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THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

February 17, 2009

Supreme Court No. 20080299
Civil No. 18-08-C-270

Robert Scott Pearson,
Plaintiff-Appellee,

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

v.

FEB 17 2009

Lois Elaine Pearson,
Defendant-Appellant.

STATE OF NORTH DAKOTA

Appeal from the Judgment Entered on or about the 29th day of October, 2008, by the Honorable
Lawrence E. Jahnke

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Issues Presented for Review ¶ 1

Statement of the Case..... ¶ 3

Statement of the Facts..... ¶ 5

Standard of Review..... ¶ 10

Argument ¶ 11

 I. THE DISTRICT COURT CORRECTLY APPLIED THE RUFF-FISCHER
 FACTORS TO THE CIRCUMSTANCES OF THE PARTIES..... ¶ 11

 II. THE COURT’S APPLICATION OF THE RUFF-FISCHER FACTORS
 PROPERLY RESULTED IN AN AWARD OF REHABILITATIVE
 SPOUSAL SUPPORT TO MS. PEARSON..... ¶ 24

Conclusion ¶ 33

Affidavit of Service by Mail..... 13

TABLE OF AUTHORITIES

CASES

| | |
|---|------------------|
| <u>Bader v. Bader</u> , 448 N.W.2d 187 (N.D. 1989) | ¶ 19 |
| <u>Christian v. Christian</u> , 2007 ND 196, 742 N.W.2d 819..... | ¶ 28-30 |
| <u>Gronland v. Gronland</u> , 527 N.W.2d 250..... | ¶ 31 |
| <u>Krueger v. Krueger</u> , 2008 ND 90, 748 N.W.2d 671 | ¶ 27 |
| <u>Lucy v. Lucy</u> , 456 N.W.2d 539 (N.D. 1990)..... | ¶ 10, 18 |
| <u>Marschner v. Marschner</u> , 2002 ND 67, 660 N.W.2d 196..... | ¶ 17 |
| <u>Riehl v. Riehl</u> , 1999 ND 107, 595 N.W.2d 10..... | ¶ 24 |
| <u>Rummel v. Rummel</u> , 265 N.W.2d 230 (N.D. 1978)..... | ¶ 20 |
| <u>Schoenwald v. Schoenwald</u> , 1999 ND 93, 593 N.W.3d 350..... | ¶ 10, 12 |
| <u>Sommer v. Sommer</u> , 2001 ND 191, 636 N.W.2d 423 | ¶ 12, 27-28 |
| <u>Staley v. Staley</u> , 2004 ND 195, 688 N.W.2d 182 | ¶ 11-12 |
| <u>Striefel v. Striefel</u> , 2004 ND 201, 689 N.W.2d 415..... | ¶ 13, 17, 24, 30 |
| <u>Wagner v. Wagner</u> , 2007 ND 33, 728 N.W.2d 318..... | ¶ 24 |
| <u>Wold v. Wold</u> , 2008 ND 14, 744 N.W.2d 741 | ¶ 31 |

ISSUES PRESENTED FOR REVIEW

[¶ 1] Whether the District Court correctly applied the Ruff-Fischer factors to the circumstances of the parties.

[¶ 2] Whether the District Court correctly awarded rehabilitative spousal support to Ms. Pearson.

STATEMENT OF THE CASE

[¶ 3] This divorce action commenced by the issuance of the Summons and Complaint, dated February 19, 2008, which was served on the defendant, Lois Elaine Pearson. (App. 1.) The Complaint sought divorce on the grounds of irreconcilable differences. (App. 6.) Ms. Pearson submitted an Answer denying irreconcilable differences and asked that the marriage be dissolved. (App. 9.) The matter was tried before the Honorable Lawrence E. Jahnke, on September 17, 2008. (App. 2, 56.)

[¶ 4] Judgment was filed on October 29, 2008. Id. The Judgment Nunc Pro Tunc awarded the parties an absolute decree of divorce on grounds of irreconcilable differences. (App. 71-74.) Robert Scott Pearson was ordered to pay Ms. Pearson the sum of \$1,400.00 per month rehabilitative spousal support. (App. 71.) The Judgment divided and awarded the parties' property and debts and directed that each party is responsible for his or her respective attorney fees. Ms. Pearson appealed the trial court's decision. (App. 72-73.)

STATEMENT OF THE FACTS

[¶ 5] Scott holds a four year degree which he received in the fall of 1980. (Trial Tr. 73:19-20, Sep. 17, 2008.) At that time he received a bachelor's degree in business administration. (Tr. 72:11.)

