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STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

Supreme Court Case No. 20090114
Morton County Case No. 30-07-C-663

Erik Isaacson, Appellant,
v.
Traci L. Isaacson Appellee.

BRIEF OF APPELLANT

APPEAL TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA FROM THE JUDGMENT OF MORTON COUNTY DISTRICT COURT DATED JANUARY 27, 2009 BY THE HONORABLE ROBERT WEFALD, JUDGE OF THE DISTRICT COURT IN MORTON COUNTY.

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STATEMENT OF THE ISSUES

1. The Trial Court, In Making Its Custody Determination, Deprived Plaintiff of His Due Process Rights and, Consequently, Erred in Awarding Custody to Traci.
    a. Standard of Review and Overview of Applicable Law.
    b. Erik's Cross-examination of Traci Was Improperly Interrupted and Shortened By The Court.
    c. The Court Improperly Advised Counsel to Forego Cross-Examination or Rebuttal Evidence on Multiple Occasions Throughout the Trial.
    d. The Court Improperly Denied Erik an Opportunity to Present Closing Argument.
2. The Trial Court's Valuation of the Marital Estate Was Clearly Erroneous.
    a. Standard of Review and Overview of Applicable Law.
    b. The Trial Court Erred by Refusing to Include Traci's Breast Augmentation in the Marital Estate.
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STATEMENT OF THE CASE

1. A. Procedural History.

2. Plaintiff Erik Isaacson ("Erik") commenced the above-captioned divorce proceeding by service of Summons and Complaint on May 1, 2007. (Appendix 3 (hereinafter "App.")). Erik's claim for relief included his request for an order awarding Erik sole legal and physical custody of the parties' three children, an equitable property distribution of the marital estate, child support in accordance with the North Dakota Child Support Guidelines, and attorney's fees. Id. A trial was initially scheduled for July 10 and 11, 2008 in Morton County District Court before the Honorable Robert Wefald. (App. 1).

3. The parties stipulated to appoint Francine Johnson as custody investigator and to continue the trial to a later scheduled date. (App. 73). The trial was subsequently rescheduled to take place on December 10 and 11, 2008.

4. Erik filed a motion for an interim order on September 3, 2008 requesting primary physical custody, child support, custody of the family dog, that a psychiatric evaluation be conducted of Defendant (hereinafter "Traci"), joint use of the family pontoon, and an order that Traci should not have members of the opposite sex present in her home. (App. 1). In response, Traci filed a competing motion for interim order. A hearing on the parties' motions for interim order was held on October 6, 2008 with the court denying both parties' motions for interim orders. (App. 2).

5. The trial was held on December 10 and 11, 2008. (App. 72). Both parties filed post-hearing briefs. (App. 2). The Memorandum Opinion, Findings of Fact,

Conclusions of Law, and Order for Judgment and Judgment were entered on January 27, 2009 and Notice of Entry of Judgment (hereinafter "Opinion") was served on January 28, 2009. (App. 2).

6. Erik filed a Notice of Appeal to the North Dakota Supreme Court and Specification of Errors with the court on March 23, 2009. (App. 2). The transcript order was received by the court reporter on April 6, 2009.

7. B. Statement of Facts

8. Erik and Traci were married on August 14, 1993. Three children were born out of their marriage: B.I. (born 1995); K.I. (born 1997); and A.I. (born 2003).

9. At trial, the court omitted various items from the property and debt listing. These items included the children's furniture, wedding rings, clothing, and Traci's breast implants. (Transcript 5-6 (hereinafter "Tr.")). In excluding the breast implants from the property and debt listing, the court stated that including them would defy common sense and that it would be impossible to equitably divide them between the parties. Id.

10. At the outset of the trial, the court advised the parties that there would be strict time limitations imposed upon them during trial. Specifically, the court stated that each party would be given half of the available time to present its case, and that they should gauge their witnesses according to that schedule. (Tr. 7). The trial began at 9 a.m. on December 10, 2008 and was scheduled to conclude at 5:00 p.m. on December 11, 2008. (App. 101).

