

**IN THE SUPREME COURT,
STATE OF NORTH DAKOTA**

Kurt G. Datz,)	
)	Supreme Court No. 20120435
Plaintiff/Appellant,)	
)	Burleigh County District Court
vs.)	Civil No. 08-2011-DM-01109
)	
Helen A. Dosch,)	
)	
Defendant/Appellee.)	

**APPEAL FROM THE
DISTRICT COURT OF THE SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE THOMAS J. SCHNEIDER PRESIDING**

BRIEF OF APPELLEE

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[¶3]STATEMENT OF ISSUES

- A. [¶4]The trial court's decision to award primary residential responsibility to the Appellee was correct and not clearly erroneous.
 - 1. [¶5]The trial court's finding that the one occurrence of domestic violence committed by the Appellee upon the Appellant did not result in serious bodily injury and did not show a pattern of domestic violence was correct and not clearly erroneous.
- B. [¶6]The trial court's decision to deviate upward from the presumptive child support amount requiring the Appellant to pay one-half of the nanny expenses was correct and not clearly erroneous.
- C. [¶7]The trial court's determination of the value of the marital estate was correct and not clearly erroneous.
- D. [¶8]The trial court's division of the marital estate was correct and not clearly erroneous.

[¶9]STATEMENT OF THE CASE

[¶10]A. Nature of the Case

[¶11]This is a family law matter on appeal from the district court. The Appellant ("Kurt") appealing the award of primary residential responsibility, an upward deviation from the presumptive child support amount, the valuation of the marital estate, and the division of the marital estate including the court's finding that both economic and non-economic fault existed on the part of Kurt.

[¶12]The trial court awarded primary residential responsibility of the parties' minor children to the Appellee ("Helen"). The trial court also decided to upwardly deviate from the child support guidelines, and ordered Kurt to pay one-half of the expenses for a nanny to help care for the parties' minor children in the marital home.

[¶13]The trial court also divided the marital estate awarding roughly forty-seven percent (47%) of the marital estate to the Helen, and roughly fifty-three percent (53%) of the marital estate to Kurt.

[¶14]B. Additional Procedural History Not Addressed by Appellant

[¶15]The Appellee joins in Appellant's paragraphs 10-12. The Interim Order described in Appellant Paragraph 14 was entered on February 28, 2012. Additionally, Helen lives in Bismarck, but works in Fargo. The Appellee joins in Appellant's paragraphs 15-22.

[¶16]The following procedural history was not addressed by the Appellant. Discovery was served on Kurt by Helen, on July 18, 2011. Almost one year later, a contempt hearing was held on June 21, 2012, based on Helen's Motion for Contempt due to Kurt's failure to provide answers to discovery, and non-payment of court ordered

support. (Appellee 32). Kurt was found not credible at the June 21, 2012 hearing, and a Money Judgment was ordered against Kurt in the amount of \$140,005.44 plus interest, for non-payment of support. (Appellee 33).

[¶17]STATEMENT OF FACTS

[¶18]Kurt G. Datz, is currently 48 years of age, and Helen A. Dosch is currently 57 years of age. (Tr. 268, 17-22). Helen and Kurt met in medical school at the Philadelphia College of Osteopathic Medicine. (Tr. 269, 3-4). The parties married two years later on March 25, 1988, in Philadelphia, Pennsylvania. (Tr. 269, 10) The parties had a long-term marriage, having been married for nearly 25 years. Helen gave birth to the parties' first child, Kal Datz, during their last year of medical school in 1990. (Tr. 271, 19-20)

[¶19]After graduating medical school, the parties moved to New York City, NY to begin their residency. (Tr. 271, 15-17) For a brief period, Helen put her residency on hold in order to care for baby Kal, now age 23. (Tr. 272, 3-7). After obtaining good child care, both parties were able to complete their residency. (Tr. 272, 6-7). Helen gave birth to the parties' second child, H.D. in 1994. (Tr. 8, 10-12). (Now, H.D. is age 18 and a senior in high school, graduating in May 2013.) (Tr. 270, 15-17).

[¶20]The family then moved to Havre, Montana. (Tr. 272, 7-9). While in Montana, Helen worked only three days a week, with no on-calls and no weekends. (Tr. 272, 8-10). However, Kurt was the director of the critical care unit, working at both the clinic and the hospital. (Tr. 8, 18-19). Helen gave birth to the parties third child, L.D., in 1996, while the parties were still living in Montana. (Tr. 8, 23; 270, 18-21).

[¶21]The family then moved to Bismarck, ND in 1998. (Tr. 11, 22-24). After moving to Bismarck, Helen worked five days a month, with no weekends or on-calls. (Tr.

272, 10-18). In Bismarck, Kurt worked full-time as a general internist at Mid Dakota Clinic. (Tr. 12, 7-8; 20, 18-20).

[¶22]The family made the decision to move to Dickinson in 2002. (Tr. 21, 22-24; 22, 1-2, 8). Kurt chose to open private practices in Bismarck and Minot, rather than finding employment in Dickinson. (Tr. 22, 15-21). Helen took a position in Dickinson where she worked two weeks on and two weeks off. (Tr. 272, 19-21). The parties hired a nanny, to assist with caring for the children. (Tr. 272-273, 25-1). When Helen worked, she would often bring the two youngest children and the nanny, to work with her. (Tr. 272, 22-24). The family had a nanny for many years. (Tr. 273, 1). The nanny was a trained nurse. (Tr. 273, 2-4).