Scott and Lois Pearson were married on January 5, 1980. (Tr. 6:20.) At the time of the divorce, the parties had been married 28 years (Tr. 55:11-12), and were both 50 years old. (Tr. 32:24, 67:17-18.) During the course of their marriage, they had two children. (Tr. 7:15-16.)

[¶ 6] Lois was also able to attend college. She spend one year at Spokane Community College where she studied biology. (Tr. 70:14-17.) Then she studied biology and art at Pacific Lutheran University for two years. (Tr. 70:25-71:3.) She left school to take a year off. (Tr. 71:11-13.) After moving to North Dakota, she attended the University of North Dakota for one semester, studying elementary education. (Tr. 71:18, 22.)

[¶ 7] Mr. Pearson wanted a divorce in March 2007. (Tr. 68:22-24.) The couple separated in July 2007. (Tr. 7:2-3.) At the time of their separation, their two children were over the age of eighteen. (Tr. 7:11-16.) Mr. Pearson wants to continue to monetarily assist his daughter while she is in school. (Tr. 31:23-25.) Mr. Pearson is the Vice President of Home of Economy and makes approximately \$82,000 per year. (Tr. 19:19.) Ms. Pearson assists buyers at Home of Economy. (Tr. 46:24-25.) She has been with the company since 1989. (Tr. 77:21-24.) She makes \$13.40 per hour. (Tr. 81:1-4.)

[¶ 8] Mr. Pearson sees a chiropractor regularly and a therapist weekly. (Tr. 29:3-6.) His therapist visits are related to the divorce. (Tr. 29:14-16.) Mr. Pearson had to change his hours at work because of the divorce, so he spends more time working from home. (Tr. 47:9-13.)

[¶ 9] Ms. Pearson wants to attend college for at least two years after the divorce. (Tr. 72:17.) She would like to get a two-year degree in horticultural science, so she can

be qualified to do more greenhouse and landscape work. (Tr. 73:1-2.) Ms. Pearson is physically healthy. (Tr. 84:24-25.) However, she may have to have eye surgery in the next two years. (Tr. 85:16-22.) Since the divorce, she has also been seeing a psychiatrist. (Tr. 86:17-18.) At the divorce hearing, she specified that she had no preference but would like either spousal support or direct payment of her expenses. (Tr. 97: 8-13.) The court found that Ms. Pearson was a "disadvantaged spouse" and awarded her the sum of \$1,400.00 per month for a period of 24 months as rehabilitative spousal support.

STANDARD OF REVIEW

[¶ 10] Spousal support determinations are findings of fact, and the district court's decision on spousal support will not be set aside unless it is clearly erroneous. Schoenwald v. Schoenwald, 1999 ND 93, ¶ 6, 593 N.W.2d 350. A finding of fact is clearly erroneous "when the reviewing Court on the entire evidence is left with a **definite and firm conviction** that a mistake has been made." Lucy v. Lucy, 456 N.W.2d 539, 541 (N.D. 1990) (emphasis added).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED THE RUFF-FISCHER FACTORS TO THE CIRCUMSTANCES OF THE PARTIES.

[¶ 11] Ms. Pearson claims that the district court erred in its application of the Ruff-Fischer factors to the circumstances of the parties. However, she has the burden of proof to show that the court's determination was clearly erroneous. "A spousal support determination is a finding of fact which will not be reversed on appeal unless it is clearly erroneous." Staley v. Staley, 2004 ND 195, ¶ 7, 688 N.W.2d 182. A finding of fact is clearly erroneous "when the award is induced by an erroneous view of the law, there is no

evidence to support it, or this Court is convinced, based on the entire record, a mistake has been made." Id. Absent a finding that the spousal support award is clearly erroneous, the Supreme Court will not reverse a district court's award merely because it may have viewed the evidence differently. Id. In addition, the complaining party bears the burden of proof to show that the trial court's determination is clearly erroneous. Id.

[¶ 12] In making a spousal support determination, a district court must consider the Ruff-Fischer guidelines for both the amount and the duration of the support. Staley, 2004 ND 195, ¶ 8, 688 NW2d 182. The trial court "must consider **relevant factors** under the Ruff-Fischer guidelines." Schoenwald, 1999 ND 93, ¶ 7, 593 N.W.2d 350. The court need not make specific findings as to each factor; however, the rationale for the court's determination must be discernable. Sommer v. Sommer, 2001 ND 191, ¶ 8, 636 N.W.2d 423.

