

STATE OF NORTH DAKOTA
Supreme Court Case No. 20090114
Morton County Case No. 30-07-C-663

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STATE OF NORTH DAKOTA

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

REPLY 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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TABLE OF CONTENTS

	<u>Paragraph Nos.</u>
TABLE OF AUTHORITIES	Page 3
STATEMENT OF THE ISSUES	1
LAW AND ARGUMENT	3
ISSUES:	
I. THE TRIAL COURT’S CONDUCT IN ADMINISTERING THE TRIAL WAS PLAIN ERROR, AND IS PROPERLY APPEALABLE.	3
II. THE TRIAL COURT’S VALUATION OF ITEMS IN THE MARITAL ESTATE LACKED AN EVIDENTIARY BASIS, AND THEREFORE FAILED TO COMPLY WITH APPLICABLE LAW.....	19
CONCLUSION.....	31
CERTIFICATE OF SERVICE	34

TABLE OF AUTHORITIES

Paragraph Nos.

STATE STATUTES

N.D. Cent. Code § 14-05-2421, 30

STATE REGULATIONS

N.D.R. Evidence 103(d).....4

FEDERAL CASES

Santosky v. Kramer, 455 U.S. 745, 753 (1982).....7
Meyer v. Nebraska, 262 U.S. 390, 399 (1923)7
Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).....7
May v. Anderson, 345 U.S. 528, 533 (1953).....7

STATE CASES

Adoption of J.S.P.L., 532 N.W.2d 653, 660 (N.D. 1995).....17
Blotske v. Leidholm, 487 N.W.2d 607 (N.D. 1992).....30
Gullickson v. Kline, 2004 ND 76, 678 N.W.2d 138 (N.D. 2004)12, 18
Hoff v. Berg, 1999 N.D. 115, 595 N.W.2d 285 (N.D. 1999)7
In re L.F., 1998 ND 129, 580 N.W.2d 573 (1998)7
Kleingartner v. D.P.A.B., 310 N.W.2d 575 (N.D.1981).....7
Muraskin v. Muraskin, 336 N.W.2d 332 (N.D. 1983).....8
Niemann v. Niemann, 2008 ND 54, 746 N.W.2d 03 (N.D. 2008)10
Slaubaugh v. Slaubaugh, 466 N.W.2d 573, 580 (N.D.1991).....18
State v. Olander, 1998 ND 50, 575 N.W.2d 658 (N.D. 1998).....5
State v. Schmidtkunz, 2006 ND 92, 721 N.W.2d 387 (N.D. 2006).....5, 30
Svetenko v. Svetenko, 306 N.W.2d 607 (N.D. 1981).....21
Thompson v. Olson, 2006 ND 54, 711 N.W.2d 226 (N.D. 2006)16
Adoption of J.S.P.L., 532 N.W.2d 653 (N.D. 1995).....17
Ward v. Shipp, 340 N.W.2d 14, 18 (N.D.1983)12
Zuger v. Zuger, 1997 ND 97, 563 N.W.2d 804 (N.D. 1997).....30

STATEMENT OF THE ISSUES:

1. THE TRIAL COURT'S CONDUCT IN ADMINISTERING THE TRIAL WAS PLAIN ERROR, AND IS PROPERLY APPEALABLE.
2. THE TRIAL COURT'S VALUATION OF ITEMS IN THE MARITAL ESTATE LACKED AN EVIDENTIARY BASIS, AND THEREFORE FAILED TO COMPLY WITH APPLICABLE LAW.

ISSUES

3. **I. THE TRIAL COURT’S CONDUCT IN ADMINISTERING THE TRIAL WAS PLAIN ERROR, AND IS PROPERLY APPEALABLE.**

4. The Appellee, Traci L. Isaacson, contends that Appellant, Erik Isaacson, may not complain of error on appeal if the issue was not presented to the trial court through an objection. (Appellee’s Brief, ¶ 31). However, the evidentiary rules permit the court to take notice of errors affecting substantial rights of the parties, although they were not brought to the attention of the trial court. N.D.R. Evidence 103(d).

