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**IN SUPREME COURT
STATE OF NORTH DAKOTA**

ROBERT SCOTT PEARSON,)
)
 Plaintiff/Appellee,)
)
 vs.)
)
 LOIS ELAINE PEARSON,)
)
 Defendant/Appellant.)

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

BRIEF OF THE DEFENDANT/APPELLANT

**APPEAL FROM THE JUDGMENT ENTERED ON OR ABOUT THE 29TH DAY OF
OCTOBER, 2008, BY THE HONORABLE LAWRENCE E. JAHNKE**

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STATEMENT OF THE ISSUES

- I. WHETHER THE DISTRICT COURT ERRED BY MISAPPLYING THE RUFF-FISCHER FACTORS TO THE PARTIES' CIRCUMSTANCES, THEREBY FAILING TO AWARD THE DEFENDANT PERMANENT SPOUSAL SUPPORT.

- II. WHETHER THE DISTRICT COURT ERRED BY NOT AWARDING PERMANENT SPOUSAL SUPPORT AFTER LOIS REQUESTED PERMANENT SPOUSAL SUPPORT AND SCOTT AGREED THAT LOIS WOULD REQUIRE LONG TERM SUPPORT.

STATEMENT OF THE CASE

This is an appeal from a judgment in a divorce case. The action was commenced by Summons and Complaint served by the Plaintiff/Appellee, Robert Scott Pearson, on the Defendant/Appellant, Lois Elaine Pearson and thereafter filed with the trial court on or about the 19th day of February, 2008. (App. 1) The Complaint sought a divorce on the grounds of irreconcilable differences. (App. 6) The matter was tried on September 17, 2008, before the Honorable Lawrence E. Jahnke, at the Grand Forks County Courthouse in Grand Forks, North Dakota. (App. 2, 56) The original Findings of Fact, Conclusions of Law & Order for Entry of Judgment – Judgment was filed on October 29, 2008. (App. 2, 56-64) Findings of Fact, Conclusions of Law & Order for Entry of Judgment Nunc Pro Tunc – Judgment Nunc Pro Tunc, was filed on November 18, 2008. (App. 65-74) The Judgment Nunc Pro Tunc awarded the parties an absolute decree of divorce on the grounds of irreconcilable differences; ordered the Plaintiff, Robert Scott Pearson, to pay the Defendant, Lois Elaine Pearson, the sum of \$1,400.00 per month as and for rehabilitative spousal support; divided and awarded the parties' property and debts; and directed each party to be responsible for his or her own attorney fees. (App. 65-74) The Defendant, Lois Elaine Pearson, appeals the trial court's decision on the basis that the evidence presented at the divorce hearing supports an award of permanent spousal support.

STATEMENT OF THE FACTS

Robert Scott Pearson (hereinafter "Scott") was born on August 31, 1958, and at the time of the divorce hearing was 50 years of age. (Tr. 32). Lois Elaine Pearson (hereinafter "Lois") was born on January 6, 1958, and at the time of the divorce hearing was 50 years of age. (Tr. 67) Scott and Lois were married on January 5, 1980. (Tr. 6, 67) The parties were married in Tacoma, Washington. (Tr. 73) The parties separated in July of 2007. (Tr. 7) At the time of the divorce hearing the parties had been married 28 years. (Tr. 55) The marriage produced two children (Tr. 7). A son, Robert, was born on August 6, 1981, and at the time of the divorce hearing was 27 years of age. (Tr. 75) A second child, daughter Christina, was born on June 23, 1988 (Tr. 75) or 1987 (Tr. 77), and at the time of the divorce hearing was either 20 or 21 years of age. Regardless of the discrepancy in the year of Christina's birth, both children were over the age of eighteen years at the time of the divorce hearing. (Tr. 7)

Scott holds a four year college bachelor's degree. (Tr. 56) Scott graduated from college in the fall of 1980. (Tr. 73) Scott's degree is in business administration. (Tr. 72) Scott also holds a pilot's license. (Tr. 57)

Lois graduated from Circle High School in Circle, Montana, in 1976. (Tr. 70) After graduating from high school Lois spent a year at Spokane Community College on a track scholarship. (Tr. 70) Her event was the mile run. (Tr. 70) While at Spokane Community College Lois studied biology. (Tr. 70) After attending Spokane Community College Lois attended Pacific Lutheran University for two years, where she studied biology and art history. (Tr. 70-71) Lois did not earn a college bachelor's degree. (Tr. 71)

