
executor@btinet.net

/s/ Kent M. Morrow
Kent M. Morrow