

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

Alane Ann Schmuck,)	
n/k/a Alane Ann Dosmann,)	
)	
Plaintiff/Appellant,)	Supreme Court No. 20150210
)	
vs.)	District Court No. 50-2014-DM-00085
)	
Richard D. Schmuck,)	
)	
Defendant/Appellee.)	

BRIEF OF THE APPELLANT, ALANE ANN DOSMANN

**APPEAL FROM THE JUDGMENT ENTERED
ON JUNE 15, 2015**

**DISTRICT COURT OF WALSH COUNTY,
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE M. RICHARD GEIGER, PRESIDING**

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STATEMENT OF ISSUES

- [¶2] I. The Trial Court's denial of spousal support to Alane was clearly erroneous.
- II. The Court should have awarded support or should have retained jurisdiction over the issue of spousal support.
- III. The property settlement was paid and the payment and that issue has become moot.

STATEMENT OF THE CASE

[¶3] This is an action for divorce.

[¶4] Prior to trial, the parties had entered into an agreement. The Stipulation, which was in writing and filed, resolved most of the issues between the parties. The agreement awarded residential responsibility of the children to Alane and contained a very detailed parenting plan. It also established child support, divided retirement benefits, vehicles, personal property and bank accounts. It was agreed that Alane's last name would be changed from Schmuck to Dosmann.

[¶5] The parties were unable to agree on other issues and trial was held on March 10, 2015. The Stipulation was presented for the Court's consideration in deciding the remaining issues, which were: 1) Spousal Support; 2) Remaining Property and Debt Division (which included numerous valuation disputes); 3) IRS Tax Audit Responsibility; and 4) Attorney's Fees.

[¶6] Following Trial on these issues, the Court entered an Interim Order so that the agreed-upon child support would commence without delay. The Court issued the Findings of Fact, Conclusions of Law and Order for Judgment on June 10, 2015.

[¶7] In its Order, the Court adopted most of the parties' Stipulation. The Court-approved Stipulation terms are included in the Judgment and Decree of Divorce in paragraphs 6 through 49.

[¶8] The Court's Terms for Judgment begin at paragraph 50 of the Judgment. The Court modified the calculation of Richard's income and accordingly, increased the amount of child support from what the parties had agreed to.

[¶9] The Court spent significant time identifying and valuing the marital estate. After doing so, fashioned a division which purports to give Alane 55% of the total marital estate.

[¶10] The Court declined any spousal support to Alane, did not reserve jurisdiction over the issue, and required each party to pay their own attorney's fees.

[¶11] Alane filed an Appeal relating to the issues determined by the Court.

STATEMENT OF FACTS

[¶12] The Plaintiff (Alane) and Defendant (Richard) were married on August 22, 1987. They divorced in June of 2015, just shy of their 28th wedding anniversary.

[¶13] They have three (3) children; J.S., an adult; K.S., born XX-XX-1998; and L.S., born XX-XX-2001.

[¶14] During most of the marriage Richard served in the military. He was deployed on various occasions. His career was a priority to the Schmucks. Alane and the children moved if it suited Richard's career. Alane mostly took positions that allowed her to parent the children and support Richard.

[¶15] Before their trial, the Schmucks resolved many issues and filed an agreement that reflected their agreements. Primary residence of the children was awarded to Alane and child support awarded to her. A trial was held on the issues of spousal support, property

division, and attorney's fees.

[¶16] Facts as relevant to the issues presented will be further set forth below.

ARGUMENT

I. The Trial Court's denial of spousal support to Alane was clearly erroneous

[¶17] N.D.C.C. § 14-05-24.1 provides that a trial court in a divorce case may require one party to pay spousal support to the other party for any period of time. An award of spousal support is a "finding of fact which will not be set aside on appeal unless clearly erroneous." *Solem v. Solem*, 2008 ND 211, ¶5, 757 N.W.2d 748. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after a review of the entire record, we are left with a definite and firm conviction a mistake has been made." *Woodward v. Woodward*, 2013 ND 58, ¶5, 830 N.W.2d 82.

[¶18] In determining whether spousal support is appropriate, the district court must consider the relevant factors under the *Ruff-Fischer* guidelines. *Overland v. Overland*, 2008 ND 6, ¶16, 744 N.W.2d 67; *Fischer v. Fischer*, 139 N.W.2d 845 (N.D.1966); *Ruff v. Ruff*, 78 N.D. 775, 52 N.W.2d 107 (1952). These factors include:

"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." *Krueger v. Krueger*, 2008 ND 90, ¶8, 748 N.W.2d 671 (quoting *Sommer v. Sommer*, 2001 ND 191, ¶9, 636 N.W.2d 423).

