

## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

---

Robert Martin Heidt,

Plaintiff and Appellee,

v.

Trina Ann Heidt,

Defendant and Appellant.

Supreme Court No. 20130371

District Court No. 50-2012-DM-00037

---

## REPLY BRIEF OF THE APPELLANT

---

APPEAL FROM THE AMENDED JUDGMENT ENTERED ON THE 3<sup>RD</sup> DAY OF  
OCTOBER, 2013, BY THE NORTHEAST JUDICIAL DISTRICT COURT, COUNTY  
OF WALSH, STATE OF NORTH DAKOTA

---

Patti J. Jensen, ND ID 04328  
John D. Schroeder, ND ID 07147  
GALSTAD, JENSEN & McCANN, P.A.  
411 Second Street Northwest, Suite D  
P.O. Box 386  
East Grand Forks, MN 56721  
Telephone: (218) 773-9729  
Facsimile: (218) 773-8950  
E-mail: [pjensen@gjmlaw.com](mailto:pjensen@gjmlaw.com)  
[jschroeder@gjmlaw.com](mailto:jschroeder@gjmlaw.com)

**ATTORNEYS FOR DEFENDANT AND  
APPELLANT**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW ..... 1

    I. Whether There Are Insufficient Findings Made By The Court To Determine Robert Lacks The Ability To Pay Spousal Support When The Court Made No Specific Findings About His Budget Or An Explanation Of How It Determined His Income...¶1

    II. Whether This Court Should Strike Paragraphs 49 Through 58 of Robert’s Brief As Robert Has Not Filed A Cross-Appeal And Any Arguments About The Calculation Of Trina’s Child Support On Remand Are Inappropriate.....¶2

ARGUMENT .....3

    I. There Are Insufficient Findings Made By The Court To Determine Robert Lacks The Ability To Pay Spousal Support When The Court Made No Specific Findings About His Budget Or An Explanation Of How It Determined His Income.....¶3

    II. This Court Should Strike Paragraphs 49 Through 58 of Robert’s Brief As Robert Has Not Filed A Cross-Appeal And Any Arguments About The Calculation Of Trina’s Child Support On Remand Are Inappropriate.....¶11

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Paragraph</u></b>
<u>Carpenter v. Carpenter</u> , 2006 ND 111, 714 N.W.2d 804.....	12
<u>Conzemius v. Conzemius</u> , 2014 ND 5, 841 N.W.2d 716.....	5
<u>Corbett v. Corbett</u> , 2001 ND 113, 628 N.W.2d 312.....	7
<u>Ehlen v. Melvin</u> , 2012 ND 246, 823 N.W.2d 780.....	12
<u>Hoverson v. Hoverson</u> , 2001 ND 124, 629 N.W. 2d 573.....	5
<u>Hovet v. Hebron Pub. Sch. Dist.</u> , 419 N.W.2d 189 (N.D.1988).....	12
<u>Kalvoda v. Bismarck Pub. Sch. Dist.</u> , 2011 ND 32, 794 N.W.2d 454.....	12
 <b><u>Statutes</u></b>	
I.R.C. § 125.....	6
 <b><u>Court Rules</u></b>	
N.D.R.App.P. 13.....	12

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**[¶1] I. Whether There Are Insufficient Findings Made By The Court To Determine Robert Lacks The Ability To Pay Spousal Support When The Court Made No Specific Findings About His Budget Or An Explanation Of How It Determined His Income.**

**[¶2] II. Whether This Court Should Strike Paragraphs 49 Through 58 of Robert's Brief As Robert Has Not Filed A Cross-Appeal And Any Arguments About The Calculation Of Trina's Child Support On Remand Are Inappropriate.**

## ARGUMENT

### [¶3] I. **There Are Insufficient Findings Made By The Court To Determine Robert Lacks The Ability To Pay Spousal Support When The Court Made No Specific Findings About His Budget Or An Explanation Of How It Determined His Income.**

[¶4] The District Court analyzed all of the Ruff-Fischer factors and noted, “[i]n many respects, the defendant would otherwise be an appropriate candidate for receiving spousal support.” App. 264-65. The District Court also stated “even with some amount of child support, given the expenses *likely* to be experienced by the plaintiff, including expenses relating to maintaining a large home for seven children and then seeing to their individual financial needs as they incur either school costs or daycare costs, there is no ability in the court’s view for the plaintiff to also provide spousal support to the defendant.” App. 265 (emphasis added). The District Court also focused on the assumption of nearly all of the debt by Robert as justification for denying spousal support, but fails to acknowledge that the percentage award of net property was approximately 60% to Trina and 40% to Robert.<sup>1</sup>

[¶5] The language noted above about Robert’s likely expenses shows the District Court did not adequately make findings about Robert’s budget or his ability to pay spousal support. The District Court does not make findings that his budget as presented was reasonable. The District Court also does not explain anywhere in its Supplemental Findings how it arrived at what it claims to be Robert’s net annual income of approximately \$82,000.00. App. 265. The documentary evidence and testimony showed Robert’s income earning ability exceeds \$110,000.00 per year. App. 59-60; Tr. 148, 158,

---

<sup>1</sup> The total net marital estate the parties stipulated to was \$43,669.64. App. 38. The amount awarded to Trina was \$25,844.00, which divided by the total net estate is 59.18%. App. 38.