11. During trial, Erik moved the court to require Traci to provide information regarding a trust account, the "TJK trust" which he had valued at $90,000 in the

property and debt listing. (Tr. 182-183). The court granted said motion and ordered Traci to produce information on the trust during the second day of trial. Id. Despite the court's clear directive, Traci failed to produce any documentary evidence of the value of the trust. During her direct examination, however, she testified that the trust money had been spent. (Tr. 470). Erik disputed this assertion, but the court relied upon Traci's uncorroborated testimony in valuing the trust at $0.00. (Tr. 182).

12. Throughout the trial, the court stated many times that each parties' time to present evidence was limited. At the close of day one of the trial, the court stated to Erik's attorney, Ms. Mcleod, that she knew what her "time was," and that the court knew that she had "a lot of witnesses scheduled," and she didn't have a "lot of time to do it." (Tr. 281). During day two of the trial, Ms. Mcleod, Erik's attorney, partially cross-examined Traci. During the cross-examination, the court interrupted Ms. Mcleod and stated, "Counsel, you got about five minutes left." (Tr. 524). By this statement, the court was notifying Ms. Mcleod that she had five minutes to present the rest of her evidence in the case. The court continued, "I'm just advising that because I don't know if Ms. Moore [sic] is going to call more witnesses or not, but if you need to save some time to cross-examine some future witness." (Tr. 524). Ms. Mcleod responded, "I'll do that. I will save my five minutes," to which the court responded, "I think you should do that, but that's only me talking." Id. None of the remaining three witnesses called by Traci were cross-examined by Ms. Mcleod. (Tr. 534, 545, 550).

13. Traci called Jerri Hopfauf as a witness. (Tr. 525). Hopfauf testified to three

different conflicts between Erik and his eldest daughter that she allegedly witnessed. She also testified to statements the daughter made against Erik. At the conclusion of the direct examination of Ms. Hopfauf, the court asked Ms. Mcleod, "Do you have any questions in the few minutes you have?" (Tr. 534). Ms. Mcleod replied that she did not. Id.

14. Traci called her mother, Mona Streyle, as a witness. Ms. Streyle testified at length about Traci's positive characteristics as a mother. (Tr. 537-545). At the conclusion of Streyle's direct examination, the court stated to Ms. Mcleod, "Do you want to use one of your couple minutes on any kind of cross-examination here or do you want to…" Ms. Mcleod again indicated that she did not. (Tr. 545).

15. Bobbi Trana, Traci's friend and neighbor, was the final witness called in Traci's case-in-chief. Ms. Trana testified favorably to Traci's ability as a mother. (Tr. 547-548). She also testified to seeing Erik drink and to seeing Erik leave Traci's home after what appeared to be a heated exchange. (Tr. 548-549). At the conclusion of her direct testimony, the court asked Ms. Mcleod, "Now do you want to use one of your five minutes to cross-examine this witness?" Ms. Mcleod replied that she didn't think that she did. (Tr. 550).

16. Ms. Mcleod recalled Erik as a rebuttal witness. Before he took the stand, the court stated to Ms. Mcleod that she had five minutes of time remaining. (Tr. 550). Heeding the court's admonition, Ms. Mcleod hastily examined Erik. At the conclusion of her examination, the court stated, "Man, you saved yourself a couple of minutes." (Tr. 554).