[¶19] When making a spousal support determination, "the district court is not required to make specific findings on each factor, provided we can determine the reasons for the court's decision." *Krueger*, at ¶8. "

[¶20] Spousal support awards must also be made in consideration of the needs of the spouse seeking support and of the supporting spouse's needs and ability to pay." *Overland*, at ¶16 as cited in *Lindberg v. Lindberg*, 2009 ND 136, 770 N.W.2d 252.

a. The Ruff-Fischer Guidelines suggest an award of support to Alane is appropriate.

[¶21] The Court issued an extensive decision. Findings specifically relating to the Ruff-Fischer Guidelines are set forth in the Court's Order at pages 27-29. Other relevant findings are interspersed throughout the Order.

1. The respective ages of the parties

[¶22] Both parties are 48 years old (Order ¶1, ¶2).

2. The earning ability of the parties

[¶23] The Court, at page 27 of its Order found,

"Earning Ability - Richard has a substantially greater earning ability than Alane. Although there is some potential for Alane to acquire additional education to improve her earning capability, the likelihood is not significant. She is 48 years old. She would likely have to remain employed full time while at the same time accomplishing that. By the time she were to complete that, she would then be in her fifties and still be entering a new career, potentially at an entry level...."

[¶24] At ¶8 of the Order the Court also made findings related to the parties' education. The Court outlined their employment histories at ¶9 and ¶10.

[¶25] Alane graduated from Grafton High School in 1984. She has had no other education (Transcript p. 20, ls. 16-21).

[¶26] Alane was working as a cashier at Denny's Jack and Jill when she met Richard (Transcript p. 43, lines 1-9). She worked throughout the parties' marriage. She did childcare, worked in various grocery stores and at a nursing home. If Richard's job

required the family to move, Alane quit her job and found another one. His career in the Air Force was a priority for the Schmucks. Alane's jobs have usually not provided benefits, retirement, or insurance (Transcript pp. 50-51).

[¶27] Once the parties had children, Alane provided childcare either at licensed centers or at her home. She expressed a commitment to care for her own children and accepted positions that allowed her children to accompany her (Transcript pp. 52-53). This seems appropriate and necessary, as throughout much of the parties' marriage, Richard was away at trainings or deployed. Alane estimated that during the parties' marriage Richard was away from home more than half of the time. He was sent all over the world for weeks or months at a time (Transcript p. 66). Richard reported that he was deployed 150-160 days a year for 7-8 years (Transcript p. 249).

[¶28] Alane began working as a paraprofessional at the Grafton Public School District about eleven years ago (Transcript p. 20). This position allowed her to be home when the children were not in school. She earns \$13.18 per hour. She had also taken on a part-time cleaning job shortly before trial as she could not make ends meet on her income at the school.

[¶29] Richard is also a high school graduate, graduating from Birchwood, Wisconsin, Public School in 1984. Richard has had significant training and education during his military service in the area of aircraft maintenance (Transcript p. 157).

[¶30] In addition to his military training, Richard also has an Airframe and Power Plant license through the F.A.A. This licensure allows him to work on commercial airplanes. Richard has had specialized training repairing various types of aircraft. He has worked in this occupation in the military and in private industry.

aa. The Court erred in establishing Richard’s present income

[¶31] The Trial Court found Richard’s income in 2014 to be established at \$79,535.00. This was based upon his disability pay, his share of the military retirement, and his income at American Crystal Sugar. The Court, however, failed to consider that Richard admitted to having income from Lockheed - Martin as late as June of 2014 (Transcript p. 231 and Exhibit 21). He admitted to receiving a W-2 from Lockheed but somehow failed to provide it.

[¶32] Even without the Lockheed income, the Court made a conservative estimate as no overtime was accounted for at American Crystal despite receiving it throughout the time of his employment (Exhibit 2). His 2014 income as found by the Court also does not necessarily reflect his “earning ability”. Richard has the ability to earn much more; and usually has.

[¶33] The Court admitted the parties’ tax returns for 2009-2013 (Exhibits 4-8). These returns show that Alane’s income has steadily increased over those years. She earned \$12,382.00 in 2009; \$13,449.00 in 2010; \$13,998.00 in 2011; \$14,569.00 in 2012 and \$15,447.00 in 2013.