[¶23]In 2006, the family made the decision for Helen to take a part-time position in Fargo. (Tr. 29, 10-13). Additionally, the family made the decision to move back to Bismarck. (Tr. 29, 14-19; 273, 8-9) Helen worked part-time in Fargo, working about two weeks a month. (Tr. 273, 11-17). Helen resided in the family home in Bismarck, and rented a small apartment in Fargo for when she was working. (Tr. 273, 11-13). Helen again put her career on hold, so that she could be with the children. (Tr. 273, 15-17).

[¶24]Helen supported Kurt in his many business endeavors, including helping him pick out real estate, and co-signing loans for him. (Tr. 273, 19-21). Kurt began a lucrative vitamin business in 1998. (Tr. 307, 1). Kurt opened medical spas in both Bismarck, ND and Minot, ND in 2004. (Tr. 274, 25; 275, 1-2; 451, 6). Both practices included a spa and medical practice. (Tr. 275, 24-25). Kurt travelled extensively in support of his vitamin business, and other endeavors. (Tr. 274, 18-20). The spas were Kurt's dream, and Helen

supported that. (Tr. 274, 21-23) Helen made sure the children were cared for. (Tr. 274, 13-15).

[¶25]In the following years, Kurt became less and less involved as a father and husband. (Tr. 277, 25; 278, 1-3). In 2009, after becoming involved with Scott Gray and Kristie Hetzler ("Kristie"), Kurt would often disappear. (Tr. 2-8) When Kurt returned, he would have excuses that did not match the known facts. (Tr. 278, 6-13). Kurt was less and less forthcoming with Helen around this time. (Tr. 274, 3-6). Kurt opened another medical spa in Tennessee at this time, only telling Helen about it on the day he was moving the equipment to Tennessee. (Tr. 274, 2-6)

[¶26]When Helen would return home to Bismarck after working in Fargo, she found the family home in complete disarray. (Tr. 278, 16-23). There would be food left out, dirty dishes left to be cleaned, and bathrooms left in shambles. (Tr. 278, 16-23). Helen would clean for two hours, and then prepare dinner for the family, shop for the family's food for the week, and prepare meals for the following week.(Tr. 278, 16-23). Helen purchased the children's clothing, bought groceries, cooked, and did the laundry. (Tr. 281, 8-17). Even Kurt has said that Helen is a good mother. (Tr. 210, 11-13).

[¶27]Kurt lied about having an affair with Kristie, saying their relationship did not begin until August 2011. (Tr. 61, 20-24). However, Kurt admitted to his nurse, Lorene Hohbein, to having an affair with Hetzler as early as January 2011. (Tr. 458, 10-14). Kurt fractured his penis while he was with Kristie, and lied to Helen telling her he fell on the ice. (Tr. 351, 2-9) Eventually, Kurt admitted his relationship with Kristie, but told Helen that he had ended the relationship. (Tr. 283, 3-15;303, 17,19). The parties went to marriage counseling. (Tr. 283, 11-12). However, in March 2011, Kurt left the house, and

Helen later saw Kurt jump a highway fence, get into Kristie's car, and speed away. (Tr. 303, 20-22). Kurt also admitted to being involved with several other women during the marriage. (Tr. 284, 8-11).

[¶28]Kurt then closed the Minot and Bismarck offices abruptly in March and April 2011 respectively, without consulting Helen. (Tr. 282, 3-13). This was a time of chaos for Helen and their children. (Tr. 344, 8-14). Kurt lied to Helen about where he was. Helen was never able to reach Kurt, even when the children were ill. (Tr. 344, 8-14).

[¶29]During the course of his affair with Kristie, Kurt spent thousands of dollars on her, including expensive gifts of a necklace and earrings. (Tr. 550, 15-25). However, Kurt lied in his deposition, and in discovery, stating he had never purchased anything for her. (Tr. 556, 8-11). The jeweler was subpoenaed, and the documents showed otherwise. (Appellee 27, 29). Kurt also lied about not receiving mail and supplies at Kristie's house. (Tr. 556, 13-17). He also took Kristie on out-of-state trips. (Tr. 191, 6-10; 345, 10-11; 574, 17-18). Lezlie Kalberer also testified to these things. (Tr. 554; 556)

[¶30]After Kurt closed the clinics in Bismarck and Minot, the medical equipment used in the facilities was unaccounted for. (Tr. 291-292). Loans had been taken out for the equipment in both parties names, and Kurt stopped making any loan payments. (Tr. 289, 15-18). One of the items, an x-ray machine valued at \$50,000, Kurt claimed he simply threw it away in the dumpster behind the office building. (Tr. 127, 1-2; 215, 17-18; 309, 16-19). However, Scott Gray told Kurt's nurse, Lorene Hohbein, that the x-ray machine was sold. (Tr. 466, 1-4).

[¶31]Kristie put a salon in Lezlie Kalberer's home on or about April 2011, soon after the Bismarck and Minot clinics were closed. (Tr. 556, 18-21). Kurt testified at trial

that a missing washer and dryer from the Bismarck spa was located in the U-Haul storage unit. (Tr. 231, 25; 232, 1-9). Helen and her brother went to the U-Haul storage unit the night after this testimony, and the washer and dryer were not there. (Tr. 325, 1-6; 514, 24-25; 515, 1-16). Kristie's dryer at her house had recently stopped working. (Tr. 556, 1-7). Additionally, one of two microderm machines that Helen was supposed to take possession of for Cornerstone Bank, was missing. (Tr. 292, 6-19). However, Kristie had a microderm machine at her house, in her home salon. (Tr. 554, 7-8).