After marrying Scott, Lois attended the University of North Dakota in 1981 for one semester, studying elementary education. (Tr. 71)

After the divorce, Lois would like to go back to college. (Tr. 72) Unfortunately, out of all the classes she took at Spokane Community College and Pacific Lutheran University, only her English credits will transfer toward a degree. (Tr. 72)

Lois and Scott met at Pacific Lutheran University. (Tr. 71) They moved to North Dakota before Scott graduated in the fall of 1980. (Tr. 73) Lois' family lives in Washington state. (Tr. 94) Scott and Lois left Washington and moved to North Dakota so Scott could be employed at Home of Economy. (Tr. 73) Home of Economy is Scott's family's business. (Tr. 74)

Home of Economy is a corporation retail operation with six stores located in Grand Forks, Grafton, Devils Lake, Minot, Williston, and Jamestown. (Tr. 11) In 2007 Home of Economy had assets of nearly \$15 million and gross sales of somewhere between \$25 million and \$30 million. (Tr. 39) Scott is Vice President of Home of Economy. (Tr. 12) Scott's brother, Wade, is President of Home of Economy. (Tr. 12) Scott's grandmother recently passed away. (Tr. 13). When Scott's grandmother's Home of Economy stock is finally distributed through probate, Scott expects he and his brother will own approximately 60 percent of Home of Economy, in substantially equal shares. (Tr. 41)

In his job as Vice President of Home of Economy Scott earns approximately \$82,000 per year. (Tr. 19) In 2007, in addition to his salary, Scott received a bonus of \$16,000. (Tr. 20) At the time of the divorce hearing, the year 2008 had been a very good year for Home of Economy. (Tr. 38, 39)

After completing two years of school at Pacific Lutheran College, Lois took some time off from school and worked at Commonwealth Title. (Tr. 71, 74) While at Commonwealth Title Lois posted land transactions and liens. (Tr. 74) Lois left that job to move to Grand Forks with Scott. (Tr. 73) In Grand Forks Lois worked at UND in the Department of Community Medicine from the fall of 1980 to August of 1981. (Tr. 74) While at the Department of Community Medicine, Lois worked as a reader for an instructor who was losing her eyesight. (Tr. 75)

Lois left UND to stay at home when her son, Robert, was born on August 6, 1981. (Tr. 75) Lois stayed at home and cared for Robert for two years. (Tr. 76) After caring for Robert for two years, Lois returned to work wrapping Christmas gifts at Norby's. (Tr. 76) Lois then left Norby's and went back to work at UND as a reader for the same instructor who was losing her eyesight. (Tr. 76) Lois was paid minimum wage while working at UND. (Tr. 77) Lois lost her job at UND when the instructor left the school in 1986. (Tr. 76)

Lois then stayed at home with her minor son, Robert, until her daughter, Christina, was born on June 23, 1987. (Tr. 77) Lois stayed at home with her two children for the next two years, and then went to work for Home of Economy where she was still employed at the time of the divorce hearing. (Tr. 77) When Lois started at Home of Economy she earned \$6.00 per hour. (Tr. 78) At the time of the divorce hearing Lois was running the Home of Economy greenhouse and assisting a buyer get acquainted and solve problems. (Tr. 78) At the time of the divorce hearing Lois was being paid at the rate of \$13.40 per hour. (Tr. 79) On an annual basis Lois made \$26,700 per year from Home of Economy. (Tr. 46) After the divorce is final. Lois will probably lose her job at Home of Economy. (Tr. 47, 93)

As a result of Scott's and Lois' separation, Lois is struggling with depression, anxiety, and stubbornness. (Tr. 90) Her stubbornness involves letting go of her marriage. (Tr. 90) The divorce process has been very difficult for Lois. (Tr. 90) On or about September 4, 2008, Lois took an overdose of tranquilizers and was hospitalized for five days. (Tr. 91) Lois is being treated by Dr. Bansal. (Tr. 91) Dr. Bansal has told Lois to put as many miles between her and her husband as possible. (Tr. 92) Dr. Bansal strongly suggests that Lois not return to work at Home of Economy. (Tr. 93)

Lois has had an artificial eye since she was six months old. (Tr. 85) As Lois is aging, her eye socket has been changing shape and will now probably have to be replaced within the next two years. (Tr. 85)