5. The Supreme Court may notice a claimed error that was not brought to the trial court's attention if there was “(1) error, (2) that is plain, and (3) affects substantial rights.” State v. Schmidtkunz, 2006 ND 92, ¶ 6, 721 N.W.2d 387, 390-91 quoting State v. Olander, 1998 ND 50, ¶¶ 13-14, 575 N.W.2d 658. Once a forfeited plain error affecting substantial rights is established, the Supreme Court has discretion to correct the error, and should correct the error where it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id. at ¶ 16.

6. **A. Preservation Of The Parent-Child Relationship Is A Substantial Right.**

7. North Dakota has recognized that natural parents have a fundamental liberty interest in the care, custody, and management of their children. Hoff v. Berg, 1999 N.D. 115, ¶ 8, 595 N.W.2d 285, 288, citing Santosky v. Kramer, 455 U.S. 745, 753 (1982). The rights to conceive and to raise one's children have been deemed “essential,” “basic civil rights of man,” “[r]ights far more precious ... than property rights.” Id. citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923), Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and May v. Anderson, 345 U.S. 528, 533

(1953). Parents have a fundamental, natural right to their children which is of constitutional dimension. In re L.F., 1998 ND 129, ¶ 9, 580 N.W.2d 573; Kleingartner v. D.P.A.B., 310 N.W.2d 575, 578 (N.D.1981).

8. The relationship of child and parent is protected by 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). Therefore, this Court should correct the trial court's due process violations that affected Erik's constitutional right to the care and custody of his children.

9. **B. The Court's Manner Of Conducting The Trial Was Error That Directly Affected Erik's Right To Parenting Time With His Children.**

10. Traci relies upon Niemann v. Niemann, 2008 ND 54, 746 N.W.2d 03 (N.D. 2008), as controlling on the issue of whether the trial court properly limited Erik's time to present his case at trial. (Appellee's Brief, ¶ 18). Although the Supreme Court held in Niemann that the trial court did not abuse its discretion by limiting the time allowed for the proceeding, the holding in that case was specific to the facts presented and is distinguishable from the case at hand. 2008 ND 54, ¶ 20. It qualified the court-imposed time limitation upon the parties by noting that the parties submitted numerous affidavits and stipulations before the hearing, that those affidavits were part of the record, and that the number of affidavits and stipulations were limitless. Id. Additionally, the Supreme Court held that the trial court could receive additional evidence and allow additional time on remand. Id.

11. Erik's objection to the trial court's improper limitations is not based solely on the imposition of a time limit on the trial. Rather, on multiple occasions, the trial court improperly interjected into Erik's examination of witnesses and suggested that Erik

preserve his minimal remaining time to cross-examine Traci's additional witnesses. (Transcript 524, 534, 545 (hereinafter "Tr.")). Erik, being a litigant and inferior to the court, was not in a position to object to the judge's persistent pressure and time limitations because doing so could have irritated the judge and adversely affected the outcome of the trial.

12. This Court maintains that trial courts should not arbitrarily disallow critical testimony, 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). Here, the transcript reflects the court's own acknowledgment that the trial that was scheduled for the following day had 'gone away,' affording the court ample time to allow the parties additional time to examine witnesses. (Tr. 558). In light of this admission by the judge, when it became apparent to the trial court that Erik had effectively exhausted his time, the court should have exercised its discretion and granted him additional time to completely examine the remaining witnesses. Instead, the court arbitrarily, and to Erik's detriment, denied Erik the right to conduct cross-examination of Traci's witnesses.

13. The court's decision to adhere to its arbitrary time limit allowed Traci to present essentially uncontested testimony pertaining directly to the best interest factors that the court ultimately held favored Traci, particularly the domestic violence allegations. (App. 74-77). This is particularly troublesome considering the due process protections afforded litigants involved in civil disputes affecting the parent-child relationship.