[¶32]In about May 2011, Kurt stopped contributing financially to the family. (Tr. 285, 17-21). From June 2011 to June 2012, Helen was forced to pay roughly \$290,000 to maintain the family finances. (Tr. 285, 25; 286, 1-4). Helen was forced to use credit cards and a line of credit to keep the family and their finances afloat. (Tr. 286, 5-8). The most recent year the parties have filed taxes is for the 2009 tax year. (Tr. 338, 10-20). Helen was forced to personally pay the accountant \$15,000 to have the 2009 taxes completed for trial; a large portion of the fees being for Kurt's companies. (Tr. 338, 10-20). In 2009, Kurt had a gross income of \$948,723. (App. 45).

[¶33]In the summer of 2011, Helen went to Kristie's house and found Kurt there. (Tr. 560, 18-20) An altercation ensued. (Tr. 567, 6-10). Helen scratched Kurt but did not hit him. (Tr. 565, 17-19). Helen received many bruises. (Appellee 22-26). In the police report, Kurt said he let Helen in. (Tr. 566, 10-11). Ultimately, Kurt arranged for bail. (Tr. 73, 20-25).

[¶34]Helen hired a nanny to help her care for the children, due to Kurt's irresponsibility. (Tr. 279, 4-5). In June 2011, Helen hired Kathy Berg to once again care for the children. (Appellee 15). Ms. Berg only worked for Helen until August 2011.

(Appellee 16). Kurt came to the family home on August 11, 2011. (Appellee 16). After reading a letter from his attorney, Kurt became angry and began accusing Ms. Berg of providing Helen with information against him. (Appellee 16) Kurt made Ms. Berg so uncomfortable to the point she felt she had no other option but to quit and leave. (Appellee 16).

[¶35]Helen then hired a new nanny, Janie Stute, a nurse. (Tr. 288, 25; 289, 1-3). Ms. Stute has stabilized the household. (Tr. 288, 17-20). Ms. Stute has filled the gap left by Kurt's absence when Helen is working in Fargo. (Tr. 287, 3-4; 289 5-7). An Interim Order gave primary residential responsibility to Helen in February 2012. (App. 21).

[¶36]SUMMARY OF THE ARGUMENT

[¶37]The standard of review when reviewing all of the issues in this matter is whether or not the trial court's findings were clearly erroneous. Appellant has the burden to show that the decision of the trial court was based on an erroneous view of the law, that no evidence existed to support the trial court's findings, or that a clear mistake was made. The Appellant fails to meet this burden as to every issue on appeal, and actually fails to even argue several issues he appealed. The discussion should stop there.

[¶38]However, even if this court were to review the matter *de novo*, as the Appellant would have it do, the same result would be reached. Despite the Appellant's arguments which employ circular reasoning and unsupported claims, the simple truth is the trial court did not find Kurt credible. Kurt lied to both Helen and the trial court on multiple occasions. The Appellant fails to meet his burden as to the standard of review, and would also fail if this court reviewed the matter anew. The trial court's decision should be affirmed in all respects.

[¶39] Argument

[¶40] A. The trial court's decision to award primary residential responsibility to the Appellee was correct and not clearly erroneous

[¶41] The standard of review on appeal when reviewing an award of primary responsibility is set forth in Morris v. Moller, 2012 ND 74, ¶ 5, 815 N.W.2d 266, 268. The trial court's "award of primary residential responsibility is a finding of fact, which will not be reversed on appeal unless it is clearly erroneous."

[¶42] The reviewing court does not "reweigh evidence, reassess witness credibility, retry a custody case, or substitute [its] judgment for the district court's decision merely because [it] may have reached a different result." Morris at ¶ 6.

[¶43] A finding of fact is clearly erroneous "if its induced by an erroneous view of the law, if no evidence exists to support it, or although there is some evidence to support it, on the entire record," the reviewing court is left, "with a definite and firm conviction a mistake has been made." Morris at ¶ 6. A choice between two permissible views of the weight of the evidence is not clearly erroneous." Dronen v. Dronen, 2009 ND 70, ¶ 7, 764 N.W.2d 675, 681.

[¶44] The Appellant fails in his burden to show that the trial court's award of primary residential responsibility is clearly erroneous. However, even if clearly erroneous was not the standard, and this court reviewed this matter *de novo*, the same result would be reached.

[¶45] The Appellant makes no attempt to argue how the trial court's award was clearly erroneous. This court stated that in appeals involving child custody, "this court will not retry the case or substitute its judgment for that of the district court when its determination is supported by the evidence," and that "the complaining party bears the

burden of demonstrating on appeal that a finding of fact is clearly erroneous." Dronen at ¶ 7.

[¶46]Appellant argues since the trial court failed to make specific findings for each specific factor in N.D.C.C. § 14-09-06.2(1), that its' decision to award Helen primary residential responsibility was clearly erroneous. This line of reasoning is not consistent with the law. This court has said, "although a separate finding is not required for each statutory factor, the court's findings must contain sufficient specificity to show the factual basis for the custody decision." Miller v. Mees, 2011 ND 166, ¶ 12, 802 N.W.2d 153, 157.