[¶34] Contrast that with Richard’s income (after adding his nontaxable disability benefit of \$18,827.00) which compared as follows:

<u>Tax Year</u>	<u>Richard’s income</u>	<u>Alane’s income</u>
2009	\$75,747.00	\$12,382.00
2010	\$199,777.00	\$13,449.00
2011	\$199,228.00	\$13,998.00
2012	\$131,408.00	\$14,569.00

2013 \$155,818.00 \$15,447.00

bb. The Court erred in calculating Alane's income

[¶35] The Court then erred in determining Alane's future income, attributing to her \$35,643.00. To do this the Court found her income at Grafton Public School to be \$18,214.00 and estimated \$4,097.00 from her part-time job cleaning, and an estimated \$6,000.00 for the summer months (Order p. 18, ¶20).

[¶36] Alane's summer job in 2014 was for the Grafton School District. As such, her W-2 already includes that income. She testified to this, and established that the duration of summer school was three weeks (Transcript p. 22).

[¶37] Alane also testified that she had applied for migrant school for the summer of 2015. She indicated the duration of migrant school to be seven weeks. She did not, in her testimony suggest that this would be in addition to summer school.

[¶38] Adding \$6,000.00 of pay to Alane's income for 2015 is not based upon any evidence in the record. At most, Alane may have had four additional weeks of compensation. Alane had \$17,139.10 in income for 2014. This includes 9 months of the school year, plus three weeks of summer school. This equates to approximately \$1,713.91 per month. Even if Alane got the migrant school job, it might be an extra \$1,713.91, not the \$6,000.00 added by the Court.

[¶39] The Court erred in determining Alane's income from her part-time job.

[¶40] Alane had never taken on extra part-time work before. She had just started cleaning for her sister and brother-in-law's commercial cleaning business about six months before trial. She testified she earned \$9.50 per hour and worked three days a week for 1-1.5 hours per shift (Transcript p. 28).

[¶41] The Court imputed to Alane, income from this job of \$4,097.00 annually. (Order, p. 18). This would require 431.26 hours. Even if Alane never took a vacation from this part-time job, she would need to work 8.3 hours per week. This is substantially more than the 3 – 4 hours she testified of.

[¶42] Alane's W-2s for 2014 were admitted as Exhibit 9. By adding her income from the Grafton Public Schools and Demester Cleaning, her wage income in 2014 was \$17,652.00. Adding her share of Richard's military retirement pay provides her with \$24,984.00. The Court's finding of \$35,643.00 is not based upon the evidence presented and is clearly erroneous.

3. The duration of the marriage

[¶43] Alane and Richard met in 1986 when they were 20 years old (Transcript p. 42). They were quickly engaged and married in August of 1987 (Transcript p. 44). Judgment was entered in June of 2015, just shy of the parties' 28th wedding anniversary. This is a long term marriage.

4. The conduct of each during the marriage

[¶44] Richard had a couple brushes with the law that affected his rank and his employment. He had a DUI in 1993 or 1994 (Transcript p. 61). Then, in 1996, Richard had a car accident in the early morning hours after drinking. He hit another vehicle head on. As a result of this, he lost rank and income (Transcript p. 59-60). Then, in 2001 when he was on TDY in Alaska, Richard threw a beer bottle through a car window and was arrested. As a result of his conduct, he was kicked out of the military and the family was kicked off of the base (Transcript p. 61).

[¶45] Richard could have retired with full military benefits after 20 years of service. At 18 years he was looking for work (Transcript p. 62). Richard borrowed money to hire a lawyer to fight his termination. He traveled to Washington DC for the hearing, but was not successful. The parties returned to Grafton and Richard obtained a job in maintenance at Alchem, an ethanol plant. (Transcript, p. 65). He eventually earned retirement status by enlisting with the North Dakota National Guard for the remaining two years of service.

[¶46] The Court correctly found, it's that Richard was at fault for the divorce itself. In finding H the Court said:

“...In terms of the divorce itself, Richard is likely more at fault than Alane. He has failed to address his chemical dependency issues, as he had an opportunity to do so and as noted previously, has placed the parties in a financial predicament that could have been avoided.”

[¶47] The Court also made findings on page 3 of the Order related to significant tax issues the parties were having solely due to Richard's poor decision making.

[¶48] The Court also found Richard's conduct in his use of credit cards to be worthy of note in the factors for property division but failed to address this conduct as it relates to spousal support.

[¶49] The evidence presented was that there was no credit card debt when the parties separated. Richard further admitted that the cards were only in his name and that he made all the expenditures on these cards since the date of separation (Transcript pp 236-241). These cards totaled almost \$19,000.00 at the time of trial (Order p. 21). While the debt was awarded to Richard, it diminished the marital estate by approximately 25%. For this, Alane was given 5% more of the property division. Then the Court used this debt, and other bad decisions by Richard, to find that he cannot afford to provide support to Alane.