Scott agrees that he has a greater earning ability than Lois. (Tr. 57) Lois believes Scott's income in the future will increase. (Tr. 108) Lois stated she needed permanent spousal support in the amount of \$3,000 per month. (Tr. 108) Scott agreed with the duration of the requested support, stating, "Subject to, you know, the normal kind of considerations like marriage or cohabitation it would appear that she will need a long term support." (Tr. 55)

Lois will more than likely lose her job at Home of Economy after the divorce. (Tr. 47, 93) Therefore, Lois completed a vocational assessment with Don Ostenson. (Tr. 81) On the vocational assessment Lois was in the 21 percent for reading which means 80 percent of the people in America read better than Lois. (Tr. 128) According to the vocational assessment, after the divorce Lois can expect to be employed at a wage of no more than \$10.00 per hour. (Tr. 95). Scott's attorney stipulated to the report of Mr. Ostenson which lends to the inference that he agreed with the expert's conclusion that a

wage of \$10.00 per hour is the most that Lois can expect in the future. He presented no rebuttal to Mr. Ostenson's conclusions.

LEGAL AUTHORITY

Under N.D.C.C. § 14-05-24.1, a district court in a divorce case may require one party to pay spousal support to the other for any period of time. Wold v. Wold, 2008 ND 14, ¶ 13, 744 N.W. 2d 541, 547. The decision whether to award spousal support is a finding of fact and will not be set aside on appeal unless it is clearly erroneous. Id. (citation omitted). 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, after a review of the entire record, **we are left with a definite and firm conviction a mistake has been made.** Christian v. Christian, 2007 ND 196, ¶ 7, 742 N.W. 2d 819, 822-823 (citation omitted)(emphasis added).

Spousal support awards must be made in consideration of the requesting spouse's needs and the supporting spouse's needs and ability to pay. Wold at ¶ 13 (citation omitted). It is not necessary for the court to determine a spouse is disadvantaged by the divorce to award spousal support to that spouse. Id. (citation omitted). Rather, the court must perform analysis under the Ruff-Fischer guidelines in determining the appropriateness of awarding support. Id.

The Ruff-Fischer factors are the following:

The respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties 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 at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material.

Wold at ¶ 5.

Permanent spousal support and rehabilitative support are two distinct remedies. Wold at ¶ 14. (citation omitted). Rehabilitative spousal support is appropriate when it

is possible to restore a spouse to independent economic status or to equalize the burden of the divorce by increasing that spouse's earning capacity. Id. Permanent spousal support is generally appropriate when a spouse cannot be equitably rehabilitated to make up for the opportunities lost in the course of the marriage. Id. Even when a spouse is capable of rehabilitation, permanent spousal support may be an appropriate remedy to ensure the parties equitably share the overall reduction in their separate standards of living. Id.

Rehabilitative spousal support is preferred to give a spouse an opportunity to become self-supporting, but support may be required indefinitely to maintain a spouse who cannot be adequately restored to economic status. Gronland v. Gronland, 527 N.W. 2d 250, 253 (N.D. 1995) (citation omitted). Permanent support is not limited to a spouse who is incapable of any rehabilitation, but may be awarded to a spouse incapable of adequate rehabilitation or self-support. Id. (citation omitted). Permanent support is appropriate when the economically disadvantaged spouse cannot be equitably rehabilitated to make up for the opportunities and development she lost during the course of the marriage. Fox v. Fox, 2001 ND 88, ¶ 24, 626 N.W. 2d 660, 666 (citations omitted).

We have frequently recognized a preference for rehabilitative spousal support, rather than permanent spousal support. Krueger v. Kreuger, 2008 ND 90, ¶ 9, 748 N.W. 2d 671, 674 (citation omitted). We have acknowledged, however, when there is substantial disparity between the spouse's incomes that cannot be readily adjusted by property division or rehabilitative support, it may be appropriate for the court to award indefinite permanent support to maintain the disadvantaged spouse. Id. (citation omitted) (quotation marks omitted). A disadvantaged spouse is one who has foregone

opportunities or lost advantages as a consequence of the marriage. Ingebretson v. Ingebretson, 2005 ND 41, ¶ 14, 693 N.W. 2d 1, 6 (citation omitted). Permanent spousal support is appropriate when an economically disadvantaged spouse cannot be equitably rehabilitated to make up for opportunities lost during the course of a marriage, while rehabilitative spousal support is appropriate when it is possible to restore an economically disadvantaged spouse to independent economic status, or to equalize the burden of a divorce by increasing the disadvantaged spouse's earning capacity. Krueger at ¶ 9 (citation omitted).