[¶47]In Shaw v. Shaw, 2002 ND 114, 646 N.W.2d 693, the trial court did not enumerate findings for each individual factor. However, this court was able to infer from the trial court's findings, its conclusions with regard to each factor in reaching its ultimate decision regarding the award of primary responsibility. A trial court need not fill out a scorecard for each factor, rather the trial court must reach its decision regarding custody mindful of each factor in a reasoned manner in light of the evidence and testimony presented.

[¶48]Even though the trial court's findings do not comport with Kurt's version of events, this court has said that the trial court's "opportunity to observe witnesses and determine credibility should be given great deference." Morris at ¶ 17.

[¶49]The trial court specifically stated in its' August 2012 order, finding Kurt in contempt, that it did not find Kurt credible. (Appellee 32). Throughout the litigation, Kurt was uncooperative, untruthful, and evasive, which affected the weight and credibility the trial court gave to Kurt's evidence and testimony. In Miller, the Appellant, Mees, invited

this court to reweigh the evidence and reassess credibility after the trial court found her not credible, but this court declined to do so. Miller at ¶ 15. As in Miller, here the trier of fact found Helen more credible and gave greater weight to her evidence and testimony.

[¶50]If this court were to review this matter *de novo*, then it would reach the same conclusion as the trial court. Looking at factors relevant to the facts in this case, they would either favor Helen, or favor neither party. Appellant argues that the trial court failed to discuss any of the factors, but reviewing the findings, the trial court's reasoning is clear.

[¶51]In reviewing Factor a. this court has said, that while there is no presumption in favor of primary caretakers, primary caretakers do "deserve recognition." Heinle v. Heinle, 2010 ND 5, ¶ 9, 777 N.W.2d 590, 596-597. In Heinle, the court noted that stronger emotional ties existed with the parent who was the child's primary caretaker prior to the parties separation. The Appellant argues that he is the primary caretaker and that the children rely on him, however this argument does not comport with the facts.

[¶52]Kurt has not had the children overnight for parenting time since February 2012. (App. 32). Kurt was granted every other weekend with the children in the Interim Order, but chose not to exercise that schedule. Kurt did not make his apartment family friendly, or rent a more family friendly house. (App. 32). The trial court noted that Kurt's whereabouts are often a mystery, and that Kurt would "disappear at times." (App. 33). Appellant argues he alone monitors and cares for L.D.'s diabetic condition, failing to note that Helen is a trained medical doctor, has worked with diabetic pumps, and that Helen hired a registered nurse to care for the children when she is working in Fargo. (Tr. 471). The lives of the children, and the family as a whole, were thrown into chaos. It was only

through Helen's efforts that any sense of stability and normalcy was restored. Factor a. clearly favors Helen.

[¶53] In reviewing Factor b., "the ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment," the trial court must look at the ability of each parent to provide for the children's necessities, as well as their mental and social development. In Bernhardt v. Harrington, 2009 ND 189, 775 N.W.2d 682, and in several other cases, the trial court was faced with the situation where both parents love the children, and in turn the children love the parents. There was a time that Helen and Kurt worked as a team to provide a safe, nurturing environment for the children. Both Helen and Kurt were active in the children's school and extracurricular activities.

[¶54] However, Kurt changed and his erratic behavior has shown his inability to provide a safe and nurturing environment for the children. Kurt is often out of town. Kurt is often unreachable, even when the children are sick. Kurt refused to pay the child and family support, was found in contempt, and his claims of poverty were found not credible. Factor b. clearly favors Helen.

[¶55] The analysis of Factor c. is similar to that of Factor b. While Kurt may have the ability to meet the child's development needs, Kurt's behavior and actions over the last three years has shown him to be an unstable influence in the lives of the children. The parent awarded primary residential responsibility must not only love the children, but also do what is best for them every day. Factor c. clearly favors Helen.

[¶56] In reviewing Factor d. the court must look both to past and anticipated future events when evaluating which parent's home will provide the greater continuity and

stability. Deyle v. Deyle, 2012 ND 248, ¶ 9, 825 NW 2d 245. The children have lived in the family home most of their lives, from 1998-2002, and since the family returned to Bismarck in 2006. Helen was awarded the family home, and intends to maintain it until at least L.D. graduates from high school. (App. 34). Throughout, Helen has been making the payments on the family home, as well as paying the utilities and the like. (App. 35).

[¶57]Alternatively, Kurt rented an apartment in October 2011, where the children have never stayed overnight. Prior to this, if not sleeping at his office, Kurt stayed with Kristie at Lezlie Kalberer's home from the summer of 2011, until renting his apartment. Appellant argues that the children lived with him the majority of their lives, and should continue to do so as such a change would be contrary to their interests. However, this logic is flawed, and asks this court to look only at past events. Kurt does not currently have a home suitable for children, while Helen provides the children the ability to live in the home they grew up in. Factor d. clearly favors Helen.

[¶58]Factor e. would favor neither Helen or Kurt. There has been animosity on the part of both parties, but both Helen and Kurt wish for their children to have continuing relationships with the other.

[¶59]Factor f. addresses the moral fitness of both parents. In Morris the court addressed allegations of untruthfulness with regards to its decision regarding primary residential responsibility. Morris at ¶ 13. In this case, Kurt has lied on several occasions, including while under oath. Even the trial court specifically noted that it did not find Kurt credible. Factor f. clearly favors Helen.