[¶ 13] Here, the district court properly considered the Ruff-Fischer factors including the respective ages of the parties, their earning abilities, the duration of the married, 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, and whether it was accumulated before or after marriage. Striefel v. Striefel, 2004 ND 201, ¶ 7, 689 N.W.2d 415. While the court did not address directly a finding of the conduct of the parties during the marriage, the court's rationale for its determination was discernable from its order.

[¶ 14] The trial court explicitly set out findings on each factor. (App. 68-70.) Both parties are 50 years old. (App. 68:23.) The parties married in 1980 and separated in 2007. (App. 68:24-25.) Under earning abilities, the court considered not only the gross salaries

of each party in 2007, but also Mr. Pearson's annual salary in 2008 and Ms. Pearson's earning capacity as described in her vocational evaluation. (App. 69:2-10.) The court stated that the conduct of the parties is a factor which is not relevant to the issues in this action. (App. 69:11-12).

[¶ 15] The court discussed the parties' station in life including Ms. Pearson's need of additional training or education. (App. 69:15-16.) In regards to the circumstances and necessities of each party, the court discussed the financial affidavits and testimony presented by both parties. It described the budget of each party as a "no frill" monthly budget of \$3,000, and listed the main post-divorce expenses of each. (App. 69:17-19.) Neither party was found to suffer from health problems; however, the court noted that both parties were seeing a psychiatrist for issues related to the divorce and that Ms. Pearson has an eye condition that is not presently debilitating. (App. 70:2-6.)

[¶ 16] The court found that the parties have a joint net worth of \$820,000. (App. 70:8-9.) Almost all, if not all, real property interest was found to have been accumulated during the marriage. (App. 70:11-14.) Ms. Pearson was also found to be a disadvantaged spouse under the court's analysis. (App. 70:22-24.)

[¶ 17] A trial court's findings of fact on these matters are presumptively correct, and the Supreme Court will review the evidence presented in the light most favorable to the findings of the trial court. Striefel, 2004 ND 201, ¶ 8, 689 N.W.2d 415. "The burden is on the complaining party to demonstrate on appeal that a trial court's finding of fact is clearly erroneous." Id. (quoting Marschner v. Marschner, 2002 ND 67, ¶ 4, 660 N.W.2d 196). The Supreme Court does not reweigh evidence or reassess the credibility of the evidence if there is evidence supporting the trial court's findings. Id.

[¶ 18] The order of the trial court demonstrates that the court adequately applied the facts of the case to the Ruff-Fischer factors. The trial court analysis of the factors and their factual findings under these factors are presumptively correct. Ms. Pearson does not provide additional information in her assessment of the Ruff-Fischer factors or evidence which demonstrates any alleged mistake. The Court cannot have a definite and firm conviction that a mistake has been made in this case. Lucy, 456 N.W.2d at 541. The trial court's rationale for its determination under each factor is clearly discernable, as presented above.

[¶ 19] While Ms. Pearson may view the evidence differently than the trial court, this does not merit a finding that the spousal support award was clearly erroneous. First, Ms. Pearson argues that the trial court refused to consider the conduct of the parties during the marriage. However, the court stated that the conduct of neither party was considered an issue in this case. Although "the conduct of the parties is a factor to be considered in ordering spousal support, *it is but one factor* and there is no requirement that the award be based on conduct alone." Bader v. Bader, 448 N.W.2d 187, 190 (N.D. 1989).

[¶ 20] Ms. Pearson claims that all the blame assessed for the break-up of the marriage is attributable to Mr. Pearson alone. (Appellant Brief 13.) When determining a divorce action on irreconcilable differences, as Mr. Pearson requested here, the court need only find that irreconcilable differences exist and is not required to go into the conduct or fault of the parties. Rummel v. Rummel, 265 N.W.2d 230, 234 (N.D. 1978). "Irreconcilable differences as grounds for divorce . . . was adopted to eliminate the public accusation of wrongdoing by the parties." Id. Specifically in property division, whether or not the

conduct of the parties is a significant factor is a matter within the sound discretion of the trial court. Id. at 235. Here, the trial court determined that the conduct of the parties was not a significant factor in the determination of property division and spousal support in this case. The court explained this by stating that “the conduct of neither party is considered by the court as an issue in this action.” (App. 69:11-12.)