Continuing a standard of living is a valid support consideration in a long-term marriage, as is balancing the burdens created by the separation when it is impossible to maintain two households at the predivorce standard of living. Id. (citation omitted).

A disadvantaged spouse is one who has foregone opportunities or lost advantages as a consequence of the marriage and who has contributed during the marriage to the supporting spouse's increased earning capacity. Hoverson v. Hoverson, 2001 ND 124, ¶ 31, 629 N.W. 2d 573, 583 (citation omitted). Any spouse who remains at home, out of the workforce, in order to maintain a marital residence and act as a homemaker has foregone opportunities and has lost advantages that accrue from work experience and employment history. Id. (citation omitted). However, a complete abandonment of work outside the home is not a prerequisite to being a disadvantaged spouse; rather, a spouse who remains out of the workforce to any degree in order to provide child care or homemaking services has foregone opportunities and has lost advantages that accrue from work experience and employment history. Sommer v. Sommer, 2001 ND 191, ¶ 11, 636 N.W. 2d 423, 428

(citation omitted)(quotation marks omitted). A valid consideration in awarding spousal support is balancing the burden created by the divorce. Hoverson at ¶ 31 (citation omitted).

ARGUMENT

- I. THE DISTRICT COURT ERRED BY MISAPPLYING THE RUFF-FISCHER FACTORS TO THE PARTIES' CIRCUMSTANCES, THEREBY FAILING TO AWARD THE DEFENDANT PERMANENT SPOUSAL SUPPORT.

The district court found that Lois was a "disadvantaged spouse" and awarded Lois the sum of \$1,400.00 per month for a period of 24 months as and for rehabilitative spousal support. (App 61). Although Lois sought a greater amount of support in this appeal, she finds no fault with either that finding or award, but argues that the decision should have included an award of permanent spousal support.

The application of the Ruff-Fischer factors to the parties situation results in the following analysis.

Age of the parties: At the time of the divorce hearing both Lois and Scott were 50 years of age. (Tr. 32, 67)

The parties earning ability: Lois worked at Home of Economy and earned about \$26,700 per year. (Tr. 46) Scott agreed that after the divorce Lois will leave Home of Economy. (Tr. 47) Lois was evaluated by Don E. Ostenson of Vocational Restoration Services, Inc., of Brooklyn Center, Minnesota. (Tr. 81) Mr. Ostenson tested Lois' job skills, evaluated the local job market, and concluded Lois would be able to find employment after the divorce earning a rate of pay of \$10.00 per hour. (Tr. 95) Based upon expected annual expenses of \$54,216, and expected annual income of \$20,800 (\$10.00 per hour), Mr. Ostenson set Lois monthly income deficit at \$2,780.67 per month. (Ex. 3) Scott is Vice President at Home of Economy, the family's business. (Tr.

12, 74) Home of Economy is a involved in retail sales with six stores in North Dakota. (Tr. 11) In 2007 Home of Economy had sales of \$25 million to \$30 million, and assets worth \$15 million. (Tr. 39) Scott will soon own 30 percent of Home of Economy, and his brother, Wade, will own another 30 percent of the company. (Tr. 41) Scott's salary from Home of Economy in 2008 was \$82,000. (Tr. 19) In 2007 Scott received, in addition to his salary, a bonus of \$16,000. (Tr. 20) In the Judgment Nunc Pro Tunc, the trial court acknowledged that Scott's annual income was \$82,000, and that Lois' expected annual income after the divorce was \$20,800, and wrote, "The gap in the parties' respective earning capacities will never be, in this court's opinion, much closer." (App. 69)

The duration of the marriage: The parties had been married for 28 years, a long term marriage by any definition. (Tr. Tr. 6, 67)

The conduct of the parties during the marriage: Scott is the one who filed for divorce, and at first Lois was opposed to the idea. (Tr. 68-69) Lois testified that their marriage failed because of the lack of time and attention that Scott was willing to give the marriage, and the attention he would give other women. (Tr. 69) Lois also testified that Scott had been assaulted by the husband of a women that Scott was too friendly with. (Tr. 69). If blame were to be assessed for the break-up of the marriage, that blame would be Scott's alone. The trial court refused to consider the conduct of the parties as an issue in the divorce. (App. 69)

The parties' station in life: Lois left her home and family in Washington State and followed Scott to North Dakota. (Tr. 73) Two children were born as a result of the marriage. (Tr. 7) Lois left the work force to stay at home and keep house for Scott and to raise their two children, and gave up educational opportunities and employment opportunities for Scott's benefit. (Tr. 75) Lois attended various colleges for three years,

but because that was so long ago virtually none of her credits will transfer toward a new degree. (Tr. 72) After the divorce Lois will lose her job at Home of Economy. (Tr. 47, 93) Without permanent financial support from Scott, Lois will never be able to maintain a standard of living even close to that she enjoyed while married to Scott.