17. Ms. Mcleod also called Jill Morton, Erik's half sister, as a rebuttal witness. Ms. Morton testified regarding domestic violence allegations that Traci had made to her. (Tr. 555). The court advised Ms. Mcleod that she had two minutes to examine Ms. Morton. (Tr. 554). Ms. Mcleod hurriedly questioned Ms. Morton and Ms. Mills Moore subsequently cross-examined the witness. (Tr. 557).
18. The court concluded the trial at the close of Ms. Morton's examination. (Tr. 558). There was no discussion of conducting closing arguments. The court questioned the parties over several issues pertaining to the property distribution, and concluded the trial at 4:31 p.m. on December 11, 2008. Although the court limited the parties' time and made numerous references to this effect throughout the two day trial, he did not offer for either party to utilize the remaining twenty-nine minutes to present additional testimony or evidence.
19. The court, in its Opinion and Judgment, concluded that Traci would be awarded physical custody of the parties' minor children due to the court's finding that Erik inflicted domestic violence upon Traci (App. 102). The court also determined that Traci's interest in the TJK Trust and her breast augmentation would be omitted from consideration of the court's equitable distribution of martial assets. Id.

LAW AND ARGUMENT

20. **II. Issue 1. The Trial Court, In Making Its Custody Determination, Deprived Plaintiff of His Due Process Rights and, Consequently, Erred in Awarding Custody to Traci.**
21. A. Standard of Review and Overview of Applicable Law.

22. A claimed violation of a constitutional right is reviewed de novo. Rowley v. Cleaver, 1999 N.D. 158, ¶ 8, 598 N.W.2d 125, 127 (N.D. 1999); State v. Treis, 1999 N.D. 136, ¶ 11, 597 N.W.2d 664, 667 (N.D. 1999). Under the Fourteenth Amendment of the U.S. Constitution, no state may deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. XIV § 1. The North Dakota Constitution provides the same protection. N.D. Const. art. I, § 12. The relationship of child and parent falls under the protection of the Fourteenth Amendment, and may not be changed without due process of law. Muraskin v. Muraskin, 336 N.W.2d 332, 335 n.2 (N.D. 1983). The fundamental requirement of due process is to be heard 'at a meaningful time and in a meaningful manner.' In the Interest of D.C.S.H.C., 2007 ND 102, ¶ 11; 733 N.W.2d 902, 906 (N.D. 2007); Mathews v. Eldridge, 424 U.S. 319, 333 (1976) quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

23. B. Erik's Cross-examination of Traci Was Improperly Interrupted and Shortened By The Court.

24. Although the right to confront witnesses is not an express constitutional right in civil cases, the denial of the opportunity to cross-examine in a civil case affecting the parent-child relationship raises significant due process problems. Adoption of J.S.P.L., 532 N.W.2d 653, 660 (N.D. 1995). A party to any procedure is entitled to know what evidence is used or relied upon, and generally has a right to present rebutting evidence or to cross-examine unless such right is waived by the parties either expressly or by implication. Muraskin v. Muraskin, 336 N.W.2d at 335 n.2.

25. At the outset of the trial, the court notified the parties that trial would "finish on

time" and that each party would be allotted half of the total time available to present their cases. (Tr. 7). The court also stated at the close of day one of the trial that Attorney Mcleod had "a lot of witnesses scheduled" and notified her that she didn't have a "a lot of time to do it." (Tr. 280).

26. Ms. Mcleod's first witness, Ms. Francine Johnson, was the custody investigator that had been appointed by the court to evaluate the parties' respective suitability for purposes of a custody determination. (Tr. 8, 11-21). Despite being a court-appointed independent investigator, Ms. Johnson's testimony was counted as a part of Erik's total available time to present his case. Id. Ms. Johnson was a key witness, and was cross-examined by Attorney Mills Moore. (Tr. 34-57, 71-75). Ms. Mcleod's other primary witness was Erik, who also testified at length about the family dynamics. Erik was also cross-examined by Attorney Mills Moore. During her case-in-chief, Traci testified at length to the dynamics of family life during the marriage. Traci's testimony alleged incidences of alcohol abuse, domestic violence and argued that Erik was the aggressor in the relationship. (Tr. 437-42). Her testimony varied markedly from the testimony of both Ms. Johnson and Erik. (Tr. 11-21, 437-42).