[¶60]Factor g. favors neither party as both parties are mentally and physically fit.

[¶61]In reviewing Factor h. the court has said that the "findings regarding one factor may be applicable to another....a district court's finding under Factor (d) also may be applicable to Factor (h)." In Interest of SRL, 2013 ND 32, ¶ 7. The children are living in the family home, and attending the same schools they always have. Helen has no plans to move the children from the family home. Appellant takes issue with Helen employing a nanny to assist her with raising the children, despite the fact that he had no problem employing a nanny for many years previously during their marriage.

[¶62]Factor i. addresses the preference of the minor children with regards to which parent should be awarded primary residential responsibility. The Appellant argues that the children have shown a preference for living with him. However, reviewing the children's affidavits, as prepared by the Appellant, the children express only a desire to stay in the family home and to maintain a relationship with each parent. Helen will maintain the family home, allowing both H.D. and L.D. to live there until they graduate from high school. In addition, the court's order allows for as much parenting time as the parties and children can agree on. (App. 47). Factor i. clearly favors Helen.

[¶63]Factor j. favors neither party and will be addressed in the next section of the argument.

[¶64]With regards to Factor k. the Appellant argues that Helen's choice to hire a nanny to assist her with caring for the children has detrimentally effected the children. However, the nanny was hired in the wake of the chaos wrought by Kurt's erratic lifestyle, and the children's needs. It is odd that the Appellant takes issue with the employment of a nanny, when the parties employed a nanny for so many years during their marriage. Also, the Appellant points to a series of text messages allegedly from

H.D. that indicate a negative impact of the nanny's presence. However, the alleged text messages are all from the same day, over a year ago, before the entry of the Interim Order. The messages represent nothing more than the momentary frustrations of the typical teenager. Helen is the one who took H.D. to tour colleges, had a prom dinner and party for her, and guides her future. (Tr. 206, 6-24). Factor k. clearly favors Helen.

[¶65]Factor l. is not relevant to this case.

[¶66]In reviewing Factor m. the Appellant draws attention to Helen's work schedule and claims that he is the "present" parent. The Appellant glosses over the fact that Helen lives in Bismarck, travels to Fargo for work, all while looking for employment in Bismarck. Appellant also fails to mention, the trained healthcare professional that Helen has employed to be present with the children when she's not there. Appellant also fails to discuss his habit of simply disappearing with no explanation, his odd hours, and with no way for his children to contact him. Kurt refused to give his work schedules to Helen, even in discovery. The schedules had to be subpoenaed from the hospital, and are in evidence. The hospital schedules show a very different story from Kurt's testimony, once again calling his credibility into question. Factor m. clearly favors Helen.

[¶67]The Appellant fails to meet its burden in showing that the trial court's award of primary residential responsibility to Helen was clearly erroneous. Also, even if this court had reviewed the evidence presented *de novo*, the same result would have been reached. The order should be affirmed.

[¶68]1. The trial court's finding that the one occurrence of domestic violence committed by the Appellee upon the Appellant did not result in serious bodily injury and did not show a pattern of domestic violence was correct and not clearly erroneous

[¶69]This court has said that "whether the N.D.C.C. § 14-09-06.2(1)(j) domestic violence presumption is applicable is a finding of fact, which will not be reversed on appeal unless clearly erroneous." Wessman v. Wessman, 2008 ND 62, ¶ 15, 747 N.W.2d 85, 89. When a trial court is presented with evidence of alleged domestic violence, this court requires "specific findings and conclusions regarding the presumption so [it is] not left guessing as to the court's rationale regarding the application of the presumption." Wessman at ¶ 16.

[¶70]The rebuttable presumption is triggered when "(1) there exists one incident of domestic violence which resulted in serious bodily injury; (2) there exists one incident of domestic violence which involved the use of a dangerous weapon; or (3) there exists a pattern of domestic violence within a reasonable time proximate to the proceeding." Doll v. Doll, 2011 ND 24, ¶ 20, 794 N.W.2d 425, 432.

[¶71] Appellant bases his argument on the flawed belief that the trial court failed to make specific findings concerning the one occurrence of domestic violence. However, the trial court stated,

"As to factor j, "Evidence of domestic violence," Helen did commit domestic violence upon Kurt at Lezlie Kalberer's home. However, the domestic violence did not result in serious bodily injury to Kurt. No dangerous weapon was used by Helen. There is no pattern of domestic violence by Helen." (App. 28).

[¶72]The Appellant does not argue that the trial court used an erroneous interpretation of the law, that there is no evidence to support the trial court's decision, or that there is clear evidence of mistake. The Appellant has failed to meet his burden.

[¶73]If this court did review the evidence *de novo*, it would reach the same result as the trial court. For the rebuttable presumption to be triggered, Helen would have had to inflict serious bodily injury on Kurt, use a dangerous weapon, or exhibit a pattern of domestic violence against Kurt.

[¶74]The alleged injuries suffered by Kurt do not rise to the level of serious bodily injury as defined by N.D.C.C. § 12.1-01-04(29) which states,

"bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."

[¶75]Helen did not use any form of weapon, including none of those defined in N.D.C.C. § 12.1-01-04(6). There was only one occurrence of domestic violence, which clearly is not a pattern. Helen found Kurt with Kristie, after he lied about ending his relationship with Kristie. Their almost 25-year marriage was over.