Scott has a college degree in business administration. (Tr. 56) Scott is Vice President at Home of Economy, the family's business. (Tr. 12, 74) Scott's salary from Home of Economy in 2008 was \$82,000. (Tr. 19) In 2007 Scott received, in addition to his salary, a bonus of \$16,000. (Tr. 20) As long as Scott stays employed with Home of Economy, his future is bright and secure.

The circumstances and necessities of each party: Excluding his annual bonus of 10% of the business' net profit (a bonus totaling \$16,000.00 last year (Tr. 20)), dividends, interest income, etc., Scott earns a minimum of \$82,000.00 per year (his annual salary as of March of 2008) or \$6,833.00 per month. (App. 69). After the divorce, Lois estimates her annual income will be approximately \$20,800.00 or approximately \$1,733.33 per month. (App. 69). Lois estimates her monthly expenses will be \$3,994.00. (App. 55). Thus, considering the foregoing, the circumstances are such that an award of permanent spousal support is warranted.

Each parties' health and physical condition: Scott testified that he had no physical medical problems (Tr. 30), but that he was seeing a chiropractor "regularly" and a therapist "weekly." (Tr. 29) The trial court completely ignored Lois' testimony that she was struggling with "depression, anxiety and panic attacks and stubbornness" (Tr. 90), had attempted suicide on or about September 4, 2008, and had spent five (5) days in the hospital. (Tr. 91) Lois' mental health is fragile, will certainly impact her ability to go to school, and was not considered by the trial court.

The parties financial circumstances as shown by the property owned at the time:

At the time of the divorce, the trial court found the parties were well off with a joint net worth of approximately \$820,000. (App. 70) Lois does not disagree with this finding.

The value of the property at the time: As stated above, the trial found the parties had a joint net worth of approximately \$820,000, and Lois does not disagree with this finding.

Such property's income producing capacity: The majority of the parties wealth is their Home of Economy stock, a note from Home of Economy, and the parties residence in Manvel, North Dakota. Only the note is income producing. The note has a balance of approximately \$90,000.00 and pays 8% in annual interest on the same, payable to the Plaintiff. (App. 67)

Whether the parties' property was accumulated before or after the marriage: The vast majority of the Parties' property was accumulated during the marriage.

Any other material matters: The trial court found that Lois was not presently capable of being self-supporting. (App. 70) Lois does not disagree with this finding.

Lois argues that given the totality of the situation of the parties in light of the Ruff-Fischer factors, the trial court's decision should have included an award of permanent spousal support to Lois.

A similar fact situation was presented to the Supreme Court in Sommer v. Sommer, 2001 ND 191, 636 N.W. 2d 423. Donald Sommer and Kathleen Sommer had been married for 30 years. Id. at ¶¶ 1, 2. The evidence produced at trial indicated that Donald Sommer was 52 years old and his gross income for the years 1997, 1998, and 1999 was \$58,688.39, \$68,400.00, and \$62,368.38, respectively. Id. at ¶ 3. Kathleen

Sommer was 50 years old, worked part time, and her gross income for those same years was \$36,258.93, \$11,053.93, and \$15,537.63, respectively. Id. at ¶¶ 4, 6. Their marriage had produced three children. Id. at ¶ 2. The trial court found Kathleen Sommers to be a “disadvantaged spouse.” Id. at ¶ 11. The trial court awarded Kathleen Sommers **permanent** spousal support and Donal Sommer appealed the award. Id. at ¶ 7 (emphasis added). The Supreme Court affirmed the judgment of the trial court as to permanent spousal support, but remanded the matter to the trial court on a separate issue. Id. at ¶¶ 15, 23.