27. Due to the court-imposed constraints, Ms. Mcleod was unable to completely cross-examine Traci. Ms. Mcleod cross-examined Traci until the court interjected during the middle of the questioning. (Tr. 524.) The court stated, "Counsel, you got about five minutes left. I'm just advising that because I don't know if Ms. Moore is going to call more witnesses or not, but if you need to save some time to cross-examine some future witnesses." (Tr. 524). Ms. Mcleod responded she

would do so, and the court continued, "I think you should do that, but that's only me talking." (Tr. 524). Consequently, Ms. Mills Moore called her next witness and Erik was deprived of his opportunity to elicit testimony from Traci that could have overcome her claim of domestic violence, which ultimately served as the basis for the court's custody determination. Moreover, the court's limitation and restrictions resulted in Ms. McLeod being unable to effectively represent Erik.

28. The court must balance judicial economy and convenience with the parties' right to present all of the evidence on all of the relevant issues. Gullickson v. Kline, 2004 ND 76, ¶ 15, 678 N.W.2d 138, 142 (N.D. 2004). Trial courts should not arbitrarily disallow testimony that is critical to the case, particularly when the only objection is a slight inconvenience to the court or to other parties. Gullickson, 2004 ND 76, ¶ 15, 678 N.W.2d 138; Ward v. Shipp, 340 N.W.2d 14, 18 (N.D.1983). This case presented exactly that consideration, as the court stated on record that the trial that he was to preside over the next day had been cancelled. (Tr. 558). Moreover, the lone objection over the length of examination was raised by the court and not the parties.

29. In this case, the court determined that the trial would run from 9 a.m. on December 10, 2008 to 5 p.m. on December 11. As this Court has stated, a trial court has broad discretion over the conduct of a trial or hearing, including limitations on the number of witnesses. Gullickson v. Kline, 2004 ND 76, ¶ 15, 678 N.W.2d 138; Selzler v. Selzler, 2001 ND 138, ¶ 10, 631 N.W.2d 564 (N.D. 2001); Slaubaugh v. Slaubaugh, 466 N.W.2d 573, 580 (N.D.1991); Ward v. Shipp, 340 N.W.2d 14, 18 (N.D.1983); Merrill Iron & Steel, Inc. v. Minn-Dak

Seeds, Ltd., 334 N.W.2d 652, 658 (N.D.1983); Fuhrman v. Fuhrman, 254 N.W.2d 97, 101 (N.D.1977). However, the court must temper that discretion in a manner that best comports with substantial justice. Gullickson 2004 ND 76, ¶ 15, 678 N.W.2d 138; Slaubaugh, 466 N.W.2d at 580; Ward, 340 N.W. 2d at 18.

30. The court in this case limited Erik's opportunity to cross-examine the opposing party, who was obviously a very crucial witness, and also interrupted his attorney during the cross-examination and suggested that the cross-examination be concluded. (Tr. 524). The court's instruction forced Ms. Mcleod to choose between continuing to cross-examine Traci or reserving her five remaining minutes to attempt to cross-examine three additional witnesses and present her rebuttal case. This conduct prevented Erik from fully rebutting the evidence offered by Traci's assertions of domestic violence that became so critical in the court's custody determination. Ms. Mcleod's assistance was rendered ineffective by the court's restrictions. When the court employs a procedure which fails to afford a party a meaningful and reasonable opportunity to present evidence on the relevant issues, the court has abused its discretion and violated the party's due process rights. Gullickson, 2004 ND 76, ¶ 16, 678 N.W.2d 138. Here, the trial court erred and violated Erik's due process rights by strictly adhering to the schedule it had set at the expense of depriving Erik of a full cross-examination of Traci. The court's arbitrary allegiance to judicial economy was particularly harmful when considered in light of the impact of the court's time limitation on the remainder of the trial.

31. C. The Court Advised Counsel to Forego Cross-Examination and Rebuttal

Evidence on Multiple Occasions.