166. The District Court seems to base the finding of a net annual income for Robert on a conclusion of what Robert's net annual income would be under the child support guidelines, but nowhere does the court make specific findings about what Robert's net income would be under the child support guidelines. App. 263. The District Court is also not clear on what it considers a net annual income for determining Robert's ability to pay spousal support. To the extent the use of the assumed deductions from income for child support purposes were used, these are not appropriate in the context of determining ability to pay for spousal support purposes. See Hoverson v. Hoverson, 2001 ND 124, ¶¶ 32, 37, 629 N.W.2d 573. While the child support guidelines require the use of hypothetical tax liabilities to arrive at a net income, this court has directed the District Courts to only consider actual tax consequences when properly informed about them. Conzemius v. Conzemius, 2014 ND 5, ¶ 18, 841 N.W.2d 716.

[¶6] Further, if the District Court were basing its decision on the argument of Robert as to his net income, it is also mistaken. App. of Appellee 9. Robert argued to the District Court, and to this Court, that his net income is calculated by taking the total income amount from his 2012 federal tax return of \$108,607.00 and subtracting his \$10,147.00 federal tax obligation, \$1,336.00 state income tax obligation, an assumed FICA tax obligation of \$8,301.00, and \$6,784.00 in health, dental, and vision insurance premiums. Br. of Appellee, 7; App. 59-60, 71-72, App. of Appellee 9. However, any finding of Robert's net income ignores several factors. First, the use of \$108,607.00 is not correct, because Robert receives several benefits that are not taxable, and thus not included in his income on the tax return. These include his insurance premiums, 401(k) deferrals, and flex medical spending account deferrals. App. 84-85. These are all pre-tax

deductions, and thus not included on Robert's tax returns as part of his taxable income. See App 84-85; I.R.C. § 125. Thus, the district court misstates Robert's gross income. Second, the district court, if it is accepting Robert's arguments, permits him to twice deduct his health, dental, and vision insurance premiums in arriving at a supposed net income because they are never included in the determination of his gross income amount.

[¶7] In cases involving a child support obligor requesting spousal support, the district courts have been directed to first determine the amount of spousal support under the Ruff-Fischer guidelines, and then determine an amount of child support so any award of spousal support can be included. Corbett v. Corbett, 2001 ND 113, ¶ 22, 628 N.W.2d 312. Here, the District Court first determined a child support amount and then figured that a spousal support award is not warranted. Also, the District Court was invited to commingle the arguments regarding spousal support and child support by Robert, which this Court has stated is impermissible. See id.

[¶8] Finally, the evidence shows there will be no equitable reduction in the standard of living between Robert and Trina. Even assuming a net income of \$82,000.00 is correct for Robert, which it is not, he will be able to meet all of his monthly budget with the inclusion of child support from Trina, while he is in the position of having the marital home and retiring the marital debt by paying much more than the minimum required of him. App. 38, 89. Even with his faulty calculated net income of \$82,000.00 plus Trina's child support of \$7,200.00, Robert will have \$7,433.00 per month in disposable income. His monthly expenses, which the district court never found were reasonable, total \$7,760.00. App. 89. This includes a claimed expense of \$1,975.00 in debt service plus \$700.00 towards a line of credit secured against the marital home. App. 89. However,

when the parties agreed on dividing the marital debts, the monthly totals for the debts, including the line of credit, was only \$1,580.00, not the \$2,675.00 claimed by Robert. App. 38, 89. Further, the loan on the Chevrolet Express, with a monthly payment of \$465.00 and a balance of \$970.00 in October of 2012, would have been paid off in the months between the parties' agreement on the property and debt division and trial. App. 38. Thus, a more realistic figure for Robert's debt service and house payment would be \$1,115.00 at the time of trial, not the \$2,675.00 he claimed.

[¶9] By comparison, Trina may have left the marriage with little ability to support herself. She presented a monthly budget of \$3,340.00. App. 90. Even without a rent payment of \$800.00, Trina would have a monthly budget of \$2,540.00. Her gross income as found by the District Court is only \$2,224.00 per month. App. 260-61. Now, with a \$600 per month child support obligation, Trina is left with only \$1,624.00 to pay her expenses and taxes. Trina has a distinct need for support, and the District Court's findings to the contrary are clearly erroneous.