14. In arguing that the court's allocation of equal time to both parties is fair, Traci ignores the fact that she planned her presentation of witnesses with the benefit of

having seen and heard all of Erik's evidence. Conversely, Erik was at a natural disadvantage as he could not anticipate Traci's evidence and be expected to accurately budget time based on his forecast of the case she would present.

15. Additionally, the trial court's unwavering allegiance to a strict stopwatch system ignores the realities of conducting a trial. Trials are unpredictable, and should not be subject to inflexible allocations of time.

16. Traci also erroneously contends that Thompson v. Olson, 2006 ND 54, 711 N.W.2d 226 (N.D. 2006) is analogous and dispositive of Erik's argument. The Thompson court based its holding, in part, on the party's failure to make an offer of proof as to evidence he would have presented through additional witnesses. Id. at ¶7. Unlike the Thompson case, the trial court in the instant case erred by restricting Erik's right to conduct cross-examination, not his ability to call additional witnesses.

17. This difference is significant in light of the Court's holding that a 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). The trial court's strict adherence to the time limits and constant reminders to Erik of his limited time impinged his opportunity to cross-examine witnesses which was violative of his due process rights. Accordingly, this matter should be remanded.

18. The trial court must temper its broad discretion in trial management in a manner that best comports with substantial justice. Gullickson v. Kline, 2004 ND 76, ¶ 15, 678 N.W.2d 138; Slaubaugh v. Slaubaugh, 466 N.W.2d 573, 580 (N.D.1991). Here, the trial court failed to do so. There is no justification, considering the facts of this

case, and the rights affected, for the court to administer the trial in a buzzer-beater fashion. Although courts must consider scheduling and management of their dockets, they must also guard against due process violations when a parent's rights to his children are at stake. The trial court's actions here are especially prejudicial when, due to an opening in the court's schedule, the trial court could have easily afforded Erik additional time to present his case.

19. **II. THE TRIAL COURT'S VALUATION OF ITEMS IN THE MARITAL ESTATE LACKED AN EVIDENTIARY BASIS, AND THEREFORE FAILED TO COMPLY WITH APPLICABLE LAW.**

20. Traci claims that Erik should have objected to the court's finding that 1) the TJK trust had no value and 2) Traci's breast augmentation should be excluded from the marital estate. (Appellee's Brief, ¶ 51-52). Because Erik didn't object, Traci claims he cannot raise these issues on appeal.

21. The trial court is required by section 14-05-24 of the North Dakota Century Code to include all of the parties' assets, regardless of source, in the equitable distribution of a marital estate. In equitably distributing marital assets, the trial court's determination must be based on evidence supporting the values. Svetenko v. Svetenko, 306 N.W.2d 607, 610 (N.D. 1981).

22. **A. The Court Valued The Trust Without Evidence That It Ordered To Be Produced.**

23. Traci admits that the court is obligated to value the property in the marital estate. (Appellee's Brief, ¶ 53). The court acknowledged that it lacked sufficient evidence to value the TJK trust by ordering Traci to produce information regarding its value. (Tr. 183). Erik had no duty to presume that the court would not abide by its own order and would make a determination of the trust's value without a sufficient evidentiary

basis. Furthermore, the court's valuation of the trust at zero dollars was not apparent until after trial, when the court's decision was issued. (App. 91).

24. In addition, the court's valuation of the trust at zero dollars was clearly erroneous. In doing so, the court relied upon Traci's obviously biased testimony and Exhibit 114. Traci's testimony was not corroborated by any other evidence and Exhibit 114 does not prove anything, much less that she spend the trust funds. Therefore, the court's determination was clearly erroneous and an abuse of discretion that should be reversed and remanded.