32. None of the remaining three witnesses called by Traci were cross-examined by Ms. Mcleod, which was a product of the court imposed limitations and restrictions upon Erik to present his case. (Tr. 534, 545, 550). Jerri Hopfauf, Traci's friend, testified to three different conflicts that she allegedly witnessed between Erik and his eldest daughter, and testified to things the daughter had told her. Mona Streyle, Traci's mother testified at length about Traci's positive characteristics as a mother. (Tr. 537-545). Bobbi Trana, Traci's friend and neighbor testified to seeing Erik drink and to seeing Erik leave Traci's home after what appeared to be a heated exchange. (Tr. 548-549).

33. At the conclusion of the direct examination of these witnesses, the court asked Ms. Mcleod, "Do you have any questions in the few minutes you have," "Do you want to use one of your couple minutes on any kind of cross-examination here or do you want to-," and "Now do you want to use one of your five minutes to cross-examine this witness?" respectively. (Tr. 534, 545, 550). Ms. Mcleod replied each time that she did not. The court, however, should not have imposed such a limitation and these limitations were prejudicial to Erik.

34. After Ms. Trana testified, Ms. Mills Moore indicated that she rested her case. Ms. Mcleod recalled Erik as a rebuttal witness, and before he took the stand, the court stated to Ms. Mcleod that she had five minutes of time remaining. (Tr. 550). Ms. Mcleod quickly examined Erik. At the conclusion of her examination, the court stated, "Man, you saved yourself a couple of minutes." (Tr. 554).

35. Ms. Mcleod subsequently called Jill Morton, Erik's half sister. The court

restricted Ms. Mcleod's examination of Ms. Morton to two minutes. (Tr. 554). Ms. Mills Moore was allowed to cross-examine the witness, and commented to the court that she had "34 minutes worth" of cross-examination, presumably a reference to the amount of time she had remaining to present her case. (Tr. 557). This comment illustrated the inequitable effect of the court's time limitation on the trial to Erik's detriment.

36. This case is analogous to Gullickson. In Gullickson, the court, after examining the record as a whole, determined that the procedures used by the trial court deprived defendant of a full and fair hearing and violated his right to due process. Gullickson, 2004 ND 76, ¶ 22, 678 N.W.2d 138. In that case, the court pointed to the defendant's inability to fully cross-examine witnesses as one of the fundamental procedural flaws in the hearing. Gullickson, 2004 ND 76, ¶ 17, 678 N.W.2d 138. In the case at hand, the Judge's unreasonable time constraints placed upon Erik and Ms. Mcleod prevented any cross-examination of three of the witnesses. (Tr. 534, 545, 550).

37. The court in Gullickson was also concerned with the abbreviated nature of the hearing and the court cited the fact that during defendant's testimony, the trial court interrupted defendant's counsel and cut short the hearing. Gullickson, 2004 ND 76, ¶ 14, 678 N.W.2d 138. The counsel in that case was cut short in his examination, and had to summarize the testimony that would have been offered by his additional witness as an offer of proof. Id. The court expressed its concern that by eliminating the live testimony, there was no opportunity for the court to assess the credibility of the witnesses or examine factual disputes. Gullickson,

2004 ND 76, ¶ 17, 678 N.W.2d 138.

38. Similarly, in this case, Ms. Mcleod was interrupted by the court in the middle of her cross-examination of Traci. (Tr. 524). The court suggested that she stop cross-examining Traci and ration the five minutes of time she had remaining to present her case across three additional defense witnesses and any rebuttal witnesses she would choose to call. Id. Obviously, without knowing what the subsequent witnesses would say, Ms. Mcleod was forced into making a decision to cut short Traci's cross-examination and to reserve time for cross-examination of the additional witnesses. The result was that Erik, through Ms. Mcleod, did not have a meaningful opportunity to cross-examine the next three witnesses or to effectively cross-examine Traci. (Tr. 534, 545, 550). Like the defendant in Gullickson, the court's time constraint in this case had the effect of preventing cross-examination, which prevented the court from adequately examining the credibility of four of Traci's witnesses and prevented Erik from raising significant factual disputes with their testimony. Furthermore, in Gullickson, the defendant submitted an offer of proof. Gullickson, 2004 ND 76, ¶ 14, 678 N.W.2d 138. In this case, Erik was given no opportunity to put any additional testimony on the record.