[¶10] In sum, the District Court failed to make any specific findings about the parties' relative incomes and monthly budgets. There are no findings about the appropriateness of Robert's proposed budget or on Trina's need for support. The record contains scant findings about Robert's ability to pay, and where it does, the facts show the District Court is allowing a double deduction for Robert's employer sponsored health insurance premium expenses and does not articulate how it otherwise arrived at Robert's gross income figure. His employer expected it to exceed \$126,000.00 for 2013. Tr. at 158. Finally, there are insufficient findings on the sharing of any reduced standard of living



between Trina and Robert. Because the District Court failed to sufficiently articulate its reasons, this Court should reverse and remand.

**[¶11] II. This Court Should Strike Paragraphs 49 Through 58 of Robert's Brief As Robert Has Not Filed A Cross-Appeal And Any Arguments About The Calculation Of Trina's Child Support On Remand Are Inappropriate.**

[¶12] There was no cross-appeal filed by Robert. In paragraphs 49 through 58 of his brief he attempts to make arguments to this Court about the District Court's decision regarding the inclusion of in-kind income in calculating Trina's child support. This court has stated that "a cross-appeal is necessary if the appellee seeks a more favorable result on appeal than it received in the district court." Ehlen v. Melvin, 2012 ND 246, ¶ 19, 823 N.W.2d 780 (citing Kalvoda v. Bismarck Pub. Sch. Dist., 2011 ND 32, ¶ 14, 794 N.W.2d 454; Hovet v. Hebron Pub. Sch. Dist., 419 N.W.2d 189, 193 (N.D.1988)). Here, there is no cross-appeal and Robert has waived any argument about the propriety of including in-kind income in the calculation of Trina's child support obligation. Therefore, this Court should strike those paragraphs from Robert's Brief, and as a sanction, award Trina her costs for this appeal, regardless of the outcome on appeal. N.D.R.App.P. 13; Carpenter v. Carpenter, 2006 ND 111, ¶ 39, 714 N.W.2d 804.

**CONCLUSION**

[¶13] As per the foregoing law and argument, and for all the reasons stated in Trina's principal brief, it is respectfully requested this Court: 1) Reverse the decision of the District Court regarding spousal support; 2) Order the District Court to award permanent spousal support payable from Robert to Trina; and 3) Remand the case to the District Court to determine an appropriate amount of spousal support.

Respectfully submitted on this 31st day of March, 2014.

/s/ John D. Schroeder  
Patti J. Jensen, ND ID 04328  
John D. Schroeder, ND ID 07147  
GALSTAD, JENSEN & McCANN, P.A.  
411 Second Street Northwest, Suite D  
P.O. Box 386  
East Grand Forks, MN 56721  
Telephone: (218) 773-9729  
Facsimile: (218) 773-8950  
E-mail: [pjensen@gjmlaw.com](mailto:pjensen@gjmlaw.com)  
[jschroeder@gjmlaw.com](mailto:jschroeder@gjmlaw.com)

**ATTORNEYS FOR DEFENDANT AND  
APPELLANT**

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Robert Martin Heidt,  Plaintiff and Appellee,  v.  Trina Ann Heidt,  Defendant and Appellant.	Supreme Court No. 20130371  District Court No. 50-2012-DM-00037
---	---

## CERTIFICATE OF ELECTRONIC SERVICE

[¶1] The undersigned hereby certifies a copy of the attached:

- **Reply Brief of the Appellant; and**
- **Certificate of Electronic Service**

were served upon:

**Darcie Einarson, Einarson Law Office, P.C., 640 Hill Avenue, Grafton, ND  
58237-0352**

via email using the email address published on the North Dakota Supreme Court online directory for Darcie Einarson, namely [darcie@einarsonlawoffice.com](mailto:darcie@einarsonlawoffice.com), and to [elo@einarsonlawoffice.com](mailto:elo@einarsonlawoffice.com) on the 31st day of March, 2014.

Dated this 31st day of March, 2014.

/s/ John D. Schroeder  
Patti J. Jensen, ND ID 04328  
John D. Schroeder, ND ID 07147  
GALSTAD, JENSEN & McCANN, P.A.  
411 Second Street Northwest, Suite D  
P.O. Box 386  
East Grand Forks, MN 56721  
Telephone: (218) 773-9729  
Facsimile: (218) 773-8950  
E-mail: [pjensen@gjmlaw.com](mailto:pjensen@gjmlaw.com)  
[jschroeder@gjmlaw.com](mailto:jschroeder@gjmlaw.com)

**ATTORNEYS FOR DEFENDANT AND  
APPELLANT**