[¶ 21] Second, Ms. Pearson argues that the “trial court completely ignored Lois’ testimony that she was struggling with ‘depression, anxiety and panic attacks and stubbornness.’” (Appellant Brief 14.) However, the court set out facts that both parties were receiving care from a psychiatrist. (App. 70:3-6.) Ms. Pearson did not present evidence that her mental condition would make her return to school difficult. In fact, she openly discussed her plans to attend college in Washington State, and she discussed her therapist’s recommendation that she put distance between herself and her husband. (Tr. 92:17-18.)

[¶ 22] The court noted that “neither party appears to have lingering mental health or physical problems that affect their abilities to function day to day or to continue gainful employment after divorce.” (App. 70:1-3.) Both parties see a therapist for their issues involved with this action. Mr. Pearson sees his therapist weekly. (Tr. 29:5-6.) Ms. Pearson sees her therapist monthly. (Tr. 92:21-23.) She stated that after her hospitalization in September, she returned to work the next day. (Tr. 92:8.) Her condition has not limited her functioning or ability to remain employed, even when her employment is in the same building as Mr. Pearson’s employment. The court noted that

this assistance was being provided to both parties, but did not find that either party suffered debilitating conditions. (App. 70:5-6.)

[¶ 23] Again, while Ms. Pearson may view the evidence differently than the trial court, this does not merit a finding that the spousal support award was clearly erroneous. The trial court analysis of the factors and their factual findings under these factors are presumptively correct. The order of the trial court demonstrates that the court adequately applied the facts of this case to the Ruff-Fischer factors.

II. THE COURT'S APPLICATION OF THE RUFF-FISCHER FACTORS RESULTED IN A PROPER AWARD OF REHABILITATIVE SPOUSAL SUPPORT TO MS. PEARSON.

[¶ 24] Ms. Pearson claims that the district court erred in awarding rehabilitative spousal support instead of permanent spousal support. The purpose of rehabilitative spousal support is to restore an economically disadvantaged spouse to independent status. Wagner v. Wagner, 2007 ND 33, ¶ 8, 728 N.W.2d 318. "A spouse who foregoes opportunities or loses advantages as a consequence of the marriage and who contributed during the marriage to the supporting spouse's increase earning capacity is a disadvantaged spouse." Striefel, 2004 ND 210 at ¶ 16, 689 N.W.2d 415. Rehabilitative spousal support is awarded to make up for lost opportunities for a spouse who assumed a lesser economic role in the marriage. Riehl v. Riehl, 1999 ND 107, ¶ 17, 595 N.W.2d 10. The purpose of rehabilitative support is to equalize the burdens of divorce or to restore and economically disadvantaged spouse to independent status. Striefel, 2004 ND 210 at ¶ 16, 689 N.W.2d 415.

[¶ 25] The rehabilitative support awarded by the trial court will serve its purpose in this case. The court found that Ms. Pearson “is not presently capable of self-supporting with the income she is presently capable of earning through employment.” (App. 19-21.) The two year support will provide Ms. Pearson “an opportunity to acquire an education, training, work skills, or experience to become self-supporting.” *Id.* Ms. Pearson testified that she would need two years of additional education in order to increase her income level. (Tr. 72:17.) She wants to pursue a two-year degree in horticulture science. (Tr. 73:1-2.) The rehabilitative support awarded to her will give her the opportunity to achieve independent status by obtaining her college degree.

[¶ 26] The court determined that rehabilitative spousal support for 24 months would be sufficient for Ms. Pearson to complete her vocational rehabilitation and educational efforts. (App. 71:17-19.) The court felt that she should be given the opportunity to become self-sustaining, and stated that the court will retain jurisdiction over the issue of spousal support so that review could take place. (App. 71:19, 21-23.) By retaining jurisdiction over the spousal support issue, the trial court goes beyond traditional rehabilitative spousal support. This leaves the court jurisdiction in case Ms. Pearson would suffer some unforeseen event that would require additional spousal support.

[¶ 27] The court in North Dakota has a preference for rehabilitative spousal support. *Krueger v. Krueger*, 2008 ND 90, ¶ 9, 748 N.W.2d 671. Permanent spousal support is appropriate only when the disadvantaged spouse cannot be equitably rehabilitated to make up for opportunities lost in marriage. *Sommer*, 2001 ND 191, ¶ 14,

636 N.W.2d 423. Generally, this occurs when the dependent spouse has health problems or is of an age that she is unable to rehabilitate. Id.