39. Erik's inability to submit additional evidence to rebut Traci's assertions was particularly damaging considering the weight that North Dakota law gives to domestic violence allegations in custody determinations. See N.D. Cent. Code § 14-09-06.2 (j) (creating a presumption against awarding custody to a parent who the court finds has committed domestic violence). The alleged evidence of

domestic violence was essentially the determining factor in the case at hand. (App. 74). By the time Traci offered her testimony alleging incidents of domestic violence, Erik had only five minutes remaining to argue his case. Due to the court's time limit, Erik was denied a crucial opportunity to attack the credibility of Traci's testimony and the testimony of the witnesses that followed.

40. As a result, Erik, like the defendant in Gullickson, was denied due process by the court's time constraints as well as by the court's interruption of Ms. Mcleod's examination. In short, Erik was denied a full and meaningful hearing in this case. Therefore, this court should hold that the trial court's conduct, when viewed as a whole, violated Erik's due process right to a full and fair hearing, and that this case should be remanded for a new trial.

3. D. The Court Improperly Denied Erik an Opportunity to Present Closing Argument.

41. The United States Supreme Court has held that it is reversible error, because it is a denial of the constitutional right to be represented by counsel, to deny an attorney for a party in a criminal case the opportunity to make a closing argument. Herring v. New York, 422 U.S. 853 (1975). In North Dakota, this reasoning has been extended to civil nonjury proceedings, and litigants in civil nonjury cases have a right to have their attorneys make a final argument. Fuhrman v. Fuhrman, 254 N.W.2d 97, 101 (N.D. 1977). This right may be limited as to time and as to content so as to preclude improper argument, but it cannot be totally denied. Id. The court reasoned, citing Herring v. New York, that there are cases where a closing argument may correct a premature misjudgment and avoid an otherwise

erroneous verdict. Fuhrman, 254 N.W.2d at 102, citing Herring v. New York, 422 U.S. at 863 (1975).

42. The case at hand is analogous to Fuhrman. In Fuhrman, the parties were engaged in a divorce trial, where both custody and property division were at issue. Fuhrman, 254 N.W.2d at 101. After both parties in that case rested, the trial judge stated, "Well, I am going to dispose of argument because I have sat through this case, and I don't think there is any point in your rehashing the evidence, which I think is as clear to me as it needs to be." Id. Therefore, the parties did not present closing arguments. Id. Similarly, in the case at hand, the court concluded the trial immediately following Ms. Mills Moore's cross-examination of Jill Morton without allowing the attorneys the opportunity to present closing arguments. (Tr. 558). Like the court in Fuhrman, the court at issue stated, "I think I understand most of this. I've got it all down." (Tr. 558).

43. In Fuhrman, the court pointed out that there was no opportunity for a closing argument nor did the litigants waive the opportunity for final argument. Fuhrman, 254 N.W.2d at 101. In the case at hand, there is no evidence of either party waiving presentation of closing arguments on the record, but the parties were permitted to submit post-trial briefs. (App. 30). However, the court indicated on the record that it would be drafting its opinion before the parties' submitted the briefs. (Tr. 566). Therefore, the post-trial briefs were inconsequential and did not constitute a substitution for the parties' opportunity to present closing arguments.

44. The Fuhrman court reasoned that closing argument may be even more important in bench trials than in jury trials since a judge reaches his decision without the

"stimulation of opposing viewpoints inherent in the collegial decision-making process of a jury." Fuhrman, 254 N.W.2d at 102; quoting Herring, 422 U.S. at 863. Because the parties in the case at hand were denied an opportunity to present closing arguments, the Fuhrman court's reasoning applies, and the court should hold here, as it did in Fuhrman, that this case must be reversed and remanded for additional testimony and presentation of closing arguments.