[¶76]The Appellant has failed to meet his burden. Furthermore, even if this court reviewed the evidence anew it would reach the same conclusions, as none of the actions needed to trigger the rebuttable presumption, occurred in this case. The trial court's findings should be affirmed.

[¶77]B. The trial court's decision to deviate upward from the presumptive child support amount requiring the Appellant to pay one-half of the nanny expenses was correct and not clearly erroneous

[¶78]The Appellant offers no legal reasoning as to why the trial court's order requiring him to pay half of the nanny expenses should be reversed, other than it's "absurd." Unfortunately, for the Appellant, law and precedent require a more detailed analysis. When a trial court chooses to deviate upward when awarding child support, that decision "is a finding of fact subject to review under the clearly erroneous standard."

Nuveen v. Nuveen, 2012 ND 260, ¶ 11. This court has said that it will defer "to the trial court's determination of the appropriate needs of the children." Nuveen at ¶ 10. Also, this court has found that the needs of children "in a family with substantial income are more expansive because of the standard of living the family has enjoyed." Nuveen at ¶ 13.

[¶79] The Appellant fails to meet his burden, as he offers no argument or evidence of an erroneous application of the law, lack of evidence to support the trial court's decision, or that a clear mistake was made. The order should be affirmed.

[¶80]C. The trial court's determination of the value of the marital estate was correct and not clearly erroneous

[¶81]When dividing the marital estate, the trial court, "must start with a presumption that all property held by either party whether held jointly or individually is to be considered marital property. The trial court must then determine the total value of the marital estate in order to make an equitable division of property." Dronen at ¶ 35.

[¶82]The trial court's valuation of the marital estate is a "finding of fact and will only be reversed on appeal if it is clearly erroneous." Dronen at ¶ 23. The trial court's valuation of the marital estate is presumed correct. Id. This court reviews the evidence presented in the light most favorable to the trial court's findings of fact. Id. This court has also said,

"It is the province of the district court to judge the credibility of witnesses and the evidence they introduce. When the district court's valuation is within the range of evidence provided by the parties, the district court's valuation will not be set aside, unless this Court has a definite and firm conviction a mistake has been made." Id.

[¶83]811 E. Interstate Building

[¶84]The Appellant argues that the trial court's findings contain "blatant omissions and contradictions," specifically that Kurt was indebted to Avitus for \$30,000,

Quest Diagnostics for \$19,000, and Aspen Group for \$8,000. The Appellant addressed these debts for the first time at the last minute during trial. (Tr. 177, 9-25; 178, 1-6) The debts were not included on the Appellant's pre-trial Joint 8.3 Debt/Property List. However, the trial court specifically addressed these debts in its discussion of the 811 E. Interstate building. (App. 36-37). The trial court acknowledged the abovementioned debts as well as other liabilities encumbering the property. The trial court also noted that in its Interim Order it granted Helen the right to sell the building, but Kurt did not cooperate with the sale of the property. The trial court stated that the property should be sold, all liabilities be paid, and that Kurt would then be entitled to the remaining proceeds. (App. 36-37).

[¶85]The Appellant argues that the court's valuation was an abuse of discretion, and not within the range of evidence presented. Unfortunately, the Appellant fails to cite the proper standard of review. The proper standard of review when evaluating the trial court's valuation of the marital estate, is whether the valuation was clearly erroneous. The trial court's "marital property valuations are not clearly erroneous if they are within the range of evidence presented." Wolt v. Wolt, 2010 ND 26, ¶ 43, 778 N.W.2d 786, 799.

[¶86]The owner of real property may testify to the value of land, without any further qualification or specialized knowledge. Wolt at 43. The trial court is in the best position to judge the credibility and demeanor of witnesses. Wolt at ¶ 44. The trial court noted through its findings and throughout this matter as a whole, that it did not find Kurt credible. After reviewing the evidence and the testimony of the witnesses, the court used Helen's value since it judged that to be the most credible valuation.

[¶87]Medical Equipment/Office Supplies

[¶88]The court noted that given the unknown whereabouts of several pieces of equipment it was difficult to arrive at a valuation of the medical equipment, and office supplies. Kurt claims that he simply threw away an x-ray machine and all attachments, despite the fact that, his manager, Scott Gray, told Lorene Hohbein that the x-ray machine was sold. Kurt lied under oath with regards to the whereabouts of the washer and dryer from the Bismarck spa. (App. 42-43). Also, one of the microderm abrasion machines is missing, while coincidentally Kristie had just such a machine in her home spa. Kurt failed to cooperate in discovery, had control over all of the items, did not obtain appraisals on the equipment, but now he complains about the valuation of the equipment.

[¶89]The court stated, that "Kurt's value...is not credible." The Appellant argues that his willingness to award Helen the medical equipment and office supplies at his value shows the fairness of his valuation. Such circular reasoning is without merit. The trial court evaluated the evidence presented, the credibility of the witnesses, and after finding Kurt's credibility wanting, provided a value in between the values offered by the parties.

[¶90]Kurt G. Datz, D.O., P.C., Bismarck Medical Spa, Tennessee Medical Spa

[¶91]The Appellant argues that the court incorrectly valued these three businesses and that the court should have adopted his values as they represented the fair market value as of the date of trial. Here the Appellant employs the same circular reasoning that since he was willing to let Helen have the assets for his value, then his value must be fair.