[¶ 28] In Christian v. Christian, 2007 ND 196, ¶ 10, 742 N.W.2d 819, the disadvantaged spouse suffered from health problems and had long absences from the workforce. Throughout the marriage, the couple had to move frequently which prevented Ms. Christian from working or returning to school. Id. These facts along with her serious health condition, an enlarged heart that created risks for blood clots, persuaded the court to grant permanent spousal support in that case. Id. In Sommer, the Supreme Court decided that permanent spousal support should have been awarded by the district court because the disadvantaged spouse could not work full-time. Sommer, 2001 ND 191, ¶ 15, 636 N.W.2d 423. She was in an automobile accident and could no longer work as many hours as she could in the past. Id. Her injuries were debilitating. Neither of the cases discussed above are factual similar to the case at hand.

[¶ 29] As stated in Christian, “each spousal support determination is fact specific.” Christian, 2007 ND 196, ¶ 13, 742 N.W.2d 819. Here, Ms. Pearson has been able to hold steady, full-time employment since 1989. (Tr. 77:21-24.) She has also resided in Grand Forks since the fall of 1980. (Tr. 73:19-20.) She did not leave her educational pursuits to get married, but to take a year off from school. (Tr. 71:8-11.) After leaving school, she has had the ability to return to school and had inquired about continuing her education during her marriage, but she chose not to do so. (Tr. 71:23-72:1.) In addition, unlike the disadvantaged spouses in Christian and Sommer, Ms. Pearson has no currently debilitating health problems which prevent her from working fulltime.

[¶ 30] The factual findings in this case support the trial court's award of rehabilitative spousal support in this action. Christian, 2007 ND 196, ¶ 13, 742 N.W.2d 819 (stating that each spousal support determination is fact specific). A trial court's findings of fact on these matters are presumptively correct, and the Supreme Court will review the evidence presented in the light most favorable to the findings of the trial court. Striefel, 2004 ND 201, ¶ 8, 689 N.W.2d 415. The trial court's specific fact findings in this case were discussed in Section I above. The decision of the court on spousal support is supported by its fact-findings, specifically that Ms. Pearson would like to pursue a two-year degree in horticulture science. This finding of fact influenced the court's decision that 24 months of spousal support is appropriate in this case because it gives Ms. Pearson the ability to rehabilitate. Again, by retaining jurisdiction over the spousal support issue, the trial court addressed the issue of whether Ms. Pearson might need additional support to complete her vocational rehabilitation and education after the 24 month period.

[¶ 31] In addition, property division and the request for spousal support are interrelated. Wold v. Wold, 2008 ND 14, ¶ 16, 744 N.W.2d 741. Generally, the Supreme Court will not view determination of property division and spousal support in a vacuum because they must be viewed together. Gronland v. Gronland, 527 N.W.2d 250, 253 (N.D. 1995). The trial court properly assessed the property division and spousal support together in this action. If the spousal support award needs to be reassessed in this case, it should be reassessed by the district court at the end of the 24 months of rehabilitative spousal support or if other modification issues arise before that time.

[¶ 32] The rehabilitative support in this case serves its purpose, and the district court did not err by denying Ms. Pearson permanent spousal support.

THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Robert Scott Pearson,

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v.

Lois Elaine Pearson,

Defendant-Appellant

Supreme Court No. 20080299
District Case No. 18-08-C-270

AFFIDAVIT OF FILING AND SERVICE BY E-MAIL

Carol Quern being first duly sworn, deposes and says that on the 17th day of February, 2009, she filed by email the attached Brief of Appellant, Table of Contents, Table of Authorities and Appendix according to the N.D. Sup. Ct. Admin. Order 14 upon:
supclerkofcourt@ndcourts.com

Carol Quern, being first duly sworn, deposes and says that on the 17th day of February, 2009, she served by email the attached Brief of Appellant, Table of Contents, Table of Authorities and Appendix as required by N.D. Sup. Ct. Admin. Order 14(D)(1), in Adobe PDF Format (document formatting and page numbering may be slightly different than Word), upon:

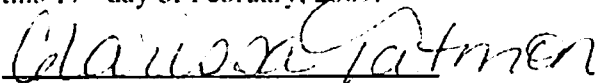
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Dated this 17th day of February, 2009.



CAROL QUERN

SUBSCRIBED AND SWORN to before me this 17th day of February, 2009.



Notary Public, State of North Dakota