45. **III. Issue 2. The Trial Court's Distribution of the Marital Estate was Clearly Erroneous.**

46. A. Standard of Review and Overview of Applicable Law.

47. In order to reverse the trial court's findings of fact regarding the valuation and distribution of marital property, the Supreme Court must find that the trial court's determinations on valuation and division of martial property are clearly erroneous. Zuger v. Zuger, 1997 ND 97, ¶ 6, 563 N.W.2d 804, 806 (N.D. 1997); Blotske v. Leidholm, 487 N.W.2d 607, 610 (N.D. 1992); N.D.R.Civ.P. 52(a). 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 the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made. Zuger, 1997 ND 97, ¶ 6, 563 N.W.2d 804; Blotske, 487 N.W.2d at 610. The trial court's findings of fact are presumptively correct, and the complaining party bears the burden of demonstrating on appeal that a finding of fact is clearly erroneous. Id.

48. Section 14-05-24 of the North Dakota Century Code governs the distribution of marital assets and debts and requires the court to make an equitable distribution of

the marital estate. In order to make an equitable distribution under this section, the trial court must include all of the parties' assets, regardless of source, in the marital estate. Id. A spouse need not make a direct contribution to the acquisition of an asset for it to be included in the marital estate. Zuger, 1997 ND 97, ¶ 8, 563 N.W.2d 804. An asset accumulated after the spouses have separated, but while the marriage still exists, is includable in the martial estate. Id.

49. A. The Trial Court Erred by Refusing to Include Traci's Breast Augmentation in the Marital Estate.

50. At the outset of trial, the court indicated that it would not consider Traci's breast augmentation to be a marital asset and stated it would not remain on the property and debt listing. (Tr. 5). The court voiced its confusion over how it would be expected to evenly distribute such an item, and ordered that the item was stricken from the debt and property listing. Id. Accordingly, the record indicates that Traci benefited from a breast augmentation; however, the court denied Erik the opportunity to present evidence regarding its value. Id.

51. Although this is an issue of first impression in North Dakota, courts in various other states have held that cosmetic surgeries benefiting one of the parties can be included as a marital debt or asset and distributed in the division of a marital estate. For example, the Supreme Court of Hawaii held that if cosmetic surgery was not considered a reasonably necessary marital expense, then the court should include the cost of the cosmetic surgery as a marital asset and charge the wife with having received that money. Okada v. Okada 137 P.3d 386 (Haw. 2006). Furthermore, an unpublished Delaware case included costs of cosmetic surgery as

a marital debt to be divided between the parties. K.S.B v. J.F.B., 2008 WL 1947871 (Del. Fam. Ct.) (unpublished).

52. In Morgan v. Morgan, a Kentucky case, a husband spent over $140,000 on various items and services, including cosmetic surgery, in an effort to dissipate marital funds during the period of time between the parties' separation and divorce. Morgan v. Morgan, 2007 WL 2812600 (Ky. App.) (unreported). The court in that case held that the various expenditures, including the cosmetic surgery, were spent in an effort to dissipate marital funds and therefore included them in the marital estate. Id.

53. The same reasoning applies in this case. Traci underwent cosmetic surgery during the marriage, as evidenced by the inclusion of the breast augmentation in the debt and property listing. (App. 27). Consistent with the reasoning in Morgan, the trial court's exclusion of this asset effectively allowed Traci to expend marital assets on property she would keep after the divorce, yet escape receiving any financial detriment for the asset in the division of the marital estate. To appreciate the unfairness and erroneous nature of the court's decision, please consider that any money that the couple spent on various purchases of assets that were awarded to Erik were credited to him and subsequently counted against him in the distribution of marital assets. (App. 23-30). To allow Traci to have a surgery purely for cosmetic purposes and to refuse to include it as a marital asset is clearly erroneous. Moreover, the court provided no basis for determining that the breast augmentation was not a marital asset. (Tr. 5-6). Therefore, this court should hold, as the court in Morgan, that a breast augmentation should be

considered a marital asset properly credited to Traci and factored it into the equitable distribution of marital assets. Therefore, this case should be remanded for the taking of further evidence in this regard so that the distribution of the estate can be properly adjusted, and the breast augmentation counted as Traci's asset.