[¶92]The trial court evaluated the value of the businesses as well as Kurt's actions leading up to the end of the each business. The trial court found that Kurt made no effort to sell any of the businesses, the associated equipment, or patient files. Rather, Kurt

stated that he never intended to sell these practices, and never tried to. (App. 38). Helen was left out of his decisions, yet she was left with the joint debt. The trial court incorporated into its valuation what the value would and should have been of these businesses, if not for Kurt's actions.

[¶93]The court once again found the testimony of Helen and others far more persuasive and credible than Kurt's testimony regarding the value of these businesses and valued the assets appropriately.

[¶94]Socle Supplements

[¶95]The Appellant objection to the valuation of the supplements is confusing. The Appellant argues the supplements should be valued much lower, even though the supplements were awarded to Helen, thus in the Appellant's view artificially inflating her share of the estate to her own detriment. If the value were to be adjusted the Appellant would have an even larger percentage share of the marital estate than he already does.

[¶96]Hair Removal Laser Hand Piece

[¶97]As with the other assets, the Appellant argues that his value is more credible than that of Helen. Unfortunately, the court did not find Kurt credible in many respects, and chose to adopt Helen's version of the relevant facts. The hand piece was recently purchased, had no time to depreciate, and thus the value of the hand piece was its retail cost, which is the value the court adopted. (Tr. 406, 10-25).

[¶98]Helen first found the purchase receipt for the laser hand piece when she was finally able to visit their Tennessee clinic via court order. Kurt had not disclosed the purchase of the laser hand piece. Kurt continued to claim poverty while spending marital assets on whatever he chose to. (App. 44).

[¶99]Viewing the evidence in the light most favorable to the trial court's findings, the Appellant has failed to demonstrate that a clear mistake was made and that the trial court's findings with regards to the values of the above assets were not within in the range of the evidence presented. Thus, the Appellant has failed to meet his burden regarding the valuation of the marital estate. The trial court's findings should be affirmed.

[¶100]D. The trial court's division of the marital estate was correct and not clearly erroneous

[¶101]A district court must make an equitable distribution of the divorcing parties' property. N.D.C.C. § 14-05-24(1). Dronen at ¶ 34. This court review's the trial court's decision regarding the distribution of the marital estate as a finding of fact, and will not reverse unless the district court's findings are clearly erroneous. Id. This court has said "that a property division need not be equal to be equitable, but a substantial disparity must be explained." Dronen at ¶ 35.

[¶102]After a fair evaluation of the entire marital estate is complete, the trial court must then divide the entire marital estate equitably between the parties under the *Ruff-Fischer* guidelines." Dronen at ¶ 35. (see Ruff v. Ruff, 52 N.W.2d 107 (ND 1952); Fischer v. Fischer, 139 N.W.2d 845 (ND1966)). Under the Ruff-Fischer guidelines the trial court must consider:

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. The trial court is not required to make specific findings, but it must specify a rationale for its determination.

Dronen at ¶ 35.

¶103]When evaluating facts under the Ruff-Fischer guidelines, economic and non-economic fault on the part of the parties are proper factors for the trial court to consider. Walstad v. Walstad, 2012 ND 204, ¶ 19, 821 N.W.2d 770, 776.

¶104]The Appellant does not argue the trial court's distribution of the marital estate was clearly erroneous, rather that his share of the marital estate is inequitable.

¶105]The distribution of the estate is a separate finding of fact from the valuation of the estate. The Appellant addresses the distribution of the estate for two paragraphs, but his only argument is the trial court's distribution was clearly inequitable. Unfortunately, clearly inequitable is not the standard of review employed by this court. The Appellant does not point to an erroneous interpretation of the law, a lack of evidence to support the court's decision, or evidence of clear mistake by the trial court, thus they have failed to meet their burden.

¶106]As with the rest of the issues on appeal, if this court chose to review the record *de novo*, it would reach the same determination as the trial court. The overriding factors in the trial court's findings is the economic and non-economic fault committed by Kurt, which resulted in the waste of the marital assets.

¶107]The parties were married for almost twenty-five years, for the total of their professional lives. Helen is nine years older than Kurt which means that Kurt should be able to work for nine years after Helen has retired. All of the assets comprising the marital estate, minus Kurt's Triumph convertible which was awarded to him at his value, were accumulated during the course of the marriage. Both Helen and Kurt are in good physical and mental health. All of these factors would indicate that Helen should be

awarded a slightly larger share of the estate given that she will likely retire sooner than Kurt.

[¶108]When the court then looked at the property owned at the time by the parties, the value of the property, and its income-producing capacity, the court looked closely at the actions of Kurt and the effect of those actions had on the value of the marital estate. The trial court found that Kurt was more interested in his relationship with his mistress, than he was in running his clinics. (App. 39).

[¶109]Helen cosigned the loans for most of the real estate and equipment Kurt used in his clinics, but yet Kurt failed to consult her when he closed the clinics. Kurt did not even try to sell the clinics, even though both clinics had interested buyers. (App. 39). Kurt had no plan regarding how he would pay back the debt he owed on these businesses. It was Helen, who was left to field the calls from the creditors, to pay bills on credit cards, and negotiate with angry banks. (Tr. 289, 19-21). The trial court valued the business at what they would have been worth but for the irresponsible actions on the part of Kurt, and gave the business to Kurt at that value.