5. Their station in life

[¶50] The Court erroneously found that the parties' stations in life were similar (Order p. 27). This finding is inconsistent with other findings made by Court.

[¶51] Richard's station in life appears significantly higher than Alane's. Richard unilaterally made major financial decisions for the family, without input or discussion from Alane. For example, Richard purchased hunting property in Wisconsin with a military buddy of his. He bought it, placed the property in joint tenancy with his friend and took out a loan. Then, he just gave up his interest (Transcript p. 179-187).

[¶52] Richard also purchased a \$45,000.00 shop in the Commercial District in Grafton so that he could "work on cars." The shop was equipped well, even including a hydraulic lift (Transcript p. 188). He entered into this transaction over the phone while in Afghanistan. At that time, he told the Seller that he "Wanted it, and I asked her (Alane) to send him a check for \$5,000.00 for a deposit until I got back to take the loan. And she did." (Transcript p. 191). The building and the loan were not in Alane's name.

[¶53] During the marriage, Alane testified the parties drove newer vehicles, remodeled their home often and took trips together (Transcript p. 75). Her budget includes none of these items. The Court further discounted Alane's "luxuries: such as dining out with the children (Order p. 25).

[¶54] Following the division of the parties' marital estate, Richard keeps virtually all the property, including the parties' marital home in rural Grafton. This home, has three bedrooms, two bathrooms, and a heated, double attached garage on rural acreage. The home appraised at \$115,000.00 (Exhibit 14). Alane and the children have moved to an apartment in Grafton. It is older, smaller, however she felt she had no choice to move as she could not afford the home in the country (Transcript 82).

[¶55] Richard suggested he might sell the home if he could not afford to remain there. He also does not require a shop in town to perform small vehicle repairs. His standard of living significantly exceeds Alane's.

6. The Circumstances and Necessities of Each

[¶56] The Court found Alane's reasonable budget to be \$4,300.00 (Order p. 23). The Court then found that Richard's likely budget was up to \$8,042.00 (Order p. 24). Alane's household budget for three people is half of Richard's household budget for one. This disparity also shows the significant disparity in the parties' station in life as addressed above.

[¶57] During the marriage, Richard worked and earned income for the family. Alane took care of the home and family. The Court correctly found that "there is nothing in Alane's living style that is extravagant or supports a reduction." The Court incorrectly found that this was true for Richard as well, at least before he incurred significant credit card debt (Order p. 27).

[¶58] The Court already found that Alane's budget is not excessive and that for a time, she will have income from child support coming into her household. The Court expressed:

"For a period of time and without considering salary increases (something both parties could experience), Alane will also have income from child support coming into the household of an additional sum of \$19,248.00 for approximately three years and a sum of \$12,216.00 for two years thereafter. Consequently, her total income resources for the next three years will be approximately \$54,891.00, approximately \$47,859.00 for two years thereafter; and then without considering any other resources thereafter the sum of \$35,643.00." (Order p. 19).

[¶59] The parties' oldest child had graduated from high school at the time of trial. The youngest two, resided with Alane. K.S. was born in 1998. She will graduate from high

school in May of 2016. Thus, Alane's support will reduce after one year, not two, as the Court found. It is clear from the findings that as soon as child support is not being paid, Alane does not have enough household income to maintain her minimal budget. This will happen within one to four years.

7. Their Health and Physical Condition

[¶60] The Court found that, "Alane has had basal cell carcinoma which has resolved but is otherwise in good health (Transcript p. 20).

[¶61] Then the Court went on to discuss at length, Richard's medical history, finding that he had been declared to be 70% disabled by the Veterans Administration as a result of injuries suffered while deployed in Afghanistan (Order p. 2).

[¶62] While these findings are correct, they have no real significance in light of the income that Richard has continued to earn since his injury. His income is actually enhanced by this finding.

[¶63] Richard's injury came shortly before his retirement from the military in 2008 (Transcript p. 69).

[¶64] After Richard's retirement, he was sent for a full evaluation. This evaluation resulted in a finding that Richard was 50% disabled. He was awarded benefits. This was in 2009. The level of disability has since increased to 70% (Transcript p. 165). The terms of his disability award do not prohibit Richard from working, while continuing to receive full benefits (Transcript p. 163-164).

[¶65] Richard's income, since becoming disabled, has been substantially more than it was prior to his retirement from the military. From a financial perspective, his health and

physical condition does not appear to affect his earning ability or ability to provide Alane with support.