25. B. The Court's Exclusion Of Traci's Cosmetic Surgery Had No Factual Basis And Was Plain Error.

26. Similarly, the court excluded Traci's breast augmentation from the marital estate absent evidentiary and legal authority. (Tr. 5-6). There is a legitimate question as to whether Traci's cosmetic surgery, paid for during the marriage, but benefitting and remaining with Traci upon divorce, is an asset that should be counted in the distribution of the marital estate. While the particular surgery at issue may seem awkward to discuss, other jurisdictions, cited in Appellant's brief, have seen the merit of this particular argument and have held that such elective surgeries are properly counted in the marital estate. (Appellant's Brief, ¶¶ 51-53).

27. The trial court cited its disgust at counting a breast augmentation in a marital estate as the basis for summarily excluding it from the equitable division. (Tr. 6). Traci raises the same argument in her brief. (Appellee's Brief, ¶ 40). However, neither Traci nor the trial court cited any legal authority for their position. This is a legitimate question of first impression for this Court to consider.

28. This Court should rule that cosmetic surgery benefitting one party and assumed

by that party after divorce is a marital asset, regardless of when it occurred, similar to the court awarding any other tangible property to one party. It is worthwhile to consider that debt from a cosmetic surgery remaining at the time of divorce would likely be equitably divided between the parties upon a divorce without much debate. Therefore, the benefit derived from that debt, though on one's body, should be allocated at the time of divorce as well.

29. Traci argues that because Erik did not object when the court announced it would not consider the cosmetic surgery, that Erik is barred from appealing the trial court's decision. In light of the sarcastic and stern comments from the judge regarding the issue, Erik would have been foolish to raise the issue again or to object, considering the enormous power of the judge in determining the outcome of his divorce. Obviously, the risk of further upsetting the judge at the outset of trial was so great that Erik was not in any position to object or address the issue and was forced into acquiescence by the judge.

30. In addition, the court's failure to establish any factual basis for excluding the cosmetic surgery from the marital estate is plain error, and clearly erroneous. 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 607, 610 (1992). Here, the court rejected consideration of the cosmetic surgery because it found it "nonsense" that breast implants could be considered marital assets. (Tr. 6). Absent legal support for its decision, it is plain error for the court to rest on its own personal opinion of

including the breast augmentation in the marital estate. The court's ruling violates section 14-05-24 of the North Dakota Century Code, which requires a valuation of all of the parties' property. Id. The result of this error was a deprivation of additional property in the marital estate that should have been awarded to Erik had the value of Traci's cosmetic surgery been included in the equitable division. Because the court made an evidentiary ruling with no factual basis which affected Erik's property rights, its ruling fulfills the elements of plain error and is properly appealable to the Supreme Court. State v. Schmidtkunz, 2006 ND 92, ¶ 6 (holding that an appellate court may notice a claimed error that was not brought to the district court's attention if there was "(1) error, (2) that is plain, and (3) affects substantial rights."). Id.

CONCLUSION

31. Erik was unable to be meaningfully heard due to the time limitations placed upon the trial and interjections by the court, which prevented him from cross-examining numerous witnesses. An inability to cross-examine witnesses in a proceeding affecting the parent-child relationship constituted a violation of his right to due process. Because the court's errors in conducting the trial were plain, and affected Erik's constitutional right to the care and custody of his children, the issue is properly appealable to the Supreme Court under the plain error doctrine.

32. The court's valuation of the TJK trust lacked a proper evidentiary basis. As the court's error became apparent after trial had concluded, Erik could not have been expected to object at trial to the court's future failure to require Traci to comply with its order. The court's valuation was clearly erroneous, and is not precluded from appeal.

33. Finally, the court excluded Traci's breast augmentation from the marital estate without any factual basis. North Dakota law requires a valuation of all marital assets. For the court to exclude the breast augmentation with no factual basis is clearly erroneous, plain error, and properly appealable to the Supreme Court.

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CERTIFICATE OF SERVICE

34. I HEREBY CERTIFY that on November 5, 2009 a true and correct copy of the foregoing **Reply Brief of Appellant** has been furnished electronically by email to:

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