[¶110]When the trial court evaluated the real property owned by the parties, the parties agreed on the values of all the real property except the 811 E. Interstate building, and Kurt's Pennsylvania property. As discussed above the trial court clearly noted that it did not find Kurt credible. The Appellant argues that the trial court does not explain the issues it had with his credibility. The simple fact that the Appellant needs to have that issue explained speaks volumes. Throughout the course of this matter, and at trial, it has been shown that Kurt has lied about a number of topics, has lied under oath both at trial

and in depositions, and yet the Appellant struggles to determine the basis of the trial court's finding that he is not credible.

[¶111]The court accepted Helen's value of the 811 E. Interstate building, awarded it to Kurt, and ordered Kurt to sell it. It was Helen who managed the parties' tenants in the building. She handled their concerns, paid the bills, and collected the rent. However, as the trial court noted, in the Interim Order, Helen was allowed to sell the building, but Kurt prevented it. (App. 36). Kurt refused to move out of his half of the building, preventing the sale, while Helen continued to be financially responsible for the building. (App. 36).

[¶112]With regards to the medical equipment the Appellant again argued that the trial court's valuation was incorrect. The Appellant notes that the trial court found it difficult to value the medical equipment. The reason the trial court had difficulty in assigning value and why it awarded all of the medical equipment to Kurt, was that he refused to provide an accounting of what equipment he had, where it was located, and its true value. (App. 38).

[¶113]Kurt provided very little information regarding the Tennessee clinic. Helen was granted a court order so she was able to fly to Tennessee, take pictures, and take an accounting of what was there. (App. 35).

[¶114]The trial court was forced to assign a value to the equipment somewhere between the values submitted by the parties, and then awarded the equipment to Kurt, because he's the only one who knows where it all is, what was sold, for how much, and so forth. (App. 38).

[¶115]The Appellant argues that there is no evidence of marital waste. Kurt committed marital waste in a number of ways. Through Kurt's action and inaction, he destroyed three successful medical practices, and a vitamin business. Kurt purchased thousands of dollars worth of jewelry for himself and his mistress. In December 2010, Kurt spent over \$2,000 in cash on a necklace for his mistress, while Helen struggled to ensure the children would continue to have a roof over their heads. (Appellee 29). Kurt refused to provide additional discovery, forcing Helen to subpoena credit card companies, banks, telephone records, the jeweler, and fly to Tennessee. Kurt's irresponsible handling of his businesses, especially with regards to the loans that Helen cosigned on, could have destroyed her credit rating if not for her efforts to maintain it. While Kurt was enjoying vacations with his mistress, it was Helen left trying to hold the family together. (App. 42-43).

[¶116]In addition to Kurt's economic fault, the trial court also found that Kurt committed non-economic fault as well, namely he had at least one extramarital affair with his mistress, Kristie. (App. 43). It was this affair coupled with Kurt's erratic and irresponsible behavior, that led to the complete destruction of the parties' 25-year marriage. The trial court found that Kurt had been deceitful with both the court and Helen. (App. 44). The Appellant argues that there is no evidence of adultery. That is simply not true. Kurt told his nurse, Lorene Hohbein, that he was having an affair with Kristie as early as January 2011. (App. 43). Additionally, both Helen and Lezlie Kalberer testified to seeing Kristie wearing the expensive necklace that Kurt purchased. Also, Kurt admitted to his affair during his counseling sessions with Helen. (App. 43).

[¶117]The Appellant's only argument is that the trial court's distribution of the marital estate is inequitable. At no point did the Appellant meet his burden showing the trial court's decision regarding distribution was clearly erroneous. The facts are clear. Kurt committed both economic and non-economic fault, so the Appellant's argument that the distribution of the estate was inequitable is not tenable. The decision of the trial court should be affirmed.

[¶118]CONCLUSION

[¶119]The Appellant has failed to meet his burden with regards to every issue on appeal. The Appellant has presented no evidence that any of the trial court's findings in this matter were based on an erroneous view of the law, that no evidence existed to support the trial court's findings, or that a clear mistake was made. Additionally, as shown above, even if this court reviewed this matter *de novo*, it would reach the same result. The trial court's decision should be affirmed in all respects.

/s/ Leslie Johnson Aldrich
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April 22, 2013
Date

**IN THE SUPREME COURT,
STATE OF NORTH DAKOTA**

Kurt G. Datz,)	
)	Supreme Court No. 20120435
Plaintiff/Appellant,)	
)	Burleigh County District Court
vs.)	Civil No. 08-2011-DM-01109
)	
Helen A. Dosch,)	
)	
Defendant/Appellee.)	

**CERTIFICATE OF SERVICE
VIA EMAIL**

Leslie Johnson Aldrich, being of legal age and an officer of the court, states that on the 22nd day of April, 2013, she served a true and correct copy of the following document(s):

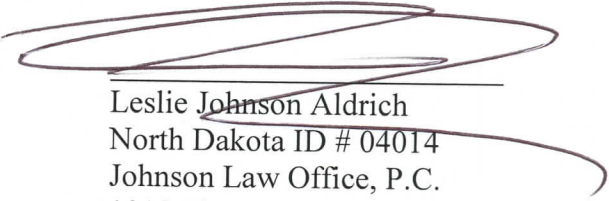
1. **Brief of Appellee**
2. **Appendix to Brief of Appellee**

That copies of the foregoing were electronically served through email to the following parties:

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