[¶66] The Court also found, “That disability will likely create an expectation of retirement at a normal period rather than beyond age 66.” Richard himself testified that he hoped to work until he was 65 (Transcript p. 248). By then, he will likely have earned another retirement pension. The Court erred in finding this factor to favor Richard.

8. The Financial Circumstances of the Parties

[¶67] Richard will receive nearly all of the property. In addition to the value of the property, Richard does also acquire at least some property that has the potential to generate income. The shop has a lift to work on cars, and Richard and Alane both testified that Richard is a good mechanic. Therefore, the shop does possess the potential to produce income for Richard.

b. An Award of Permanent Support to Alane is Appropriate

[¶68] Alane should be entitled to an award of permanent spousal support in this case. An award of permanent spousal support is appropriate when “a spouse cannot be equitably rehabilitated to make up for the opportunities lost in the course of the marriage.” *Wold v. Wold*, 2008 ND 14, ¶ 14, 744 N.W.2d 541. Further, permanent spousal support may be appropriate “[e]ven when a spouse is capable of rehabilitation . . . to ensure the parties equitably share the overall reduction in their separate standards of living.” *Id.*; *Weir v. Weir*, 374 N.W.2d 858, 864 (N.D. 1985).

[¶69] Permanent spousal support is appropriate when an economically disadvantaged spouse cannot be equitably rehabilitated to make up for opportunities lost during the course

of a marriage." *Krueger v. Krueger*, 2008 ND 90, ¶ 9, 748 N.W.2d 671 as cited in *Pearson v. Pearson*, 2009 ND 154 ¶23; 771 N.W.2d 288.

[¶70] The Court has further held that permanent spousal support is appropriate when there is a significant disparity in the parties' income. *See Donarski v. Donarski*, 1998 ND 128, ¶¶ 6, 8, 581 N.W.2d 130 (holding that permanent spousal support is appropriate to maintain a disadvantaged spouse when a substantial disparity exists between the spouses' incomes); *Ingebretson v. Ingebretson*, 2005 ND 41, ¶ 9, 693 N.W.2d 1.

II. The Court should have awarded support or, should have retained jurisdiction over the issue of spousal support

[¶71] Here, the Court clearly found a significant disparity in the parties' earnings. The Court also found it unlikely that Alane would obtain additional education or have the ability to make more than she was presently earning. The Court's denial of support was likely based upon the fact that as long as Alane was receiving child support, she did not have need and Richard did not have the ability to pay.

[¶72] For the reasons set forth above, Alane disputes this. She won't have enough income once the children are grown, to support her household. Richard likely will.

[¶73] The Court also failed to provide support based upon an impression that Richard may have more debt on a short term basis (i.e. to pay the property settlement, for child support, debt service). Now that the divorce is over, Richard may go back to his prior level of earnings. He may sell or refinance property to consolidate his debt. Any number of things could occur to change Richard's financial situation.

[¶74] The problem is, that without an award of support or a specific reservation of jurisdiction, Alane cannot later make a request for alimony. This Court has said in *Becker v. Becker*, 262 N.W.2d 478, 484 (N.D. 1978), that "where there was no initial award of

alimony to modify and no express reservation of jurisdiction, the trial court lacked jurisdiction to order the payment of alimony."

[¶75] In *Branson v. Branson*, the failure of the Court to retain such jurisdiction was reversible error. The Court found that Pamela had a need for support but that David did not presently have the ability to pay it. However, the Court said, "In view of Pamela's demonstrated need for rehabilitative spousal support and the possibility that David may be able to afford such support in the future, we believe that the trial court should have expressly retained jurisdiction to later award such support if circumstances changed. We are left with a definite and firm conviction that a mistake has been made in not awarding spousal support to Pamela without retaining jurisdiction to later award spousal support if Pamela's needs remain and David is later able to afford to pay rehabilitative spousal support. *Branson v. Branson*, 411 N.W.2d 395 (N.D. 1987).

III. The Property Settlement was Paid and that Issue has become Moot

[¶76] In her Notice of Appeal, Alane also appealed certain issues related to the property payment to be made. Since the Notice was filed, Richard has made full payment and this issue is now moot.

CONCLUSION


[¶77] For the above stated reasons, the Appellant respectfully requests that this Court reverse the decision of the trial court and award Alane an award of permanent support to be paid as the child support is reduced or eliminated. Also, for an award of costs, disbursements, and reasonable attorney's fees to the Appellant.

[¶78] In the event the Court upholds the decision of the Trial Court with regard to present payment of support, the Appellant requests that the Supreme Court reverse and direct the Trial Court to reserve jurisdiction of the Court to award spousal support.

DATED this 9th day of November, 2015.

Respectfully Submitted,

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