Before their divorce, Jerome Heinz and Eleanor Heinz had been married for 25 years. Heinz v. Heinz, 2001 ND 147, ¶ 2, 632 N.W.2d 443, 446. Their marriage produced two children. Id. The trial court ordered the parties' home to be sold with the net proceeds evenly divided between the parties, and Jerome's retirement account to be evenly divided between the parties. Id. at ¶ 3. Of the remaining marital property, Eleanor was awarded \$64,840.57 and Jerome was awarded \$71,683.00. Id. In addition, the trial court awarded Eleanor Heinz rehabilitative and permanent spousal support for eight years, and then **permanent** spousal support thereafter until Eleanor remarried, attained the age of 65, or either party died. Id. (emphasis added). The Supreme Court affirmed the award of spousal support but remanded the matter to the trial court on another issue. Id. at ¶ 20.

In Krueger v. Kreuger, 2008 ND 90, 748 N.W. 2d 671, the parties had been married 38 years and had two children together. Id. at ¶ 2. Albert Krueger operated a tax business with gross earnings of \$135,652.00 in 2004, \$126,867.58 in 2005, and \$114,148.00 in 2006. Id. at ¶ 3. Shirley Krueger worked part time at the tax business and earned \$970.00 per month. Id. at ¶ 2. The district court awarded Shirley spousal

support of \$1,500.00 per month for 10 years, and \$1,000.00 per month **thereafter** until she remarried or died. Id. at ¶ 5. (emphasis added). Albert appealed the award of spousal support. Id. at ¶ 1. The Supreme Court affirmed the award. Id. at ¶ 16.

Deborah and Carl Hoverson were married in 1977 and had five children. Hoverson v. Hoverson, 2001 ND 124, ¶ 2, 629 N.W. 2d 573, 577. After 20 years together, the parties separated in 1997. Id. at ¶ 4. During the marriage Carl farmed and formed a partnership. Id. at ¶¶ 2, 3. The trial court found the partnership was an ongoing business, and that Carl's share of the partnership was worth \$524,648. Id. at ¶ 6. At the time of the divorce Deborah was earning \$8.39 per hour. Id. at ¶ 4. The trial court awarded Deborah \$352,630, and awarded Carl \$469,540. Id. at ¶ 6. Deborah was also awarded \$117,000 in future cash payments to equalize the property division. Id. The trial court awarded Deborah **permanent** spousal support in the amount of \$500 per month, increasing to \$1,000 per month after Carl's child support obligation ceased. Id. (emphasis added). The Supreme Court found the trial court had not erred in awarding Deborah permanent spousal support. Id. at ¶ 33.

Linda and Larry Gronland were married in 1971. Gronland v. Gronland, 527 N.W.2d 250, 251 (N.D. 1995). Two children were born as a result of the marriage. Id. During the five years prior to the divorce hearing Larry was an independent surgical anesthesiologist and earned between \$100,000 and \$120,000 per year. Id. Linda stayed at home with the children when they were young, and at the time of the divorce hearing Linda was working on a master's degree in family therapy. Id. The trial court's division of the parties' assets satisfied the Supreme Court. Id. at 253. The trial court awarded Linda

\$2,900 per month in rehabilitative spousal support for approximately 23 months, and **permanent** spousal support in the amount of \$1,000 per month until her death, her remarriage, or until Larry started drawing social security payments. Id. at 252 (emphasis added). The Supreme Court affirmed the trial court's award stating:

The court considered both spouses' claimed expenses and earnings. The court concluded Linda would need \$2,900 per month in spousal support through December 1996 to pay her expenses while getting additional education to become partially self-supporting. However, the court also concluded that Linda would remain disadvantaged by the divorce and would be incapable of independently sustaining her standard of living. This is a proper basis for awarding permanent spousal support.

Id. at 253.

Timothy and Diane Christian were married in 1984. Christian v. Christian, 2007 ND 196, ¶ 2, 742 N.W. 2d 819, 821. At the time of the marriage Timothy worked as a cloud seeding pilot and Diane farmed with her father and worked as a waitress. Id. A daughter was born to the parties while they were residing in Alaska. Id. The parties moved back to North Dakota where Diane stayed home with their daughter and Timothy worked as an airline pilot. Id. The parties separated in August of 2004. Id. at ¶ 3. At the time of the divorce hearing Timothy was 47 years old and Diane was 48 years old. Id. at ¶ 10. Timothy earned approximately \$107,000 per year and Diane earned approximately \$25,000 per year. Id. The parties were able to agree on child custody, child support, property division, and debt allocation. Id. at ¶ 3. The parties were unable to reach an agreement on spousal support. Id. After considering the Ruff-Fischer factors, the trial court awarded Diane \$1,200 per month in **permanent** spousal support. Id. at ¶ 10 (emphasis added). The Supreme Court affirmed the award. Id. at ¶ 33.