54. B. The Trial Court Erred by Failing to Require Traci to Comply with its Order to Produce Information Regarding The Value of Her Trust.

55. The North Dakota Supreme Court has held that in order to make an equitable distribution, the trial court must first determine the net worth of the property owned by the parties. Graves v. Graves, 340 N.W.2d 903, 906 (N.D.1983). There is no requirement that the trial court place a value on the individual items making up the net worth of the parties; but when the trial court does act to set such values, there should be evidence in the record supporting the value placed upon the property. Svetenko v. Svetenko, 306 N.W.2d 607, 610 (N.D. 1981).

56. Erik argued to the court that Traci had a trust fund, the TJK Trust, which was valued at $90,000. (Tr. 182). Erik included the trust in the property and debt listing. (App. 25). Traci argued that the asset was not a trust, but rather a limited partnership ownership and was a gift. (Tr. 183). Ms. Mills Moore stated Traci would be making an argument to exclude the trust from the marital estate. Id. Additionally, Erik noted that several times prior to trial, he had asked Traci to provide documentation regarding the trust. (Tr. 182-183). Therefore, Erik made a motion and the court ordered that Traci produce evidence regarding the value of the trust. (Tr. 183). The court even acknowledged and referenced Zuger at the

time of issuing its order on the basic premise that trust assets, though received by one party, are included in the marital estate.

57. Despite the court's clear and unambiguous order, Traci failed to supply the court with the information it had ordered to present regarding the trust. Despite its order and Traci's non-compliance, the court ultimately held that the trust had no value. (App. 91). This finding was based on Traci's uncorroborated testimony of the trust's value. (Tr. 470).

58. Because the trial court placed a value on individual items making up the net worth of the parties, the court was required to set that value based on evidence in the record supporting the value. Svetenko, 306 N.W.2d at 610. The court's disregard of its own order requiring Traci to produce evidence of the value of the trust and the court's reliance on Traci's testimony alone is clearly erroneous. By ordering Traci to produce evidence of the trust's value, the court acknowledged that more information was required to make a final judgment as to the value. Therefore, this court should remand the case to the trial court with the requirement that corroborating evidence of the trust's value be provided to the court.

CONCLUSION

59. The trial court made an improper custody determination based upon the court's unilateral decision to impose a restrictive time limit on Plaintiff's case. The court's denial of adequate time to cross-examine witnesses, present rebuttal evidence, and conduct closing argument deprived Erik of a full hearing and opportunity to properly present his case. This procedure denied Erik a full and fair

hearing on the custody determination and violated his due process rights under the Fourteenth Amendment.

60. In addition, the court's distribution of the marital estate was clearly erroneous. The court improperly excluded Traci's breast augmentation from the marital assets and failed to provide any legal or factual reasoning for excluding them from the valuation of the marital estate.

61. Finally, the court erred by failing to require Traci to comply with its order to produce evidence of the value of the TJK trust. The court's determination that the trust had no value was not based on sufficient evidence and was clearly erroneous.

62. For the foregoing reasons, this court should remand this case to the trial court for a new trial regarding the custody determination and reopen the case to allow additional evidence regarding the trust account and the inclusion of the breast augmentation in the equitable division of the marital estate.

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Dated this 23rd day of September, 2009.

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CERTIFICATE OF SERVICE

63. I HEREBY CERTIFY that on September 23, 2009 a true and correct copy of the foregoing **Brief of Appellant** has been furnished electronically by email and **Appendix** has been also furnished electronically by email to:

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