Kirk and Kandas Wold were married in July of 1990. Wold v. Wold, 2008 ND 14, ¶ 2, 744 N.W. 2d 541, 544. Their son was born in 1991. Id. At the time they were married, Kandas was employed as a waitress and Kirk was employed as an oil field worker. Id. The parties separated in June of 2003. Id. In 1991 the parties purchased a company involved in pressure testing oil field equipment. Id. The trial court found the parties' fifteen year marriage qualified as a long-term marriage. Id. at ¶ 17. At the time of trial Kandas was working as a bank teller earning \$15,000 per year and Kirk was running the parties' business with income expectations exceeding \$200,000 per year. Id. The trial court awarded Kandas \$485,165.31, and awarded Kirk \$467,319.59. Id. at ¶ 3. The trial court also ordered Kirk to pay spousal support to Kandas in the amount of \$3,000 per month **for 20 years**. Id. (emphasis added). Kirk appealed several issues in the trial court's order including the award of spousal support. Id. at ¶ 1. The Supreme Court affirmed the trial court's award of spousal support stating:

Recognizing the income disparity, the court determined that a spousal support award to Kandas Wold of \$3,000 per month was justified to balance the economic burden created by the parties' separation.

Id. at ¶ 17.

II. THE DISTRICT COURT ERRED BY NOT AWARDING PERMANENT SPOUSAL SUPPORT AFTER LOIS REQUESTED PERMANENT SPOUSAL SUPPORT AND SCOTT AGREED THAT LOIS WOULD REQUIRE LONG TERM SUPPORT.

During the divorce hearing Lois was asked, "Are you asking that the court award you permanent spousal support?" (Tr. 108). Lois responded, "Yes, I am." (Tr. 108). Scott agreed that Lois would need permanent support. (Tr. 55) During the hearing Scott was asked, "If she is entitled to an award of spousal support do you agree it should be

permanent in nature?" (Tr. 55) Scott replied, "Subject to, you know, the normal kind of considerations like marriage or cohabitation it would appear that she will need a long term support." (Tr. 55).

A similar fact situation was presented in Ingebretson v. Ingebretson, 2005 ND 41, 693 N.W. 2d 1. Marlin and Marla Ingebretson were married in 1985. Id. at ¶ 2. At the time of the divorce hearing Marlin was 41 years old, Marla was 40 years old, and the parties had two minor children. Id. Marlin was the owner and operator of Ingebretson Air Spray, Inc., and his average monthly income for the prior five years was \$6,074 per month. Id. Marla had a degree in elementary education and had held various jobs in education and elsewhere. Id. She had stayed at home for four years to raise their children, but then had returned to the work force. Id. At the time of the divorce hearing Marla was working as a kindergarten teacher earning \$1,458 per month. Id. During the trial Marla testified that she needed spousal support in the amount of \$1,800 to \$2,000 per month **for ten years**. Id. at ¶ 4 (emphasis added). The trial court ordered Marlin to pay permanent spousal support in the amount of \$1,500 per month. Id. Marlin appealed the award of permanent spousal support. Id. at ¶ 5. The Supreme Court remanded the matter stating:

Where the evidence in the record does not support an award of permanent spousal support because the recipient testified she needed support for ten years, and the court has not articulated a reason for exceeding the duration of her request, we conclude the award of permanent spousal support was clearly erroneous. We reverse and remand for detailed findings or an amended award.

Id. at ¶ 20.

CONCLUSION

The trial court found that Lois was in need of support. Objectively applying the *Ruff-Fischer* factors to the respective economic circumstances of the parties both before and after the divorce results in the unavoidable conclusion that Lois should have been awarded permanent spousal support. An objective review of the facts in this matter leaves one ". . . with a definite and firm conviction a mistake has been made."

It is respectfully requested that this court reverse the Judgment Nunc Pro Tunc of the trial court and remand this matter back to the trial court with direction for making appropriate findings based upon the evidence admitted during trial supporting an award of permanent spousal support and award Lois the permanent spousal support that she deserves.

DATED this __ day of January, 2009.

/s/
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